

# **Co-ordination problems between European and national private law: a Scenario to be avoided in the Europeanisation of Tenancy Law**

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## ***I. Introduction***

Up until now, tenancy law has almost entirely remained a national field of law and has not yet been affected by Europeanisation to a large extent. However, against the background of its further Europeanisation, it may be useful to take account of co-ordination problems which have happened in the interaction of other fields of European and national private law. To this end, this background paper examines the interplay of European and national law in the fields of product liability, which has been dealt with by the European Court of Justice in three more recent and (in)famous cases (II), and of real property and credit law (III), the field which comes closest to tenancy law in ECJ jurisprudence so far. These problems will be shown to be so severe, disrupting and disintegrative that they constitute a scenario to be absolutely avoided in the Europeanisation of further fields of private law. The concluding analysis on how such problems might be overcome leads to a clear result in respect of fields with strong national characteristics such as tenancy law: harmonisation should be abandoned altogether in favour of some loser form of European co-ordination (IV).

## ***II. Product liability cases***

### ***1. Survey***

The biggest problems in the interaction of the European product liability directive and national law have so far presented themselves in the area of concurrent liability regimes. The concurrency provision (hierarchical and material conflict-of-laws rule) in Art. 13 provides here that claims arising from contractual or non-contractual liability or a special liability rule existing at the date of publication of the directive remain unaffected. It emerges from the genesis and from the thirteenth recital that the last alternative, the “special liability rule”, means sectoral regimes, such as notably strict liability under the German Pharmaceuticals Act. The term contractual liability covers at least warranty liability; quasi-contractual liability regimes like *culpa in contrahendo*, which in other Member States are mostly regulated tortiously, ought on an autonomous interpretation of the directive better to be counted as non-contractual liability, which by Art. 13 may also apply alongside the directive. The ECJ has decided that non-contractual liability within the meaning of Art. 13 mainly means liability for fault in accordance with national law, but by contrast not the strict liability regulated in the directive. Against this background, the problem arises, for national strict liability regimes that do not transpose the directive nor can, like the

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German Pharmaceuticals Act, be regarded as special sectoral liability arrangements, of a possible blocking effect from the directive. Specifically in question here is the principle of minimum harmonization – not explicitly enjoined by the directive, by contrast with later consumer directives – according to which Member States ought to be able to retain more severe strict liability regimes. This point may be of importance notably in connection with the burden of proof according to the directive, which tends to disfavour the injured party. The majority of voices in the literature accompanying the genesis of the directive favoured the admissibility of stricter national regimes because of its incompleteness, deliberately putting up with the associated limitation of its *effet utile*. To represent these, we cite a well-known 1988 opinion by Gert Brüggemeier:

The EC product liability directive does not – by contrast with, say, the individual product-related directives – aim at any complete harmonization of this liability-law area of product safety law. The provisions are complementary, not exclusive. Alongside the pre-existing national contractual, tortious and strict liability systems, partly of continuing validity, the EC provisions come along as a pan-European minimum standard of product liability.... The downside of this is an indisputable limitation of the legal harmonization effect. Since the most relevant area in product liability and product-liability insurance practice, damage to commercially used goods, and the increasingly important area of post-sale product monitoring and response liability and even the whole area of compensation for non-material damage, continue entirely within the province of the national legal systems, the central concern of approximation of laws, namely the harmonization of competition conditions, is largely lost ....”<sup>2</sup>

In three judgments on 25.4.2002, however, the ECJ decided the opposite way.

## ***2. ECJ case law on the relation between product liability and national liability regimes***

### **a) Relation to Spanish law**

The González Sánchez case<sup>3</sup> had the directive’s relationship to national strict-liability provisions in Spanish law as its object. The plaintiff had been infected with hepatitis C virus by a blood transfusion in a hospital of the defendant Medicina Asturiana S.A.; the blood producer was however not the defendant but a central blood products institution, the Centro Comunitario de Transfusión del Principado de Asturias. Product liability is governed in Spain by two laws. First, the “General Consumer and User Protection Act” of 1984, based on objective liability provisions meaning that the injured party has only to show damage and the causal connection with an action of the tortfeasor; this would lead to a claim against the hospital, which had administered the blood product. The second law is a 1994 Act transposing the product liability directive, which takes over its provisions almost unchanged. As mentioned, the injured party must according to the directive show fault, damage and causality, a considerable added burden of proof by comparison with many national legal systems like the Spanish one. In that case no claim would lie, since the hospital had not made the blood product. The second Act, of 1994, in a final provision states its primacy over the 1984 Act.

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<sup>2</sup> G. Brüggemeier, Produkthaftung und Produktsicherheit, ZHR 152 (1988), 511, 531, 534.

<sup>3</sup> Case C-183/00, González Sánchez v. Medicina Asturiana, ECR 2002, I-3901.

This concurrency rule induced the Oviedo court of first instance to put the preliminary-ruling question whether Art. 13 of the product liability directive is to be interpreted as “precluding the restriction or limitation, as a result of transposition of the directive, of rights granted to consumers under the legislation of the Member State”.<sup>4</sup> The court thus considered it possible that Art. 13 had a blocking effect on national law, such that a national liability regime in being at the time of enactment of the directive and more favourable to the injured party must be kept. This question could have been answered simply by saying that Art. 13 did not compel the national legislator to maintain the status quo, but merely allowed the level of protection in concurrent national liability regimes like the Spanish Act of 1984 to be adjusted to that in the directive. The compatibility of the Spanish concurrency rule with the directive’s requirements would thus have been adequately established.

The Court of Justice, however, without any concrete prompting, reinterpreted the preliminary-ruling question to ask whether Art. 13 still allowed the injured party to appeal to national liability rules that were stricter for the tortfeasor than the directive – in other words, whether the directive itself, irrespective of national concurrency provisions, compelled the inapplicability of the stricter national liability regime. This question can be framed in the keywords full harmonization or minimum harmonization. The plaintiff and the Greek, French and Austrian governments argued in the proceedings for the minimum-harmonization principle, since a lowering of the level of protection manifestly ran counter to the directive’s purpose, a consideration underlined *inter alia* by the explicit statement of this principle in Art. 153(5) TEC.

The Court of Justice started its answer by pointing to the legal basis for the directive, Art. 94 TEC, which by contrast with Art. 95 contains no special procedure for exceptionally allowing national departures. Further, the tenor of Art. 153(5) TEC needed no extension – and according to it the principle of minimum harmonization concerns only flanking Community consumer protection measures pursuant to Art. 153(3)(b) TEC – which have, as stated, hardly ever come about – and not the internal-market-related competence for approximation of laws pursuant to Art. 153(3)(a) taken together with Art. 95 TEC, with which measures enacted earlier pursuant to Art. 94 like the product liability directive were also to be equated. Additionally, Art. 153 TEC was worded in the form of an instruction addressed to the Community for its future policy and could not, because of the direct risk to the Community *acquis*, confer any power on Member States autonomously to adopt measures that lagged behind the latter.

In view of this, the question of the national creative discretion had to be decided on the basis of the directive itself. This was aimed essentially at creating level framework conditions for competition on the internal market through a harmonized product liability regulation, facilitating free movement of goods and avoiding differences in consumer protection. By contrast with, say, the directive on unfair terms in consumer contracts, the product liability directive, furthermore, contained no minimum harmonization clause. Finally, the exceptions and regulatory options allowed national law were to be seen as a *numerus clausus*, and therefore did not allow the conclusion that harmonization in the matters regulated by the directive was not to be complete. Against this background, Art. 13 could be interpreted only as excluding retention of any other “general system of product liability” – evidently alluding to its nature as strict liability of enterprises. Other liability rules based on other grounds, such as

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<sup>4</sup> Case C-183/00, No. 13.

contractual liability for defects or tortious liability for fault, remained of course, by Art. 13, unaffected by the directive. The last alternative in Art. 13 referred, finally, only to sectoral liability arrangements, not the case here. Accordingly, the Court found, Art. 13 was not relevant here, and the retention of stricter national provisions was forbidden. In the upshot, accordingly, the plaintiff could not rely on the Spanish Act of 1984, more favourable to her – her entitlement to compensation for damage was therefore eliminated.

### **b) Relation to French and Greek law**

Along with the González Sánchez case, on the same day the ECJ decided two actions for breach of treaty, against France<sup>5</sup> and Greece,<sup>6</sup> accused by the Commission of having gone beyond the directive's level of protection in transposing it nationally. Specifically, France was accused of compensating damage even under the €500 own-risk threshold in Art. (9)(b) of the directive, by Art. 1386(2) CC; of making the supplier of a defective product always equally liable with the manufacturer, by Art. 1386(7)(1) CC, although Art. 3(3) of the directive provided only for subsidiary liability for the latter; and finally, of having ordered in Art. 1386(12)(2) CC that a manufacturer, in order to be able to appeal to the grounds of exemption in Art. 7(d) and (e), had to show proof of having taken appropriate steps, in particular post-marketing checks, to avert the consequences of a defective product. Greece was by contrast accused only of having done without the own-risk rule in its transposition.

The ECJ found for the Commission and condemned both Member States. After taking over verbatim its statements in the Sánchez case on the general inadmissibility of stricter national law, the Court argued regarding the first complaint that the own-risk rule in the directive was the outcome of complex considerations and reflected the legislator's decision to avoid an overlarge number of disputes over minor damage. Since, furthermore, an injured party could appeal to unharmonized national product liability law for compensation for damage within the own-risk margin, access to the courts was not – as the French government objected – hampered. This possible validity of different liability regimes for manufacturers of defective products and those injured thereby did not, moreover, constitute an infringement of the equal-treatment principle, since the differentiation on the criterion of the nature and amount of the damage suffered was objectively justified. The further defence submission that the own-risk provision *de facto* led to total exemption from liability, contrary to French *ordre public*, was rejected by the ECJ *a limine*, since grounds of national law could never be adduced against the application of Community law. The fact that the Commission itself, in the Green Paper on product liability reform – in the run-up to the Commission report cited – had considered abolishing the own-risk provision, finally, had only the nature of a legal policy debate, totally irrelevant for the application of the law in force. With the same justification, Greece was also condemned for the absence of an own-risk provision in its transposing Act.

The second complaint, of improper transposition of supplier liability pursuant to Art. 3(3) of the directive, was also upheld by the Court. The first plea was that the equation of manufacturer and supplier liability was based on specific features of procedural law (namely the admissibility of an “action directe” against the supplier), for which the Community had no competence. This was rejected by the Court with the

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<sup>5</sup> C-52/00, Commission v. France, ECR 2002, I-3827.

<sup>6</sup> C-154/00, Commission v. Greece, ECR 2002, I-3879.

arguments that, first, the unlawfulness of the directive could not be pled in breach-of-treaty proceedings, and second, the point was a matter not of procedural law but of substantive product liability law, for which the Community undoubtedly was competent. The argument that the French regulation was equivalent to the regulation in the directive, since a supplier held liable could take recourse against the manufacturer, was not accepted by the ECJ either, since the possibility of a regress of suppliers would set off a chain of lawsuits that was the very thing the prior liability of the manufacturer in the directive was intended to avoid.

The Commission's third complaint was also successful. The linkage of exemption from liability pursuant to Art. 7(d) and (e) of the directive with carrying out post-marketing product monitoring obligations similarly exceeded the Member State's discretion in transposition. Art. 15 allowed Member States only to revise the exemption from liability provided for in Art. 7(d) entirely, but "intermediate solutions" like the French one were not admissible. The objection by France that the 1992 general product safety directive exhaustively regulated product monitoring obligations and that the Green Paper had also contemplated thus supplementing the product liability directive was similarly irrelevant, since that regulation did not concern the manufacturer's product liability.

Evidently these judgments did not meet with great enthusiasm in the Council. For it thereupon – seemingly for only the second time in the Community's entire history – adopted, on 19.12.2002, a resolution to amend the directive.<sup>7</sup> In it the Council pointed to a joint declaration given by Council and Commission on the directive's scope on 25.7.1985 when it was adopted, which was not then published, though it was minuted. It left Member States free pursuant to Art. 3 and 12 of the directive to adopt national regulations on the liability of intermediaries, since this was not covered by the directive. The regulations could also concern the final mutual apportionment of liability among several liable producers and intermediaries (used as synonym for suppliers). Against this background the Council very clearly states that the condemnation of France regarding supplier liability "gives rise to concern", since the directive, by contrast with what the Court "evidently" assumed, did not, apart from Art. 3(3), seek to regulate this area. Moreover, strict liability on suppliers could bring the consumer a number of benefits: in particular, the higher number of possible respondents meant better chances of actually obtaining compensation. This statement is followed by a sentence that reads like a resounding slap in the Court's face:

"The Council also recalls that one of the general objectives of the Community is to promote consumer interests and ensure a high level of consumer protection, cf. Articles 95 and 153 of the Treaty."

Against this background, the Council concludes, formal amendment of the directive should be considered, so as to allow for national rules on liability of suppliers again. One can presumably read these statements as showing disapproval by the Council itself of the Court's basic tendency to interpret the directive primarily as an instrument for creating equal legal conditions for firms, disregarding consumer protection. As will be brought out below, this case law of the Court's meets with still other fundamental objections.

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<sup>7</sup> EC OJ 2003, C 26, 1; on this cf. P. Rott, *Produkthaftung und Vollharmonisierung – der Rat kartet nach*, RIW 2003/4, Editorial.

### **3. Criticisms**

#### **a) Formal doctrinal viewpoint**

A critical analysis must first credit the ECJ that its findings seem thoroughly tenable from a formal doctrinal viewpoint.<sup>8</sup> Thus when adopted the directive was indeed primarily based on the objective of securing uniform competition conditions for firms Community-wide; it was even queried whether the Community had the competence for this, in the absence of a direct need to harmonize liability law for the creation and functioning of the Common Market pursuant to old Art. 100 TEC.<sup>9</sup> Regarding the minimum harmonization principle, this is not only not specifically mentioned in the product liability directive, by contrast with later directives in consumer private law. Additionally, certain individual optional provisions in favour of Member States – e.g. Art. 15(1), which lets development risks be imposed on the manufacturer, against Art. 7(e) – would be superfluous if they had from the outset a general power to intensify manufacturer liability in favour of the consumer side, under the minimum harmonization principle.<sup>10</sup> Against this background, the interpretation of the concurrency rule of Art. 13 also seems comprehensible. After this provision has exactly specified the national liability regimes applicable alongside the directive (contractual, general tortious and strict, sector-related product liability), it can hardly be assumed that a further unwritten limitation like general admissibility of stricter national law in the area of general product liability too was desired, robbing the directive of almost all practical effectiveness into the bargain. The prohibition of the French combination of product monitoring obligations and exemption from liability pursuant to Art. 7(e) of the directive can also be justified by the formal argument of keeping legal differences between Member State transposition provisions as small as possible, going against accepting a deficit of exemption from liability pursuant to Art. 15. Thus all the ECJ's arguments, if not exactly compelling doctrinally, can at least be followed.

#### **b) Broader viewpoint: context and consequences**

But the picture changes very drastically if the actual consequences of the ECJ case law are taken into account, particularly with regard to the interaction of the incomplete European provisions with the national systems. The first thing to bring to mind again in this context is that the directive cannot even begin to reach its goals of creating uniform competition conditions for European firms and promoting free movement of goods, because of its numerous lacunae. This emerges particularly clearly from a finding, according to which the proportion of conventional product damage covered by the directive is marginal beside environmental damage, commercial property damage and property damage by products within employer's liability insurance, so that a firm cannot possibly make its arrangements and calculations for its flow of goods on the basis of the liability provisions in the Community directive.

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<sup>8</sup> Cf. in this sense Rott, loc. cit., who attests the ECJ's "good doctrinal justification".

<sup>9</sup> Cf. Part 2.

<sup>10</sup> AG L. Geelhoed also pointed this out in his conclusions – here not, however, followed by the Court - No. 53; but the Advocate General's reference to Art. 16 is flawed, since it is precisely a limitation of liability at the expense of the consumer side that is left to the discretion of Member States there.

If, then, the parts of product liability law of business relevance are left up to Member States, then in legal reality it can only be counterproductive for the ECJ to erect the torso of the European regulation into an absolute, timelessly valid canon, to be followed scrupulously by the national legal systems. This also leaves out the fact that on important points the directive ignores the current reality in this area of law, and its effect can be assessed only by exactly analysing its embeddedness in the national liability systems – a viewpoint the ECJ essentially eliminates from its cognitive field. This means that this case law produces harmful “petrifying” tendencies that make it harder for Member States to do justice to their responsibility for the coherence of the liability system and its social and economic guidance functions. In fact the disintegrative character of the ECJ’s interventions for all the individual specific points covered by them can be demonstrated.

The distribution of the burden of proof is, as described in the *Sánchez* case and in the statements on tortious product liability pursuant to § 823(1) BGB, less favourable for the injured party than the domestic Spanish or German law. The facilitations of liability in these national legal systems are certainly vitally necessary, in view of the blending of the concept of fault with subjective elements described, in order to make liability effective. Accordingly, the provision in the directive is behind the times on this point; yet the ECJ did not even begin to go into such arguments in the *Sánchez* case. It was relatively unproblematic doctrinally for it to “quash” the opposing Spanish provision, as a provision of general strict liability, the only thing not coming under the exceptions of Art. 13. In the case of the German construction of tortious product liability pursuant to § 823(1) BGB it would certainly be much more problematic. To be sure, this construction – which, as we know, in most cases reaches the same results as strict liability, by reversing the burden of proof – could be seen as a functional equivalent of general strict liability and similarly linked to the maximum liability level in the directive.<sup>11</sup> But the ECJ’s basically formalistic approach makes such a decision rather unlikely, since the German construction is still formally to be reckoned as liability for fault, so that Art. 13 is, by its wording, clearly relevant. Certainly, the German construction reaches the very result disapproved of by the ECJ, a better burden-of-proof position for the injured party than in the directive. Against this background, it seems arbitrary and in total contradiction with the directive’s aim of uniformization to favour the German provision – which has more or less by chance been developed judicially on different doctrinal bases – over the Spanish one.

Similar observations could be made regarding the own-risk provisions. In this case, as the Court and the Advocate-General also find, it is even required as a basic right that an injured party with damage less than €500 should have available some other liability arrangement without own risk, since otherwise there would be a denial of justice. Against this background, the own-risk provisions not only contribute to the directive’s irrelevance, by compelling injured parties and the courts always to test damage claims against national product-liability law too. Even its basic conception errs, whereby – as Advocate-General Geelhoed writes – the favourable burden of proof for strict liability should not operate in the case of minor damage, to protect courts and manufacturers from an avalanche of suits.<sup>12</sup> For as just explained the

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<sup>11</sup> Cf. C. Joerges, *Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU*, EUI Working Paper LAW 2003/2, 30ff., which rates such a step by the ECJ as so damaging both for the matter at issue and for the ECJ itself that it is hardly conceivable that way.

<sup>12</sup> As the rationale of the provisions is described by AG L. Geelhoed, *Conclusions*, No. 68.

distribution of the burden of proof according to the directive is by no means more favourable than the national laws, but the reverse. A flood of proceedings can accordingly not be stemmed with the provisions in the directive. Additionally, the German construction attains the result the ECJ disapproves of, strict liability without own-risk provisions, and the *de facto* discrimination of the Spanish law in this connection is no easier to justify than the burden-of-proof aspect.

On the question of supplier liability, a glance at German law shows also that the case law based on tortious product liability pursuant to § 823(1) BGB loads special obligations not just on to third-country importers but occasionally even importers from Community countries – and their compatibility with European primary law is, as stated, certainly controversial. This case law is, as also recounted, based on the plausible consideration that otherwise the attractions of tort law for the prevention of damage could not be obtained, and that importers are normally better placed than manufacturers for post-marketing checks in their own country. The German case law thus ends up once again very close to the French construction forbidden by the ECJ: parallel liability of manufacturer and all links in the marketing chain, so that the question of equal treatment again arises.

The most complicated picture, finally, arises around the issues of product monitoring obligations. As shown, such obligations have in domestic developments of product liability law increasingly been given the job of compensating for exemption from liability for development risks. This construction has the advantage of better justiciability by comparison with the costly determination of the state of science and technology by the courts. Additionally, civil-law post-marketing monitoring through product monitoring obligations proves to be a requisite complement to public-law post-marketing monitoring, regulated in the 1992 general product safety directive. If in this context French law makes exemption from liability pursuant to Art. 7(e) of the directive dependent on compliance with product monitoring obligations, this is an appropriate and up-to-date solution, which in turn comes very close to the situation in German law. The European ban on this pattern by contrast has no advantages at all, even though it can in formal doctrinal terms be derived from the directive. On the contrary, it presumably offers an incentive for the French legislator and case law to develop the indispensable, given social and economic realities, tool of product monitoring obligations in some other systematic context, thus getting round the directive, as has already happened in Germany.

Summarizing, it may accordingly be stated that without exception all the ECJ interventions block necessary further developments of product liability law that have already come about in national law, and lead to unjustified unequal treatment between legal systems affected and those like the German and others that have largely already attained the same results, presumably in directive-proof fashion, through liability for fault. Indeed, the ECJ is through this case law making it harder for Member States to properly meet their responsibility for the coherence of the liability system and its social and economic guidance functions. The same finding has been reached by leading voices in the French and Italian literature. Thus the *grande dame* of French law of tort, Geneviève Viney, writes:

“En définitive, ces décisions paraissent regrettables, non seulement parce qu’elles ne répondent évidemment pas à l’attente des consommateurs, mais aussi et surtout parce qu’elles manifestent la volonté d’imposer aux citoyens européens un droit “tout fait” composé de textes disparates qu’ils doivent appliquer sans que leur soit laissée la marge de souplesse nécessaire pour que les Parlements nationaux, qui doivent assurer le



contrôle démocratique, puissent les intégrer à leur législation nationale de façon à respecter l'équilibre et l'harmonie de l'ensemble.”<sup>13</sup>

The ECJ's formalistic and unreflected schematic procedure thus paradoxically leads precisely to interference with the methodologically essential tool of the liberal formal paradigm of law, a coherent system of private law. It is hard to see any ways out of this dilemma. Even an approach to a solution must be based on a different basic model for the interpretation of Community private law and its coordination with national private law that ignores neither the social and economic consequences of a decision nor the embedment of European provisions in the national private-law systems. These starting-points will now be further explored in connection with European consumer contract law, where the ECJ's interpretations pose similar problems.<sup>14</sup>

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<sup>13</sup> G. Viney, L'Interprétation par la CJCE de la Directive du 25 Juillet 1985 sur la Responsabilité du Fait des Produits Défectueux, *La Semaine Juridique*, 2002, I 177, 1945. Similar criticisms are in J. Calais-Auloy, Menace européenne sur la jurisprudence française concernant l'obligation de sécurité du vendeur professionnel, *Recueil Le Dalloz* 2002, No. 31, 1458; A. Palmieri/ R. Pardolesi, Difetti del prodotto e del diritto privato europeo, *Il Foro Italiano* IV, 2002, 296; in the German literature the decisions' dangerous potential has so far scarcely been recognized; but cf. C. Joerges, Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, *EUI Working Paper LAW* 2003/2, 30ff.

<sup>14</sup> Cf. below.

### III. The Heininger Saga

#### 1. Factual circumstances and decisions by the sequence of courts

Mr & Mrs Heininger had bought a freehold flat in 1993 in East Germany for investment purposes, to benefit from the high special allowances in the then tax laws.<sup>15</sup> To finance this they took out a 150,000 DM loan with the defendant bank, with mortgage cover to the same figure. This contract came about through the help of a free-lance estate agent known to the plaintiffs, who the couple alleged had several times called on them at home uninvited. The credit agreement itself was however concluded on the bank's premises. Five years later the investment proved unprofitable because of the excessive purchase price of the flat and limited rental possibilities, and the Heiningers sought ways of breaking the contract. On legal advice they declared revocation of the declarations of intent relating to the loan agreement and took legal proceedings for rescission of the contract pursuant to § 3 HWiG a.F. [Act on the cancellation of doorstep transactions and analogous transactions, old version].

The doorstep revocation directive provides in Art. 3(2)(a) that *contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property* are not covered – a formulation that does not readily fit credit agreements, so the Heiningers accordingly challenged its applicability. The then one-week duration of the revocation right also seemed surmountable, since this period starts to run from written notice of the right to revoke, but there had been no such notice (§ 1(1) HWiG a.F.). Admittedly, § 2(1) S. 4 HWiG a.F. provided that where there had not been notice of the right to revoke it lapsed one month after full completion of performance by both sides; but a loan contract is fulfilled by both sides only after full repayment of the loan, which had not yet happened here. Further, it could be asserted that this provision ran counter to the directive. For the doorstep revocation directive contains no provision for this case, and admittedly, in Art. 4(3), leaves it to national legal systems to take appropriate consumer protection measures – in line with the usual regulatory strategy of leaving technical legal transposition and sanctioning of European measures to national law. Finally, it suffices for application of the HWiG Act that the consumer have been induced to make the declaration of intent establishing the contract in their dwelling (only) (§ 1(1)(1) HWiG), whereas according to the directive the conclusion of the contract must have come about in or near the dwelling (Art. 1(1)).

But the first thing that really proved a problem was the concurrency provision of § 5(2) HWiG a.F., providing for primacy of the Consumer Credit Act (VerbKrG) in the event of its concurrent applicability. While this Act, by contrast with the corresponding EC directive, provided in § 7 VerbKrG a.F. [old version] for a revocation right, this was by § 3(2)(2) VerbKrG a.F. excluded for credit agreements “in which credit is subject to the giving of security by way of a charge on immovable property, and is granted on usual terms for credits secured by a charge on immovable property and the intermediate financing of the same ....” This unequal treatment for real-estate loan contracts was based primarily on economic considerations:<sup>16</sup> it was

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<sup>15</sup> Cf. J. Hoffmann, Realkredite im Europäischen Verbraucherschutzrecht ZIP 2002, 145.

<sup>16</sup> On this see the authoritative explanations by the competent rapporteur in the German Federal Ministry of Justice, J. Schmidt-Räntsch, Gesetzliche Neuregelung des Widerrufsrechts bei Verbraucherverträgen, ZIP 2002, 1100, 1101.

feared that the revocation rate for such agreements might because of their often large amounts be well above that for other loan contracts, where at some 0.5% it is of only marginal importance. As a consequence the banks, in part because of the particularly strict refinancing provisions with real-estate loans (principle of same-day refinancing<sup>17</sup>), had warned against making such loans more costly, something seen as undesirable for the economy as a whole. Finally, this exclusion was also regarded as acceptable by the borrowers' side, since because of their size real-estate loan contracts are normally, by contrast in particular with other consumer credit agreements, carefully considered..

A further obstacle was § 7(2)(3) VerbrKG, whereby in the event of failure to give notice the right of revocation expires only after full performance on both sides, but not later than one year after the consumer's declaration of intent to conclude the credit agreement. In view of this legal position, the Heinigers were unsuccessful in the first two courts, the Munich Landgericht and Oberlandesgericht<sup>18</sup>. The question whether there was a doorstep situation was left open by these courts on grounds of procedural economy, since in any case no right of revocation existed, by VerbKrG. This was in line with the then dominant view that the primacy of this Act extended to all contracts in principle coming under its area of application, even if some of its provisions – as here the right of revocation for real-estate loan contracts – could not apply to such agreements.

## ***2. The preliminary-ruling referral order by the BGH [Federal Supreme Court of Justice]***

The Federal Supreme Court of Justice then had to deal with the ensuing appeal on points of law. While in its order for referral of November 1999<sup>19</sup> this court in principle supported the lower courts' statements on the primacy of the Consumer Credit Act, it nonetheless expressed doubts as to the compatibility of this provision with the doorstep revocation directive. On this, the BGH on the one hand put the view that a real-estate loan agreement could not be treated like a contract about other rights in property and hence did not come under the exclusion from application in Art. 3(2)(a) of the directive; on the other hand it found that it followed from the simultaneous production of the doorstep revocation directive and the consumer credit directive that the latter was conceived by the legislator as a *lex specialis* and hence displaced the former.

Alternatively, the BGH also raised the issues of the expiry of the right of revocation for failure to give notice; because of the unclear provision in the doorstep revocation directive, special importance attached to this. Here the BGH recommended – adducing *inter alia* the premise that for real-estate loan contracts the right of revocation under the doorstep revocation directive applied – analogous applicability of the time-limit in the consumer credit directive, as being the provision more closely related to the case; that would mean that given the expiry of the one-year period in the case in point, the right would have expired.

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<sup>17</sup> In this connection, M. Franzen, *Privatrechtsangleichung durch die EG*, 1999, 324 with further references.

<sup>18</sup> Cf. WM 1998, 1723, WM 1999, 728.

<sup>19</sup> BGH NJW 2000, 521f.

The BGH did not, however, address the question, left open by the lower courts, whether when the contract was concluded the “doorstep” situation, decisive according to the directive and/or the German Doorstep Revocation Act, existed at all. Since the German Act’s area of application, as shown, went beyond the directive’s, a case of transposition overshoot is present. Insofar as the area of overshoot was involved here, making the situation in the case in point covered only by the German but not the European provision, there need not, on the above principles, have been any submission at all. Equally, there was no mention of the question whether, should the ECJ, against the BGH’s legal opinion, affirm a right of revocation pursuant to the doorstep revocation directive and deny its expiry, this outcome would, given the contrary tenor of § 5(2) HWiG, be at all realizable within the framework of interpretation in conformity with directives. For if the BGH had, as the tenor would by no means rule out, asserted a case of adjudication *contra legem* here, it could also have done without a submission, for lack or relevance of the interpretation of the doorstep revocation directive.

### 3. The ECJ judgment

In its decision<sup>20</sup> the ECJ first found that loan agreements were also covered by the doorstep revocation directive, and that the exception in Art. 3(2) of the doorstep-selling directive was, as the plaintiff claimed, not relevant:

“Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive. Both for consumers, whom the doorstep-selling directive is designed to protect, and for lenders, the subject-matter of a credit agreement such as that in point in the present case is a grant of funds which is linked to a corresponding obligation of repayment together with interest. The fact that the credit agreement is secured by a charge on immovable property does not render any less necessary the protection which is accorded to the consumer who has entered into such an agreement away from the trader's business premises.”<sup>21</sup>

On the relation between the doorstep revocation directive and the consumer credit directive, the German government, like the BGH in its referral order, favoured the notion that the latter was a *lex specialis*. For this position, it only recommended but did not prescribe the introduction of a revocation right for credit agreements. This was to take account of the economic peculiarities of secured-credit agreements, already mentioned. For these reasons loan agreements intended mainly for purchasing property were also excluded from the area of application of the consumer credit directive by Art. 1(1)(a), while for other mortgage-secured credit agreements, by Art. 2(3), various provisions of the directive do not apply. The ECJ did not however go into the special features of real-estate loan agreements in its arguments at all, but rejected a limitation of “doorstep cancellation” on purely formal grounds:

“It is sufficient to observe, as regards those submissions, that the doorstep-selling

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<sup>20</sup> Case C-481/99, *Heininger*, ECR 2001, I-234.

<sup>21</sup> ECJ, No. 32-34.

directive is, as pointed out earlier, designed to protect consumers against the risks arising from the conclusion of contracts away from the trader's premises and, second, that that protection is assured by the introduction of a right of cancellation. Neither the preamble to nor the provisions of the consumer credit directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the doorstep-selling directive in order to exclude secured-credit agreements from the specific protection provided by that directive.”<sup>22</sup>

This line of argument had been foreshadowed in the earlier *Travel-Vac* judgment.<sup>23</sup> This makes directives with overlapping areas of application in principle fully applicable alongside each other. But this sort of solution to the concurrency question, aimed solely at maximizing the effectiveness of Community law, inevitably leads to further large contradictions between norms, given the differing preconditions and legal consequences of different directives. Still more problematic in the *Heininger* case, though, was the following passage, on the inadmissibility of a temporal restriction on the exercise of revocation rights:

“The doorstep-selling directive thus expressly provides that the minimum period of seven days prescribed for cancellation must be calculated from receipt by the consumer of the notice concerning his right of cancellation, and that it is on the trader that the obligation falls to provide that information. Those provisions are explained by the fact that if the consumer is not aware of the existence of the right of cancellation, he will not be able to exercise that right. Having regard to the wording and purpose of Article 5 of the doorstep-selling directive, it is not possible to construe the third paragraph of Article 4 as enabling the national legislature to provide that the consumer's right of cancellation must in any event be exercised within a period of one year, even if the trader has not notified the consumer of the existence of that right. Finally, as regards the argument that it is essential, for reasons of legal certainty, to restrict the period within which the right of cancellation may be exercised, such reasons cannot prevail since they imply a limitation of the rights expressly conferred on consumers by the doorstep-selling directive in order to protect them against the risks arising from the fact that the credit institutions have chosen to enter into agreements away from their business premises. If those institutions choose such methods in order to market their services, they can easily safeguard both the interests of consumers and their own requirements as to legal certainty by complying with their duty to supply consumers with information.”

This argument says any restriction of the period for revocation pursuant to the doorstep revocation directive on grounds of lack of notice is inadmissible; in other words, those rights are accordingly perpetual. This result is unacceptable for various reasons. First, the discretion given Member States by Art. 4, third paragraph, of the directive to take appropriate consumer protection measures in cases where the information is not supplied is undermined. Were one, with the ECJ, to take it that if there is no notice the period never starts, because the consumer is unaware of the right of revocation, then this provision would no longer seem to have any meaningful area of application at all.

Still more important, the non-acceptance of any time-limit on the right of revocation obviously contains no tenable compromise between the conflicting values of consumer protection on the one hand and legal certainty on the other. Nor can putting legal certainty in second place be justified, contrary to the ECJ, by the global argument that the point here is solely to protect consumers against bad-faith banks

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<sup>22</sup> No. 38f.

<sup>23</sup> Case C-423/97, *Travel Vac SL/ Manuel José Antelm Sanchis*, ECR 1999, I-2195.

wishing deliberately to undermine the right of revocation, so that there is no need to put a time-limit on it. The case in point itself shows that even in the event of complete absence of notification the bank need not necessarily have acted in bad faith. It was after all scarcely perceptible for it that the broker acting for it may have been in a “doorstep situation”. Such uncertainties are frequent, not least because of the frequent demarcation problems with the consumer concept and the objective requirements of consumer law. The one-sidedness of the ECJ’s argumentation becomes still clearer in the case of merely incomplete notification. For the requirements on the form and content of a right-to-cancel notice are so high in German law<sup>24</sup> that even upright businessmen can get tangled up in them.<sup>25</sup> This very fact has brought the German legislator to furnish a sample notice,<sup>26</sup> though its lawfulness is in turn called in question.<sup>27</sup> Even though all these arguments favour a time-limit on the right to cancel over legal certainty, the ECJ has simply ignored them in its one-dimensional concentration on the Community-law *effet utile*.

Finally, the ECJ’s result is also a slap in the face of the European and national legislator. Thus, as already indicated, it creates, for no compelling reason, a regulatory contradiction between the doorstep revocation directive and the later directives on timeshare and on distance selling, which regulate similar time-limits explicitly, albeit, on no apparent objective ground, differently. In this connection, this decision also runs counter to the Commission’s more recent plans to eliminate such not objectively justified regulatory differences between various directives by consolidating them together into a unitary consumer code that could be part of the planned optional instrument.<sup>28</sup> For German law, finally, this case law brought the unfortunate consequence that the “system-building” new provision of § 355(3) BGB, providing for a uniform new six-month time limit for most legally regulated consumer revocation rights in the absence of notification, was no longer in conformity with European law for the case of doorstep revocation. The German legislator was thus, as will shortly be shown, forced to change the provision generally. All these doctrinal consequences of its decision were manifestly not pondered by the ECJ, something that is tantamount to refusing any responsibility for creating a coherent private-law system in Europe.

Though in the *Heininger* judgment the ECJ thus sought to maximize the *effet utile* of the doorstep revocation directive without regard to other interests and legal goods meriting protection, it left the most important feature for effective consumer protection, namely the fate of the property purchase financed through the loan, out of its decision. Thus, the ECJ even explicitly stressed that while the loan agreement came under the doorstep revocation directive, the consequences of successful revocation for the contract to purchase the property and the involvement of mortgage law were to follow the national law.<sup>29</sup> The fact that the ECJ did not establish any Community-law “reservation as to efficacy” here is, in view of the duty of procedurally effective transposition of European measures by national law it otherwise so strongly emphasizes, anything but a matter of course. For a right of

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<sup>24</sup> For a survey cf. Münchner Kommentar-P. Ulmer, 4th ed. 2003, § 355, No. 44ff.

<sup>25</sup> Cf. Franzen, op. cit., 326.

<sup>26</sup> Annexes 1 and 2 to § 14 BGB-InfoVo.

<sup>27</sup> Cf. once again Franzen, op. cit., 326 with further references.

<sup>28</sup> Cf. in this connection also the Green Paper on European Union Consumer Protection, COM 2001, 531 final.

<sup>29</sup> *Heininger* Case, op. cit., No. 35.

revocation confined to loan agreements is practically worthless if the house purchase itself cannot be reversed. It was with just such questions that the Bundesgerichtshof had to deal in its ensuing decision in the main case.

#### **4. National Follow-up Decisions**

In its ensuing decision in the main case, of 9.4.2002<sup>30</sup>, the BGH thus had to face the task of linking the ECJ judgment with the systematic structure of German law. First, on the relation between the two directives, the BGH decided that the concurrency provision in § 5(2) VerbrKG was, for doorstep transactions, to be teleologically restricted, insofar as the VerbrKG too provided for a right of revocation; moreover, recourse to the HWiG still remained possible. This did not cross the border into *contra legem* adjudication, since the concept of “preconditions of a transaction under the Consumer Credit Act” in § 5(2) HWiG was capable of interpretation. This was, however, disputed in the literature, since in § 3(2) VerbrKG the legislator had deliberately privileged real-estate loan agreements, in view of their peculiarities regarding particularly the banks’ refinancing provisions.<sup>31</sup> In fact, this unambiguous intent of the legislator in the VerbrKG cannot, contrary to the BGH, be dismissed with the overall assertion that the legislator wished to transpose the doorstep revocation directive in conformity with Community law. The BGH further decided that the restrictive interpretation of § 5(2) VerbrKG extended, in the ECJ’s intention, since it was focusing only on the doorstep situation, to personal and real-estate loans equally; accordingly the latter were not, by contrast with what was sometimes assumed in the literature, privileged unreasonably. Interpretation in conformity with the directive was, moreover, to be done irrespective of the fact that the underlying situation here at most came under the German HWiG, not the directive, which requires not just the making of the offer but the conclusion of the contract itself to be in a doorstep situation (Art. 1(1)). For a split interpretation would contradict the equal treatment of the different doorstep situations desired by the German legislator. The consequences of the unlimited validity of the right of revocation where there had been no notice, in particular its manifest incompatibility with the time-limit regulation in § 2(1)(4) HWiG, did not, finally, need to be gone into by the BGH, since even under the German HWiG – which because of the restrictive interpretation of § 5(2) HWiG was to be applied – revocation was still possible even with this time limit, because there had not been full performance on both sides.

As a consequence the BGH set aside the appeal judgment and referred the matter back to the Munich OLG. Only in an *obiter dictum* did the BGH go into the decisive question of the fate of the property purchase and mortgage after exercise of the right of revocation. Although the right followed mainly from the Doorstep Revocation Act, the BGH found that the privileging of real-estate credit pursuant to § 3(2) VerbrKG a.F. could continue to apply, so that as well as the right of revocation the provision of § 9 VerbrKG a.F. is inapplicable to economically linked transactions. According to consistent case law, said the BGH, such a connection between real-estate credit transaction and property purchase could not be assumed. For with property purchases even legally inexpert and unbusinesslike lay persons knew that credit provider and

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<sup>30</sup> ZIP 2002, 1075 m. Anm. P. Ulmer ZIP 2002, 1080.

<sup>31</sup> In this connection cf. Franzen, *op. cit.*, 324 with further references.

property seller were as a rule different people. This assessment also reflected the exclusion provision in § 3(2) VerbrKG a.F. mentioned.

This *obiter dictum*, which largely takes away the right of revocation in real-estate loan agreements, met with justified criticism in the literature.<sup>32</sup> In particular, the BGH had in the formula cited reproduced its already exhaustive case law on the economic connection of third-party-financed property transactions rather too globally.<sup>33</sup> Especially in cases of property investments in East Germany, there was regularly a very close economic interpenetration between credit provider and property seller. Thus, the banks involved often financed up to 100% of the purchase price, something bound to give the investor the impression of a good investment. These facts have often led to affirming the conditions for tied transactions. Additionally, denying a tied transaction leads to the paradoxical result that the consumer is worse off exercising the right than waiving it, even though it is supposed to protect him. For upon exercise of the right to cancel the borrower must by § 3(1) and (3) HWiG immediately repay the whole net credit amount plus usual market interest, since the instalment payment also expires on revocation. But effective consumer protection would be ensured only if the lender were no longer, in accordance with the rules on reversing tied transactions, involved in the property transaction financed either, and on reversal could claim entry only to the rights of the seller; then the borrower would be obliged no longer to repay the credit, but only hand over the property financed by the loan and repay any intermediate benefits (§§ 9(2)(4) VerbrKG a.F., 358(4)(3) BGB). Against this background, the BGH decision certainly led to great relief among the banks, which had to fear, instead of repayment of their credits, transfer to themselves of a large number of barely saleable dwellings. Equally, it had not only frustrated the consumer protection objective of the directive, but turned it right round into its opposite.

Following referral of the Heininger case back to the Munich OLG, for the first time in the whole proceedings the actual presence of the requirements for a doorstep transaction was enquired into.<sup>34</sup> But the plaintiffs could not furnish the proof required of them that they had been induced by the mediator on a visit to their apartment to give the declaration of intent to conclude the loan agreement, since they themselves had first approached the mediator to enquire into possibilities of property investment. Consequently, their suit was dismissed on the merits. Thus the whole previous proceedings, including the involvement of the BGH and ECJ, turned out to be vacuous: the legal points about the concurrency of the doorstep revocation and consumer credit directives and the time limit in the absence of notice of the right to cancel had suddenly become completely irrelevant to the outcome of the proceedings.

### ***5. Reactions by the German legislator***

After the ECJ judgment and the BGH's follow-up decision the German legislator in turn felt compelled to make amendments to the new consumer contract law only

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<sup>32</sup> Cf. J. Hoffmann, *Haustürwiderruf bei Realkredit und verbundenes Grundstücksgeschäft*, ZIP 2002, 1066.

<sup>33</sup> Cf. J. Hoffmann, *Haustürwiderruf bei Realkredit und verbundenes Grundstücksgeschäft*, ZIP 2002, 1066.

<sup>34</sup> OLG München, BKR 2002, 912.



just included in the BGB on 1.1.2002, with the reform of the law of obligations.<sup>35</sup> Given the otherwise conceivable State liability claims following the Francovich and Dillenkofer case law, this was already done in connection with the Act to amend Representation by Legal Counsel before the OLG, with effect from 1.7.2002.<sup>36</sup>

The most convincing aspect here is the amendment of the legal position on tied transactions, no doubt to be seen as a correction to the BGH's Heininger follow-up decision, felt by the legislator to be too narrow.<sup>37</sup> The new regulations were taken into the general provision of § 358(3)(3) BGB, so that they now apply to all consumer contracts regulated in the BGB. In content, they essentially contain a codification of the case law to date. This now assumes third-party-financed property purchase to be an economic unity wherever lenders themselves have procured the property, advised the borrower on the financed transaction, conveyed the impression they have also checked it from economic points of view, or otherwise, over and above the provision of loans, promoted the property purchase in collaboration with the contractor.

On the right to cancel real-estate loans, the ECJ had as we have shown decided only that this had to exist where these are also doorstep transactions. This situation is presumably very rare, even taking the validity of the other conditions for applying the German doorstep revocation provisions as a basis. The German legislator nonetheless felt compelled to extend the right to cancel to all real-estate loan agreements, on equal-treatment considerations.<sup>38</sup> Thus, the exclusion of real-estate loan agreements from the VerbrKG in § 491(3)(1) BGB was deleted; to be sure, some provisions like the duty to indicate the total amount of all costs by § 491(1)(a) BGB remain inapplicable, since they are very hard to determine for such agreements. Moreover, the right to cancel property loan contracts that are not doorstep transactions is subject to be contracted away in a transition period up to 30.6.2004 (§ 506(3) BGB n.F.).<sup>39</sup> With this extremely wide extension of the outcome demanded by the ECJ, the German legislator has left the considerations still valid today, that a right to cancel real-estate loan agreements is not justified given their economic peculiarities, in the background. The reason for equal treatment for "doorstep real-estate loans" and all other real-estate loans is hard to follow. In Jürgen Schmidt-Räntsch's words, in justifying unequal treatment the legislator was not able to focus on the possibly limited chances for mature consideration in doorstep situations, since "this plays no part in other loan agreements either." This passage seems impossible to follow. If it is meant to mean that the right to cancel other loan agreements is not bound up with the special features of doorstep situations, this is obvious. But it clearly in no way explains why the economic peculiarities of real-estate loan agreements cannot, as in the older legal position, justify doing without the right to cancel, as long as the other conditions of a doorstep transaction are absent. With no convincing objective reasons and with no compelling need, the amendment has conferred great scope on the ECJ decision, already flawed in itself.

Equally unconvincing is the legislative decision on the course of the time-limit for revocation in the event of absence of notification. Since this time-limit provision is

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<sup>35</sup> On the legislative motivation cf. the statements by the relevant rapporteur in the Federal Ministry of Justice, J. Schmidt-Räntsch, Gesetzliche Neuregelung des Widerrufsrechts bei Verbraucherverträgen, ZIP 2002, 1100, 1101.

<sup>36</sup> On this cf. J. Schmidt-Räntsch, op. cit., 1101

<sup>37</sup> Cf. Schmidt-Räntsch, op. cit., 1101f.

<sup>38</sup> Schmidt-Räntsch, op. cit., 1102.

<sup>39</sup> J. Schmidt-Räntsch, op. cit., 1107.

generalized in the new rules on revocation and restitution (§ 355(3) BGB), the German legislator's sole alternative was either to delete the time-limit for doorstep transactions alone, or do so generally for all consumer cancellation rights where there is no notification. On the justification of keeping the unity of the general provisions as broad as possible, the legislator decided for the second alternative (§ 355(3)(3) BGB n.F.). The appropriateness of this unlimited temporal extension of the right to cancel is extremely doubtful. It seems incompatible not just with legal certainty and public policy – the very grounds adduced by the legislator not a year before in the Act modernizing the Law of Obligations and again for the time-limit on the right to cancel in § 355(3) BGB. The further danger exists that given the easier acceptance of tied transactions the right to cancel will in future increasingly be used as a right to repent if the value of investments does not rise as expected. A doctrinal “brake” might come from a reawakening of the past debates on the requirements for forfeiture of the right to cancel. By contrast with what the explanatory statement on the draft law says, finally, limiting the amendment to § 355(3) BGB to doorstep revocation provisions only would by no means have meant having to take over the differing revocation periods in the other consumer directives individually into the BGB.<sup>40</sup> For since these directives, as shown, provide for shorter time-limits where no notice of right to cancel is given, the six-month period in § 355(3) BGB would still have been covered by the minimum harmonization principle.

The strongest counter-argument to the excessive transposition of the *Heininger* judgment chosen by the German legislator, finally, was later supplied by the Commission's publishing the already-mentioned 11.9.2002 draft new consumer credit directive.<sup>41</sup> By contrast with the old directive, the new draft is based on the principle of *full harmonization* (Art. 30 of the draft), whereby stricter national consumer protection rules are not admissible. By Art. 3(2) (a) of the draft, the new directive, like the old one, does *not* extend to real-estate loan agreements guaranteed by a property mortgage or equivalent collateral. This leaves real-estate loan agreements basically within the competence of the national legislator, who ought thus really to be free to extend the right to cancel to such agreements. Though not clearly covered by the wording, it seems not implausible to see in this provision additionally a positive decision by the Community legislator not to let the consumer enjoy the rights provided for in the directive, including the right of revocation, in the case of real-estate loan agreements, since for the economic reasons set forth these rights do not suit such agreements. Then this provision developed a blocking effect, making the new German provisions contrary to the directive, so that they had to be cancelled again. While this sequence is rather improbable, that the new time-limit provision in § 355(3)(3) BGB is contrary to the directive in the case of consumer loan agreements within the meaning of the directive seems quite clear. For the national provision is incompatible with Art. 11 of the new draft, which sets a time-limit of fourteen calendar days on exercise of the right to cancel. This period starts on receipt of the official copy of the loan agreement concluded, and according to the tenor of the draft does not depend on notification of the existence of the right to cancel. Nor is such notice even due at all: the lender has to indicate only the procedure for exercising the right to cancel (Art. 10(4)(f) in the draft). Against this background the German time-limit provisions, which obviously put the consumer in a better position, would on the

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<sup>40</sup> But see Schmidt-Räntsch, *op. cit.*, 1103.

<sup>41</sup> Commission proposal COM (2002), 443 final.

principle of full harmonization no longer be permissible. Consequently, the BGB will fairly certainly have to be amended again.

## 6. Summary assessment

Considered as a whole, the *Heininger* case constitutes a catastrophic example of the poor cooperation between the European and national judiciaries and legislatures in the European multi-level system, which has led to results none of the participants likely wanted. The first two courts can be reproached for having ignored in their judgments the Community viewpoint and the possibility the concurrency provision in § 5(2) HWiG they centrally based their decision on might be against Community law. Had they instead immediately enquired into the actual presence of a doorstep transaction, all those involved would have been spared the rest of the proceedings.

The BGH's submission order for a preliminary ruling, attesting that court's much higher sensitivity to Community law, by contrast seems basically justified. The compatibility of § 5(2) HWiG in its then interpretation with the doorstep revocation directive indeed seems greatly in doubt. Yet this court would have done better, before submission to the ECJ, to set aside the OLG decision and send the matter back to it for further factual clarification as to the actual existence of a doorstep transaction. Again, the BGH could elegantly have avoided the submission had it, following weighty voices in the literature, denied the possibility of interpreting § 5(2) HWiG in conformity with the directive and deduced from Art. 4(3) the unambiguous existence of national room for discretion in regulating the consequences of failure to give notice of the right to cancel, whereupon it could, following the ECJ's CILFIT case law, have done without a submission.

The ECJ decision is to be seen as disastrous in every respect. In a perspective dangerously narrowed down to the *effet utile* of Community law, this Court once again proved incapable of recognizing conflicting interests and weighing them properly against each other – quite simply, the basic task of any private-law adjudication. Thus, it took totally inadequate account of the central arguments on the economic peculiarities of real-estate loan agreements and on time-limits for revocation rights on grounds of legal certainty and public policy. The Court thus arouses the impression of a sort of “partiality for *effet utile*”. The efforts of national courts to refrain from submissions in private-law cases as far as possible become very comprehensible in this light.

The BGH's follow-up decision seems equally unacceptable. While complying with the Community requirements through restrictive interpretation of § 5(2) HWiG is just as defensible as refraining from deciding on the time-limit provision in § 2(1)(4) HWiG, denying the application of the principles to tied transactions leads to the untenable result that the purchaser is worse off exercising the right to cancel than waiving it. For after declaring revocation, he must as explained immediately repay the whole amount of the loan, since the instalment agreement also terminates. This makes a mockery of all consumer protection. Interestingly, this paradoxical situation has brought the Bochum LG to a new preliminary-ruling submission to the ECJ, raising the question of the compatibility of these legal consequences with the principle of effective consumer protection, which underlies both the doorstep revocation directive and the EC treaty.<sup>42</sup> This paradoxical decision arouses the further impression that the

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<sup>42</sup> NJW 2003, 2613.

BGH for its part was concerned to turn the ECJ judgment into national law in such a way as to take any practical effectiveness from it – a sort of supreme judicial cat-and-mouse game at the expense of the parties, observable in earlier preliminary-ruling proceedings too.<sup>43</sup>

The German legislative response, extending the scope of the ECJ decision far too far in an excessive transposition for no compelling reason, must also be considered totally wrong. Extending the right to cancel to all kinds of property loans and abolishing time limits across the board in the absence of notice, with no restriction to doorstep transactions, are wrong from the viewpoints of economic efficiency, legal certainty and public policy. At least the last of these will no longer exist in the light of the impending reform of the consumer credit directive. Further amendments to the BGB will be unavoidable. Thus the German legislator, hand in hand with the ECJ, has made the BGB into a “work in progress” and brought intertemporal private law an unexpected upswing.

Worst of all, however, this chaotic interplay of European and national bodies is coming at the expense of private persons, for whom private law ought really to be a serviceable and effective instrument for securing their rights. For what are the parties involved supposed to think of a legal system that needs five years to decide an objectively anything but complex case, involving four courts dealing essentially with questions of absolutely no relevance to the outcome of the proceedings? This situation shows the Kafkaesque picture of a legal system concerned primarily with itself, which has bid farewell to its basic task of bringing those concerned their rights in an appropriate time, in a way that can be followed doctrinally, and legitimately in the social and economic context. This deplorable state of affairs is reason enough to ponder even radical changes to the judicial and legislative coordination of the various levels of law in the overall European system.

#### ***IV. Prospects for improvement***

While the two foregoing sections have shown the massive coherence, coordination and system problems arising in private-law directives, domestically and in the interaction with national law, let us conclude by going briefly into a few ways of, if not overcoming these problems, at least reducing them to a more tolerable volume. Here the legislative (1) and judicial (2) levels are to be distinguished.

##### ***1. Legislative level***

At bottom, all the system problems proceed from the selective, functional regulatory approach of Community private law, aimed primarily not at a consistent, fair system of legal relations of private persons, but at the legal systematization of particular market sectors. This is the fundamental problem of the instrumentalization of private law for the European integration project. This problem may perhaps be overcome in future by the millennial project of a comprehensive European codification of private law, in achieving which the system problems in existing Community private law are, however, only one of many legal, economic and social legitimacy aspects. As long as this option is not yet available, but even only in preparing it, minor possibilities of correction will have to suffice.

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<sup>43</sup> Cf. the main-case decision in *Brasserie du Pêcheur*.

Obviously, in this context there is an urgent need to improve the internal coherence of Community private law, so that even the Commission's current efforts in this direction are to be welcomed. But they by no means solve the system problems in the European multi-level system. For as long as Community law does not itself possess a system tending towards comprehensiveness, it has to be recognized that systematic responsibility for private law continues to lie with the Member States. This responsibility for the system should be respected to the fullest possible extent by the Community. Here the Community legislator should think back to the original conception of the directive: that it may prescribe only the regulatory objective, while the choice of form and means is to be made at national level. As became particularly clear on the example of the directives in sales law, a directive is the harder to introduce into national private law without breaches in the system the more comprehensive and detailed the systematic structures it itself lays down. Accordingly, the Community legislator should at the drafting stage of a directive formulate only prescribed objectives, and in functional language. For instance, it would have been preferable if instead of the complicated construction of presumptions on the contractuality of the goods bought in Art. 2 of the sales law directive it had simply been laid down that the criteria laid down in Art. 2(a) – (d) were to be complied with in determining contractuality. That would, without taking anything away from the Community regulatory objective, have left the Member-State legislator with greater discretion to bring the European prescriptions into line with the national system.

To facilitate the national legislator's exercise of its systematic responsibilities, great importance further attaches, as already repeatedly stressed in this section, to the principle of minimum harmonization. Although it can in turn lead to considerable problems in applying the law, this principle is what in the first place enables national legislators at all to achieve European instructions within the framework of the existing national system. Allowing national legislators to exceed the European protective level upwards gives them greater room for manoeuvre, which can be exploited using the technique of "integrative transposition". Were the minimum-harmonization principle removed, the national legislator would instead always have to transpose directives one-for-one – bringing all the inconsistencies and irrelevant subdivisions in them into domestic law. The catastrophic consequences for the system of abolishing this conflict-of-laws rule have already been shown all too clearly in the above-described ECJ decisions on product liability law, where the national systems involved were forced to exactly transpose detailed requirements of questionable content. The Commission's demands for abolition of the minimum-harmonization principle in the most recent consumer-policy action programme focus too one-sidedly on the aim of promoting the Community-law *effet utile* by creating uniform legal framework conditions even for private-law transactions. Yet it should be noted that this aim can only really be achieved if a coherent, functioning private-law system is available. The "system damage" to be expected from abolishing the minimum-harmonization principle thus threatens greatly to exceed the benefits from this procedure.

## **2. Judicial level**

The currently greater potential for avoiding system problems lies with the ECJ. The ECJ's present "*effet utile* partiality" is probably the worst of all possible modes of coordination in the European multi-level system. For it is aimed one-dimensionally at maximizing the effects of European regulations, largely ignoring their embeddedness in the national-cum-European multi-level system. This way of instrumentalizing the

parties' relationship, moreover, neglects the basic task of a private-law court, to weigh the rights and interests of the parties fairly against each other.

Against this background, a solution can lie only in placing the relation between European and national justice on a totally different footing. Several preliminary considerations seem in order here. Since the concrete effects of a European norm always emerge only from its interplay with national law, the ECJ, which possesses no competence to adjudicate about national law, cannot, merely for technical legal reasons, be the appropriate body for fine-tuning European private law, something that would into the bargain overstrain its capacities. By contrast with courts that have to cultivate a comprehensive private-law system, ECJ decisions do not, because of the gappiness of Community private law, bring about an increasingly concrete, "narrower-meshed" coverage of the material. Intensified judicial involvement with European private law – as its over-representation in current case law on private law shows – would instead need more discussion of questions of demarcation from the area of application of European legal acts, which would bring little gain in system. Additionally, pan-European unitary fine-tuning in private law, given continuing differences in social and economic conditions, could raise problems of acceptance and legitimacy among citizens affected. And such problems very definitely arise when the ECJ, as in the product liability decisions and the Heiningen case, does not go into the social and economic reality at all, but guides its decision by general objectives of European legal acts like farthest-reaching protection of the consumer in doorstep transactions, which cannot in practice be achieved, simply because of the lacunas – e.g. in the Heiningen case for lack of regulations on tied transactions.

A desirable role the ECJ could methodologically cope with and socially legitimately exercise, in European private law too, would instead be as a sort of European Constitutional Court, seeking as it were to apply the basic conceptions of procedural law to the relation between Community law and national law.<sup>44</sup> Here the ECJ ought in substance primarily to uphold European basic constitutional values such as especially the freedom and equality of all Community citizens; in so doing it should not steer the national legal systems comprehensively from above, but concentrate on stabilizing them and ensuring their compatibility with the European basic values in fair proceedings. In this connection above all the inclusion of all interests concerned, e.g. also those of absent, only indirectly affected third parties from other Member States, should be ensured. For this, the Court of Justice would have to enter substantive dialogue with the national courts, refraining as far as possible from European *diktats*. Outside the area of European basic values, and thus in fine-tuning private law, it should leave Member States the greatest possible freedom of interpretation.

It is in this sort of constitutional and procedural sense that the Centros case law, can, with some deletions, be read.<sup>45</sup> In it, the ECJ on the one hand sets national courts the material standard of the equality of all national forms of company, which are accordingly to be respected Community-wide as legal personalities, with an eye to equal freedom of establishment; on the other hand, it allows Member States to stop abuses in national law. However, it goes beyond this basic evaluation for the ECJ to

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<sup>44</sup> For more on the legal-theory background, cf. C. Schmid, Multi-level constitutionalism and constitutional conflicts, PhD thesis, EUI Florence, 2002, 194ff.

<sup>45</sup> Cf. C. Joerges, Zur Legitimität der Europäisierung des Privatrechts. Überlegungen zu einem Recht-Fertigungs-Recht für das Mehrebenensystem der EU, EUI Working Paper LAW 2003/2, 30ff.

instrumentalize foreign dummy companies in order to put through freedom of establishment faster and more effectively. Though its doctrinal foundation is shaky, the Leitner decision can similarly, with deletions, be interpreted in a constitutional and procedural sense. In it, Austrian citizens are allowed a right of compensation for damages that largely meets a pan-European protective standard, so that the ECJ has merely completed a developmental process already under way Community-wide. Diametrically opposite to this conception, by contrast, are the doctrinally and legitimatorily problematic European *diktats* like those the ECJ has handed down in the product liability cases and the Heininger case.

This constitutional and procedural model should continue as the one for national courts to follow in deciding whether to ask for a preliminary ruling. Specifically, this means that they should, as far as possible in the individual case, make a submission only if a case of constitutional significance in the sense just set out is present; whereas in matters primarily of doctrinal fine tuning, they should refrain from submissions as far as possible.

A methodical adoption of a constitutional and procedural model for the relation between European and national courts would require a broadening of traditional legal hermeneutics. A restriction to interpretation of Community law on the traditional interpretive criteria, as undertaken by the ECJ in its case law, is not enough here, in several respects. First, as already noted, European norms develop real effect as a rule only in the interaction with national norms, something that admittedly takes different forms in the various Member States. The one-dimensional restriction to the tenor, systematics and teleology of European norms largely continues to ignore the opposing rights and interests protected in national law but enjoying no comparable position in Community law – like legal certainty and public policy in the case of the time limit on revocation in the absence of notice in the *Heininger* decision. Finally, a restriction to the teleology of European norms also makes impossible any guarantee that this can actually be achieved in the interaction with the national legal system. Thus, the overall objective of the product liability directive, creating uniform liability conditions for firms to be able to operate in the whole common market, is already nullified by its lacunas. Accordingly, as shown, it can only lead to counter-productive effects if judicial interpretation of the directive is to be guided primarily by its objective.

Against this background, we here suggest traditional methods of interpretation, so as to take account of the actual consequences of a decision and enhance its social legitimacy. Inevitably, the requisite forecast of consequences is partly speculative in nature, and may sometimes also require whoever is applying the law to make political evaluations. It is, however, better than simply ignoring these unavoidable facts at least to look them in the face and take account of them in a decision in as rational and socially sensitive a way as possible. It is along these lines that the question discussed above of making indefinite legal concepts and general clauses concrete should be approached. Thus, this procedure does not, as in traditional doctrinals, reduce solely to whether European or national bodies ought to be concretizing the usually vague objectives of a directive and its relative importance for integration (e.g. guaranteeing Community-wide marketability of goods and services, or merely removing distortions of competition). Instead, one should also ask what content comes into question for concretizing a vague norm at European level, how concretization might work out in the doctrinal and systematic context of the European multilevel system, and finally whether it could meet with social acceptance from the public, those concerned and

legal scholars. Admittedly, these are relatively abstract criteria, which can assuredly be concretized only in individual technical areas or even decisions. To illustrate this, let us once again point to the example of the concretization of the compensation-rights general clause in the product liability directive. Here it makes a great difference in terms of the system compatibility and social legitimacy of a European concretization whether the ECJ gives guidelines to national law that can be achieved in full within the national system and confirm an existing pro-victim basic trend in the national law – or else, as in the *González Sánchez* case, interprets the directive in such a way as not only to take away from citizens suffering damage the compensation entitlements due to them in domestic law, but also to make it harder for Member States to do justice to their responsibility for the coherence of the liability system and its social and economic guidance functions.

What are, finally, the lessons to be derived from this model for tenancy law? In a straightforward language, it is on account of its strong national and even subnational nature that harmonisation of this field should not be envisaged at all. Instead, the European input should be limited to some loser form of co-ordination of the European and national level such as the „open method of governance“.<sup>46</sup>

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<sup>46</sup> See, on this topic, the background papers by Fabrizio Cafaggi and Christian Joerges to this project.