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Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*

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Abstract: This article examines the Asturcom judgment of 6 October 2009 from the angle of ex-officio application of European law, specifically in terms of procedural autonomy, public policy, and international arbitration. In Asturcom, the ECJ was confronted with enforcement proceedings of a final arbitration award made in the absence of the consumer based on an arbitration agreement that contained a potentially unfair term. The ECJ examined the national rule under the principle of procedural autonomy in the form of the effectiveness and equivalence tests. It extended the use of the 'contextual effectiveness test' developed in Peterbroeck/van Schijndel to Consumer law. Most remarkably, the ECJ has manipulated the 'equivalence test' as to grant certain European norms public policy status on national level. Lastly, in terms of arbitration, the judgment reaches a result that is in conformity with international law.

Résumé: Cet article étudie l'arrêt Asturcom rendu le 6 octobre 2009 vue sous l'angle de l'appréciation d'office du droit européen, notamment les aspects de l'autonomie procédurale, l'ordre public, et l'arbitrage international. Dans Asturcom, la CJUE était confronté par une procédure d'exécution forcée d'une sentence arbitrale définitive rendue en l'absence du consommateur basée sur une convention d'arbitrage qui renferme éventuellement une clause abusive. La CJUE vérifie la règle nationale sous le principe de l'autonomie procédurale en forme des tests d'effectivité et d'équivalence. Elle a élargit l'utilisation du teste de 'l'effectivité contextualisé' développé dans Peterbroeck/van Schijndel en droit de la consommation. Digne d'attention la manipulation de la DJUE du 'teste d'équivalence' qui reconnait pour certains normes européens statut d'ordre public au niveau national. En dernier, en ce qui concerne l'arbitrage, le jugement aboutit au résultat conforme au droit international.

Zusammenfassung: Der folgende Beitrag analysiert den Fall Asturcom vom 6. Oktober 2009. Besonderes Augenmerk wird dabei auf die Frage gelegt, welche Rahmenbedingungen für eine Anwendung des europäischen Rechts von Amts wegen, insbesondere betreffend der Prozessautonomie, öffentlichen Ordnung, und Schiedsverfahren, bestehen. In Asturcom hatte der EuGH über die Durchführung einer Zwangsvollstreckung zu befinden, die auf einem rechtskräftigen und in Abwesenheit des Verbrauchers ergangenen Schiedsspruch beruhte. Es konnte nicht ausgeschlossenen werden, dass die zugrundeliegende Schiedsvereinbarung eine missbräuchliche Klausel enthielt. Der EuGH untersucht die in Streit stehende nationale Regel vor dem Hintergrund des Prinzips der Prozessautonomie in Gestalt der praktischen Wirksamkeit (Effektivität) sowie der Gleichwertigkeit. Er weitet das Prinzip der 'kontextualisierten praktischen Wirksamkeit', entwickelt in Peterbroeck/van Schijndel auf das Verbraucherrecht aus. Bemerkenswert ist weiter, dass der EuGH das Gleichwertigkeitsprinzip transformiert,

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so dass gewisse europäische Normen den Status von öffentlicher Ordnung auf nationaler Ebene erhalten. Letztlich kommt das Urteil in Bezug auf das Schiedsverfahren zu einem Resultat welches mit internationalem Recht im Einklang steht.

1. Introduction

This article discusses the national judge's duty to raise European law ex officio from the perspective of the *Asturcom*[1] ruling from 6 October 2009. The case concerned an enforcement action for an arbitration award containing a potentially unfair arbitration clause that had become final after the lapse of a national prescription period. *Asturcom* answered the question whether there is internal market legislation, in this case the Consumer Directives, whose nature is so fundamental that *in se* it enjoys the status of 'European public policy' and has to be applied ex officio. The European Court of Justice (ECJ) ruled in applying the procedural autonomy test that the 'effectiveness' limb did not require automatic application. Under the 'equivalence' limb, the provision of Consumer law was said to be so fundamental as to have to be treated equal to national public policy. It is this author's interpretation that hereby the ECJ denied the status of a uniformly and automatically applicable 'European public policy' to the Consumer Directives. It did, however, create an indirect form of European public policy, namely by elevating Consumer concerns to national public policy. Whereas the true public policy type would always require automatic application, the indirect type remains contingent on the national legal system having an exception for public policy at all.

Before delving straight into the ex officio application of European law, let us take a step back to grasp the topic globally. Ex officio application is a figure of procedural law that denotes an application of the law by the judge on his own motion rather than due to the impetus of one of the parties. The national civil procedural narrative is staged on a horizontal axis, on which the ownership of the dispute is described as a struggle between the powers of the judge and the parties to frame the dispute. The powers of the judge are analysed as his activeness or passiveness, correlative to the parties' autonomy. This distinction crudely matches the juxtaposition of an adversarial to an inquisitorial procedural system. An 'inquisitorial system', the continental model, might be said to pursue an ultimate and positivistic legal solution as truth. Principally, finding the applicable norm is left to the Court rather than invocation by the parties under the maxim *iura novit curia*, the Court knows the law. The distinction between facts and law, however, nuances the powers of the judge in the maxim *da mihi factum, dabo tibi jus*. The parties establish or own the facts, the Court owns the law. The 'adversarial system' of the common law system is grounded in the parties' opposition towards each other and essentially lets them define the extent or ambit of the dispute. Such conception of legal proceedings is then more narrated as adjudicating a conflict between subjects.

[1] ECJ 6 Oct. 2009, C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* (hereinafter *Asturcom*).

The claim that parties should be in charge of their dispute is grounded in party autonomy, which in turn is rooted in a substantive liberal private law vision. This can and has been challenged by arguing for the social function of procedural law. Procedure and a private dispute do not only affect parties individually but also society as a whole. This can justify interference with legal disputes between private parties. At this point, we come back to the ex officio theme of this article: Both continental and common law models elevate certain 'public interests' above party autonomy. How the balance between societal and individual interests is struck is determined within a legal system and essentially constitutes a tendency towards either social or liberal conceptions, respectively. In addition, the caricature of the difference between continental and common laws breaks down at this point; both models accept public interest as ground for interference of the judge and application of the law regardless of the parties' position.[2]

So, where does the ex officio application of European law fit into the classic rehearsal of procedural law? In applying European law, the answers to 'Who is the master of the dispute?' can be phrased not only in terms of judge/party delimitation but also in terms of European/national law. In other words, the ownership of the dispute is not just a horizontal power struggle between actors but a vertical one between national procedural law and exigencies of European law. Discussions of ex officio application of European law are therefore often coloured in tones of sovereignty. Public interest intrusion of private autonomy, read private relationships, is nothing new at national level. New is the hierarchical dimension and the thought that the public interest can be formulated at European level. This brings us to the last general point. With the involvement of the European level, we reach the second dimension, the principle of procedural autonomy, which has become a vehicle for manifesting Member States' concerns regarding sovereignty over procedure. The factual circumstances of *Asturcom* contained an element of arbitration – a field that traditionally exhibits great resistance against the intrusion of public interest due to its nature as an alternative and private dispute settlement mechanism. *Asturcom* is at the crossing of these tensions, illustrating the impact of European law on private law.

2. The Case

2.1 The Facts

Asturcom Telecomunicaciones SL (Asturcom) and Maria Cristina Rodríguez Nogueira (the consumer) had concluded a mobile phone contract. The consumer defaulted under the contract as she failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired.

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[2] Opinion of AG Jacobs delivered on 15 Jun. 1995 in Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (hereinafter *van Schijndel*). See his overview of the different procedural regimes on public policy in paras 33–45 and on this point particularly para. 37 with the remark that the determination of what constitutes public policy is much more contended between the legal systems.

The contract included an arbitration clause stipulating that disputes should be brought in front of the 'European Association of Arbitration in Law and Equity'. Asturcom initiated proceedings in front of the arbitration tribunal located in Bilbao, which handed down an award decision against the consumer to pay the sum of around EUR 700. The consumer had not become involved at any stage of the proceedings, the result being that after the expiry of the two-month time limitation, the arbitration award became final under Spanish law. Asturcom then applied to the Spanish Court for the enforcement of the arbitration award.

At this point, the Spanish Court stayed proceedings and referred the following preliminary question under Article 234 EC to the ECJ:

> *In order that the protection given to consumers by* [Directive 93/13, the Unfair Terms Directive] *should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?*

2.2 The Case in Front of the ECJ

The judgment was rendered by the First Chamber with Judge Tizzano as Rapporteur, who had been Advocate General (AG) in the closely related *Mostaza Claro*[3] case. In answering the referred question, the ECJ centred on the ex officio issue of the case. Rather than the result of the case, it is particularly the Court's line of reasoning that should deserve our attention.

The ECJ started its argumentation by noting the principles that in previous cases had lead it to require a National Court to assess of its own motion whether a contractual term is unfair. This was particularly the protective purpose of the Unfair Terms Directive based on the assumption that the consumer is a weaker party both in terms of bargaining power as well as knowledge. Specifically, Article 6(1) of the Directive providing that unfair terms shall not be binding on the consumer has the purpose of creating an effective rather than formal balance between the parties. As the Court noted, the 'mandatory' nature of the provision in *Mostaza Claro* leads it to pronounce a duty on a National Court to correct an imbalance by positive actions unconnected with the parties to the contract – that is to require the National Court to assess the unfairness of contract terms on its own motion. The Court distinguished the facts in *Asturcom* by pointing out that the consumer never became involved in the arbitration proceedings and did not challenge the arbitration award in court – whereby after passing of the national time limits for challenge, the award acquired force of res judicata.

[3] ECJ 26 Oct. 2006, C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL.*

The Court then pointed to the importance of the principle of res judicata for both European and national legal orders, the implementation of which in the absence of European rules is left to the Member States. The Court proceeded to subject these national procedural rules to the two pronged test of 'effectiveness of European law' and 'equivalence' – the two limitations to the general presumption of procedural autonomy of the Member States.

Under 'effectiveness', the Court tested whether the national procedural rule makes the application of European law *impossible or excessively difficult*. It then referred to the judgments in *van Schijndel*[4]/*Peterbroeck*,[5] which formulated a 'contextual approach' to effectiveness by examining a given national rule in context – having regard to its role, progress and, as a whole, including the basic principles of the domestic judicial system. In the present case, the Court considered that the arbitration award acquired force of res judicata due to the lapse of the time limit to challenge arbitration awards. The Court reiterated case law on the compatibility of reasonable time limits with European law. It then examined the Spanish two-month time limit to challenge arbitration awards under 'reasonableness' from two points: First, the length of the time limit, which it judged to be sufficient for an assessment *as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared*.[6] The initiation of the time period was held to be reasonable as the time limit commences only at the consumer's notification of the arbitration award, which precludes the expiry of the time period without a consumer being aware of the award. For these reasons, the Court found the national time periods in compliance with the principle of effectiveness and turned to the test of equivalence.

The Court here recalled the basic formulation of the principle of 'equivalence':

> the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must not be less favourable than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking.[7]

The Court stressed the privileged, namely mandatory, nature of Article 6(1) of the Unfair Terms Directive as well as that of the general purpose of the Directive, which is essential to the tasks of the Community under Article 3(1)(t) of the EC Treaty:[8]

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[4] *van Schijndel*, *supra* n. 2.

[5] ECJ 14 Dec. 1995, C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State* (hereinafter *Peterbroeck*).

[6] *Asturcom*, *supra* n. 1, para. 44.

[7] *Ibid.*, para. 49.

[8] With the entry into force of the Lisbon Treaty, according to the table of equivalence, Art. 3 was repealed and replaced 'in substance, by Article 7 of the Treaty on the Functioning of the European

> Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.[9]

The National Court was under a duty to apply European law of its own motion both where it has the duty or discretion to do so for national rules of public policy. The ECJ finished the case with a strong indication that Spanish Courts have acknowledged their ex officio power in award enforcement proceedings in relation to national public policy rules. Though for verification of the referring Court, under the principle of equivalence it was therefore required to examine the unfair term at issue of its own motion.

The last issue concerned the consequences to flow from such ex officio application. These are at the disposition of national law, as long as they ensure the goal of Article 6(1) of the Directive, namely that any unfair terms are not binding on the consumer.

2.3 *The AG's Opinion*

In her opinion, which had been delivered 14 May 2009, AG Trstenjak tackled the referred question by separating the issue of the power of review of the enforcing court from the duty to review. Regarding the first issue, the power of review, she relied on a teleological interpretation of the Directive by stressing the principle of effective judicial protection and the right to be heard, which calls for 'adequate and effective means' to protect consumers against such terms. On the other hand, she pointed out that due to the nature of arbitration proceedings a general reluctance in legal systems of carrying out substantive examinations in the enforcement stage of arbitration awards persists. The Court had held that an imbalance between parties must be corrected by *positive action unconnected with the actual parties to the contract*.[10] The AG took the view that such 'positive action' is not granted in a case where the consumer has to participate in invalid arbitration proceedings. Under the assumption that a consumer could not be required to file an action for annulment *in view of the frequent lack of business experience among consumers*,[11] the National

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Union ("TFEU") and by Articles 13(1) and 21, paragraph 3, second subparagraph of the Treaty on European Union ("TEU")'. Art. 7 TFEU has replaced the extensive list of the EC Treaty and simply reads: *The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.*

[9] *Asturcom*, *supra* n. 1, para. 52.

[10] The AG cites ECJ 27 Jun. 2000, Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA v. Rocié Murciano Quintero* (C-240/98) and *Salvat Editores SA v. José M. Sánchez Alcón Prades* (C-241/98), *José Luis Copano Badillo* (C-242/98), *Mohammed Berroane* (C-243/98), and *Emilio Viñas Feliú* (C-244/98), para. 25 and ECJ 26 Oct. 2006, C-168/05, *Mostaza Claro*, *supra* n. 3, para. 26.

[11] Opinion of AG Trstenjak delivered on 14 May 2009 in *Asturcom*, *supra* n. 1, para. 67.

Court is the first judicial instance to assess the unfairness of a given contract term. Therefore, she followed principles that are recognized also under international law and proposed:

> The enforcement of an arbitration award which is contrary to public policy is prohibited, in the light of the fact that in *Mostaza Claro* the Court implicitly ranked Community-law consumer protection provisions as rules capable of being governed by considerations of public policy.[12]

Here, she reached the point of having to assess the principle of res judicata that could be violated under these circumstances and reviewed the previous case law on this matter. The principle of res judicata had to be in conformity with the principle of effectiveness and equivalence, the procedural autonomy test. Her conclusion in reliance on the 'effectiveness limb' was:

> [A]bove all in view of the need for effective consumer protection and having regard to the case-law of the Court of Justice which expressly requires positive action unconnected with the actual parties to the contract, I am convinced that it may be necessary, in exceptional cases, to disregard the principle of *res judicata.*[13]

From the *Mostaza Claro* judgment, she derived that the assessment of the Court's own motion is a duty rather than mere power.

3. The Issues: Procedural Autonomy, Public Policy, and International Arbitration

How did the ECJ in *Asturcom* find a duty of the National Court to raise the Unfair Terms Directive ex officio during enforcement proceedings for an arbitration award granted on the basis of a consumer contract including a potentially unfair arbitration clause? It reached its judgment in performing four steps of reasoning. First, it distinguished *Asturcom* from *Mostaza Claro*; second, it stressed the principle of procedural autonomy of the Member States as limited by the effectiveness and equivalence. The third and fourth steps consisted in testing the effectiveness and equivalence requirements, respectively. The national rules on time limitation and res judicata passed the effectiveness test. In construing Consumer law to constitute a European rule of equal importance as national public policy considerations, the national rule failed under the equivalence limb. The AG, by contrast, had held that

[12] *Ibid.*, para. 70.
[13] *Ibid.*, para. 75.

the national time limit did not comply with the effectiveness limb of the principle of procedural autonomy.

Regarding (A) the principle of procedural autonomy and the methodology used to establish compliance with the 'effectiveness' limb thereof, the ECJ confirmed that the contextual approach of *van Schijndel/Peterbroeck* is also used for testing the effectiveness of Consumer law application. This can be analysed as an attempt to streamline Consumer law with the increasing importance of the contextual approach to test 'effectiveness' under procedural autonomy in general. (B) From a Consumer law point of view, *Asturcom* finally settled the indeterminacy surrounding the status of Consumer law provisions and its disputed rank as public policy. Most importantly, the ECJ locates the legal authority of Consumer law. Previous consumer cases had led to the finding of a duty on behalf of the National Courts to raise European law, but whether it was Consumer law by itself, effectiveness, or equivalence that required this application remained unclear. *Asturcom* clarified that the unfair term provision of the Unfair Terms Directive constituted mandatory law equal in nature to national public policy under the equivalence limb. (C) From the point of view of international arbitration, *Asturcom* was fundamental in establishing how European law coped with the challenges of alternative dispute settlement. EC Consumer law had to be raised in an enforcement action of an arbitration award to the extent that there was a duty or discretion to raise rules of national public policy rules. The result reached is in conformity with international law obligations of the Member States under the New York Arbitration Convention. Each of these issues will be explored in greater detail below.

3.1 Procedural Autonomy

That we should be concerned at all with questioning in which cases EC law must be applied ex officio is far from evident. Had the ECJ followed the Opinion of AG Darmon in *Verholen*,[14] the national judge would have an entirely different cognition of European law than is currently the case. He had argued that *all* EC law provisions should be raised of their own motion in the National Courts.[15] The argument ran as follows: The doctrine of direct effect and primacy created a duty on the National Court to disapply a national rule that was contrary to a European rule. It followed from *Simmenthal*[16] that this disapplication had to be made on the Court's own motion. Therefore, at the same time, this rule implicitly seemed to rely on a duty to always apply European rules. After all, the national judge could only disapply a national rule contravening EC law of its own motion after considering that

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[14] ECJ 11 Jul. 1991, Joined Cases C-87/90, C-88/90, and C-89/90, *A. Verholen and others v. Sociale Verzekeringsbank Amsterdam*.

[15] Opinion of Mr AG Darmon delivered on 29 May 1991 in *Verholen*, *supra* n. 14, paras 19–22; see also M. Eliantonio, *Europeanisation of Administrative Justice?: The Influence of the ECJ's Case Law in Italy, Germany and England* (Europa Law Publishing, 2009), 130.

[16] ECJ 5 Mar. 1980, 243/78 *Simmenthal*.

European rule in the first place. The question of ex officio application was thus rephrased as a question of primacy.[17] The ECJ did not follow the AG's opinion; the question of the duty to apply European law in 'sequel'[18] to direct effect and supremacy remained untouched and hence open.

Instead, what followed was the creation and rise of the principle of procedural autonomy. Accordingly, since European law is applied in National Courts,[19] Member States are presumed to enjoy procedural autonomy. The origin of the principle of procedural autonomy is located in the wording of the *Rewe/Comet* cases:

> [I]t is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law [...] it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.[20]

This autonomy is limited by (1) the principle of effectiveness, (2) the principle of equivalence, and (3) general principles of European law.[21] The principle of primacy

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[17] Prechal notes the tendency to perceive 'all kinds of obstacles' in terms of supremacy as symptomatic for French legal writing; S. PRECHAL, 'Community Law in National Courts: The Lessons from Van Schijndel', *Common Market Law Review* (1998): 681, 683.

[18] PRECHAL, *supra* n. 17.

[19] With minor exceptions, Competition law holds a special position in respect of application of EC law.

[20] ECJ 16 Dec. 1976, 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, para. 5. Similarly, 'Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter'. ECJ 16 Dec. 1976, 45/76, *Comet BV v. Produktschap voor Siergewassen*, para. 13.

[21] For example, the possibility of a reference to the ECJ must have existed at one stage of judicial proceedings (*Peterbroeck*, *supra* n. 5) or effective judicial protection under Art. 6 of the European Convention on Human Rights (ECHR). The standard reference for this aspect is the *Johnston* case, specifically para. 18 ff. ECJ 15 May 1986, Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*. This third limb of procedural autonomy is not systematically tested in the jurisprudence of the Court. It has, however, in previous jurisprudence been established that the autonomy of national procedural rules can 'fail' under general principles of law. To include it in a list may be a tautology as the principle of procedural autonomy applies only 'in the absence of Community rules governing a matter', and of course the general principles are formulated on Community level. What makes their mention worthwhile in the list limiting procedural autonomy is their nature as principles. Hence, they cannot be applied in a rule per se fashion and instead enter into the testing under the procedural autonomy heading.

determines that, in case of a conflict between substantive European and national rules, the European law rule prevails. Rules of the legal environment, on the other hand, that is *procedural matters in this broad sense as they are organized in the legal systems of the Member States*, only need to ensure that they enable the effective application of EC law or realization of EC rights, respectively. The rationale behind this approach has been explained by AG Jacobs: *It should be noted first that the proper application of the law does not necessarily mean that there cannot be any limits on its application*.[22] Under this 'procedural autonomy' model, EC law enjoys substantive primacy but has to respect procedural autonomy, which challenges EC law to determine the line between 'substantive'[23] and procedural laws. Hence, not all EC law is automatically applied in the Courts of the Member States.

The primacy/procedural autonomy dichotomy[24] represents a fundamental conceptual schism within European law. The perspective one takes thereto boils down to an interpretation of the *Simmenthal* (ex officio application out of primacy and direct effect) judgment juxtaposed with the *Rewe/Comet* (procedural autonomy) line. It is important to understand the fundamental nature of this discord.[25] For the purpose of this article, it is, however, sufficient to observe that in the last ten years

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[22] Opinion of Mr AG Jacobs delivered on 15 Jun. 1995 in *van Schijndel*, *supra* n. 2, para. 31.

[23] Substantive in this respect is probably not a very happy choice of words. It must be read as existing substantively on European level. For Community law, the distinction becomes one of whether an aspect is 'intrinsic' to a European rule or whether it is a procedural rule independent of the EC rule, thus enjoying the margin or procedural autonomy. Such ambiguity was found in *T-Mobile Netherlands* regarding a rule of evidentiary nature (presumption of a causal connection). Evidence under Dutch law was classified as procedural rules. The questions thus rose whether the presumption could be said to be contained in the EC Competition rules itself, thus falling under primacy of EC law, or not, and hence enjoying the benefit of the procedural autonomy testing. The ECJ ruled that the presumption was an intrinsic part of the Community rule so that the National Court is obliged to apply it (para. 46). The case is both a confirmation of the validity of the approach as well as an illustrative example of the models inherent ambiguity on defining a rule to be either procedure or intrinsic to an EC rule. ECJ 4 Jun. 2009, C-8/08, *T-Mobile Netherlands, KPN Mobile NV, Orange Nederland NV Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*.

[24] These two different approaches juxtapose *Simmenthal* and *Rewe* with each other. For an elaboration of the inherent tension and how to reconcile the judgments, see PRECHAL who discusses the relationship between procedural rules, primacy, and direct effect and which is largely congruent with the Opinion of Mr AG Jacobs in *van Schijndel*, *supra* n. 2.

[25] Most famously against procedural autonomy C.N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', *Common Market Law Review* (1997): 1389. See also contributions by Lenaerts as one of the strongest primacists: K. LENAERT & T. CORTHAUT, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *European Law Review* 31 (2006): 287. A different account is followed by M. DOUGAN, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', *Common Market Law Review* 44 (2007): 931. The difference between primacist versus procedural autonomy is explicated very clearly by S. PRECHAL & N. SHELKOPLYAS, 'National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and beyond', *European Review of Private Law* 5 (2004): 589.

the ECJ has developed a very consistent jurisprudence, which relies on the *Rewe/Comet* that is the procedural autonomy line.[26] Accordingly, primacy and procedural autonomy are not antitheses of each other. Therefore, the ECJ presently operates under the premise that European law as it stands does not presume its automatic application. Consequently, ex officio application is principally left to the realm of the Member States' respective judicial organization, subject to the test of procedural autonomy under which European law may require the national judge to apply European law of its own motion.[27]

The issue of procedural autonomy is of course omnipresent in any discussion of ex officio application since the powers of the judge are a crucial feature of national procedural law.[28] This article addresses the *mechanisms* of the principle of procedural autonomy as a 'way of organizing reasons' and creating a 'supportive structure' between reasons and decision.[29] In this way, procedural autonomy is a second-order argument that ranks different legal arguments. The principle of procedural autonomy comprises two tests, the effectiveness and the equivalence test, which we address in turn.[30] The wide potential implications of the *Asturcom* case are due to the fact that *Asturcom* manipulates the use of the legal reasoning mechanism itself.

3.1.1 Effectiveness – From Standard to Balancing

Under the 'effectiveness'[31] limb, the Court tests, respectively, that a national rule must not render 'virtually impossible or excessively difficult' the exercise of rights conferred by European law or must not render 'virtually impossible or excessively difficult' the application of European law. These formulations differ from one

[26] The dichotomy between the two interpretations is not convincing. One can explore a different conceptualization of effectiveness and equivalence to accommodate both elements. The procedural autonomy analysis determines whether a conflict between European and national laws occurs. If it does, primacy solves the conflict in favour of the European norm.

[27] One caution to this generalization may be found in Competition law as a truly European public policy, which might require 'automatic application' (read: ex-officio application). This argument is discussed below in the section on public policy.

[28] Continued criticism of the notion 'procedural autonomy' was in vain, first only the AGs and parties used the notion, but after the *Wells* case [2004] the language has entered, and consistently so, also the ECJ's judgment.

[29] See J. Bengoetxea, N. Maccormick & L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in *The European Court of Justice*, eds Grainne de Burca & Joseph H.H. Weiler (Collected Courses of the Academy of European Law, 2001) for an instructive elaboration of the 'legal reasoning' approach applied to the EC J.

[30] Leaving aside the discussion whether fundamental rights do constitute a third element of procedural autonomy or stand outside of the test.

[31] For a very original and differentiated discussion of the meaning and importance of the principle of 'effectiveness' for the European legal order, see M. Ross, 'Effectiveness in the European Legal Order(s): beyond Supremacy to Constitutional Proportionality', *European Law Review* 31 (2006): 476.

another as one is geared to the protection of a right, the other towards the protection of the law itself. These two formulations, from which the ECJ seems to choose the 'better fit' to a legal problem, exemplify a subjective or an objective approach, respectively.[32] Subjective in this context refers to a specific interest of an individual or group-based test, whereas objective relates to the pure application of law in order to protect a wider common interest of society. The distinction can also be formulated as effectiveness of a right versus effectiveness of policy-based approach.

In *Asturcom*, the Court jumps from one phrasing to the other, beginning with an objective, concluding with a subjective formulation. This suggests that the protected interests are not mutually exclusive.[33] In Consumer law, the ECJ generally uses the formulation that a national rule may not make 'virtually impossible or excessively difficult' the exercise of consumer rights. In both formulations, 'effectiveness' functions as a standard or threshold. Further the intensity of the standard applied was discussed, as it is sometimes expressed in terms of adequacy or a more stringent 'full effectiveness' rather than the mere 'virtually impossible or excessively difficult' wording.[34]

The test of 'effectiveness' was reshaped in the *van Schijndel/Peterbroeck* cases, by which the ECJ when testing the 'effectiveness' of a national rule created an additional and seemingly cumulative consideration:

> [N]ational procedural provisions [. . .] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national instances. [context part] In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration [balancing part].[35]

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[32] The acceptance of the terms subjective and objective for the indication that the protected interest can either be specific or general varies with the legal tradition. The distinction is meant similar to the French distinction between 'public policy rules designed to order society (*règles d'ordre public de direction*), adopted in the general interest and which the court may raise of its own motion, and public policy rules designed to protect specific interests (*règles d'ordre public de protection*), adopted in the interest of a particular category of persons and which may be relied upon only by persons belonging to that category'. See ECJ 4 Oct. 2007, C-429/05, *Max Rampion and Marie-Jeanne Godard, née Rampion v. Franfinance SA and K par K SAS*, para. 58.

[33] I do think that there a significance in differentiating between objective and subjective might arise by arguing that the Consumer behaviour can impact on the validity of his right in negligent behaviour whereas his behaviour should be beyond impact for general public interest in application of a rule.

[34] Seyr in her thesis on effectiveness/*effet utile* finds that the formulation used by the ECJ does not influence the outcome. Where the ECJ deploys the test of full effectiveness, the outcome is not more intrusive into national procedural autonomy than where it uses the 'virtually impossible' formulation. S. Seyr, *Der Effet Utile in der Rechtsprechung des EuGH* (Duncker & Humblot, 2008).

[35] ECJ 14 Dec. 1995 C-312/93, *Peterbroeck*, *supra* n. 5.

The structure of the effectiveness test changed from being standard to a new emphasis of the national context and a subsequent balancing thereof. Generally, the *van Schijndel/Peterbroeck* test is therefore referred to as 'contextual approach'.[36] Accordingly, the rationale of a given procedural rule can justify a restriction or limitation on the bringing of a claim based in EC law. The Court referred to rights of the defence, legal certainty, and proper conduct of procedure, but we can also think about, for example, unjustified enrichment.[37,38] However, the test goes further than a merely 'contextualized' understanding of a national procedural rule, which would only imply a method for determining the 'real' nature of a national rule. In addition, the basic principles upon which these national rules are based must *be taken into consideration*. Herein lays the truly fundamental importance of the contextual approach: National procedural law receives standing. By taking into consideration national procedural rules, these can enter into conflict with EC law requirements. The conflict is not automatically resolved by primacy as a rule but under a balancing exercise. It is, however, not an alternative to effectiveness as a standard. In understanding the contextualized *van Schijndel/Peterbroeck* test as a balancing exercise, effectiveness as a standard is used to determine the EC law side of the balance. The EC law interest is then balanced against the contextualized national procedural provision.[39]

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[36] Sometimes the *van Schijndel/Peterbroeck* case law is referred to as 'purposive approach' because it is the purpose of the national rule that is taken into the legal reasoning. This is not very fitting: It is not only the purpose ('the role of that procedure') of the national rule that plays but the context, which is a wider notion including role, progress, and various judicial instances. Moreover, the purpose as teleological reasoning is taken into account on both levels, Community and national. The balancing aspect is the novelty. The ECJ and commentators have referred to the passage of the judgment in a unitary way so that in discourse contextualization and balancing are not separated. Hence, the preference for 'contextual approach' to designate both parts.

[37] ECJ 13 Jul. 2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v. Fondiaria Sai SpA* (C-296/04), *Nicolò Tricarico v. Assitalia SpA* (C-297/04), and *Pasqualina Murgolo v. Assitalia SpA* (C-298/04).

[38] In other words, the Court balances the domestic national interests, with the interest of the European claim. Some authors have maintained that it is European general principles that are being balanced. Alone on a literal reading of the judgment, this reasoning can be rejected, as the Court clearly speaks of the national context, which has to be taken into account.

[39] For strong criticism on the use of the 'effectiveness' limb in general, see A. Ward, 'Do unto Others as You Would Have Them Do unto You: Willy Kempter and the Duty to Raise EC Law in National Litigation', *European Law Review* 33 (2008): (739), 753. According to her, the effectiveness as a standard is too indeterminate, and the contextual approach too unstructured. She therefore proposes to streamline the ECJ's jurisprudence with Art. 6(1) ECHR case law, according to which 'non-discriminatory temporal limitations to the enforcement of Community law, at national level, would only need to be disapplied, under EC law, if they struck at the "very essence" of right of access to a court, failed to pursue a legitimate aim, and were disproportionate'. In my reading of the case, all these elements are already implicit in the effectiveness under the *Peterbroeck* test, with the possible exception of the 'very essence' element. A clearer articulation within effectiveness testing would

3.1.2 Consumer Law in the Procedural Autonomy Test

The 'contextualized approach' is regularly applied by the ECJ within testing procedural autonomy, albeit not in systematic fashion. Not so in Consumer law, where almost all cases were decided on the basis of an exclusively teleological rationale (what is the aim of a given provision), in which effectiveness acted as a standard instead of the balancing/contextualized approach. The case law located the duty to apply Consumer law ambiguously in the specific nature of Consumer law, the values and purposes of Consumer Directives, rather than a clear subsumption under the equivalence or effectiveness balancing approach.[40] Neither in *Océano Grupo*[41] [2000], *Mostaza Claro* [2006], or *Rampion and Godard*[42] [2007] had the Court made reference to the *van Schijndel/Peterbroeck* balancing test. In *Cofidis* [2002], it did but used the context not the balancing bit of the formulation.[43] *Pannon*[44] [2009] does not contain a reference to *van Schijndel/Peterbroeck*, but the Court arguably performs a brief balancing.[45] In all of these cases, the exigencies of EC Consumer law prevailed and in the outcome ex officio application was required. As a result, due to their intrusive nature into national procedure, Consumer law cases were hovering grouped together in a special bubble, the legal authority's origin of which remained disputed.

Regarding the ex officio application of general European as opposed to European Consumer law, *van der Weerd*[46] seems the most metajudicial judgment that addressed the question of the nature of Consumer law. The ECJ organized its case law in three categories: (1) the *Peterbroeck* case as access to justice and the opportunity to rely effectively on the incompatibility of a domestic provision with European law; (2) the specificity of the Unfair Terms Directive and the consumer as a group worthy to be given effective protection (*Océano Grupo*, *Cofidis*, *Mostaza Claro*); and (3) the ruling in *Eco Swiss*[47] as belonging to the 'equivalence' test. Only

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nevertheless be desirable. I do agree with Ward's criticism of the indeterminacy of the effectiveness test as standard.

[40] In the same direction, J.H. Jans, *Europeanisation of Public Law* (Europa Law Publishing, 2007), arguing that the ex-officio application is 'not always approached along the lines of Van Schijndel and Peterbroeck'.

[41] *Océano Grupo*, *supra* n. 10.

[42] *Rampion and Godard*, *supra* n. 32.

[43] ECJ 21 Nov. 2002, C-473/00, *Cofidis SA v. Jean-Louis Fredout*.

[44] ECJ 17 Sep. 2009, C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Gyrfi*.

[45] *Ibid.*, para. 34: 'the specific characteristics of the procedure for determining jurisdiction, which takes place under national law between the seller or supplier and the consumer, cannot constitute a factor which is liable to affect the legal protection from which the consumer must benefit under the provisions of the Directive'.

[46] ECJ 7 Jun. 2007, Joined Cases C-222/05 to C-225/05, *J. van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit* (C-222/05), *H. de Rooy sr. and H. de Rooy jr v. Minister van Landbouw, Natuur en Voedselkwaliteit* (C-223/05), *Maatschap H. en J. van't Oever and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit* (C-224/05), and *B. J. van Middendorp v. Minister van Landbouw, Natuur en Voedselkwaliteit* (C-225/05).

[47] ECJ 1 Jun. 1999, C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*.

then did it proceed to test the general requirement of effectiveness in the concrete case under the *van Schijndel/Peterbroeck* contextual approach. Remarkably therefore, the ECJ in its 'organization' of case law continued to treat Consumer law outside of the box of ordinary procedural autonomy testing, or at least on a very high end of a gradation of effectiveness.[48] It explicitly acknowledged the duty to apply Consumer law as a separate category, a category beyond balancing and equivalence considerations.[49] In its open and strong teleological consideration, the consumer jurisprudence significantly diverged from the general case law line.

With this previous categorization, *Asturcom* sits uneasy. Especially, the sui generis status that had been accorded to Consumer law in *van der Weerd* is not confirmed. On the contrary, in *Asturcom*, the ECJ clearly subjects Consumer law to the exigencies of procedural autonomy, namely understood as a principle covering the jurisprudence rendered in *Rewe/Comet* and limited by the principles of equivalence and effectiveness. What is interesting is that the Court uses the *van Schijndel/Peterbroeck* approach to determine compliance of the rule with the effectiveness limb. *Asturcom* in this respect can be read as an attempt to streamline Consumer law cases with the general, often administrative, body of law regarding procedural autonomy. The jurisprudential developments, I would predict, move towards a point of stabilization. Procedural autonomy as a principle has been firmly enshrined in the European legal order, and the ECJ dogmatically sticks to the effectiveness and equivalence test – even in the field of Consumer law.

3.1.3 Res Judicata as the Starting Point

If procedural autonomy is conceived of as a frame, whatever is picked as the central object to the effectiveness and equivalence test literally changes the picture. Which rules we subject to the test determines the rules to be balanced and determines the case outcome. In *Asturcom*, the balancing is formally made between, on one hand, the objective of the Unfair Terms Directive (replacing the formal balance of the contract with an effective balance between consumer and other party) and, on the other hand, the requirements of res judicata coupled with the fault element of the consumer (the consumer's inertia).[50] The Court locates the principle of res judicata

[48] As the AG suggested, the consumer is situated at a very high end of a sliding scale of effectiveness, see the Opinion of the AG in Joined Cases C-222/05 to C-225/05, *van der Weerd*, *supra* n. 46, para. 23: 'The question whether in practice it is excessively difficult to exercise a right can be a matter of a sliding scale'.

[49] See also J.J. van Dam & J.A.R. van Eijsden, 'Ex Officio Application of EC Law by National Courts of Law in Tax Cases, Discretionary Authority or an Obligation?', *EC Tax Review* 1 (2009): 16, 20.

[50] *Asturcom*, *supra* n. 1, para. 34: 'Accordingly, it is necessary to determine whether the need to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them requires the court or tribunal responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert his rights and notwithstanding the fact that the domestic rules of procedure apply the principle of res judicata'.

on both European and national levels. This is a typical example of the Courts reconciliatory approach. Rather than framing an issue as a conflict between European and national exigencies, it creates an overlap, a fiction, of a single norm expressed on both levels. By stressing the need *to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions that have become definitive can no longer be called into question.*[51] For both legal orders, the reasoning mitigates the conflict. The ECJ then subjected the national two-month time limit to a reasonableness test, holding it to be *reasonable in that it enables both an assessment to be made as to whether there are grounds for challenging an arbitration award and, if appropriate, the action for annulment of the award to be prepared.*[52]

By framing the procedural rule at issue, the ECJ narrates the case as one of time limits. That an important moment of choice had already passed at this stage of reasoning is pinpointed by the alternative account of the AG. She had analysed the question as one regarding access to justice rather than time limits. An access to justice test would have considered whether there was an effective opportunity to rely on a right and the question of whether the consumer can be expected to bring judicial proceedings against an arbitration award at all. The ECJ's reasoning was also contingent on this question, but it circumvented a reasoned consideration thereof. Yet, for the consumer rationale the issue was not so much the adequacy of a time limit but the duty of the consumer to bring proceedings as such.

3.1.4 Subjective versus Objective Effectiveness and a Discussion of the Consumer Right

The consumer's behaviour figured as an element taken into consideration within the effectiveness limb of procedural autonomy. The behavioural element ultimately tipped the scales within the effectiveness consideration:

> the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a National Court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro*, but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final.

Non-reliance of a consumer on his right seemed to compromise the existence of the right; differently formulated, the consumer forfeited his rights by not participating actively at any stage of the legal proceedings.

[51] *Ibid.*, para. 36.
[52] *Ibid.*, para. 44.

The ECJ had seemingly previously denied this,[53] indicating that the costs of bringing judicial proceedings could be so deterring on the consumer that certain terms of Consumer law should be applied ex officio for that reason alone. It had relied on the *imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract*,[54] of ensuring effective protection *in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them*,[55] and the fact that the protection of the Directive *thus extends to cases in which a consumer who has concluded with a seller or supplier a contract containing an unfair term fails to raise the unfair nature of the term, whether because he is unaware of his rights or because he is deterred from enforcing them on account of the costs that judicial proceedings would involve*.[56] In addition, the ECJ had previously relied on the deterrent function of such review by the Courts.[57] One therefore has to wonder what changed in the *Asturcom* constellation of facts. Just the same, Mrs Rodríguez Nogueira might be ignorant as regarding her right not to be bound by an unfair term, or more likely still, she might not even be aware that the term was unfair at all. Second, the costs of initiating court proceedings in minor claims remain just as deterrent. In addition, one might add a third additional point. How many laypeople or consumers are actually aware of the qualitative difference between arbitration and judicial proceedings? If arbitration is perceived as a judicial instance by the consumer, the bar for actually initiating proceedings is raised another notch.

As touched upon above, the ECJ does not clearly distinguish between testing the 'effectiveness' of the law objectively or a specific right subjectively. However, if we understand *Asturcom* to rely on a fault element that consists of the consumer not having brought an action, then the ECJ seems to rely on a subjective interpretation of effectiveness. After all, the 'effectiveness' requirements of the law objectively and the general interest that it protects are not influenced by the behaviour of the consumer.[58] Of course, one can also translate the behaviour 'not bringing an action' not as a behavioural difference but as objectified difference regarding the nature of the proceedings (enforcement as opposed to annulment actions), that is the difference between *Mostaza Claro* and *Asturcom*. Whereas both disputes involved an arbitration award, *Mostaza Claro* was a reference in an action for annulment of the

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[53] *Pannon*, *supra* n. 44.

[54] *Océano Grupo*, *supra* n. 10, para. 27.

[55] *Ibid.*, para. 28.

[56] *Cofidis*, *supra* n. 43, para. 34.

[57] *Océano Grupo*, *supra* n. 10, para. 28, *Cofidis*, *supra* n. 43, para. 32.

[58] As Pound already cautions: 'when it comes to weighing or valuing claims [. . .] we must be careful to compare them on the same plane [. . .]. If we think of either in terms of a policy we must think of the other in the same terms [. . .] If the one is thought of as a right and the other as a policy, or if the one is thought of as an individual interest and the other as a social interest, our way of stating the question may leave nothing to decide'. R. Pound, 'A Survey of Social Interests', *Harvard Law Review* 57 (1943): 1, 2.

arbitration award whereas *Asturcom* was referred in an action for enforcement thereof.

By stressing the 'inertia' of the consumer, the ECJ implicitly relied on the fiction that there is a difference between the consumer not having taken any judicial steps 'at all' and the consumer having brought an action for annulment be it outside of the time limits. Under the New York Convention (see below), these facts indeed would have made a difference. However, one may wonder what this distinction really is, generating insecurity about outcomes in cases in which consumer had become active but so after the prescription of time limits. The open scenario is that of a consumer trying to rely on the Consumer Directive only in enforcement proceedings, when he had not previously raised the argument and the time limits for an annulment action passed. Though not the focus of this article, we may at least in passing note the discussion regarding the legitimacy of the use of jurisdiction and arbitration clauses in consumer contracts in general.[59]

3.2 Public Policy

3.2.1 Is There a European Public Policy?

Briefly summarized, the AG came to the conclusion that because the National Court was the first independent instance able to scrutinize the terms of a contract, it had to be able to review an arbitration award in enforcement proceedings. The Court reached the same conclusion, however, via a markedly different path of argumentation: Whereas the AG reached the duty of the judge to apply European law under the principle of effectiveness, the ECJ only did so under the principle of equivalence, which is contingent upon the national legal orders.

In first instance, we noted that based on the facts in *Asturcom*, Consumer law was not able to engage ex officio application from a point of view of effectiveness of the Unfair Terms Directive. The Court then proceeded (note the sequence!) to test the equivalence limb of procedural autonomy. The second and paramount importance of the *Asturcom* ruling lies in the clarification that Consumer law, at least Article 6(1) of the Unfair Terms Directive, has the status of a 'mandatory provision'[60] ranking equal to national rules of public policy and does so under the principle of equivalence.

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[59] Principally, arbitration must be voluntary; which can be questioned on grounds of the parties' difference in bargaining power. Bates additionally cites the 'repeat-player' advantage, the threat to consumer's due process due to incorrect application of legislation, the costs of arbitration for the consumer and limited appeal possibilities. She thus pleads for excluding consumer contracts from arbitration, due to the fact that the advantages (e.g., transaction costs) of the arbitration process for businesses do not materialize in relation to consumer disputes. D. Bates, 'A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?', *Fordham International Law Journal* 27 (2004): 823.

[60] *Asturcom*, *supra* n. 1, para. 30.

The importance of this clarification can only be understood by placing *Asturcom* in the public policy discourse that preceded the judgment. Though not all of the *acquis* would be applicable as a public policy matter of fact, it remained open whether not at least some EC law provisions were 'more equal' than others arose first in the field of Competition law after the *Eco Swiss* case. Competition law was an obvious candidate due to its hierarchical and central standing in the EC legal order as well as the fact that, traditionally, Competition law rules figure among the internationally accepted rules of *ordre public international*. The question became whether there were European rules that qualified as public policy/*ordre public*[61] or to classify their mandatory nature as either domestic, international, or transnational.[62] Domestic public policy traditionally is a more far-reaching, more encompassing concept,[63] for example, the New York Convention committee endorsed a narrow view of public policy.[64] International public policy still refers to a national vision on what all other nations would perceive to be a concept of public policy. Due to its theoretically greater generalizability, it is, at the same time, more narrow as the exceptions it permits will tend to be more limited exactly for the reason that they are said to be applicable (albeit be it still from a national point of view) to other countries as well. Truly international public policy in a transnational sense, on the other hand, presumes an 'objective concept of international public policy'.[65] Under truly national public policy, the identification of a rule as public policy as well as the rule formulation remain on domestic level ('national public policy'). Under a true European transnational public policy, both identification and rule formulation move to EC level ('European public policy'). *Asturcom*, however, confirmed a third option: Certain European provisions carry such fundamental importance as to require internally in the law of the Member States to be classified as public policy. The Member States remain free to attach the consequences and to design the laws to their public policy. The rules remain of the *ordre public national* in a third mixed option. They are European in the sense that EC law determines their standing within the national legal order ('indirect EU public policy' as national public policy with European origin). The distinction is a vital one, which lies at the heart of the significance of the *Asturcom* ruling.

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[61] Public policy and *ordre public* is used interchangeably here. *Ordre public* has been argued as a wider notion than the notion of public policy. The different language versions of ECJ cases defy this interpretation; public policy is consistently translated as *ordre public*. Hence, in *Asturcom* the Court ruled that '*doit être considéré comme une norme équivalente aux règles nationales qui occupent, au sein de l'ordre juridique interne, le rang de normes d'ordre public*'. *Ibid.*, para. 52.

[62] J.D.H. Wires, *The Public Policy Sword and the New York Convention: A Quest for Uniformity* (SSRN eLibrary, 2009), 7.

[63] *Ibid.*, 8; A. van den Berg, 'Distinction Domestic-International Public Policy', in *Yearbook Commercial Arbitration*, ed. A. van den Berg (Kluwer Law International, 1996).

[64] Wires, *supra* n. 62, 8, citing Report of the Committee on the Enforcement of International Arbitral Awards, 28 Mar. 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1.

[65] *Ibid.*, 10.

3.2.2 *Truly European or a National Public Policy of European Origin?*

The contentious point was whether *Eco Swiss* could constitute authority for considering Competition law as a European public policy of the *ordre public international* type or whether it remained *ordre public national*. The ECJ had held that where *domestic rules of procedure require a National Court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) EC.*[66] Under the principle of equivalence, though the Court did not expressly name it, Article 81 EC enjoyed equal footing with other provisions on national public policy. The Court grounded the particular status of Article 81 EC in two authorities: (1) The first was Article 3(1)(g) EC, which is *essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.*[67] (2) The fact that agreements and decisions prohibited according to the article are automatically void under Article 82(2) EC.[68]

Regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Court held that Article 81(1) EC must be regarded as a matter of public policy within the meaning of the Convention. The Convention provides that recognition and enforcement may be refused on national public policy grounds.[69] By providing that Article 81 EC constitutes a reason of public policy, the ECJ created an external face of Communitarian public policy. On the internal side, Article 81 EC was levelled with national public policy. Because its application remained contingent on national law, no independent and automatically applicable European public policy was created.

According to this view, it is only indirectly under the principle of equivalence that Competition law became a rule of public policy; according to another view, *Eco Swiss* created a European public policy rule.[70] However, considering that *Eco Swiss* explicitly referred to the duty to grant an application for annulment of an arbitration award *where its domestic rules of procedure require it [. . .] founded on failure to*

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[66] *Eco Swiss*, *supra* n. 47, para. 37.

[67] *Ibid.*, para. 36.

[68] *Ibid.*

[69] 'The public policy of that country'. Since all Member States have ratified the New York Convention, all Member States effectively enjoy the possibility under that Convention of not recognizing and enforcing an arbitration award on grounds of national public policy. The question is whether under the principle of equivalence such a power to derogate for national public policy reasons, in an issue involving European law, does not easily turn into a duty to derogate.

[70] Consequently gave rise to the reference in *van der Weerd*, *supra* n. 46, see the Opinion of the AG Maduro: 'Is this any different when the Community rule at issue is fundamental? In its order for reference, the referring court contemplates the possibility that some norms may be of such crucial importance that Community law regards them as rules of "public policy" and thus requires national courts to apply them of their own motion', para. 26.

observe national rules of public policy,[71] a merely textual interpretation must arrive at the conclusion that, by nature, public policy remained at national level. An interpretation later confirmed explicitly in *van der Weerd*, which explicitly grouped *Eco Swiss* as a case decided under the equivalence principle and hence of indirect European public policy only.[72]

While the interpretation of *Eco Swiss* nevertheless remained disputed,[73] the Court referred to the judgment in *Mostaza Claro* – a consumer case – and the public policy discussion, which had broken out in the Competition area and moved into Consumer law. The eager reception of the discussion points to a need for a legal explanation to justify the unspecified source of authority for the very intrusive and far-reaching nature of the case law in this area. *Mostaza Claro*[74] concerned the validity of an arbitration clause under the Unfair Terms Directive. The Court only referred one question, namely whether the Court must examine the unfairness of the clause even when *that issue is raised in the action for annulment but was not raised by the consumer in the arbitration proceedings*.[75] The Court, rather unsurprisingly after the judgments in *Océano Grupo* and *Cofidis*, found that the Court was required to determine whether an arbitration agreement is void even if that argument had not been raised in previous arbitration proceedings.

AG Tizzano in *Mostaza Claro* had remarked that there were two ways in which to reach the very same conclusion.[76] Both by means of drawing an analogy to *Eco Swiss*, however one arguing the status of the Unfair Terms Directive needed to be considered as public policy, the other by means of fundamental right to a fair hearing argument. The AG suggested the latter approach in presenting the *Krombach*[77] case under which the ECJ had held that insufficient protection of the defendant's right to defence could constitute enough ground to have recourse to the public policy exception. As fundamental right of the European Union (EU), and common to the Member States, the right to be heard would therefore have been elevated to public policy status, rather than the consumer Directive itself. The ECJ did not follow the Opinion: *The nature and importance of the public interest*

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[71] *Eco Swiss*, *supra* n. 47, paras 37 and 41.

[72] The same solution was also advocated by AG Maduro: 'However, it would be mistaken to conclude from Eco Swiss that the principle of effectiveness requires that some Community norms, on account of their importance for the Community legal system, must be applied by national courts even where the parties have failed to rely on them'. *van der Weerd*, *supra* n. 46, para. 27.

[73] Prechal & Shelkoplyas, *supra* n. 25, (589) 600, who argue that *Eco Swiss* decided the public policy character of Art. 81 EC only for the context of review of arbitration awards.

[74] The facts and question of the case are pretty straightforward: Mostaza Claro had concluded a contract with a mobile operator, and when she did not comply with the minimum subscription period, was granted a period to refuse the arbitration proceedings. She did not object, the arbitration body found against her, at what time she contested the clause in front of the referring Court.

[75] *Mostaza Claro*, *supra* n. 3, para. 20.

[76] Opinion of AG Tizzano in *Mostaza Claro*, *supra* n. 3.

[77] ECJ 28 Mar. 2000, C-7/98, *Dieter Krombach v. André Bamberski.*

underlying the protection that the Directive confers on consumers justify, moreover, the National Court being required to assess of its own motion whether a contractual term is unfair.[78] Again, it was Consumer law as such rather than judicial protection arguments that explained the National Court's duty to apply European law. On *Eco Swiss*, that is Competition law, the Court confirmed a restricted interpretation, namely that Competition law fell under the principle that *equal treatment is given to pleas based on national law and those based on Community law*.[79] Hence, Competition law remained at the level of *ordre public national*.[80] By contrast, where should the special nature of Consumer law be legally rooted? Did previous judgments imply that Consumer law occupied a position similar to a European public policy, just as the Competition law or was the special nature attributable alone to the strengths of the public interests protected?

3.2.3 Asturcom *on the Nature of the Consumer Law Provision as National Public Policy*

The wording of *van der Weerd* and *Mostaza Claro*[81] did not refer to national provisions as gates for public interest considerations. Therefore, in Consumer law, speculation on the nature of Consumer law remained vivid. They could be true and independent European public policy, or remain part of *ordre public national*. Under another interpretation, Consumer law would not at all be a Communitarian public interest (be it independently or dependent on the national public interest notion). Rather, consumer rights enjoyed a different presumption under the effectiveness limb of procedural autonomy – in other words if effectiveness is a *sliding scale*, the Consumer finds itself on the higher end thereof.[82] These three interpretations rivalled on the nature of the Consumer law provisions, and there were good arguments for each of them.

The AG in *Asturcom* favoured an independent European public policy. She therefore pleaded for the EU to 'embrace' a principle according to which the enforcement of an arbitration award that is contrary to public policy is prohibited.[83] This principle would be grounded in a reading of the *Mostaza Claro* case ranking Consumer law *implicitly [. . .] as rules capable of being governed by considerations*

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[78] *Mostaza Claro*, *supra* n. 3, para. 38.

[79] *van der Weerd*, *supra* n. 46, para. 40.

[80] Main confirmation for the true public policy theory was read into the *Manfredi*, *supra* n. 37. However, even a very recent case, *T-Mobile Netherlands*, *supra* n. 23, states that Competition law is 'automatically applicable' – a point in favour of a true European public policy case. In my opinion, the development in the field of Competition law has not reached a conclusive stance as to whether or not at least Art. 81(3) EC may be regarded as a directly applicable and thus true European public policy provision.

[81] 'The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair.' Mostaza Claro, *supra* n. 3, para. 38.

[82] See Opinion of the AG in *van der Weerd*, *supra* n. 46.

[83] Opinion of the AG in Case C-40/08, *Asturcom*, *supra* n. 1, para. 70.

of public policy.[84] Accordingly, the AG found a duty on the National Court to reject an application for enforcement of a final arbitration award. The reasoning was subsumed under the effectiveness limb and by raising Consumer law to public policy without the need for a connection to a national provision – as under the equivalence limb – that would elevate Consumer law to a truly European public policy. Especially, *Mostaza Claro*, perhaps in an analogy to the *Eco Swiss* ruling under Competition law, had received such an interpretation widely shared in the literature.[85]

The ECJ did not follow. *Asturcom* decided that the nature of the European measure in question matters but only insofar as a measure that is fundamental or sufficiently important will be classified as equal to national public policy under the equivalence test. The ECJ grounded the special mandatory nature of the measure in three factors: (1) the mandatory nature of Article 6(1) of the Unfair Terms Directive, (2) the fact that consumer protection constitutes a measure essential to the accomplishment of the EU's tasks under Article 3(1)(t) EC, particularly raising the standard of living and the quality of life in its territory, and (3) the nature and importance of the public interest underlying the protection that the Unfair Terms Directive confers.

The argument therefore relates only to the way national public policy is elaborated. We have, on one hand, potentially and depending on one's reading of *Eco Swiss*, *Manfredi*, *T-Mobile*, not to forget *Ingmar*, a set of true European public policy as *ordre public international* rules in the sense that they are automatically applicable in National Courts, due to primacy. The relevance of *Asturcom* is that it creates a hybrid or third form of 'indirect European public policy' – the ECJ determines under 'procedural autonomy' and thereof the equivalence limb that Article 6 (1) Unfair Terms Directive engages the same consequences as national

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[84] Opinion of the AG in Case C-40/08, Asturcom, *supra* n. 1, para. 70.

[85] The Opinion of the AG in *Asturcom*, *supra* n. 1, cites several articles in para. 41: 'Jordans, R., "Anmerkung zu EuGH Rs. C-168/05 – Elisa Maria Mostaza Claro gegen Centro Móvil Milenium SL", *Zeitschrift für Gemeinschaftsprivatrecht* (2007), 50, which interprets the judgment to the effect that the Court regarded the unfair nature of the clause in question as being so serious that it was a matter of public policy. In the view of Loos, M., "Case: ECJ – Mostaza Claro", *European Review of Contract Law* 4 (2007): 443, the Court accorded the mandatory provisions of the directive on consumer protection the status of rules of public policy, as it had done previously in connection with the rules on competition. Poissonnier, G./Tricoit, J.-P., "The CJEC confirms its intention that the national courts should implement Community consumer law", *Petites affiches*, September 2007, No 189, 15, observe that, unlike the Commission, the Court has not expressly classified Community consumer protection legislation as rules of public policy. Nevertheless, they take the view that the Court's arguments in that judgment may be interpreted in such a way. In the view of Courbe, P./Brière, C./Dionisi-Peyrusse, A./Jault-Seseke, F./Legros, C., "Clause compromissoire et réglementation des clauses abusives: CJCE, 26 octobre 2006", *Petites affiches,* 2007, No 152, p. 14, this case-law of the Court of Justice elevates the consumer protection rules in Directive 93/13 to the status of rules of public policy'.

public policy. The rules and hence consequences for the hybrid form remain determined by national law.

3.3 International Arbitration

In order to understand the factual situation that gave rise to the *Asturcom* case, it is important to bear in mind the specificities of arbitration proceedings as alternative dispute settlement mechanisms. The pertinent feature of arbitration is that the parties voluntarily, that is by agreement, undertake to settle their dispute in a private forum rather than the public courts. A neutral third party then renders a decision – the arbitration award – which then typically can be challenged, recognized, or executed judicially. The process of arbitration can generate different legal moments; the arbitration proceedings and, on the judicial level, the action for annulment as well as recognition or enforcement of the award. The grounds for interference by Courts are generally interpreted narrowly. International arbitration distinguishes between the powers of review of the Court in annulment actions from those in enforcement actions. Specifically, in 'mere' actions of enforcement, a case is not reopened *ab initio* and examined in substance unless for reasons of public policy. The question to which extent the application of EC law is required ex officio is specifically sensitive from an arbitration point of view, as the review powers of the judge are normally largely limited. Furthermore, in theory, for each of these actions, EC law could formulate different requirements regarding the duty of a National Court to raise EU law.

In a case involving both arbitration and the ex officio application of EC law in an award enforcement action, one might have expected the ECJ to reason in terms of the special nature of arbitration proceedings. AG Trstenjak had considered the national traditions of the Member States that typically consider enforcement proceedings not as a procedure in which the judge carries out a substantive (re-)assessment of the case. Substantive pleas in law by the parties are thus curtailed, as are the review powers of the judge.[86] The safety net of State authority within the private nature of arbitration proceedings is then public policy, as codified in several Member States and international law.[87] Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards recognizes public policy as a ground for refusing recognition and

[86] Opinion of the AG in *Asturcom*, *supra* n. 1, para. 62.

[87] Similarly, 1985 UNCITRAL Model Law Art. 36 but without a definition of public policy. In addition, Art. 29(2) of the 1966 Council of Europe Convention providing a Uniform Law on Arbitration, which was, however, only ratified by Belgium even though at the time of its inception this Arbitration Convention was taken to be the decisive ground for excluding arbitration from the scope of the Brussels Jurisdiction Convention, now Brussels I Regulation in Art. I(4). See, for the consequences of the exclusion of arbitration from the Brussels Regime, H. van Houtte, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?', *Arbitration International* 21 (2005): 509. Member States hence remain bound by the regime of the New York Convention.

enforcement of a foreign award but takes a narrow view on public policy by defining it as public policy of the country in which enforcement is sought only.

In the *Asturcom* judgment, even though the considerations on arbitration proceedings might have been underlying the motivation of the ECJ, they were not made explicit. An argument is to be made to the effect that the specific reasoning of the Court and the subsequent result of the case that was in perfect compliance with the New York Convention are indications for the Court being very conscious of not interfering with the working of the arbitration system. The Court began its reasoning with underlining the fact that the consumer did not *in any way become involved in the various proceedings [...] and, in particular did not bring an action for annulment*.[88] The 'consumer's inertia' appeared as the decisive reason for distinguishing *Asturcom* from *Mostaza Claro*. Whether 'consumer inertia' was a consideration independent in addition to or within the procedural autonomy test to determine the effectiveness of a right remained unclear. The consumer behaviour was, as we saw, taken into account under the 'effectiveness' limb. The formulation could, however, also be read to the effect that it additionally constituted a variable independent from the procedural autonomy test.

Article V of the New York Convention makes refusal or enforcement in case of invalidity of the award agreement contingent on the request of the party against whom it is invoked.[89] Ex officio refusal of recognition and enforcement is then only allowed for the grounds listed in Article V(2), namely inarbitrability of the subject matter and the public policy exception. The *Asturcom* facts could have qualified as a case of invalidity due to the inclusion of an unfair term. Under the New York Convention, refusal of enforcement for invalidity is only available at the request of a party. In its ruling, the ECJ stressed the inactivity of the consumer, maybe to indicate implicitly tribute to the New York Convention. The ECJ constructed the duty to raise EC law in an enforcement proceeding ex officio under the 'equivalence' limb by ranking it as national public policy. Public policy, rather than invalidity, is one of the grounds on which an award recognition action may be refused without a request of the party. It thereby complied with the permissible reasons for refusing recognition and enforcement ex officio and without party activity as listed in Article V(2) of the New York Convention. The ECJ could also have established a duty on the national judge to review and hence possibly refuse an arbitration award under the effectiveness limb. Thereby, an award would possibly be refused for invalidity of the arbitration award in the absence of a party request as required under Article V (1) of the Convention. Whether consciously achieved or not – an inquiry which cannot surpass the nature of speculation – the result of *Asturcom* is compliant with the New York Convention. With a view to guaranteeing

[88] *Asturcom*, *supra* n. 1, para. 33.

[89] Article V(1)(a).

the efficiency of arbitration in the European legal order, the *Asturcom* ruling is therefore to be welcomed.

4. Critical Assessment

There are several questions that naturally flow from this process of judge-made policy. First, is the undertaking a legitimate part of the judicial function? Second, by what means are the sense of community values and current needs of the community ascertained? Third, is the process any different from the formation of a rule of law?[90]

Asturcom is incisional from a point of view of procedural autonomy, in terms of sovereignty of the Member States over their domestic procedure. Principally, 'equivalence' amounts to a lower standard of review derived from the European level – were it not for the ECJ using the national public policy construction in *Asturcom*. Under the test of equivalence, while assuring that conditions for the application of EU law may not be less favourable than those governing domestic law of the same ranking, the domestic Court nevertheless remains responsible to select the domestic rule that qualifies as benchmarking comparator. *It is for that [the national] court, which alone has direct knowledge of the detailed procedural rules governing actions in the field of domestic law, to consider both the purpose and the essential characteristics of domestic actions, which are claimed to be similar.*[91] Though the task might be a difficult one,[92] it remained at the domestic level in terms of competence. By considering EU Consumer norms as national public policy, the ECJ substitutes the National Courts' choice of comparator with an authority grounded in the nature of a specific EC law provision *in se*. For the domain of Member States' procedural laws, this operation is much more intrusive than the free or unguided equivalence test.

This is a seemingly neutral choice if one argues that in every case decided under the equivalence limb, the ECJ will look into the national legal system in order to determine the provisions 'governing domestic law of the same ranking'. Yet, normally, 'equivalence' is an operation based on the facts of case, whose generalizability is strongly limited. The ECJ might compare whether procedural rule A for claims based on EU law is less advantageous than procedural rule B, which is used to determine similar domestic claims. In *Asturcom*, however, the Court is saying that Consumer law (arguably only Article 6(1) Unfair Terms Directive) is so important that it has to rank equal to national public policy. Rather than deciding a case on the facts, this judgment has the quality of a general rule in the abstract. In addition, public policy is not one legal provision of a given legal system, it is a category of rules. Such reasoning has implications well beyond the facts of one

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[90] J. Hopkins, 'Public Policy and the Formation of a Rule of Law', *Brooklyn Law Review* 37 (1971): 323, 330.

[91] *Asturcom*, *supra* n. 1, para. 50.

[92] Prechal & Shelkoplyas, *supra* n. 25, 589, on difficulty of equivalence testing.

single case. Second, in terms of consequences, the nature of general procedural rules is qualitatively different from public policy rules. Public policy rules require exceptions to usual procedure; by their nature, their consequences are extraordinary. Through the use of this 'guided equivalence test', the ECJ created a kind of maximum equivalence vehicle.

The most important question to be posed after *Asturcom* seems to be whether the ECJ should rank European law. From a principled EC institutional legal point of view, the result is that the classification of EC law within a typology of legal acts (horizontal differentiation, as opposed to the vertical hierarchization of sources of law) as fundamental or not seems a rarity. Such hierarchization is not reflected in the Treaty structure's typology of sources of EC law. The case for competition is more readily made; first of all, it concerns a Treaty article, and therefore in the rather strict hierarchy of sources in EU law an authoritative source. Next, it is directly applicable as between parties and agreements in violation thereof are automatically void. Furthermore, Competition law has much stronger claims to a uniform application as enforcement of Competition law is harmonized. Similarly, one could argue for State aid. The nature of Consumer law, however, is different. The conferral of a special place on Consumer protection in the legal order is an innovation, which eventually falls difficult to justify.

We may agree with a notion of public policy as furthering societal interests, which a community places above individual interests.[93] However, through societal interests expressed in a notion of public policy, *extrinsic factors of uncertain weight* may decide a case – which justifies a cautious stance towards the concept.[94] AG Tizzano in *Mostaza Claro* cautioned against elevating Consumer protection to public policy: *I fear that it is open to the objection that it might give excessively wide scope to a concept, namely that of public policy, which traditionally refers only to rules that are regarded as being of primary and absolute importance in a legal order*.[95] *Asturcom* accords this status to at least Article 6(1) Unfair Terms Directive. Presumably, other provisions of Consumer law would enjoy the same status. After all, it is the consumer protection motive by which the mandatory nature of the Directive is justified – this object is common to all pure Consumer law on EC level. Possibly the reference to the binding nature could make a difference – in the sense that Article 6(1) calls for a specific result.

Despite the fact that the case law is developed in areas 'which cannot be applied mechanically in fields other than those in which they were made',[96] one should consider the implications of according 'fundamental' importance to Consumer law for other fields of law. On EU level, legal instruments will have to be analysed along the line of 'equal to national public policy' argument in order to

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[93] Pound, *supra* n. 58, 4-7.
[94] Hopkins, *supra* n. 90, 323.
[95] Opinion of AG Tizzano in *Mostaza Claro*, *supra* n. 3, para. 56.
[96] *Cofidis*, *supra* n. 43, para. 37.

determine which acts enjoy this status. Why should not labour law, or environmental law, make similar claims? AG Tizzano, for example, applied this reasoning in the opinion to *Heemskerk and Schaap*.[97] According to him, the object of Regulation Nos. 1254/1999 and 615/98, namely to safeguard animal welfare and to protect the financial interests of the EU, could not be regarded as equivalent to national (Dutch) rules of public policy. The difference might be readily justifiable in case of administrative measures as the transport of animals; however, one might certainly think of other secondary legislation such as the environment directives, or the equal treatment ones.[98] We can draw inspiration from the Private International Law (PIL) framework due to the fact that the substance of certain secondary instruments was sufficiently important (and our exercise is to 'find out' which are the important European instruments) so as to warrant an interference into the standard conflict of law rules adopted in the European Regulations. Certainly, a good case is to be made for the Agency Directive in an analogy to the decision in *Ingmar*. In the reform of the Rome Convention, the Annex (now deleted) featured four directives: the Return of Cultural Objects Directive (EC 7/93); Posted Workers Directive (EC 71/96); Second Non-life Insurance Directive (EC 49/92), and the Second Life Assurance Directive (EEC 619/90).[99] Thinking further along the lines of Competition law and treaty articles, Article 12 EC[100] and Article 18 EC on citizenship[101] fall to mention. These are the fields on the side of EU law that could be considered to form part of a European public policy.

On the side of the national law, it falls to consider which fields of domestic law deploy special public policy exceptions, as these are the areas that are potentially affected by the *Asturcom* ruling. *Asturcom* illustrates the impact of EU law whenever the national system foresees ex officio application of national public policy in relation to the enforcement of arbitration awards. Other fields of domestic law that often contains important public policy exceptions are, for example, nullity of contracts and other juridical acts or settlement agreements.[102] According to one view,[103] these judgments (for example, *Eco Swiss*) cannot be extrapolated to other

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[97] Mr AG Bot delivered on 6 May 2008 in Case C-455/06, *Heemskerk BV and Firma Schaap v. Productschap Vee en Vlees*, para. 109.

[98] J.H. Jans & A.T. Marseille, 'Case Note Joined Cases C-222–225/05, Van der Weerd and others v. Minister van Land- bouw, Natuur en Voedselkwaliteit', *Common Market Law Review* 45 (2008): 853, 861.

[99] J.-J. Kuipers, *The Scope of Secondary EC Law – A Matter for the Rome I Regulation?* (2009) on file with author.

[100] Prechal & Shelkoplyas, *supra* n. 25, 589, 603, cite a judgment of the Austrian Oberster Gerichtshof (OGH), which found that Art. 12 EC constitutes public policy that must be taken into account by virtue of national procedural law.

[101] *Ibid.*, 609, fn. 70, which mention a decision by the Dutch Council of State (ABRS2.3.2004, No.200308607/1) who ignored the possibility of Art. 18 EC qualifying as public policy.

[102] For a good overview of domestic rules from Dutch and Belgian backgrounds, see *ibid.*, 599.

[103] *Ibid.*, 599.

fields of law. Accordingly, the relevance of *Asturcom* would be limited to meaning that Article 6(1) of the Unfair Terms Directive is equal to national rules on public policy as understood in arbitration award proceedings only. It is true that public policy may be interpreted in a range, sometimes wider, sometimes more narrow. Respective national provisions deploy different meanings of public policy. The point is reinforced by remembering that most legal systems or instruments (for example, the New York Convention) have a more narrow interpretation of public policy whenever the enforcement of arbitration awards is concerned. It is here submitted that this argument cannot convince. Even though public policy – as argued above – has many national facets, EC law does not rely on the national definitions thereof.[104] According to the ECJ, the European provisions of fundamental nature level domestic rules of public policy – it does not matter how narrow or wide these national public policies are shaped. In addition, *Asturcom* already concerned the fields that must have one of the most narrowest interpretations of public policy exceptions, namely the enforcement stage of arbitration proceedings, which by its very nature only allows for a very limited catalogue of review. If already in this 'sensitive' area Consumer law triggers national public policy, this must *a fortiori* be true for less narrow national interpretations of public policy.

Under a judicial activism critique, *Asturcom* is open for criticism of taking choices that should have been the legislator's rather than the judiciary's. As the name suggests, public policy is essentially a policy choice, the legislature arguably being closer to the community and politically legitimated.[105] However, the Member States have not expressed such a will in favour of Consumer policy. The main thrust of this criticism can be rephrased also by making a critique based on the need for legal reasoning in order to sustain judgments – that is a vision of adjudication beyond mere dispute settlement but ensuring predictability and legal certainty. So, if the so-called ranking of European law was not new, for example, comparing the *Ingmar*[106] decision that gave special status to Articles of the Agency Directive,[107] then the ECJ should have referred to these decisions. In addition, we might refer to the Brussels regulation[108] in which Consumer and Labour laws are

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[104] *Ordre public* has been argued as a wider notion than the notion of public policy. The different language versions of ECJ cases defy this interpretation; public policy is consistently interpreted as *ordre public*. Hence, in *Asturcom*, the Court ruled that '*doit être considéré comme une norme équivalente aux règles nationales qui occupent, au sein de l'ordre juridique interne, le rang de normes d'ordre public*'. *Asturcom*, *supra* n. 1, para. 52.

[105] Hopkins, *supra* n. 90, 336. In addition, 324, listing three reasons already advanced by St Thomas Aquinas to prefer legislature: (1) It is easier to find a few wise men in the legislature rather than many to judge, (2) legislators have more time for deliberation, and (3) legislators make decisions about the future in a general sense, judges make decisions about past events in an individual sense.

[106] ECJ 9 Nov. 2000, C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*

[107] Directive 86/653/EEC.

[108] Regulation 44/2001/EC.

explicitly mentioned as areas that deserve protection. All potentially valid arguments, but they were not advanced by the Court.

In sum, the special status of Consumer law in respect of the ex officio application of EC law is based on (1) the mandatory nature of the provision in question, (2) the importance of the public interest underlying a legal instrument, and (3) the fact that the legal instruments is, in accordance with Article 3(1)(t) EC, a measure that is essential to the accomplishment of the tasks entrusted to the EU. It is difficult to predict which other provisions fulfil this test. Notably, the argument based on Article 3 EC is weak. Certainly, not all objectives that are named therein hold importance equal to national public policy.[109] A caricatured reference to the fact that protection of tourists included in Article 3 EC suffices to demonstrate that it does not lend itself to identify a catalogue of interests, which hold greater importance in European law.

On its face, the use of the equivalence mechanism might seem the politically most desirable – respecting the procedural autonomy of the Member States and allowing for a seemingly neutral application. Below the surface, this is not true, if it is the ECJ deciding which rules are fundamental enough to constitute rules of public policy. The *Asturcom* ruling was too abstract and consequently far reaching in manipulating the procedural autonomy test, which is made specifically for judging factual circumstances rather than creating quasi rules. The content of

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[109] Article 3 EC contained an extensive catalogue listing the activities of the Community:

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

> (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (d) measures concerning the entry and movement of persons as provided for in Title IV; (e) a common policy in the sphere of agriculture and fisheries; (f) a common policy in the sphere of transport; (g) a system ensuring that competition in the internal market is not distorted; (h) the approximation of the laws of Member States to the extent required for the functioning of the common market; (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment; (j) a policy in the social sphere comprising a European Social Fund; (k) the strengthening of economic and social cohesion; (l) a policy in the sphere of the environment; (m) the strengthening of the competitiveness of Community industry; (n) the promotion of research and technological development; (o) encouragement for the establishment and development of trans-European networks; (p) a contribution to the attainment of a high level of health protection; (q) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (r) a policy in the sphere of development cooperation; (s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development; (t) a contribution to the strengthening of consumer protection; (u) measures in the spheres of energy, civil protection and tourism.

this quasi rule in *Asturcom* was 'Article 6 Unfair Terms Directive is so fundamental that it ranks among national public policy' – thereby creating a typology of Directives (fundamental/non-fundamental) that is unforeseen by the Treaty structure. That nature will have to be judicially determined in the future for individual provisions.

5. Conclusion

In the end, does the National Court know European law? Of course the lawyer has to answer with a mitigating 'It depends!'. However, *Asturcom* clarified the fact that, yes, certain Consumer provisions are mandatory, enjoying a status equal to that of national public policy. The simple answer could then be: The national judge has to know EC Consumer law whenever he is supposed to know public policy.

Rather than assembling all the cases rendered on the delimitation of the procedural autonomy of the Member States, this article has taken the opportunity to illustrate in *Asturcom* the tools with which the ECJ reasons when deciding and the different elements it consists of. The ECJ is not consistent in its approach. There is no way of reasoning that can justify all of the case law rendered. We can state, however, that the Court has expanded and modified its methods of reasoning. First, it constructed the principle of procedural autonomy, which is a proper creation of the Court in those aspects that go further than factual necessity due to the structure of decentralized enforcement of European law. The early version of procedural autonomy stipulated that national procedure must give sufficient effect or enforcement to European law. The concept changed with the introduction and proliferated use of the contextual/balancing approach, which stipulates that the rationale of the national procedural rule must be taken into consideration. Procedural autonomy moved from a descriptive to a normative concept to serve as a shield of national rules against requirements of effectiveness from European law.

Effectiveness as a standard is a self-referential definition of a European provision itself.[110] On the contrary to this under the *van Schijndel/Peterbroeck* approach, the national legal system formulates part of the balancing equation. As we have seen, the effectiveness limb created a gate for national considerations. Effectiveness as a standard has much greater harmonizing power – the result reached by the Court concerns the interpretation of the EU level only, hence valid for all Member States. By weighing the national rule, in the national circumstances, a judgment on effectiveness becomes very specific. Broadly speaking, it is less relevant for legal orders other than the referring one. This translates into less harmonization power.

However, not only the effectiveness test has received a spin. Equivalence properly enjoys a new mechanism. From the very specific factual application of

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[110] 'Effectiveness' as a standard balancing occurs, for example, if access to justice is taken into consideration when considering time limits under effectiveness requirements.

comparing a procedure for the realization of a national rule with that of a European-based one, the ECJ invented 'maximum equivalence' in ruling that certain EU instruments have to enjoy the same procedural privileges as national public policy. The comparator for these European instruments has been fixed on a quite abstract level. Hence, the nature of the equivalence reasoning has received a new possible structure. Although not full harmonization, the abstraction of the rule guarantees higher convergence of outcomes. In terms of procedural autonomy, the operation is more intrusive into national procedure than the standard equivalence test. The implications of *Asturcom* therefore go well beyond international arbitration and Consumer law alone.

In purified form, two contrasting demands can be raised on the design of procedural rules. One is a materialistic conception, in which through procedure, a material form of justice can be warranted. Procedural law in this sense already contains a form of substantive justice. Alternatively, procedural law is seen in an instrumentalist fashion, by means of which the substantive law is realized. In other words, in one version, procedural law itself is the goal; in the other, it is a means to achieve a goal. Of course it is not always possible to separate these two approaches. When taking into account European law, we not only have this horizontal distinction between the role of substantive in relation to procedural law but we also have the hierarchical dimension between the European and domestic levels.

The equivalence limb is a procedural test; it is self-sufficient, and from the vertical tension, this procedure itself guarantees a 'just' outcome. The effectiveness limb, on the other hand, is not mechanical in the same sense, it balances, and naturally in order to balance it constitutes a decision based on values, or ultimately justice.[111] It is not a neutral decision, even though the technicalities of the test conceal this to a certain degree. In the European context, this is the obvious advantage of deciding a case under the equivalence limb, since a value judgment in its original formulation is not required. Authors have proposed to put more emphasis on the equivalence test.[112] However, by privileging the Consumer *acquis* in the application of the equivalence test, the neutral character of this rule is changed so as to include a value judgment on substance. As we have seen, such value choice in favour of the consumer *acquis* is critical.

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[111] As an inspirational rather than rigorous point, one may mention the distinction created by Rawls in his Theory of Justice. He distinguishes between perfect, imperfect, and pure procedural justices, based on various constellations of the existence of a fair outcome and the corresponding procedure, a vision of the fair outcome but no corresponding procedure, and the last in which the procedure itself constitutes the fair outcome.

[112] Prominently, Ward, *supra* n. 39, (739) 751.

	Community instrument	National rule?	Result: ex officio yes or no	Effectiveness reasoning	Contextual/ balancing?	Equivalence?
Oceano, paragraphs 25–29	Article 6 Unfair Terms Directive, Unfair jurisdiction clause		Yes	Pure effectiveness	No	No
Cofidis, paragraphs 27–38	Articles 6 and 7 Unfair Terms Directive, time period	Two-year limitation period under French law	Yes	Effectiveness. Reference to *Peterbroeck* and context but not actively taken into account. Rule fails because 'expiry of a limitation period' [note generality of claim] is liable to 'render application of the protection intended to be conferred on them by the Directive excessively difficult', paragraph 36	*Peterbroeck* mentioned, but rationale of domestic legislation not discussed	No
Mostaza Claro, paragraphs 24–39	Article 6 Unfair Terms Directive, annulment action arbitration award	Requirement to plead invalidity in initial submissions	Yes	Effectiveness points towards ex officio application. Then consideration of 'efficient arbitration proceedings' argument is cancelled out by establishing requirement under the 'equivalence limb'. Effectiveness and equivalence reinforce each other	Arguable. Efficiency of arbitration proceedings is extensively discussed but not located in the national legal system	Yes, reinforces effectiveness rationale

	Community instrument	National rule?	Result: ex officio yes or no	Effectiveness reasoning	Contextual/ balancing?	Equivalence?
Godard & Rampion, paragraphs 57–69	Article 11(2) Consumer Credit Directive		Yes	Interesting: dual aim of Directive stressed: 'dual aim of ensuring both the creation of a common consumer credit market [. . .] and the protection of consumers who avail themselves of such credit'. Aim of consumer protection under effectiveness	Van Schijndel mentioned by French government. ECJ circumvents discussion by denying issue was contained in referred question. Therefore, no active use of the approach	No
Pannon, paragraphs 29–35	Article 6 Unfair Terms Directive, jurisdiction clause		Yes	Result is reached under effectiveness considering the aim of the Directive	Arguably, in paragraph 34, ECJ briefly discards the relevance of any national law	No
Asturcom, paragraphs 28–56	Article 6 Unfair Terms Directive, enforcement action arbitration award	Two-month limitation period under	Outcome: Yes. No under effectiveness, yes under equivalence	Effectiveness failed for the first time to establish duty on National Court to apply Consumer law. ECJ moves to equivalence limb, equals Consumer provision to national public policy. Result is ex officio application	Yes, extensively on purpose of res judicata	Yes