EUROPEAN UNION INTERNATIONAL *ORDRE PUBLIC*

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The Community legal order displays its autonomy in a twofold sense. On the one hand it creates new notions which are aimed at the European integration process. On the other hand, it delimits the understanding of already existing State notions. This twofold phenomenon finds reflection in the framework of the private international law systems of Member States. We shall analyse the notion of public policy in order to illustrate this contention. Indeed, Member States' public policy must be reread in the context of Community integration. At the same time, it is possible to delimit a true Community public policy which is activated by State judges independently from Member State notions. First we shall delimit the different senses that Community public policy may be given in the context of the EC sphere (1). Second, we shall try to discern the contents of public policy (2) and the functions it fulfils (3). Then it will be possible to tackle the way it applies (4) and the effects which derive therefrom (5). The last considerations will refer to the transformations that Spanish public policy might undergo in the framework of the Community and to its relationship to Community public policy (6).

1. What does community public policy mean?

1.1. Several understandings of the notion

1. The notion of public policy is not exclusive to the private international law sphere. On the contrary, it raises a diversity of interpretations in the different branches of law.[1] Following the thorough

1. The problem of interpretation also drives from terminology. In latin countries it is usual to refer to a single notion, ordre public, ordine pubblico, orden público, without distinguishing the possible nuances that a single term may incorporate. On the contrary, Saxon countries tend to differentiate between *ordre public* and public policy, offentliche Ordnung, according to the (private or public) legal sphere where it is invoked .

Spanish Yearbook of International Law, Volume III 1993–1994, 43–85.

analysis undertaken by Fernández Rozas and González Campos,[2] reference to public policy may be found in the Spanish legal system in constitutional law,[3] administrative law,[4] criminal law,[5] procedural law,[6] labour law[7] and civil law.[8] Seemingly, it is possible to identify a reference to public policy more or less directly linked to each branch of law.

This statement raises the question whether international public policy is not but an aspect among others of a general notion inherent to a legal system. Furthermore, did that general notion exist, what does it mean? The answer has been advanced that public policy refers to the minimal conditions that make possible the existence of the legal order and the State community to which it applies while they protect their integrity.[9] Public policy appears as a unique notion that may be referred to both in internal and international law since it fulfils the same function in both cases. On the one hand public policy would fulfil a positive function of inspiration of the system: it reflects the values upon which the system is built and which help it to relate to other systems. In a negative sense of exclusion public policy prevents that private will or foreign rules or decisions produce legal effects when they are not compatible with the values and principles of the legal system in which they want to produce effect.[10]

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2. Fernández Rozas/González Campos, "Comentario al art.12.3 C.c." en *Comentarios al Código civil y Compilaciones forales*, dir. M. Albaladejo, tomo 1, vol.2, 1995, pp. 901ff.

3. Article 16(1) and Article 21(1) of the Spanish Constitution 1978.

4. Ley 45/1959 (30.6) de orden público, Ley orgánica 4/1981 (1.6) de los estados de alarma, excepción y sitio.

5. Arts. 246 to 249 of the Spanish Código Penal.

6. As results from the judgment of the Spanish Constitutional Court, STC 108/1985 of 8.11.

7. Art. 1.4 ET (R.D.Leg. 1/1995 of 24.3, BOE 29.3.95).

8. See Arts. 1.3.1°, 6.2. and 1255 Spanish Civil code.

9. In the same sense, Rigaux *(Droit international privé. Théorie générale, vol.I, Larcier, Bruxelles, 1987 p.351) sustains that "ordre public constitue le pouvoir judiciaire gardien d'une forme supérieure de légalité qu'on ne saurait pas inscrire dans les textes, elle confie aux juges la mission d'exprimer, à propos de situations particulières que le législateur est impuissant à prévoir, la conscience juridique de la société"*

10. González Campos/ Fernández Rozas, op. cit., p.906 and N. Palaia, *L'ordine pubblico internazionale*, Padua, CEDAM, 1974 p.115. The latter defines this public policy as a normative one, referring to the ideal system of values which inspires the whole legal order, in other words, they are the whole of fundamental conditions which characterise in a precise historic moment the State community. They are necessary for the State and may not be

2. From a technical point of view, public policy seemingly is to be construed as a general clause of the legal system. In other words, all legal systems incorporate general clauses that help the judge to integrate the gaps the system may have. The integration is undertaken with reference to relatively abstract contents of an ethical or moral nature. General clauses may be perceived thus as a technique for the judicial elaboration of rules for the case, particular rules that need further specification by reference to the legislative policies fostered by each branch of the legal system.[11]

This perception of public policy has already found acceptance in case law: "public policy appears a set of principles and directives that in the concrete historical framework shape the structure of the fair legal order according to the convictions of the society. Those convictions must be followed both by the legislator while ruling and by the judge while judging. They may appear both as public policy rules, cogent and not disponible by individuals, such as the Constitution or ordinary legislation, or as a result of the generalisation of the rules or complementary case law. This general clause (valve of the legal order) needs be integrated with other values and criteria enshrined in the same rule".[12]

3. Transposing these considerations to the Community legal system it follows that the latter must also have moulded a notion of public policy which aims at its protection from external legal manifestations that might threat its integrity while it covers the gaps of the system. Since the hindrance to Community particular aims may derive from both Member States and individuals, it is understandable that scholars refer to Community public policy in a threefold sense: as Community law, internal law and private international law. Despite the inaccuracy of the terms, we shall keep the distinction to analyse these

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renounced because of their particular relevance. In opposition to this one, he speaks of *material or substantive* public policy as a specific situation of public security, a peaceful condition which helps to indicate the regular development of human activities in the State community. It also refers to the absence of perturbations or disorder which may hinder or threaten the good functioning of civil society. This is a legal good directly protected by specific rules of the system, namely public security, administrative rules and criminal law.

11. J.M. Miquel, "Cláusulas generales y desarrollo judicial del Derecho", *AFDUAM*, 1997, pp. 305 and 314.

12. S. AP Barcelona, 18.3.91 AC al70/1991 marg. 393 (fdtos 7 & 8). My own translation.

aspects mainly focusing on the feature of public policy in the sense of private international law.

1.2. Public policy in the sense of the founding Treaties

4. The Rome Treaty makes a reference to public policy in a specific Community sense, namely as an exception clause to Community freedoms, enshrined in Articles 36, 48, 56 and 73 of the EC Treaty.[13] Public policy allows Member States to keep national measures, national legislation, which hinder the free movement endeavoured by the EC Treaty. According to the European Court of Justice (hereinafter EJC), each Member State, within a margin of discretion, may define in relation to the concrete case which are the conditions that activate the exception subject to the limits imposed by the Treaty.[14] Member States may invoke public policy in order to protect the interests of a democratic society[15] while they respect the principle of non discrimination and the proportionality test.[16]

5. The development of the notion undertaken by the ECJ's case law has led scholars to query about the nature of Community public policy in the sense of the Treaties. In other words, are we facing a Community notion or a national one?[17] Some scholars sustain the State nature of the notion. They reject the mere existence of a specific and autonomous notion of Community public policy aimed at guaranteeing the uniform application of Community law. They argue that public policy by its own nature repels any *a priori* conceptual definition. Furthermore, this position sustains that the competence division settled by the Treaty frames the notion of public policy as a safety valve for Member States.[18] That is the reason why, they argue, the ECJ may not speak of a Community public policy but it must introduce different

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13. They refer respectively to free movement of goods, persons, services and capitals. Public policy in relation to the free movement of capitals was only included in the Maastricht Treaty reform.

14. Case 41/74 *Van Duyn* [1974] ECR 1337 p. 18.

15. Case 36/75 *Rutili* [1975] ECR 1219 at p. 32.

16. Joint Cases 115-6/81 *Adoui & Cornuaille* [1982] ECR 1665 at p. 8.

17. See F. Hubeau ("L'exception d'ordre public et la libre circulation des personnes en droit communautaire", *C.D.E.*, 1981 p. 213) for an analysis of the different positions.

18. D. Simon, "Ordre public et libertés publiques dans les CommunautJs Européennes", *Rev. Marché Com.*,1976 p. 205.

elements in order to delimit in a transitional manner a Community conception of public policy which leaves untouched the existence of a multiplicity of national public policy notions.[19]

Other scholars, have raised however in favour of a Community notion of public policy in the sense of the Treaties.[20] They derive the Community nature of public policy from the fact it has been foreseen in the text of the EC Treaty that, on the same token, establishes its limits. Indeed, the realisation of Community aims seemingly entails the identification of a Community public policy: "If the realisation of the treaty aims has considerable incidence on the State definition of public policy and public liberties, as the *Rutili* case has shown, this realisation equally results into the activation of a true Community conception of public liberties and it leads, as the *Nold* jurisprudence shows, to the definition of a *ordre public communautaire* which imposes the limits required by the general good to the exercise of fundamental rights".[21]

Such an understanding presumably imposes a strong economic character to the notion. Thus, A. G. Mayras points out in an opinion, that "if a *Community public policy* exists in areas where the Treaty has the aim or the effect of transferring directly to Community institutions powers previously exercised by Member States, it can only be an economic public policy relating for example to Community organisation of the agricultural market, to trade, to the common customs tariff or of the rules on competition".[22]

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19. G. Desolre, "Ordre public, droits politiques et syndicaux dans la CEE", Doc. de travail (79)20, Institut d'études européennes, ULB, Brussels 1979 p. 40. Such an approach would be confirmed by the words of Advocate General Mayras, according to whom "since... it is impossible to provide an exclusively Community definition of the concept of public policy which is in many aspects a relative matter, it seems more realistic to inquire precisely what limits the Treaty and the directives adopted in the implementation thereof have set on the powers of national authorities" (case 36/75 *Rutili* [1975] ECR 1219 at p. 1242).

20. T.C. Hartley, *EEC Immigration Law*, North-Holland Publishing Company, Amsterdam-New York-Oxford, 1978 p. 152.

21. Simon, *Op. cit.*, p. 221.

22. Case 41/74 *Van Duyn* (1974) ECR 1337 at p. 1358. See however footnote 19.

1.3. Domestic (internal) sense

6. Other scholars refer to public policy in a sense which comes closer to internal conceptions of public policy (such as Article 3 of the Spanish civil Code), namely as a limit to party autonomy. In a Community framework, the immediate (but not exclusive) reference to this kind of public policy points to economic matters. In this sense, it is possible to think of a Community public policy in competition law: *"il est indéniable qu'elle [la CEE] aussi fait peser son ordre public sur les contrats privés, par toutes les measures impératives et prohibitives qu'elle établit en vue d'assurer la libre concurrence ou d'y déroger. Ces defenses et prohibitions sont d'ordre public économique. Elles émanent... d'autorités économiques imposant aux contractants une technique économique"*.[23] The notion can be said to affect, in general terms, whatever economic regulation. However, the latter is not the only sphere where it may possibly apply. Seemingly there exist mandatory rules in the Community "which are capable of modifying or even excluding the application of rules of domestic law, [and] include the requirement that the exercise of a right or the implementation of an obligation following from Community law should not be made virtually impossible".[24]

Some have gone further and have suggested that Community public policy would indeed constitute a general limiting rule to party autonomy. If this were so, it would be invoked *"en tant qu'exception permettant de tenir en échec la volonté des parties à un contrat qui le viole"*.[25] Neither scholars[26] nor case law[27] clearly set whether we are

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23. R. Savatier, "L'ordre public économique", *Recueil Dalloz Sirey* (Chron. VI), 1965 p. 39.

24. In this sense, some light is shed by the words of Advocate General Darmon in case 94/87 *Commission v. Germany* [1989] ECR 175 at p. 7.

25. Hubeau, *op. cit.*,, p. 216. In the same sense, Poillot-Peruzzetto, "Ordre public et droit communautaire", Rec. Dal., vol.25,1993 p. 180.

26. Poillot-Peruzzetto, *op. cit.*, p.181, sustains that *le caractère impératif des règles communautaires proves "l'existence d'un ordre public communautaire... [car] la norme communautaire nie en effet tout space à l'autonomie de la volonté"*.

27. In cases C-362/89 *D'Urso & Others v. Ercole Marelli* ([1991] ECR I-4105, p.11) and 324/86 *Daddy's Dance Hall* ([1988] ECR 739) the ECJ, referring to the Council Directive 77/187/EEC (of 14.2.77 on the approximation of the laws of the Member States relating to the safeguarding of employees rights in the event of transfer of undertakings, O.J. L61/26), points out that those rules are to be deemed to be mandatory. Therefore, it is not possible to derogate

facing a mandatory rule or the general clause we have identified as *ordre public* (§2).

1.4. Private international law sense

7. Are there then elements enough to define a notion of international *ordre public* within a Community framework? Struycken, sustaining a positive answer, stays the starting point of this notion in the perception of a shared European culture. Such common culture finds reflection in the legal sphere in the shape of basic principles and rules. The delimitation of the principles will define the content of the notion of Community public policy: "we shall firstly think of human rights formulated in the 1950 Treaty of Rome and its Protocols as enshrined in the Maastricht Treaty". However, "Community *ordre public* has a wider scope than human rights [...]a distinction may be made then between Community law principles which express sound moral values on the one hand, and principles which are necessary to understand the Community law system on the other hand. Both of then are mandatory principles. It is not excluded that the same principle stems also from both categories". Furthermore, "Community ordre public encompasses...another principle... which is enshrined in the first paragraph of Article F, [namely] respect of national identity of Member States."[28]

In other words, it would appear that the EU ordre public is construed by reference to the ECHR as a reflection of those human rights that *"expriment une valeur morale inattaquable"* and by what has been previously defined as Community public policy in the sense of the Treaties since *"la réalisation des objectifs du traité... conduit... à la définition d'un ordre public communautaire"*.[29] In addition, the Community public policy is constituted by the principles and objectives of the founding Treaties.[30]

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from them in a manner unfavourable to employees. Fallon ("Les conflits de lois et de juridictions dans un space économique intégré. L'expérience de la Communauté Européenne", *Rec. des Cours*, vol. 253, 1995 p. 243) criticises the lack of precision in these two decisions.

28. Struycken, "Les conséquences de l'intégration européenne sur le développement du droit international privé", Rec. des Cours, t. 232,1992 pp. 275, 276, 278. (Our translation).

29. Simon, *op. cit*, p. 221.

30. García Rodríguez, "Derecho aplicable y orden público comunitario", R.I.E., vol. 20, 1993 p. 940 and Van der Elst & Weser, *Droit international privé belge et droit conventionnel international*, tome I, Bruylant, Bruxelles, 1983, p. 258.

8. In manner of conclusion: from the preceding considerations it stems that Community *ordre public* has found a certain support among scholars. This notion exhibits particular features which derive mainly from the particular nature of the EC. From the preceding considerations we can infer that scholars perceive Community public policy as a mainly economic notion which may evolve to include political shades.[31] We can also define Community public policy as a true international notion of public policy: it is particular to the Union (as a means of attaining its aims) while it is common to all its Member States.

2. Contents of Commnnity ordre public

2.1. A general layout

9. In order to approach the content of ordre public the whole system must be studied, taking into account not only its particular legal features but also its philosophy, the policies it pursues, its economic, moral, social and political characteristics. The content of public policy is not to be found listed in legislation. On the one hand, because of the variability of this constantly changing notion, legal systems do not usually provide a fixed set of principles that can be said to be those of public policy. On the other hand, the concept is too general, and its scope can cover many different areas that are only relevant as a function of the specific case at hand and at that time.[32] However, this absence of a delimited content is filled by a kind of intuition according to which the principles to be protected refer mainly to moral, economic and political values.[33] These are a reflection of the functions traditionally attributed to public policy, namely (1) the elimination of foreign law which offends "natural" law, (2) the defence of the principles that are at the basis of a legal system and (3) the safeguarding of the legislative

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31. "Si le caractère économique de l'ordre public communautaire s'impose, l'évolution du domaine d'intervention du droit communautaire risque d'engendrer un ordre public politique" (Poillot-Peruzzetto, *op. cit.*, p. 181).

32. That is what scholars identify as *actualité de l'ordre public*. In other words, public policy is seen in the light of the values that are in force or prevail in a precise moment. For a more thorough study of the matter, see De Angulo Rodríguez ("Du moment où il faut se placer pour apprécier l'ordre public international", *R.C.D.I.P.*, vol.61, 1972 p. 369).

33. These values constitute indeed the delimiting elements of any general clause (as seen in §2).

policies it pursues.[34] The following considerations deal with the analysis of the three layers.

10. (i) ethical-moral values: with this first block reference is made to fundamental choices of a community which guide and inspire the legislative and political activity of a State. They reflect the conception of the good that the society (in a deliberative consensus) agrees as basic. Thus, we do not limit the values to a religious conception or *bonnes moeurs*. Ethical-moral values should be understood in a large sense, comprehensive of a whole net of values, concerned with establishing and maintaining relations among persons with respect to issues or interests typically vital to such persons.[35] They are mainly categorised through the identification fundamental rights. The incorporation of human rights extends the reach of this layer to the most diverse areas which go from the conception of human dignity to procedural guarantees.[36] In other words, the activation of the public policy clause entails a position with regard to fundamental rights, for instance, when procedural public policy rejects the validity of proof illegally obtained, it makes a choice in favour of the right to dignity and privacy.

11. (ii) Idiosyncrasy signs: these elements set up the legal conception of a society while they distinguish it from other societies. They are less stringent principles that those noted in (i). Nonetheless they are not renounceable for the society since they reflect organisational principles of the society where they apply, for instance as family and property are concerned. Accordingly, they evolve in the same sense that the interests and beliefs of the society change. In many occasions they constitute the differential characters of a group, in front of neighbouring societies. A clear example is provided by the Spanish

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34. We follow the traditional French classification as found in Mayer, *Droit international privé*, 5th edition, Montchrestien, Paris, 1994 p.140 (§200) and Batiffol/Lagarde, *Droit international privé*, vol. 1, 8ème edition, L.G.D.J, Paris, 1993 p. 576 (§358/9).

35. Following Coleman/Murphy, *Philosophy of Law. An Introduction to Jurisprudence*, 1990, Westview Press, Boulder, San Francisco/London, at p.69.

36. In this sense, the Spanish Tribunal Constitucional has clearly stated that human rights, as enshrined in the Constitution, inspiring the whole system have a direct effect in the identification of public policy. Thus, procedural public policy must mirror the basic right to a fair hearing enshrined in Article 24 of the Constitution and its developments. See the TC judgments 43/1986 (of 15.10.83) and 54/1989 (of 23.2.89).

prohibition of divorce after the Civil war, when the State was a confessional one.[37]

12. (iii) Legal-economic standards: to a certain extent they are the development of programmatic rights foreseen by the society (mainly within the Constitution) which need to find concrete elaboration. They are usually incorporated into economic and social policies which find their natural outcome in mandatory rules.[38] This particular aspect of State interests is also the most likely to be moulded according to external criteria due to the participation of the State in the international society. Belonging to international organisations implies to overcome the national viewpoint and the assumption of common policies and values which inspire the international treaties and conventions signed.[39]

13. From the previous considerations it stems that *ordre public* is individuated both through principles and rules. Additionally it must be pointed out that although principles are not subordinated to each other, the first two listed are less likely to be sacrificed than the third. Therefore, it seems to me that a kind of primacy over the third group can be asserted. Firstly, because these ethical-moral principles are usually connected in some way to the identity signs of a community. It might be then more difficult to enter into any kind of bargaining concerning them. Secondly, they make clear the differences between legal systems. Pursuing this argument further, it could be concluded

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37. See for instance Auto Supreme Court of 28.9.58 (Rollo 1532) denying recognition to a foreign divorce (in Remiro Brotons, *Ejecución de sentencias extranjeras en España,* Tecnos, Madrid, 1974 p. 210). As property is concerned, see Audiencia Provincial Madrid (27.1.90, RGD,1990: 3497) imposing the (Constitution enshrined) right to property and freedom of market, which prevail as public policy against Cuban legislation.

38. See the Auto Tribunal Supremo (of 28.5.32, Rollo 163, in Remiro Brotons, *op. cit.*, p.209) which refuses recognition to a French judgment because it threatens the interests protected by Spanish legislation on trade marks. See also the judgment of the Spanish Tribunal Defensa Competencia (of 20.2.91, La Ley 1992-1,837) which states that the protection of free the market raises public policy considerations.

39. See the German BGH decision of 22.6.82 *Allg. Vers. G.H. v. E.K*, BGHZ 59,82. Moreover, the influence exercised by the international treaty can go further than ratification. It is possible that although not being in force, a treaty is taken into account by the national judge when appreciating the existence of public policy exceptions. In relation to the Convention on the mutual recognition of companies of 29.2.68 (not yet in force), see case Anstalt del Sol (Belgian Cassation, 13.1.78, Pas., 1978, 1, 543) and Appello di Milano (3.10.86) in case Industrie Creusot Loire (Foro it., 1987, 3238 No.760).

that in actual fact, ethics makes the difference between the different notions of public policy. Third, ethical-moral values also may explicit the criteria according to which to balance and chose between conflicting criteria.[40] Although moral elements may be considered irrelevant to an economic notion of public policy,[41] the fact that they are different in nature should not lead one to disregard that they are not completely alien. Indeed, there is a global and inter-dependent protection of values and policies. Regulation of gambling entails an ethical position of the State which might be combined with economic policies as redistribution. This inter-dependence is accentuated in a context of progressive internationalisation which has effects in the three levels.

2.2. Content of a Community public policy

Is it possible to identify the three levels above mentioned at the European Community level? We may answer in the affirmative, introducing however some specificities which stem from Community law.[42] Community public policy — as any other notion of public policy, despite its legal nature, is subject to political or contextual (economic) interference. Such influence is accentuated in a framework where integration aims are fostered. The three layers which conform a notion of public policy, namely ethical-moral values, national identity characteristics and economic-legal standards need then be tackled.

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40. As R. Alexy (*Teoría de los derechos fundamentales*, Centro de Estudios constitucionales, Madrid, 1993 p. 105ff) points out, there are certain principles which under certain conditions keep a preferential (but not absolute) character within the system. Unless the circumstances change, in a conflict between principles, they are to be preferred.

41. See Verheul, "Public Policy and Relativity", *N.I.L.R.*, vol.26, 1979 p. 112.

42. We would rather discourage the delimitation of a European public policy on the basis of the comparison and convergence of national notions, despite the close links between them. This is the position sustained by B. Dutoit, "L'ordre public: caméléon du droit international privé? Un survol de la jurisprudence suisse", in *Mélanges Guy Flattet*", Payot, Lausanne, 1985 p. 472 and later developed by Spickhoff, *Der ordre public im internationalen Privatrecht*, Alfred Metzner Verlag, Frankfurt, 1989 p. 89.

(i) Ethical-moral values

14. Some scholars have spoken of the morality of the Community.[43] However, the initial configuration of the EC Treaty does no seem to incorporate any kind of ethical reference which could be at the basis of a Community public policy. Indeed, ethics is probably the less developed aspect and one would suspect it is not likely to develop further. The delimitation of ethical (or moral) criteria at an international sphere seems rather hazardous. The delimitation of what kind of morality deserves to be protected remains a State competence.[44] However, not even EC law is exempted of addressing these matters.[45]

15. The construction of any ethical-moral reflection in the EC sphere stems from the principle of non discrimination on the basis of nationality (basic pillar of Community law as enshrined in Art. 7 EC Treaty, now Art. 6 since the Union Treaty, and completed on grounds of sex by Art. 119 in employment matters). This is certainly a first element for the delimitation of a Community *ordre public*.[46] The ethical component of Community public policy is to be completed with a

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43. Hetsch ("Emergence des valeurs morales dans la jurisprudence de la CJCE", *R.T.D.E.*, vol. 18, 1982 p. 554) refers to collective morals, while Temple Lang ("Community Constitutional Law: Article 5 EEC Treaty", *C.M.L.R.*, vol. 27, 1990 p. 656) refers to Community law as incorporating a moral objective.

44. As the Strasbourg case-law on the ECHR has acknowledged, the main handicap of the international sphere is that no univocal answer to these conflictual matters can be given. A margin of appreciation is left hence to national authorities which is supervised by the Strasbourg Court; see *Otto Preminger Institut v. Austria* (series A, vol.295, par. 50) and Open Door Counsel (Series A, vol.245-A, par. 68).

45. Indeed, the ECJ has been confronted to the most diverse devices as gambling (case C-275/92 *Lotteries)*, abortion (C-159/90 *Grogan*), obscene articles (cases 121/85 *Conegate* and 34/79 *Henn & Darby*), prostitution (cases 115-6/81 *Adoui & Cornuaille*), etc.

46. Equality (Article 119) has developed even to become as a mandatory rule. Gardeñes Santiago ("La imperatividad internacional del principio comunitario de no discriminación por razón de la nacionalidad", *R.I.E.*, vol. 24, 1996 p. 870) contends it constitutes a mandatory rule because of its twofold function: it aims at protecting the individual as well as providing institutional protection. This leads him to include Article 119 into the hard core of public policy. Thus, where the applicable law belongs to a third State, he argues, the mandatory rule prevails because the Community *ordre public* character of the rule is too strong to renounce in front to third States (p. 872). The confusion in his development arises in relation to the justification of such character within the EC because he mistakes EC and State legal systems. When he assumes that *lex fori*, as mandatory rule, is applicable as a result of the principles of

human right's viewpoint. The protection of human rights has been steadily incorporated into Community law. In case *Stauder*[47] the ECJ stated for the first time that fundamental rights were part of Community law. This statement was further developed in cases *Internationale Handelsgesellschaft*[48] and *Nold.*[49] The ECJ, that finds inspiration in the constitutional traditions of the Member States and the international conventions signed by the latter, ensures the protection of human rights.[50] Among the international conventions that Member States have ratified, the ECHR constitutes the main reference point for the ECJ.[51] The convention becomes the main sustaining element to establish the general principles which are already incorporated to the constitutional traditions of Member States. Throughout these decades the Court has has acknowledged the right to property,[52] to privacy and inviolability of domicile,[53] access to courts,[54] right to a fair hearing,[55] right to judicial control of decisions,[56] freedom of expression,[57] freedom of association, of religion and protection of the family.[58]

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direct application and primacy, he confirms the supremacy of Community law but not the mandatory nature of the rule.

47. Case 29/69 *Stauder v City of Ulm*, [1969] ECR 419.

48. Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Geldtreide*,[1970] ECR 1125 at pars. 3 y 4.

49. Case 4/73 *Nold v Comisión* [1974] ECR 491, par. 13.

50. Case 5/88 *Wachauf v Germany*, [1989] ECR 2609 par. 17. More recently, par. 16 case C-177/90 *Kühn v. Landwirtschaftskammer Weser-Ems*, [1992] ECR 1-35.

51. Nonetheless it is recalled that in occasions, Advocates General have provided the Court with opinions based on the ECHR that the Court had ignored in order to shape the issue as a purely economic one. This happened in cases *SPUC v. Grogan* (C-159/90 [1991] ECR 1-4685) and *Konstantinidis* (C-168/91 [1993] I-1191).

52. Case 44/79 *Hauer v Land Rheinland Pfalz* [1979] ECR 3727, par. 17.

53. Joined cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859; C-62/90 *Commission v Germany* [1992] ECR I-2575 confirmed in case C-404/92 *X v. Commission* [1994] ECR I-4737 in a case of AIDS control for fonctionnaires.

54. Case 98/79 *Pecastaing v Belgium* [1980] ECR 691, par. 13.

55. Joined cases 100-3/80 *Musique Diffusion française et al. v Commission* [1983] ECR 1825, par. 10. These cases refer to anti-dumping practices but the same right has been applied to Community fonctionnaires.

56. Case 222/84 *Johnston v Chief Constable of the R.U.C* [1986] ECR 1651, par. 18.

57. Case C-23/93 *TV 10 SA & Commissariaat voor de Media* [1994] ECR I-4795.

58. Case 266/83 *Samara v. Commission* [1985] ECR 189; case 273/83 *Michel v. Commission* [1985] ECR 347; case 130/75 *Vivien Prais v. Council* [1976] ECR 1589; case 267/83 *Diatta* [1985] ECR 567; case 249/86 *Commission v. Germany* [1989] ECR 1263.

This does not mean however, that the ECJ limits its concern to the scope of rights included in the ECHR. On the contrary, the Court incorporates new specific concerns[59] such as the rights of workers and economic agents, freedom to pursue trade or professional activities[60] and the free choice of partners as an expression of the latter,[61] the protection against insolvency[62] or the safeguarding of employees rights in the event of transfer of undertakings.[63] The features of some of these cases were so distinctive that they appear to have influenced the development of the ECHR and the judgments of the European Court of Human Rights.[64]

A specificity of the Community approach to human rights derives from the functional viewpoint followed. In other words, we can perceive the Community interest for these matters when they have a direct incidence in the achievement of Community aims. Two examples are clear in this sense: the Community acknowledges the right to a name[65] and the right to have a process in the chosen language.[66] Functional as they are to the Community integration process, they contribute nevertheless to the identification of Community parameters of human rights protection which might be at the basis of a Community notion of public policy. This is the case of procedural rights, such as the right to a fair hearing and the equality of arms, singled out in

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59. In Murphy/Coleman's distinction (*op. cit.*, p. 86) these concerns would constitute conventional or policy based rights which promote the welfare of the society. The above referred to would constitute natural or respect based rights which are accorded, on the contrary, to secure the special oral status of the person.

60. Cases 201-2/85 *Klensch v. Sécrétaire d'Etat* [1986] ECR 3503.

61. Case C-307/91 *Association Agricole Luxlait v. Hendel* [1993] ECR I-6849.

62. Case C-334/92 *Wagner Miret v. Fondo Garantia Salarial* [1993] ECR I-6911.

63. Case C-392/92 *Schmidt v. Spar-und-Leihkasse* [1994] ECR I-1311.

64. Mendelson ("The Impact of EC Law on the Implementation of the ECHR", *Y.E.L.*,1983 p. 99) gives some examples to illustrate this influence: the *Marckx* case (Series A, vol. 31) refers to case *Defrenne v. Sabena* [1976] ECR 455; the *Funke* case (Series A, vol. 256-A) refers to case 374/87 *Orkem* [1989] ECR 3351 and the *Vosper PLC v. UK* case (Applic. 9262/81 (1983)5 EHRR 465) puts forward the ECJ arguments concerning the development of indirect discrimination.

65. Case C-168/91 *Konstantinidis*, [1993] ECR I-1191, since it generates a risk of confusion of identity on potential clients.

66. Case 137/84 *Mutsch*, [1985] ECR 2681, as an essential element of integration for migrant workers.

competition procedures.[67] The functional acknowledgement undertaken by the ECJ is further completed by other EC institutions in a more declarative manner. Thus, there is an increasing development of legal texts in the Union directly concerned with human rights, such as the Parliament Declaration on Human Rights and the Resolution on the European Charter on the Rights of the Child.[68] Meanwhile several statements as to the engagement on the promotion for respect of human rights have been endorsed both in the framework of the European Union Treaty and secondary legislation.[69]

Despite the limitations that the Community functional approach to fundamental rights has, the elements here mentioned appear as sufficient to agree on the minimum of ethical-moral rights of the Community. On the basis of the minimum ethical agreement the Community public policy appears as possible. We shall now deal with the two other layers in order to check how they develop other sides of the first layer here analysed.

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67. The ECJ ensures the right to be provided with the justification of the reasons on which the decision is founded (case 222/86 *Heylens* [1987] ECR 4097 at p. 15 and case 36/75 *Rutili* [1975] ECR 1219 at p. 39) and the right to be notified in order to secure defence (case 66/74 *Farrauto* [1975] ECR 157 requires that such notification takes place in a language that the addressee understands). Other rights admitted by the Court are the right to legal representation from the preliminary inquiry stage of procedure (Cases 97-99/87 *Dow Chemical v. Commission* [1989] ECR 3165, p.13), the right to confidentiality in the relationships between the party and his advocate (Case 155/79 *AM & S Europa Ltd v. Commission* [1982] ECR 1575 at p.18), the right not to give evidence against oneself (restricted to individuals and in competition proceedings, case 374/87 *Orkem v. Commission* [1989] ECR 3283), the right of access to file in the competition proceedings before the *Commission* both in the case of inculpatory and exculpatory documents (Cases T-30/91 *Solvay v. Commission*, T-36/91 ICI v. *Commission* and T-37/91 *ICI v. Commission*, [1995] ECR II-1779, II-1851 & II-1904) and the right to require that proceedings take place in a specific language (Case 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681). The ECJ remains cautious with regard to means of proof in connection with the right to defence. No explicit case law is available but in cases 97-99/87 *Dow Chemical v. Commission* the ECJ seems to advance a guarantee of legality as far as means of proof are concerned (Cases 97-99/87 [1989] ECR 3165 at p. 12).

68. Respectively given in 12.4.1989 (OJ C120/51) and 21.9.91 (A3- 0172/92, OJ C241 p. 67).

69. See art. F(2) of the Maastricht Treaty (recently sanctioned by the Amsterdam Treaty) and the Parliament and Council Directive 95/46/EC on the protection of data basis of 24.10.95 (OJ L281 of 23.11.95).

(ii) Idiosyncrasy elements

16. The European Union exhibits some particular features which differentiate it from other organisations. The achievement of economic integration constitutes its main distinctive element; however it transcends the latter to attain other aims. The essential defining features of the Union are of an economic nature, mainly the achievement of the internal market in the terms of the EC Treaty. However, the development of this aim has entailed a revision in the formulation of the objectives pursued. We may now sustain that the Union is something more than an economic choice for its Members.[70]

17. This change acknowledges the existence of idiosyncrasy elements within the Community. They are defined through the judicial development of the notion of the general good as undertaken by the ECJ and its ulterior confirmation by the Maastricht Treaty. The general good functionally constitutes a second escape valve for Member States, in many cases an alternative to the notion of public policy as foreseen in the Treaties (see §4). From a substantive point of view, the general good is defined as the core of values and policies of Member States that are admitted by Community despite their hindrance character to the market. They must however respect the criteria of non discrimination and proportionality. Case law and legal development (through Directives) of the general good cover a vast number of areas directly interested by the notion: *socio-economic policies* (such as worker and consumer protection, market regulation, taxation or fair trading), *ethical-moral values* (as gambling) and *idiosyncrasy elements* (such as linguistic diversity, environmental protection, cultural dissemination and the protection of intellectual property).[71] This brief presentation reflects on the one side that Member States reproduce the three-layer

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70. Weiler ("The Transformation of Europe", 100 *Yale L.J.*, 1991, p. 2477) indicates how the market has not only an economic aspect but also cultural, political and ideological features that incorporate a perception of the individuals. "A single European market is a concept which still has the power to stir. But it is also a market. It is not simply a technocratic program [...] It is at the same time a highly politicized choice of ethos, ideology and political culture [...] It is also a philosophy, [...] premised on the assumption of formal equality of individuals."

71. See respectively Insurance, banking and securities Directives; case C-306/88 *Rochdale Borough Council v. Anders* [1992] ECR I-6457; case C-204/90 *Bachman v. Belgium* [1992] ECR I-249; case C-76/90 *Säger v. Denmark* [1991] ECR I-4221; case C-275/92 *Lotteries* [1994] ECR I-1039; case 379/87 *Groener v. Minister for Education* [1989] ECR 3967; case

contents of public policy into the Community sphere. Thus, it confirms the unitarian and communicative character of the notion. On the other hand, it stresses that in many cases we are dealing with features deeply rooted in the culture of the Member States.

18. The Community notion of the general good appears as a result of the definition by the ECJ of the national notions of the general good. The Community general good is a standard according to which national interests are evaluated.[72] It works as a compatibility parameter, a substantive rule according to which control the restrictions introduced by Member States (legislation). In this sense, while it functions in a quasi constitutional controlling manner, it also works as a 'domestic' public policy, whereof parties (in this case, Member States) cannot dispose freely. From a substantive point of view, the Community general good reflects the bigger concern of the Union in relation to matters other than economic regulation that deserve particular protection. As Fallon points out, these are the values that appear as a Community culture, interests covering the most diverse aspects: patrimonial features, environmental protection, health and physical integrity of individuals as well as freedom of expression.[73] They have such a relevance for the Community system that they become incorporated to the Treaty text (see Articles 128 to 130 of the Union Treaty).

The idiosyncrasy elements reflect to a certain extent the culture in which a legal order is embedded. The cultural identity of Member States becomes thus an essential constitutive element in the definition

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240/83 ABDHU [1985] ECR 531; cases guides touristiques: C-154/89 *Commission v. France* [1991]ECR I-659; C-180/89 *Commission v. Italy* [1991] ECR I-709 and C-189/89 *Commission v. Greece* [1991] ECR I-727; case 62/79 *Coditel* [1980] ECR 881.

72. "It is clear, for instance, that the designation of Sunday as a general day of rest falls under that rubric [political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics], as the Court indeed indicated in the *B & Q* judgement: the imposition of at least one weekly rest day is undoubtedly a policy choice directed at the protection of the working environment and of the health of humans, which are objectives recognised by the Treaty. The designation of Sunday as the day of rest is a choice suited to the specific socio-cultural characteristics of the Member State in question". (A.G. Van Gerven, cases C-312/89 and C-322/89, [1991] ECR 1-997 and I-1027).

73. Fallon, "Les conflits de lois...", *op. cit.*, p. 262.

of the European Union *ordre public*. It could not be otherwise, since the culture of the Union is the sum of the Member States identity and the interaction which derives therefrom. Cultural identity as conforming Community public policy must be understood in two senses. On the one hand, it appears as the element which reinforces the individual identity of the States within the Union (Art. 128 EU Treaty). Such understanding can take the most varied shapes: protection of language diversity, protection of cultural goods, etc. Identity exhibits however a larger scope than strictly cultural features. Indeed, civil law matters (family and property law) reflect essential choices of legal systems as far as identity is concerned. In this sense, its respect becomes a sort of internal public policy or constitutional requirement within the Union: such respect of the national identity leaves to Member States a margin for deviation to define their own *ordre public* and keep their specificity[74] (with the obligation for Member States to respect the compatibility criteria with the Community legal order). On the other hand, the Union protects the European culture against non-European partners. This European culture (which emerges and consolidates under the general good formula) has a large reach in which the most diverse areas are encompassed: protection of environment,[75] health,[76] cultural goods,[77] respect of privacy,[78] freedom of expression, etc. Many of these aspects will tend to adopt the shape of mandatory rules.

(iii) Legal-economic standards

19. A project of economic integration such as the European Community necessarily presupposes converging aims and certain similarities in the starting interests. The convergence of interests is inserted in a wider movement which takes place at the international level. This also entails that the different notions of State public policy do not diverge exceedingly in substance but mainly in the means according to which they attempt to reach those aims. Legal-economic

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74. Struycken, *op. cit.*, p. 281.

75. Article 130R EU Treaty.

76. Article 129 EU Treaty.

77. Council Directive 93/7/EEC of 15.3.93 on the return of cultural goods unlawfully removed (OJ L74/74 of 27.3.93).

78. Recital (10) of the Council and Parliament Directive 95/46/EC concerning the protection of individuals in relation to the processing of personal data (of 24.10.95, OJ L281/31 of 23.11.95).

standards, under the shape of mandatory legislation, due to their similarity are easily acknowledged by other Member States. In this context, the delimitation of a Community public policy appears more feasible. Certainly, it appears preferentially tainted with economic shades, and articulated into (mandatory) rules rather than principles. The European Union, as an important agent in the international trade, defends its policies.

Which are the legal-economic standards of the Community? It seems that a consensus exists as to include the rules which govern competition: protection of competition in a free market has been, since the very beginning, one of the main purposes of the Community which has developed a web of mandatory legislation in this area on the basis of Articles 85 and 86 EC Treaty. The development of mandatory rules in the Community is not restricted however to that area but has developed into a wide range of matters which concern labour relations within the Community,[79] the posting of workers;[80] Social Security;[81] the approximation of the laws of the Member States concerning liability for defective products;[82] the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-share basis;[83] unfair terms in consumer contracts;[84] insurance law (life and non-life insurance);[85] Community mark;[86] the return of cultural objects unlawfully removed from the territory of a Member State.[87] In broad terms it is possible to extract two main concerns stemming from these rules. Firstly, the need to ensure a certain level of Community protection, moreover when the applicable law comes from a non-EC State. This interest is particularly felt in

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79. Proposal for a Council Regulation, OJ C 49/26 of 18.5.72.

80. Proposal for a Council Directive 93/C 187/07, OJ C187/5 of 9.7.93.

81. Council Regulation 1408/71 of 14.6.71, OJ L149/2 of 5.7.71, and its consequent modifications.

82. Council Directive of 25.7.85, OJ L210/29 of 7.8.85.

83. Parliament & Council Directive 94/74/EC of 26.10.94, OJ L280/83 of 29.10.94.

84. Council Directive 93/13/EEC of 5.4.93, OJ L 95/29 of 21.4.93.

85. Second Directive Non-life Insurance, 88/357/EEC of 22.6.88 (OJ L 172/1 of 4.7.88); Second Directive Life Insurance, 90/619/EEC of 8.11.993 (OJ L 330/50 of 29/11/90); third Directive Non-life Insurance, 92/49/EEC of 18.6.92 (OJ L 228/1 of 11.8.92); third Directive Life Insurance, 92/96/EEC of 10.11.92 (OJ L 360/1 of 9.12.92),

86. Council Regulation No.40/94 of 20.12.93, OJ L11/1 of 14.1.94.

87. Council Directive 93/7/EEC of 15.3.93, OJ L 74/74 of 27.3.93.

relation to consumer protection, and it can also be extended to the protection of workers.[88] The second concern focuses on fostering the internal market and avoiding distortions in competition.[89] These areas —which also develop in an important manner under mandatory rules, are closely linked to economic and social rights. Such legislation implies specific protective concerns which do not conceal a certain commitment as regards the latter. Thus, an incipient web of Community mandatory rules is progressively defined in parallel layers to Member State's mandatory rules. Although there is no clear pattern about the territorial applicability of such rules, it can be advanced that it tends to be activated when the issue exhibits territorial connection to the EU.[90]

20. Legislative policies however go further the pure economic regulation and extend to other areas. Thus, the Union has also adopted political economic measures which have a political-penalty character, such as boycotts and embargoes[91] as well as other measures which come close to the moral-ethical layer, namely the measures against drugs dealing and money laundering.[92]

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88. In relation to consumers, see Article 9 of the Time-share Sales Directive, Parliament & Council Directive 94/74/EC of 26.10.94, OJ L280/83 of 29.10.94; Article 6(2) of the Unfair Contract Terms Directive, Council Directive 93/13/EEC of 5.4.93, OJ L 95/29 of 21.4.93 and the Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at distance, OJ C308/18 of 15.11.93. Concerning workers, see the Proposal for a Council Regulation Concerning Conflict of Laws in Labour Relations and the Proposal for a Council Directive Concerning the Posting of Workers.

89. As results from Recital 1 of the Time-share Sales Directive (see footnote 86), Recital 6 of the Unfair Contract Terms Directive (footnote 87) or Recital 1 of the Liability for Defective Products Directive of 25.7.85 (OJ L210/29 of 7.8.85).

90. See for instance Article 6(2) of the Unfair Terms Directive and Article 9 of the Time-share Sales Directive. However, it is noted that in the Proposal for a Council Directive on Contracts Negotiated at a Distance no connection of this kind is envisaged.

91. See the recent Council Regulation 2271/96 (of 22.11.96, OJCE 309/1 of 29.11.96) against the Helms-Burton regulation, Council Regulation 3275/93 (of 29.11.93) as a result of the UN Resolution 883(1993) on embargo measures against Libya, Council Regulation 877/82 (of 16.4.82 OJ L102/2) and Parliament Resolution (of 22.4.82 OJ C125/73) on the embargo against Argentina.

92. See the EU action plan proposed by the Commission to combat drugs in Press Release 7760/94 (Press 128) of Justice and Home Affairs Council Meeting of 20.6.94, Luxembourg, Council of the EU and the Council Directive 91/308 OJ L166/77 of 10.6.91 on prevention of the use of the financial system for the purpose of money laundering.

No misleading conclusion shall be reached: it is not because the economic element has prevalence in the definition of Community public policy that the other elements are alien to it. Indeed, from such economic standards other criteria have arisen, as we have noted in relation to the general good. The latter develops different aspects such as environmental protection, cultural protection, etc. (§18). In actual fact, a Community which aims at the "creation of an ever closer Union among the peoples of Europe"[93] must go beyond economic integration and foster other aims. Indeed, the fulfilment of an economic market as an identifying feature of the EC also needs to be put in context with human rights protection and — extensively — ethical choices: protection of workers and their families. This is so in a context of pluralism of values. Admittedly, legal-economic standards tend also to overlap with cultural identity. Moreover, economic integration only finds its whole sense where it is put to the service of raising the standard of living of its citizens and furthering the works of peace.[94]

These considerations bring about a notion which is in permanent evolution and which exhibits the three layers of public policy in an EU sphere. Probably the economic one is the most relevant. However, it cannot be correctly understood if it is not read in conjunction with the two others.

3. Fuuctions of Community ordre public

21. We have already noted (§9) that the contents of public policy are not but directly linked to the functions the notion fulfils, namely the elimination of foreign law where it is contrary to 'natural' law, the defence of the principles that shape the community and the safeguard of legislative policies. In the particular framework of European integration it is especially important to stress the functional character of public policy. Should the considerations made in general terms on the function of public policy be reproduced as far as EU *ordre public* is concerned? Seemingly the transposition of these functions to the European sphere may not be exactly undertaken. Indeed, the European Union would exhibit more an offensive character than a defensive one,

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93. Article A(2) of the Union treaty.
94. In the words of the preamble to the EC Treaty.

thus insisting on the two last features more than on the first one. As stems from the analysis of the content of the notion and due to its offensive character, Community *ordre public* would confirm the tendency pointed out above to prefer public policy rules to public policy principles.[95]

Ordre public as fostering certain policies introduces elements of international public policy which can be identified with internal notions of public policy in State law. This means that possibly an internal public policy also exists at the European Union level. In actual fact, such a notion should be understood under private law terms. *Ordre public* as internal public policy means that party autonomy is restricted in contractual relations. Indeed, such is the outcome of certain provisions of Community law[96] as Article 119 EC Treaty and the Directives on company law.

In contrast to Member States' public policy, public policy in the European Union exhibits an integrative character. This feature is obvious when the notion applies in relation to third States. In such a case, it is irrelevant which Member State is having recourse to the notion, since an aggression against Community public policy will encounter the same answer whatever the place of the offence. The role that public policy plays is not only of 'formal' integration but also of substantive integration.[97] In other words, the content of European public policy reflects European culture, its defining characters and idiosyncrasy. It contributes to reinforce a common identity. Furthermore, *ordre public* in the European Union appears as a means of fulfilling material justice because it entails substantive concerns and an offensive role which materialises in mandatory rules.

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95. Fallon (*op. cit.*, 1995 p. 255) insists on the different way of application of these two notions: when rules are invoked, recourse to the principles is excluded. He further contends that Community public policy fulfils essentially a positive function which is expressed by the application of those EC public policy rules (1995: 257).

96. In this sense, Poillot-Peruzzetto, *op. cit.*, p.182.

97. This is one of the characters which reinforces its nature as a general clause: it contributes to the completion and flexibility of the system (J.M., Miquel, *op. cit.*, p. 322).

4. Application of the notion

Community public policy may only find exact definition when it is applied by the national judge, both in relation to applicable law and the recognition of forcign decisions. The application of Community *ordre public* in the sense of private international law has to address several questions which reproduce to a certain extent the questions the judge must tackle when applying State international public policy. What kind of link with the Union activates the clause? In other words, does *Inlandsbeziehung* apply at this level too? Other inquiries however, derive from the specific framework where the clause operates: is it operative in intra-Community relations or should it be exclusively reserved for external relations?

4.1. The Community connection

22. State public policy is activated after a thorough evaluation of two basic parameters: the interest at stake and the connection to the forum (*Inlandsbeziehung* in German terms). *Inlandsbeziehung* is the set of circumstances which are envisaged in the present case and which impose the application of forum law, despite the conflict rule had imposed the application of another legal order. *Inlandsbeziehung* activates public policy on the basis of the close link that the issue exhibits with the forum.[98] The stronger the interest protected is, the less relevant the link to the forum must be to activate public policy: a clear example is provided by human rights protection. *Inlandsbeziehung* retrieves all its strength in relation to mandatory rules, since the later are the most concrete manifestation of State interests. When they are so relevant to the State, they justify that the rules are applied also outside the State boundaries. In this case, the State must have the actual possibility to impose the rule. In other words: the connection to the forum is closer in relation to mandatory rules than to public policy principles.

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98. Lagarde, "La théorie de l'ordre public international face B la polygamie et B la répudiation. L'expérience française", in *Nouveaux itinéraires en droit. Hommage à FranHois Rigaux*, 1993 p. 270 §9. He seems to restrict *Inlandsbeziehung* to a territorial link, which is a reductionist vision of the notion. However, in his study on Public Policy, IECL, §§32 and 41, he refers to other criteria such as nationality, mainly related to family and personal status.

23. Since we have seen (§§14-20) which are the interests (contents) which activate Community public policy, we shall focus now on the second element, namely, *Inlandsbeziehung*. The requirement of a link to the Union may be deduced from the ECJ's case law: the 'effects' doctrine plays an important role in the application of Community law. However, this link should not be reduced to a territorial connection to the Community, since other criteria may also activate the intervention of Community law. This results from the ECJ's case law.

In case *Walrave & Koch* the ECJ tackled the question of the applicability of non-discrimination on grounds of territorial effect: "by reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships insofar as these relationships, by reason of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community."[99] As A. G. Darmon suggests in his opinion in the *Woodpulp* case, the conclusions reached in the former case may be transposed to competition law. Accordingly the Court decides that "if the applicability of prohibitions laid down under competition law were made to depend on the place where the place of the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means to evade those prohibitions. The decisive factor is therefore the place where it is implemented."[100] Since the implementation had taken place in the Community the prohibitions were deemed to have been infringed. A further step as regards the localisation of Community competence has been recently taken in case *Aldewereld*. The ECJ, admittedly reproducing former case law, states that "the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community"[101]. The connection is set in the fact that the Community worker was employed by an undertaking from a Member State. The

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99. Case 36/74 [1974] ECR 1405 at p. 28.

100. Case 89/85 *Ahlström v. Commission* [1988] ECR 5193 See p. 17 of the opinion and p. 16 of the judgment. Contrary to this opinion, Basedow ("Conflicts of Economic Regulation" in *A.J.C.L.*, vol.42, 1994 p. 431) suggests that the effects doctrine may not be said to be recognised yet in the European competition law. However, he admits that the outcome of the Court's case law is very close to the effect doctrine.

101. C-60/93 [1994] ECR I-2291 p.14.

Court definitely opts for a large conception of the links with the European Union, consequently expanding the extraterritorial effect of Community law. A last step in this conception is given in the *Boukhalfa* judgment; the ECJ deems that the link of the case *to the law of one of the Member States* makes a sufficient link to the Community sphere.[102]

These cases regard essential areas of Community law, namely competition law and free movement of workers. In other words, idiosyncratic elements of Community law are activated where there exists a particular connection to the forum. The latter may adopt various shapes, either the effects in Community territory, the nationality of a Member State, etc. If Community *ordre public* is to be applied by Spanish courts, they will activate Community public policy when it comes within the Community sphere of application: where no connection with Community is at stake, Community law withdraws and Spanish public policy enters the game.

4.2. Relations where the Community public policy may be invoked

4.2.1. Relations between the Union and the Member States (Spain)

24. A notion of *ordre public* in the sense of private international law implies that recourse to the notion is excluded as far as the relationships of the Union and its Member States are concerned. Scholars who insist on the notion of public policy as governing such relationship have a biased starting point.[103] Indeed, the relations between Spain and the EU are based on the principle of supremacy of the latter and a delimitation of the competences of both of them. Although the relation between the Union and its Member States may be envisaged in terms of conflicts of law (in the way it is fashioned in the United States, hereinafter U.S.), it should be understood more in constitutional terms than in private international law terms. Since there is no conflict of laws at stake, no public policy exception plays.

25. However, some scholars sustain the possibility to speak of conflict of laws within the Community. In this case, Community law would establish from above the law to be applied among the plurality of

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102. Case C-214/94 *Boukhalfa v. Germany* [1996] ECR I-2253 (emphasis added).
103. This is the position sustained by Poillot-Peruzzetto, *op. cit.*, p. 182.

systems likely to be applied: the Community rules would then define the applicable law within the framework of the Community legal order (and not of the State legal orders).[104] Thus conceived, the conflict of rules asks for a special notion of public policy, a specific mechanism which decides on the application or exclusion of a Member State rule. It would be a sort of substantive rule according to which we could solve the conflict of laws within the Union.[105] In this case, the notion would be closer to a constitutional clause, in the same manner that the *full faith and credit clause* fulfils in the U.S. Probably, the Community general good, as above mentioned, should be understood in this sense. (§18).

4.2.2. Relations between Spain and non Member States

26. Some voices have raised claiming the necessity to define and apply Community public policy in relation to third States; thus *ordre public* would exclusively apply in those relations and would be excluded from the intra-States relationships.[106] We shall explain later on (§38) why do not agree with this point of view, but we shall first distinguish the different spheres where it may be applied.

27. (i) Applicable law: as stems from the previous analysis, European ordre public will find application mainly in an economic sphere. Probably the 1980 Rome convention provides an adequate framework where the notion would be invoked. In this context not only general principles such as non-discrimination will find protection, but also EC mandatory rules will find application. The mechanisms which might be used are:
— Article 16, as the path for public policy principles such as the non discrimination principle
— Article 7.2, as forum mandatory rules are concerned: despite they keep a Community character and they cannot be identified as State rules, Community rules become part of the double lex fori the

104. G. Badiali, "Le droit international privé des Communautés européennes", *Rec. des Cours*, t. 191, 1985 pp. 44-45.

105. H. Duijnter Tebbens ("Les conflits de lois en matière de publicité déloyale B l'épreuve de droit communautaire", *R.C.D.I.P.*, vol. 83, 1994 p. 478) suggests that Community *ordre public* acts as a corrective in the application of the conflict rules of Member States when they become a hindrance to market achievement.

106. Hubeau, *op. cit.*, p. 216 and García Rodríguez, *op. cit.*, p. 940.

enforcement of which is ensured by Spanish courts;[108] this would be the case of the protection of the free market and property[109]
— Article 7.1 in those cases where the applicable law is neither *lex causae* nor *lex fori,* as a general rule, for instance concerning competition matters;
— Article 5 in consumer cases and Article 6 in cases concerning workers provide the context for the application of mandatory rules. The public policy clause will be only activated in these areas when the interest to be protected is not enshrined in the specific rule and the legal order so demands: for instance in similar conditions to the Canary Islands cases.[110]

The particularity of Community *ordre public* derives from the obligation to apply it for the Spanish judge. In opposition to national rules referred to in Article 7.1, the application of which is left to the discretionary of the judge, Community public policy rules are not subject to a judgment of convenience, but they are directly imposed.[111] The hypothesis here advanced do not exclude the application of Community public policy in any other area linked to the fulfilment of the internal market. When Community *ordre public* is at stake, the Spanish judge may invoke it on the same footing than Spanish public policy. The judge will simply proceed to establish whether the issue comes under the realm of Community or Spanish public policy.

Seemingly the Community *ordre public* is not restricted to the Rome Convention framework and it may find application under the *ordre*

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107. So did the Reporters Giuliano & Lagarde foresee in the Report on the Rome Convention 1980 on the applicable law to contractual obligations, OJ C282/38 of 31.10.80.

108. We borrow the double lex fori terminology from Struycken, *op. cit.*, p. 324.

109. In this sense, when the A.P. Madrid (see footnote 36) rules that the right to property and freedom of market, as constitutional principles (Articles 33 & 38), prevail as public policy against Cuban legislation, it must also consider whether the realm of Community law is also affected. If this were so, Community public policy would be activated. Admittedly, pertaining to a supranational (economic) system entails that the securing of a free market is granted from a European perspective which overcomes strict State boundaries.

110. Probably the development of such principle suited to the case (particular rule) might be at the basis of a future general (mandatory) rule in the system. This is precisely the role of public policy as a excepting clause.

111. Fallon, "Les conflits de lois...", *op. cit.*, p. 263.

public provisions of The Hague Conventions.[112] Conceived in these terms, EU *ordre public* provides a uniform and firm position in front of third States in the same manner that, for example, the United States might do in front of European States. Furthermore, these reflections should insist on the fact that a Community public policy will progressively incorporate contents other than economic ones and activate therefore when the latter are threatened. This is seemingly the case of protection of cultural goods. However, in other areas as civil law, particularly family law, such a contention is not yet possible and probably not feasible. In such cases the notion that will be resorted to is the national one.

28. (ii) *Jurisdiction and recognition of foreign decisions*: the relations established between Spain and third States come under the realm of Spanish legislation (LOPJ and LEC)[113] and bilateral conventions subscribed by Spain and those States. As a general rule, issues related to *international jurisdiction* remain excluded from the public policy control. There are, however, cases where it is possible to sustain the activation of the notion. Thus, it has been contended that the election of forum clauses made in fraud of EC mandatory rules activates Community public policy (such as those foreseen in Article 113 EC Treaty).[114]

29. In relation to *recognition*, both substantive and procedural Community *ordre public* may find application under Article 954.3 LEC and the provisions foreseen in bilateral conventions.[115] *Substantive* public policy would probably be activated at the recognition stage

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112. For instance it is possible to think of its application in Article 18 of the *Convention sur la loi applicable aux contrats de vente internationale de marchandises* (La Haye, 22.12.86, not yet in force), Article 17 of the *Convention sur la loi applicable aux contrats d'intermediaires et à la représentation* (La Haye, 14.3.78, in the light shed by Council Directive 86/653/EEC of 18.12.86 OJ L382/17 of 31.12.86) or to Article 10 of the *Convention sur la loi applicable à la responsabilité du fait des produits* (La Haye, 2.10.73 in the light shed by Directive 85/374/EEC of 25.7.85).

113. This will be so unless the third State party is domiciled in a Member State and the dispute comes under the Brussels convention substantive scope.

114. Struycken, *op. cit.*, p. 348.

115. See Convention with *Czechoslovakia* (of 4.5.87, BOE n.290 of 23.12.88), Mexico (of 17.4.89, BOE n.85 of 5.4.91), Israel (of 13.4.89, BOE n. 3 of 3.1.91), Brazil (of 13.4.89, BOE n. 164 of 10.7.91).

where the judgment which claims enforcement has disregarded essential EC mandatory rules. The case where this may most likely happen regards competition matters but other areas should not be excluded, namely those concerned with consumer protection (namely in cases of insurance, sales, banking, etc.) and also with the protection of cultural goods. A progressive enlargement in the application of Community *ordre public* is not excluded to other fields, but it encounters the same limitations noted in relation to applicable law (§27). Community *procedural* public policy is likely to be activated also at this recognition stage. Seemingly this is already so in the framework of competition matters, where a set of principles which are at the basis of a true procedural Community notion has developed on grounds of the right to a fair hearing and the equality of arms (see §15). The guarantees laid down by the Court exhibit, to a certain extent, a bias due to several reasons such as the nature of the proceedings (in many cases of an administrative character -namely they regard competition and civil servant cases) or the personal scope of its beneficiaries. The ECJ has acknowledged that the guarantees to the right to defence in administrative cases are necessarily different from the guarantees in a civil procedure.[116] The preferential application of Community procedural public policy in competition procedures does not exclude its activation in other areas, namely in the context of civil and commercial litigation.

4.2.3. Relations between Spain and other Member States

As the Brussels convention 1968 was signed, a debate took place on the convenience to maintain a notion such as public policy in the framework of cooperation and convergence set by the EC.[117] Where State notions of public policy are not perceived as necessary, it can be doubted whether the need is felt for a Community public policy. However, voices have raised as to the convenience of such notion, either as a sort of internal public policy (in the sense they cannot be

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116. Case C-60/92 *Otto v. Postbank* [1993] ECR I-5707 at p.15.

117. In the context of the Brussels convention on jurisdiction and recognition of foreign judgments, see G.A.L. Droz, *Compétence judiciaire et effets des jugements dans le Marché Commun*, Dalloz, Paris, 1972 p. 309. He admits, however, that the presence of public policy is

disposed of by individuals), or as a typical mechanism for the correct functioning of conflict rules.[118]

30. (i) *Applicable law*: from both a theoretical and a functional point of view, recourse to Community public policy by a Member State court while deciding about another Member State law would seem not possible since it may be understood as an usurpation of the ECJ's competences. National courts are not supposed to wear the ECJ's hat. However, recourse to public policy — although it must remain restricted — appears as necessary. Otherwise, the acceptance of the rule coming from the first State which runs counter to EC public policy would entail the infringement of Community obligations by the second State.[119] In this case, the judge should fill the gap having recourse *ex officio* to Community public policy, thus working out the rule to solve the specific case.[120]

Moreover, it is possible that two Member States endeavour to make prevail two different aspects of a Community public policy, for instance, where two mandatory rules conflict (in social security and employees protection) or when a mandatory rule and a principle clash (for instance, one of them invoked competition mandatory rules while the other argued on the basis of the right to privacy). Indeed, such

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a mechanism that favours ratification of the convention.

118. See García Rodríguez, *op. cit.*, p. 937 & 940. Spickhoff, op. cit., p. 89, stresses the lack of congruence of applying Community public policy against third States (such as the United States) while its application is refused against Member States, when in both cases a similarity of traditions exists.

119. This reasoning mirrors a broader hypothesis: a violation of international obligations may not be accepted in another State which is entitled to refuse such an infringement. Otherwise, by applying a rule or recognising a judgment which violates the international rule, it becomes itself an accomplice in breaching the same obligation. As a practical illustration, see case *Soering* (7.7.89) Series A, vol.251: the European Court of Human Rights held that the extradition to a country in which the infringement of Article 3 of the ECHR would be likely, (though the US are not a contracting party to that convention) would constitute itself an infringement of the ECHR for the extraditing State. In relation to procedural public policy see French Cassation (of 3.12.96, RCDIP, 1997:329).

120. This could have been a proper solution to the Gran Canaria cases which concerned the application of Spanish and German law. Fallon ("Les conflits de lois...", *op. cit.*, p. 243) thinks the judge should apply ex officio the non-implemented directives, since, he deems Community rules to be *"d'ordre public, impérative ou non"*. We deem this position to be a possible interpretation of the integrative character of public policy.

appears as a conflict between different layers of the EU public policy. According to what criteria should it be solved? Several elements must be taken into consideration to produce an answer.[121] As it was sustained *supra*, principles should prevail over rules and probably the economic aspect should withdraw in favour of the non-economic ones.

31. (ii) *Jurisdiction and recognition of foreign judgments*: the Brussels convention 1968 governs litigation between persons domiciled in the EC. In Art. 28.3 it expressly excludes recourse to public policy in *jurisdiction* matters. However, a cautious recourse to a Community public policy could also be advanced as far as control of jurisdiction is concerned. In principle, such control remains outside the scope of public policy in European tradition. We nevertheless contend that, as a reflection of procedural guarantees and as a manifestation of the non-discrimination principle, in order to cover the gap created by the application of an exorbitant forum by a Member State Community public policy could intervene. This should be so with preference to national *ordre public* (as stemming from Art. 24 of the Spanish Constitution) because a Community standard is thus ensured throughout the whole Community. In this sense, Community public policy would act as a constitutional clause — in the same terms that due process in the US corrects the excesses which States of the Union may commit.

32. In the sphere of *recognition* the Convention leaves a reduced margin for the application of public policy (Art. 27.1).[122] Recourse to the notion should be thus reduced to the greatest extent. Nevertheless we can face several possible applications of public policy. On the one hand, recourse to public policy is likely when the judgment to be recognised[123] has disregarded mandatory rules of the recognising State. In other words, where a Community mandatory rule has not been applied, good sense imposes to make reference to Community public policy to deny recognition to the judgment. On the other hand, where the ECJ's case

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121. The clash between principle and rule in actual fact mirrors a conflict between a explicit principle and the implicit principle underlying the rule. In this sense, it is the case that we proceed to weigh the values and choose one of them as more relevant under the concrete circumstances (see R. Alexy, *op. cit.*, pp. 90ff).

122. Jenard, Report to the Convention, p. 44.

123. Jenard Report, p. 24; he thus sanctions the close link existing between rules and principles.

law is disregarded, Community public policy may be activated too.[124] It seems reasonable to activate the latter, which stems from the Court's case law, instead of having recourse to national notions of public policy, which stem rather from State criteria. Lastly, we would advance a parallel proposal to the applicable law sphere: a judgment can be refused in another Member State where the recognition of the latter will entail the infringement of EC law by the recognising court (§30).

The notion of public policy may undergo an enlargement as new conventions are drafted when the scope of the convention so allows, according to a competence division. Thus, the proposal for a convention on jurisdiction and recognition of judgments in family law matters will still set the framework for national notions to apply since this issues are directly linked to State idiosyncrasy.[125]

5. Effects of the application of Community public policy

In general, the effects of applying Community public policy should be the same, both when it is invoked in relation to third States and when it is operative within the Union. A distinction is undertaken according to the field where public policy has been invoked.

5.1. Applicable law

33. Admittedly, Community public policy, in the three defined layers, is enshrined in both principles and rules. Thus, where *public policy principles* are applicable, they delimit the framework of tolerance within the Union. If the clash is radical the rejection of the foreign law which runs counter to them follows. Such rejection may be total or partial. The question arises according to what law to establish the effects of the rejection or partial admission of the rule. Seemingly a substitute rule may be looked for. If we were dealing with Spanish

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124. M. Weser, *Convention communautaire sur la compétence judiciaire et l'exécution des décisions*, CIDC, Bruxelles, 1975 p. 331.

125. See Press Release 7760/94 (Press 128) of Justice and Home Affairs Council Meeting of 20.6.94, Luxembourg, Council of Europe. As Kohler ("L'article 220 du traité CEE et les conflits de juridictions en matière de relations familiales: premières reflexions", R.D.I.P.P., vol.28, 1992 p. 237) points out *"Le droit de la famille reste lié aux traditions, aux moeurs et aux conditions sociales propres à chaque État à tel point qu'il touche à l'identité nationale"*.

public policy, the Spanish court would have recourse to the *lex fori* or the *lex causae.*[126] In logical coherence, at the Community level, this substitute rule should be Community law if it appears as forum law or *lex causae.* If there is a piece of Community legislation directly applicable which is a development of a public policy principle then, such rule would apply (for instance, the principle of non-discrimination as results from Article 119 EC Treaty or Regulations on employment or social security matters). On the contrary, in the case of no directly applicable text, when the principle (as consumer protection, Art. 129) is developed in Directives, recourse probably would have to be made to Member State's implementation (of Directives).

The question becomes, then, to select which of the (fifteen) State implementations should govern the issue. Since the implementation of Community public policy rules puts all the Member State laws on the same footing, the application of one or the other would be indistinct. As the violation of Community public policy must have occurred on the territory of a Member State, it is probable that the judge finds the implementation of the forum's law the most relevant-connected (and logical) solution to apply. However, where the forum had no 'interest' in the matter and/or the effect of the infringement would take place in another Member State, then the law of the latter is to prevail. Either the forum law or the law secondly selected will decide in an integrative function (§2) the consequences of the application of EC public policy principle, whether it entails absolute nullity of the contract or whether a partial admission is possible.

34. In the case the Spanish judge was dealing with EU mandatory rules, either as they stem directly from Community legislation or as they result from Member States' implementation (of the Directives which introduce such Community mandatory rules), he will apply them in the sense noted in §27. Mandatory rules will, on many occasions emphasise the territorial links of the rule to the Community, and more

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126. Recourse to *lex fori* has been traditionally the solution Spanish courts have adopted, in the same way as French courts usually do. Other legal systems such as the German and the Italian (after the 1995 reform) tend to apply another rule of the same legal system to which the rejected rule belongs. Both solutions may be criticised since they alter the normal functioning of conflict rules. Alternative proposals have been advanced, such as the creation of substantive rules that may replace the foreign rules (F. Vischer, "General course on Private international Law", *Rec. des Cours*, t. 232, 1992 p.14), but they have found little success in case law.

precisely to the territory of its Member States. In contrast to national mandatory rules that, in the framework of Article 7.1. of the Rome convention, may be given effect, Community mandatory rules (or their State implementation) will be effectively applied. It is the task of the Spanish judge to decide according to Spanish (forum) law the ensuing consequences as if they were national mandatory rules. Such a position has already been upheld by the ECJ in competition matters.[127]

5.2. Recognition of foreign decisions

35. A foreign judgment may display in the forum (Spain) its effects to the extent it does not offend neither the Spanish nor the Community public policy. Having recourse to one or the other is not indifferent since, not only they have different competence spheres but also they have different preclusive effects. Where Community public policy has been activated, then, such offending judgment will find no recognition wherever it tries to be enforced. On the contrary, where the national public policy is activated, the preclusion of recognition in one State does not exclude the recognition in other States. The existence of a unique judicial European area reflects in the application of a uniform notion of public policy as regards the recognition and/or enforcement of foreign decisions. In such a case, the risks of forum shopping are reduced.

Where there has been an infringement of procedural guarantees, the successful invocation of public policy will imply that one should reset the procedure to the moment of the infringement. This is so because it is the fairest solution in order to balance the right to defence and the

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127. In case 56/65 *Société Technique Minière v. Machinenbau Ulm GmbH* [1966] ECR 235 the ECJ held the nullity of contractual provisions which were incompatible with Article 85(1) adding that "the consequences of that nullity for all other elements in the agreement are not the concern of Community law". A. G. Roemer (at p. 357) further stated that "the law of the Treaty on competition only touches with nullity those parts of an agreement which have a bearing from the viewpoint of competition. For the rest, it is not necessary... to settle on the level of Community law, i.e., uniformly for all the Member States, the question of the effects on the partial nullity of an agreement on the whole of the undertakings included in the contract. For that question it is the applicable national law which can claim precedence (according to the rules of private international law)". More recently, in cases C-430-1/93 *Van Schijndel* [1995] ECR I-4705 p. 49, A.G. Jacobs sustains that national courts must apply to contractual disputes the sanctions foreseen by Art. 85 EC Treaty *ex officio*.

interests of the applicant in not being denied justice. On the contrary, when jurisdiction rules have been infringed (because exorbitant fora have been applied), the successful invocation of public policy entails to simply refuse the judgment with no curing alternative.

6. Re-framing the nnderstanding of Spanish and Community pnblic policy

The previous pages have shed some light on the notion of Community *ordre public*. Still, the communication aspect of public policy is to be tackled from a twofold point of view, namely, the influence that State public policy undergoes due to the fact Spain belongs to the Community and the relationship between the two notions.

6.1. Rereading Spanish international ordre public

36. The question arises: which are the correct limits of application of Spanish public policy in the EU framework? As a fundamental guideline, it is assumed that recourse to public policy is not allowed when it hinders Community aims: "when the national Courts apply their national law and the private international law of their State they must do so in a way which is in keeping with attainment of the objectives of the Treaty. Thus a strained and consequently unsuitable interpretation of the principle of ordre public for example might in fact constitute an infringement of the EEC Treaty"[128]. Such a criterion is completed by the obligation of cooperation between Member States as enshrined in Art. 5 of the EC Treaty. It is argued that the principle of solidarity among Member States imposes the respect and application of their rules, also those encompassing public law rules of the other Member State.[129] The evolution of private international law promotes solidarity so as to include the respect and application of mandatory rules of Member States. Another possible reading of this cooperation principle would exclude the excessive recourse to public policy in order to impose forum law. A persistent attitude in this sense would threaten the market.

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128. Case 15/78 *Koestler*, [1978] ECR 1971 A. G. Reischl, p. 1988.

129. Drobnig, "L'apport du droit communautaire au droit international privé", in *C.D.E.*, 1970 p. 539.

The fulfilment of Community freedoms sets thus a limit to public policy. In this sense, the strict limits in which public policy in the sense of the Treaties is enshrined, provides certain guidelines to this review of international public policy.[130] Thus, recourse to *ordre public* with a purpose of protecting national economy should be avoided. It furthermore means that non-discrimination between EC-nationals and the adjustment to the ECHR must ensue from the application of such notion. The control of State public policy takes place when its application comes within Community scope. Once again the problem is focused on the delimitation of the scope of Community law. Seemingly, the cession of competence which allows such control by the EC is mainly restricted to economic matters. Thus, economic public policy of Member States is more likely to undergo such restriction. The question arises whether areas other than economic may also be affected by this loss of power and consequently come under Community control. Could certain areas of private law where puhlic policy is particularly active (e.g. family law) be subject to a reading under Community parameters? The potential expansive character of EC law which may lead one to so conclude. A certain limit stems nevertheless from Treaty provisions, since these matters reflect the idiosyncrasy of Member States, and so they should be respected by EC law in compliance with Articles 3 and 128 after Maastricht Treaty (§18).

37. On what grounds may the control of public policy be undertaken? In other words, what are the parameters of the correction? The only case where recourse to the international *ordre public* of a Member State was questioned, namely *Koestler*, solved the issue on grounds of non-discrimination.[131] The judgment, which has met

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130. The case by case delimitation of the notion by the ECJ provides few guidelines. Each freedom blends the notion with particular features, but it stems clearly that exceptions based on economic grounds are definitely excluded. This stems from case 352/85 *Bond van Adverteerders* [1988] ECR 2085, p. 34 in relation to services; cases 95/81 *Commission v. Italy* [1982] ECR 2187 and 113/80 *Commission v. Ireland* [1981] ECR 1625 in relation to free movement of goods. Considerations of consumer protection have also been excluded from the realm of public policy: case C-239/90 *Boscher v. British Motors Wright* [1991] ECR I-2023, p. 22.

131. Case 15/78 *Koestler,* [1978] ECR 1971. The case concerned the action for recovery of the account owed by a German national to a French bank. This debt resulted of the time-bargain orders carried out in the stock market by the former on the instructions of the defendant. The German Court contended that recovery of a debt arising out of claims on time-bargain was

negative readings,[132] probably would find another justification if submitted now to the Court, and would confront the recourse to German public policy with the criteria of necessity and proportionality. To these requirements of non-discrimination, necessity and proportionality responds precisely the criterion of the general good as results from the evolution of Community law and case law of the ECJ (§18). The correct understanding of the general good restricts such control to the extent it comes within the Treaty scope. Thus, recourse to the public policy exception would be admitted where no harmonisation has taken place, where it is not discriminatory and where there is no other means of attaining the result which is less restrictive to market completion than this one. Although stress has been put in the absence of harmonisation so that the public policy could be operative, it is contended that in presence of harmonised legislation recourse to public policy is not excluded. Indeed, in the latter case, recourse to public policy is still possible by means of Article 16 of the Rome Convention, in those areas where its sphere may coincide with Directives.

These reflections must be extended to cover mandatory rules, fundamental expression of the general good interests of Member States. Community general good, which defines the protective concerns of the Union, will delimit the conditions of application of national mandatory rules. The latter may not hinder the fulfilment of the internal market unless this hindrance is justified by general good reasons. The control of State mandatory rules is nevertheless limited to the European Union scope. That is, it is only possible in the sphere of the EC Treaty. However, even where this condition is fulfilled, not all the mandatory rules within the scope of the Treaty shall be subject to this control. Only essential features with direct and relevant incidence in market fulfilment are likely to undergo such control.[133]

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contrary to the German public policy. The question arose whether such interpretation was in accordance to Community liberalisation of the provision of services. The ECJ settled that, since the measure in question was non-discriminatory, it could be permitted under Community law.

132. See Rigaux, "New Problems of Private International Law in the Single Market", *K.C.L.J.*, vol.4, (1993 — 94) (23 — 43). These criticisms stress the fact that the Court ignored the effects of the application of such a exception to rely on a simple discrimination test.

133. Radicati di Brozolo ("L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation", *R.C.D.I.P.*, vol. 82, 1993 p. 417) suggests -in relation to insurance service provisions- that only those mandatory rules which hinder the conclusion of operations legally permitted in the country of origin or those which modify the content or affect the essential conditions and characteristics of the service are subject to such control.

6.2. Relations between Community public policy and Spanish public policy

38. This question reproduces the existing debate in the context of a true international public policy and its relation with domestic notions: when State courts apply a true international public policy, what do they intend to apply? Some think it is an element of the State notion of public policy. Others, on the contrary, think that recourse to true international public policy is an indicator of the existence of another notion, distinct from the national one and which differs from the latter. If this were so, one may deem that one of the two is superfluous. In this case we must accept one of the two solutions: either we eliminate the international notion, or we impose the true international *ordre public* on the basis of the superiority of international law.[134] If we transpose the debate into the Community sphere, some think[135] that Community public policy should prevail over the State notions while other sustain the incorporation of the Community notion into the State notions of public policy.[136] Lastly, some think, and we subscribe this position, that both notions should co-exist in the following terms.

One could argue that there is no need for a Community notion of public policy since the role it fulfils is already satisfied by Member State public policy which incorporates Community law criteria. The risk that such a conception entails is to give raise to fifteen understandings of Community public policy. Such a danger certainly does not favour integration aims. The opposite risk appears when, while accentuating the integrative purposes of the Union, one admits that the acknowledgement of a Community (international) public policy entails the substitution of the national notions. The latter position does not respect the sovereignty of Member States. Indeed, despite the partial cession of sovereignty/competence to the EC, Member States still keep

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134. A. Chapelle (*Les fonctions de l'ordre public international en droit international privé*, Paris II, thèse, 1979 p. 490) for the first position and B. Goldman ("La protection internationale des droits de l'homme et l'ordre public international dans le fonctionnement de la règle de conflit de lois", in *René Cassin Amicorum Discipulorumque Liber*, vol.I, Pedone, Paris, 1966 p. 118) for the second.

135. Van der Elst & Weser, *op. cit.*, p. 258; Loussouarn & Bredin, *Droit du commerce international*, Ed. Sirey, Paris, 1969 p. 507.

136. Drobnig, *op. cit.*, p. 539; Mayer, *op. cit.*, p. 664 and Giuliano/Lagarde Report on the Rome Convention (OJ C282/38 of 31.10.80).

a margin of autonomy to define and activate State notions of public policy which reflect the national identity.

39. The basic reason which justifies the existence of the two notions of public policy is the separate sphere of competences that Member States and the Union keep. Indeed, one would be tempted to justify the existence and solve the possible conflicts of application between the two notions on grounds of supremacy. However, the previous comments should help us to understand that it is more a question of competence than of supremacy.

In this game of delimitation among the respective spheres of competence, reference must be made to the principle of subsidiarity. This principle introduces a wider margin of actuation for private international systems of the Member States while it reduces the Community intervention. The restrictive recourse to a Community notion of *ordre public* is further delimited by the principle of subsidiarity. If subsidiarity is understood in the sense that matters should not be Europeanised without good reason,[137] then Community public policy is only operative when it ensures better protection than the national notion or when it solves arising problems in a more definite manner. We have advanced a proposal in this sense as far as procedural public policy is concerned in the framework of the Brussels convention (as a means of saving the exorbitant fora §31). Closely linked to subsidiarity appears the principle of respect of national identity, which defines specific areas which should be kept under State realm. Indeed, it has been argued that the areas which reflect with more intensity cultural identity should come under the realm of subsidiarity. This is particularly so in the case of private law.[138] Admittedly, only at Member State level may new features be dealt with in convenient terms. Phenomena such as homosexual marriages and bioethics put at stake many questions that, for the time being, pertain to the State sphere. However, the progressive overlapping of Community competences may entail an expansion of Community public policy in

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137. Hartley, "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser", 18 *E.L.Rev.*, 1993 p. 510.

138. See in this line of argumentation Rigaux, "La condition des personnes dans l'Europe de 1993", RBelDI, vol. 2, 1992 p. 528, Fallon, "Les droits accesoires à l'exercise des droits économiques de la personne dans la Communauté", *Annales de droit de Louvain*, 1993 p. 250 and Kohler, *op. cit.*, p. 236.

detriment of Member State's public policy. It is not excluded thus, that the essential economic character of Community public policy enlarges to include more civil law contents, up to now an essential State area. Further developments are not excluded.[139]

40. The separate spheres of State and Community law will delimit, then, the scope of application of the two notions. This means that a continuous examination of the evolutions of Community law must be undertaken. If public policy appears as a variable notion in general terms, in the EU sphere this character is accentuated and does not escape strong political and economic influences. This also means that criteria other than legal ones may enter the game. In a system of pluralism public policy appears as an area where contextual interaction is possible and leads to higher integration. The admission of cultural identity criteria allows in certain 'dissident' elements in public policy. This means that States may have recourse to the ethical considerations of public policy without being dismissed by Community criteria. Such a contention will materialise mainly in the sphere of human rights protection. Precisely those ethical considerations set the difference between notions of public policy. Community public policy may then balance two interests, namely the fulfilment of the market and the respect of cultural identity of its Member States in favour of the latter.

41. A parallel application of the two notions of public policy finds its last justification in the particular character of Spanish courts. Member State courts have a twofold nature which results in a *dédoublement fonctionnel.* Judges assume both a national and a

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139. Inroads of the Union in this area are not excluded if the latter retakes the stride advanced some years ago as regards private law. Already in 1983 the European Parliament (Resolution of the 9.6.83, referring to Articles 2 and 235 of the Rome Treaty) suggested to the Commission to devote special attention to "differing legal provisions in the Member States, and the possible consequent need for Community action in the following areas: the laws on adoption, the laws on custody of children where partners are separated or divorced, the rights of access to children by one divorced or separated spouse where custody has been awarded to the other...". The Parliament has gone further and has adopted also a Resolution A 3-0028/94 on equal rights for homosexual and lesbians in the EC (of 8.2.94, OJ C61/40 of 28.2.94). In this same line, the Resolution of the European Parliament of 26.5.89 on action to bring into line the private law of the Member States (OJ C 158/400), states that "unification can be carried out in branches of private law which are highly important for the single market". Serious works have been undertaken in this respect. See namely the "Principles of European Contract Law" (1995) prepared by the Commission on European Contract Law.

Community character. In this respect, acting as one or the other will entail the application of one public policy or the other. Two essential guidelines appear as fundamental for judges: on the one hand, Spanish public policy cannot be understood if not in a context of Community integration; on the other hand, Community public policy must respect necessarily Member States' notions as a reflection of State identity. Thus, the possible coexistence of the two notions is viable. In this framework, the discernment of the application of one or the other notion relies on judges. They have to assume the responsibility of identifying correctly the principles and rules at stake and then, choosing one of them.

7. Concluding remarks

I. Public policy is a basic notion in any legal system. It could be characterized as a manifold and global protective device of the latter. It operates as a general clause which serves the purpose of sustaining the basic principles of the legal system, and at the same time, ensuring (and controlling) the transfer of principles from other systems (like ethical ones) and between different legal systems and different branches of the law (§1—2). It is possible to delimit three layers in which the public policy clause articulates: ethical, idiosyncratic and legal-economic standards (§10—13).

II. Membership to international organisations necessarily implies the incorporation of the inspiring principles of the latter to the State system; but it also generates a safeguarding mechanism in relation to the former. This is the sense of public policy and the general goodwithin the EC Treaty. As exceptions to the Community freedoms, they must be constructed in restrictive terms and with necessary respect to the principles of non-discrimination, proportionality and to human rights (§4, 5, 17). EC law endeavours to work out with more or less strict criteria both notions with a view to fulfil the aims pursued by the Treaties. On the one hand, the pursuance of State economic aims becomes less justifiable; on the other hand, the ethical and idiosyncratic layers find progressive acceptance through the incorporation of human rights.

III. Belonging to the EC has an additional effect: it suggests the necessity to find inspiration in the aims the latter pursues and to review

national mechanisms (such as general/escape clauses) in the light of EC aims. Paying a new visit to State public policy might demand applying to it the same conditions imposed to EC Treaty exceptions. The achievement of the single market suggests an even more restricted recourse to public policy in relation to other Member States. This obligation is enhanced with the duty of cooperation between Member States (Art. 5 EC Treaty) (§36, 37). In relation to third States, there is a broader margin of appreciation for the Member State judge. As mandatory rules are concerned (as main expression of the State general good requirements), the necessary recognition of the "closeness" of the other Member States' legislation ensues, particularly in a context where most of the legislation may come from the implementation of Community legislation.

IV. If any legal system generates its own safeguarding mechanism, we must derive the existence of a Community *ordre public*. From EC mechanisms (namely case law and legislation) we can figure out the presence of the three layers which constitute and define public policy.

V. There is an ethical layer mainly specified through human rights, as identified in case law and sustained by several legislative declarations (§15). At the same time it is possible to pin down Community idiosyncrasy elements under the Community general good. The latter comprises interests worth of protection by the ECJ: consumer protection, health protection, and so on. Many of these interests are coincident with State general good. The main difference with the latter is the constitutional role that the Community general good plays: it becomes the yardstick according to which Member States' legislation and public policy are reviewed (§16—18). Lastly, legal-economic standards (free movement and market, competition) have traditionally been defining features of the EC that develop towards political concerns after Maastricht Treaty (§19, 20).

VI. Community *ordre public* fulfils the same functions as State public policy: it is inherent to the system and ensures its continuance (§21). As a private international law clause it may be invoked both in relation to questions of applicable law and also in relation to jurisdiction and recognition and/or enforcement of decisions. This is so as regards third States (§26—29) but also against other Member States' laws and judgments, as far as there is no resort to a better mechanism in order to skip the existing difficulties (pointed out in the application of the

Brussels convention 1968 and Rome Convention 1980 — namely with reference to exorbitant jurisdiction, misprotection of procedural rights and faulty implementation of Community legislation by Member States) (§30—32).

VII. State and Community *ordre public* have to co-exist since national public policy is a necessary consequence of the enshrinement of the principle of subsidiarity in the EU Treaty. State public policy notions are constituents of the Community *ordre public*, something which reflects the Community's complex idiosyncrasy. Also ensuing from the principle of subsidiarity, pluralism within the EC legitimates that each legal system retains its notion of public policy (§39): pluralism is safeguarded by the acceptance of State particularities/differences. The two notions, despite their differentiated features, overlap to a certain extent. This explains why the application of public policy between Member States needs be reviewed (§36, 37). The judge shall choose between Spanish *ordre public* and EC ordre public according to the criteria established in relation to State public policy: Inlandsbeziehung and the relevance of the interest at stake (§21, 22).

VIII. The relationship between the two notions is not one of supremacy but of competence (§39). Summing up, different notions of public policy co-exist based upon the assumption that Spanish public policy is necessarily constructed in EC parameters and EC *ordre public* incorporates the respect of State identity as an essential constituting element (§41). The national judge has to play his role as a Community agent and bear in mind that the Spanish and the Community legal orders interact and require similar mechanisms to ensure their continuity.