

Cross-Border Private Enforcement of Community Law

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Published in J.A.E. Vervaele et al. (eds.), *Compliance and Enforcement of European Community Law*, The Hague: Kluwer Law International, 1999.

Abstract

It is legally more complex to regulate the non-economic aspects of the Single Market, such as a high level of consumer protection, than to ensure market access by operators. The latter can frequently be ensured by the disapplication of national rules obstructing one of the free movements provisions, whereas the former may require the courts to practically redraft a rule of national law. Ensuring compliance with Community standards will depend to a large extent on the willingness of the national courts to creatively construe their domestic law in order to give effect to Community law. Private law sanctions, in particular injunctions, are useful as a policing mechanism in this context. In cross-border situations in particular, civil remedies are potentially effective instruments of enforcement, both for the benefit of private actors and public bodies. The main part of this paper will be a detailed discussion of four illustrative cases, including the *Konsumentenombudsman* case of July 1997. Before doing so, the legal framework is sketched; afterwards, the most relevant legislative development will be examined.

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1. Terminology and introduction

The term 'private enforcement' may be used in different meanings. Generally speaking, it denotes legal action by private actors as opposed to public authorities. In fact, one could thus link 'private enforcement' to a privatization of the enforcement function if the focus of the discussion is primarily on the type of actor involved. A different, but related, meaning of 'private enforcement' concerns the use of private law rather than public law (both administrative and criminal). This perspective focuses upon the type of legal instrument rather than on the kind of actor. Both public authorities and private (legal) persons could in principle use the same instruments of private law. The most important of which, in enforcement perspective, are injunctions issued by a civil court, usually in combination with a periodic penalty payment in the event of non-compliance with the court order. Combined with Community law, the use of the term 'private enforcement' in this paper refers to a duty arising under Community law incumbent upon a private person and enforced before a civil court by either another private person or a public body.

In EC law literature about enforcing Community law the discussion is mainly concerned with national administrative and criminal law.¹ Apart from such general studies, the same applies where specific policy areas such as environmental protection are being examined.² Another line of literature focusing on remedies before national courts primarily deals with legal action by private parties against the State or other public authorities - not against private actors.³

A parallel line of possible enforcement action which has received less attention is directed against private persons, frequently operators or undertakings. If and when the plaintiff is also a private entity, the legal framework within which the action takes place will be that of private law, notably the law of contractual and non-contractual obligations. National

¹ See e.g. Christopher Harding & Bert Swart eds., *Enforcing European Community rules. Criminal proceedings, administrative procedures and harmonization*, Aldershot etc.: Dartmouth 1996.

² Han Somsen ed., *Protecting the European environment: enforcing EC environmental law*, London: Blackstone 1996.

³ See e.g. Rose M. D'Sa, *European Community Law and Civil Remedies in England and Wales*, London: Sweet & Maxwell 1994; Josephine Steiner, *Enforcing EC Law*, London: Blackstone Press 1995; Clive Lewis, *Remedies and the enforcement of European community law*, London: Sweet & Maxwell 1996.

private law is then used (indirectly) for the purpose of enforcing Community law. This development is reflected in EC directives which envisage a role for this form of private enforcement such as the Misleading Advertising Directive.⁴

During the last decade or so, there is increasing interest in the development of European private law. Especially in Germany, Italy and the Netherlands, scholars have 'rediscovered' a European *Ius Commune*, combining three fields of research: legal history, comparative law and European Community law.⁵ The notion of private enforcement as examined here may therefore be linked to the emerging European private law as well as to the more general Community law development of the concept of effective protection of Community rights (both public and private law ones).⁶

Compared to the impact of Community law on national public law, in particular fields of administrative law such as economic public law, EC law has had less impact on the core doctrines of private law. This is partly due to the fact that the Member States resist Europeanization of their systems of private law.⁷ Especially in codified legal systems, there are objections to disruptions of such a conceptually whole system by topic-by-topic-harmonization measures. A more hidden form of resistance stems from the fact that harmonization of national tort and contract law reveals underlying value choices which, in the national context, are hidden behind formal conceptual consistency of a Code.

Nonetheless, significant indirect effects are taking place. Under the influence of Community law the private realm (as opposed to the public domain) is widened. Accordingly, the role of non-governmental actors is increased, who, in turn, rely on private law. This national private law of the Member States is thus functioning in a radically new and supranational setting.⁸ To give an example, a perfectly everyday reliance on figures of contract law such as misrepresentation may be precluded by an EC law Directive.⁹

⁴ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, O.J. 1984 L 250/17.

⁵ See generally Arthur Hartkamp a.o. (eds.), *Towards a European Civil Code* (2nd ed.), Nijmegen: Ars Aequi Libri & The Hague etc.: Kluwer Law International 1998.

⁶ Cf. Sacha Prechal, *Directives in European Community Law. A Study on EC Directives and their Enforcement by National Courts*, Oxford: OUP 1995, p. 158.

⁷ Daniela Caruso, 'The Missing View from the Cathedral: The Private Law Paradigm of European Integration', 3 ELJ 3 (1997).

⁸ Christian Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective', 3 ELJ 378, § IIIA (1997).

⁹ Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657; [1994] 2 C.M.L.R. 681; casenote Gerrit

Also, under the Treaty of Amsterdam,¹⁰ legislative powers with respect to private law topics are, for the first time in primary EC law, spelled out in the context of the so-called Area of Freedom, Security and Justice (New Title IV of the EC Treaty on Visas, Asylum, Immigration and other Policies related to the Free Movement of Persons). Judicial cooperation in civil matters has been moved from the third pillar to the first pillar of the European Union, albeit to the extent of cross-border implications and 'insofar as necessary for the proper functioning of the internal market' (Article 65 EC Treaty new). In addition to subjects of private international law - e.g. conflict of laws, jurisdiction and cross-border service of documents - the Community legislature is empowered to adopt measures 'eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States'.

Until such harmonization of procedural rules is going to take place, the well-known *Rewe* provisos,¹¹ refined in *Van Schijndel*,¹² constitute the Community law 'check' on the use of national law remedies.¹³ 'Euro-claims' (rights arising under Community law) may not be treated less favourably than similar domestic actions nor may the domestic procedural rules render virtually impossible or excessively difficult the exercise of rights conferred by Community law. In order to assess the compatibility of the applicable national law with these two principles (non-discrimination or assimilation; effectiveness) the relevant rule must be considered in its broad context, 'including the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure' (§ 19 *Van Schijndel*).

2. Policy views on private enforcement

2.1 Policy areas

Betlem, 'The *Effet Utile* of Indirect Effect', 2 MJ 73 (1995).

¹⁰ O.J. 1997 C 340.

¹¹ Case 33/76, [1976] ECR 1989; [1977] 1 C.M.L.R. 533. See generally Mark Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules', 21 E.L.Rev. 365 (1996).

¹² Joined Cases C-430 and C-431/93, [1995] ECR I-4705; [1996] 1 C.M.L.R. 801; AB 1996, 92 FHvdB; NJ 1997, 116.

¹³ See generally, Francis G. Jacobs, 'Remedies in National Courts for the Enforcement of Community Rights', in: Manuel Pérez González a.o. (eds.), *Hacia un Nuevo Orden Internacional y Europeo* - Festschrift Díez de Velasco, Madrid 1993 and Christopher M.G. Hinsworth, 'Things Fall Apart: The Harmonization of Community Judicial Procedural Protection Revisited', 22 E.L.Rev. 291 (1997).

Probably the oldest field within which private enforcement is prominently present is competition law. A Commission Notice¹⁴ spells out how the Commission intends to assist the national courts in the application of the Articles 85 and 86 EC Treaty. The latter have the task of safeguarding the rights of private persons in their relationship with one another (but for one exception, the provisions have direct horizontal effect); such effect occurs both with respect to national tort as well as contract law. The Commission notes the indirect enforcement of Community competition law by an action by one private person against another. A number of remedies against the culprits are only available through the national courts, namely interim relief, injunctions and in particular damages.¹⁵ Moreover, the Notice continues (No. 44), such judgments by a civil court are covered by the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Cases (as amended),¹⁶ so that private enforcement in cross-border disputes is being facilitated. However, a critical comment on the practical value of this theoretical starting point may be made. According to Caruso, very few reported cases of successful claims exist. Also, the absence of punitive damages, contingency fees and class actions discourage potential plaintiffs.¹⁷

A subcategory within the enforcement of the Community's competition policy concerns state aid. In another Notice on Cooperation¹⁸ the European Commission observes that the role of national courts in this sector primarily consists in 'the enforcement of duties usually at the behest of private parties' (No. 4). In particular, those courts must ensure that Member States comply with their procedural obligations such as the duty to notify new aid before it is put into effect (directly effective last sentence of Article 93(3) EC Treaty). Although this particular obligation is addressed to the Member States, the undertakings receiving the aid are of course indirectly affected. Indeed, competitors may take legal action before national (civil) courts against beneficiaries of allegedly unlawful aid. In *SFEI* for example,¹⁹ competitors of the French postal service sought a declaration before the *Tribunal*

¹⁴ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993 C 39/6.

¹⁵ Cf. the 'hint' by the ECJ in Case C-59/96 P *Koelman* [1997] ECR I-4809, § 43, 44.

¹⁶ Latest consolidated version in O.J. 1998 C 27.

¹⁷ Note 7 above, at 18-22.

¹⁸ Notice on cooperation between national courts and the Commission in the State aid field, O.J. 1995, C 312/8.

¹⁹ Case C-39/94, [1996] ECR I-3547; [1996] 3 C.M.L.R. 369; NJ 1997, 354.

de Commerce, Paris, that certain assistance afforded by the post office to a subsidiary constituted state aid and that it had been implemented without prior notification to the Commission, in breach of the last sentence of Article 93(3) EC Treaty. In addition, they applied for an injunction to stop further granting of aid and for repayment of already granted aid; also, they claimed damages of FF 216 million from the defendants.

Finally, other instances of legal fields with a (potentially) large role for private enforcement are European social law, in particular the European Works Council Directive,²⁰ and consumer law, notably the Misleading Advertising Directive and the Consumer Injunctions Directive (cited below), which both explicitly envisage legal action by private organisations as well as public bodies as against operators not complying with implemented provisions of Community law.

2.2 Policy purposes

Weatherill has pointed out that policing market regulation is much more complicated than ensuring market access for traders by obliging non-enforceability of national law barriers.²¹ In particular positive obligations regarding diffuse interests such as environmental and consumer protection²² are less likely to be invoked by interested individuals before the national courts. This distinction reflects the divisions between negative and positive integration, but now in the context of enforcing Community laws protecting non-economic interests. The role of NGOs is important here. Even where they act though, there is the problem of the lack of horizontal direct effect of directives. The alternatives are a *Francovich* claim or convincing a national court to interpret some national rule in conformity with a Community norm. Both are fraught with difficulties.

The European Commission has documented these complexities most clearly in the

²⁰ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, O.J. 1994 L 254/64.

²¹ Stephen Weatherill, 'Compulsory Notification of Draft Technical Regulations: the Contribution of Directive 83/189 to the Management of the Internal Market', 16 Y.E.L. 129 (1996), in particular 192-204.

²² See generally Norbert Reich, *Internal Market and Diffuse Interests*, Bruxelles: Story Scientia 1990 and his 'System der subjectiven öffentlichen Rechte' in the Union: A European Constitution for Citizens of Bits and Pieces', VI *Collected Courses of the Academy of European Law I*, The Hague: Kluwer Law International 1998, p. 157 at 185 and 208.

1993 Green Paper about Access to Justice for Consumers.²³ More particularly, it discussed a case of cross-border misleading advertising, illustrative for private enforcement complexities. A German based company sent misleading advertisements to consumers in France. Both countries had implemented the Misleading Advertising Directive. Germany had adopted civil remedies and France criminal sanctions. The German courts ruled that a tort had not been committed since the German market had not been affected.²⁴ Neither was there any breach of German criminal law. Even though criminal liability of the trader in France obtained, the French convictions were unenforceable in Germany, as they are not covered by the cited Brussels Convention.²⁵ A number of the identified difficulties with the application of the Misleading Advertising Directive in transfrontier situations - the main example - reflect the limits of legislative measures (as opposed to judicial decisions) and will be returned to below (§ 4.3).

2.3 The limits of legislation

The knee jerk reaction to all sorts of social problems is: there should be a law against. Or in Europeak: there should be a Directive against it. However, it may be the case that the particular problem in hand cannot be adequately solved by the adoption of a new directive, but in effect depends upon the interpretation of the already existing rules of domestic law, whether they are of EC origin or not. As will be examined below, construing a national Act such as to accommodate its application in an cross-border dispute is a case in point. This national courts' duty to interpret their applicable rules of domestic law in conformity with the requirements of Community law is of particular importance where private enforcement is concerned (below § 4.3).

3. Case law on extraterritorial enforcement within the EU

One specific situation where private enforcement is relevant is the case of non-compliance with Community law (or the national implementation laws in case of Directives) in an

²³ Commission of the European Communities, 16 November 1993, Green Paper, *Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, COM(93) 576 final.

²⁴ See LG München I, 2 April 1992, VuR 1993, 62; LG Aachen 10 December 1993, VuR 1994, 37.

²⁵ Tribunal de Grande Instance Strasbourg 10 July 1987, IPRax 1989, 47. See for possibilities to start a civil procedure, Tribunal de Grande Instance Nanterre 1 February 1993, VuR 1993, 258.

international setting. Because the legal framework of private international law is more developed than in the context of public law, it is in this field that the most promising scope for private enforcement, both by public bodies and private actors, lies. In this paragraph the most important relevant case law of the ECJ will be examined in detail.

3.1 Hedley Lomas and Compassion in World Farming

Although perhaps best known as a State liability case (post-*Francovich*),²⁶ *Hedley Lomas*²⁷ is also relevant to the enforcement of Community law in an international setting. It is a leading case in that it articulates the principles limiting enforcement action in the cross-border context.²⁸ The relevant facts are the systematic refusal, in the period 1990-1993, of the English Ministry of Agriculture, Fisheries and Food to issue licences for the export to Spain of live animals for slaughter, on the ground that their treatment in certain Spanish slaughterhouses was allegedly contrary to a Directive on stunning of animals before slaughter. In terms of international relations, the case involves the sensitive issue of animal welfare activism in the UK versus traditional customs in countries like Spain, which, at the political level, ended up in the Treaty of Amsterdam Protocol on Animal Welfare. It is declared that in formulating and implementing policy, including the internal market policy, 'the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage' (read bull fights and the like).²⁹

In enforcement terms, the authorities of Member State UK thus indirectly acted against an alleged breach of Community law by Member State Spain. After investigation, the Commission decided not to open infringements proceedings (Article 169 EC Treaty) and informed the UK that it considered the general ban on exports to Spain to be contrary to Article 34 EC Treaty (quantitative restrictions on exports) and not capable of justification

²⁶ Joined Cases C-6 and C-9/90, [1991] ECR I-5357; [1993] 2 C.M.L.R. 66; NJ 1994, 2; AB 1994, 482 FHvdB. Cf. the Web site by Betlem & Lefevre, '*Francovich* Follow-Up. A Survey of Cases on State Liability for Breach of European Community Law', <http://www.eel.nl/dossier/francovi.htm>.

²⁷ Case C-5/94, [1996] ECR I-2553; [1996] 2 C.M.L.R. 391; AB 1996, 503 FHvdB; NJ 1997, 228.

²⁸ See also Stephen Weatherill, 'Reflections on EC Law's "Implementation Imbalance" in the Light of the Ruling in *Hedley Lomas*', in: Ludwig Krämer a.o. (eds.), *Law and Diffuse Interests in the European Legal Order - liber amicorum Norbert Reich*, Baden-Baden: Nomos 1997, p. 31.

under Article 36 (animal protection as one of the exceptions). The ban was only lifted months after this notification.

In its judgment in the preliminary rulings procedure the ECJ recalled its established case law that recourse to Article 36 is no longer possible where Community directives provide for harmonization. This position remains unaffected by the absence in the Directive of specific monitoring procedure or penalties.³⁰ For under Articles 5 and 189 the Member States are already obliged to take all measures necessary to guarantee the application and effectiveness of Community law.³¹ It follows that Community law precludes a Member State from invoking Article 36 to justify a limitation of exports of goods to another Member State on the sole ground that, according to the first State, the second State is not complying with the requirements of a directive. Member States must rely on trust in each other to carry out inspections on their respective territories and one Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law. As is well known, unlike public international law, EC law does not recognize the principle of reciprocity - Member States may not take the law in their own hands; overt retaliation is impermissible, as the Court has consistently ruled from 1964 onwards.³²

Under the Community law system, the UK can bring proceedings against Spain under Article 170, including the possibility of interim relief under Article 186.³³ However, it is well known that Member States are reluctant to do so. Since the very beginning of the EEC, only one such case has been reported.³⁴ A second case, *Belgium v. Spain* is still pending.³⁵

The case was thus conceptualized as an attempt to apply Article 36 extraterritorially. In that respect the Court agreed with Advocate General Léger, who argued in his Opinion

²⁹ O.J. 1997 C 340/110.

³⁰ Contra A-G Léger in his Opinion, Nos. 15-21. See also the Casenote by Van Calster, 3 CJEL 132, 141 (1996/1997).

³¹ The ECJ cites Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 23 (Re Greek Maize).

³² Joined Cases 90 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625; Case 232/78 *Commission v France* [1979] ECR 2729; Case C 11/95 *Commission v Belgium* [1996] ECR I-4115, [1997] 2 C.M.L.R. 289; Case C-14/96 *Denuit* [1997] ECR I-2785, para. 35; Case C-265/95 *Commission v France* [1997] ECR I-nyr (judgment of 9 December 1997), para. 63.

³³ See explicitly Case C 11/95 *Commission v Belgium* [1996] ECR I-4115, para. 39 (Re Cable Television); [1997] 2 C.M.L.R. 289.

³⁴ Case 141/78 *France v United Kingdom* [1979] ECR 2923 (Re Fisheries); [1980] 1 C.M.L.R. 6.

³⁵ Case C-388/95, O.J. 1996 C 46/5. Coincidentally, this case also concerns alleged breach of Article 34 EC Treaty, but now by Spain, in not complying with Case C-47/90 *Delhaize Frères* [1992] ECR

(no. 23) that it should not be possible for the UK to rely on Article 36, as it did not further the UK's own interest in preventing maltreatment of the animals there, but rather the Community interest in combatting an allegedly unlawful treatment abroad. Article 36 only applies to situations within the national territory, it was ruled (the text of the provision does not compel this reading, though).³⁶ However, it may be argued that the UK is exercising proper territorial jurisdiction over the animals when they are still on British territory.³⁷ The *extraterritorial* element here is only their destination. Certainly in terms of private international law connecting factors there is a sufficient link with the UK legal order where 'goods' are involved of UK origin and present within the jurisdiction. In this view, the UK could have invoked Article 36 but would (of course) still have to satisfy the proportionality test.³⁸ In this respect the *Hedley Lomas* situation may be contrasted to the one in *Gourmetteria van den Burg*³⁹ where the Dutch authorities imposed import restrictions on a species of bird which does not live in (nor migrated to) the Netherlands. Under the relevant Directive, which was held to have exhaustively covered the matter, stricter protective measures than those provided for by the Directive could only be taken with respect to species occurring within their territory.

Support for the view that *Hedley Lomas* does not involve an extraterritorial application of the law may be taken from Advocate General Jacobs' Opinion in the *Werner* and *Leifer* cases.⁴⁰ They involve export restrictions on so-called dual use goods (usable for both peaceful and military purposes). Arguing that the provision of the Regulation in issue corresponds to Article 36, he proposed that a Member State should be allowed to impose export restrictions justified in order to protect human life, including human life and health outside its own territory. The Court did not rule on this matter as the case was resolved on other grounds. The decisive point for the Court was to justify the restriction on the ground of the public security of the exporting State, which could not be isolated from the security of the international community at large. The extraterritorial interest is thus linked to an intra-

I-3669.

³⁶ H.G. Sevenster, *Eco-imperialisme binnen de Europese Unie: en juridisch Probleem?*, Deventer: W.E.J. Tjeenk Willink 1998.

³⁷ Casenote Van Calster, 3 CJEL, at 143 (1996/1997).

³⁸ *Idem*.

³⁹ Case C-169/89, [1990] ECR I-2143.

⁴⁰ Case C-70/94 *Werner Industrie-Ausrüstungen* [1995] ECR I-3189; Case C-83/94 *Criminal Proceedings against Peter Leifer et al.* [1995] I-3231.

territorial one. The ruling leaves open the question whether a restriction could independently be justified for the protection of human life elsewhere. No matter how undesirable from a humanitarian point of view this may be, the legal test adopted here provides no guidance as there is no equivalent link to the one between national and international public security and the protection of human life of nationals and those living far beyond the exporting State's borders.⁴¹ It remains an open question whether or not this justification ground is applicable or not.

In a second case involving similar facts, *Compassion in World Farming*,⁴² the ECJ, partly contrary to the Opinion of the Advocate General, affirmed *Hedley Lomas* in denying a possible prohibition of exporting calves to other Member States, where they would be subject to the 'veal crate system' banned in the UK, on the grounds of animal welfare, public or public morality. In legal terms, there are two new points compared to *Hedley Lomas*. The main proceedings before the national court did not concern the refusal of an export licence, but the claim by animal rights groups that the British government should adopt legislation imposing a ban; the Minister of Agriculture said that he had no power to do so. The compatibility with EC law of such an eventuality thus rises. Secondly, no lack of enforcement of a Directive by another Member State was involved, but the alleged invalidity of a directive on the ground of its incompatibility with Council of Europe measures.

For present purposes the case's aspects of extraterritoriality merit attention, in respect of which these two differences are not material. In accordance with the rules adopted by the Council of Europe, the veal crate system had been banned in the UK. The UK thus applied stricter rules than required under the relevant Community legislation, which the Directive allowed. The Community as well as all the Member States were bound by the Council of Europe Convention. Is a prohibition of export possible where the calves would, in the other Member States, not be treated in accordance with the rules of the Convention?

According to Advocate General Léger, the Directive did not provide for full, exhaustive, harmonization during the relevant period; also, the Member State would be allowed to invoke the ground of public morality, but no others, to ban the export. In the light of a broad 'margin of appreciation', the Advocate General would allow reliance on public

⁴¹ Casenote on *Werner and Leifer* by Govaere, 34 CMLRev. (1997) 1019, 1034.

⁴² Case C-1/96, [1998] ECR I-nyr (judgment of 19 March 1998), [1998] 2 C.M.L.R. 661; cf. annotation of Mortelmans, 'Vrij verkeer in de EG en de gezondheid van dieren: laat je niet kisten', AA 1998, p. 709.

morality in order to restrict export, where the national court had decided that the veal crate system was considered to be cruel and immoral by a considerable body of public opinion in the exporting State - subject to the requirement of proportionality.⁴³ None of the other grounds of Article 36 could apply because it 'does not allow a Member State to restrict its exports on account of extra-territorial circumstances which, even though they produce effects within its population, *do not affect on its own territory* the interest protected by this provision'.⁴⁴ By contrast, an impact on the public morality is an effect on a country's own territory.

The Court held the Directive to have exhaustively regulated the matter of minimum standards for the treatment of cattle within the Community. This Directive was not incompatible with the Council of Europe Convention, as the latter was held not to contain legally binding obligations. Under the Directive, stricter measures were limited to strictly territorial boundaries, relating only to farmers within that State and must comply with the general rules of the Treaty. A ban on export would call this exhaustive harmonization into question. The Court allowed no recourse to public morality either: 'a Member State cannot rely on the views or the behaviour of a section of national public opinion ... in order unilaterally to challenge a harmonising measure adopted by the Community institutions' (§ 67). Presumably, where the *whole* public opinion, and not just a sector of it, is affected does the justification ground of public morality come into play.

It may be tentatively concluded from these cases that any enforcement action of Member States of either Community law rules or international law standards implemented in their national law must be limited to purely internal situations. Under the provisions of the free movement of goods and the like, they may only restrict economic action, invoking Article 36 grounds, for the protection of their own interests, except perhaps where serious danger to human life is involved.⁴⁵

⁴³ Opinion of A-G Léger of 15 July 1997, nyr, Nos. 101-107

⁴⁴ *Idem*, No. 113, emphasis added.

⁴⁵ See casenote on *Hedley Lomas* by Oliver, 34 CMLRev. (1997) 666, 671. No counterargument can be derived from *Exportur* (Case C-3/91, [1992] ECR I-5529; TvC 1993, p. 150 nt. Temmink). Here a Spanish origin name of confectionary was protected in France, but on the basis of a Franco-Spanish Convention. Also, the ECJ conceptualized the issue of protective scope as one of choice of law (§ 36). Because of these specific characteristics, *Exportur* has not even been referred to in the case law on extraterritoriality.

3.2 Alpine Investments

In the context of the Treaty rules on freedom to provide services (Article 59 EC Treaty), the question has come before the Court whether the Dutch authorities were allowed, under Community law, to ban so-called cold calling by Dutch based traders of potential clients based both inside and outside the Netherlands with a view to concluding securities transactions contracts. Clients based in Germany could be called up lawfully under German law. This question was raised in the *Alpine Investments* case, where a firm established in the Netherlands was granted permission to practice brokerage in commodities futures trading in the Netherlands but subject to the condition to comply with the ban.⁴⁶ The Dutch authorities' aim was both to protect consumers and to protect the reputation of the Dutch financial services industry, following complaints from 'unlucky cold called' investors. The firm applied for judicial review of this permit condition, invoking Community law.

The most interesting aspect of this case in the present context is the issue of which interests are protected, and are allowed to be protected under Community law, by the Dutch Act in question. Because there is an element of extraterritoriality in this administrative law case, *Alpine Investments* is relevant to questions of using private law in an international enforcement context, although the matter was raised in this judgment in the context of considering a possible justification on the grounds of imperative reasons of public interest of a restriction of the freedom to provide services. *Alpine Investments* argued that the Dutch authorities were prevented by Community law from prohibiting the cold calling of prospective clients in other Member States, for in its view, it only has to comply with the law of the State where the prospective client is established and not with Dutch law.

What was the Court's view? The crucial point is that the ECJ examined the justification of the prohibition of cold calling, a hindrance to intra-Community trade in services, in the light of protecting the reputation of the home State's financial industry and not in the light of protecting consumers in the destination State(s). Indeed, to an extent, it seems to agree with the view that the Netherlands is not allowed to protect non-domiciliaries:

43 Although the protection of consumers in the other Member States *is not, as such, a matter for the Netherlands authorities*, the nature and extent of that protection does none the less have a direct effect on *the good reputation of*

⁴⁶ Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] ECR I-1141; [1995] 2 C.M.L.R. 209; NJ 1995, 703; AB 1996, 397 FHvdB; SEW 1996, p. 244 m.nt. Timmermans.

Netherlands financial services.

44 Maintaining the good reputation of the national financial sector may therefore constitute an imperative reason of public interest capable of justifying restrictions on the freedom to provide financial services. [Emphasis added.]

It would seem to follow that extraterritorial protection of consumers on its own would be an insufficient justification for the ban on cold calling. Only where it is linked to an internal interest is it allowed; the Court stressed that confidence in the competence and trustworthiness of the financial intermediaries are particularly relevant to the type of financial service in issue, the speculative and complex commodities futures contracts (para. 42). A similar approach is taken by the Community legislator in the food stuffs field, where Member States may not exclude a product from appropriate control on the ground that it will be exported; the reason is the prevention of evasion of inspection procedures.⁴⁷

According to Advocate General Jacobs, 'there can be no doubt that the concern to protect consumers *and* the concern to safeguard the reputation of The Netherlands securities markets may justify the imposition of restrictions on the free movement of services' (No. 66; emphasis added). This could be read as both interests being independently capable of constituting such a justification. However, the Opinion continues by insisting on the link, like the ECJ does, between investor confidence and the integrity of the financial markets.

Concluding the issue of which interests may be protected, it should be noted that the national rules in question were not subject to harmonization. It can be argued that where a Community rule seeks to protect consumers in the internal market - by definition not confined to consumers domiciled in one Member State - in principle a Member State should be allowed to invoke the interest of consumer protection, even where only non-domestic consumers are involved, in order to regulate the conduct of operators established within its territory. The even implementation of such rules justifies, and requires, such an approach, in my view. One could draw an analogy with protection of the common heritage of the Member States, which, as a matter of Community interest, is worthy of protection.⁴⁸ Where such

⁴⁷ See Council Directive 95/53/EC of 25 October 1995 fixing the principles governing the organization of official inspections in the field of animal nutrition, O.J. 1995 L 265/17, recital 7 of the Preamble and Article 3. See also the BSE case where the ban on exports of British beef to both the Community and third countries was upheld as not disproportionate for this reason, Case C-180/96 *United Kingdom v Commission* [1998] ECR I-nyr (judgment of 5 May 1998), para. 109.

⁴⁸ Sevenster, *op.cit.*, note 36, p. 21.

cross-border enforcement would be conducted with private law instruments, it would be consistent with the system of jurisdiction established by the Brussels Jurisdiction and Judgments Convention,⁴⁹ which regards, in the words of the ECJ, the contracting parties' territories as 'a single entity'.⁵⁰ Protection of consumers based outside the enforcing State cannot therefore be regarded as an improper exercise of jurisdiction, provided a ground for competence recognized by the Convention applies.

Under current Community law, in particular the Distance selling Directive,⁵¹ there is still no harmonization of the national rules, where they exist, on cold calling. Article 10 Restrictions on the Use of Certain means of Distance Communication, unlike the proposed text by the Commission, does not include the telephone as a means requiring prior consent of the consumer (and thus does not prohibit cold calling).⁵² Moreover, financial services are excluded from the scope *ratione materiae* of the Directive altogether (Article 3(1)). However, consumers confronted with other activities which are covered by secondary Community law might benefit from extraterritorial enforcement as advocated here.

A second, and related, issue raised by *Alpine Investments* is the question of which State - the home State of the consumer, of the operator or both - should act in order to protect a consumer in an cross-border situation. Alongside its argument that the Dutch rules could not apply to German consumers (as seen above), *Alpine Investments* argued that the Dutch ban on cold calling is not necessary in such a situation, 'because the Member State of the provider of services should rely on the controls imposed by the Member State of the recipient' (para. 47). The Court opted for the principle of home country control, even where the targets of the marketing practice in question are based outside the home State of the operator. It said:

48. That argument must be rejected. The Member State from which the telephone call is made *is best placed to regulate cold calling*. Even if the receiving State wishes to prohibit cold calling or to make it subject to certain

⁴⁹ Above note 16.

⁵⁰ Case C-398/92 *Mund & Fester v Hatrex Internationaal Transport* [1994] ECR I-467, para. 19; NJ 1994, 385 JCS & Ter Kuile.

⁵¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. 1997 L 144/19.

⁵² Amended Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling), O.J. 1993 C 308/18, Article 4. It also referred to electronic mail, but this prohibition of 'cold emailing' was not adopted either.

conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that State.

49. Consequently, the prohibition of cold calling by the Member State from which the telephone call is made, with a view to *protecting investor confidence in the financial markets of that state*, cannot be considered to be inappropriate to achieve the objective of securing the integrity of those markets. [Emphasis added.]

It follows that the ECJ does not adopt any doctrinal position on the matter of choosing an enforcer, but a practical reason - home State is best placed - for emphasizing the role of the origin State over the destination State.⁵³ Recital 48 clearly assumes that both Member States are allowed to regulate cold calling, but envisages practical difficulties in the extraterritorial enforcement of a prohibition. Presumably, the ECJ thinks of a public authority such as a Ministry, exercising public authority powers, when referring to 'the competent authorities'. As such, public law powers do not extend outside the territory of the enforcing state.⁵⁴ In the context of *Alpine Investments*, Germany would indeed not be able to exercise direct control under German public law over the Dutch based firm; the Dutch authorities can.

In a different context, the issue of exercising public authority powers outside the territory was also considered by the ECJ in *Van Schaik*.⁵⁵ In criminal proceedings regarding a conviction for driving a car without a valid test certificate, it was argued that the relevant Dutch law was contrary to the freedom to provide services of Article 59 EC. Van Schaick contended that as the national law only recognizes roadworthiness tests carried out by Dutch based garages, the Road Traffic Act is incompatible with Community law. He is prevented from obtaining a certificate from a garage in another Member State. The ECJ ruled as follows on the Article 177 reference by the Dutch court:

16. On that point, it need only be observed that the grant by the Netherlands State of recognition for the purposes of Article 9g of the WVV [Road Traffic Act] to garages established in other Member States involves *the extension outside the national territory of rights and powers pertaining to the exercise of state authority* and, consequently, does not fall within the scope of Article

⁵³ See also the Opinion of A-G Jacobs, No. 67.

⁵⁴ I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford 1990) p. 307.

⁵⁵ Case C-55/93 *Criminal Proceedings against Johannes Gerrit Cornelis Van Schaik* [1994] ECR I-4837; SEW 1995, p. 128 m.nt. Slot; NJ 1995, 209.

59 of the Treaty. [...]

20. The requirement that vehicles undergo a periodic test serves the interests of road safety. The effectiveness of those tests is assured, in particular, by various requirements relating to the solvency and professional competence of the authorized garages, and by supervision of the tests carried out, *which can only be undertaken on Netherlands territory and by the Netherlands authorities*.⁵⁶ [Emphasis added.]

The ECJ here qualifies the recognition of a foreign garage as an exercise of jurisdiction over it in that foreign State. That is, however, unconvincing, as there is no question of the Dutch authorities having to go over to the country of that garage in order to inspect it. All it has to do is accept the control over the garage exercised by its home State. The Court should not have addressed this issue in terms of enforcement jurisdiction at all, but in terms of mutual recognition of home State controls.⁵⁷ Effective enforcement needs should therefore not uncritically be restricted by too easy a referral to the perceived impossibility of extraterritorial enforcement jurisdiction.

However, in an *Alpine Investments* situation, enforcement action might be taken both by the home State of the trader and by the State of domicile of the consumer.⁵⁸ The ECJ has not ruled this out in *Alpine Investments* itself. But as public law action would here - unlike in *Van Schaick* - indeed constitute 'the extension outside the national territory of rights and powers pertaining to the exercise of State authority' (para. 18, as cited), enforcement agencies (including the State) should turn to the use of civil remedies. Under the applicable national law, a private law instrument such as an injunction might be available under the law of the consumer's home State in a civil suit against the operator by a plaintiff such as a consumer organisation which would be automatically recognised under the Brussels Convention; this will be further examined below.

In conclusion, there were no harmonization rules in place relevant to cold calling, and in particular no rules dealing with double enforcement jurisdiction. This is precisely the difference with the next judgment under examination where a Directive did deal with the issue of double enforcement powers.

⁵⁶ Cf. Para. 21: 'That view is moreover the one which underlies in Directive 77/143, which is based on the premiss that a Member State can only undertake direct supervision of testing establishments which are situated on its own territory...!'

⁵⁷ Casenote Slot, SEW 1995, 131.

3.3 Konsumentenombudsman

The Television Without Frontiers Directive⁵⁹ seeks to ensure freedom to provide television broadcasting services and lays down minimum rules for broadcasts in the EC. Member States must ensure that all broadcasters under their jurisdiction comply with its laws. The Court has interpreted this notion of jurisdiction *ratione personae* over a broadcaster as overlapping with the concept of establishment within the meaning of Article 59 EC Treaty; where a broadcasting company is established in more than one Member State, there is still only one with jurisdiction over it - the one in whose territory the broadcaster has the centre of its activities.⁶⁰

The Directive complements this principle of home state control with the following rule: 'Member States shall ensure freedom of reception and *shall not restrict retransmission on their territory* of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive' (Article 2a of the amended Directive). They may only provisionally suspend retransmissions under strict conditions. For example, only broadcasts which 'manifestly, seriously and gravely' infringe Article 22 and the new Article 22a qualify for receiving State action; that provision is limited to protecting minors from, in short, pornography and gratuitous violence as well as to the 'incitement to hatred on grounds of race, sex, religion or nationality'. In other words, but for these exception explicitly listed in the Directive, the receiving state is prohibited from enforcing any breaches of the standards of the Directive even where, the broadcasting State would not have taken any action against these alleged violations of the law (ban on double enforcement).⁶¹

Under Swedish law a television advert must not be designed to attract the attention of children under 12 years of age. Furthermore, misleading advertising, like otherwise unlawful adverts, are sanctioned in the context of the Marketing Practices Act, which would be the

⁵⁸ See also Joerges, *op.cit.*, note 8, § IVB2.

⁵⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. 1989 L 298/23 (amended by Directive 97/36/EC, O.J. 1997 L 202/60).

⁶⁰ C-222/94 *Commission v United Kingdom* [1996] ECR I-4025; Case C-56/96 *VT4* [1997] ECR I-3143, [1997] 3 C.M.L.R. 1225.

⁶¹ This is well-established case law: C-222/94 *Commission v United Kingdom* [1996] ECR I-4025; Case C-11/95 *Commission v Belgium* [1996] ECR I-4115 (Re Cable TV); Case C-14/96 *Denuit* [1997] ECR I-2785; [1997] 3 C.M.L.R. 943.

equivalent of committing a tort under legal systems without such a specific unlawful trade practices legislation such as the Netherlands. In *Konsumentenombudsman* the ECJ ruled on the compatibility of the Swedish enforcement powers with the principle of home state control of the Directive.⁶²

The facts are as follows. TV3 is based in the UK and broadcasts programmes by satellite to Scandinavia. TV4 and Homeshopping Channel are channels operating in Sweden under a Swedish licence. Case C-34/95 concerns adverts for a magazine on dinosaurs by the Swedish company De Agostini which belongs to an Italian group. The Consumer Ombudsman sought an injunction, accompanied by periodic penalty payments, restraining the adverts on the ground that they are directed at children and/or misleading. The other two cases concern 'infomercials' for skin-care products by TV-Shop broadcast on TV3 and on Homeshopping Channel. Again an injunction is sought of allegedly misleading adverts. In essence the preliminary questions are about the possibilities for Sweden to prevent television adverts broadcast from another Member State.

The European Court first identifies the main objectives of the Directive (which it managed to discover 'in spite of its defective drafting', § 24). It then recalls its earlier Case C-222/94 (cited above) on a Member State's jurisdiction *ratione personae* over broadcasters established there. It points out that the Directive also covers control of the content of television advertising, such as the prohibition to encourage behaviour prejudicial to the protection of the environment, while laying down a number of principles regarding the protection of minors.⁶³

The scope of the Directive is however, according to the ECJ, limited. For 'it does not have the effect of excluding completely and automatically the application of rules other than

⁶² Joined Cases C-34, C-35 and C-36/95 *Konsumentenombudsman v De Agostini Svenska and TV-Shop i Sverige* [1997] ECR I-3843; [1998] 1 C.M.L.R. 32; AB 1998, 104; SEW 1998, p. 255 nt. Temmink.

⁶³ See Article 15: 'Television advertising for alcoholic beverages shall comply with the following criteria:

(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages; ...' and Article 16: 'Television advertising shall not cause moral or physical detriment to minors, and shall therefore comply with the following criteria for their protection:

a) it shall not directly exhort minors to buy a product or a service by exploiting their inexperience or credulity;

(b) it shall not directly encourage minors to persuade their parents or others to purchase the goods or services being advertised;

(c) it shall not exploit the special trust minors place in parents, teachers or other persons;

those *specifically* concerning the *broadcasting and distribution* of programmes' (§ 33; emphasis added). The Directive is construed as not in principle precluding 'application of *national rules with the general aim of consumer protection* provided that they do not involve secondary control of television broadcasts in addition to the control which the broadcasting Member State must carry out' (§ 34; emphasis added). Therefore application of consumer protection legislation to broadcasts from other Member States cannot be considered to constitute an obstacle prohibited by the Directive. Put differently, such rules are outside the occupied field of the Directive (not covered by its *Sperrwirkung* - no preemption).

It is not absolutely clear what general rules exactly may be applied notwithstanding those coordinated by the TV Directive. They could include competition law and rules on fair trading, as they are specifically designated as unaffected by the TV Directive in its preamble (recital 17).⁶⁴ Likewise, the Misleading Advertising Directive refers to consumers and competitors, but also to the general public. It is an open question whether it is possible to invoke a breach of the unwritten duty of due care, as applied by and under the terms of the courts of the receiving State. In addition, are the familiar grounds such as public order, public morality applicable or must they be deemed to be covered by the control of the home State? It would seem to follow from the Cable TV case that they are covered by the Directive, although not necessarily exhaustively. Uncertainty remains to the extent that the Court went on to say that 'inasmuch as the rules which it lays down are not exhaustive, the protection of those interests cannot in any event justify a general system of prior authorization of programmes coming from other Member States'.⁶⁵ Combatting unlawful advertising on a case by case basis is (of course) no such general system of prior authorization.

Under citation of an EFTA Court judgment, the ECJ explains the relationship between the Television Without Frontiers and the Misleading Advertising Directive.⁶⁶ It states that the latter 'could be robbed of its substance in the field of television advertising if the receiving Member State were deprived of all possibility of adopting measures against an advertiser and that this would be in contradiction with the express intention of the Community legislature' (§ 37). It concludes that the Television Without Frontiers Directive does not preclude Member States from protecting consumers by taking measures against misleading advertising, even

(d) it shall not unreasonably show minors in dangerous situations.' See also Article 22.

⁶⁴ Casenote H.A.G. Temmink, SEW 1998, at 260.

⁶⁵ Case C-11/95 *Commission v Belgium* [1996] ECR I-4115, § 92.

⁶⁶ Note 4 above.

where the broadcasts emanate from another Member State, provided that those measures do not prevent the retransmission of the programmes as such.

The Court also deals with the impact of Article 30 EC Treaty (free movement of goods) but that need not concern us presently. As regards freedom to provide services (Article 59), the Swedish rules constitute a restriction on the freedom to provide services. Again, they may be justified as an overriding requirement of public interest. Thus 'it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims mentioned in Article 56 of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade' (§ 54). In this respect the ruling echoes *Alpine Investment* as discussed above.

The issue of double enforcement was addressed again with respect to the protection of minors (in addition to double enforcement of misleading advertising). Regarding broadcasts emanating from another Member State than the receiving one, the broadcasting State must ensure that the provisions of the Directive on minors are complied with. This power and duty does not affect the application of legislation of the receiving State protecting consumers or minors *in general*, 'provided that its application does not prevent retransmission, as such, in its territory of broadcasts from another Member State' (§ 59). It follows that, like with misleading advertising, double enforcement is possible but only to the extent of ensuring compliance with general (consumer and) minor protection law of the receiving State. For the latter 'may no longer, under any circumstances, apply *provisions specifically designed* to control the content of television advertising with regard to minors' (§ 60; emphasis added). In this respect, the ECJ upholds the principle of home State control in ruling that such an application 'would add a secondary control to the control which the broadcasting Member State must exercise under the Directive' (§ 61).

It follows that the Directive does preclude the application of such rules. Consequently, as in the situation of *Hedley Lomas* mentioned above, the receiving State only has one option in the event of alleged underenforcement in the broadcasting State. The Court expressly points it out in the *Belgian Cable Television* case. It held:

36 Only in the circumstances provided for in the second sentence of Article 2(2), to which the second part of the fifteenth recital refers, may the receiving Member State exceptionally suspend retransmission of televised broadcasts,

on the conditions laid down by that provision. Moreover, if a Member State considers that another Member State has failed to fulfil its obligations under the directive, it may, as the Commission has rightly observed, bring Treaty infringement proceedings under Article 170 of the EC Treaty or request the Commission itself to take action against that Member State under Article 169 of the Treaty.

37 It is settled case-law that a Member State cannot unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law (judgments in Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9, and Case C-5/94 *Hedley Lomas* [[1996] ECR I-2553], paragraph 20).

...

39 Furthermore, the receiving Member State may request the Court under Article 186 of the EC Treaty to prescribe interim measures in any proceedings brought before it under Article 170 of the Treaty.⁶⁷

Accordingly double enforcement is not possible in the occupied field of the TV Directive. However, this is only the case where specific rules are concerned, e.g. no adverts directed at minors, and both the national and the EC rules have exactly the same scope. For the rest - e.g. consumer protection in general; misleading advertising as such - enforcement in the receiving state is possible despite the principle of home state control.

Interestingly, this implies extraterritorial enforcement against persons based outside the enforcing State (in the present case, all defendants were Swedish based subsidiaries of multinational companies).⁶⁸ An injunction can be issued by the courts of the place of reception - the place of the harmful event within the meaning of Article 5(3) Brussels Convention⁶⁹ - which under that same Convention is recognised in the other Member States. This possibility is to be welcomed as an adjunct to the enforcement route to Luxembourg under Articles 169 and 170 EC. The effectiveness of the latter is problematic, for it is well-known that the Commission has discretion in deciding whether or not to take action while the

⁶⁷ Case C-11/95 *Commission v Belgium* [1996] ECR I-4115; [1997] 2 C.M.L.R. 289.

⁶⁸ See for a discussion of Dutch law Gerrit Betlem, 'Transboundary Enforcement: Free Movement of Injunctions', in: Sven Deimann & Bernard Dyssli eds., *Environmental Rights - Law, Litigation & Access to Justice* (Cameron May, London 1995), Studies of the Environmental Law Network International, Vol. 7, p. 184-229.

⁶⁹ Above note 16.

Member States are unlikely in practice to have recourse to Article 170.⁷⁰ Moreover, the action before the national court is directed at the broadcaster and not the Member State, who is the proper defendant as in breach of the law of the receiving State. Holding another Member State responsible for lack of enforcement would be difficult to establish and in any event is unlikely to be accepted unless a lengthy pattern of underenforcement is present.⁷¹

How does this ruling relate to the Opinion of A-G Jacobs? In part there is a crucial difference as the Advocate General opined that the Directive would indeed prevent a Member State from taking action against any tv-adverts broadcast from another Member State. It will be remembered that two types of advertising must be distinguished: child-directed and misleading adverts. The ECJ and the A-G agree about the first (no enforcement in receiving State) but disagree about the second type. The Advocate General points out that one must distinguish between the issue of the occupied field of directives and the specific matters regulated by them (No. 80). Advertising as such is within the scope of the TV Directive, as one of the coordinated fields with respect the prevention of hindrances to cross-border broadcasts (not a coordinated field e.g. is copyright). It follows, according to the A-G, that national laws on misleading advertising may not be invoked at all. Not only would this undermine the 'transmitting State principle' (home country control; mutual confidence), but also give rise to practical problems with respect to broadcasters based abroad. '[T]he practical difficulties of enforcing remedies available under the receiving State's national law are all too apparent' (No. 84). As said, the ECJ does not follow the A-G on this issue. It thus envisages the possibility of extraterritorial remedies; at least, it does not regard possibly connected difficulties as an argument against enforcement by the receiving State.

One might explain the difference between the Court and its Advocate General by contrasting private and public law enforcement with respect to intra-Community disputes. Such a contrast was highlighted by the ECJ in *Pastors*.⁷² In the context of assessing the lawfulness of the imposition of stricter criminal penalties of lorry drivers based outside the jurisdiction than on those domiciled within it, the difference between civil and criminal law was one of the factors considered. That is to say the fact that the cited 1968 Brussels Juris-

⁷⁰ Weatherill, *op.cit.*, note 28, at 33 and 43.

⁷¹ Cf. the breach of the free movement of goods by France for not taking action against violent protests of French farmers, Case C-265/95 *Commission v France* [1997] ECR I-nyr (judgment of 9 December 1997); AA 1998, p. 200 note by Mortelmans.

⁷² Case C-29/95, [1997] ECR I-285; [1997] 2 C.M.L.R. 457; SEW 1998, p. 24 nt. Van Ooik.

diction and Judgments Convention does not cover criminal judgments. Thus there is a serious risk that a conviction of a non-domiciliary may not be executed. This case concerned criminal attachment of a truck for violation of social Regulations and a Directive protecting truck drivers. Defendants domiciled outside Belgium had to pay a higher charge per breach of the law, in order to prevent criminal proceedings, than those domiciled in Belgium. The lack of foreign enforcement guarantees constituted an objective justification of a discrimination on the ground of nationality within the meaning of Article 6 EC Treaty.⁷³

A contrario a mechanism is in place in *civil* cases, including injunctions and periodic penalty payments. Indeed, the ECJ, in *Mund & Fester*,⁷⁴ even places so much confidence in the Brussels Convention that it regarded a German provision on (civil) seizure of goods owed by persons based outside Germany contrary to Community law as far as parties to the Brussels Convention are concerned, on the ground that the territories of those states 'may be regarded as forming a single entity' (§ 19). In other words, the German provision which holds as a sufficient ground for seizure the mere fact that enforcement must take place abroad, cannot be justified on the basis of presumed difficulties of enforcing the order outside Germany to the extent 'abroad' means the territory of a contracting party to the Brussels Convention. The ECJ assumes that enforcement in another Brussels Convention state is just as effective as in the country of issuance, since they form one judicial area.⁷⁵

In conclusion, under the case law of the Court there is little room for double enforcement in situations where an alleged breach of Community law either takes place exclusively outside the territory of the State intent on taking action or where secondary Community law has created a system of home State control. In the first situation, involving, such as in *Hedley Lomas*, alleged breach of EC law or underenforcement thereof by another Member State, Community law prevents the first Member State from taking any unilateral measures intended to redress that situation. Where no disregard of EC law by another Member State is involved, a Member State is permitted to take action against its own residents even where their behaviour would produce harmful effects outside the jurisdiction, provided the objective

⁷³ The Belgian rules in issue were nonetheless not in conformity with Article 6 EC on the ground of their disproportionate nature, § 26.

⁷⁴ Case C-398/92 *Mund & Fester v Hatrex Internationaal Transport* [1994] ECR I-467; cf. the comparative notes in 3 ERPL 613 (1995).

⁷⁵ Cf. Verschuur, 3 ERPL (1995), at 622, expressing doubts about the Court's optimism.

is to protect internal interests (such as the reputation of its financial services sector). It has been argued that this reasoning should be extended to cover external interests where rules of market regulation, in particular consumer protection, pertaining to the whole territory of the EU are involved. Even where Community law insists on home State control, the Court allows double enforcement provided the second State seeks to uphold so-called general protective rules. It is not yet clear what provisions will be covered by this notion. In any event, the Court has implicitly recognised the feasibility and propriety of legal action against non-resident defendants, including, presumably, cross-border injunctions.

4. The Consumer Injunctions Directive

It is well-known that the availability of a remedy, including one under private law, is a matter for the applicable national legal system. This follows from the principle of procedural autonomy, as articulated by the Court since the 1976 *Rewe* judgment.⁷⁶ This autonomy is not so much a result of a division of legislative powers between the Community and the Member States, as an abstinence of using those powers by the Community legislature. However, on an ad hoc basis EC rules with respect to national procedural law have been adopted. A striking example of Community law specifically aimed at the approximation of private (procedural) law, and explicitly envisaging private enforcement within the double sense as used in this paper, is the Consumer Injunctions Directive.⁷⁷

It forms the legislative follow-up to the 1993 Green Paper on Access to Justice by Consumers, identifying as a key problem area the enforcement of consumer protection rules, in particular on misleading advertising, in cross-border situations.⁷⁸ It also highlighted the need for the availability of standing of consumer protection organizations (group actions) as a mechanism of effective redress. The latter subject need not necessarily be limited to international disputes; the Proposal for the Directive failed to provide clarity about the scope of the proposed rules (cross-border situations alone or including purely domestic disputes).⁷⁹

⁷⁶ Case 33/76, [1976] ECR 1989; [1977] 1 C.M.L.R. 533. See generally Mark Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules', 21 E.L.Rev. 365 (1996).

⁷⁷ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, O.J. 1998 L 166/51.

⁷⁸ Commission of the European Communities, 16 November 1993, Green Paper, *Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market*, COM(93) 576 final.

⁷⁹ O.J. 1996 C 107/3; COM(95) 712 final; see Gerrit Betlem & Carla Joustra, 'The Draft Consumer

According to the preamble, the Consumer Injunctions Directive purports to address the problem of compliance with certain listed consumer protection Directives insofar as infringements of the collective interests of consumers are concerned; the current mechanisms are insufficient (recital 2). The preamble continues by noting that it is where unlawful practices produce effects outside the country where they originated that Community legislative action is required. The Directive seems to focus upon the situation where a trader in country A acts in breach of the implementing laws of a listed Directive but, according to the applicable law, nonetheless commits no tort because the effects of his acts occur outside his State of domicile. Like the proposed text, the title of the Directive (Injunctions for the Protection of Consumers' Interests) is misleading as it is only actually regulating access to the courts of the place where persons acted contrary to certain consumer protection laws of so-called qualified entities from another Member State. Although the Directive is not entirely clear in this respect, it would seem to follow that it is restricted to cross-border enforcement. In any event, it does not introduce a Community standard on the *locus standi* of consumer protection organizations. The Directive restricts its harmonization of the relevant national rules as follows.

4.1 Envisaged enforcing actors

What type of plaintiff does the Directive have in mind? The key term of the Directive is 'qualified entity'. The envisaged right of action must be granted to 'any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 [the national implementing laws of listed Directives] are complied with' (Article 3). Within the broad category of 'interested enforcer', two types of body are highlighted:

- independent public bodies and
- private consumer protection organizations, in accordance with requirements laid down by their national law.

Compared to the Proposal, and unlike other related Directives such as the Misleading

Advertising Directive⁸⁰ and the Distance Selling Directive⁸¹, professional organisations are not explicitly mentioned. However, they might of course be included in the concept of the interested enforcer. But which law decides this point? There are three (or maybe even four) possibilities: (i) it is an autonomous concept of Community law; (ii) the *lex fori*, the law of the State of the court seized with the case, as the legal system governing procedural issues; (iii) the law governing the dispute (*lex causae*) as selected by the applicable choice of law rules. In addition, it may be argued that it is the legal system under which the professional organization was established that governs the matter.

This paper is not the place to discuss all these questions of private international law. Suffice it to note that with respect to the 'organisations whose purpose is to protect [consumers'] interests', i.e. the private consumer protection groups, the Directive refers to *their* national law. It follows that no new standing rules are introduced by the Directive. A consumer protection group may still be only granted standing where it complies with the requirements, e.g. a minimum number of members or a minimum period of existence, under the relevant law of the Member State in question. Put differently, no harmonization of the rules on *locus standi* of consumer protection organizations has taken place.

4.2 Scope and protected interests

What subjects are covered by the Directive? According to Article 1, the purpose of Directive 98/27 is to approximate the Member States's laws relating to actions for an injunction aimed at the protection of the *collective interests* of consumers. Just because there are difficulties in ensuring compliance with consumer protection laws where legal action by individuals is not feasible - e.g. because of the risks and costs involved in litigation which outweighs the relatively small financial interest of the consumer in the first place - the Directive recognizes the need for adaptation of the legal remedies where the position of potentially all consumers is adversely affected.

This potentially broad scope is, however, circumscribed by several restrictions. First, the Directive only applies to infringements of Directives listed in an Annex 'as transposed into the internal legal order of the Member States' (Article 1(2) emphasis added). It follows

⁸⁰ Note 4 above, Article 4.

⁸¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, O.J. 1997 L 144/19, Article 11.

that enforcement of a Directive which has not been transposed within the required period cannot take place under the terms of the Directive. From the point of view of enforcing *Community* law this is an unwarranted restriction. Second, the list system may be useful from the point of view of legal certainty instead of working with an open criterion such as 'consumer protection legislation'. However, it is questionable whether it is not too restrictive. Neither food law nor product safety law is included.

Thirdly, no new remedies are to be introduced into the national legal systems on account of the Directive. All the Directive does is prescribe that qualified entities must be able to seek an injunction, publication of the judgment and/or a corrective statement, or *insofar as* the legal system of the Member State concerned so permits, a periodic penalty payment. Under the original proposal the enforcer would have been entitled, as a matter of Community law, to apply for a periodic penalty payment. It followed that legal systems which do not recognize this possibility would have to introduce it. Already at the stage of the Amended Proposal this interesting form of harmonization of national remedies law was dropped.⁸²

Fourth and finally, as said, a fundamental unclarity of the Proposal was whether the Directive would only be applicable (or rather the implementing legislation) in international disputes or in both purely domestic and cross-border cases. Also the text as finally adopted gives rise to this problem of interpretation. Neither the definition of infringement (cited above) nor the provision prescribing that the qualified entity must be able to seek an injunction to combat that infringement exclude purely internal disputes. In other words, they are capable of covering both cross-border and domestic infringements. However, a systematic interpretation of these provisions of the Directive points in the opposite direction. The preamble, as mentioned, identifies the aim of the Consumer Injunctions Directive in terms of overcoming difficulties in the situation of cross-border unlawful practices, i.e. originating in one Member State while producing effects in another. In addition, Section 2 of Article 2 reads:

This Directive shall be without prejudice to the rules of private international law, with respect to the applicable law, thus leading normally to the application of either the law of the Member State where the infringement originated

⁸² O.J. 1997 C 80/10 proposed Article 2(1)c. See generally Marcel Storme ed., *Approximation of Judiciary Law in the European Union*, Dordrecht: Martinus Nijhoff 1994.

or the law of the Member State where the infringement has its effects.

As this provision does not say something along the lines of '*in the event of cross-border infringements*', but on the contrary refers to application of the laws of either the country where the act took place or the place of the harmful impact, it assumes that Section 1 only operates in transfrontier situations, I should think. Against this one might say that Article 4 is headed '*Intra-Community infringements*', which is not necessary where the whole Directive is only concerned with intra-Community infringements. However, this provision complements the entitlement to an injunction rather than independently deal with other aspects of enforcement of Community consumer law. This is actually the main Article of the Directive dealing with access to the remedies in the State of origin of unlawful practices by qualified entities from another Member State. The Member States must to this end draw up a list of their qualified entities and report this to the Commission, which will publish it. This provision thus seeks to ensure the recognition of the legal capacity to bring proceedings by a plaintiff from another Member State (mutual recognition), albeit qualified by a possible requirement of prior consultation with either the defendant and/or an '*internal enforcer*' (Article 5). The Television Without Frontiers Directive (as amended) contains a similar right of access to a foreign court.⁸³

The presumed factual situations underlying this mutual recognition requirement are apparently limited to extraterritorial harmful effects of acts committed by persons within the jurisdiction. In this respect the factual context, as assumed by this Directive, resembles the one of the *Alpine Investment* case (cited above), where the Dutch authorities took action against a Dutch-based trader for selling activities in connection with German-based consumers. It follows that the Consumer Injunctions Directive addresses but very few of the complex legal questions involved in cross-border litigation with a view to private enforcement of Community law. In fact, on a '*pessimistic*' reading, it only prescribes a kind of certification of potentially suitable enforcers seeking legal remedies in the country of the tortfeasor. It says nothing about the mirror image: legal action before the courts of the place where the harmful impact occurred. In the foreseeable future, the effectiveness of the enforcement of EC Community law will thus largely depend on how the various national

⁸³ Above note 59. See the new Article 3(3): '*The measures shall include the appropriate procedures for third parties directly affected, including nationals of other Member States, to apply to the competent*

courts interpret their laws on remedies, including, in cross-border disputes, the Brussels Convention (cited above). In fact, the Directive acknowledges this central role of the courts even where it prescribes recognition of the foreign qualified entity. For Article 4(1) stipulates that the list must be accepted as proof of the qualified entity's legal capacity, but 'without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case'. Clearly this is a potential barrier to access to the foreign court, depending on the attitude of the court in question, while any involvement of the ECJ seems doubtful. The provision confirms the pivotal role of the national courts adjudicating these actions.

4.3 Role of courts

It has been seen that the new elements of the Consumer Injunctions Directive are limited. Especially since some of the problems underlying its adoption do not seem to be addressed at all. For example, protection of the interests of foreign consumers may be considered to be outside the remit of the purpose of the relevant consumer organization (or public authority, for that matter).⁸⁴ In terms of the case law discussed above, the problem here concerns protected interests. It is recalled that in *Alpine Investment* the ECJ was reluctant to accept this broad scope of protected interest (except where possible internal harm would be at stake).

It is especially in the context of private international law questions, that actions by the various recognised actors for the enforcement of Community law require construing national laws in terms of their protective scope and/or with respect to new to be recognised plaintiffs. For instance, it is argued in the Dutch legal literature that non-Dutch based NGOs already possess the right to institute a collective action before the Dutch civil courts - subject, of course, to them having jurisdiction over the defendant - as a matter of Dutch law (interpretation of Article 3:303a of the Dutch Civil Code).⁸⁵ In this view, such potential plaintiffs do not have to 'wait' for any legislative action at the Community level, such as the proposed Consumer Injunctions Directive. Explicit mentioning of the position of non-Dutch based plaintiffs would of course contribute to legal certainty, but it is no surprise that all sorts of

judicial or other authorities to seek effective compliance according to national provisions.'

⁸⁴ Green Paper, above note 23; Norbert Reich, 'Rechtsprobleme grenzüberschreitender irreführender Werbung im Binnenmarkt', (1992) 56 RabelsZ. 444.

⁸⁵ P. Vlas, 'Het Verdrag inzake aansprakelijkheid voor milieugevaarlijke activiteiten en het internationaal privaatrecht', A&V 1993, p. 25, 28; H.A.G. Temmink, 'Beslechting van

provisions of private law do not specifically take into account that they may have to be applied to international as well as purely domestic disputes. Whenever a Community law rule is in issue it is for the national courts to ensure its *effet utile*. This includes extension of a narrow territorial scope of an organization's protected persons through construing the organization's current statutory purpose.⁸⁶

In particular it follows from *Van Munster* that where the application of national law in an international context - even where the legislation as such is not contrary to Community law - 'gives rise to unforeseen consequences, hardly compatible with the aim of Treaty provisions governing, in casu, free movement of persons (§ 30), the national authorities must seek to co-ordinate the application of this legislation and 'as far as is at all possible, interpret it in a way which accords with the requirements of Community law' (§ 34).⁸⁷ This duty of consistent interpretation is particularly suited for dealing with the kinds of problems discussed here. Moreover, the ECJ recently emphasized the national courts' role, in the context of Article 169 EC Treaty proceedings by the Commission against the UK regarding the Product Liability Directive, in that it refused to accept that the UK had incorrectly transposed the Directive in the absence of national case law.⁸⁸ The English courts must first be given an opportunity to construe the English Act in conformity with the Directive, indeed they are under the obligation to do so.

5. Concluding remarks

Private enforcement is envisaged by the Community legislature and policy makers. It is particularly relevant in international disputes regarding market regulation, notably consumer protection, as opposed to market access. The case law of the Court of Justice reflects a 'Directive by Directive approach' and is still in a forming state. Crucial to the effective application of private enforcement is the cooperation of the national courts. In this paper it is argued that Community-wide consumer protection rules justify extraterritorial application of national implementing laws and remedies.

consumentengeschillen binnen de interne markt', NTER 1996, p. 147.

⁸⁶ See further Betlem & Joustra, above note 79.

⁸⁷ Case C-165/91, [1994] ECR I-4661; [1995] 2 C.M.L.R. 513.

⁸⁸ Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649; [1997] 3 C.M.L.R. 923.