INTERLOCKING LEGAL ORDERS IN THE EUROPEAN UNION AND COMPARATIVE LAW

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I. INTRODUCTION

Even if an external observer who takes an interest in the case-law of the Court of Justice of the European Communities and of the Court of First Instance of the European Communities may not have such an impression at first sight, comparative law plays a central role in the activities of these courts. It means much more than simply looking at solutions given to certain problems in the legal orders of the Member States. As a former president of the Court of Justice rightly observed, recourse to comparative law is for the Court of Justice essentially a method of interpretation of Community law itself.[1] For the Court of Justice and the CFI (below often referred to as 'Community judge' or 'Community courts'), it is one method amongst other methods of interpretation of the law (such as literal, exegetic, historical, systematic interpretation) and it constitutes a tool for establishing the law.[2]

Depending on the characteristics of the case, the Community judge may be brought to take a closer look at the legal orders of one, several or all Member States, at the legal order of third countries[3] or even at the international legal order.[4] Comparative law stands for a method of examining principles and rules originating in another legal order than the judge's own. The ultimate objective always is the same: to establish the rule of law in the Community legal order.

In this article, the different expressions of the comparative law method in the activities of the Court of Justice and the CFI are addressed first (Section

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[1] J Mertens de Wilmars, 'Le droit comparé dans la jurisprudence de la Cour de justice des Communautés européennes', *Journal des Tribunaux* (1991) 37.

[2] N Fennelly, 'Legal interpretation at the European Court of Justice', *Fordham International Law Journal* (1997) 656–79.

[3] On this issue, see P Pescatore, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres', *Revue internationale de droit comparé* (1980) 352; M Hilf, 'The role of comparative law in the jurisprudence of the Court of Justice of the European Communities', in *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Les Éditions Yvon Blais, 1986), 558; Mertens de Wilmars, op cit, 38; CN Kakouris, 'Use of the comparative method by the Court of Justice of the European Communities', *Pace International Law Review* (1994) 282.

[4] On this issue, see Pescatore, 'International Law and Community Law—A Comparative Analysis', *Common Market Law Review* (1969) 177; Hilf, op cit, 558–60; Kakouris, op cit, 271, 272, and 282.

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II). Then, the legal bases, whether general or specific, on which this method rests, as well as the common objective served by its multiple manifestations—in other words, its 'teleology'—are examined (Section III). Finally, an attempt is made to draw up a typology of the actions taken by the Community courts in order to reach this common objective (Section IV).

II. THE DIFFERENT EXPRESSIONS OF THE COMPARATIVE LAW METHOD IN THE ACTIVITIES OF THE COMMUNITY COURTS

It is striking that the case law of the Court of Justice and the CFI contains remarkably few express references to comparative law. The Court of Justice or the CFI will refer in their judgments to the 'legal traditions', the 'constitutional traditions', the 'legal orders', the 'legal notions' or the 'legal principles' common to 'all' Member States or, at least, to 'several' Member States. Only exceptionally one will find a trace of an explicit and extensive comparative law study in the case law of the Community courts. Explicit references to comparative law are rather to be found in older judgments, delivered at the time when the Community counted six Member States only.

The *Algera* judgment of 12 July 1957 can serve as a perfect illustration.[5] Each applicant in these staff cases sought to obtain the annulment of a decision of the Common Assembly which had withdrawn his or her appointment as an official on the ground that the appointments had been made illegally. The Court of Justice, having found that the Treaty does not lay down the conditions upon which an institution of the Community can lawfully set aside an administrative measure, which was invalidly adopted, considered it necessary 'to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case law of the member countries'.[6] After having made a comparative study of the legal traditions of the six Member States, the Court 'accept[ed] the principle of the revocability of illegal measures at least within a reasonable period of time'.[7]

The relatively rare judgments of the Court of Justice and the CFI in which comparative law comes to the fore may be said to constitute merely 'the top of the iceberg'.[8] This is not surprising. As an international institution, the Community judicature is 'naturally' brought to adopt a comparative approach for different reasons: the members of the Court of Justice and the CFI have their roots in different legal cultures,[9] the texts and notions to be interpreted

[5] Joined Cases 7/56 and 3/57 to 7/57, *Algera and Others v Common Assembly* [1957] ECR 39.
[6] Ibid, 55.
[7] Ibid, 56.
[8] Pescatore, op cit, cited in n 3 above, 358.
[9] On the influence of the different legal cultures in the case law of the Court of Justice, see T Koopmans, 'The Birth of European Law at the Crossroads of Legal Traditions', *American Journal of Comparative Law* (1991) 500–5.

are multilingual[10] and most of the cases brought before the Community judicature are anchored in a precise national context[11].

In contrast to the judgments of the Court of Justice, studies of comparative law regularly occur in the Opinions of the Advocates-General.[12] Even when the judgment does not refer to the analysis made by the Advocate-General, the latter will often have guided the judges in determining the outcome of the case brought before them[13]. Quite regularly, in the course of the procedure, the Commission will offer, on its own initiative, to the Court of Justice or the CFI an extensive analysis of comparative law. Member States or natural or legal persons that are parties to the proceedings before the Community courts sometimes do the same in order to have a principle of law allegedly common to the Member States recognised by the case law[14], or in order to draw the judges' attention to the special characteristics of their national legal system.

By means of a measure of inquiry,[15] the Court of Justice or the CFI may also ask the Commission, in its capacity of a party to the case or as an *amicus curiae* (eg in preliminary rulings proceedings),[16] to communicate to the Court a comparative law study.[17] The Court of Justice has also re-opened the oral procedure in cases where this was felt necessary to allow the parties to make observations with respect to the legal traditions of the Member States concerning a problem of particular interest for the case in question[18]. More often, the Court of Justice or the CFI will request their research and documentation service, which is composed of lawyers familiar with the respective national legal systems, to prepare a comparative survey on a particular issue. Such survey normally highlights the recent trends observed in the case law and the writings of academics and other commentators in the different Member States. Even if such research rarely transpires directly in the reasoning set forth in the judgment, it nevertheless backs up the decision taken by the Court.

As a result not only of the nature of the cases dealt with by the Court of

[10] See Hilf, op cit, 566–7. See also G Van Calster, 'The EU's Tower of Babel—The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language', *Yearbook of European Law* (1997) 363–93.

[11] See, eg, Case 283/81, CILFIT [1982] ECR 3415, paras 16–19.

[12] For examples, see hereinafter, throughout the text as well as the particularly important Opinion of Advocate-General P Léger in Case C-353/99 P, *Council v Hautala* [2001] ECR I-9565, in which the laws of all fifteen Member States relating to the right of access to information held by public authorities are analysed.

[13] See Pescatore, op cit, cited in n 3 above, 346 and 347. See, eg, Opinion of Advocate-General J Mischo in Joined Cases 46/87 and 227/88, *Hoechst v Commission* [1989] ECR 2859, paras 49–96 of Opinion.

[14] See, eg, Case 108/81, *Amylum v Council* [1982] ECR 3107.

[15] Art 45 of the Rules of procedure of the Court of Justice and Art 65 of the Rules of procedure of the CFI.

[16] On these proceedings, see K Lenaerts and D Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell, 1999), 17–55.

[17] See, eg, Case 155/78, *M v Commission* [1980] ECR 1797.

[18] See Case 155/79, *AM & S v Commission* [1982] ECR 1575, paras 19–22. On this issue, see T Koopmans, 'Comparative Law and the Courts' (1996) *ICLQ* 547–8.

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Justice and the CFI but also of the different nationalities of the judges, each deliberation gives rise to a 'mixing' of mentalities, cultures, and legal constructions. A judgment will thus tend to be the result of 'cross' contributions of different legal systems and ways of legal reasoning. The origin of these contributions will not always be identified and may sometimes even be unidentifiable[19]. Although the Court of Justice and the CFI—anxious to present Community law as a 'unitary' and autonomous set of rules—might erase in their judgments the too visible signs of a reasoning based on the comparison of different legal rules, the comparative approach nevertheless permeates the daily activities of the Community judge in many ways. For this reason, some commentators have called the Court of Justice and the CFI a 'laboratory of comparative law'.[20] Others think that in a spirit of cooperation and transparency access to this library of comparative law which has been gradually developed by the Court of Justice and the CFI, with the help of its research and documentation service, should be opened up to the courts of the Member States[21].

III. LEGAL BASES AND TELEOLOGY OF THE COMPARATIVE LAW METHOD APPLIED BY THE COMMUNITY COURTS

A. Legal Bases of the Comparative Law Method

The Community courts can rely on different legal bases—some of them general, others specific—which allow them, or even oblige them, to have recourse to the comparative law method.

Article 220 EC (ex-Article 164 of the EC Treaty), according to which the Court of Justice and the CFI have to 'ensure that in the interpretation and the application of this Treaty the law is observed' is the primary source of legitimation for the Community courts' recourse to the comparative approach. Indeed, in its judgment of 5 Mar 1996, in the *Brasserie du Pêcheur and Factortame* cases, the Court of Justice clearly accepted on that basis the comparative approach as a method of interpretation of Community law. It is for the Court 'in pursuance of the task conferred on it by Article [220] of the Treaty of ensuring that in the interpretation and the application of the Treaty the law is observed, to rule [. . .] in accordance with the generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles

[19] Pescatore, op cit, cited in n 3 above, 349; Mertens de Wilmars, op cit, 37.

[20] See Hilf, op cit, 550.

[21] See Y Galmot, 'Réflexions sur le recours au droit comparé par la Cour de justice des Communautés européennes', *Revue française de droit administratif* (1990) 261. See also W Van Gerven, 'Taking Art 215 (2) EC Treaty Seriously', in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Oxford, Hart Publishing, 1998), 45, and the n at 46.

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common to the legal principles of the Member States'.[22] Comparative law—more precisely the legal traditions, written or unwritten,[23] common to the Member States—thus helps the Court of Justice and the CFI to find the *ius commune*—ie 'the law'—whose observance they are to ensure in the interpretation and application of the Treaty.[24]

The recourse of the Community courts to the comparative law method finds another legal basis in the joint provisions of Articles 6(2) and 46 of the Treaty on European Union (hereinafter 'TEU'), according to which the Court of Justice and the CFI have jurisdiction, within certain limits, to ensure the respect for fundamental rights as they result 'from the constitutional traditions common to the Member States, as general principles of Community law'. In fact, these Treaty provisions take over a principle which was established a long time ago in the case-law of the Community courts. In his Opinion of 2 Dec 1970 in *Internationale Handelsgesellschaft*[25] Advocate-General Dutheillet de Lamothe set out to emphasise the major importance of the 'fundamental principles of national legal systems'[26] for Community law. According to the Advocate-General, these principles

> contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States.[27]

The Opinion of the Advocate-General found a modest reflection only in the *Internationale Handelsgesellschaft* judgment itself.[28] However, his reasoning was duplicated by the Court of Justice in its later *Nold* judgment of 14 May 1974.[29] In ruling that, '[i]n safeguarding [fundamental] rights, [it] is bound to draw inspiration from the constitutional traditions common to the Member States' and that 'it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States',[30] the Court of Justice wanted to stress that the Community is embedded in the constitutional current of its Member States so that the protection given to

[22] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 27 (for the substance of this case, see hereinafter at nn 82–93 and accompanying text).
[23] See Kakouris, op cit, 273 and 278.
[24] J Schwarze, 'Tendances vers un droit administratif commun en Europe', *Revue trimestrielle de droit européen* (1993), 235–45; K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 1999), 534.
[25] Opinion of Advocate-General A Dutheillet de Lamothe in Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, 1140.
[26] Ibid, at 1146.
[27] Ibid, at 1146–7.
[28] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.
[29] Case 4/73, *Nold v Commission* [1974] ECR 491.
[30] Ibid, para 13.

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the fundamental rights of the citizen in the different national constitutions constitutes not only a source of inspiration for the Court but even a binding guideline.[31] Concerning the protection of fundamental rights, comparative law has progressively been considered as a reference value in the activities of the Community judge even if it remains complementary to the 'key reference' in the matter, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR') which represents a vaster range of national legal traditions.[32]

A reference to the comparative law method can also be found in Article 288, second paragraph, EC (ex-Article 215, second paragraph, of the EC Treaty) which states that '[i]n the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. Even if the analysis of the case law shows that, until now, the Court of Justice and the CFI have not taken the best advantage of the opportunities offered by this Treaty provision to trace, on the basis of a comparative approach, the foundations of a non-contractual liability regime for the Community institutions,[33] it has certainly to be welcomed that the Court of Justice, applying by analogy Article 288, second paragraph, EC, developed on the basis of the general principles common to the national legal systems, the rules governing the liability of the Member States for a breach of Community law.[34]

Finally, the legal basis for applying the comparative law method can also be found outside the Treaty provisions. Thus, Article 44 of the Staff Regulations of the European Investment Bank (hereinafter 'EIB') refers to 'general principles common to the laws of the Member States' which have to be respected in the contractual relationship between the EIB and its staff and which can be enforced before the Community judge.[35]

It follows from the foregoing that, in the activities of the Community judge, the comparative approach is a 'quasi-compelling' method of interpretation of Community law, intrinsically linked to the continuous integration process

[31] As stated by Pescatore, op cit, cited in n 3 above, 341. In a joint declaration of 5 Apr 1977 (OJ C 103, 1), the European Parlement, the Council and the Commission have endorsed this case law in stressing the 'prime importance' they attach to the protection of fundamental rights 'as derived in particular from the constitutions of the Member States and the [ECHR]'.

[32] K Lenaerts, 'Fundamental rights in the European Union', *European Law Review* (2000), 578.

[33] Pescatore, op cit, cited in n 3 above, 342–3; EW Fuss, 'Die Allgemeinen Rechtsgrundsätze über die ausservertragliche Haftung der europäischen Gemeinschaften', *Festschrift für Raschhofer* (Kallmünz: Verlag Michael Laβleben, 1977) 43 to 57; Hilf, op cit, 556; Galmot, op cit, 256; Kakouris, op cit, 270–1; Van Gerven, op cit, 44–6.

[34] *Brasserie du Pêcheur and Factortame*, cited in n 22 above, paras 28–30 and 41 (see further hereinafter at nn 82–93 and accompanying text).

[35] Case 110/75, *Mills v EIB* [1976] ECR 955, para 25; Case T192/99, *Dunnett and Others v EIB* [2001] ECR II-817.

which characterises the European construction[36]. In its *Algera* judgment[37], the Court of Justice had already stressed that '[u]nless [it] is to deny justice', it cannot simply find in a particular case that there exists a lacuna in Community law. In such a case, the Court seeks to find a solution by reference to the general principles common to the Member States.

B. The Teleology of the Comparative Law Method

Whatever its legal basis, the comparative law method, when applied by the Community judge, is driven by a single *Leitmotiv*, and that is to find through the examination of other legal orders the solution which best suits[38] the objectives of the Community—namely European integration in a 'Community based on the rule of law'[39]—as well as its structure, and which is acceptable for the different national legal orders responsible for implementing Community law. Or, in other words, as Zweigert and Kötz stated: 'Comparative law is an "école de vérité" which extends and enriches the "supply of solutions" [. . .] and offers the scholar of critical capacity the opportunity of finding the "*better solution for his time and place*" ' (emphasis added).[40]

The contribution of the comparative law method to the case law of the Community courts is not limited to being a source of positive law among other sources of law.[41] It also aims at conferring upon the Community legal order a label of acceptability to the national legal orders. Knowing that the Community legal order and the national legal orders are closely intertwined and even interdependent in that the former can only function properly if the latter are willing to ensure the correct application of Community law, the Court of Justice and the CFI, when they are considering a particular case, will want to avoid 'going too far' and may therefore opt for a solution which is not necessarily the most ambitious, considered from the exclusive angle of Community law, but which has the advantage of being 'compatible' with the traditions of the Member States and of not hurting special sensitivities in certain Member States. The Community judge will thus try to establish 'the

[36] G Benos, 'The Practical Debt of Community Law to Comparative Law', *Revue hellénique de droit international* (1984) 251; Hilf, op cit, 566.

[37] Joined Cases 7/56 and 3/57 to 7/57, *Algera and Others v Common Assembly* [1957] ECR 39, 55.

[38] 'The most appropriate rule' [Kakouris, op cit, 279; U Drobnig, 'The Use of Comparative Law by Courts : General Report', in U Drobnig and S Van Erp (eds), *The Use of Comparative Law by Courts*, (The Hague/London/Boston, Kluwer Law International, 1999), 7]; 'the solution which best suits', the 'best solution', or the 'optimum standard' (Hilf, op cit, 562–3).

[39] Case 294/83, *Les Verts v Parliament* [1986] ECR 1339, para 23.

[40] K Zweigert and H Kötz, *An Introduction to Comparative Law*, vol 1 (Oxford: Clarendon Press, 1987), 12.

[41] CN Kakouris, 'L'utilisation de la méthode comparative par la Cour de Justice des Communautés européennes', in U Drobnig and S Van Erp (eds), *The Use of Comparative Law by Courts* (The Hague/London/Boston: Kluwer Law International, 1999), 99.

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middle-line'[42] which has the best chances of 'surviving' the relentless conflicts between the requirements of Community law and the interests of the national systems. In other words, he will seek a solution that does not risk encountering incomprehension or resistance in some Member States, which could undermine the effectiveness and the uniform application of Community law. It can therefore be said that the comparative approach contributes in quite an essential way to guaranteeing the primacy, effectiveness and uniform application of Community law.[43]

Indeed, the national—legislative, executive or judicial—authorities which have to apply Community law in their respective spheres of competence will only consider that the solutions put forward by the Community judge offer a degree of judicial protection (at least) equivalent to the judicial protection offered by their national legal system,[44] when these solutions find their roots in the mainstream of the different national legal cultures—'rooting' which is sometimes presented as a necessary counterpart for the partial transfer of sovereignty from the Member States to the Community[45],—and are based on a very precise assessment of the threshold of tolerance in the national legal orders taken as a whole.[46]

[42] Term used by Hilf, op cit, 563–4; see also Pescatore, op cit, cited in n 3 above, 356 and 359.

[43] See W Van Gerven, op cit, 46–7.

[44] The recent case law of the *Bundesverfassungsgericht* (German Constitutional Court) shows that the Community legal order, since it draws its inspiration from the constitutional traditions common to the Member States, is considered to confer upon the individual a high level of judicial protection. Thus, by order of 7 June 2000, the *Bundesverfassungsgericht* dismissed as inadmissible a reference for a preliminary ruling made by the Administrative Court of Frankfurt/Main concerning the compatibility of a Community scheme relating to the imports of bananas with the German Basic Law. At the moment the Administrative court made its referral to the *Bundesverfassungsgericht*, the Court of Justice had already ruled in its *Atlanta* judgment of 9 Nov 1995 (Case C-466/93, *Atlanta* [1995] ECR I-3799) that the Community scheme in question was valid. The *Bundesverfassungsgericht* ruled that a reference for a preliminary ruling concerning the constitutionality of an act of secondary Community legislation is inadmissible if the reasons set forth in the referral do not clearly explain why Community law, including the case law of the Court of Justice, no longer affords an acceptable level of protection of fundamental rights.

[45] G Benos, op cit, 252.

[46] The case law concerning the direct effect of Community directives illustrates particularly well the importance the Court of Justice attaches to national sensitivities in its quest to find a Community law solution for a novel issue. In this respect, it should be recalled that Art 249 EC (ex-Art 189 of the EC Treaty) makes a distinction between regulations and directives. A regulation is directly applicable in all the Member States. By contrast, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and method. A directive prescribes a time period during which the Member States have to implement its provisions into their national legal orders. In its *Van Duyn* judgment of 4 Dec 1974 (Case 41/74, *van Duyn* [1974] ECR 1337) the Court of Justice ruled that provisions of a directive which impose a precise and unconditional obligation on the Member States have direct effect in the national legal orders, just like the provisions of a regulation. This case law was not well received in some legal orders. Thus, in its 'Cohn-Bendit' judgment of 22 Dec 1978, the French *Conseil d'État* ruled that it follows clearly from Art 249 EC (which constitutes an '*acte clair*') that whatever the degree of precision the provisions of a directive may have, such provisions cannot be relied upon before the national courts against an administrative act of a Member State. Aware of the fact that a too ambitious position with respect to the question of direct effect of Community directives could undermine the credibility of its judgments, the Court

Since it permanently draws from legal concepts prevailing in the Member States, Community judge-made law naturally enjoys a great deal of authority in the Member States where it is accepted as an integral part of the national legal order. National courts in their capacity of ordinary courts of Community law[47] and in application of the principle of sincere cooperation enshrined in Article 10 EC (ex-Article 5 of the EC Treaty)[48] ensure the respect of this judge-made law, if need be, setting aside any conflicting rule of national law. In fact, national courts come to the point of perceiving a violation of Community law as a violation of national law. This occurred in a judgment of the *Bundesverfassungsgericht* of 9 Jan 2001 annulling a decision of the *Bundesverwaltungsgericht* for breach of the principle, enshrined in the German Basic Law, according to which each person has the right to see his or her case decided by the court enjoying adjudicatory jurisdiction to that effect as a consequence of a legal provision, ie the *gesetzliche Richter*. In this case the *Bundesverwaltungsgericht*—national court of last instance—instead of referring a preliminary question to the Court of Justice, had ruled on its own

of Justice later 'specified' its *van Duyn* case-law. Thus, in its judgment of 5 Apr 1979 in the *Ratti* case (Case 148/78, *Ratti* [1979] ECR 1629) the Court of Justice based the direct effect no longer on a broad interpretation of Art 249 EC but on a general principle of law common to the Member States, namely the principle '*nemo auditur qui suam propriam turpitudinem allegat*' or the '*estoppel*' principle. On this basis the Court of Justice ruled that a Member State, which has not adopted the implementing measures required by a directive in the prescribed period, may not rely, as against individuals, on its own failure to respect Art 249 EC. In other words, if in litigation opposing an individual and a 'failing' Member State, the individual requests the national court not to apply a provision of national law incompatible with the directive, that court must uphold such request if the provision of the directive is unconditional and sufficiently precise. The Court, however, stressed that as long as the period prescribed for the Member States to incorporate the provisions of a directive into their national legal orders has not yet expired, the directive cannot have direct effect. This readjustment of the Court's case-law was confirmed in the *Faccini Dori* judgment of 14 July 1994 (Case C91/92, *Faccini Dori* [1994] ECR I-3325). In this case the Court of Justice reiterated that the possibility of relying on directives against State entities is based on the binding character of directives under Art 249 EC. The direct effect thus aims at avoiding that a Member State takes advantage of its own breach of Community law constituted by the fact that it has failed to implement the directive in its national legal order within the time limit stated. However, in contrast to what Advocate-General CO Lenz had proposed in this case, the Court of Justice ruled that, even in such circumstances, directives do not have direct effect as between individuals (horizontal direct effect), such effect being reserved as their distinctive feature to regulations. Without any doubt, the position expressed by many governments against such horizontal direct effect in the course of the proceedings influenced the Court's choice. The Court clearly preferred to play it prudently instead of imposing a solution which would have been more in the interest of Community law but which risked to be unacceptable in the Member States. See also the judgment of the *Bundesfinanzhof* of 16 July 1981 (*Europarecht*, 1981, 442–4) which expresses resistance within the German legal order against the direct effect of tax directives.

[47] See, in particular, CN Kakouris, 'Do the Member States possess judicial procedural "autonomy"?', *Common Market Law Review* (1997) 1389–1412; Lenaerts and Arts, op cit, 3–4; M Struys, 'Le droit communautaire et l'application des règles procédurales nationales', *Journal des tribunaux—Droit européen* (2000) 49–53.

[48] This obligation of sincere cooperation imposed on the national authorities (notably judicial authorities) is, in fact, the counterpart of the 'federal loyalty' obligation which the Community authorities have under Art 10 EC *vis-à-vis* the national legal orders (see order of the Court of Justice of 13 July 1990, in Case C-2/88 Imm, *Zwartveld and Others* [1990] ECR I3365, paras 16–18).

authority that two EC directives, one of 1986 and one of 1993, concerning the training and free circulation of medical doctors took precedence over another EC directive, of 1976, concerning the equal treatment of men and women. The *Bundesverfassungsgericht* criticised the fact that the *Bundesverwaltungsgericht* had based its decision exclusively on criteria of national law and had completely disregarded Community law, in particular the case law of the Court of Justice. The *Bundesverfassungsgericht* held that the *Bundesverwaltungsgericht* had breached its obligation to refer a preliminary question to the Court of Justice enshrined in Article 234 EC and, in so doing, had violated the right to the *gesetzliche Richter* enshrined in Article 101 of the German Basic Law. The *Bundesverfassungsgericht* rightly stated that the principle of equal treatment of men and women is a fundamental principle of Community law and that Community legislation which violates that right is invalid. The protection of fundamental rights would become ineffective and incomplete if the Court of Justice, failing preliminary references, could no longer control the compatibility of Community legislation with the fundamental rights guaranteed by the Community legal order.

This judgment of the *Bundesverfassungsgericht* is important for two reasons. First, it confirms that Community law forms an integral part of the German legal order and that the Court of Justice is perceived as forming an integral part of the system of judicial protection organised by the German legal order. Without any doubt the confidence expressed by the *Bundesverfassungsgericht* towards the Community legal order is to be attributed to the fact that Community law, as far as the protection of fundamental rights is concerned, is embedded in the constitutional traditions common to the Member States. Second, the judgment of the *Bundesverfassungsgericht* makes it apparent that a breach of Community law—in this case the violation of the obligation under Article 234 EC for a national court of last instance to refer a preliminary question to the Court of Justice—is perceived as a breach of national law, namely the violation of the right to the *gesetzliche Richter* enshrined in Article 101 of the German Basic Law. It should be stressed that it was only on the basis of the violation of this provision of the German Basic Law that the *Bundesverfassungsgericht* had jurisdiction to review the decision of the *Bundesverwaltungsgericht*. The operational connection between the Community and the German legal orders could hardly have been stronger.

The judgment of the *Bundesverfassungsgericht* is also remarkable if one takes into account the extreme reticence, expressed in the early years by the German legal order, in particular the *Bundesverfassungsgericht*, with respect to the principle of primacy of Community law[49]. For a very long time, the *Bundesverfassungsgericht* indeed considered that, as long as the Community legal order lacked a codified catalogue of fundamental rights as clear and

[49] See on this subject Lenaerts and Van Nuffel, op cit, 518.

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explicit as that contained in the German Basic Law,[50] it had jurisdiction to examine the compatibility of a Community measure with the fundamental rights guaranteed by the German Basic Law. The *Bundesverfassungsgericht* considered itself competent to carry out such judicial review even if the Court of Justice had already ruled, in the context of preliminary proceedings concerning the validity of the Community measure in question, that the measure did not violate any fundamental right. Only after having received assurances, in different judgments of the Court of Justice[51] concerning the importance attached by the Community institutions to the constitutional traditions common to the Member States as a source of protection of fundamental rights, did the Bundesverfassungsgericht change its position. It thus ruled, in a judgment of 22 Oct 1986,[52] that an additional review from its part of Community legislation in the light of the fundamental rights guaranteed by the Basic Law was no longer necessary so long as the case law of the Court of Justice which takes into account the common values of the Member States, offers a degree of protection equivalent to that which can be found in the German legal order.[53]

IV. TYPOLOGY OF THE DIFFERENT ACTIONS TAKEN BY THE COMMUNITY COURTS APPLYING THE COMPARATIVE LAW METHOD

The analysis of the case law of the Community courts reveals a constant concern to find through the comparative law method the best solution acceptable throughout the Member States. Faced with a lacuna in the Community legal order (see hereinafter under Section A), or asked to interpret a notion of Community law (see hereinafter under Section B) or else in order to rule on the compatibility of a national legal solution with Community law (see hereinafter under Section C), the Community courts will instinctively seek the right balance between the interests of Community law and the acceptability of their ruling to the national legal orders.

A. A Lacuna in the Community Legal Order

When the Community courts examine the pleas raised by the parties in a case they may find that the legal construction, the rule or principle of law referred

[50] See judgment of the *Bundesverfassungsgericht* of 29 May 1974 (English version published in *Common Market Law Reports* (1974), vol 2, 540–69; also called 'Solange I' judgment).

[51] See, eg, Case 44/79, *Hauer* [1979] ECR 3727, para 15.

[52] 'Solange II' judgment; English version published in *Common Market Law Reports* (1987) vol 3, 225–65.

[53] The *Bundesverfassungsgericht* confirmed its 'conditional acceptance' of the primacy of Community law in its judgment of 12 Oct 1993 concerning the constitutionality of the Maastricht Treaty (see, for the English version of this judgment, *Common Market Law Reports* (1994) vol 1, 57–108); See also, Lenaerts and Van Nuffel, op cit, 519.

to by one of them is unequalled in the Community legal order. They will then on the basis of one of the provisions mentioned above make a comparative study of the problem within the different legal orders of the Member States. That analysis may either indicate that national solutions converge (see hereinafter under Section A1) or contradict one another (see hereinafter under Section A2). The courts can also consider that a particular national solution meets the objectives of Community law so well that it should be transposed into the Community legal order (see hereinafter under Section A3).

1. Convergence between national solutions

The comparative law method may make it clear to the Community courts that the legal orders of the Member States tend to converge with respect to a particular issue in a more or less pronounced way.

- *Legal concepts common to all Member States*

When a legal concept or rule proves to be common to all the Member States, the Community courts may, without risking opposition in the national legal orders, promote it to a concept or rule of the Community legal order. Amidst a wealth of case law the *Köster* judgment may serve as an example.[54] In this judgment the Court of Justice, ruling on a preliminary question concerning the implementation of a Council regulation adopted in the field of the common agricultural policy, based itself on the 'legal concepts recognised in all the Member States'[55] to justify the view that, under the legislative scheme of the Treaty, the Commission may, by virtue of a legislative authorisation, adopt legal provisions implementing the basic regulations of the Council[56].

The judgment of the CFI of 6 Mar 2001 in the *Dunnett* case[57] contains another illustration of how a solution common to the legal systems of all the Member States can serve the advancement of Community law. This case concerned the decision of the European Investment Bank (EIB) to abolish, as from 1 Jan 1999, the right for staff members of the EIB to transfer part of their salary which was normally paid in Belgian or Luxembourg francs into another currency at a special conversion rate. During the consultations which had taken place before the adoption of this decision, the human resources department of the EIB had informed staff representatives that the abolition of the system of special conversion rates was an inevitable consequence of the introduction of the Euro. Before the CFI, the applicants submitted that the decision to abolish the system of special conversion rates was unlawful because it was adopted without proper consultation of the staff representatives. According to

[54] Case 25/70, *Köster* [1970] ECR 1161.
[55] Ibid, para 6.
[56] See, in the meantime, Art 202, third indent, EC (ex-Art 145, third indent, of the EC Treaty), introduced into the Treaty by the Single European Act (1986).
[57] *Dunnett and Others v EIB*, cited in n 35 above.

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the applicants, the consultation had indeed been based on a false premise. Relying on an analysis of comparative law which had been communicated to the Court by the EIB, the CFI noted that according to 'general principles of labour law common to the Member States of the European Union', an employer can unilaterally withdraw a financial advantage which he has freely granted to his staff on a continuous basis only when, before adopting such decision, timely and bona fide consultations with the staff have taken place.[58] In the *Dunnett* case, it was however clear from the documents before the Court that the EIB itself was aware of the fact that the introduction of the Euro did not make the application of the system of special conversion rates impossible. Therefore, in presenting to the staff representatives the abolition of this advantage as the inevitable consequence of the introduction of the single currency, the EIB had not conducted bona fide consultations with its staff, and had thus violated a general principle of labour law common to the Member States. As a result, the CFI annulled the salary statements of the applicants in so far as the system of special conversion rates was no longer applied in them.

The case-law concerning the protection of fundamental rights offers other examples of the same approach. As Advocate-General Tizzano stressed in his Opinion in the *BECTU* case, the preamble of the Charter of Fundamental Rights of the European Union solemnly proclaimed on 7 Dec 2000 by the European Parliament, the Council and the Commission also recalls the invaluable contribution of the comparative law method as source of inspiration for stating fundamental rights[59]. It indeed mentions that '[t]his Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States [. . .]'[60].

- *Strong convergence among national solutions*

The convergence of national solutions with respect to a given problem is, of course, not always total. The stronger the convergence, however, the lesser the

[58] Paras 85–90 of the judgment.

[59] See Case C-173/99, *BECTU*, [2001] ECR I-4881, Opinion of Advocate-General A Tizzano of 8 Feb 2001, paras 26–8. See also Case C-353/99 P, *Council v Hautala* Opinion of Advocate-General P Léger of 10 July 2001, cited in note 12 above, paras 80–3. In order to regard the principle of access to documents as a fundamental right, the Advocate-General emphasises the 'convergence of national laws' which in his view 'constitutes a decisive reason for recognising the existence of a fundamental principle of a right of access to information held by Community institutions' (para 55). Art 42 of the Charter of Fundamental Rights of the European Union merely confirms the existence of such fundamental right in the Community legal order. In the light of all of this, 'it appears natural to [the Advocate-General] to accept that there exists a principle of access to infomation held by the national public authorities and that that principle is such that it would engender an equivalent principle at Community level' (para 59).

[60] See Lenaerts and De Smijter, 'A "bill of rights" for the European Union', *Common Market Law Review* (2001) 273–300.

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risk for the Community courts that the solution they retain by reference to the traditions of the Member States will be rejected by the national legal orders. Where such convergence exists, the Community courts will not hesitate to give preference to the biggest common denominator of the traditions of the Member States, to the highest standard of protection,[61] or to the most performing law,[62] in order to improve the level of judicial protection within the Community. Here again, the case law concerning fundamental rights and general principles of law offers many examples. Indeed, the Community courts have often built upon a core of legal conscience sufficiently common to the Member States in order to establish a fundamental right or a general principle of Community law.[63]

The judgment of the Court of Justice in the *Johnston* case can serve as a striking example.[64] In this case, the Court had to rule on preliminary questions raised in a dispute between Mrs Johnston and the authority competent for appointing reserve police constables (the Chief Constable) in Northern Ireland. The dispute concerned the refusal of the said authority to renew Mrs Johnston's contract and to give her a training in the handling and use of firearms. At that time, a high number of police officers were being assassinated in Northern Ireland each year and against this background the Chief Constable had decided no longer to assign to women police operations which required the carrying of firearms. The preliminary questions put to the Court related to the interpretation of Council Directive 76/207/EEC of 9 Feb 1976 on the implementation of the principle of equal treatment for men and women.[65] In particular, the Court was asked to rule on the compatibility with this directive of a provision of British law according to which a certificate of the national authorities declaring that the conditions for derogating from the principle of equal treatment for the purpose of protecting the public safety are fulfilled, constitutes conclusive evidence and could not be subject to judicial review. After having recalled that Article 6 of the directive requires Member States to introduce into their internal legal systems the necessary measures to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process', the Court held that 'the requirement of judicial control stipulated by that Article reflects a general principle of law which underlies the constitutional traditions common to the Member States'.[66] It added that, according to this provision, interpreted in the light of the said general principle, it is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community

[61] Pescatore, op cit, cited in n 3 above, 341.
[62] Galmot, op cit, 258.
[63] See Pescatore, op cit, cited in n 3 above, 339–41, 344–6, 352–3; Benos, op cit, 248–50; Lenaerts and Van Nuffel, op cit, 534–6 and 539–50.
[64] Case 222/84, *Johnston* [1986] ECR 1651.
[65] OJ L 39, 40.
[66] *Johnston*, cited in n 64 above, paras 17 and 18.

law and of national legislation intended to give effect to the rights for which the directive in question provides.[67]

As some commentators have rightly observed,[68] it follows from the *Johnston* judgment that when a fundamental right finds a solid foundation in the constitutional traditions of the Member States, the Community courts will not have scruples about 'attacking' a less performing rule of national law. In other words, the Community courts will not hesitate to opt, in such a case, for a 'levelling up', instead of a 'levelling down' of the judicial protection.

- *A 'dominant idea' in the national legal systems: the example of the case law concerning the non-contractual liability of public authorities*

In some cases, the Community courts will not find in the national legal systems a sufficient convergence for a solution that can be transposed, as such, into the Community legal order. Divergences between the national legal systems, however, often concern details of the solution given in the different legal orders to a certain legal issue. That does not prevent the Community courts from finding a common denominator or dominant idea through the comparative approach. Guided by such general legal tendency, the courts will mould, in the image of the attitude adopted by the national legal orders, a 'custom-made' Community solution taking into account the priorities of the Community legal order, the objectives of the Treaty and the particularities of the Community structures and of Community law.

The case law concerning the non-contractual liability of national and Community public authorities offers the best illustration of this attitude. Even if Article 288, second paragraph, EC imposes on the Community courts the obligation to have recourse to the general principles common to the laws of the Member States, they have so far not elaborated a clear body of rules in the matter. At first sight, one would even be inclined to conclude that the source of inspiration found by the Community courts in the national legal orders amounts to nothing more than the following: in order for a national or a Community public authority to be held liable, one has to demonstrate the existence of an illegal behaviour from the side of such authority, damage, and a causal link between the illegality and the damage.

However, it was on the basis of the comparative law method that the Community courts established in the Community legal order the principle of the non-contractual liability of public authorities for the damage caused in the exercise of their normative activities. Furthermore, in the absence of a 'common model', the same method was used to find a dominant tendency in the national legal systems according to which

[67] Ibid, paras 19–20. See also FG Jacobs, 'Access to justice as a fundamental right in European law', *Mélanges en hommage à Fernand Schockweiler* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 197–212.

[68] See, in particular, Galmot, op cit, 258. For an example in the case-law, see the Opinion of Advocate-General P Léger in Case C-353/99 P, *Council v Hautala* cited in n 12 above, para 119 as to the right of partial access to documents containing some confidential elements.

> the[re was a] need to balance the opposing, competing interests at stake: on the one hand, the injured party's interest in obtaining at least financial restitution for the loss or damage he sustained as the result of an activity—in particular legislative activity—of the State; on the other, the State's interest in not having to answer invariably and in any event for loss or damage caused by the activities of its organs in performing the institutional tasks entrusted to them'.[69]

In order to avoid the exercise of the legislative power by a public authority being hindered 'by the prospect of applications for damages whenever it [. . .] adopt[s] legislative measures in the public interest which may adversely affect the interests of individuals',[70] the Court held that public authorities should only exceptionally be liable for the damage resulting from the adoption of a normative act. Therefore, it has been observed that in the rare cases where the Court of Justice referred to the general principles common to the laws of the Member States, it has done so not to define the basis, but to trace the limits of the liability of the public authorities.[71]

A glance at the case law shows that this balancing—known to all national legal systems—of the obligation to compensate and the concern to safeguard the effectiveness of the exercise of normative power underlies the definition by the Court of Justice and the CFI of the 'Community conditions'[72] for the non-contractual liability of Community and national authorities as a result of infringements of Community law.

This can be illustrated first with the case law concerning the liability of the Community for damage caused to individuals by normative measures adopted by one of its institutions. In the *Zuckerfabrik Schöppenstedt* case,[73] the Court had to rule on a request made by a German firm to compensate the damage caused by the Community as a result of the adoption by the Council of a regulation concerning the common organisation of the sugar market. Following the Opinion of Advocate-General K Roemer,[74] it established the principle of non-contractual liability of the Community for normative acts. The Court, however, taking into account the restrictive position taken in the national legal

[69] Opinion of Advocate-General G Tesauro in *Brasserie du Pêcheur and Factortame*, cited in n 22 above, I-1066, para 12.

[70] Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL and Others v Council and Commission* [1978] ECR 1209, para 5. See also *Brasserie du Pêcheur and Factortame*, cited in n 22 above, para 45, and the Opinion of Advocate-General N Fennelly in Case C352/98 P, *Bergaderm and Goupil v Commission*, 2000 [ECR] I-5291, I-5294, para 29.

[71] Pescatore, op cit, cited in n 3 above, 342.

[72] See Opinion of Advocate-General G Tesauro in *Brasserie du Pêcheur and Factortame*, cited in n 22 above, I–1081.

[73] Case 5/71, *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975.

[74] Opinion of Advocate-General K Roemer in Case 5/71, *Zuckerfabrik Schöppenstedt v Council* cited in n 73 above, 986, at 990. In his Opinion, the Advocate-General, on the basis of a study of comparative law prepared by the German Max-Planck Institute, considered it justified to recognise the liability of public authorities resulting from normative activity as a 'part of Community law, because it is widely recognised [in the Member States] and in certain cases even includes formal laws'.

systems with respect to this matter and adapting it to the specificities of Community law, held that

> [w]here legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty [now Article 288, second paragraph, EC], unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred'.[75]

This common vision of the national legal systems is also present in the case law of the Court of Justice concerning the liability of Member States for breaches of Community law. Thus in *Francovich*[76] the Court of Justice was asked to rule on the liability of the Italian State for the damages suffered by some individuals as a result of the fact that the Member State in question had failed to implement into its legal order, within the prescribed time-limit, the provisions of a Council directive relating to the protection of employees in the event of insolvency of the employer. In this case, the Court of Justice disregarded, as Advocate-General J Mischo had suggested in his Opinion, the principle of immunity of the public authorities to which some governments had referred,[77] and established as a principle of Community law the liability of the Member State for loss and damage caused to individuals as a result of breaches of Community law for which the States can be held responsible.[78]

The Advocate-General further proposed, after taking into consideration the role played by the general principles common to the laws of the Member States in the limitation of the non-contractual liability of the Community for breaches of Community law, that the liability of Member States for breaches of Community law should be subject to the same conditions as the liability of the Community in like circumstances.[79] In line with this Opinion, the Court of Justice, following the restrictive position it had taken in *Schöppenstedt*,[80] ruled that, where the breach of Community law committed by a Member State takes the form of a failure to take all the measures necessary to achieve the result prescribed by a directive, individuals would be entitled to reparation from the Member State in question where three conditions are met. First, the result

[75] *Zuckerfabrik Schöppenstedt* judgment, cited in n 73 above, para 11. In *Brasserie du Pêcheur and Factortame* (cited in n 22 above), the Court held that the decisive test for considering a breach of Community law sufficiently serious is 'whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion' (para 55). See also *Bergaderm and Goupil v Commission*, cited in n 70 above, para 43. See, on this subject, A Arnull, 'Liability for Legislative Acts Under Art 215 (2) EC', in *The Action for Damages in Community Law*, 129–53.

[76] Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991] ECR I-5357.

[77] Opinion of Advocate-General J Mischo in *Francovich*, cited in n 76 above, I-5370, at para 47.

[78] *Francovich* judgment, cited in n 76 above, paras 35 and 37.

[79] Ibid, para 71.

[80] *Zuckerfabrik Schöppenstedt*, cited in n 73 above.

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prescribed by the directive should entail the grant of rights to individuals; secondly, it should be possible to identify the content of those rights on the basis of the provisions of the directive, and third, there should be a causal link between the breach of the State's obligation and the loss or damage suffered by the individuals concerned[81]. In *Francovich*, these conditions were clearly met.

The contribution of the comparative law method is far more visible in the Opinion of Advocate-General G Tesauro and in the judgment of the Court of Justice in *Brasserie du Pêcheur and Factortame*.[82] In this case, which concerned the liablity of Member States resulting from a violation of a directly applicable rule of Community law,[83] the Court of Justice held, in a much clearer way than in *Francovich*,[84] that the liability of the State for the damage caused by its acts or omissions to individuals simply expresses—in the same way as the Community liability laid down in Article 288, second paragraph, EC, does—a general principle known to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused.[85] It further noted that in many national legal systems the essentials of the rules governing State liability have been developed by the courts.[86] On the basis of this common trend, and disregarding again, just like in *Francovich*, the opposition of certain Member States to the principle that a State could be held liable when acting as a legislator,[87] the Court of Justice, taking into account the superior interests of Community law, established once and for all the principle of liability of the State for loss or damage caused to individuals as a result of breaches of Community law for which it can be held responsible and added that this 'principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach'.[88]

When defining the 'Community criteria' relating to the liability of the 'State legislator' for a breach of Community law, the Court of Justice took into account the fact, which had been stressed by Advocate-General G Tesauro in his Opinion,[89] that 'in all the legal traditions liability for legislative activity on the part of the public authorities is limited in various ways'. On the basis of this concept common to the Member States, it ruled that, when a Member State acts—as was the case in *Brasserie du Pêcheur and Factortame*—in a field

[81] *Francovich* judgment, cited in n 76 above, paras 38–46. See, on this subject, DF Waelbroeck, 'Treaty Violations and Liability of Member States: The Effect of Francovich Case Law', in *The Action for Damages in Community Law*, 311–39.

[82] *Brasserie du Pêcheur and Factortame*, cited in n 22 above. Opinion of Advocate-General at I-1066.

[83] For an analysis of this judgment see, in particular, Van Gerven, op cit, 36–9.

[84] Cited in n 76 above. [85] Ibid, para 29. [86] Ibid, para 30.

[87] See, on this issue, Opinion of Advocate-General P Léger in Case C-5/94, *Hedley Lomas* [1996] ECR I-2553, I-2556, paras 98–100.

[88] Ibid, paras 31 and 32.

[89] Cited in n 22 above, para 60.

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where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which the Member State may incur liability must be the same as those under which the Community institutions incur liability in a comparable situation. In other words, the Member State will be held liable where a sufficiently serious breach of a superior rule of law which intends to confer rights on individuals is established.[90]

After having placed some limits on the conditions which may 'trigger off' State liability, the Court of Justice, guided by a concern inherent in the legal traditions of the Member States to strike a balance between public and private interests, established some rules relating to the obligation of public authorities to make good the loss or damage caused as a result of a breach of Community law. Here again, the comparative law method adopted by the Advocate-General in his Opinion was a source of inspiration for the Court. It specified that reparation of loss or damage caused by an act or an omission of a Member State cannot be made conditional upon a fault having been committed intentionally or by way of negligence by the organ of the State responsible for the breach going beyond that of a sufficiently serious breach of Community law.[91] With respect to the actual extent of the reparation, the Court, again relying on the comparative analysis drawn up by Advocate-General G Tesauro, ruled that reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection of their rights. In the context of economic or commercial litigation, reparation must therefore cover loss of profit.[92] It added, however, that it was 'a general principle common to the legal systems of the Member States that the injured party showed reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself'.[93]

This restrictive approach towards the non-contractual liability of public authorities, inspired by the comparative law method, also transpires in the recent case law of the Court of Justice and the CFI concerning the non-contractual liability of the Community for lawful acts. Thus, in *Dorsch Consult*,[94] the CFI was asked to rule on an application for compensation made by a German consulting company, which claimed to have suffered damage as a result of the adoption by the Council of a regulation preventing trade with Iraq and Kuwait. The CFI, in the absence of a 'dominant idea' in the legal

[90] *Brasserie du Pêcheur and Factortame*, cited in n 22 above, paras 47–55. In both cases the Court found that such a violation of Community law was established.

[91] Ibid, cited in n 22 above, para 80.

[92] Ibid, cited in n 22 above, paras 82 and 87. For a state of comparative law on these issues, see, eg, D Edward and W Robinson, 'Is There a Place for Private Law Principles in Community Law ?', in *The Action for Damages in Community Law*, 347.

[93] *Brasserie du Pêcheur and Factortame*, cited in n 22 above, para 85. See, also, Opinion of Advocate-General G Tesauro, cited in n 22 above, para 98.

[94] Case T-184/95, *Dorsch Consult v Council and Commission* [1998] ECR II-667.

systems of the Member States with respect to this issue, refrained from establishing a principle of Community law according to which public authorities (in this case the Community) could be held liable for damage caused by lawful acts. It held that *in the event* of the principle of Community liability for a lawful act being recognised in Community law, such liability could be incurred only if the damage alleged, if deemed to constitute a 'still subsisting injury', affects a particular circle of economic operators in a disproportionate manner by comparison with others (special damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (unusual damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest.[95] It follows from the reasons set forth in the judgment[96] that this Community solution is drawn directly from the German legal concept of 'exceptional sacrifice' (*Sonderopfer*) and from the Belgian and French legal concept of 'unequal discharge of public burdens'.[97] The CFI tailored these concepts limiting the liability of public authorities for lawful acts in the few Member States where such liability exists, taking into account the particularities of the Community legal order. The approach followed by the CFI was confirmed, upon appeal, by the Court of Justice.[98]

The strictness of the Community case law with respect to the non-contractual liability of national and Community authorities was considered by some commentators[99] as an attempt by the Community legal order to take back with one hand what it had given away with the other hand. In fact, in adopting a restrictive approach in the matter, the Community courts do nothing else than acknowledge a common idea of the national legal systems according to which a balance must be found between the obligation to compensate which incurs to anyone who causes loss or damage and the need to safeguard the effective exercise of normative power.

Furthermore, the Court of Justice has completed the regime of non-contractual liability of public authorities for normative acts in its judgment of 23 May 1996 in *Hedley Lomas*[100] and, more importantly, in its judgment of 4 July 2000 in *Bergaderm and Goupil*,[101] where it held that when the Member State or Community institution concerned was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the

[95] Ibid, para 80. These conditions were not met in *Dorsch Consult*.
[96] Ibid, paras 76–9.
[97] See, in particular, HJ Bronkhorst, 'The Valid Legislative Act as a Cause of Liability of the Communities', in *The Action for Damages in Community Law*, 155–8.
[98] Case C–237/98 P, *Dorsch Consult v Council and Commission* [2000] ECR I-4549. See also K Lenaerts, 'Le Tribunal de première instance des Communautés européennes: regard sur une décennie d'activités et sur l'apport du double degré d'instance au droit communautaire', *Cahiers de droit européen* (2000) 379 and 380.
[99] Mertens de Wilmars, op cit, 39.
[100] *Hedley Lomas*, cited in n 87 above.
[101] *Bergaderm and Goupil v Commission*, cited in n 70 above.

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mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.[102] This reflects a dominant idea common to the Member States according to which the strict conditions under which public authorities may incur liability for normative acts give way to a normal liability standard whenever the authorities concerned have little or no discretion in the exercise of their normative powers. Under this standard, liability will be incurred if the applicant proves the existence of a fault or a negligence, that is any kind of irregularity that a normally prudent and diligent administration would not have committed in like circumstances.[103]

2. Contradictions between national solutions

A comparative analysis of a certain matter may reveal profound contradictions—even as regards the basic principles—between the national legal systems. In such circumstances the Community courts will avoid establishing a Community solution. Indeed, when they are faced with contradictary solutions of national law, the Community courts will prefer not to impose a solution which would not meet sufficient support in some Member States to ensure a uniform and effective application of Community law.

Again, the case law of the Community courts offers many examples of this situation. In the field of family law, the *Grant* judgment deserves special attention.[104] Ms Grant, who had a stable relationship with a female partner, was an employee of a railway company. Her employer had refused to give her the benefit of an advantage (a travel concession for partners) which she would have obtained if she was married or had a stable relationship with a partner of the opposite sex. The Court of Justice was asked to rule whether this decision of Ms Grant's employer was compatible with the principle of equal treatment of men and women as regards remuneration enshrined in Article 119 of the EC Treaty (now Article 141 EC). Whilst in his Opinion Advocate-General M Elmer suggested that there was discrimination on the basis of gender,[105] the Court of Justice came to a different conclusion. It first examined the laws of the Member States and found that 'while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way'.[106] It then held that 'in the

[102] *Hedley Lomas*, cited in n 87 above, para 28; *Bergaderm and Goupil*, cited in n 70 above, para 44. See also Case T-178/98, *Fresh Marine v Commission*, [2000] ECR II-3331, confirmed upon appeal, by the Court of Justice (Case C-472/00P, Judgment of 10 July 2003), not yet reported in ECR.

[103] See, on this issue, MH van der Woude, 'Liability for Administrative Acts under Art 215 (2) EC', in *The Action for Damages in Community Law*, 109–28, and Van Gerven, op cit, 42 and 43.

[104] Case C-249/96, *Grant* [1998] ECR I-621.

[105] Opinion of Advocate-General M Elmer in *Grant*, cited in n 104 above, I-623, I-635.

[106] *Grant* judgment, cited in n 104 above, para 32.

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present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex' and concluded that '[c]onsequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex'.[107] The Court deemed it necessary to add that '[i]n those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position'.[108] The Court, being aware of the fact that certain strongly held views within the Community were not yet ready to accept the equivalence of a homosexual and a heterosexual relationship as a principle of Community law, thus left it to the political authorities to rule on this matter.

3. Transposition of a national solution into Community law

Applying the comparative law method, the Community courts can come to the conclusion that a legal concept or solution known in a particular Member State would best serve the interests of the Community legal order. It therefore happens that such a legal concept or solution is 'imported' in the Community legal order. Thus, the principles of proportionality[109] and protection of legitimate expectations[110]—recognised for many years as principles of Community law—were originally 'borrowed' from the German legal order.[111]

B. The interpretation of a concept of Community law

When dealing with the interpretation of a concept of Community law, the Community courts will very often pay no attention whatsoever to the meaning the same concept may have in the legal systems of the Member States. The case law indicates that in the name of the autonomous character of Community law the Community courts will, to the greatest extent possible, interpret the concepts of Community law in the light of the rules of Community law itself and try not to refer to the case law of a supreme court of a Member State or to the laws of the Member States.[112]

Nevertheless, it does happen that in order to overcome a problem of inter-

[107] *Grant* judgment, cited in n 104 above, para 35. [108] Ibid, para 36.
[109] Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125. See Koopmans, 'Comparative Law and the Courts', op cit, 547; JA Usher, *General Principles of EC Law* (London/New York, Longman, 1998), 37–51.
[110] Joined Cases 205 to 215/82, *Deutsche Milchkontor* [1983] ECR 2633. See, in particular, F Belaich, 'La répétition de l'indu en droit communautaire dans la jurisprudence de la Cour de justice des Communautés européennes', *Revue du Marché commun et de l'Union européenne* (2000), 113–14; see also Usher, op cit, 52–64.
[111] For other examples, see by Pescatore, op cit, cited in n 3 above, 346.
[112] Mertens de Wilmars, op cit, 38.

pretation the Community courts take a look at the national legal systems. Such an analysis may reveal a solution common to the Member States which will help the courts find an answer to the problem of interpretation (see hereinafter under Section B1). The Community courts can also find an excuse in the profound divergences among national interpretations of a given concept in order to establish an autonomous interpretation of Community law (see hereinafter under Section B2). Finally, through a comparative law analysis, the Community courts may identify the national interpretation which seems most appropriate—given its interest for the realisation of the Community's objectives—for 'import' into the Community legal order (see hereinafter under Section B3).

1. Common Interpretation in the Member States

The *AM & S* case illustrates perfectly well the contribution of comparative law to the interpretation of an insufficiently precise provision of Community law.[113] The case concerned the respect of the rights of defence in administrative proceedings initiated by the Commission prior to the finding of an infringment of the EC competition rules.[114] The facts of the case were as follows. The Commission suspected that the company AM & S had engaged in anti-competitive practices. It adopted a decision on the basis of Article 14 of Regulation No 17[115] by which this company was required to produce for examination by officers of the Commission all the documents for which legal privilege was claimed. AM & S sought the annulment of this decision before the Court of Justice. Since Community law itself offered no solution as to how the principle of protection of confidentiality, common to the Member States, was to be interpreted as regards the relationship between a lawyer and his or her client, the Court of Justice made a comparative analysis of the national legal solutions of this problem. Although the principle of the protection of written communications between lawyer and client is generally recognised in the national legal systems, the Court of Justice noted that the scope of this principle and the criteria for its application vary from Member State to Member State.[116] However, it observed that

> [a]part from these differences [. . .] there are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment[117].

[113] *AM & S v Commission*, cited in n 18 above.
[114] Arts 81 and 82 EC (ex-Arts 85 and 86 of the EC Treaty).
[115] Council Regulation No 17 of 6 Feb 1962. First regulation implementing Arts 85 and 86 (now Arts 81 and 82) of the Treaty, OJ Special Edition [1959–62], p 87.
[116] *AM & S*, cited in n 18 above, paras 19 and 20.
[117] *AM & S*, cited in n 18 above, para 21.

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The Court then concluded that

> [v]iewed in that context Regulation No 17 must be interpreted as protecting, in its turn, the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States[118].

Applying these criteria to the case in hand, the Court of Justice did not allow the Commission officials to investigate a series of documents which were considered to be confidential written communications between AM & S and its lawyer[119].

2. Divergent national interpretations as a pretext for autonomous Community interpretation

Often, when the Community courts turn to comparative law in order to find inspiration for the interpretation of a concept of Community law they will find profound divergences in the interpretation given to the concept in question in the national legal systems. Such a finding may then provide a justification for establishing an autonomous interpretation of the concept in Community law. They will, of course, see to it that this interpretation of Community law reconciles to the greatest extent possible the interests of the Community legal order with the requirement that the Community solution should be 'acceptable' in the Member States.

The *Reed* case[120] illustrates this approach of the Community courts. Ms Reed was the partner of a British citizen, legally residing in the Netherlands. The Dutch authorities had refused to grant her a residence permit since she was not married to her partner. In this context it should be mentioned that Article 10 of Council Regulation No 1612/68[121] provides that certain members of the 'family' of a worker, including his 'spouse', irrespective of their nationality, 'have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State'. In the *Reed* case the Dutch Supreme Court ('Hoge Raad') asked the Court of Justice to rule on the question whether an unmarried partner in a stable relationship should not be assimilated to a 'spouse' within the meaning of Article 10 of Regulation No 1612/68. Aware of the fact that—in view of the definition of 'regulations' given in Article 249 EC (ex-Article 189 of the EC Treaty)—its interpretation of the said Article 10 would have effects in all of the Member States, the Court held that 'any interpretation of a legal

[118] *M & S*, cited in n 18 above, para 22.
[119] See, on this judgment, Galmot, op cit, p 256–7.
[120] Case 59/85, *Reed* [1986] ECR 1283.
[121] Council Regulation No 1612/68 of 15 Oct 1968 on freedom of movement for workers within the Community (OJ, Special Edition, 1968 (II), 475).

term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State'.[122] The Advocate-General had already stressed in his Opinion that 'companions can certainly not be treated in the same way as spouses in all Member States in view of the fact that their cultural, social and ethical traditions vary widely in some respects'.[123] The Court of Justice therefore concluded that '[i]n the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term 'spouse' in Article 10 of the Regulation refers to a marital relationship only'.[124]

3. Import of a national interpretation into the Community legal order

The Community courts will often draw from the richness of the national legal systems when looking for the interpretation of a given concept which suits best the interests of the Community legal order.[125] After having made sure that the interpretation chosen is not likely to meet with serious opposition in the national legal systems unfamiliar with such interpretation, they will not hesitate to 'import' this interpretation in Community law. Thus, for instance, the interpretation the Community courts gave, in the context of actions for annulment, of the concept of 'misuse of power' was largely influenced by the interpretation of this concept in French administrative law[126].

[122] *Reed*, cited in n 120 above, para 13.

[123] Opinion of Advocate-General CO Lenz in *Reed*, cited in n 120 above, I-1284, I-1294.

[124] *Reed*, cited in n 120 above, para 15; See also the judgment of the Court of 31 May 2001 in Joined Cases C-122/99 P and C-125/99 P, *D and Sweden v Council* [2001] ECR I-4319, in which an appeal lodged against the judgment of the CFI of 28 Jan 1999 in Case T264/97, *D v Council* [ECR-SC I-A-1 and II-1] was dismissed. The CFI had itself dismissed an action lodged by a Swedish official of the European Communities, who had a registered partnership under Swedish law with another Swedish national of the same sex, against the Council decision refusing him the benefit of the household allowance provided for in the Staff Regulations for 'married' officials. The Court of Justice first recalled that 'according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex' (para 34). It then considered that even if, since 1989, an increasing number of Member States have introduced statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex (such as the registered partnership), such arrangements not previously recognised in law are regarded in the Member States concerned as being distinct from marriage (paras 35 and 36). In such circumstances, the Court of Justice concludes that it cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage. The intention of the legislature was indeed to grant the benefit only to married couples (para 37).

[125] Mertens de Wilmars, op cit, 39.

[126] See, on this subject, Pescatore, op cit, cited in n 3 above, 354. See also R Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis', *Working Paper of the European University Institute at Firenze* (1994/3), 2.

C. Judging the Compatibility of a National Provision with the Objectives of the Community

Each time the Court of Justice is asked to rule—in the framework of preliminary proceedings or an infringement action brought against a Member State by the Commission or another Member State—on the compatibility of a provision or 'solution' of national law with the Community legal order, it will adopt a comparative approach. It will indeed have to take a look at the different legal orders concerned as well as their respective priorities and requirements. Taking into account the observations made by the Member State whose law is in issue as well as those submitted by other Member States and the Commission, the Court will 'gauge the temperature' of the national legal systems in order to ascertain the credibility and 'acceptability' of its decision for the whole of the Community.

Through a comparative analysis the Community court can either confirm the compatibility of the national provision with Community law (see hereinafter under 1), or set aside a rule of national law which is considered to be incompatible with the requirements of Community law (see hereinafter under 2), or it can take note of the choice made by the national legal system concerned and confront the latter with the consequences of this choice as regards the Community legal order (see hereinafter under 3).

1. Compatibility of a national provision with Community law

Asked to rule on a matter revealing an obvious conflict between the interests served by a rule of national law and the requirements of the Community legal order, the Community court may find that the former are nevertheless compatible with the latter. In such case, the comparative law method can be considered as a 'reconciliation process'[127] between Community law and the rules or values enshrined in the internal legal order of the Member State concerned.

The *Eco Swiss* case may serve as a striking example.[128] Benetton had concluded a licensing agreement with Eco Swiss. Benetton terminated the agreement before the end of the period provided for in the contract. The case was brought before arbitrators. The arbitration award ordered Benetton to pay damages to Eco Swiss for breach of the licensing agreement. When the parties failed to come to an agreement on the quantum of the damages, the arbitrators, in a subsequent award, ordered Benetton to pay Eco Swiss 23.75 million USD. Benetton refrained from appealing against the first award within the prescribed time-limit. It, however, brought before a Dutch court proceedings for stay of enforcement of the final arbitration award. According to Benetton,

[127] M Darmon, 'La prise en compte des droits fondamentaux par la Cour de justice des Communautés européennes', *Revue de science criminelle et de droit pénal comparé* (1995) 29.
[128] Case C-126/97, *Eco Swiss* [1999] ECR I-3055.

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the licensing agreement violated Article 81 EC (ex-Article 85 of the EC Treaty). The award was therefore said to be inconsistent with Dutch public policy. The Dutch court referred some preliminary questions to the Court of Justice. In substance the latter had to rule on the question whether Community law requires a national court to refrain from applying a rule of domestice law according to which an arbitration award acquires the force of *res judicata*, if it is not appealed against within a prescribed time-limit. Indeed, in order to examine in the proceedings brought against the final award whether the agreement which the first award held to be valid in law was neverthesless void under Article 81 EC, the national court would have had to call into question the first award.

The Court of Justice first held that the 3-month time-limit, prescribed by the Dutch rules of procedure, in which an action for annulment of an arbitration award was to be made 'does not seem excessively short compared with those prescribed in the legal systems of the other Member States and does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law'.[129] It went on to stress that upon the expiry of that period, domestic procedural rules which restrict the possibility of applying for annulment of a subsequent arbitration award proceeding upon an interim arbitration award which is in the nature of a final award, because it has become *res judicata*, are justified by the basic principles of the national judicial system, such as the principle of legal certainty and acceptance of *res judicata*, which is an expression of that principle.[130] In these circumstances, the Court held that the national court was not obliged to refrain from applying these domestic procedural rules.[131]

Finding that the time-limit prescribed in Dutch law for lodging an annulment action against an arbitral award was 'normal', the Court of Justice was anxious not to impose a Community provision which would go against 'a general principle of law recognised in all the Member States, namely that "the force of *res judicata* prevents rights confirmed by a judgment of [a court] from being disputed anew" '.[132] It did so, even though the option chosen entailed a certain reduction of the effectiveness of Article 81 EC.

2. Setting aside the national provision held to be incompatible with Community law

It happens that upon a comparative analysis the Community courts set aside a national provision which is held to be incompatible with the objectives and the structure of the Community. This may be illustrated with the *Simmenthal II*

[129] Ibid, para 45. [130] Ibid, para 46. [131] Ibid, paras 47 and 48.
[132] Opinion of Advocate-General A Saggio in Case C-126/97, *Eco Swiss* [1999] ECR I-3055, I-3057, para 48.

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case[133] which is the sequel to *Simmenthal I*.[134] In the latter case, the Court of Justice had ruled that the Italian health taxes imposed on the occasion of the importation of meat in Italy were incompatible with Community law. Having regard to this judgment, the Italian court which had referred the questions to the Court of Justice in *Simmenthal I*, ordered the tax administration to repay the taxes unlawfully charged. The tax administration appealed against this order. It held that, according to the case law of the Italian Constitutional Court, where there is a conflict between Community law and a subsequent provision of Italian law, the matter must be referred to the Italian Constitutional Court. Indeed, only the Constitutional Court could set aside a provision of Italian law.

Aware of the disadvantages which might arise in a situation where the national court—instead of being able to declare of its own motion that a rule of national law impeding the full force and effect of Community law is inapplicable—was required to raise the issue of constitutionality of the rule in question, the Italian court again addressed a preliminary question to the Court of Justice. It asked whether a rule of national law which is contrary to Community law must be disregarded without waiting action on the part of the national legislature (repeal) or other constitutional authorities (declaration that the provision is unconstitutional). The Court of Justice found that the case law of the Italian Constitutional Court was incompatible with the objectives of the Community. It considered incompatible with the requirements which are the very essence of Community law, any provision of a national legal system and any legislative administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect.[135] It therefore ruled that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, even if this implies the setting aside, of its own motion, of a provision of national law.[136] Consequently, it was not necessary for the Italian court to request or await the prior setting aside by legislative or other constitutional means of the provision of Italian law which was incompatible with Community law.[137]

Often—even if, again, this transpires only rarely from the judgment itself—an analysis of comparative law will precede the decision of the Court of Justice to set aside a national provision. The analysis will seek to ensure that the judgment has solid foundations in the national legal traditions. Thus, in *Factortame*[138] the Court of Justice was asked to rule on the compatibility with

[133] Case 106/77, *Simmenthal* [1978] ECR 629.
[134] Case 35/76, *Simmenthal* [1976] ECR 1871.
[135] *Simmenthal II*, cited in n 133 above, para 22.
[136] Ibid, para 24.
[137] Ibid.
[138] Case C-213/89, *Factortame and Others* [1990] ECR I-2433.

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Community law of a provision of British law which prevented the national court from ordering interim measures in a case where the applicant sought to enforce rights allegedly held under Community law. The Court first referred to its *Simmenthal II* case law and stressed the need to ensure the effectiveness of directly applicable rules of Community law.[139] According to the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 10 EC, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.[140] The Court then held that the effectiveness of Community law would be impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.[141] It concluded that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.[142]

Even if this does not come to the surface in the judgment, the analysis of comparative law contained in the Opinion of Advocate-General G. Tesauro certainly assured the Court of Justice of the rightness of the solution to set aside the application of the contested British measure. It follows indeed from this analysis that there exists 'in all the legal systems of the Member States (the Danish system constitutes a partial exception), however diverse may be the forms and requirements connected with the duration of the proceedings, [. . .] provision for the interim protection of rights denied under a lower ranking provision but claimed on the basis of a provision of a higher order'.[143]

3. *The Community court accepts the choice made by the national legal system but confronts the latter with the consequences of this choice with regard to the requirements of the Community legal order*

It must hardly be recalled that vast areas of law have, until now, not been subject to any legislative coordination or harmonisation on a European level. When a preliminary question is referred to the Court of Justice regarding a matter which is thus left to the autonomy of the Member States, the Court will first endeavour to define the choice made by the national legal order concerned. It will then confront this choice with the requirements of the Community legal order. While fully respecting the autonomy of the national legal order in the matter, the Community court will oblige this national order to bear the responsibility for the consequences of the choice made as regards the respect for Community law.

[139] Ibid, para 18.
[140] Ibid, para 19.
[141] Ibid, paras 18–21.
[142] Ibid, para 23.
[143] Opinion of Advocate-General G Tesauro in *Factortame*, cited in n 138 above, I-2450, para 23 of Opinion.

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The area of procedural law illustrates this peculiar variant of the comparative law method in the activities of the Court of Justice. The authors of the Treaty did not set up special Community courts in the Member States which would have exclusive jurisdiction to apply Community law. Instead, they opted for a system where the national courts would be the ordinary courts of the Community legal order.[144] Very soon, the case law of the Court of Justice enshrined the principle of procedural autonomy according to which it is for each Member State to designate the competent courts and to lay down the procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law.[145] The principle of procedural autonomy is, however, limited by two requirements of Community law, namely the procedural rules applicable to actions under Community law may not be less favourable than those governing similar domestic actions (principle of equivalence) and they may not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[146]

The case law concerning the question whether a national court can be obliged to raise of its own motion a plea regarding a violation of Community law demonstrates that the Court of Justice prefers, in the context of the relative procedural autonomy of the Member States, not to impose a uniform rule which would hurt the sensitivities of the Member States which are unfamiliar with such particular rule of procedural law (even if such uniform rule would certainly serve the effectiveness of Community law). While respecting the choice made by the Member States on this procedural matter, the Court of Justice nevertheless demands from the Member States on the basis of their duty of sincere cooperation under Article 10 EC that they bear, within 'the limits of the acceptable', the consequences of their choice as regards the fundamental requirements of Community law.

This flows from the *Van Schijndel and Van Veen* cases[147] in which two Dutch physiotherapists contested the legality of a Dutch statute on compulsory participation in an occupational pension scheme. The applicants, however, in their proceedings before the national court, had not raised the issue of the compatibility of the Dutch statute with the competition rules of the EC Treaty. Before the Dutch Supreme Court ('*Hoge Raad der Nederlanden*') they invoked for the first time the alleged incompatibility with the competition rules of the EC Treaty and they contended that the inferior court should have raised the issue 'if necessary of its own motion'.[148] The *Hoge Raad der*

[144] M Struys, op cit, 49.
[145] See, eg, Case 33/76, *Rewe* [1976] ECR 1989, and Case 45/76, *Comet* [1976] ECR 2043.
[146] See case law referred to by M Struys, op cit, 50. With respect to the difficulties of putting these principles into operation, see M Hoskins, 'Tilting the Balance: Supremacy and National Procedural Rules', *European Law Review* (1996) 365–77.
[147] Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen* [1995] [ECR] I-4705.
[148] Ibid, para 10.

Nederlanden addressed some preliminary questions to the Court of Justice. It first wanted to know whether a national court should apply of its own motion the competition rules of the EC Treaty even where the party to the proceedings with an interest in application of those provisions had not relied upon them. Second, if the first question had to be answered in the affirmative, the *Hoge Raad der Nederlanden* wanted to know whether that answer also applies if in so doing the court would have to abandon the passive role assigned to it under national law, since it would be required to go beyond the ambit of the dispute defined by the parties and/or to rely on facts and circumstances other than those on which the party with an interest in application of those provisions relies in order to substantiate his claim.

The Court of Justice held that where, by virtue of domestic law, national courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned, such as the competition rules of the EC Treaty.[149] Referring to Article 10 EC, the Court of Justice added that the position is the same if domestic law confers on national courts a discretion to apply of their own motion binding rules of law.[150] So, it concluded that, in proceedings concerning civil rights and obligations freely entered into by the parties, it is for the national court to apply the competition rules of the EC Treaty even when the party with an interest in application of those provisions has not relied on them, where domestic law allows such application.[151] After having found that under the Dutch legal order the national judge has the right to raise a plea of law of his own motion, the Community judge, on the basis of the principle of sincere cooperation laid down in Article 10 EC and the effectiveness of Community law, transformed this right into a duty as far as pleas based on a violation of the competition rules of the EC Treaty are concerned.

The Court of Justice, however, added that the principle that in civil proceedings a court must or may raise points of its own motion is limited by the obligation for it to keep to the subject matter of the dispute and to base its decision on the facts placed before it.[152] The Court stressed that this limitation is justified by the principle that it is for the parties to take the initiative in a civil suit and that the court is empowered to act of its own motion only in exceptional cases where the public interest requires its intervention. According to the Court of Justice, that principle 'reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the right of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas'.[153] The Court of Justice therefore concluded that Community law does not require national courts to raise of their own motion

[149] Ibid, para 13.
[150] Ibid, para 14.
[151] Ibid, para 15.
[152] Ibid, para 20.
[153] Ibid, para 21.

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an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim.[154]

This second part of the judgment reveals that the Court of Justice—while seeking to impose on the Member States the responsibility to bear the full consequences in terms of Community law of the choices made by virtue of the principle of procedural autonomy—will always seek not to impose requirements on the national legal systems which would certainly serve the effectiveness of Community law but which would come into conflict with legal conceptions of public policy common to most Member States and which would eventually undermine the 'acceptability' of the Community solution in the national legal systems.

In its judgment of 24 Oct 1996 in *Kraaijeveld and Others*[155] the Court of Justice seemed to adopt a more daring position in the matter. In this case, the Court of Justice was asked to rule on the question whether a national court is obliged to assess of its own motion the compatibility of a national measure with a European directive. The Court of Justice held that, where under national law a court must or may raise of its own motion pleas in law based on binding national rules which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under the provisions of the directive concerned, and take account thereof when examining the action for annulment brought against the national measures implementing the directive.[156] As certain commentators correctly underlined,[157] the Court of Justice thus gave the impression that the national court had a duty to raise pleas concerning the violation of Community law of its own motion irrespective of the question whether the public interest required such intervention.

It flows, however, from the judgment of the Court of Justice of 1 June 1999 in the *Eco Swiss* case[158] that the Court intends to safeguard the equilibrium, defined in *Van Schijndel and Van Veen*,[159] between the obligation for the Member States to bear the consequences of their choice of procedural law concerning the power of the judge to raise a plea of law of his own motion and the concern to respect the common tendency in the national legal systems according to which a judge can only exceptionally act of his own motion

[154] Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen* [1995] [ECR] I-4705, para 22.
[155] Case C-72/95, *Kraaijeveld and Others* [1996] ECR I-5403.
[156] Ibid, para 60.
[157] See M Struys, op cit, 50; E Szyszczak and J Delicostopoulos, 'Intrusions into National Procedural Autonomy: The French Paradigm', *European Law Review* (1997) 141–9.
[158] *Eco Swiss*, cited in n 132 above.
[159] Cited in n 147 above.

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where the public interest so requires. In *Eco Swiss* the Court of Justice was asked to rule on the somewhat different question whether a national court to which application is made for annulment of an arbitration award must grant such an application where, in its view, that award is in fact contrary to Article 81 EC. The national court in question could under its domestic procedural rules grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitration award, effect will not be given to a prohibition laid down by domestic competition law. After having considered that it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of, or refusal to recognise, an award should be possible only in exceptional circumstances,[160] the Court ruled that the fundamental character of Article 81 EC for the accomplishment of the tasks entrusted to the Community justifies that a national court, which under its domestic rules of procedure must grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC.[161]

In this judgment, one can thus perceive the intention of the Court of Justice of limiting the duty of national courts to raise pleas of law on their own motion to cases where there is a breach of a provision of Community law considered to be of a level equivalent to an internal legal provision of public policy. This judgment also shows that the concern of the Court of Justice to see to it that the Member States bear the consequences of their internal choices of procedural law in order to further the objectives of Community law is not limited to the question whether a court is required to raise a plea of law of its own motion, but also covers other matters such as the competence of the court to annul arbitral awards.

V. CONCLUDING REMARKS

Situated at the crossroads of different, yet closely intertwined, legal cultures, the Community judicature is by nature a 'comparative' institution. In its daily activities it is permeated with the values of the surrounding legal systems. The comparative approach is a very important tool for the Community courts to interpret Community law. The Community judicature can apply this approach either for its own use in direct proceedings brought before it or for the benefit of the national courts within the context of preliminary proceedings.

Whether the comparative law method is used to confront rules of national

[160] Ibid, para 35. [161] Ibid, paras 36 and 37.

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law or to compare the Community legal order and one or more other legal orders (whether national or international), it is always inspired by the same objective: to uphold the rule of law in the Community legal order, as prescribed in Article 220 EC. Its purpose is not just to fill *lacunae* in the Community construction, but rather, after having carefully 'taken the pulse' of the national legal systems, to find the *best solution in the 'middle-line' or compromise solution*, which should enjoy credibility and acceptability in the Member States and which will ensure the effectiveness of Community law. Depending on the circumstances, this solution—which is the fruit of a subtle putting into balance of the interests of the evolution of the Community and the acceptability of this evolution in the domestic legal orders—can take the form of a principle, a fundamental right, an interpretation or a construction of Community law based on a legal concept sufficiently common to the Member States. The *solution in the* '*middle-line*' can also be of another kind. In the absence of a '*fundus communis*', the Community courts can develop an autonomous Community solution where they find contradictions in the national legal systems, or may import into the Community legal order a 'proven' national solution, or else may impose on a national legal order the obligation, within acceptable limits, to bear the 'consequences of Community law' of its own internal choices.

The comparative approach thus also becomes an exercise in 'psycho-diplomacy' for the Community courts. These courts are constantly divided between the concern 'not to give up' when confronting national divergences and that of respecting, in the interests of the 'acceptability' of Community law in the domestic legal orders, the national sensitivities and the differences which exist in the legal conceptions and constitutional traditions of the Member States and which, at the same time, constitute the richness of the legal heritage of the Community. This exercise, while very delicate, is of an utmost importance since it makes the national legal orders have confidence in the Community legal order, as the evolution of the case law of the German *Bundesverfassungsgericht* illustrates.

The preceding considerations show that the European Union, which centrally rests on the Community legal order, has its own variant of '*E pluribus unum*', that is a set of interlocking legal orders showing mutual respect for each other based on equivalent levels of judicial protection of the rule of law. That constitutes the common platform for the legal underpinnings of European integration, a *ius commune* built with the bricks of the comparative law method.

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