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# The vigilance of individuals : how, when and why the EU legislates to facilitate the private enforcement of EU law before national courts

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# The vigilance of individuals

## How, when and why the EU legislates to facilitate the private enforcement of EU law before national courts

# The vigilance of individuals

*How, when and why the EU legislates to facilitate the private enforcement of EU law before national courts*

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
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volgens besluit van het College voor Promoties
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*door*

Folkert Geert Wilman

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Brussels, 8 November 2014

All views expressed in this document are strictly personal and cannot be ascribed to the European Commission.

# Summary of Contents

# Table of Contents

# A. Introduction and background

# 1. Introduction

*"The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted […] to the diligence of the Commission and the Member States."*[1]

## 1.1. The vigilance of individuals: context

### *1.1.1. The creation of a private enforcement model*

1. In the *Van Gend en Loos* judgment of the Court of Justice of the European Union ('Court of Justice'), dating from over half a century ago, it was held that the entry into force in 1958 of the Treaty establishing the European Economic Community ('EEC'), which has since become the European Union ('EU'), had led to the creation of a new legal order.[2] This judgment made it clear that this new legal order is not exclusively a matter that concerns the Member States on the one hand and the EU institutions and other bodies that had been established on the other hand. The relationship is rather essentially *triangular* in nature, in that private parties can also have a legal position under EU law. This means that EU law can not only create obligations for these private parties, but that it can also confer rights on them, even where that is not expressly stated, as long as the provision in question is sufficiently clear and unconditional. In other words, EU law constitutes "*a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to the legal relationships under [EU] law*".[3] As is well-known, *Van Gend en Loos* thus articulated the principle of direct effect of EU law. Equally well-known is that shortly afterwards the Court of Justice confirmed the existence of the principle of primacy of EU law over national law.[4] Together these principles constitute the "*essential characteristics*" of the EU legal order.[5]

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1 CoJ case 26/62, *Van Gend en Loos*, p. 13.
2 *Ibid.*
3 CoJ case 106/77, *Simmenthal*, para. 15.
4 CoJ case 6/64, *Costa v. ENEL*, pp. 593-594.
5 CoJ Opinion 1/91, *EEA Agreement*, para. 21.

2. By insisting that private parties can in principle directly exercise and enforce the rights that they derive from EU law, the Court of Justice laid the foundations for what has become known as the *private enforcement model* of EU law.[6] This model ensures the possibility for the private parties concerned to initiate legal proceedings for alleged infringements of their rights under EU law. Not only does this serve the interests of those parties themselves, it can also contribute to the supervision exercised by especially the European Commission ('Commission') as regards the compliance with EU law. Indeed, as the above quote from *Van Gend en Loos* demonstrates, the notion that legal actions brought by private parties can be instrumental in strengthening compliance with EU law is as old as the very foundations of that law. This implies that private parties can be recruited as the EU's 'private attorneys general'[7] or 'private policemen'.[8] That means in turn that "*the vast potential resources of the general European population [are] enlisted to supplement the Commission in its efforts to secure the uniform and effective application of [EU] law*".[9] Implicit in this private enforcement model is that these proceedings are to be brought before the competent courts of the Member States. All this was, and continues to be, of importance, for several reasons.

3. In the first place, the scope for enforcement of EU law at the central, European level, i.e. before the EU courts in Luxembourg, is limited for *legal reasons*. The main mechanisms designed to ensure such supervision and enforcement at that level, to which reference was made in *Van Gend en Loos*, are infringement proceedings. The relevant Treaty provisions, i.e. Articles 258 and 259 Treaty on the Functioning of the EU ('TFEU'), allow both Member States and the Commission to bring a case before the Court of Justice when they consider that a Member State has infringed EU law. Private parties can neither initiate these proceedings, nor can they be taken to court in this context.[10] Infringement proceedings thus remain an affair from which private parties are largely excluded.[11]

It is of course true that the EU Treaties allow private parties to initiate 'direct actions' before the EU courts. But these actions can only be brought in a limited number of circumstances. In particular, in order to have legal standing (*locus standi*, i.e. the legal capacity to bring an action before the court) under Article 263 TFEU a private party must demonstrate that it is directly and individually concerned by the act that is the object of the legal action in question. As construed by the EU courts, this threshold can be

6 Kilpatrick (2000), p. 1.
7 *Ibid*., p. 2.
8 Drake (2006), p. 843, with reference to Weiler (1981), p. 273.
9 Dougan (2004), p. 76.
10 Cf. e.g. GC Order case T-532/12, *Morea*, para. 7.
11 On these infringement proceedings and the role of private parties in this regard, see further subsection 2.4.1 below.

notoriously difficult to overcome.[12] The amendment of the relevant Treaty provision in 2009 (Treaty of Lisbon) has relaxed this test somewhat in certain cases. This has however not fundamentally altered the restrictive approach with respect to the private party's possibility to bring these direct actions before the EU courts.[13] Direct actions are moreover limited to contesting the legality of acts, or failures to act, of the institutions and other bodies of the EU, as well as claims in connection to the EU's contractual or non-contractual liability.[14] No such actions can be brought against Member States, let alone against other private parties.[15]

Under Article 267 TFEU the Court of Justice can furthermore give preliminary rulings in proceedings that private parties brought before the courts of the Member States, in cases where there is uncertainty as to the interpretation or validity of provisions of EU law. Those rulings clarify the law as it ought to have been understood from its entry into force and as such they are also of relevance to other legal relationships than those between the parties to the case at hand.[16] The preliminary reference procedure has been held to be "*essential for the preservation of the [EU] character of the law established by the [EU] Treaties*"[17] and an element of the "*complete system of legal remedies and procedures designed to ensure judicial review of the legality of [those] acts*".[18] These characteristics have led some to call it the 'infringement procedure for private parties'.[19] Yet also in this case there are certain limits. In particular, the preliminary reference system establishes in essence a form of direct cooperation between the national courts and the Court of Justice.[20] Procedurally speaking, such a reference it is no more than a side-step in the proceedings before the former.[21] Where the Court of Justice has issued a

12 E.g. CoJ case 25/62, *Plaumann*, pp. 106-107; CoJ case C-50/00 P, *UPA*, para. 32-46. See also Opinion AG Jacobs case C-50/00 P, *UPA*, para. 36-99. See further e.g. Ward (2009), pp. 343-347.

13 Notably it follows from the fourth subparagraph of Art. 263 TFEU, as amended, that, where regulatory acts that do not entail implementing measures are concerned, a private party-applicant is no longer required to demonstrate individual concern. See e.g. CoJ case C-583/11 P, *Inuit*, para. 45-62 and 68-77. See further e.g. Ward (2009), pp. 357-359; Craig (2010), pp. 129-132; Kornezov (2014), p. 251; Van Malleghem &. Baeten (2014), p. 1187.

14 See Articles 263, 265 and 340 TFEU respectively. Cf. e.g. GC Order case T-635/13, *Aćimović*, para. 6.

15 E.g. CoJ case 175/84, *Krohn*, para. 18; CoJ case C-407/04 P, *Dalmine v*, para. 62; GC Order case T-469/11, *Al Qadhafi v. France*, para. 8; GC Order case T-311/13, *FQ*.

16 E.g. CoJ case 61/79, *Denkavit*, para. 16; CoJ case C-231/96, *Edis*, para. 15.

17 CoJ Opinion 1/09, *Patent Court Agreement*, para. 83.

18 CoJ case C-583/11 P, *Inuit*, para. 92.

19 Pescatore, cited in Micklitz (2012), p. 393.

20 E.g. CoJ Opinion 1/09, *Patent Court Agreement*, para. 84; CoJ case C-416/10, *Križan*, para. 66.

21 Cf. the standard phrase used by the CoJ in relation to the allocation of costs associated with preliminary references, according to which "*these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court*". See e.g. CoJ case C-416/10, *Križan*, para. 117.

preliminary ruling, it remains for the national court concerned to apply that ruling to the case at hand.[22] Moreover, while EU law can require the national court seised by a private party to make a preliminary reference, the decision whether or not to do so is, as a matter of EU law, taken independently from the acts or views of the parties to the proceedings.[23]

4. In the second place, there are *practical considerations* that limit the scope for enforcement of EU law at the central, European level. To begin with, in practice the Member States seldom use the abovementioned powers to initiate infringement proceedings against their peers.[24] The Commission, as the 'guardian' of the EU Treaties,[25] is in contrast generally willing to use its powers in this regard where it deems this necessary. The Commission's resources are however limited, in terms of information gathering capacity, manpower as well as financial means. This was the case already in the early days of the process of European integration, but it arguably carries even more weight today, in an EU that has been enlarged to 28 Member States and over 500 million citizens and that is moreover involved in many different fields of law. As a consequence, in its own words, the Commission cannot act as "*a kind of 'super enforcement authority'*".[26]

Similar considerations apply to the EU judiciary. The EU courts have over the decades been confronted with a virtually permanently increasing number of cases brought before them. By means of an illustration, the published case law of the Court of Justice for 2001 alone takes up the same shelf space as that for the first 19 years of case law up to 1972.[27] And whereas in 2000 around 900 new cases were brought before the EU courts (with approximately 1450 cases pending), ten years later this number had risen to around 1250 new cases per year (with approximately 2100 cases pending),[28] i.e. an increase of almost 40%. As a result the EU courts regularly struggle with their workload. Structural and organisational changes have been enacted, most notably the creation of (what is now) the General Court in 1988. More recently the Court of Justice, which is charged *inter alia* with ruling on pre-

22 E.g. CoJ case 51/74, *Van der Hulst*, para. 12; CoJ joined cases C-175/98 and C-177/98, *Lirussi*, para. 38.

23 E.g. CoJ case 70/77, *Simmenthal*, para. 10; CoJ case C-2/06, *Kempter*, para. 41-42; CoJ case C-137/08, *Pénzügi Lízing*, para. 28-29; CoJ case C-561/11, *Fédération Cynologique Internationale*, para. 30. This is not to say that the parties to the proceedings before a national court may not *suggest* making a preliminary reference, in accordance with the applicable national procedural rules. Some also link the preliminary reference procedure to the principle of effective judicial protection, discussed in subsection 2.3 below. See e.g. Opinion AG Léger case C-224/01, *Köbler*, para. 147; Opinion AG Ruiz-Jarabo Colomer case C-14/08, *Roda Golf*, para. 29.

24 Only four such cases were been brought in the period up until 2012. See Lock (2012), p. 1677.

25 Cf. Art. 17 TEU.

26 Commission, Communication on public procurement in the EU, COM(1998) 143, p. 13.

27 Jacobs (2004a), p. 823.

28 See CoJ, Annual reports 2000 and 2010 respectively.

liminary references and in infringement proceedings, has been able to cut back the length of the proceedings before it. However especially the General Court, which acts mainly as the first instance court for direct actions, continues to struggle with its workload and the resulting long delays. Indeed, the length of the proceedings before this latter court has already several times been held to have exceeded a reasonable time period.[29] Discussions on reforms therefore continue.[30]

5. Lastly, as a general rule, EU law is *implemented by the Member States*.[31] This implementation therefore takes place primarily at national level. It follows that there is also considerable potential for the enforcement of EU law at that level, i.e. before the competent national courts.[32] The abovementioned finding in *Van Gend en Loos* that under certain conditions EU law confers rights on private parties on which these parties can rely directly in legal proceedings allowed the unleashing of this potential for decentralised enforcement, particularly in combination with the principle of primacy of EU law.[33] Indeed, after that judgment it did not take the Court of Justice long to clarify that "*every time a rule of [EU] law confers rights on individuals, those rights, without prejudice to the methods of recourse made available by the Treaty, may be safeguarded by proceedings brought before the competent national courts*".[34] Earlier it had already held that "*it may generally be assumed that a substantive right has as its corollary that it provides the person in whose interest it operates with the means of enforcing it himself by proceedings before the courts rather than the intervention of a third party*".[35]

Since *Van Gend en Loos*, which concerned a provision of the EU Treaties, it has been made clear that the principle of direct effect extends to potentially all EU legal acts. Provided that they are sufficiently clear and unconditional, provisions of regulations and decisions can also be directly

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29 E.g. CoJ case C-40/12 P, *Gascogne*, para. 102; CoJ case C-243/12 P, *FLS Plast*, para. 142.

30 On the functioning and workload of the EU courts as well as past and possible future reforms, see further e.g. Rasmussen (2000), p. 1071; Schiemann (2008), p. 3; Forwood (2008), p. 34; Meij (2013), p. 3.

31 Cf. Art. 291(1) TFEU. See e.g. also CoJ case C-201/04, *Molenbergnatie*, para. 52: "*according to the general principles on which the [EU] is based and which govern the relations between it and the Member States, it is for the MemberStates, under Article [4(3) TEU], to ensure that [EU] rules are implemented on their territories*".

32 Cf. CoJ case 294/83, *Les Verts*, para. 23.

33 For, whereas direct effect can be understood as meaning that EU law is to be considered as the 'law of the land', it is the combination with the principle of primacy that ensures that EU law is also the '*higher* law of the land'. See Weiler (1991), p. 2415.

34 CoJ case 28/67, *Firma Molkerei*, p. 153.

35 CoJ case 6/60, *Humblet*, pp. 571-572. This case relates to the European Coal and Steel Community ('ECSC') and not to the EU Treaties, but considering its principled nature and the similarity of the relevant provisions at issue there appears to be no reason why this statement would not be equally applicable as a matter of EU law. That is confirmed by the reference to this case made in CoJ joined cases C-6/90 and C-9/90, *Francovich*, para. 36.

effective.[36] The same applies to directives, but only in 'vertical' legal relationships, i.e. in actions between a private party on the one hand and a Member State (including its decentralised entities and semi-public bodies) on the other hand.[37] The Court of Justice has consistently held that directives have no 'horizontal' direct effect. This means that, in and by themselves, provisions of directives cannot impose obligations on private parties and cannot be invoked and enforced in legal relationships between private parties.[38] The effects of this position tend to be moderated somewhat by the fact that the concept of a 'State' – and therefore that of a vertical relationship – is a rather wide one in this connection. The capacity in which the latter acts is not of relevance. Provisions of directives that are capable of having direct effect may therefore be relied upon against any body, whatever its legal form, which has been made responsible pursuant to a measure adopted by a Member State for providing a public service under the control of the State and which has for that purpose special powers beyond those which result from the normal rules applicable in relations between private parties.[39] But for instance an association governed by private law with a social objective does not meet these conditions.[40] This absence of horizontal direct effect furthermore does not mean that the application of a directly effective provision of EU law in a vertical context cannot, indirectly, have certain adverse repercussions for another private party or have 'collateral effects' in horizontal legal relationships.[41] Having said that, the fact remains that the Member States first need to transpose a directive into national law for the rules of EU law in question to have effect in 'truly' horizontal legal relationships.[42]

The aforementioned potential is reinforced by other 'weapons' that private parties can use in proceedings before national courts where claims based on EU law are at stake. Of particular importance is the principle of consistent interpretation, also known as 'harmonious interpretation' or 'indirect effect'. Under this principle, as construed by the Court of Justice, national law must be interpreted, in so far as possible, in light of the wording and the purpose of the EU law at issue.[43] This means that national courts

36 CoJ case 9/70, *Grad*, para. 5; CoJ case 39/72, *Commission v. Italy (slaughtered cows)*, para. 17.

37 CoJ case 41/74, *Van Duyn*, para. 12.

38 E.g. CoJ joined cases C-397/01 to C-403/01, *Pfeiffer*, para. 108; CoJ case C-282/10, *Dominguez*, para. 37 and 42.

39 E.g. CoJ case C-282/10, *Dominguez*, para. 38-39; CoJ case C-425/12, *Portgás*, para. 24-26.

40 CoJ case C-176/12, *Association de médiation sociale*, para. 37.

41 E.g. CoJ case C-443/98, *Unilever*, para. 49-51; CoJ case C-201/02, *Wells*, para. 57. See further Prechal (2005), pp. 255-270.

42 Cf. Art. 288 TFEU, pursuant to which a directive is "*binding, as to the result to be achieved, upon each Member State to which it is addressed*", while leaving "*to the national authorities the choice of form and methods*".

43 E.g. CoJ case 80/86, *Kolpinghuis Nijmegen*, para. 13-14; CoJ case C-106/89, *Marleasing*, para. 8; CoJ joined cases C-397/01 to C-403/01, *Pfeiffer*, para. 118; CoJ case C-42/11, *Lopes Da Silva Jorge*, para. 54-56; CoJ case C-176/12, *Association de médiation sociale*, para. 38-39. See further Prechal (2005), pp. 180-215; Craig & De Búrca (2011), pp. 200-207.

must do whatever lies within their jurisdiction, taking the whole body of national law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the rule of EU law in question is fully effective and to achieving an outcome consistent with the objective pursued by it. The principle of consistent interpretation finds its limits however in the general principles of law that form part of the EU legal order, in particular those of legal certainty and non-retroactivity, which can thus constitute a bar to incurring criminal liability and preclude an interpretation *contra legem*. Given the aforementioned absence of horizontal direct effect of directives, the principle of consistent interpretation is particularly relevant in actions between private parties concerning rights and obligations derived from directives, especially where they have not been transposed into national law in a correct and timely manner. Other such 'weapons' at the disposal of private parties seeking to assert their rights derived from EU law before the courts of the Member States are the principle of Member State liability and the (nascent) principle of private party liability. Pursuant to these latter two principles, which are discussed in further detail below, infringers must compensate for the harm caused as a consequence of their breaches of EU law.[44]

### *1.1.2. EU involvement with private enforcement at national level*

6. In light of the foregoing one could say that in the EU legal system the enforcement possibilities on the central, European level are not as triangular in nature as the distribution of rights is. Instead the enforcement by private parties of the rights granted to them by EU law generally takes place before national courts. From the viewpoint of these parties these latter courts are thus the *primary venue* for asserting their rights vested in EU law.[45] When considering and deciding those cases, the national courts seised do not act in a purely national capacity. They rather act, in effect, as a judicial organ of a unitary EU judicial power.[46] As the Court of Justice put it, the courts of the Member States are, together with the Court itself, the "*guardians of [the EU] legal order and the judicial system of the European Union*", as it is for them to "*ensure that the full application of [EU] law in all Member States and to ensure judicial protection of a [private party's] rights under that law*".[47] As such these national courts are the "*'ordinary' courts within the European Union legal order*".[48]

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44 See section 2.5 below.
45 Cf. Tridimas (2006), p. 419.
46 GC case T-51/89, *Tetra Pak*, para. 42; Opinion AG Cosmas case C-83/98 P, *France v. Ladbroke Racing and Commission*, para. 92.
47 CoJ Opinion 1/09, *Patent Court Agreement*, para. 66 and 68.
48 *Ibid.*, para. 80.

7. This crucial role of the national courts in the EU legal order makes it all the more remarkable that there are *comparatively few EU rules* that regulate the proceedings before those courts involving the enforcement of EU law. EU law typically defines the rights and obligations of private parties, but it generally does not provide for the remedies and procedural rules that are necessary for their enforcement at national level.[49]

This certainly holds true where *primary* EU law is concerned, i.e. the rules laid down in the EU Treaties. While primary EU law, as interpreted by the EU courts, is often generous in conferring rights on private parties,[50] it is largely silent on the remedies and procedures necessary to enforce them.[51] In fact, primary EU law contains only one explicit reference to the term 'remedies', namely in Article 19(1) Treaty on European Union ('TEU').[52] Tellingly this reference was only introduced in 2009 (Treaty of Lisbon). Even more tellingly perhaps, this provision recalls that it is for the Member States – and therefore in principle not for the EU – to provide "*remedies sufficient to ensure effective legal protection in the fields covered by EU law*". Article 19(1) TEU thus essentially confirms and formalises the dominant pattern of decentralised judicial review, discussed above.[53] As such it ensures the observance of the fundamental right to effective judicial protection within the EU.[54]

The picture has to a large extent long been comparable if we look at *secondary* EU law, i.e. the rules laid down in legal acts adopted by the EU legislature on the basis of the EU Treaties, such as regulations and directives.[55] Especially in the early days of EU law common rules in this regard were almost completely lacking.[56] As is shown in the remainder of this study, significant developments have taken place since. Nonetheless to date there is still no generally applicable set of rules laid down in secondary EU law obliging Member States to harmonise their respective national rules relating to the remedies and procedures that apply to the proceedings initiated by private parties before their national courts concerning the enforcement of rules of substantive EU law.

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49 Cf. Jacobs & Deisenhofer (2003), p. 214.

50 See also para. 446 below.

51 Cf. Whish (1994), p. 3.

52 Cf. Komninos (2008), p. 149 (n. 52).

53 Tridimas (2006), p. 420 (regarding the corresponding article in the draft EU Constitutional Treaty, which, via the Treaty of Lisbon, later became Art. 19(1) TEU). Cf. CoJ Opinion 1/09, *Patent Court Agreement*, para. 66; CoJ case C-583/11 P, *Inuit*, para. 101.

54 See e.g. CoJ case C-418/11, *Texdata*, para. 78; CoJ case C-583/11 P, *Inuit*, para. 100. On the right to effective judicial protection set out in Art. 47 Charter, see further section 2.3 below. Cf. Opinion AG Jääskinen case C-536/11, *Donau Chemie*, para. 47, where it is argued that Art. 19(1) TEU supplies a supplementary guarantee to the '*Rewe*-principle' of effectiveness, discussed in subsection 2.2.2 below.

55 Cf. Art. 288 TFEU.

56 For an overview, see subsection 1.1.3 below.

8. It is important to note that all this is not a matter of mere formalities. Attention may often tend to focus on the substantive provisions conferring rights on the private parties that are subject to EU law, yet the importance of remedial and procedural rules can hardly be overstated. As the Commission put it, "*rights which cannot be enforced are worthless*".[57] Formulated somewhat more elegantly, it has been said that (civil) procedural law serves "*to infuse life into all other areas of the law, to bring into actual being and to give reality and effect to all the legal rights and duties of every person and body in society*".[58] Remedial and procedural rules may in practice often be at least as important for the private parties concerned as their abstract substantive entitlements under EU law.[59] Without having legal standing, for instance, a private party cannot bring an action before the competent national court in the first place. Similarly rules on issues such as access to evidence, the burden of proof, causality and legal costs tend to determine to a high extent whether there is any point in bringing such a claim and, when it is brought, whether it will be successful. The applicable rules on remedies and procedures can therefore have a substantial impact on the *effectiveness* of the substantive EU law at stake. In addition the predominant reliance on the laws of the Member States to regulate remedial and procedural matters related to the enforcement of EU law before national courts inherently also implies that differences can and do exist in this respect across the EU, both as regards the manner in which this enforcement takes places and the outcomes to which it may lead. A system of decentralised judicial enforcement that principally relies on national law for the adjudication of private enforcement actions can thus also lead to *inconsistencies* and *unequal treatment*.[60]

### *1.1.3. EU legislative action*

9. As is discussed in further detail in the following chapter, over the decades important steps have been set in the *case law* of the Court of Justice that mitigate the effects of the general absence of EU rules in the field of remedies and procedures applicable in proceedings before the national courts concerning the enforcement of rights vested in EU law.[61] In so doing, that EU institution has corrected to some extent the apparent imbalance, referred to above, between on the one hand the heavy reliance on enforcement of EU law at the national level and on the other hand the general lack of common remedial and procedural provisions. However such intervention can "*by the nature of things only alleviate, but not eliminate the problem*".[62]

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57 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 2.
58 Jacob (1987), p. 63.
59 Flynn (2008), p. 245.
60 Cf. Bridge (1984), pp. 32-36; Jacobs & Deisenhofer (2003), p. 198.
61 See in particular sections 2.1 and 2.2 below.
62 Toth (1978), p. 187.

Crucial as this case law surely has been, and indeed continues to be, for principled as well as practical reasons there are limits to what can be expected from the judiciary in this respect. The EU courts may be obliged to do justice in the cases brought before them,[63] but it is nonetheless primarily for the EU legislature to address these issues in a more systematic and general matter.[64] While that holds true generally, it arguably applies even more so in the specific context of EU law. For where the EU courts come close to, or are seen as overstepping, the line between the resolution of concrete cases and laying down quasi-legislative measures, they become vulnerable to 'accusations' of judicial activism.[65] All this applied in 1979, when Advocate General Warner noted that the Court of Justice "*cannot create [EU] law where none exists: that must be left to the [EU]'s legislative organs*".[66] And it still applies today, as is illustrated by Advocate General Trstenjak's observation thirty years later that the EU courts "*may not assume the role of the [EU] legislature if a gap in the law can be filled by the [EU] legislature*".[67]

10. While highlighting especially the (potential) differences in treatment of private parties resulting from the lack of uniformity in this respect, the Court of Justice therefore spoke in 1980 of a "*regrettable absence*" of EU law provisions on the remedies and procedures regarding the enforcement of EU law at national level.[68] It held that "*[i]t is not for the Court to issue general rules of substance or procedural provisions, which only the competent institutions may adopt*".[69] Particularly from the 1980s onwards and increasingly throughout the 1990s, this barely disguised call for EU *legislative* action on these matters also started to resonate in the legal literature, often as part of broader concerns relating to the effectiveness and practical effects of EU law in the Member States.[70] Gradually the EU legislature started responding to these calls for EU legislation to be established on the matters at issue here. As is illustrated in the following, especially since the mid-1980s and even more so in the following decades, a range of EU legislative measures were adopted

63 Cf. Art. 19(1) TEU, where it is stipulated that the EU courts "*shall ensure that in the interpretation an application of the [EU] Treaties the law is observed*". Specifically in relation to the preliminary reference procedure set out in Art. 267 TFEU, it is settled CoJ case law that "*where the questions submitted concern the interpretation of [EU] law, the Court is in principle required to give a ruling*". See e.g. CoJ case C-416/10, *Križan*, para. 53.

64 See further subsection 9.3.1 below.

65 Cf. Garben (2013), p. 15. Regarding the discussion on judicial activism in relation to the EU courts more generally, see e.g. Tridimas (1996), p. 199; Craig & de Búrca (2011), p. 63-66; Dougan (2012a), p. 113.

66 Opinion AG Warner case 265/78, *Ferwerda*, p. 640.

67 Opinion AG Trstenjak case C-101/08, *Audiolux*, para. 107.

68 CoJ case 130/79, *Express Dairy Foods*, para. 12. See e.g. also CoJ case 54/81, *Fromme*, para. 4.

69 *Ibid*., para. 12. See e.g. also CoJ joined cases 205/82 to 215/82, *Deutsche Milchkontor*, para. 24.

70 E.g. Bridge (1984), p. 41; Steiner (1995), p. 60; Neville Brown (1997), p. 71; Himsworth (1997), p. 292. On the said broader concerns, see e.g. Snyder (1993), p. 19.

that aim to facilitate the enforcement by private parties of their rights vested in EU law before national courts. Broadly speaking, it is this legislative action that forms the subject of this study.[71]

11. Such involvement from the side of the EU legislature with issues of private enforcement is not an entirely recent phenomenon. *Early examples* of EU legislative action in this regard can be traced back as far as the 1960s.[72] It is however appropriate to consider the late 1970s as the period in which the EU legislature set the first, hesitant steps in establishing rules on the private enforcement of EU law before national courts.[73] Most notably in 1976 in the field of gender equality Directive 76/207 was adopted, which has been later recast in Directive 2006/54 ('Gender Equality Directive').[74] This directive requires measures to be taken at national level to ensure effective review possibilities through judicial and administrative procedures, touching upon issues such as compensation for damage, legal standing and the burden of proof. Another early approach can be found in Directive 85/374 ('Product

71 See also subsection 1.2.1 below.

72 E.g. Art. 12 Directive 65/65/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products, OJ 1965, 22/369. This directive has since been replaced by Directive 2001/83/EC on the Community code relating to medicinal products for human use, OJ 2001, L 311/67. Another example is Art. 7 Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 1964, 56/850. This directive has since been replaced by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004, L 158/77.

73 Apart from the legislation referred to above, see e.g. also the (rather rudimentary) provisions on civil liability in Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ 1977, L 26/1 (Art. 18); Directive 78/855/EEC based on Article 54(3)(g) of the Treaty concerning mergers of public limited companies, OJ 1978, L 295/36 (Art. 20-21). These directives have since been replaced by respectively Directive 2012/30/EU on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, OJ 2012, L 315/74 ('Public Limited Liabilities Companies Directive'); Directive 2011/35/EU concerning mergers of public limited liability companies, OJ 2011, L 110/1.

74 Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976, L 39/40. See also Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1980, L 14/6. These two directives have since been replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006, L 204/23.

Liability Directive').[75] To protect consumers this directive establishes the principle of civil liability in damages without fault of producers for defective products. It also addresses a number of related issues such as the available heads of damages and the limitation periods that apply in legal proceedings brought under this directive.

12. Over time the EU's legislative involvement with private enforcement-related matters became *more intense*, especially in the 1990s and the 2000s. The adoption at EU level of specific provisions relating to remedies and procedures available to private parties in proceedings before their national courts became increasingly common. These provisions were often part of legal acts setting out substantive rules. Examples can be found in fields as diverse as the protection of personal data, e-commerce and the environment. As to the former, Directive 95/46 ('Data Protection Directive') and Directive 2002/58 ('E-Privacy Directive') follow an approach that is essentially based on establishing a right to effective redress and to reparation in damage for persons having suffered injury.[76] Directive 2000/31 on certain legal aspects of information society services ('E-Commerce Directive') encourages out-of-court settlements, stipulates that rapid court actions, including interim measures, must be available to terminate infringements and prevent further impairment of the interests involved, and contains certain exemptions from liability.[77] And, while Directive 2004/35 on environmental liability ('Environmental Liability Directive') is not concerned with civil liability, it nonetheless includes noteworthy rules on legal standing for private parties, including parties not representing strictly individual interests, such as non-governmental organisations.[78] Concerning environmental impact assessments, common rules on review were inserted in 2003 in (what is now) Directive 2011/92 ('Environmental Impact Assessment Directive'), *inter alia* on legal standing and legal costs.[79]

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75 Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985, L 210/29.

76 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and of the free movement of such data, OJ 1995, L 281/13; Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002, L 201/37.

77 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000, L 178/1.

78 Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004, L 143/56.

79 Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ 2012, L 26/1. This directive is a codification of Directive 85/337/EEC on the assessments of the effects of certain public and private projects on the environment, OJ 1985, L 175/40. It has been amended in 2014, which amendment is to be transposed into national by May 2017. See Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ 2014, L 124/1.

Around the same period the EU legislature also took more ambitious action, in the sense that it adopted broader, self-standing legal acts that are exclusively concerned with setting out measures aimed at facilitating the private enforcement of the substantive EU rules in a given sector. Early examples are the twin Directives 89/665 and 92/13 relating to EU public procurement law ('Procurement Remedies Directives').[80] These directives stipulate that effective and rapid remedies should be available to aggrieved private parties. They also contain specific rules on legal standing, forum, interim relief and actions for damages. Similarly Directive 2004/48 ('IPR Enforcement Directive') is dedicated specifically to the private enforcement of intellectual property rights.[81] To this aim it harmonises national remedial and procedural rules on matters such as legal standing, evidence, interim relief, injunctions, damages and legal costs. Furthermore Directive 98/27, later codified in Directive 2009/22 ('Consumer Injunctions Directive'), seeks to protect consumers' interests by specifying rules on legal standing and providing for certain specific remedies, most notably injunctive relief.[82]

13. *More recent developments* indicate that legislative measures of the type at issue here continue to be considered, proposed and adopted at EU level. Indeed, it is noticeable that many of the pressing current-day EU level challenges are addressed by an approach that involves a private enforcement element. For instance, the EU's response to the economic crisis included an amendment to Regulation 1060/2009 on credit rating agencies ('Credit Rating Agencies Regulation'), which established a strengthened regime on the civil liability in damages of those agencies.[83] In the area of free movement of persons and employment, Directive 2014/54 ('Free Movement of Workers Enforcement Directive') requires judicial procedures to be made available to EU citizens who exercise their rights in this regard and who are confronted with unjustified restrictions and discrimination.[84] These procedures are also to be made available to certain associations acting on behalf or in support of the private parties concerned. A comparable approach can be found in

80 Directive 89/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989, L 395/33; Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992, L 76/14.

81 Directive 2004/48/EC on the enforcement of intellectual property rights, OJ 2004, L 195/45.

82 Directive 98/27/EC on injunctions for the protection of consumers' interests, OJ 1998, L 166/51; Directive 2009/22/EC on injunctions for the protection of consumers' interests, OJ 2009, L 110/30.

83 Regulation (EC) No 1060/2009 on credit rating agencies, OJ 2009, L 302/1, as amended by Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ 2013, L 146/146. On these liability rules, see further Haar (2014), p. 315.

84 Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ 2014, L 128/8.

Directive 2014/67 ('Posting of Workers Enforcement Directive').[85] While this latter directive mainly strengthens public enforcement, it also requires the Member States to ensure that affected private parties as well as certain third parties, such as trade unions, can initiate legal proceedings at national level to safeguard the rights vested in EU law in this domain. Yet another politically charged topic is the protection of personal data. The proposed strengthening of the EU's regime in this regard includes more elaborate provisions on the right of redress of the private parties concerned.[86] Reference can also be made to developments in the area of passengers' rights, where acts such as Regulation 261/2004 ('Air Passengers' Rights Regulation') and Regulation 1371/2007 ('Rail Passengers' Rights Regulation') require the compensation of passengers in certain cases.[87] Last but not least, although at the time of writing it still awaits adoption and publication, which is expected to take place before the end of 2014, in the spring of 2014 political agreement was reached on the Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the Union ('Competition Damages Directive').[88]

14. A final and separate issue that merits attention when discussing EU rules relating to proceedings brought by private parties before national courts concerns another 'branch' of EU legislative activity, namely *judicial cooperation in civil matters*. While historically this subject-matter received comparatively little attention at EU level, more recently it has been rising up the agenda.[89] Indeed, especially in the course of the 2000s a considerable body of secondary EU law has been established in this domain.[90] Prime examples are Regulation 44/2001 on jurisdiction and the recognition and

85 Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, OJ 2014, L 159/24.

86 Commission, Proposal for a regulation on the protection of individuals with regards to the processing of personal data and on the free movement of such data, COM(2012) 11.

87 Regulation (EC) No 261/2004 establishing common rules in compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ 2004, L 46/1; Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, OJ 2007, L 315/14. In 2013 the Commission proposed amending the former regulation. See Commission, Proposal for a regulation amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, COM(2013) 130.

88 For the text on which political agreement was reached, see European Parliament, Legislative resolution on the proposal for the Competition Damages Directive, P7_TA(2014)0451. That text is the basis for the further discussion of this (draft) directive in the following, whereby it is assumed, as seems likely, that it will be adopted in its current form.

89 Hodges (2011), p. 448.

90 For an overview of the legislation and other developments in this field, see e.g. Storskrubb (2008); Storskrubb (2011), p. 299.

enforcement of judgments in civil and commercial matters[91] ('Brussels I Regulation'), Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters[92] ('Evidence Regulation'), Directive 2003/8 concerning legal aid in cross-border disputes[93] ('Legal Aid Directive'), Regulation 861/2007 establishing a European small claims procedure[94] ('Small Claims Regulation') and Regulation 864/2007 on the law applicable to non-contractual obligations[95] ('Rome II Regulation').

15. The foregoing overview is by no means meant to be complete and exhaustive. It rather serves to illustrate three main points. First, despite a late and somewhat hesitant start, over the past decades the EU legislature has repeatedly demonstrated its *willingness and ability* to adopt private enforcement-related legislation where this was considered appropriate. Second, the above overview highlights that the relevant provisions are *not limited* to specific sectors or fields of EU law. They can be found scattered across the body of EU law (*acquis communautaire*). The need to facilitate legal actions brought by private parties before their national courts to address infringements of EU law can thus be felt in many different areas. Third, even though these legislative measures tend to have certain common characteristics, the *diversity* is significant. The arrangements sometimes consist of only one article, whereas in other instances a more elaborated regime or even a self-standing legal act is provided for. The level of detail also tends to vary considerably. Moreover these rules may or may not contain certain provisions on specific issues such as the burden of proof, legal standing, actions for damages and alternative dispute resolution.

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91 Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1. As per January 2015, this regulation is replaced by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012, L 351/1 ('New Brussels I Regulation 1215/2012'). On this new regulation and the changes it entails, see further Nielsen (2013), p. 502.

92 Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001, L 174/1.

93 Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003, L 26/41.

94 Regulation (EC) No 861/2007 establishing a European small claims procedure, OJ 2007, L 199/1. In 2013 the Commission proposed an amendment to this regulation. See Commission, Proposal for a regulation amending Regulation (EC) No 861/2007 establishing a European small claims prrocedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure, COM(2013) 794 final.

95 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, OJ 2007, L 199/40.

## 1.2. The vigilance of individuals: aim and content of the study

In the foregoing section the issues and developments that constitute the background of the present study have been sketched. In this section it is explained in further detail what this study entails. That is done by setting out the main research question and its relevance and by explaining which choices have been made in answering this question in terms of selection, approach and methodology. Although the relevant definitions and specifications of the terms used in this study have mostly been included throughout this study, a number of general definitions as well as certain editorial remarks are also set out here. Finally, the remainder of this study is outlined.

### *1.2.1. Main research question and relevance*

16. The present study is essentially concerned with the EU's law-making activities of the sort outlined above that are related to the establishment of EU legislation facilitating the private enforcement of EU law before national courts.[96] More specifically, the *main research question* is what such legislation entails, particularly in terms of remedies and procedures enacted, and how it is to be understood more generally, notably as regards its typical characteristics, its underlying objectives as well as the advantages and drawbacks of and the limits to the choices made by the EU legislature in this connection. In a nutshell, under consideration is the how, when and why of the said legislation.

Accordingly it is determined in the context of the first part of the above question which types of EU legislative measures have been considered and enacted in which situations. It is thus assessed what the perceived problem is that the EU legislation under consideration aims to address and which legislative means have been employed to reach those aims. Where relevant, this includes a consideration of the reasons underlying the choices made, the options that were discarded in the process of preparing and establishing that legislation and the evolution over time in this regard. On that basis the second part of the above question involves an analysis of how EU legislation facilitating the private enforcement of EU law is to be understood at a more fundamental level. This includes an assessment of both the legislative techniques used and the philosophy underlying this legislation. That allows in turn for more general conclusions to be drawn as to the EU's scope to exercise its law-making powers to facilitate the private enforcement of EU law at national level, including the possible future developments in this regard.

96 For a definition of the term 'private enforcement' for the present purposes, see para. 22 below.

17. It is true that the decentralised enforcement of EU law by private parties and the related impact of EU law on national rules on remedies and procedures have not been lacking attention in the legal literature. But earlier studies into this subject-matter generally focus on the *case law* of the EU courts.[97] The relevant legislative developments are typically mentioned only in passing, if at all. This predominant focus on the case law may have been understandable and indeed appropriate some time ago, because this was where most relevant developments took place.[98] However, even if such jurisprudential developments continue to be of great importance, this is considerably less evident today. In many respects the EU's legislative involvement with private enforcement-related issues is now such that it is well worthy of further study in a more detailed and structured manner.

Further, whereas the above questions can naturally only be answered having regard to the legislative measures that have been adopted and subsequently applied in a particular context and at a particular point in time, the resulting findings can nonetheless be expected to have *broader implications*, especially for any possible future legislative action related to the private enforcement of EU law. That is the case, in the first place, because the relevant requirements, limitations and preferences of a legal nature identified in this study often apply more broadly. Especially where certain issues have been regularly or even consistently encountered in the (recent) past, for instance because they stem from primary EU law or the interaction with certain aspects of the domestic legal systems of the Member States, the same or similar issues can be expected to emerge in the future. Therefore, for legal reasons of an essentially 'horizontal' nature, options that are theoretically conceivable or desirable may have to be discarded or, on the contrary, there may be reasons to apply certain specific law-making approaches more generally. In addition, even apart from these possible legal constraints or imperatives, path dependency is a well-documented phenomenon in EU decision-making processes.[99] It implies that already the simple fact that at an earlier stage certain steps were set in a particular direction may well elicit additional moves in that same direction along similar lines. Although at every step along the way there remain choices to be made, there can thus be a sort of self-reinforcing mechanisms at work at the level of EU policy and law-making.[100] Consciously or not, the actors involved in EU legislative activities on the matters under consideration here may therefore be inclined to copy, extend or build on already existing legal instruments and approaches of the kind assessed in this study.

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97 E.g. Lonbay & Biondi (1997); Kilpatrick, Novitz & Skidmore (2000); Dougan (2004); Lindholm (2007); Galetta (2010); Micklitz & De Witte (2012).

98 In addition there may also be some truth in the suggestion that "*lawyers tend to like cases more than legislation*". See Craig (2012a), p. 25.

99 E.g. Kay (2003), p. 405; Ackrill & Kay (2006), p. 113; Greer (2008), p. 219; Giandomenico (2009), p. 89.

100 Kay (2003), p. 406.

### 1.2.2. Selection, approach and methodology

18. It logically follows from the foregoing that the questions under consideration in this study are to be answered primarily on the basis of an analysis and comparison of the available EU legislation and related official documents.[101] However, as was already noted above, the number and types of legal acts and the fields of law that may be of interest here are very broad and diverse.[102] Largely in light of practical considerations only a limited number of legal acts and fields of EU law can be analysed with a sufficient degree of detail in the present context. The following four fields of EU law and the related legislation and official documents have therefore been selected, for the reasons set out below.

The first field is *public procurement law*. As was noted above, the two Procurement Remedies Directives that were adopted in this field provide an early and important example of two (very similar) self-standing EU legal acts that address, with a certain level of detail, the issues under consideration here. As such they are obvious candidates for further in-depth analysis. These directives have moreover been in force for a considerable period of time. This means that experience has been gained as regards their application in practice and that relevant case law has been generated. Furthermore these directives were substantially revised in 2007, which means that their analysis does not only offer an insight in the choices at the time of their adoption (i.e. around 1990), but also those made roughly a decade and a half later. The Procurement Remedies Directives have over the years also attracted considerable attention in academic literature.

Second, the IPR Enforcement Directive relating to *intellectual property law* has been selected for more in-depth analysis. The reasons for selecting this directive are largely similar to those set out above. That is to say, also this directive concerns a specialised, self-standing EU legal act. It sets out a broad range of relatively detailed rules relating to remedies and procedure designed to facilitate the enforcement by private parties of intellectual property rights before national courts. This directive has also been applicable for a number of years, allowing for the generation of practical experience, case law and academic publications. The more recent assessment of the functioning of this directive and reflections on possible amendments reveal the evolution in the thinking in this regard.

The third field addressed is that of *consumer protection law*. Also in this field various relevant private-enforcement related provisions of EU law can be found. The situation here is somewhat different from the two abovemen-

101 The term 'official document' refers to a formally adopted and publicly available or accessible document that is not legally binding in nature, issued by an EU institution or body, which expresses its position, interpretation or intentions. Examples are white papers, green papers, communications, staff working documents, consultations, resolutions and opinions.

102 See subsection 1.1.3 above.

tioned fields however, in that there is not one single legal act that is concerned with the issues that are of interest for the present purposes. The relevant provisions are rather mostly spread over a considerable number of directives. This therefore necessitates a somewhat broader assessment. While not overlooking other provisions that may be of interest, attention therefore focuses, in the first place, on the abovementioned Consumer Injunctions Directive. This is also a self-standing directive of broader application, even if it is limited in various respects. The relevant provisions on contractual remedies, primarily those found in the Directive 93/13 on unfair terms in consumer contracts ('Unfair Terms Directive'), are also analysed.[103] That is followed by an assessment of the Product Liability Directive, which focuses on civil liability in damages in relation to defective products. The topic of collective redress is also addressed here.

Fourth and finally, the relevant developments in the field of *competition law* are assessed. Two types of EU legislative measures are analysed in particular. It concerns in the first place the contractual remedy set out in Article 101(2) TFEU, pursuant to which forbidden anticompetitive agreements are automatically void. In addition the Competition Damages Directive is an important recent example of an act of secondary EU law relating to private enforcement. While there is at present no practical experience with, nor case law relating to, this directive, this is compensated for by the case law of the Court of Justice predating the directive that relates to similar matters, as well as the extensive studies, official documents, consultations, academic publications and debates that preceded and accompanied it, which provide important indications as to the coming into being and the understanding of a directive such as this one.

19. A particular challenge in a study such as this one is finding the appropriate balance between 'width' and 'depth'. On the one hand the above legislation can only be properly understood in its *broader context*. This study therefore pays particular attention to three additional elements. In the first place, there are several relevant principles of EU law, most notably the principles of national procedural autonomy, equivalence, effectiveness and effective judicial protection. The said legislation came into being, and continues to operate, against the background of a legal environment that is to a large extent 'shaped' by these principles. They not only define the *status quo ante*, but they also play an important role in the interpretation of this legislation. For essentially the same reasons several key rulings of the Court of Justice related to the enforcement of EU law at national level are also assessed in some detail, as they establish a number of fundamental concepts, in the context of which the EU legislation of the type under consideration in this study should be understood and without which such legislation would arguably hardly be conceivable. In the second place, the applicable

103 Directive 93/13/EEC on unfair terms in consumer contracts, OJ 1993, L 95/29.

public enforcement framework is considered, as the legislation under consideration co-exists and to some extent interacts with the relevant rules on the enforcement of EU law by the competent EU and national public authorities. Lastly, although this study is concerned first and foremost with developments at EU level, at times attention is also paid to certain relevant developments at national level. Given the nature of the subject-matter under consideration, one can hardly consider the abovementioned EU legislation in complete isolation from its impact on, and other relevant developments at, national level. Such references to developments at national level are however meant as illustrations; this study does not seek to provide a complete and exhaustive sketch of the state of play in the Member States where the private enforcement of EU law is concerned.

On the other hand certain *limits* must evidently be set, if only for practical reasons. Despite the selection made, the issues under consideration in this study are clearly still rather broad and diverse. They relate to a considerable number of legal acts and official documents, regarding various fields of EU law and numerous specific subject-matters. PhD theses could be, and indeed often have been, written on each of them individually. The aim here is not to assess these issues for their own sake. The intention is instead to consider them in sufficient detail to come to a meaningful analysis for the purposes of answering the abovementioned research question. Making a selection in addition implies 'posteriorisation' as much as it implies prioritisation. That is to say, there are certainly also other EU legal acts and developments that can be of interest in the present context, which have nevertheless mostly been left aside here. The Gender Equality Directive, the Environmental Impact Assessment Directive and the principle of Member State liability are but three examples thereof. While the focus of this study remains firmly on the four selected fields of law, they are occasionally taken into account in the latter part of this study, where this is considered helpful to sketch the broader context or to illustrate a particular point emerging on the basis of the analysis related to the selected fields.

20. Finally, in terms of the approach and methodology, in analysing the abovementioned legislation particular attention is paid to the aims that they seek to achieve, their relevant background and context, the adoption process as well as the remedial and procedural means eventually selected by the EU legislature in order to achieve the said aims. Naturally account is also taken of the interpretation of this legislation by the Court of Justice where appropriate, as well as of secondary sources. The latter concerns especially the available legal literature, mainly in English, but occasionally also in French and Dutch, regarding both the said legislation and the issues under consideration more generally. The law is stated as on 1 October 2014. The relevant websites were also last visited on that date.

### *1.2.3. Definitions and editorial remarks*

21. It follows from the foregoing that this study is in large part concerned with issues of rights, remedies and procedures. It is therefore important to clarify at the outset what is meant by these terms. As regards the concept of a *'right' i*n EU law, it has often been noted that this is an ambiguous concept in EU law.[104] This is probably not in small part due to the significant variations between the domestic legal systems of the Member States in what is understood by this term.[105] A (tentative) definition holds that a rights refers to "*a legal position which a person recognized as such by the law […] may have and which in its normal state can be enforced by that person against […] others before a court of law*".[106] This is also how this concept is understood here.

The enforcement of these rights happens by means of one or more *remedies*. Again what is understood by this term may well vary, both across the EU and depending on the context in which it is used. In this study the term 'remedies' refers, broadly speaking, to classes of actions intended to make good infringements of the right at issue.[107] Put differently, it concerns in essence the instrument with which that right can be enforced.[108] One can think in particular of actions aimed at obtaining damages awards, actions for injunctions,[109] actions aimed at invalidating or otherwise making ineffective contractual arrangements ('contractual remedies') and interim relief.[110]

These classes of actions are brought in accordance with certain *procedures*, i.e. the rules governing the exercise of remedies that are intended to make them operational.[111] In this study the terms 'procedure' and 'procedural' are used somewhat loosely, essentially referring to any of the private enforcement-related measures under consideration other than remedies. This includes measures on issues as diverse as legal standing, time limits, forum (i.e. the body competent to rule on the private enforcement claim in ques-

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104 E.g. Van Gerven (2000), p. 507; Eilmansberger (2004), p. 1199; Prechal (2006), pp. 303-304; Nazzini (2009), pp. 403-404.

105 Jacobs & Deisenhofer (2003), pp. 187-188. See further e.g. Prechal (2005), pp. 98 and 102-104; Van Dam (2006), pp. 129-131.

106 Van Gerven (2000), p. 502.

107 *Ibid.*

108 Cf. Peyer (undated), p. 5. Note that the term 'remedy' is sometimes also understood in a broader sense, i.e. not corresponding to a particular class of action, but rather to redress more generally. See Prechal (2005), p. 145 (n. 99). Cf. Art. 19(1) TEU. In the present study the term 'remedy' is in principle understood in the former, more specific sense however.

109 As is further discussed in para. 284 below, in this study the term 'injunctive relief' refers to the granting of a court order that either *prohibits* a private party from acting in a particular manner (prohibitive injunctions) or that *obliges* a private party to act in a particular manner (mandatory injunctions).

110 As is further discussed in subsection 8.2.1 below, proceedings for interim relief are characterised by the provisional nature of the resulting measures (typically injunctions). These proceedings thus contrast with the definitive resolution of the dispute at hand through proceedings on the merits of the case.

111 Van Gerven (2000), p. 502.

tion), the internal organisation of the judiciary, rules of evidence, burden of proof, etc.

Taken together, the issues under consideration here can thus extend beyond what in many national jurisdictions is normally understood by the term 'procedural law'. This study is in effect concerned with almost all legal means available to private parties under the EU legislation in question for the enforcement of the substantive rules of EU law at issue.

22. The concept of '*private enforcement*' is evidently also central to this study. As used here, it refers to legal actions brought by a private party before a national court with a view to enforcing its rights based on EU law.[112] The claims concerned are normally of a civil law nature. But that is not necessarily the case; they may also involve actions that in a national legal system are qualified as being covered by administrative law. Indeed, qualifications as 'civil', 'administrative' or 'criminal' law tend to differ depending on the national jurisdiction concerned. This cannot in itself be decisive as a matter of EU law. As the Court of Justice has held, "*[t]he effectiveness of [EU] law cannot vary according to the various branches of national law which it may affect*".[113]

The foregoing also implies that the term '*court*' is understood broadly, in the sense that it is not dependent on the term or categorisation used in national law. Its precise meaning can vary in function of the specifications set out in the EU legal acts at issue, as further discussed in the following.[114] Suffice to note for the present purposes that the term 'court', as it is used here, broadly corresponds with the term 'court or tribunal of a Member State' within the meaning of Article 267 TFEU on the preliminary reference procedure. That implies in a nutshell that it is an independent and permanent body, established by law with compulsory jurisdiction, which applies rules of law on the basis of *inter partes* proceedings.[115] Although in certain cases arbitration bodies may also meet these conditions, this excludes, as a general rule, alternative dispute resolution bodies.[116]

As regards the *parties* initiating the legal actions referred to above, the terminology used in this study is somewhat loose. In the case law of the EU courts reference is normally made to 'individuals'. The legislation and official documents under consideration tend to use a relatively broad range of specific terms, such as 'undertaking', 'person', 'rightholder' or 'consumer'.

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112 For other, mostly comparable definitions, see e.g. Betlem (1999), p. 391; Komninos (2008), p. 2; Zippro (2009a), p. 223; Hodges (2011), p. 437. See Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 3. On the term 'private enforcement', see also para. 440 below.

113 Cf. e.g. CoJ case 82/71, *Sail*, para. 5. See e.g. also CoJ case 29/76, *LTU*, para. 5.

114 See in particular subsection 9.2.1 below.

115 E.g. CoJ case 246/80, *Broekmeulen*, para. 18; CoJ case C-54/96, *Dorsch Consult*, para. 23; CoJ case C-136/11, *Westbahn Management*, para. 27; CoJ joined cases C-58/13 and C-59/13, *Torresi*, para. 17-19.

116 Cf. e.g. CoJ case 102/81, *Nordsee*, para. 9-16; CoJ Order case C-555/13, *Merck Canada*, para. 17-25.

The general term used here to cover all these categories of persons is 'private parties'. This term can encompass legal as well as natural persons.[117] In certain cases it also covers public authorities, where the latter do not act in a public capacity.[118] The aforementioned more specific terms are nonetheless occasionally used where it is considered necessary to stress a particular characteristic of the private party in question. For instance, the term 'undertaking' highlights that it concerns a private party which is engaged in economic activity, offering goods or services on a given market.[119] The term 'rightholder' similarly indicates that the private party at issue is the holder of an intellectual property right. And the term 'consumer' refers specifically to a natural person acting for purposes falling outside his trade, business, craft or profession.[120]

Private enforcement, as defined above, contrasts with '*public enforcement*'. The latter refers to the range of coercive measures and mechanisms at the disposal of public authorities of the EU and of the Member States, acting in a public capacity, with a view to ensuring compliance with and the enforcement of EU law. Public enforcement can involve, as the case may be, the imposition of administrative sanctions, such as fines, but also criminal law sanctions, such as imprisonment.

23. Finally, concerning the *EU institutional level*, references made in this study to the EU legislature should, unless specifically indicated otherwise, be understood as references to the European Parliament and the Council, acting jointly on the basis of a legislative proposal by the Commission in accordance with the ordinary legislative procedure.[121] Reference is further made to the 'Court of Justice', or simply 'the Court', on the one hand and the General Court ('GC') on the other hand, which (together with the specialised courts, notably the Civil Service Tribunal ('CST')) jointly constitute the 'Court of Justice of the EU'. These courts are referred to here collectively as the 'EU courts' or the 'EU judiciary'. Over the decades the relevant EU insti-

117 Cf. Prechal (2005), p. 238.

118 Public authorities do not to act in a public capacity where they do not exercise public powers derogating from the rules of law applicable to relations between private individuals, but instead act in accordance with these latter rules. Cf. e.g. CoJ case C-167/00, *Henkel*, para. 30.

119 In EU competition law the term 'undertaking' refers to any entity, regardless of its legal status or the way it is financed, engaged in economic activity, i.e. offering goods or services on a given market. See further para. 199 below. In EU public procurement law reference is generally made to 'economic operators'. In EU consumer protection law various terms are used, such as 'seller or supplier' and 'producer'. Although each of these terms has its own distinct meaning, these differences are of limited relevance for the present purposes. The term 'undertaking' is therefore in principle used throughout this study, except where it is considered appropriate to use one of the aforementioned more specific terms.

120 The precise definition of the term 'consumer' can differ somewhat between the various EU consumer protection directives considered in this study. The above definition is most commonly used however. See further para. 151 below.

121 Art. 289 and 294 TFEU.

tutions and other bodies, treaties and treaty articles have several times changed name and numbers respectively. For reasons of readability and ease of understanding, this study refers only to the current names and numbers, unless explicitly indicated otherwise. The designations TEU and TFEU (referred to collectively as the 'EU Treaties') are thus used also in relation to periods preceding the entry into force of these treaties. The same applies as regards the current numbering of their articles. In citations this is indicated by using square brackets. In a similar manner reference is consistently made to the current names of the EU and its institutions and other bodies.[122]

### *1.2.4. Outline of the study*

24. This study consists of four parts. *Part A* introduces the subject-matter under consideration and sketches the relevant background and context. In addition to the present chapter this part also consists of chapter 2. The latter first introduces the principles of national procedural autonomy, equivalence, effectiveness and effective judicial protection. Where possible, the emphasis is placed on the practical implications of these principles, so as to best connect this part with the subsequent chapters. This is followed by an outline of the general public enforcement context and some remarks on the interaction between public and private enforcement. Finally, five rulings by the Court of Justice that are of particular importance in a private enforcement context are discussed and analysed, first separately and then jointly.

*Part B* analyses in turn the EU legislation and relevant official documents relating to the four field of EU law, mentioned above. Accordingly chapter 3 is concerned with EU public procurement law and more in particular the Procurement Remedies Directives. Chapter 4 deals with EU intellectual property law, with particular regard to the IPR Enforcement Directive. Chapter 5 focuses on EU consumer protection law, most notably the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive. In chapter 6 attention turns to the relevant developments relating to the private enforcement of EU competition law and especially the Competition Damages Directive.

*Part C* aims to build on the findings of the two foregoing parts. It analyses the legislation and other developments that have been considered in part B in a comparative and contextual manner, with particular emphasis on the relevant provisions on remedies and procedures. This part consists of three chapters. Chapter 7 and 8 are concerned with the available remedies. In the former actions for damages and for injunctions are assessed, whereas the latter concentrates on contractual remedies and the other remedies provided for.

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122 The term 'EU institutions and other bodies' is used in this study to refer to the full range of entities established as part of the EU's institutional framework. This can thus include the EU's seven institutions (see Art. 13 TEU), its advisory bodies (see Art. 300 TFEU) and its specialised bodies, offices and agencies (referred to in Art. 263 TFEU).

Chapter 9 subsequently analyses the procedural provisions and related issues that are of broader interest.

Building on these findings, the final *part D* of this study then essentially seeks to address a number of more general aspects related to EU legislation facilitating the private enforcement of EU law. Chapter 10 first sets out to answer a set of questions that can be summarised as the 'how', 'when' and 'why' of this legislation. Chapter 11 then seeks to place the phenomenon of private enforcement generally and EU legislating thereon specifically in a broader perspective. It concentrates on two such perspectives, namely the perspective of effectiveness and what is called the 'horizontalisation' perspective. Finally, chapter 12 summarises the main findings of this study and sets out the conclusions.

# 2. Key principles, public enforcement and case law

As has been explained in the foregoing, this study focuses on EU legislative measures facilitating the private enforcement of EU law. However these measures cannot be properly understood without assessing a number of key principles of EU law, as mostly developed in the case law of the Court of Justice. It concerns in the first place the principles of national procedural autonomy, equivalence, effectiveness and effective judicial protection. These principles are introduced and outlined in the first three sections below. They embody what can be called the 'default' situation, i.e. they constitute the requirements of primary EU law in situations where no specific secondary EU law applies. As such they also 'shaped' the EU legislative measures and other developments under consideration in part B as well as the legal environment in which these measures are 'embedded'. The fact that secondary EU law has been adopted in certain fields does not mean that they are no longer of relevance. Account should also be taken of the relevant public enforcement mechanisms. The possibilities and obligations under EU law for EU and national public authorities to bring legal actions to ensure compliance with and the enforcement of that law are therefore briefly assessed in the fourth section below. At the very end of this chapter attention turns to five key judgments of the Court of Justice that are of particular importance in connection to the private enforcement of EU law.

## 2.1. Principle of national procedural autonomy

The principle of national procedural autonomy is of obvious importance in a study concerned with litigation brought by private parties before the courts of the Member States for infringements of EU law. After a general introduction of this principle, below a number of more specific remarks are made on the meaning and importance of this principle.

### *2.1.1. National procedural autonomy: introduction*

25. The principle of national procedural autonomy is understood to mean that, as a general rule, the remedies and procedural rules needed at the domestic level in order to enforce EU law are to be provided for by *national* law, rather than by EU law. In other words, it implies that the Member States

have in principle an autonomous choice of means in remedial and procedural matters where the enforcement of EU law at national level is concerned.[1]

26. The 'classical' articulation of the principle of national procedural autonomy can be found in the Court of Justice's ruling in *Rewe*, which dates from 1976.[2] This case related to charges for phytosanitary inspection on the importation of apples, which had already been held to be equivalent to customs duties and therefore contrary to EU law. The applicant in the main proceedings had therefore requested a refund, but this was initially rejected due to the non-observance of a time limit provided for under national law. The question then arose whether this was in conformity with EU law. The Court of Justice ruled as follows:

> *"Applying the principle of [sincere] cooperation laid down in [Article 4(3) TEU], it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [EU] law.*
> *Accordingly, in the absence of [EU] rules on this subject, it is for the domestic legal systems of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.*
> *Where necessary, Articles [114 to 117 and 352 TFEU] enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the internal market.*
> *In the absence of such measures of harmonization the right conferred by [EU] law must be exercised before the national courts in accordance with the conditions laid down by national rules".*[3]

In *Rewe* the Court thus highlighted the central role of national courts in ensuring the legal protection of private parties in cases where their rights derived from EU law are infringed, a topic which has already been touched upon earlier.[4] Moreover the above citation makes clear that it is, in principle, for the *domestic legal system* of each Member State – and thus not for the EU – to designate the courts that are competent to rule in those cases and to establish the applicable procedural rules that apply to the legal proceedings in question. As the Court of Justice noted in 1981, and has repeated since, the EU Treaties are not intended to create new remedies before the

1 Cf. Galetta (2010), p. 12.
2 CoJ case 33/76, *Rewe*. See also CoJ case 45/76, *Comet*. For an earlier reference, see e.g. CoJ case 13/68, *Salgoil*, p. 463.
3 CoJ case 33/76, *Rewe*, para. 5.
4 See also subsection 1.1.1 above.

national courts to ensure the observance of EU law, other than those already provided under national law.[5] This can be otherwise only if the structure of the domestic legal system is such that it is not possible, even indirectly, to ensure respect for the rights that private parties derive from EU law.[6]

27. As regards the *origin and philosophy* underlying this approach relying primarily on the domestic legal systems of the Member States, it is important to note at the outset that this is the general point of departure in the EU legal order. That is to say, as was noted earlier, it is in principle for the Member States to implement EU law.[7] When doing so, in so far as EU law does not set out common rules, they are to act in accordance with the procedural and substantive rules of their own national law.[8] Under the broader principle of institutional autonomy, it is primarily for the Member States, within the limits set by EU law, to decide which bodies are charged with fulfilling the obligations that EU law imposes on them and how those bodies are structured and organised, including the means that these bodies have at their disposition and the rules applicable to them.[9]

Having said that, several (interrelated) factors are likely to play a role when seeking to explain why, while over the decades the EU has adopted common rules on so many issues of substantive law, the abovementioned general point of departure remains to a considerable extent intact where remedial and procedural matters are concerned. They include considerations of a pragmatic nature. Issues of remedies and procedures were probably not at the forefront of the parties concerned when the foundations were laid of a new legal order that was primarily designed to further economic (and, indirectly, political) integration in Europe. Indeed, it would not seem unreasonable that an early stage of the process of European integration attention largely focused on substantive issues, especially reducing the existing barriers to trade and creating an internal market. Deliberate or not, the resulting reliance on national law where remedial and procedural matters are concerned may also have helped furthering the 'embedment' and acceptance of EU law at national level.[10]

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5 CoJ case 158/80, *Rewe-Handelsgeschellschaft Nord*, para. 44; CoJ case C-432/05, *Unibet*, para. 40; CoJ case C-583/11 P, *Inuit*, para. 103. This 'no new remedies' rule can be traced back to CoJ case 34/67, *Lück*.

6 CoJ case C-432/05, *Unibet*, para. 41; CoJ case C-583/11 P, *Inuit*, para. 104. See also CoJ case C-562/12, *Liivimaa Lihavei*, para. 71.

7 See para. 5 above.

8 See e.g. CoJ joined cases 205/82 to 215/82, *Deutsche Milchkontor*, para. 17; CoJ case C-201/04, *Molenbergnatie*, para. 52.

9 See e.g. CoJ case C-389/08, *Base*, para. 26. Cf. Prechal (2005), pp. 317-318.

10 Bridge (1984), p. 31; Prechal (2005), p. 134; Storskrubb (2008), p. 18. On the effects at national level of the EU legislative measures of the type at issue here, see also subsection 10.4.2 below.

Furthermore, while it is not uncommon for courts to apply foreign substantive law, if and when they do so, the procedural rules of the forum normally apply.[11] Procedural law thus typically 'travels less' and is more territorially grounded than substantive law.[12] Also from this perspective it is understandable that, at least initially, matters of remedies and procedures applicable to proceedings before the courts of the Member States were mostly left unregulated at the time of the drafting of the EU Treaties. There also appears to have been – and to some extent continues to be – a general assumption that the remedies and procedural rules provided for by national law normally suffice to ensure that EU law is effective and can effectively be enforced at national level by the parties concerned.[13] All Member States are after all subject to the rule of law; according to the EU Treaties, this is a value common to the Member States and one of the central values on which the EU is founded.[14]

In any case, given the resulting lack of any explicit arrangement on these matters in primary and at least initially also secondary EU law, the EU courts had little choice but to mostly continue to rely on national law in this respect.[15]

28. The principle of national procedural autonomy – or at least the term itself – is *not uncontroversial* however. Many commentators have noted that the term suggests a degree of 'autonomy' on the side of the Member States that in reality does not exist. One of the most far-reaching criticisms is that this term completely misrepresents reality, because national procedural law is in fact applied ancillary to EU law and thus merely "*serves*" EU law.[16] Procedural law of course always 'serves' substantive law. The point here is however that it serves first and foremost substantive *EU* law, as opposed to substantive *national* law. Others have argued that this term tends to exaggerate the room for manoeuvre available to Member States.[17] Alternative terms have therefore been suggested, such as 'procedural competence' of the Member States or 'a combination of national procedural competence and European procedural primacy'.[18]

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11 Cf. Storme (1994), p. 43.
12 Kilpatrick (2000), pp. 17-18.
13 Cf. Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 29-30. See e.g. also Lindholm (2007), p. 100.
14 Art. 2 TEU. See also CoJ case 294/83, *Les Verts*, para. 23. Respecting the rule of law is a precondition for becoming a Member State (Art. 49 TEU), whereas a serious breach thereof by a Member State can lead to the suspension of its rights under the EU Treaties (Art. 7 TEU).
15 Jacobs (1997), pp. 25-26; Dougan (2004), p. 19.
16 Kakouris (1997), p. 1408. In a similar sense, see e.g. Milutinovic (2010), p. 308; Bobek (2012), p. 305.
17 E.g. Lindholm (2011), p. 472.
18 See Van Gerven (2000), p. 502; Delicostopulos (2003), pp. 599-613, respectively.

Crucially this criticism highlights that the 'autonomy' of the Member States is in fact more limited than this very term might suggest, a theme to which we shall return below.[19] For now suffice to note that this term has not been laid down expressly in the EU Treaties. In fact, it even entered the Court of Justice's vocabulary only comparatively recently.[20] It has since been used rather frequently. Just to give one example of a phrase typically used by the Court in this connection, in 2010, in relation to the question of enforceability obligations provided for in civil law contracts, it was held that "*in the absence of rules provided for under [EU] law, and in accordance with the principle of procedural autonomy, the detailed rules governing implementation of those obligations are a matter for national law*".[21] There are no clear indications that this more recent explicit use of this term has had implications for the substance of the Court's rulings. In that connection one can also point to the use of the word "*detailed*" in relation to the national rules that typically accompanies it. This certainly does not appear to signal a particular willingness to leave the Member States a greater margin of manoeuvre than before.

Such criticism notwithstanding, this recent and frequent use by the Court of Justice, as well as in the legal literature, of the term (national) procedural autonomy seems sufficient reason for the continuous use of this term. It is therefore also used in this study.[22]

### *2.1.2. National procedural autonomy: further remarks*

29. A first additional remark to be made in relation to the principle of national procedural autonomy is that in the *Rewe* ruling, cited above, the Court of Justice identified the principle of *sincere cooperation* as its (primary) legal foundation.[23] Pursuant to that principle, laid down in Article 4(3) TEU, "*the [EU] and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the [EU] Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the [EU] Treaties or resulting from the acts of the institutions of the [EU]. The Member States shall facilitate the achievement of the [EU]'s tasks and refrain from any measure which could jeopardise the attainment of the [EU]'s objectives.*"

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19 See subsection 7.3.2 below.

20 Namely in 2004. See CoJ case C-201/02, *Wells*, para. 65. Cf. Schebesta (2010), p. 857.

21 CoJ case C-451/08, *Müller*, para. 62.

22 The EU courts tend to refer to 'procedural autonomy'. As is generally the case in the legal literature, in this study the word 'national' is added so as to clarify that it is the Member States that possess this 'autonomy'.

23 See para. 26 above. Cf. Temple Lang (2008), p. 76. Other authors have suggested that a (further) basis is to be found in the principle of primacy of EU law or the principle of effective judicial protection. See Jacobs & T. Deisenhofer (2003), p. 217; Dougan (2004), p. 54, respectively.

The absence of an explicit legal basis for the principle of national procedural autonomy in the EU Treaties, as mentioned above, combined with this origin in the very broadly formulated principle of sincere cooperation, implies that the obligations of the national authorities in this respect are not clearly described. That means in turn that the Court of Justice is left with a significant margin of discretion in determining just how far these obligations extend. According to some, such discretionary appreciation on the part of the Court brings with it the *"seeds of intrusion"*.[24] Others have rightly noted that it will depend on one's point of view whether the resulting rather obscure delineation of the boundaries between EU and national law in matters relating to remedies and procedures is seen as inevitable, harmful, desirable or simply the lesser of two evils.[25] In any case the view that there is a degree of unpredictability and uncertainty in the case law of the EU courts on these matters is broadly shared.[26]

30. A second observation is that, as the Court of Justice highlighted in *Rewe*, this autonomy of the Member States is only relevant in the *absence of EU rules* on the subject-matter in question.[27] Consequently, to the extent that there are such specific EU rules, this principle does not apply. In addition the Court implied in that judgment that harmonisation in the field of procedures and remedies is possible in principle, provided that the conditions of the relevant legal basis have been met.[28] In other words, the original EEC Treaty – on the basis of which *Rewe* was decided – already contained a potentially sufficient legal basis for harmonisation in this field. Much of the abovementioned criticism of the term national procedural autonomy should be understood against this background, as this implies that there is no actual 'autonomy' for the Member States in this regard. It is instead principally a question of the EU having not (yet) made use of its potential competences, subject to restrictions that the EU Treaties impose in this connection.

There is moreover no reason to believe that the insertion in 2009 (Treaty of Lisbon) of Article 19(1) TEU on Member States' obligations to provide sufficient remedies substantially into the EU Treaties alters this point of departure. Quite to the contrary, as was noted above, this provision seems to primarily confirm and formalise the responsibilities of the Member States in ensuring effective judicial protection.[29] It is therefore not concerned with the distribution of competences between the EU and the Member States.[30] This latter issue has been addressed elsewhere in the EU Treaties, also since

24 Szyszczak & Delicostopoulos (1997), p. 143.
25 Tridimas (2006), p. 422.
26 See e.g. Prechal (2001), p. 43; Himsworth (1997), p. 310; Dougan (2011), p. 420; Lindholm (2011), p. 482.
27 See para. 26 above.
28 On legal basis issues, see further subsection 10.1.1 below.
29 See para. 7 above.
30 Cf. Komninos (2008), p. 149; Komninos (2009), pp. 374-375.

2009.[31] Neither the provisions of the EU Treaties concerned, nor the relevant case law of the Court of Justice contains any indication that these more recent amendments to the EU Treaties should lead to a reconsideration of the Court's well-established *Rewe* case law.

31. A third point to notice is that the reference in *Rewe* to "*rights derived from the direct effect*" of the relevant provisions of substantive EU law is not always apparent in later case law. Often (although by no means in all cases) reference is made to "*rights which individuals derive from [EU] law*".[32] In the present context it is the *existence of a right* that is the central element.[33] The question whether or not a provision of EU law satisfies the conditions for being of direct effect is, in and by itself, not decisive.[34] In its earlier case law, the Court of Justice sometimes seemed to treat direct effect and the conferral of rights on private parties basically as one and the same thing.[35] From the finding that a provision of EU law is directly effective it was almost 'automatically' deduced that that provision creates rights for private parties.[36] Subsequently both issues 'grew apart' to some extent however.[37] That is to say, the direct effect of a provision of EU law on the one hand and the creation of rights through that provision on the other hand still often coincide, but that is not necessarily the case.[38] The key difference between both concepts is that "*the question whether a provision creates individual rights is a matter of its* content*; the question whether a provision has direct effect relates to the* qualities ascribed to it*, namely whether it can be invoked by those concerned within the national legal system*".[39] Put differently, as it stands, the conferment of rights can be a *consequence* of direct effect, but is not identical to it.[40]

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31 See Title I of Part One TFEU and in particular Art. 3-5 TFEU. Concerning matters relating to the EU's competence to act in this regard, see further subsection 7.1.3 below.

32 See e.g. CoJ joined cases C-279/96, C-280/96 and C-281/96, *Ansaldo*, para. 27; CoJ case C-224/01, *Köbler*, para. 46; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 28.

33 On the concept of a 'right', see para. 21 above.

34 Lenaerts, Arts & Maselis (2006), p. 83 (n. 385).

35 For an overview of the discussions on the scope and meaning of the principle of direct effect and further references, see Craig & De Búrca (2011), pp. 180-199.

36 E.g. CoJ case 13/68, *Salgoil*, pp. 460-461; CoJ case 33/76, *Rewe*, para. 5.

37 Cf. e.g. CoJ joined cases C-6/90 and C-9/90, *Francovich*, discussed in para. 59 below, illustrating that a rule of EU law that is not directly effective can still create rights (or at least have been intended to do so).

38 Prechal (2006), p. 305.

39 *Ibid*. For a more detailed discussion, see Prechal (2005), pp. 99-106. As is noted in this latter contribution (p. 100), therefore, should one wish to describe direct effect in terms of rights, it could at most be said that this is a sort of procedural right, namely the 'right' to invoke EU law. Cf. CoJ case C-426/05, *Tele2 Telecom*, para. 33.

40 Jacobs (2004b), p. 306. See also Prechal (2005), p. 102. An alternative approach that touches essentially upon the same issue is to distinguish between 'subjective' and 'objective' direct effect, discussed in Van Gerven (2000), p. 506.

32. Fourth and finally, when used in the context of the principle of national procedural autonomy, the term 'procedural' is understood in a *very broad sense*. This term should not primarily be understood with reference to categories of national law. As is already evident from the above citation from *Rewe*, and as is further illustrated below, it covers in principle rules relating to the organisation of judicial remedies as well as those on the jurisdiction of the courts.[41] The principle of procedural autonomy can thus in effect cover virtually all remedial and procedural rules, mechanisms and arrangements available in legal proceedings before the courts of the Member States that are concerned with the enforcement of EU law.[42]

### *2.1.3. Summary*

33. The principle of national procedural autonomy expresses the general point of departure that in EU law it is primarily for the Member States – and not the EU – to designate the competent courts and to establish the remedial and procedural rules necessary for the enforcement by private parties of their rights vested in EU law before those courts. As was explained in the Court of Justice's 1976 *Rewe* judgment, this principle is based on the Member States' obligation of sincere cooperation, set out in Article 4(3) TEU. However, even if the EU courts nowadays regularly use this term, it is important to note that there is no full and proper 'autonomy' for the Member States in this respect. For one thing, the principle of national procedural autonomy only comes into play in the absence of specific EU rules on the issues concerned. For another thing, the Member States' scope for autonomous decision-making is conditioned by the principles of equivalence and effectiveness, discussed in the following subsection.

## 2.2. Principles of equivalence and effectiveness

In *Rewe* the Court not only laid the basis for the principle of national procedural autonomy. It also made it clear there that this autonomy of the Member States is by no means unrestricted. The Member States' scope for autonomous decision-making in this respect is constrained in particular by two EU law requirements, namely the principles of equivalence and effectiveness.[43] This section subsequently introduces these two principles, which in

41 See para. 26 above and subsection 2.2 below. In the same sense, see Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 14. It follows that, in this specific context, the meaning of the term 'procedural' is wider than the definition set out in para. 21 above, as it effectively encompasses rules on remedies as well as on procedures.

42 Cf. Komninos (2009), p. 372. Some distinguish a separate doctrine of 'remedial autonomy'. See Trstenjak & Beysen (2011), pp. 104-109.

43 Occasionally the CoJ assesses national procedural rules under other rules or principle of EU law, such as the general prohibition of discrimination on grounds of nationality (Art. 18 TFEU). See e.g. CoJ case C-323/95, *Hayes*. Cf. Dougan (2004), pp. 20-23.

practice are often applied jointly. Especially in relation to the principle of effectiveness the emphasis is placed on the concrete applications thereof in the Court's case law.[44]

### *2.2.1. Principle of equivalence*

34. The phrase "*it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature*" in *Rewe* contains the essence of the principle of equivalence. As the Court of Justice later clarified, this is "*in fact simply the expression of the principle of equal treatment, which is one of the fundamental principles of [EU] law*".[45] It essentially requires that the national remedial or procedural rule at issue is to be applied *without distinction*, regardless of whether the alleged infringement is of EU law or of national law, where the purpose, cause of action and essential characteristics are similar.[46] This principle applies in relation to all such rules, regardless of whether they are judicial or administrative in nature.[47]

35. Although it can be of considerable importance in individual cases, from the viewpoint of EU law generally the principle of equivalence tends to play a *rather modest role*.[48] This is in part due to the fact that, as a general rule, it is for the national courts to verify whether this principle has been complied with. As the Court of Justice has often noted, only these national courts have after all direct knowledge of the remedial and procedural rules governing actions in the relevant fields.[49] At the same time this primary role of the national courts in applying this principle does not necessarily stop the Court of Justice from issuing "*guidance*" in specific cases.[50] This may involve it, to a varying degree, assessing the relevant national rules and giving its views on what could be considered an equivalent action or what would be likely to violate this principle.[51] Still this guidance is often far from comprehensive, in that it does not cover the full scope and the precise application of this principle in concrete cases.[52]

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44 Evidently this application in concrete cases is generally closely linked to the specific circumstances of the cases at hand. The examples given below and the rules deducted therefrom should therefore be understood and applied with some caution.

45 CoJ case C-34/02, *Pasquini*, para 70. Cf. Opinion AG Kokott case C-268/06, *Impact*, para. 67.

46 E.g. CoJ case C-326/96, *Levez*, para. 41; CoJ case C-78/98, *Preston*, para. 49 and 55; CoJ case C-63/08, *Pontin,* para.45; CoJ case C-177/10, *Rosado Santana*, para. 90.

47 CoJ case C-34/02, *Pasquini*, para. 62.

48 Cf. Prechal (1998), p. 687.

49 E.g. CoJ case C-326/96, *Levez*, para. 43; CoJ case C-78/98, *Preston*, para. 49; CoJ case C-177/10, *Rosado Santana*, para. 90.

50 CoJ case C-78/98, *Preston*, para. 50. See further Craig & De Búrca (2011), p. 238.

51 E.g. CoJ case C-78/98, *Preston*, para. 50-53; CoJ case C-147/01, *Weber's Wine World*, para. 105-108; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 29-32.

52 Dougan (2004), p. 25.

36. The Court of Justice has clarified that, when applying this principle, national courts must take into account the role played by the allegedly similar provision in the procedure as a whole, as well as the conduct of that procedure and any specific features.[53] The various aspects of these rules should be examined not in isolation, but in their general context, and this should be done in an objective manner, rather than subjectively.[54]

The principle of equivalence cannot be put into effect and will thus be deemed not to have been infringed where no sufficiently similar national action can be established.[55] This conclusion also follows where the situations under consideration are different, to the extent that these differences provide an objective justification for the difference in treatment of the claim at issue.[56] It has further been held that this principle does not mean that the Member States are obliged to extend their most favourable national rules to the EU law-based action concerned.[57]

### *2.2.2. Principle of effectiveness*

37. While highlighting in *Rewe* the important role of the Member States' legal systems in remedial and procedural matters, the Court of Justice added in that same judgment that "*the position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect*".[58] In so doing, it laid the foundation of the principle of effectiveness. The Court later clarified that this principle also covers situations where it is *virtually impossible or excessively difficult* – and thus not merely 'impossible in practice' – to exercise the rights concerned.[59] This widened test not only raised the 'effectiveness threshold', it also gave the Court of Justice greater discretion in assessing whether it has been respected in a concrete case.[60]

The principle of effectiveness can be seen as a principle of minimum protection, as it merely lays down the lower limit.[61] But this does not mean that it is necessarily easily complied with. The importance that the Court of Justice attaches to the principle of effectiveness has tended to differ over time. Broadly speaking, one can distinguish a prudent initial phase in the case law (up to the early 1980s), followed by a significantly bolder period (mid 1980s-early 1990s), which was subsequently followed by a last phase

53 E.g. CoJ case C-326/96, *Levez*, para. 43-44; CoJ case C-63/08, *Pontin*, para.45; CoJ case C-177/10, *Rosado Santana*, para. 90.
54 CoJ case C-78/98, *Preston*, para. 62; CoJ case C-63/08, *Pontin*, para.46.
55 CoJ case C-261/95, *Palmisani*, para. 39.
56 CoJ case C-132/95, *Jensen*, para. 50-51.
57 CoJ case C-326/96, *Levez*, para. 42; CoJ case C-63/08, *Pontin*, para. 45.
58 CoJ case 33/76, *Rewe*, para. 5.
59 This broader formulation was first used in CoJ case 199/82, *San Giorgio*, para. 14.
60 Trstenjak & Beysen (2011), pp. 101-102.
61 Prechal (2001), p. 40.

(mid 1990s onwards) that is characterised by a more balanced and selective approach.[62]

38. Notwithstanding this evolution over time and its inherent case-by-case character, as compared to the principle of equivalence, the Court of Justice often gives considerably more *detailed and 'intrusive' guidance* where the principle of effectiveness is concerned. While the Court typically refers to both principles in cases that touch upon remedial and procedural issues under national law (pursuant to the principle of national procedural autonomy), it is the principle of effectiveness that tends to receive most attention and that is most likely to lead to the conclusion that the national rule at issue infringes EU law.[63] It has therefore been called "*the most volatile weapon in the Court's armoury*".[64] The following examples are just four illustrations of the range of situations covered and the impact that this principle can have in individual cases before the courts of the Member States.

First, this principle can come into play in relation to the national rules designed to encourage *out-of-court settlements*. For instance, in *Alassini* the Court of Justice highlighted that a national legal system that entailed mandatory prior recourse to such procedures affected the exercise of the rights of private parties based on EU law.[65] It found that the said principle had not been infringed in light of the specifics of the arrangement in question (no binding outcome, no substantial delay, suspension of time limits, no fees or significant costs), subject to electronic means not being the only means of access to that procedure as well as interim measures being available where necessary. In *Evans* a situation where the applicable EU law required Member States to establish a simple redress mechanism was assessed.[66] Here the Court held that the national system at issue, which consisted of several phases and concerned a combination of administrative review, arbitration and appellate judicial review, did not as such infringe the principle of effectiveness. Again the emphasis was on the practical consequences of the procedural arrangement in question for the private party concerned, in particular its advantages in terms of speed and legal costs.[67]

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62 For an overview, see Dougan (2004), pp. 29-30; Craig and De Búrca (2011), pp. 223-237; Dougan (2011), pp. 412-421.

63 Flynn (2008), pp. 245-258.

64 Dougan (2004), p. 27.

65 CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 52-60.

66 CoJ case C-63/01, *Evans*, para. 44-58.

67 See e.g. also CoJ case C-268/06, *Impact*, para. 51-53. In this case it was found that, where a Member State designates specialised courts to rule on certain claims while for other claims separate actions needed to be brought before the ordinary courts, such an arrangement can lead to an infringement of the principle of effectiveness, to the extent that it results in procedural disadvantages for the private parties concerned in terms of *inter alia* costs, duration and rules on representation that make it excessively difficult to exercise their rights.

A second example concerns the *standard of judicial review* to be applied by the national court in cases where rights vested in EU law are at stake. The relevant case law suggests that the principle of effectiveness does not necessarily require a 'full' review, at least not where the action rests on a complex assessment.[68] This means that the national court does not necessarily need to be empowered, as a matter of EU law, to substitute its own assessment of the facts and of the scientific evidence relied on for the assessment made by the competent national authorities. A review limited to examining the accuracy of the findings of fact and law, as well as on points of manifest error, misuse of powers or excess of the bounds of discretion, appears to suffice in such cases.

Third, the principle of effectiveness can have an impact on the applicable *rules related to evidence*. Even if it is generally for the Member States to establish rules of this kind, those rules may not make the exercise of the rights vested in EU law virtually impossible or excessively difficult.[69] Accordingly this principle can preclude the application of national rules establishing an unjustified presumption to the applicant's disadvantage or setting out special limitations concerning the form of the evidence to be adduced, such as the exclusion of all evidence other than documentary evidence.[70] It can also have consequences for the question which party carries the burden of proof.[71] In addition this principle can imply that a national court must ensure that the applicant can benefit from an exceptional procedure provided for under national law permitting witness evidence.[72] Similarly the Court of Justice has held that a national court may be required, in light of the burden of proof upon the applicant and the evidence that may not be in the latter's possession, to order the necessary measures of inquiry provided for under national law, such as obliging the other party to the proceedings or a third party to produce a particular document.[73] It can also entail adjusting or lightening the burden of proof.[74]

Finally, this principle has regularly been applied to national rules setting *limitation periods* for initiating legal proceedings before national courts for alleged infringements of EU law. The question of the admissibility of such time bars was already addressed in the aforementioned *Rewe* judgment itself.[75] There the Court essentially ruled that the principle of effectiveness did not stand in the way of imposing a reasonable limitation period, because

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68 CoJ case C-120/97, *Upjohn*, para. 30-37; CoJ case C-55/06, *Arcor*, para. 170.

69 Cf. e.g. CoJ case C-242/95, *GT-Link*, para. 25-26; CoJ case C-340/99, *TNT Traco*, para. 60-61.

70 CoJ case 199/82, *San Giorgio*, para. 11-15; CoJ case C-147/01, *Weber's Wine World*, para. 113-114; CoJ case C-129/00, *Commission v. Italy*, para. 35-40.

71 CoJ case C-72/12, *Altrip*, para. 52.

72 CoJ case C-228/98, *Dounias*, para. 71.

73 CoJ case C-526/04, *Laboratoires Boiron*, para. 55. See also CoJ case C-264/08, *Direct Parcel*, para. 35.

74 CoJ case C-479/12, *Gautzsch*, para. 43.

75 See para. 26 above.

this concerns an application of the principle of legal certainty. In subsequent judgments this rule has been repeatedly upheld and applied. It has thereby been highlighted that such limitation periods must be reasonable.[76] They should be established in light of *inter alia* the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration.[77] It follows that whereas in some situations a 15-day period can for instance be sufficient, in other cases it may not.[78] Moreover, even when a limitation period may seem reasonable in and by itself, specific circumstances can lead to the conclusion that its application in a particular case infringes the principle of effectiveness.[79] That can occur where there was deceit on the side of the defendant,[80] or lack of timely implementation of a directive by a Member State that deprived the private party-applicant of any opportunity to rely on its rights.[81]

39. The Court of Justice's more recent case law is characterised by the application, where relevant, of a *balancing test*. This approach was most clearly articulated in the 1995 *Van Schijndel* ruling.[82] As in *Rewe* and *Comet* before them, these two cases were issued on the same day and in virtually the same wording. In a nutshell, *Van Schijndel* concerned a preliminary reference asking, in the context of a dispute on the compulsory membership of an occupational pension scheme, to which extent there could be an obligation under EU law for the competent national court to consider of its own motion (*ex officio*) the compatibility of a rule of national law with the EU competition rules. In answering the questions referred the Court of Justice held that "*each case which raises the question whether a national procedural provision renders application of [EU] law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system […] must, where*

76 E.g. CoJ case C-30/02, *Recheio*, para. 17-22 (regarding the question whether a 90-day period is reasonable); CoJ joined cases C-392/04 and C-422/04, *i-21 Germany*, para. 58-64 (regarding the period available for filing an appeal).

77 CoJ case C349/07, *Sopropé*, para. 40; CoJ case C-63/08, *Pontin*, para. 48; CoJ case C-177/10, *Rosado Santana*, para. 93.

78 CoJ case C349/07, *Sopropé*, para. 41; CoJ case C-63/08, *Pontin*, para. 60-67.

79 CoJ case C349/07, *Sopropé*, para. 44.

80 CoJ case C-326/96, *Levez*, para. 32.

81 CoJ case C-208/90, *Emmott*, para. 23.

82 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*. See also CoJ case C-312/93, *Petersbroeck*. This balancing approach can however be traced back further. See e.g. CoJ case 33/76, *Rewe*, para. 5, where the CoJ balanced the need to ensure the effectiveness of EU law with the requirement of legal certainty.

*appropriate, be taken into consideration"*.[83] It has since referred back to this phrase on many occasions.[84]

The Court thus balanced the EU law interest related to the principle of effectiveness on the one hand and the aims pursued by certain basic principles of the national judicial system on the other hand. This approach has been called a 'procedural rule of reason'[85] or a form of an 'objective justification' approach.[86] One of these basic principles is the principle of legal certainty.[87] A specific expression thereof is a rule preventing the re-opening of administrative or judicial decisions that have become final (*res judicata*). In this respect it has been held that "[EU] *law does not require a court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of [EU] law by the decision at issue*".[88] Other such basic principles include preventing unjust enrichment,[89] the rights of defence[90] and the proper conduct of procedure.[91] These latter two principles can find a concrete expression in the passive role of national courts in civil proceedings, as was at issue in the aforementioned *Van Schijndel* ruling. There the Court of Justice clarified that the principle of effectiveness does not preclude a national provision which prevents courts from raising of their own motion (*ex officio*) the issue of whether a provision of EU law has been infringed, where examination of that issue would oblige them to abandon their passive role by going beyond the ambit of the dispute defined by the parties and relying on facts and circumstances other than those on

83 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 19.

84 E.g. CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 33; CoJ case C-63/08, *Pontin*, para. 47; CoJ case C-177/10, *Rosado Santana*, para. 92.

85 Prechal (2001), p. 46; Prechal (1998), p. 691.

86 Dougan (2011), p. 419. Considering the particular emphasis that is placed in *Van Schijndel* on the context in which the national rule at issue operates, this is sometimes also referred to as the 'contextual approach'. See Schebesta (2010), p. 859.

87 E.g. CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 19. See also CoJ case 33/76, *Rewe*, para. 5.

88 CoJ case C-234/04, *Kapferer*, para. 21. This case concerned judicial decisions. In that connection see e.g. also CoJ case C-2/08, *Olimpiclub*, para. 29-30. In relation to arbitration award proceedings, see CoJ case C-126/97, *Eco Swiss*, para. 46-47. In relation to administrative decisions, see CoJ case C-453/00, *Kühne & Heitz*, para. 24; CoJ joined cases C-392/04 and C-422/04, *i-21 Germany*, para. 51 and 57. In this regard the situation concerning the recovery of unlawfully granted state aid is a somewhat special case, in particular in light of the exclusive nature of the Commission's supervisory powers in this domain. See e.g. CoJ case C-24/95, *Alcan*, para. 24-25; CoJ case C-199/05, *Lucchini*, para. 62-63. See further Nebbia (2008a), p. 427.

89 E.g. CoJ case 199/82, *San Giorgio*, para. 13; CoJ case C-309/06, *Marks & Spencer*, para. 41.

90 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 19; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 33.

91 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 21; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 35.

which the party with an interest in the application of those provisions has based its claim.[92] There are however certain exceptions to this rule.[93]

This balancing approach does not mean that a mere abstract reference to any of the abovementioned basic principles suffices to 'counter balance' the working of the principle of effectiveness. In the case law emphasis is often placed on the practical application of these basic principles, on the basis of a case-by-case assessment.[94] That means that the Court's assessment can still be as 'intrusive' as was the case under its earlier case law.[95] In other words, in its more recent case law the Court of Justice may tend to follow an approach that is more nuanced and 'respectful' where basic principles of national law truly are at stake, but it also guards against creating a general loophole that would put at risk the interests that it has long sought to protect through the application of the principle of effectiveness.

### *2.2.3. Summary*

40. The application of the EU law principles of equivalence and effectiveness can substantially affect the Member States' procedural autonomy. The former principle is a concrete expression of the general EU law principle of equal treatment. It implies that the national rules on remedies and procedures are to be applied without distinction, regardless of whether the alleged infringement is of national law or of EU law, where the purpose, cause of action and essential characteristics are similar. National courts generally play an important role in applying this principle. The Court of Justice tends to give more detailed and occasionally more 'intrusive' guidance where the principle of effectiveness is concerned. Pursuant to this latter principle the national rules at issue may not make it virtually impossible or excessively difficult for a private party to exercise its rights vested in EU law. It can affect national rules on for instance out-of-court settlement procedures, the standard of judicial review, rules relating to evidence and limitation periods. Powerful as this 'weapon' may be, this principle is not absolute. In particular, in concrete cases there can be reason to balance it with the basic principles of the Member States' legal systems. It follows that, even where a given national remedial or procedural rule negatively affects the possibilities for a private party to enforce its rights based on EU law, that rule can at times nonetheless be upheld, for example because it ensures legal certainty, the rights of defence or the proper conduct of proceedings.

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92 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 20-22. See also CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 33.

93 E.g. CoJ case C-312/93, *Petersbroeck*, para. 16-21; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 39-40. See also subsection 9.2.4 below.

94 Cf. CoJ case C-473/00, *Cofidis*, para. 37.

95 Dougan (2004), pp. 31-32.

## 2.3. Principle of effective judicial protection

After having introduced in the foregoing the principle of national procedural autonomy, as conditioned by the principles of equivalence and effectiveness, the fourth principle that is of particular importance here, i.e. the principle of effective judicial protection, is introduced below. A general introduction of this principle, including an assessment of its relationship to the '*Rewe*-principle' of effectiveness, is followed by an illustration of its practical expressions on several private enforcement-relates issues.[96]

### *2.3.1. Effective judicial protection: introduction*

41. The origins of the principle of effective judicial protection, as it emerges in EU law, can be traced back as far as 1968.[97] It is however only since the 1980s that the EU courts properly "*discovered*" this principle,[98] in that it has taken an increasingly prominent position in the case law on matters of remedies and procedures in proceedings both before these EU courts and before national courts in cases involving the application of EU law.

42. The increased prominence of the principle of effective judicial protection is in part due to it having the character of a fundamental right. The Court of Justice has long held that as such it is to be considered a *general principle* of EU law.[99] It underlies the constitutional traditions common to the Member States and has also been enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), notably its Articles 6 and 13.[100] These latter two articles respectively provide for a fundamental right to a fair trial and to an effective remedy.[101] In the case law of the European Court of Human Rights ('Court of Human Rights'), the Strasbourg-based court that is charged with interpreting the ECHR, it is Article 6 that typically receives most attention in this connection. This article

96 Again the proviso should be made that this application in concrete cases is generally closely linked to the specific circumstances of the cases at hand. The examples given here and the rules deducted therefrom should therefore be understood and applied with some caution.

97 CoJ case 13/68, *Salgoil*, pp. 462-463.

98 Prechal (2001), p. 40.

99 E.g. CoJ case 222/84, *Johnston*, para. 18; CoJ case C-55/06, *Arcor*, para. 174.

100 The ECHR and the ECtHR have been established under the auspices of the Council of Europe, an international organisation separate from the EU. See www.hub.coe.int. On the ECHR and its application by the ECtHR, see further e.g. Mowbray (2012).

101 In this particular context the meaning of term 'remedy' is thus broader than the definition otherwise used in this study, as here it essentially corresponds with redress generally. See para. 21 above.

often 'absorbs' Article 13, given that the requirements under the latter article are generally less strict than under the former.[102]

43. In recent years the importance of this principle has been reaffirmed and increased by its inclusion in *Article 47 of the Charter* of Fundamental Rights of the EU ('Charter'). There it appears in the form of the 'right to an effective remedy and a fair trial'. Since 2009 (Treaty of Lisbon) the Charter expressly has the same legal value as the EU Treaties.[103] It has thus become the main point of reference for the EU courts when assessing the respect for fundamental rights in relation to EU law. It is therefore also the main point of reference in this respect in the present study.

The Court of Justice held that Article 47 Charter "*secures in EU law the protection afforded by Article 6(1) of the ECHR*", for which reason it can suffice to only refer to this former provision.[104] That is not to say however that the ECHR, and the corresponding case law of the Court of Human Rights, are no longer of relevance. In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of these rights is the same as those laid down in the ECHR.[105] This implies that the Court of Justice has particular regard to the case law of the Court of Human Rights on these matters.[106] The ECHR also remains relevant for two other reasons.

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102 E.g. ECtHR case 6289/73, *Airey v. Ireland*, para. 20-35; ECtHR case 12964/87, *De Geouffre de la Pradelle v. France*, para. 27-37. This does not mean that Art. 13 ECHR cannot have an independent meaning however. See e.g. ECtHR case 5029/71, *Klass v. Germany*, para. 61-75; ECtHR case 21987/93, *Aksoy v. Turkey*, para. 88-100.

103 Art. 6(1) TEU. As was noted in para. 7 and 30 above, from that same moment onwards, Art. 19(1) TEU requires the Member States to "*provide remedies sufficient to ensure effective legal protection in the fields covered by [EU] law*". As such both Art. 47 Charter and Art. 19(1) TEU give expression to the *adagio* that each right conferred must be accompanied by a corresponding remedy ensuring its enforcement (*ubi ius, ibi remedium*). The CoJ has clarified that Art. 19(1) TEU serves to ensure the observance of Art. 47 Charter within the EU. See CoJ case C-418/11, *Texdata*, para. 78; CoJ case C-583/11 P, *Inuit*, para. 100-101.

104 CoJ case C-199/11, *Otis*, para. 47. In the same sense, see CoJ case C-386/10 P, *Chalkor*, para. 51; CoJ case C-439/11 P, *Ziegler*, para. 126. See also Opinion AG Cruz Villalón case C-69/10, *Samba Diouf*, para. 38-44. The Explanations relating to the Charter of Fundamental Rights, OJ 2007, C 303/2, clarify that the first subparagraph of Art. 47 Charter is based on Art. 13 ECHR (although it is more extensive in that it guarantees an effective remedy before a court), whereas the second subparagraph of Art. 47 corresponds with Art. 6(1) ECHR (although again its scope is wider, as it is not confined to disputes relating to civil law rights and obligations) and the third subparagraph of Art. 47 is based on the ECtHR case law on the latter article. See e.g. ECtHR case 6289/73, *Airey v. Ireland*. Art. 48 Charter corresponds in turn with Art. 6(2) and (3) ECHR. Pursuant to Art. 6(1) TEU and Art. 52(7) Charter the said explanations have to be taken into consideration for the interpretation of the Charter.

105 Art. 52(3) Charter. This is subject to the possibility to provide for more extensive protection in EU law.

106 E.g. CoJ case C-506/04, *Wilson*, para. 51; CoJ case C-279/09, *DEB*, para. 35-37; CoJ case C-399/11, *Melloni*, para. 50. See further Douglas-Scott (2006), p. 629.

First, the EU is to accede to the ECHR.[107] Second, the fundamental rights guaranteed by the ECHR, together with those resulting from the constitutional traditions common to the Member States, continue to constitute general principles of EU law and are as such to be applied by the EU courts.[108]

It is further to be noted that the field of application of the Charter is not unlimited. There can be no doubt that the Charter applies to the acts of the institutions and other bodies of the EU. However, in as far as the *Member States* are concerned, pursuant to its Article 51(1) their acts are only covered where the criterion has been met that "*they are implementing [EU] law*".[109] The Court of Justice has made clear that this essentially means that the fundamental rights in question are applicable in all situations governed by EU law, but not outside such situations.[110] The applicability of EU law thus entails the applicability of the fundamental rights guaranteed by the Charter.[111] Specifically with regard to Article 47 of the Charter, given its character of a sort of 'meta-right', this provision is likely to be interpreted in such a manner that it covers essentially all situations where rights granted by EU law are affected.[112] As to the personal scope of the Charter, whereas there may well be a need to differentiate between the various rights set out therein in certain cases,[113] the available case law suggests that Article 47 Charter covers in principle natural as well as legal persons.[114]

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107 Art. 6(2) TEU. In April 2013 a draft Agreement on the accession of the European Union to the European Convention on Human Rights was agreed. For the text of that draft agreement, see www.coe.int/t/dghl/standardsetting/hrpolicy/accession/meeting_reports/47_1(2013)008rev2_EN.pdf. A request for an opinion by the CoJ on the compatibility of this draft agreement with the EU Treaties pursuant to Art. 219(11) TFEU is currently pending; see CoJ Opinion 2/13, *ECHR*. See further e.g. Lock (2010), p. 777; Craig (2013), p. 1114; Gragl (2014), p. 13.

108 Art. 6(3) TEU.

109 See also Protocol No 30 TFEU as to the application of the abovementioned criterion with respect to the United Kingdom ('UK') and Poland, as clarified in CoJ joined cases C-411/10 and C-493/10, *N.S.*, para. 119-120. See further Craig (2010), pp. 237-240; Ladenburger (2012), pp. 28-31.

110 CoJ case C-617/10, Åklagaren, para. 19. See e.g. also CoJ joined cases C-411/10 and C-493/10, *N.S.*, para. 64-69; CoJ case C-370/12, *Pringle*, para. 179-180; CoJ case C-206/13, *Siragusa*, para. 24-34.

111 CoJ case C-617/10, Åklagaren, para. 21; CoJ case C-418/11, *Texdata*, para. 73.

112 This seems implicit in CoJ case C-399/11, *Melloni*, para. 49. See Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007, p. 2), where it is stated that "*Article 47 applies to the institutions of the [EU] and of Member States when they are implementing [EU] law and does so for all rights guaranteed by [EU] law*". In a similar sense, see Opinion AG Cruz Villalón case C-69/10, *Samba Diouf*, para. 38-44; Iglesias Sánchez (2012), p. 1586 (n. 111); Ladenburger (2012), pp. 20-21.

113 Certain rights laid down in the Charter are inherently not applicable to legal persons, such as the right to life (Art. 2(1)), whereas certain other rights expressly apply also to legal persons, such as the right to access to documents (Art. 42 Charter). Yet for most rights the situation is less clear. See further Oliver (2011), pp. 2028-2037.

114 Cf. e.g. CoJ case C-275/06, *Promusicae*, para. 61-70; CoJ case C-279/09, *DEB*, para. 36-62; GC case T-496/10, *Bank Mellat*, para. 36 (appeal pending; see CoJ case C-176/13, *Bank Mellat*. See also the ECtHR case law cited in Oliver (2011), p. 2030 (n.. 29).

44. As is illustrated by the examples discussed in the following subsection, there can be a noticeable *overlap* between the principle of effective judicial protection on the one hand and the principle of effectiveness that was established in the *Rewe* case law, discussed earlier, on the other hand.[115] Both principles generally appear to fulfil a similar function in ensuring that rights of private parties vested in EU law can be effective enforced.[116] The rise to prominence of the former principle is such, that it has to some extent eclipsed the principle of effectiveness. Indeed, in some respects the latter principle seems to have been entirely 'absorbed'.[117] Many consider the principle of effective judicial protection as the over-arching principle.[118] This view certainly finds some support in especially the more recent case law. For instance, the Court of Justice has repeatedly held that "*the requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure effective judicial protection of an individual's rights under [EU] law*".[119] In this connection it can also be recalled that the principles of equivalence and effectiveness apply only "*in the absence of [EU] rules*".[120] The granting of legally binding force to the Charter, and thus also its Article 47, means that the principle laid down therein is now a rule of (positive) EU law. In addition to its status as a fundamental right, this may help explain why this principle generally obtains most attention.

115 See subsection 2.2.2 above.

116 Cf. Opinion AG Poiares Maduro joined cases C-222/05 to C-225/05, *Van der Weerd*, para. 16. For a different view, see Prechal & Widdershoven (2011), p. 46. These authors argue that the main concern underlying the principle of effectiveness is in essence the effective application and enforcement of EU law *per se*, rather than the protection of the rights of private parties. On this latter distinction, see further subsection 11.1.1 below.

117 E.g. CoJ case C-279/09, *DEB*, para. 27-29. Here the referring court had posed a preliminary question to the CoJ regarding the application of the '*Rewe*-principle' of effectiveness. The CoJ restated the question however and answered it as one concerning the application of the principle of effective judicial protection.

118 Van Gerven (2004a), p. 515; Dougan (2004), p. 4; Drake (2005), p. 332-335; Prechal (2005), p. 144; Tulibacka (2009), p. 1537; Reich (2010), p. 132; Arnull (2011), p. 55; Oliver (2011), pp. 2037-2039. See also Opinion AG Trstenjak case C-411/10, *NS*, para. 161. Note that, although these authors all essentially identify effective judicial protection as the over-arching concept, their views differ significantly as to why that is the case, which nuances should be acknowledged and which consequences should be drawn therefrom. For another view, see e.g. Opinion AG Kokott case C-75/08, *Mellor*, para. 28, where it is held that, conversely, the principle of effective judicial protection is an expression of the '*Rewe*-principle' of effectiveness.

119 CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 49. In a similar sense, see CoJ case C-268/06, *Impact*, para. 47; CoJ case C-63/08, *Pontin*, para. 44. See also CoJ case C-55/06, *Arcor*, para. 190, where reference is made to "*the principles of equivalence and effectiveness of judicial protection*".

120 CoJ case 33/76, *Rewe*, para. 5. See para. 26 and 30 above.

Having said that, as the law stands at present it cannot be said with certainty that both principles neatly coincide and that one has 'absorbed' the other.[121] In particular, there is also case law suggesting that, 'post-Lisbon', both principles continue to fulfil an independent role, in the sense that the Court of Justice assessed them separately.[122] It is therefore not always evident through which lens a particular question relating to national rules on remedies and procedures will be assessed. It appears that further clarification needs to be awaited before firm conclusions can be drawn on the precise relationship and interaction between the two abovementioned principles. It is moreover uncertain to what extent, if at all, any of this translates into a difference in practice. There can be no doubt that the application of the principle of effective judicial protection can have significant consequences for the national rules in question.[123] However, as has been seen earlier, the same can be said of the '*Rewe*-principle' of effectiveness.[124] The Court of Justice arguably tends to motivate its more intense scrutiny preferably with reference to the former principle.[125] If so, this may be linked to the positive formulation of that principle (effective judicial protection *must* be ensured), as compared to the negative formulation of the principle of effectiveness (national procedural rules may *not* make the exercise of rights virtually impossible or excessively difficult).[126]

### *2.3.2. Effective judicial protection: application*

45. The principle of effective judicial protection comprises various elements.[127] One of them is the right of *access to court*. This latter right in turn encompasses a range of more specific issues. It implies for instance that the competent court must be *independent and impartial*. That means that it must be protected against external intervention or pressure liable to jeopardise the independent judgment of its members. It also implies that there must be a 'level playing field' for the parties to the proceedings and their respective interests, requiring objectivity and the absence of any interest in the outcome of the proceedings on the side of the members of the courts, apart from the strict application of the rule of law. The applicable rules, for example on the

121 In a similar sense, see Iglesias Sánchez (2012), p. 1579; Prechal & Widdershoven (2011), p. 31; Parret (2012), p. 159. In the latter two publications it is argued, while acknowledging the overlap and similarities between both principles, that they serve different purposes and are driven by different rationales and should thus be distinguished. On the meaning and significance of the concept of effectiveness in the present context, see also section 11.1 below.

122 CoJ case C-12/08, *Mono Car Styling*, para. 49; CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 52-66. Cf. also CoJ case C-276/01, *Steffensen*, para. 66-80.

123 See subsection 2.3.2 below.

124 See subsection 2.2.2 above.

125 Cf. Prechal (2001), p. 40. See also Prechal & Widdershoven (2011), pp. 38-40.

126 Cf. Dougan (2011), p. 413.

127 CoJ case C-199/11, *Otis*, para. 48.

composition of the courts and on the appointment and dismissal of its members, must be such as to dismiss any reasonable doubt in the minds of the parties concerned as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.[128] This right does not necessarily entail a certain number of levels of jurisdiction however.[129]

The right of access to court also implies certain requirements in terms of the *standard of judicial review* exercised.[130] As the Court of Justice has clarified, for a court to be able to determine a dispute concerning rights or obligations arising under EU law in accordance with Article 47 Charter, (at least) in proceedings where penalties were imposed, it must be empowered to consider all questions of fact and law that are relevant to the case before it.[131] Accordingly the courts must verify *inter alia* whether the evidence relied on is factually accurate, reliable and consistent. They must also establish whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.[132]

The right of access to court can also have implications for rules on *legal standing* and *time limits*. The Court of Justice has held that it is, as a general rule, for national law to determine a private party's standing in initiating legal proceedings, as long as these rules do not undermine the right to effective judicial protection.[133] It is not necessarily required that a direct, free-standing action is available to contest a rule of national law that allegedly infringes EU law. The availability of an indirect remedy may suffice, for instance in the form of a damages claim or the possibility to contest the measures enacted on the basis of the allegedly infringing provision.[134] In that sense the Court assesses the remedies in their totality.[135] Depending on the circumstances the right of access to court might however be prejudiced where it is made conditional upon a preceding mandatory attempt to settle the dispute in question.[136] As regards the applicable time limits, notably limitation periods for initiating legal proceedings, it has been held that the

128 CoJ case C-506/04, *Wilson*, para. 46-53. In this case the CoJ also clarified that the concept of a 'court or tribunal' used here corresponds to that referred to in Art. 267 TFEU on preliminary references.

129 CoJ case C-69/10, *Samba Diouf*, para. 69.

130 For an overview of the (nuanced) assessment under Art. 6(1) ECHR, see ECtHR cases 32181/04 and 35122/05, *Sigma Radio Television*, para. 126-127 and 147-157.

131 CoJ case C-199/11, *Otis*, para. 49.

132 CoJ case C-386/10 P, *Chalkor*, para. 53-67. See also CoJ case C-501/11 P, *Schindler*, para. 33-38. These rulings relate to the judicial review exercised by the EU courts regarding Commission decisions for infringements of EU competition law. On that review, see further Nazzini (2012), p. 971.

133 E.g. CoJ joined cases C-87/90 to C-89/90, *Verholen*, para. 24.

134 CoJ case C-13/01, *Safalero*, para. 54-56; CoJ case C-432/05, *Unibet*, para. 40-42.

135 This corresponds with the approach followed by the ECtHR under Art. 13 ECHR. See e.g. ECtHR case 9248/81, *Leander v. Sweden*, para. 84; ECtHR case 46477/99, *Edwards v. UK*, para. 101.

136 CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 62.

period prescribed must be sufficient in practical terms to enable the applicant to effectively prepare and bring a case. This does not exclude that account is taken of the nature of the procedure at issue.[137]

46. Another element of the broader right of effective judicial protection concerns the *rights of defence*. This includes a duty for the competent authorities to state reasons for their decisions, in a specific and concrete manner.[138] This should allow the private party concerned to defend its rights on the best possible conditions and ensure that this party has the possibility of deciding, with a full knowledge of the relevant facts, whether or not there is any point in him applying to the courts.[139] It also serves to ensure that the court is fully in a position to review the lawfulness of the contested decision.[140] The rights of defence in addition imply a right to be heard for the private parties concerned. Thus in all proceedings that are liable to culminate in a measure adversely affecting a party every party must be given the opportunity to make known its views effectively before the adoption of a decision, even where the applicable legislation does not expressly provide for such a procedural requirement.[141] It also requires the authorities to pay due attention to the observations submitted by the private party concerned, as well as examining carefully and impartially all the relevant aspects of the individual case.[142]

The rights of defence, including the right to be heard, do not only apply in respect of decisions of EU or national administrative authorities. They also apply in relation to decisions by a court in proceedings between private parties, in particular where the court raises an issue of its own motion.[143] This is closely related to the *right to adversarial proceedings*.[144] That latter right aims to prevent a court from being influenced by arguments that the parties have been unable to discuss.[145] As interpreted by the Court of Human Rights it ensures that the parties to the proceedings have the opportunity to make known any evidence needed for their claims to succeed and to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision.[146]

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137 CoJ case C-69/10, *Samba Diouf*, para. 66-67.

138 CoJ case 222/86, *Heylens*, para. 15; CoJ case C-104/91, *Borell*, para. 15; CoJ case C-277/11, *M.M.*, para. 88.

139 CoJ case C-239/05, *BVBA Management*, para. 36; CoJ joined cases C-402/05 P and C-415/05 P, *Kadi*, para. 336-337; CoJ case C-75/08, *Mellor*, para. 59.

140 CoJ joined cases C-402/05 P and C-415/05 P, *Kadi*, para. 337.

141 CoJ case C349/07, *Sopropé*, para. 37-38; CoJ case C-277/11, *M.M.*, para. 82 and 85-87.

142 CoJ case C-277/11, *M.M.*, para. 88.

143 CoJ case C-89/08 P, *Commission v. Ireland*, para. 51-57; CoJ case C-472/11, *Banif Plus Bank*, para. 29.

144 Cf. CoJ case C-89/08 P, *Commission v. Ireland*, para. 58.

145 CoJ Order case C-17/98, *Emesa Sugar*, para. 18.

146 ECtHR case 21497/93, *Mantovanelli v. France*, para. 33; ECtHR case 32106/96, *Komanicky v. Slovakia*, para. 46.

47. The *principle of equality of arms* is another important element of the broader right of effective judicial protection guaranteed by Article 47 Charter.[147] This principle aims to ensure a fair balance between the parties to the dispute. It implies that each party is afforded a reasonable opportunity to present its case, including its evidence, under conditions that do not place it at a substantial disadvantage *vis-à-vis* their opponent.[148] The principle of equality of arms (as well as the aforementioned right to adversarial proceedings) can thus for instance have a bearing on national rules of evidence. On the one hand it is principally for the national courts to assess the evidence brought before them and the relevance of any evidence that a wishes to produce.[149] On the other hand, at least under Article 6(1) ECHR, the fairness of the proceedings must be considered as a whole, i.e. including the manner in which evidence was taken.[150] It must therefore be ensured that a party has a real opportunity to examine and challenge any such evidence, particularly where the evidence pertains to a technical field of which the judges have no knowledge and it is likely to have a preponderant influence on the assessment of the facts by the court.[151] A rule of national law that a particular document issued by the national authorities is to be treated as conclusive evidence can therefore be contrary to this principle where it deprives a party of the possibility of asserting its rights by judicial process.[152]

### *2.3.3. Summary*

48. The principle of effective judicial protection has received increasing attention in the case law on matters of remedies and procedures in relation to EU law. That applies in particular since the Charter became legally binding in 2009. Article 47 thereof sets out the right to an effective remedy and a fair trial. This principle appears to have eclipsed at least to some extent the '*Rewe*-principle' of effectiveness, even if the precise relationship between both principles remains to be clarified. The broad banner of effective judicial protection covers various elements, such as the right of access to court, the rights of the defence and the principle of equality of arms. As such its application can affect national rules on a range of issues. Examples include the independence and impartiality of the courts, the standard of judicial review, legal standing, limitation periods and rules of evidence.

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147 E.g. CoJ case C-199/11, *Otis*, para. 48; CoJ case C-169/14, *Sánchez Morcillo*, para. 48.

148 E.g. CoJ case C-199/11, *Otis*, para. 71-72. See e.g. also ECtHR case 14448/88, *Dombo Beheer BV v. Netherlands*, para. 33; ECtHR case 62543/00, *Gorraiz Lizarraga v. Spain*, para. 56.

149 CoJ case C-276/01, *Steffensen*, para. 75. See e.g. also ECtHR case 21497/93, *Mantovanelli v. France*, para. 34; ECtHR case 32106/96, *Komanicky v. Slovakia*, para. 47.

150 ECtHR case 21497/93, *Mantovanelli v. France*, para. 34; ECtHR case 32106/96, *Komanicky v. Slovakia*, para. 47.

151 CoJ case C-276/01, *Steffensen*, para. 76-77; CoJ case C-199/11, *Otis*, para. 72.

152 E.g. CoJ case 222/84, *Johnston*, para. 20. This case was decided on the basis of the principle of effective judicial protection generally, i.e. without any further specification of a particular element thereof.

## 2.4. Public enforcement

Private enforcement cannot be properly understood without having regard to the public enforcement context. This section therefore briefly outlines the main public enforcement mechanisms that exist under EU law. A distinction is made between infringement proceedings before the Court of Justice on the one hand and other forms of public enforcement on the other hand. Both forms are subsequently discussed below. On that basis several observations are then made on the interaction of these public enforcement mechanisms with private enforcement.

### *2.4.1. Infringement proceedings*

49. One of the most important means of public enforcement in an EU law context is enforcement through *infringement proceedings*, as provided for in Articles 258 and 259 TFEU.[153] These proceedings, which are to be brought before the Court of Justice, can be initiated by either the Commission or a Member State when they consider that a Member State has failed to fulfil its obligation under the EU Treaties. Those obligations include compliance with secondary EU law. Not only the acts and omissions of a Member State's central government are concerned here, but also those by its regional or local governments and specific branches, such as the judiciary. These infringement proceedings can result in the Court of Justice declaring that the Member State in question has failed to fulfil its obligations. That Member State is then required to correct the situation so as to ensure conformity with EU law.[154] Where this has been applied for, the Court of Justice can impose a lump sum or a penalty payment on the Member State concerned in case of non-compliance. However, apart from certain special cases, under Article 260 TFEU the Commission first needs to initiate additional, separate proceedings before these latter measures can be imposed.[155] As has been noted earlier, in practice infringements proceedings initiated by the Commission far outnumber the actions brought by Member States.[156] These proceedings are thus principally a matter between the Commission and the Member State allegedly having infringed EU law.

50. That is not to say however that *private parties* cannot play a role in this context. In particular, they can file complaints to the Commission on alleged infringements of EU law by the Member States. For these private parties this can be a cheap and easy means of exposing (alleged) non-compliance. One

153 See further e.g. Rawlings (2000), p. 267; Prete & Smulders (2010), p. 9.
154 Art. 260(1) TFEU.
155 Art. 260(2) TFEU. The said special cases concern the situation where the Member States have failed to notify measures transposing a directive into national within the set time period (see Art. 260(3) TFEU).
156 See para. 4 above.

could say that it allows them to enforce their rights in an indirect manner. For the Commission these complaints are an important means of information-gathering. As is the case with the Commission's own initiative investigations, only a small minority of all complaints received actually leads to the Commission actually bringing an infringement action before the Court of Justice. Not only does it not act upon all complaints received, the Commission and the Member State concerned also often prefer negotiating a solution 'in the shadow of the law' rather than having the matter settled by the Court.[157] Yet the fact remains that a significant amount of the infringement cases that are actually brought before the Court of Justice find their origin in such complaints.[158] In this manner private parties can thus play significant role in this context.

But that role only goes that far. Whether initiated as a consequence of a complaint or otherwise, in essence infringement proceedings are firmly 'public-public' in nature. Most notably a private party-complainant never becomes a party to these proceedings. The Commission moreover enjoys full discretion as to whether or not it wishes to initiate or terminate them. A private party cannot force the Commission to act in a certain manner in this respect, nor can it stop the Commission from acting in the manner that the latter deems appropriate. Put in legal terms, both an action for the annulment of a Commission decision as to whether or not it wants to initiate infringement proceedings and an action against the Commission for failure to act upon a complaint received brought by a private party will normally be dismissed.[159] As the Court of Justice has held, "*the Commission is not bound to commence [infringement proceedings], but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position*".[160] The private party-complainants' rights are essentially only procedural, in particular with regard to them being kept informed as to the decision taken in relation to their complaint.[161] At most one could therefore speak of 'privately-triggered public enforcement'.[162]

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157 In 2012 the Commission received more than 2800 complaints. Over 600 of these led to discussions being opened with the Member State concerned. In that year more than 1000 infringement cases were closed before or shortly after the proceedings reached the stage of litigation before the CoJ, while the CoJ delivered 46 judgments in infringement cases. See Commission, $30_{th}$ Annual report on applying EU law (2012), COM(2013) 726, pp. 6- 9.

158 Namely 53% in 2009 and 40% in 2010. See Commission, $28_{th}$ Annual report on monitoring the application of EU law (2010), COM(2011) 588, p. 3 (no such data can be derived from more recent reports).

159 E.g. CoJ case 48/65, *Lütticke*, p. 27; CoJ case 247/87, *Star Fruit Company*, para. 11-12.

160 CoJ case 247/87, *Star Fruit Company*, para. 11.

161 Cf. Commission, Communication on updating the handling of relations with the complainant in respect of the application of Union law, COM(2012) 154.

162 Jacobs & Deisenhofer (2003), p. 197.

### 2.4.2. Other forms of public enforcement

51. EU law also foresees also other forms of public enforcement. Unlike the infringement proceedings discussed in the previous subsection, these other forms are 'public-private' in nature, rather than a 'public-public'. These latter public enforcement mechanisms thus essentially entail supervision exercised *by public authorities* concerning the compliance with EU law *by private parties*. In this connection one can distinguish essentially two types of situations as far as the Member States' obligations under EU law are concerned.

52. In the first type of situation *no explicit provision* as regards the public enforcement of the applicable rules of substantive EU law has been set out as a matter of EU law. This is thus the 'default' situation, which is regulated by primary EU law. The EU Treaties do not contain any detailed provisions of a general nature imposing on the Member States an express obligation to ensure the compliance with and enforcement of EU law within their respective jurisdictions. Nonetheless under the principle of sincere cooperation laid down in Article 4(3) TEU Member States are required to take all appropriate measures to ensure the fulfilment of the obligations arising out of EU law. The Court of Justice has interpreted this principle in such a manner, that it not only entails obligations by the Member States to ensure respect for EU law where their own acts are concerned, but also as regards acts by private parties falling within their jurisdictions.

The Court addressed this issue most notably in the 1989 *Greek maize* case.[163] This case concerned fraud to the detriment of the financial interests of the EU with agricultural levies. The Commission brought infringement proceedings in light of the failure by Greece to penalise the persons involved in this fraud. The Court clarified that the said principle implies that Member States must take "*all measures necessary to guarantee the application and effectiveness of [EU] law*".[164] To that aim, they must ensure that infringements of EU law are penalised "*under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed, with respect to infringements of [EU] law, with the same diligence as that which they bring to bear implementing corresponding national laws*".[165] These references to analogous conditions and the same diligence clearly echo the principle of equivalence.[166] The reference to effective, proportionate and dissuasive penalties similarly recalls the principle of effectiveness.[167] In *Greek Maize* it was further noted that the said obligation to take all necessary measures applies

163 CoJ case 68/88, *Commission v. Greece (Greek maize)*.
164 *Ibid.*, para. 23.
165 *Ibid.*, para. 24.
166 See subsection 2.2.1 above.
167 See subsection 2.2.2 above.

(only) where EU legislation does not specifically provide any penalty for an infringement, nor refers for that purpose to national law.[168] This recalls the reference to the absence of specific EU rules in relation to the principle of national procedural autonomy, discussed earlier.[169] Indeed, it has been observed that the Court increasingly tends to treat the Member States' obligations in this regard as virtually interchangeable with a private party's right to an equivalent and effective remedy under its *Rewe* case law.[170]

In the 1993 *Spanish strawberries* case it was found that France had not fulfilled its obligations under EU law by "*manifestly and persistently [abstaining] from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardise the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts*".[171] The contested acts in question consisted of the interception of lorries, the destruction of their loads and violence towards their drivers, as well as threats to and the damaging of goods of wholesalers and retailers, taking place regularly for more than ten years. Although these acts had been committed by private parties, the Court of Justice condemned France for not having taken the necessary preventive and penal measures to remedy the resulting obstruction of intra-EU trade. Also in this case the obligation to take such action was based on the principle of sincere cooperation, *in casu* read together with the EU law principle of free movement of goods.

Consequently, where EU law contains no specific rules in this respect, national public authorities are under an obligation to take the necessary steps against private parties so as to ensure the proper application of the rules of EU law at issue.[172] But the Court has also consistently held that in such a case the precise choice of penalties remains, as a general rule, for the Member States.[173] These penalties can therefore in principle be administrative, civil or criminal in nature.[174]

53. The second type of situation is one whereby EU law does provide for an *explicit obligation* for certain public authorities to enforce the substantive EU rules in question. This is for instance the case in the field of competition law. In that field both the Commission and the competent national competition authorities are charged with ensuring the compliance with the EU competition rules. To this aim these authorities are *inter alia* empowered to

168 CoJ case 68/88, *Commission v. Greece (Greek maize)*, para. 23.
169 See para. 26 and 30 above.
170 Dougan (2010), pp. 106-107. See also Dougan (2004), pp. 39-40.
171 CoJ case C-265/95, *Commission v. France (Spanish strawberries)*, para. 65.
172 See e.g. also CoJ case C-112/00, *Smidberger*.
173 E.g. CoJ case 68/88, *Commission v. Greece (Greek maize)*, para. 24 and 26; CoJ case C-265/95, *Commission v. France (Spanish strawberries)*, para. 34; CoJ case C-617/10, Åklagaren, para. 34 and 36.
174 Cf. e.g. CoJ case 14/83, *Van Colson*, para. 28; CoJ case C-326/88, *Hansen*, para. 15-19; CoJ case C-7/90, *Vandevenne*, para. 16-17.

impose fines on undertakings that have been found to infringe these rules.[175] Although perhaps most well-known, this is however by no means the only field where public enforcement-related requirements are explicitly provided for as a matter of EU law. Relevant provisions can for instance be found in other fields of EU law as diverse as fisheries,[176] the protection of personal data[177] and transport.[178] In those fields the public enforcement obligations at issue are typically on the Member States alone, and not (also) on the Commission.

The tasks and powers of the various public authorities concerned under such measures of secondary EU law can differ significantly, both between the various fields of EU law and between the Member States. Not one, uniform model of public enforcement exists. On the whole the degree of details provided for as a matter of EU law is rather limited however. This implies that also in these cases considerable discretion tends to be left to the Member States as regards the precise structure, powers and functioning of the national public enforcement authorities in question. For instance, under the Railway Passengers' Rights Regulation the Member States are obliged to designate a body responsible for the enforcement of the rules at issue.[179] It specifies that this body must be independent and that it must take the measures necessary to ensure that the rights of railway passengers are respected. Yet it is further left to the Member States to define the powers of that body.[180] The obligations on the Member States in this respect can also involve providing for a possibility for the private parties concerned to file complaints.[181]

By means of a codification of the aforementioned *Greek maize* case law, the public enforcement obligations on the Member States often also include a requirement to provide for penalties for infringements of the rules of substantive EU law at issue that are effective, proportionate and dissuasive. This has in fact become a standard phrase that can be found in many acts of secondary EU law.[182] The Court of Justice has clarified that it follows from this requirement that the severity of the penalties provided for under national law must be commensurate with the seriousness of the infringement at issue, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality.[183] Having said that, as is the

175 On the public enforcement of EU competition law, see further subsection 6.4.2 below.

176 Art. 5 Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ 2009, L 343/1 ('Fisheries Control Regulation').

177 Art. 28 Data Protection Directive 95/46; Art. 15a(2)-(4) E-Privacy Directive 2002/58.

178 Art. 16(1) Air Passengers' Rights Regulation 261/2004; Art. 30 Railway Passengers' Rights Regulation 1371/2007.

179 Art. 30 Railway Passengers' Rights Regulation 1371/2007.

180 Cf. CoJ case C-509/11, ÖBB-Personenverkehr, para. 59-66.

181 E.g. Art. 28(4) Data Protection Directive 95/46; Art. 16(2) Air Passengers' Rights Regulation 261/2004.

182 E.g. Art. 15a(1) E-Privacy Directive 2002/58; Art. 32 Railway Passengers' Rights Regulation 1371/2007; Art. 90(2) Fisheries Control Regulation 1224/2009.

183 E.g. CoJ case C-565/12, *LCL Le Crédit Lyonnais*, para. 44-45.

case under the case law discussed above, these are still rather broad parameters. They continue to leave the Member States – and the national courts – considerable discretion. Although the Court of Justice sometimes gives guidance, it has also emphasised that it is for the national court seised to determine whether the abovementioned requirements are fulfilled in individual cases.[184] It is only in exceptional cases that the EU legislature goes beyond merely providing for the said standard phrase so as to require for example that criminal penalties must be provided for.[185]

### *2.4.3. The interaction between public and private enforcement*

54. Turning to the *interaction* between public and private enforcement in an EU law context, a first point to note is that, where public enforcement takes the form of infringement proceedings, both forms of enforcement are in principle distinct. That is to say, as was noted in the introduction to this study, the Court of Justice has long seen private enforcement ('the vigilance of individuals') as a possible complement to this form of public enforcement.[186] But that does not mean that it considers them to be *interchangeable*. As the Court noted as far back as in 1968, "*the guarantees given to individuals under the Treaty to safeguard their individual rights and the powers granted to the [EU] institutions with regard to the observance by the [Member] States of their obligations [under EU law] have different objects, aims and effects*".[187] Here it was added that legal actions brought by private parties are "*intended to protect individual rights in a specific case, whilst intervention by the [EU] authorities has as its object the general and uniform observance of [EU] law*".[188]

Thus the fact that an allegedly infringed provision of EU law is directly effective and that at national level remedies are available to the private party concerned by that alleged infringement is generally not a relevant argument in the context of infringement proceedings.[189] Conversely, for a private party to be able to successfully bring an action for damages for an infringement of EU law against a Member State,[190] it is not required that the Court of Justice first establishes in the context of infringement proceedings that there is such an infringement, although such an earlier ruling by the Court can of course be an important factor in this respect.[191] On a similar note the Court

184 E.g. *ibid*., para. 50-54.
185 Cf. Commission, Communication towards an EU criminal policy, COM(2011) 573. See further Dougan (2012b), p. 74.
186 See subsection 1.1.1 above.
187 CoJ case 28/67, *Firma Molkerei*, p. 153.
188 *Ibid.*
189 E.g. CoJ case 29/84, *Commission v. Germany*, para. 29; CoJ case C-508/03, *Commission v. UK*, para. 71.
190 On these actions for damages pursuant to the principle of Member State liability, see para. 59 below.
191 CoJ case C-445/06, *Danske Slagterier*, para. 37-39. See e.g. also CoJ case 39/72, *Commission v. Italy (slaughtered cows)*, para. 11. Cf. Craig & De Búrca (2011), pp. 414-415.

has held more recently that proceedings that permit an undertaking that has been fined by the Commission for a competition law infringement to contest that penalty do not serve to facilitate the bringing of claims for damages by private parties for that same infringement.[192] Even if in practice the finding in one proceeding may well have a bearing on another, in procedural terms public and private enforcement thus largely remain two separate worlds.

55. At first sight it may seem that this conclusion is put in doubt, where the obligations of the Member States in terms of public enforcement are concerned, by the Court of Justice's 2008 ruling in *Parmesan cheese*.[193] This case concerned infringement proceedings, brought by the Commission, for Germany's alleged infringement of an EU regulation on the protection of designations of origin. It will be recalled that, due to the nature of a regulation, private parties can rely on its provisions before their national courts without any transposition to national law being required.[194] The Commission argued that Germany had failed to take the administrative and penal measures necessary to reach that regulation's objectives. In its judgment the Court of Justice first noted that the rights of private parties to rely on the provisions of a regulation before their national courts cannot release the Member States from their duty to ensure a regulation's full application. However it also found that the domestic legal system at issue provided legal instruments designed to ensure the effective protection of the rights which private parties derive from the regulation in question. The Court observed that these possibilities of taking legal action were moreover not reserved solely to the legitimate user of the designation of origin, as they were also open to competitors, business associations and consumer organisations. It further established that the regulation in question entailed no (express) obligation for Member States to penalise infringements on their own initiative. The regulation did provide for certain inspections, but these concerned the Member State from which the protected designation of origin came (*in casu* Italy). In other words, it was found that the Member State of the *producer* was responsible for monitoring compliance and not the Member State of the *consumer*. Given that the infringements proceedings had been initiated against the latter and not the former, the case was dismissed.

This case could thus be read as suggesting that less is expected from a Member State in terms of public enforcement where private enforcement is a realistic possibility for the private parties concerned. No suggestions to this effect were made in cases such as *Greek Maize* and *Spanish strawberries*, discussed above, however.[195] It would seem that several factors could explain

192 CoJ case C-596/11 P, *Schenker*, para. 23.
193 CoJ case C-132/05, *Commission v. Germany (Parmesan cheese)*, para. 68-81.
194 Art. 288 TFEU.
195 See para. 52 above.

this difference.[196] The main explanation may well lie in the specifics of this case. For one thing, there are no indications that in *Parmesan cheese* the Commission had invoked the principle of sincere cooperation, which is central to the *Greek maize* case law. For another thing, this latter line of case law only applies where EU law does not contain any specific rules. The regulation at issue in *Parmesan cheese* did set out certain public enforcement obligations; these were addressed to *another* Member State than the one against which the infringement proceedings were brought. In combination with the finding that the national legal system of this latter Member State allowed a range of potentially interested private parties to seek redress themselves if necessary, this appears to have been sufficient for the Court of Justice to conclude that more was not required from the Member State in question in that particular case. It thus appears that it cannot be concluded on the basis of this case that, in general, the Member States are deemed to have complied with their public enforcement obligations only by ensuring the availability of adequate private enforcement opportunities.

### *2.4.4. Summary*

56. Public enforcement can take various forms in EU law. First, there is the possibility of infringement proceedings being brought before the Court of Justice. These proceedings, in practice mostly brought by the Commission, relate to infringements of EU law *by the Member States*. Private parties regularly play a role in this respect by drawing the Commission's attention to alleged infringements. But these parties play no formal role in this respect. Second, secondary EU law sometimes explicitly charges Member States (and in exceptional cases also the Commission) with ensuring compliance with and enforcement of EU law with respect to *private parties*. Also where such an obligation is not set out explicitly, under the principle of sincere cooperation the Member States are required to take all necessary measures to guarantee the application and effectiveness of EU law. As was clarified in the *Greek maize* case law, they must penalise infringements of EU law under conditions which are analogous to those applicable to infringements of national law of a similar nature and importance. These penalties must in any event be effective, proportionate and dissuasive. As to the interaction between public and private enforcement, it is clear that the availability of certain remedies at the national level, available to the private parties that are negatively affected by the infringement, plays in principle no role in the context of infringement proceedings. Neither does this generally seem to discharge the Member States from their public enforcement obligations.

196 See Prete & Smulders (2010), p. 23. These authors suggest that a pragmatic acknowledgment on the side of the CoJ that it may be impossible for the Member States to act of their own motion against all possible infringements occurring in their territory may (also) have played a role here.

## 2.5. Key case law relating to private enforcement

In this final section of chapter 2 attention turns to five rulings of the Court of Justice, i.e. namely *Simmenthal*, *Factortame*, *Francovich*, *Courage* and *Muñoz*. Even if they are not all concerned with private enforcement of EU law as such, they are considered to be of particular importance in this connection, as they set out some key aspects relating to the enforcement of EU law at national level. Although many will be familiar with these landmark cases, their importance for the present purposes justifies recalling and assessing them in some detail here, including some subsequent rulings where relevant. After having introduced first the three former rulings and then the two latter ones, they are also considered jointly, with the emphasis on *Courage* and *Muñoz* and their possible broader implications.

### *2.5.1. Simmenthal, Factortame and Francovich*

57. The Court's ruling in *Simmenthal* dates from 1978.[197] This case concerned a company that had imported beef from France to Italy. A fee had been charged for the veterinary and health inspection of the beef. Earlier it had already been decided that this charge was contrary to EU law.[198] The national court therefore ordered its repayment. The national authorities concerned contested this order, arguing in essence that pursuant to a (subsequent) national law only the national constitutional court – and not the lower court at issue – could *set aside* the national law that prevented this repayment. The Court of Justice did not accept this argument however. After having recalled the importance of the principles of direct effect and primacy of EU law, it held that the abovementioned rule of national law would both amount to a denial of the effectiveness of the EU law obligations of the Member State in question and endanger the effectiveness of the preliminary reference procedure.[199] It noted in this connection that "*every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule. […] Accordingly, any provision of the national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [EU] rules from having full force and effect, are incompatible with those requirements which are the very essence of [EU] law*".[200]

197 CoJ case 106/77, *Simmenthal*.
198 See CoJ case 35/76, *Simmenthal*.
199 CoJ case 106/77, *Simmenthal*, para. 14-20.
200 *Ibid.*, para. 21-22.

58. A second case that is of particular relevance here is *Factortame*, dating from 1990.[201] The dispute before the national court concerned the compatibility with EU law of a national law which was designed to prevent fishing vessels from other Member States from being registered, where that registration was considered to be merely meant to evade rules on fishing quotas. As in *Simmenthal*, the referral did not concern the question of compatibility as such, but rather the question which *consequences* a national court is to draw from the finding that the national law in question is contrary to EU law. More specifically, the central question referred to the Court of Justice was whether a national court must be able to grant *interim relief* where it considers that a rule of national law is contrary to EU law, even if under national law that remedy is not available in that particular case.

Referring to *Simmenthal* and the principle of sincere cooperation, the Court recalled the need for national courts to ensure the legal protection that private parties derive from the direct effect of provisions of EU law. It also stressed the risks to the effectiveness of EU law if national law were to prevent those courts from setting aside rules of national law "*which might prevent, even temporarily, [EU] rules from having full force and effect*".[202] It was then added that "*the full effectiveness would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by [EU] law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under [EU] law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule*".[203] This interpretation was reinforced, the Court noted, by the preliminary reference system set out in Article 267 TFEU, if there were no possibility of granting interim relief in attending a preliminary ruling.[204] In subsequent rulings the Court has regularly highlighted the importance of the availability of interim relief in cases where EU law is infringed. The most notable example is *Unibet*.[205] In that case it was clarified that this need not necessarily be a free-standing action. It was also held there that the applicable conditions are to be determined by national law, subject to the principles of equivalence and effectiveness.[206]

A distinct yet related question is whether national courts can grant interim relief where the validity of an act of secondary *EU* law is in question (as opposed to a rule of *national* law, as was the case in *Factortame* and *Unibet*), pending a preliminary ruling on the matter. The Court has answered this question essentially answered in the affirmative. In particular, in *Atlanta* it was found that the interim legal protection offered to private parties under

201 CoJ case C-213/89, *Factortame*.
202 *Ibid*., para. 18-20.
203 *Ibid*., para. 21.
204 *Ibid*., para. 22.
205 CoJ case C-432/05, *Unibet*, para. 67. See e.g. also CoJ case C-226/99, *Siples*, para. 19.
206 *Ibid*., para. 71-73 and 79-82. On the principles of equivalence and effectiveness, see further section 2.2 above. See e.g. also CoJ case C-530/11, *Commission v. UK*, para. 67.

national law should not depend on whether a national measure is contrary to EU law or whether an act of secondary EU law is contrary to EU law of a higher order.[207] The Court nonetheless attached rather strict conditions, derived from the case law on when interim measures are to be granted in legal proceedings before the EU courts themselves.[208]

59. In the third place, regard should be had of the Court of Justice's 1991 *Francovich* judgment.[209] This case concerned the lack of timely transposition by Italy into national law of a directive, thus adversely affecting a private party. Although unconditional and sufficiently precise to be directly effective, the rights concerned could nonetheless not be enforced before a national court without the required national measures. The Court of Justice found that under these circumstances a Member State could be *held liable* by a private party for the loss and damage resulting from this breach of the Member State's obligations under EU law. It reached this conclusion after recalling, first, the finding in *Van Gend en Loos* that the EU Treaties had created a new legal order that is also intended to give rise to rights for individuals and, second, that, as had already been made clear in *Simmenthal* and *Factortame*, national courts must ensure that EU rules take full effect and must protect the rights of individuals.[210] On that basis the Court of Justice ruled that the "*full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible*".[211] Therefore it found that "*it is a principle of [EU] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [EU] law for which they can be held responsible*".[212]

This judgment thus established the principle of *Member State liability* for breaches of EU law. The Court considered this principle to be inherent in the system of the EU Treaties, while finding a further basis in the principle of sincere cooperation, which implies an obligation to nullify the unlawful consequences of an infringement of EU law.[213] It added in subsequent cases, most notably in *Brasserie du Pêcheur*, that "*the right to reparation is the necessary corollary of the direct effect of the [EU] law provision whose breached caused the damage sustained*" and that there is a "*general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obli-*

207 CoJ case C-465/93, *Atlanta*, para. 28.
208 *Ibid*., para. 51. The conditions referred to above are: (i) the existence of serious doubts as to the validity of the act in question; (ii) urgency, i.e. a necessity with a view to avoiding serious and irreparable damage; (iii) due account being taken of the interests of the EU; and (iv) respect for earlier decisions by the EU courts on the matter. On the possibility of interim relief before the EU courts, see Art. 279 TFEU.
209 CoJ joined cases C-6/90 and C-9/90, *Francovich*.
210 *Ibid*., para. 31-32.
211 *Ibid*., para. 33.
212 *Ibid*., para., para. 37.
213 *Ibid*., para. 35-36.

*gation to make good the damage caused*".[214] In so doing, the Court drew an analogy with the rules on the non-contractual liability of the EU provided for in Article 340 TFEU.[215] Those rules require the EU, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions and its servants.

In *Brasserie du Pêcheur* the Court also clarified the *conditions* that must be fulfilled to incur Member State liability.[216] These conditions depend on the nature of the breach of EU law at issue. They must also in principle correspond to those applicable to the aforementioned non-contractual liability of the EU. Therefore, in areas where the Member State has a wide discretion, these conditions are that: (i) the rule of law infringed must be intended to confer rights on private parties; (ii) the infringement must be sufficiently serious; and (iii) there must be a direct causal link between the infringement and the damage sustained by the injured parties. Reparation for the consequences of the loss and damage caused must further be made in accordance with the domestic rules on liability, subject to the principles of equivalence and effectiveness.[217] In its subsequent case law the Court of Justice expanded in particular on the application of this principle to the various decentralised or functional bodies of a Member State,[218] the applicable conditions[219] and the aforementioned analogy with the non-contractual liability of the EU.[220]

214 CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 22 and 29 respectively.

215 *Ibid.*, para. 28-29 and 40-42.

216 *Ibid.*, para. 38-51. In *Francovich* the CoJ had already touched upon these conditions, but there no analogy had been drawn with the non-contractual liability of the EU under Art. 340 TFEU. There these conditions had moreover been formulated somewhat differently (although this does not entail a difference in substance; see CoJ joined cases C-178/94, C-179/94 and C-188/94 to C-190/94, *Dillenkofer*, para. 23).

217 *Ibid.*, para. 67. See also CoJ joined cases C-6/90 and C-9/90, *Francovich*, para. 41-43. On the principles of equivalence and effectiveness, see further section 2.2 above.

218 E.g. CoJ case C-302/97, *Konle* (regarding Member States with a federal structure); CoJ case C-224/01, *Köbler* (regarding breaches of EU law by the national judiciary).

219 E.g. CoJ case C-4/94, *Hedley Lomas* (regarding situations where there is significantly reduced or no discretion); CoJ case C-222/02, *Paul* (regarding the conferral of rights to private parties); CoJ case C-118/08, *Transportes Urbanos*, para. 38 (regarding the fact that no earlier finding by the CoJ in a preliminary ruling procedure of a breach of EU law is required).

220 E.g. CoJ case C-352/98 P, *Bergaderm* (regarding the application of the conditions set out in *Brasserie du Pêcheur* in cases of the non-contractual liability of the EU). On both abovementioned types of liability, as well as on the extent to which these have converted, see further e.g. Tridimas (2006), pp. 477-547; Wakefield (2009), p. 390; Gutman (2011), p. 695; Aalto (2011).

### 2.5.2. Courage and Muñoz

60. A fourth judgment that is of particular importance in the present context is *Courage*.[221] This ruling was issued roughly a decade after *Francovich*, i.e. in 2001. Two private parties had entered into a contract liable to restrict or distort competition within the meaning of Article 101(1) TFEU. One of these parties later initiated civil proceedings, claiming *compensation for damages* from its contract partner. Under national law this claim was barred on the basis that a party cannot rely on its own illegal actions to obtain damages. One of the questions referred to the Court of Justice was whether such an absolute bar is compatible with EU law. In its judgment the Court first restated, with reference to *Van Gend en Loos* and *Francovich*, that the EU Treaties created a new legal order and that EU law is intended to give rise to rights for private parties. In addition the fundamental importance of the prohibition of Article 101 TFEU was underlined. The Court highlighted that agreements caught by that prohibition are automatically void and that this automatic nullity can be relied on by anyone. It further recalled that the said article produces direct effects in relations between private parties and creates rights that national courts must safeguard.[222]

On the basis of those considerations, it was held that "*any individual*" can rely on a breach of Article 101(1) TFEU before a national court, even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.[223] Concerning the possibility of seeking compensation for loss caused by infringements of that article, the Court of Justice repeated, with reference to *Simmenthal* and *Factortame*, that it is task of the national courts to "*ensure that [the rules of EU law at issue] take full effect and [to] protect the rights which they confer on individuals*".[224] Accordingly it was held that "*[t]he full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down [therein] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU]*".[225]

The Court thus found that there cannot be an absolute bar to the bringing of such an action by a party that itself might have violated the EU competition rules. As was the case in *Francovich*, reference was made to the domestic legal system of the Member States for the designation of the com-

221 CoJ case C-453/99, *Courage*. For a more detailed analysis of this ruling, see para. 213 below.
222 *Ibid.*, para. 19-23.
223 *Ibid.*, para. 24.
224 *Ibid.*, para. 25.
225 *Ibid.*, para. 25-27.

petent courts and the applicable detailed procedural rules, subject to the principles of equivalence and effectiveness. It was added however that EU law does not prevent national courts from taking steps to ensure that the protection of rights guaranteed by EU law does not entail the unjust enrichment, nor does it preclude national law from applying the principle that a litigant should not profit from its own unlawful conduct.[226] Also in this case the Court subsequently expanded on and further refined this landmark judgment in its later case law, most notably in *Manfredi*, which is further discussed below.[227]

61. Finally, the ruling *Muñoz* appeared one year after *Courage*.[228] This case concerned two regulations setting out common quality standards for certain agricultural products. Also in this preliminary reference the point of departure was that a private party had infringed the provisions of these regulations. The question referred to the Court of Justice was in essence whether another private party could *bring a civil action* to address this non-compliance. The Court answered by outlining a number of relatively straightforward steps. It noted that, owing to their very nature and place in the system of sources of EU law, regulations operate to confer rights on individuals. National courts have a duty to protect these rights and to ensure that they take full effect. Furthermore it was established that the common quality standards at issue served to keep products of unsatisfactory quality off the market, to guide production to meet consumers' requirements and to facilitate trade relations based on fair competition.[229]

The Court therefore concluded in *Muñoz* that the said regulations should be interpreted as meaning that compliance with the provisions concerned must be capable of enforcement by means of civil proceedings instituted by a trader against a competitor.[230] In reaching that conclusion it held that "*the full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down [in the provisions of EU law under consideration], imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor*".[231] Apparently echoing *Courage* (yet without making an explicit reference), the Court further found that "*[t]he possibility of bringing such proceedings strengthens the practical working of the [EU] rules on quality standards. As a supplement to the action of the authorities designated by the Member States to make the checks required by those rules it helps to discourage practices, often difficult to detect, which distort competition. In that context actions brought before the national courts by competing operators are*

226 *Ibid*., para. 28-35.
227 See in particular CoJ joined cases C-295/04 to C-298/04, *Manfredi*, discussed in para. 214 below.
228 CoJ case C-253/00, *Muñoz*.
229 *Ibid*., para. 27-29.
230 *Ibid*., para. 32.
231 *Ibid*., para. 30.

*particularly suited to contributing substantially to ensuring fair trading and transparency of markets in the [EU]*".[232]

### *2.5.3. Comparison and assessment*

62. When comparing the five key cases discussed above, there are a number of evident *similarities*. In particular, it is clear that the reasoning and concepts used in *Courage* and *Muñoz* resemble to a significant extent the line followed in *Francovich*. The latter builds in turn on *Simmenthal* and *Factortame*. Generally speaking, the importance of ensuring that private parties can effectively enforce their rights based on EU law before their respective national courts emerges as a crucial consideration in the Court's reasoning. Apart from the need to safeguard these rights, the full effectiveness and the practical effects (*effet utile*) of the EU rules at issue typically take central stage. To these aims all five rulings highlight the importance of the availability of certain remedies in cases of conflicts between EU law and national law, i.e. the 'general' remedy of the setting aside of national law in *Simmenthal*, interim measures in *Factortame*, actions for damages against Member States in *Francovich*, actions for damages against private parties in *Courage* and civil proceedings generally in *Muñoz*.[233] As such these cases can be seen as exceptions to the 'no new remedies' rule formulated by the Court of Justice[234] (although it is also possible to see them as involving extensions of remedies that already existed under national law, rather than the creation of new remedies[235]). In any case it is evident that the EU's involvement with the remedies and procedures available in proceedings before the national courts that concern rights granted by EU law can be very substantial indeed.

63. Zooming in on the three more recent rulings, it is noticeable that, unlike *Courage* and *Muñoz*, *Francovich* is not expressly framed in terms of '*dual vigilance*'.[236] That is to say, in the two former cases the Court of Justice emphasized that legal actions brought by private parties for breaches of EU law serve a valuable purpose in supplementing public enforcement of EU law. In the latter judgment this was not the case. The Court later clarified that the purpose of Member State liability is not punishment or deterrence, but rather ensuring that thee parties having suffered damage are compensated.[237] Nonetheless the dominant view in the legal literature is that the establishment of the principle of Member State liability should be understood

232 *Ibid*., para. 31.
233 Cf. Van Gerven (2000), p. 503.
234 See para. 26 above.
235 See Van Gerven (2000), p. 517; Prechal (2005), pp. 169-170. As the latter author points out, this may also depend on whether the term 'remedy' is understood in its wide or rather in its more narrow sense (see para. 21 above).
236 Weatherill (2000), p. 92; Tridimas (2006), p. 546.
237 CoJ case C-470/03, *AGM-COS.MET*, par. 88. This position seems in line with the case law regarding the non-contractual liability of the EU. See Wakefield (2009), p. 398.

against the background of an 'enforcement deficit', originating in the lack of adequate implementation of EU law by the Member States.[238] It is further evident that *Francovich* concerns the liability of a *Member State* for infringements of EU law, while *Courage* and *Muñoz* concern the liability of a *private party* for such infringements. Whereas the former established the principle of Member State liability, the latter thus established a principle of 'individual'[239] or '*private party liability*'.[240] It is common ground that, although the context and certain details may differ, there is an analogy between both principles.[241] Indeed, *Courage* has been called a "*private Francovich*".[242]

64. Nonetheless several issues remain to be clarified. One of them is whether this nascent principle of private party liability, as articulated in *Courage* and *Muñoz*, is in all respects an *autonomous course of action*, i.e. a remedy that is inherent in the EU Treaties and founded directly on EU law and that as such is not dependent on national law. Where the principle of Member State liability is concerned, as was noted above, the Court of Justice made clear statements to this effect in *Francovich* and *Brasserie du Pêcheur*. Although less explicitly, similar conclusions have been drawn for instance in relation to the remedy of interim relief under the aforementioned *Factortame* and *Atlanta* case law.[243] The question whether the possibility of claiming damages or bringing other civil proceedings for a breach of EU law by a private party is also a proper 'EU law remedy' must probably be answered in the affirmative. While it could be argued that the rulings in both *Courage* and *Muñoz* are not entirely conclusive in this regard, their wording does not appear to allow for too narrow a reading. Indeed, it is broadly agreed that the principle of private party liability is founded on EU law itself.[244] Therefore not too much weight should arguably be attached to the absence, at present, of an explicit statement regarding this principle's foundation directly in EU law.[245]

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238 E.g. Steiner (1995), p. 21; Dougan (2002), pp. 170-171; Tridimas (2006), p. 500; Rebhalm (2008), pp. 184-185; Biondi & Farley (2009), p. 13; Craig & De Búrca (2011), p. 243; Aalto (2011), pp. 154 and 197. See also Lock (2012), p. 1675.

239 Drake (2005), p. 344.

240 Leczykiewicz (2010a), p. 257.

241 E.g. Van Gerven (2004a), p. 522; Komninos (2009), p. 383; Reich (2010), pp. 114-115; Stuyck (2011), p. 524. See e.g. also Opinion AG Kokott case C-557/12, *Kone*, para. 24.

242 Dougan (2011), p. 430.

243 See e.g. *ibid.*, pp. 426-427.

244 See Opinion AG Jacobs joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOB Bundesverband*, para. 104; Opinion AG Kokott case C-557/12, *Kone*, para. 24. See also e.g. Van Gerven (2003a), p. 407; Drake (2006), pp. 849-850; Eilmansberger (2007), p. 433; Komninos (2009), p. 378; Nazzini (2009), p. 405; Milutinovic (2010), pp. 83, 91 and 93; Dougan (2011), p. 430.

245 Indeed, there are other examples where the CoJ only at a later stage acknowledged that a key doctrine of EU law that had already been established earlier was "*inherent in the system of the [EU] Treaties*". See e.g. CoJ joined cases C-397/01 to C-403/01, *Pfeiffer*, para. 114 (concerning the principle of consistent interpretation, discussed in para. 5 above). Conversely, the CoJ was initially not entirely clear in holding that the principle of Member State liability is founded directly in EU law. See e.g. CoJ case 60/75, *Russo*, para. 9; CoJ case 101/78, *Granaria*, para. 14.

This discussion is certainly not without practical relevance. Admittedly it may well be that whether or not the principle of private party liability is based directly on EU law is less crucial in practical terms than was the case with the principle of Member State liability. For, unlike the state of play at the national level 'pre-*Francovich*', all Member States already provide for the former possibility under national law in one form or another.[246] However recognising a remedy as being based directly on EU law can still have important practical implications, in particular as regards the *conditions* that apply in this connection. The issue here is especially whether these conditions are (exclusively) a matter of *EU* law, or (also) of *national* law.[247] In this connection it has been suggested drawing a distinction between the 'constitutive' conditions, i.e. regarding the EU remedy as such, and 'executive' remedial rules, i.e. the applicable procedures to give effect to this remedy.[248] Under this logic these constitutive conditions – being closely related to the underlying right founded in EU law – must be uniform across the EU. They should therefore be set exclusively by EU law. The executive rules could in contrast be left to national law, subject to the principles of equivalence and effectiveness. However, appealing as this approach may be for its analytical clarity and logic, it should not be mistaken for an accurate description of the law as it stands. That is to say, certainly (but not only[249]) where the nascent principle of private party liability is concerned, the Court of Justice has to date not set out the applicable ('constitutive') conditions in an unambiguous and detailed manner.[250] Further clarification on this point is therefore to be awaited.

65. Different views can be taken as to the *respective significance* of *Courage and Muñoz*. On the one hand *Courage* can be seen as having the strongest claim to being the main landmark case in this respect, if only because it predates *Muñoz*. The former is moreover formulated in a rather sweeping manner, whereas the latter is remarkably short and straightforward.[251] In addi-

246 Drake (2006), p. 855. In a similar sense, see Eilmansberger (2007), p. 434.

247 Cf. Komninos (2009), pp. 391-399.

248 Van Gerven (2000), pp. 525-527. Cf. Opinion AG Kokott case C-557/12, *Kone*, para. 23.

249 See the discussion in subsection 2.5.1 above. As was shown there, in its *Francovich* case law the CoJ has set what could perhaps be called the 'constitutive' conditions for incurring Member State liability. However that is not the case in its *Factortame* case law relating to interim relief. In the *Atlanta* case law these conditions were set, but, even if both *Factortame* and *Atlanta* concern interim relief, the situations addressed by both sets of case law are to be distinguished, as was also explained in the said discussion.

250 Arguably a first step in this direction was set in CoJ joined cases C-295/04 to C-298/04, *Manfredi*. Still this step seems a hesitant one when compared to the considerably more detailed approach set out in in the *Francovich* and *Brasserie du Pêcheur* case law. Indeed, some deduce from this lack of details that it is, as yet, too early to speak of a principle of private party liability that is comparable to the principle of Member State liability. See e.g. Leczykiewicz (2010a), p. 257.

251 Cf. by contrast Opinion AG Geelhoed case C-253/00, *Muñoz*, where issues such as the creation of rights for, the direct (economic) interests of and the legal standing of the private party-applicants are discussed in much greater detail.

tion, as was noted above, the rule laid down in *Courage* has at least to some extent been further fleshed out in later case law. That has so far not been the case for *Muñoz*; in fact, this latter judgment is referred to only rarely.[252] Another difference is that in *Courage* it is stated that "*any individual*" can rely on a breach of the provision concerned and can thus claim damages.[253] In contrast in *Muñoz* the Court of Justice seemed careful to specify that the applicant was a competitor.[254]

On the other hand in certain other respects *Muñoz* has, at least potentially, broader implications than *Courage*. The former relies less on the fundamental importance of the provisions of EU law at issue. Indeed, most people would probably not consider common quality standards for agricultural products to be of fundamental or otherwise exceptional importance, even if they also affected to some extent the competition between undertakings. Also, unlike the EU competition rules at issue in *Courage*, the applicable rules were laid down in secondary – and not primary – EU law. Those provisions may therefore be difficult to distinguish from other provisions of EU law that seek to ensure fair trading and transparency of the market. That suggests that the logic of the *Muñoz* ruling might be applied more broadly.[255] At the very least it highlights that the principle of private party liability can also apply outside the field of EU competition law (*stricto sensu*). *Muñoz* furthermore does not merely concern the permissibility of a bar for civil proceedings by a specific party in a situation where such proceedings where generally already possible under national law, as was the case in *Courage*. Rather it provides that such proceedings should be made possible in a situation where they were *not possible at all* under the national law as it stood. Nor is *Muñoz* restricted to actions for damages. It instead concerned the bringing of *civil proceedings* to address an infringement of EU law by a private party generally. All this implies a substantial step into the realm of the Member States' procedural autonomy. Indeed, a reference to the principle of national procedural autonomy is notably absent in *Muñoz*.

252 Most notably the private parties in CoJ case C-432/05, *Unibet*, sought to invoke this ruling. This claim was not explicitly addressed by the CoJ, but the AG rejected it, based on a rather narrow reading of *Muñoz*. See Opinion AG Sharpston case C-432/05, *Unibet*, para. 53.

253 This statement was subsequently complemented in CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 61, where it was held that "*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]*". See further para. 214 below.

254 See further para. 343 below.

255 In a similar sense, see Betlem (2003), p. 213.

66. Finally, concerning the interaction between public and private enforcement, it is noticeable that both in *Courage* and in *Muñoz* certain public enforcement mechanisms were in place.[256] Yet neither of these judgments contains any indication that this given plays a particular role in relation to the acceptance of the principle of private party liability (other than that the latter can complement the former). These cases rather suggest that private parties must be able to enforce their rights before the national courts, regardless of whether EU or national law provides for a certain form of public enforcement of the EU rules in question. In other words, there is no 'enforcement monopoly' on the side of public authorities.[257] Both *Courage* and *Muñoz* thus appear to confirm that EU law arrangements on public and private enforcement mainly function independently from each other.[258]

### *2.5.4. Summary*

67. Above the Court's landmark rulings in *Simmenthal*, *Factortame*, *Francovich*, *Courage* and *Muñoz* have been outlined and analysed. Although they concern different remedies (setting aside, interim relief, Member State liability in damages, private party liability in damages, private party civil liability generally), these rulings evidently build on each other. Notably each time the importance of private parties being able to effectively enforce their rights vested in EU law before national courts, as well as the need to ensure the effectiveness and practical effects of EU law generally, takes central stage in justifying the EU interference with national law on remedies and procedures. Of particular relevance here is the parallel that can be drawn between the principle of Member State liability, set out in *Francovich*, and the nascent principle of private party liability, provided for in *Courage* and *Muñoz*, for infringements of EU law, even if it remains to be clarified how far this parallelism goes exactly. There are certain differences between *Courage* and *Muñoz*, and various questions still remain to be answered as to their broader significance, especially where the conditions under which private party liability can be incurred are concerned. These two rulings nonetheless underline the central importance that is attached in EU law to facilitating (or at least not barring) the private enforcement of that law before the national courts. They underline that this serves not only the individual interests of the parties concerned, but also that this helps to ensure the effectiveness of the EU rules at issue *per se*. In other words, they both rest on a 'dual vigilance' logic.

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256 In *Courage* this is not expressly mentioned, but that being a case involving EU competition law there can be no doubt that specific public enforcement mechanisms were in place (see further subsection 6.4.2 below). In *Muñoz* (para. 16 and 19) it is expressly stated that public enforcement penalties could be imposed, but that the competent national authority refused to act upon the complaints. See also Opinion AG Geelhoed case C-253/00, *Muñoz*, para. 50-55. See also Betlem (2003), p. 213.

257 Cf. Opinion AG Geelhoed case C-253/00, *Muñoz*, para. 55.

258 See also subsection 2.4.3 above.

# B. Selected EU legislation

# 3. Public procurement law

This second part of the study focuses on the selected EU legislation and other relevant developments related to EU legislation on private enforcement. It consists of four chapters, each chapter being dedicated to a particular field of EU law. The present chapter is concerned with the Procurement Remedies Directives relating to EU public procurement law. The first section below introduces these directives by sketching their background and context. The following two sections then focus more in detail on the content of the Procurement Remedies Directives. The remedies set out therein are first outlined and analysed, followed by a discussion of the most important procedural provisions. In the final section attention is paid to other enforcement issues, notably certain alternative mechanisms to ensure compliance and settle disputes as well as the public enforcement mechanisms.

## 3.1. Introduction

The first subsection below briefly sketches the background of the Procurement Remedies Directives, with particular regard to the 'substantive' EU rules on public procurement.[1] In the following subsection these directives themselves are introduced, particularly by explaining the process leading to their adoption and their objective. Next the 2007 revision of the Procurement Remedies Directives is discussed, together with the 2014 amendment of the EU's substantive public procurement regime. Finally, three additional general remarks are made as regards the broader context in which these directives operate.

### *3.1.1. Background and substantive law*

68. The economic importance of public procurement is significant. Spending by public authorities in the EU on the procurement of works, services and supplies has been estimated to account for around over 18% of EU's

1 The term 'substantive' is used here so as to distinguish the rules in question from the enforcement-related rules laid down in Procurement Remedies Directives 89/665 and 92/13. All public procurement rules are however in a sense inherently procedural, in that they are in essence concerned with the process of selecting an undertaking for the award of a public contract.

accumulated gross domestic product.[2] Traditionally many governments used public procurement, to various degrees and in various manners, to favour domestic undertakings or to achieve certain national policy objectives. This is clearly often difficult to reconcile with the EU's efforts to establish an internal market. Therefore, as from 1971, the EU has stepped in to regulate this field. In that year it adopted a first directive on public work contracts.[3] Over the following decades the EU public procurement regime has been replaced, expanded and updated several times.

69. At present there are two general, *substantive* EU directives on public procurement in force. The first is Directive 2004/18 on public procurement in the so-called 'public' sector ('Public Sector Procurement Directive').[4] This directive covers what could be called 'regular' public contracts awarded by national, regional or local authorities and semi-public entities of the Member States. Typical examples of the types of contracts covered include the construction of a public library, the supply of computers to a municipality or the provision of accounting services to a national ministry.[5] In addition since 1990 the substantive EU public procurement regime has been extended so as to cover also the 'utilities' sectors. To that effect a separate directive has been adopted, which is now Directive 2004/17 ('Utilities Procurement Directive').[6] The latter covers essentially the same sort of contracts as the Public Sector Procurement Directive, but it applies where the contracts are awarded by entities operating in the water, energy, transport and postal services sectors. Since 2009 the two abovementioned directives (collectively: 'Substantive Procurement Directives') are complemented by Directive 2009/81 on public procurement in the fields of defence and security ('Defence Procurement Directive').[7]

The two Substantive Procurement Directives only apply to contracts the estimated value of which exceeds certain threshold values. These thresholds are adjusted at regular intervals and vary somewhat between both directives. At present the thresholds for awards under the Public Sector Procurement Directive stand at approximately € 5 million for public works contracts

2 Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896, p. 2.

3 Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, OJ 1971, L 185/5.

4 Directive 2004/18/EC concerning the coordination of procedures for the award of public works contracts, public supplies contracts and public service contracts, OJ 2004, L 134/114.

5 Pursuant to Annex II to Public Sector Procurement Directive 2004/18 not all services are fully covered.

6 Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004, L 134/1.

7 Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, OJ 2009, L 216/76. On this directive, see further Trybus (2013), p. 3.

and approximately € 130.000 (central government) or € 200.000 (other contracting authorities) for supply and services contracts.[8] In practice this latter directive is often the more important one. It accounts for around 80% of the (published) contract awards, expressed in terms of value.[9]

70. The Substantive Procurement Directives are largely similar in terms of content. As was noted above, they should be understood as part of a broader effort to establish the EU's internal market. They give concrete expression to the 'fundamental freedoms' set out in the EU Treaties, in particular the freedom of establishment and the freedom to provide services relating to the exercise of economic activity in another Member State on a permanent and a temporary basis respectively.[10] Accordingly they have been adopted on the basis of Articles 53, 62 and 114 TFEU. In essence these directives seek to eliminate barriers to the exercise of the said freedoms, ensure the development of effective competition in the award of public contracts and, in so doing, to protect the interests of private parties that wish to offer goods or services to contracting authorities established in another Member State.[11] As such the provisions of these directives are in many cases directly effective and confer rights on the private parties concerned, as they are intended to protect undertakings against arbitrary behaviour on the side of the contracting authority.[12]

The basic idea is that the contracting authorities covered by these directives must publish a notice, containing information on the contract that they intend to award and inviting interested undertakings to submit a bid. The directives further lay down rules for the subsequent contract award procedure, relating *inter alia* to the applicable times periods, the (pre-)selection of tenderers and the criteria to be used for awarding the contract. On the whole the Utilities Procurement Directive tends to leave contracting authorities[13]

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8 Commission Regulation (EU) No 1336/2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC in respect of the application thresholds for the procedures for the award of contracts, OJ 2013, L 335/17.

9 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 10.

10 Cf. Drijber & Stergiou (2009), p. 805.

11 CoJ case 31/87, *Beentjes*, para. 21 and 42; CoJ case C-433/93, *Commission v. Germany*, para. 19; CoJ joined cases C-20/01 and C-28/01, *Commission v. Germany*, para. 35; CoJ case C-507/03, *Commission v. Ireland*, para. 27-28.

12 See e.g. CoJ case C-433/93, *Commission v. Germany*, para. 18; CoJ case C-54/96, *Dorsch Consult*, para. 44-45. As noted by Prechal (2005), pp. 110 and 122, this appears to come close to a statement that they confer rights. See also Opinion AG Bot case C-19/13, *Fastweb*, para. 43. See further Fernández Martín (1996), pp. 200-201; Arrowsmith (2005), pp. 161-162 and 1393; Trepte (2007), p. 537; Pijnacker Hordijk, Van der Bend & Van Nouhuys (2009), pp. 20-21. On the relationship between direct effect and the conferral of rights more generally, see para. 31 above.

13 'Contracting authority' is the term used in Public Sector Procurement Directive 2004/18 (Art. 1(9)). Utilities Procurement Directive 2004/17 refers to 'contracting entities' (Art. 2). For practical reasons the former term is used in this study to indicate all bodies covered by the substantive EU procurement rules.

somewhat more flexibility in this respect than its sibling, the Public Sector Remedies Directive.

### *3.1.2. Procurement Remedies Directives: proposals, adoption and objective*

71. Having adopted substantive rules on public procurement at EU level at a relatively early stage, over the years it became clear that *compliance* with these rules left much to be desired. In concrete terms infringements of these rules can take many forms. A public contract can for instance be awarded directly, i.e. without any prior publication and competition, contrary to what is required as a general rule under the Substantive Procurement Directives. Other infringements can consist of the preferential treatment of certain tenderers, for example by providing them with more information, ranking their bids higher without objective justification or the unjustified exclusion of an undertaking from the contract award procedure. The Commission's 1985 white paper on completing the internal market observed that the application of substantive EU law on public procurement was "*minimal*".[14] Moreover it also appeared that the private parties affected by such infringements only sparsely took legal action to remedy the consequences thereof.[15]

72. Therefore in 1987 the Commission published a *proposal* for a directive, which it amended a year later.[16] Here it expanded on the general lack of compliance with the substantive EU public procurement rules. It noted that "*both national and [EU] monitoring arrangements are unable to ensure strict compliance with the [Substantive Procurement Directives], in particular before violation of those rules becomes irreparable*".[17] The Commission also highlighted the particular challenges encountered in a public procurement context. It stated that "*infringements […] generally occur before the definitive award of the contract. Since contract award procedures are of short duration – a decision being taken within a few weeks – any failure to comply with the [EU] rules in question needs to be dealt with urgently and rapidly. Further, most such infringements differ from other types in that the irregularity committed is procedural. A procedural irregularity may be enough to exclude an enterprise from a given award procedure, and this encourages discriminatory practices*".[18] In conclusion it was said that, "*with a view to the optimal functioning of the internal market and in order for the [EU] rules on the award of public contracts to have real impact and change mentalities*", it must be ensured that the private parties concerned have easy

14 Commission, White paper on completing the internal market, COM(85) 310, p. 25.
15 Cf. Study Cleary Gottlieb, Steen & Hamilton (1988).
16 Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134; Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733.
17 Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 6.
18 *Ibid.*, p. 7.

access to effective remedies at the national level.[19] To this end the proposed directive aimed to "*ensure minimum coordination and strengthen national procedures by the courts […] so as to ensure that the rules of public contracts are correctly applied*".[20]

This Commission's proposal was not uncontroversial however. In the course of the law-making process it was the object of rather intense and lengthy discussions in Council (which at the time was the sole legislator) and it underwent considerable modifications.[21] Member States objected for instance to the proposed powers for the Commission to intervene directly at national level in cases of alleged infringements of the EU procurement rules, further discussed below.[22] Another controversial issue was the fear that the proposed review procedures might lead to abuses by 'cowboy tenderers' without a meritorious claim.[23]

73. This proposal nonetheless eventually led to the adoption in 1989 of the *Public Sector Remedies Directive*.[24] It applies to contracts in the 'public' sector, as described above.[25] Having adopted a substantive directive relating to the utilities sector in 1990, it was furthermore clear to the Commission that "*[t]he availability of adequate remedies and control procedures is as important in the hitherto 'excluded sectors' as it is in the general field of public procurement*".[26] In that same year it therefore submitted a proposal for a second directive to complement the Public Sector Remedies Directive.[27] After its adoption in 1992 this became the *Utilities Remedies Directive*.[28] The latter covers contracts awarded by entities operating in the water, energy, transport and postal services sectors.

The Utilities Remedies Directive seeks to take account of the particular characteristics of the entities operating in the utilities sectors that it covers.[29] For that reason it contains a number of specific provisions that generally allow for more flexibility, as compared to its sibling, the Public Sector Remedies Directive.[30] The two above directives (collectively: 'Procurement Remedies Directives') are however similar in many respects.[31]

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19 *Ibid*., p. 8.
20 *Ibid*., p. 10.
21 Fernández Martín (1996), p. 206. As regards the legislative history of this directive more generally, see Hebly (2011), pp. 5-262.
22 See para. 104 below.
23 Gormley (1997), p. 157.
24 Public Sector Remedies Directive 89/665.
25 See para. 69 above.
26 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 8.
27 *Ibid*.
28 Utilities Remedies Directive 92/13.
29 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 9.
30 The same can be said of the remedies regime set out in Defence Procurement Directive 2009/81.
31 Cf. CoJ case C-455/08, *Commission v. Ireland*, para. 26.

They are therefore treated jointly in this study; they are distinguished only where there is a particular reason for doing so, notably where one of them contains a provision that has not been included in the other directive.[32] Both directives were adopted on the basis of Article 114 TFEU, i.e. the provision of the EU Treaties that allows for the adoption of secondary EU law for the establishment and functioning of the internal market.[33]

74. The Procurement Remedies Directives provide that the existing arrangements at national and EU level for ensuring the "*effective application*" of the Substantive Procurement Directives are "*not always adequate to ensure compliance*", which in turn could deter undertakings from other Member States from participating in contract award procedures.[34] These directives therefore seek to ensure that "*effective and rapid remedies*" are available in case of infringements.[35] As the Court of Justice has clarified, the *objective* of the Procurement Remedies Directives is "*to guarantee the existence of effective remedies for infringements of [EU] law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the [Substantive Procurement Directives]*".[36] At other occasions the Court formulated this objective somewhat differently however, namely "*to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible*".[37]

### *3.1.3. Revisions*

75. In 2007 the two Procurement Remedies Directives were *substantially revised*, which resulted in their amendment through Directive 2007/66 ('Procurement Remedies Amending Directive').[38] This time the legislative pro-

32 For the same reasons the case law cited in this study, which typically relates to only one of these two directives, is 'generalised', in the sense that it is also understood to relate to the other directive. Where the numbering of the articles is different in these two directives, this is specifically indicated in the footnotes.

33 On Art. 114 TFEU and legal basis generally, see further subsection 10.1.1 below.

34 Recitals 1, 2 and 4 Public Sector Remedies Directive 89/665. See also recitals 1-3 Utilities Remedies Directive 92/13.

35 Recital 3 Public Sector Remedies Directive 89/665. See also recital 6 Utilities Remedies Directive 92/13.

36 CoJ case C-406/08, *Uniplex*, par 26. See e.g. also CoJ case C-392/93, *British Telecom*, para. 26; CoJ case C-314/09, *Stadt Graz*, para. 33, 39 and 43.

37 CoJ case C-455/08, *Commission v. Ireland*, para. 26; CoJ case C444/06, *Commission v. Spain*, para. 44; CoJ case C-100/12, *Fastweb*, para. 25.

38 Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007, L 335/31. On this revision, see further Wilman (2008), p. 115; Bel (2008), p. 106; Golding & Henty (2008), p. 146; Williams (2008), p. NA19.

cess was on the whole relatively swift.[39] This revision generally aimed to "*give greater encouragement to [EU] enterprises to tender in any Member State of the [EU] by providing them with the certainty that they can, if need be, effectively seek effective review if their interests seem to have been adversely affected in procedures for awarding contracts*", with a view to "*prompt[ing] awarding authorities to adopt better publication and tendering procedures for the benefit of all involved*".[40] It follows that the overall objective of the Procurement Remedies Directives remained essentially unchanged after their revision. As was the case when the first of these directives was adopted, the possibility of an increase in 'nuisance actions' was also considered in relation to this revision. The Commission considered this risk to be limited however.[41] The amendments proposed by the Commission as part of this revision were rather narrowly focused. The precise amendments finally adopted are discussed in further detail in the following. Suffice to note here that this amendment essentially sought to address the following two main shortcomings.[42]

The first was the problem of '*illegal direct awards*'. This refers to the situation where a public contract is awarded, contrary to the Substantive Procurement Directives, to an undertaking without any preceding publication and competition having taken place.[43] The Court of Justice had earlier identified this as the most serious type of infringement of EU public procurement law.[44] Such infringements are often difficult to detect, both for the Commission and for a private party that might wish to contest the decision to 'directly' award the contract. After all no publication or other form of transparency has taken place. The second main shortcoming identified was the so-called '*race to signature*'. This refers to the situation where, upon the completion of a contract award procedure, an aggrieved private party has brought or intends bringing a case, for instance challenging the decision to award the contract at issue to a competitor, but the contract is concluded anyhow before that dispute is resolved. Before the 2007 revision of the Procurement Remedies Directives, in most Member States concluded contracts were in principle to be respected, even where they were the result of a contract award procedure that was not compliant with EU public procurement

39 Agreement between the co-legislators was reached in first reading of the ordinary legislative procedure. At the outset the Commission had noted that "*virtual consensus*" existed among Member States and interested parties alike at least as regards the main problems to tackled. See Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 4. The Commission's proposal has been criticised in the legal doctrine however for imposing an unnecessary and inappropriate degree of uniformity. See e.g. Arrowsmith (2005), p. 1438. As regards the legislative history of this directive more generally, see further Hebly (2011), pp. 543-860.

40 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 2.

41 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 30.

42 *Ibid*., pp. 8-11.

43 See para. 75 above.

44 CoJ case C-26/03, *Stadt Halle*, para. 37.

law.[45] And even where national law allowed for the setting aside of concluded contracts, claims to this effect were still found to be often rejected on the basis of a balance of convenience test applied by the national court seised. As a consequence in such a case the contract award decision can in effect not be reviewed – and annulled where necessary – at the pre-contractual stage. All that then remains for the aggrieved private party concerned is the possibility of bringing an action for damages.

76. In addition in 2011 the Commission published proposals for another revision, this time of the Substantive Procurement Directives.[46] This led in 2014 to the adoption of two *new substantive directives*, i.e. Directive 2014/24 on public procurement ('New Public Sector Procurement Directive') and Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors ('New Utilities Procurement Directive'). These two new directives, which are to be transposed into national law by April 2016, repeal and replace the abovementioned current Substantive Procurement Directives.[47]

For the present purposes three points are of importance in this connection. First, while these new directives imply certain significant changes to the substantive rules in question, the main structure and objective of those rules, outlined above, remains unaltered. Second, an entirely new directive was also adopted, i.e. Directive 2014/23 on the award of concession contracts ('Concessions Awards Directive').[48] This latter directive is concerned with the award of a particular type of public contracts that had hitherto largely remained unregulated as a matter of secondary EU law. Not only does this imply a widening of the scope of the EU legislation in this regard, the Concessions Awards Directive also involves an amendment of the Procurement Remedies Directives so as to adapt the latter to the amended substantive regime, bringing also infringements of the Concessions Awards Directive within their scope.[49] Lastly, while (apart from the aforementioned amendment) this revision of the EU's substantive rules on public procure-

45 As was e.g. the case in the Netherlands pursuant to national case law (HR case 16747, *Uneto v. De Vliert*).

46 See Commission, Proposal for New Utilities Procurement Directive 2014/25, COM(2011) 895; Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896; Commission, Proposal for Concessions Awards Directive 2014/23, COM(2011) 897. On this revision and the resulting proposals, see further Commission, Green paper on the modernisation of EU public procurement policy, COM(2011) 15; Kotsonis (2011a), p. NA51; Williams (2012), p. NA101.

47 Directive 2014/24/EU on public procurement, OJ 2014, L 94/65; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, OJ 2014, L 94/243. On the latter directive, see further Kotsonis (2014), p. 169.

48 Directive 2014/23/EU on the award of concession contracts, OJ 2014, L 94/1. On this directive, see further Craven (2014), p. 188.

49 See Art. 46 and 47 Concessions Awards Directive 2014/23.

ment expressly leave the Procurement Remedies Directives unaffected,[50] the new directives acknowledge that "*there is still considerable room for improvement in the application of the [EU] procurement rules*".[51] Against this background they contain certain public enforcement-related provisions, which are further discussed below.[52]

### *3.1.4. Additional general remarks*

77. A first additional remark concerns the fact that the Procurement Remedies Directives provide for common rules on review procedures for public procurement disputes inevitably implies that the Member States' scope for autonomous decision-making is reduced in this respect. Where necessary, Member States had to amend their existing national laws so as to ensure compliance with these directives. Nevertheless efforts were made to *respect existing national practices* as much as possible.[53] As the Commission highlighted in 1990, "*[c]onsiderable flexibility is left for the Member States to implement the directive's requirements in accordance with their particular approaches to administrative and judicial review, including the procedural and other conditions applying to such remedies [so as to] facilitate the insertion of the new remedies into existing national structures*".[54] Similarly at the time of the 2007 revision it stated that "*Member States will retain their power to appoint bodies responsible for the review procedures and to maintain the national procedural rules applicable to such reviews (respect for the Member States' procedural autonomy)*".[55]

On many points this translates into the wording of the Procurement Remedies Directives. For example, as is discussed in further detail below, a significant number of the measures provided for are merely optional or can be implemented in various manners.[56] Accordingly, as the Court of Justice noted, these directives leave "*Member States discretion in the choice of the procedural safeguards it provides, and the formalities relating thereto*".[57] The harmonisation established is thus 'partial'; it does not entail 'complete' (or 'maximum') harmonisation.[58] That means *inter alia* that, without prejudice to their obligations to comply with the requirements of these directives and

50 Recital 122 New Public Sector Directive 2014/24; recital 128 New Utilities Procurement Directive 2014/25.
51 Recital 121 New Public Sector Directive 2014/24; recital 127 New Utilities Procurement Directive 2014/25.
52 See para. 105 below.
53 Cf. Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 73. See also Weiss (1993), p. 104; Bovis (2007), p. 370; Trepte (2007), pp. 530 and 544.
54 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 15.
55 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 7.
56 See e.g. Art. 1(4), 1(5), 2b, 2d(2) and 2d(3) Procurement Remedies Directives 89/665 and 92/13.
57 CoJ case C-568/08, *Combinatie Spijker*, para. 57.
58 CoJ case C-570/08, *Simvoulio*, para. 37.

to respect EU law generally, Member States are entitled to lay down further-going rules on the issues covered by these directives.

78. Certain *particularities* of public procurement law and the disputes relating thereto should also be highlighted. An obvious point is that, although there are certain limited exceptions,[59] this field of law concerns rules that regulate the relationship between a (semi-)public body on the one hand and one or more private parties (undertakings) on the other hand. In many national jurisdictions such relationships are subject to a particular legal regime, which can however differ considerably in terms of content and character across the EU.[60] In particular, in many Member States, such as Germany, France, Spain and Belgium, this field of law is regulated by a mixture of administrative and civil law. This typically means that decisions up to and including the stage of the award of the contract are subject to review by the administrative courts, while disputes related to the execution of the contract, liability and claims for damages are subject to civil law. But there are also jurisdictions, for instance in England and the Netherlands, where review is in principle exercised only by the civil courts.

Disputes relating to contract award procedures furthermore generally concern more than two parties. The very aim of these procedures is after all to have several undertakings competing for the public contract at issue. This implies that in many disputes account must also be taken of the legitimate interests of third parties, normally the other (potential) tenderers whose bid was either not successful or who were not allowed to submit a bid in the first place. Speed is often also a key concern.[61] Swift resolution of public procurement disputes, notably before the conclusion of the public contract at issue, means that the aggrieved undertaking or undertakings can still have a chance to win the contract. It also means that the contract award procedure – and consequently the award and execution of the contract – is not too much delayed because of the dispute, which is generally in the interest of all parties concerned. There will moreover normally be a public interest of some sort at stake in the execution of the contract. One could think of the interests related to the timely completion of public infrastructural works or the timely supply of certain goods to a hospital or a school. This circumstance may have an important impact on the outcome of a case, in particular where a balance of convenience test is applied, as the public interests of this kind could quickly be seen as outweighing the 'individual' interests of the aggrieved private parties concerned.

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59 Substantive Procurement Directives 2004/17 and 2004/18 sometimes also cover private undertakings. See e.g. Art. 56 Public Sector Procurement Directive 2004/18 on concessionaires and Art. 2(2)(b) Utilities Procurement Directive 2004/17 on undertakings operating on the basis of special or exclusive rights.

60 See further Bovis (2007), pp. 381-397; Hebly, De Boer & Wilman (2007), p. 155; Treumer & Lichère (2011), pp. 105-328. See also Study Italian Authority for the Supervision of Public Contracts (2010).

61 See also para. 78 above.

79. The EU's Procurement Remedies Directives should further be understood in their *international context*. This context consists in particular of the relevant instrument of the World Trade Organisation ('WTO') in this field, i.e. the Agreement on Government Procurement ('GPA'). The GPA is an international agreement to which, besides countries such as the United States, Canada, South Korea and Switzerland, both the EU and its Member States are a party.[62] It is the successor of an earlier agreement concluded in 1979 in the context of the General Agreement on Tariffs and Trade ('GATT').[63] Negotiations on the new agreement started in 1986 and were concluded in 1994.[64] The GPA entered into force in 1996.[65] The main objectives and means of the substantive procurement rules set out in the GPA are comparable to those of the EU.

Most importantly for the present purposes, the GPA also contains specific provisions on so-called 'challenge procedures'.[66] It thus also gives private parties a role in enforcing the substantive rules at issue. This characteristic sets this international agreement apart from its predecessor and most other WTO agreements.[67] This GPA framework for challenge procedures could be called a slimmed-down version of the EU's regime established in the Procurement Remedies Directives. It leaves the countries concerned significant space to provide for a system that is consistent with their respective legal, constitutional and administrative traditions.[68] Nonetheless it lays down a number of key obligations. There is a general obligation to "*provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the [GPA] arising in the context of procurements in which they have, or have had, an interest*". The GPA also clarifies that limitation periods can be set for undertakings that wish to make use of these procedures, with a minimum length of 10 days. Such disputes must either be dealt with before a court or an impartial and independent review body. In terms of remedies, "*rapid interim measures to correct breaches of the [GPA] and to preserve commercial opportunities*" must be made available under the GPA.

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62 Given the diverging range of obligations and its optional nature under WTO law, the GPA is effectively rather a series of bilateral treaties than a single multilateral arrangement. See Arrowsmith (2005), p. 1330.

63 Decision 80/271/EEC concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, OJ 1980, L 71/1.

64 See Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994, L 336/1.

65 In March 2012 agreement was reached on the revision of the GPA. Pursuant to this revision some of the GPA provisions referred to above are clarified, but not substantially altered. On this revision, see further Zhang (2011), p. 483; Anderson (2012), p. 83; Williams (2014), p. NA 29.

66 Art. III and XX GPA. These challenge procedures apply in addition to the 'regular' WTO dispute settlement regime, which is essentially an intergovernmental affair, provided for in Art. XXII GPA.

67 Arrowsmith (2003), p. 385.

68 *Ibid*.

Here it is added that "*[s]uch action may result in suspension of the procurement process*", although "*[o]verriding adverse consequences for the interests concerned, including the public interest may be taken into account in deciding whether these measures should be applied*". The remedies further include "*correction of the breach of the [GPA] or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest*".

## 3.2. Remedies

Having sketched the background of the Procurement Remedies Directives in the foregoing section, attention now turns to their content. As their (shorthand) name indicates, a set of remedies lies at the heart of the Procurement Remedies Directives. The relevance of these remedies depends in particular on the stage that the contract award procedure is in, especially whether or not that procedure has already led to the conclusion of the public contract at issue. The first subsection below concentrates on the remedies relating to the pre-contractual stage, i.e. interim measures and the setting aside of unlawful decisions. The following two subsections subsequently discuss two remedies that are primarily of relevance in the stage after the conclusion of the contract, namely actions for damages and a contractual remedy that can lead to concluded public contracts being considered ineffective.

### *3.2.1. Interim measures and setting aside injunctions*

80. Concerning the pre-contractual stage, the two Procurement Remedies Directives provide that the competent national courts (or the other review bodies designated by the Member State concerned[69]) must, in the first place, have the power to take "*at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringements or preventing further damage to the interests concerned*". These *interim measures* do not finally determine the legal situation, but rather provide for a provisional arrangement.[70] Pursuant to the directives this power must include in any case the possibility to suspend on-going contract award procedures or the implementation of any decision taken by the contracting authority.[71]

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69 On these directives' rules on the forum before which applications for review must be brought, see further para. 98 below. For reasons of simplicity, in the above reference is made only to 'courts'.

70 Cf. CoJ case C-568/08, *Combinatie Spijker*, para. 61.

71 Art. 2(1)(a) Procurement Remedies Directives 89/665 and 92/13. Cf. Art. 2(4) Public Sector Remedies Directive 89/665 and Art. 2(3a) Utilities Remedies Directive 92/12, which provide that the initiation of review procedures generally need not necessarily have automatic suspensive effect.

The directives further expressly provide that a balance of interests test is permissible in this connection.[72] Accordingly, when deciding on an application for interim measures, account may be taken of the probable consequences of these measures for all interests likely to be harmed as well as the public interest. Where the negative consequences could exceed the benefits, it may be decided not to grant the measures, without prejudice to any other claim that the private party-applicant in question may bring. The application of this test can be problematic in practice however, in the sense that the national courts seised can tend to give greater weight to the public interests that may be at stake (related to not endangering or delaying the completion of the public contract in question) than to the 'private' interests of the private party-applicant.[73] In 1996 an EU-wide study found that this could be an important impediment to the availability of this remedy.[74] The Commission noted a similar tendency in the context of the 2007 revision, without however proposing addressing this concern through legislative amendments.[75]

The Court of Justice has clarified that it is in principle permissible for a national court to take account of the chances of success of an action on the merits when deciding an application for interim measures under the Procurement Remedies Directives, in light of the absence of any express EU rules on this matter and the EU law principle of effectiveness.[76] On the other hand, it has held that an application for interim measures cannot be made dependent on the applicant previously having brought proceedings on the merits, even where the latter is a mere formality.[77]

81. In the second place, under the Procurement Remedies Directives the competent courts must be empowered to *set aside* unlawful decisions of the contracting authority. One could think of a decision to award the contract to a particular party, or to exclude a tenderer, in violation of the Substantive Procurement Directives. These directives specify that this power to set aside unlawful decision includes the possible removal of discriminatory technical, economic or financial specifications in the tender documents.[78] This addition can be of significant relevance in practice. For the setting of such specifications can be an (indirect) means to prevent undertakings from other Member States from participating or having a fair chance in a contract award procedure. Examples of such unlawful specifications include the specification in the tender documents of the name of a particular product or

72 Art. 2(5) Public Sector Remedies Directive 89/665; Art. 2(4) Utilities Remedies Directive 92/13.
73 See also para. 78 above.
74 Study Herbert Smith (1996), pp. 10-11.
75 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 15.
76 CoJ Order case C-424/01, *CS Communications*, para. 26-33.
77 CoJ case C-214/00, *Commission v. Spain*, para. 99-100. See also CoJ case C-236/95, *Commission v. Greece*, para. 11.
78 Art. 2(1)(b) Procurement Remedies Directives 89/665 and 92/13.

the requirement of a particular environmental certificate, without making it clear that equivalent products or certificates are also allowed.[79]

82. Lastly, the Utilities Remedies Directive – but not the Public Sector Remedies Directive – offers the Member States an *alternative* for the two abovementioned remedies, i.e. interim measures and the setting-aside of unlawful decisions. Instead of these two remedies Member States may provide for the power to take "*other measures*" with the aim of correcting any identified infringement and preventing injury to the interests concerned. This could concern making an order for the payment of "*a particular sum*" in cases where the infringement has not been corrected or prevented.[80] This arrangement has been introduced because the aforementioned remedies were considered to directly affect the decision-making of the entities operating in the utilities sector covered by this directive. That was seen as unacceptable, given the autonomy that these entities enjoy in the legal systems of certain Member States.[81]

The Commission's proposal originally stipulated that the amount of this sum should be not less than 1% of the value of the contract at issue, so as to ensure a minimum level of deterrence. However this suggestion was rejected by the Council.[82] Instead a more general provision has been included, which states that this sum should be set "*at a level high enough to dissuade the contracting entity from committing or persisting in an infringement*".[83] The Court of Justice later clarified that a Member State could decide to leave it to its judiciary to set this sum on a case-by-case basis.[84]

### *3.2.2. Actions for damages*

83. The Procurement Remedies Directives also provide for two forms of relief that are of particular relevance in the post-contractual stage, i.e. after the contested contract has been concluded. One of these is the possibility for the competent court to award *damages*. To this end the directives quite simply state that Member States must ensure that the measures taken concerning the review procedures include provision for powers to "*award damages to*

79 CoJ case C-359/93, *Commission v. Netherlands*, para. 28; CoJ case C-368/10, *Commission v. Netherlands*, para. 70.

80 Art. 2(1)(c) Utilities Remedies Directive 92/13.

81 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 11-12; Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, pp. 6 and 8.

82 Council, doc. 7333/91, p. 5.

83 Art. 2(5) Utilities Remedies Directive 92/13. At the time of the adoption of this directive the Council and the Commission stated that payment of this sum to an entity that is directly or indirectly linked to the contracting authority through a common budget is not to be considered dissuasive. See Council, doc. 7250/91, p. 3.

84 CoJ case C-225/97, *Commission v. France*, para. 23-28.

*persons harmed by an infringement*".[85] While this provision is common to both directives, there is a difference between them where actions for damages are concerned.

84. On the one hand the *Public Sector Remedies Directive* contains no further guidance on issues such as the heads of damages to be compensated, the procedures to be followed or the criteria to be applied. The Commission had made a (modest) suggestion in its initial proposal for this directive in 1987. It mentioned as heads of damages "*costs of unnecessary studies*, *foregone profits and lost opportunities*".[86] But this part of the proposal was not retained by the EU legislature (at that time only the Council).

85. On the other hand the situation is to some extent different under the *Utilities Remedies Directive*, which, as was noted above, was adopted a few years after the Public Sector Remedies Directive. In addition to the above-mentioned general provision on damages claims, it is specified there that, where a claim is made for damages representing the *costs of preparing a bid* or of participating in an award procedure, the applicant shall be required "*only to prove an infringement of [EU] law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*".[87] The industrial and commercial public service character of the utilities was deemed to make it more difficult for private parties to obtain the pre-contractual forms of relief discussed in the previous subsection. As the Commission explained in its proposal, the above provision on bidding costs therefore seeks to ensure that in all Member States claims for damages are a practical proposition and thus a genuine incentive to compliance.[88] The essence is that aggrieved private parties need *not* to proof that they would have been awarded the contract but for the infringement in order to receive compensation for their bidding costs.[89] Providing such proof was considered extremely difficult in many cases. Instead these private parties must 'only' demonstrate that they had a *real chance* of winning the contract at issue in order for them to be awarded damages.

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85 Art. 2(1)(c) Public Sector Remedies Directive 89/665; Art. 2(1)(d) Utilities Remedies Directive 92/13. Pursuant to Art. 2(6) Public Sector Remedies Directive 89/665 and Art. 2(1) Utilities Remedies Directive 92/13 the Member States may further provide that, where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside.

86 Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134, p. 7 (Art. 1(3)). This aspect of the proposal was not explained in the explanatory memorandum. It was not retained in the amended proposal.

87 Art. 2(7) Utilities Remedies Directive 92/13.

88 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 12-13.

89 Cf. the statement made to this effect by the Council and the Commission, laid down in Council, doc. 7250/91, p. 4.

In its proposal for the Utilities Remedies Directive the Commission had originally proposed going a step further, by specifying that the amount of these bidding costs would be deemed to be at least 1% of the value of the contract.[90] It had called this "*a limited step designed to ensure that in all Member States claims for damages are a realistic possibility*". According to the Commission, this would be sufficient to meet the EU's immediate objectives in this field. It acknowledged that claims for other losses not covered here, such as lost profits, raise "*complex issues*" and would "*for the time being*" continue to be resolved under national law. It further stated that a high level of harmonisation of the quantification of damages would "*certainly encounter difficulties*" and therefore was "*an unrealistic objective*", at least at that stage (i.e. in 1990), while adding that in the longer term it would have to be considered whether further action at EU level would be necessary. Even this limited step as regards the *ex ante* quantification of certain damages proved to be a bridge too far however. It was deleted in the amended Commission proposal at the request of the European Parliament.[91] The latter argued that the amount of damages should be determined in each individual case, as bidding costs cannot be linked to the value of the contract at issue.[92]

86. In its 1996 green paper on public procurement in the EU the Commission returned to the issue of actions for damages for infringements of EU public procurement law under the Procurement Remedies Directives.[93] Certain *discrepancies and shortcomings* were noted as regards the relevant provisions of national law implementing the directives. In particular, the green paper pointed to diverging rules and difficulties in practice as regards the provision of proof and the quantum of damages. National courts were said to sometimes only award symbolic damages or compensation of the bidding costs. The Commission therefore floated the idea of making provision for "*liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered*". Yet in its 1998 follow-up communication it did not further elaborate on this these issues,[94] despite the fact that around the same time a study, prepared at the Commission's request, had found that "*no more than a handful*" of damages cases had arisen in the Member States.[95] That was found to be the case even in Member States where other forms of public procurement-related litigation was not unusual. This general lack of actions for damages under the Procurement Remedies Directives was attributed to

90 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 13 and 19.

91 See Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, p. 19. Here it is simply stated that the extent of damages payable is to be determined by national law.

92 See European Parliament, Opinion on the proposal for Utilities Remedies Directive 92/13, OJ 1991, C 106/82.

93 Commission, Green paper on public procurement in the EU, COM(96) 583, pp. 15 and 19.

94 Commission, Communication on public procurement in the EU, COM(1998) 143.

95 Study Herbert Smith (1996), p. 18. See also Brown (1998), p. 93; Treumer (2006), p. 159.

several factors, i.e.: the fact that such proceedings tend to be formalised, costly and time-consuming; the out-of-court settlement of such disputes; uncertainty especially as regards the quantification of damages; and the difficulty of proving that, but for the infringement, the applicant would in all likelihood have won the contract, as required in some jurisdictions.

On the whole it appears that in public procurement litigation private party-applicants prefer the remedies that are available at the pre-contractual stage, discussed in the previous subsection (interim measures and setting-aside injunctions). A relevant factor in this regard is likely to be that, as is widely acknowledged, undertakings are mostly interested in winning the contract, rather than engaging in lengthy legal proceedings or obtaining damages awards.[96] The aforementioned remedies are generally better suited from that perspective. Another relevant factor is that the chances of success of damages claims are generally considered to be rather limited and, where such a claim is successful, the amount of damages awarded is often seen as too low to offset the damage actually suffered and the legal costs incurred.[97] It has further been suggested that the generally limited manner in which the Procurement Remedies Directives' provisions on damages claims have been transposed into national law by the Member States also plays a role in this respect.[98] Against this background, legal scholars and practitioners alike have over the years called for including more detailed provisions in these directives.[99]

87. In the context of the aforementioned 2007 revision of the Procurement Remedies Directives the Commission once more assessed the existing regime as regards actions for damages for infringements of EU public procurement law.[100] It noted that the numbers of actions for damages brought remained *very low*, certainly when compared to the other available remedies. Although there can be notable differences between the various jurisdictions, and more recently there appears to have been a modest increase, other reports largely confirm this assessment.[101] Here the Commission took the view that these actions suffer from certain *inherent limits*. It pointed, among other things, to the lack of real corrective effects. This refers to the fact that,

96 Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, p. 13. See also Fernández Martín (1996), p. 213; Trepte (2007), pp. 562-563; Bowsher & Moser (2006), p. 196; Caranta (2011a), p. 87; Fairgrieve & Lichère (2011), p. 193.

97 Cf. Commission, Responses to the consultation on the operation of national review procedures in the field of public procurement, 2004 (undertakings and lawyers). See e.g. also Fairgrieve & Lichère (2011), pp. 192-194.

98 Treumer (2006), p. 162. On the situation in several Member States, see Bowsher & Moser (2006), p. 195; Lichère (2006), p. 171; Ruch-Larsen (2006), p. 179; Slavicek (2006), p. 223; Fairgrieve & Lichère (2011).

99 E.g. Fernández Martín (1996), pp. 213-215; Treumer (2006), p. 164; Trepte (2007), p. 558.

100 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 12-14 and 16-17. On this revision, see also para. 75 above.

101 Caranta (2011a), pp. 87-88; Fairgrieve & Lichère (2011), p. 192; Treumer (2011a), pp. 149-150. As regards the Netherlands, see also Hebly & Wilman (2010), p. 326.

even if the claim is successful, the private party concerned will still not win the contract. These private parties may moreover feel – correctly or not – that they would compromise their future business relationship with the contracting authority concerned if he were to initiate legal action ('don't bite the hand that feeds you'; fear of 'blacklisting').[102] The fact that this would evidently be at odds with the EU procurement rules does not necessarily make this fear less real in practice, as is widely acknowledged both in reports based on field research[103] and in the legal literature more generally.[104] In its assessment the Commission noted that this fear limits the deterrent effect of actions for damages. It further acknowledged the practical difficulties associated with bring this type of actions, such as the aforementioned comparatively low chances of success and modest amounts awarded. In this connection it observed that under most national laws applicants must prove that they either would have won, or at least had a serious chance of winning, the disputed contract. Providing such proof is often difficult.[105] These problems may be even more pressing in cases of illegal direct awards, given the inherent lack of transparency in those cases.[106] It was further noted that damages claims constitute actions on the merits, to be brought before ordinary courts. As such, unlike actions for most actions for interim relief, they can last for years and incur high legal costs.

That being so, the Commission considered that "*damages, in the specific context of public procurement procedures, present a less attractive or efficient means of sanction than pre-contractual remedies*".[107] It added that making actions for damages a realistic and deterrent 'threat' for contracting authorities would involve a rather far-going overhaul of the Procurement Remedies Directives. This could be achieved by removing or relaxing the conditions as regards private parties proving that they had a serious chance of winning the contract. In the Commission's view, "*this would directly touch upon the basic national principles governing contractual liability (i.e. the rules on compensation where loss of a chance has to be proved by the plaintiff) with few benefits (i.e. no corrective effects on the award procedure and the contract signed)*". It also pointed to the possible costs for taxpayers associated with the payment of damages by contracting authorities, which are mostly (semi-) public bodies. The option

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102 See e.g. also Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 10.

103 Cf. the study by the UK Department of Trade and Industry, referred to in Arrowsmith, Linarelli & Wallace (2000), pp. 759-760 and the study carried out for the Netherlands' Ministry of Economic Affairs, published as Hebly, De Boer & Wilman (2007), p. 145.

104 Fernández Martín (1996), p. 212; Bovis (2005), pp. 138-139; Arrowsmith (2005), pp. 1435-1436; Trepte (2007), p. 553; Brown (1998), pp. 93-94; Treumer (2011b), p. 29; Caranta (2011a), pp. 81-82; Treumer (2011a), p. 157.

105 Cf. Dahlgaard Dingel (1999), p. 239; Arrowsmith, Linarelli & Wallace (2000), pp. 752 and 759-760; Bovis (2007), pp. 438-439; Trepte (2007), p. 559; Caranta (2011b), p. 175.

106 See para. 75 above.

107 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 12.

of reinforcing private parties' possibilities to claim damages for infringements of EU public procurement law under the Procurement Remedies Directives was therefore discarded at an early stage of the revision process.[108] The above considerations were at the same time apparently no reason to delete the already existing provisions on damages, discussed above; these were left untouched.

88. The foregoing does not mean however that no damages cases are brought before the national courts under the Procurement Remedies Directives. Especially in more recent years a number of these cases have led to preliminary references. The resulting rulings by the Court of Justice shed light on the provisions of these directives at issue. The first such case is the Court's 2003 ruling in *GAT*, issued pursuant to an Austrian preliminary reference.[109] In this case a tenderer had been excluded, allegedly for unlawful reasons, from a contract award procedure for the supply of road sweeping vehicles. That private party therefore sought compensation in damages. In the following process of judicial review the court seised observed however that there had been *another* infringement of the applicable public procurement rules. If this court were to raise this point of its own motion (*ex officio*), as it was required to do under national law, this could imply that the applicant would have suffered damage anyway. That, in turn, would mean that the damage resulting from the allegedly unlawful exclusion would not need to be compensated. The Court was therefore asked whether the Procurement Remedies Directives precluded a rule of national law providing for an obligation of own motion judicial review. In its reply it held that it is for the domestic law of each Member State to determine whether, and in which circumstances, the competent court may raise of its own motion an infringement of the applicable EU law. Neither the objective of these directives, nor any of their specific provisions was considered to preclude such a rule of national law. The Court added however that under the Procurement Remedies Directives an action for damages could nonetheless not be dismissed on the ground, raised of a national court's own motion, that the contract award procedure had been anyway been unlawful. For this would be incompatible with the directives' objective of ensuring rapid and effective review for an aggrieved party.

The second case is the Court's 2010 judgment in *Combinatie Spijker*, which concerned a dispute relating to a public works contract for the renewal of two bridges in the Netherlands.[110] The dispute led to a string of litigation before various national courts regarding both the decision to award the contract to a particular tenderer and a subsequent claim for damages. As regards the latter, the Court of Justice was asked whether EU law determines the

108 *Ibid*., p. 26. For amendments that could conceivably have been made in light of the abovementioned difficulties, see Reich & Shabat (2014), p. 50.

109 CoJ case C-315/01, *GAT*, para. 46-55.

110 CoJ case C-568/08, *Combinatie Spijker*, para. 85-92.

criteria for the determination of the damage and if so, what these criteria are. The Court first observed that the abovementioned provisions on damages claims laid down in the Procurement Remedies Directives contain no statement either as to the conditions under which a contracting authority may be held liable or the amount of the damages it may be ordered to pay. Second, it clarified that these provisions are an expression of the principle of Member State liability for loss and damage caused as a result of breaches of EU law for which a Member State can be held responsible, as set out in its *Francovich* case law.[111] This means that the conditions for such liability apply in this connection (i.e. the rule of EU law infringed must be intended to confer rights on private parties, the infringement must be sufficiently serious and there must be a direct causal link between the infringement and the damage suffered). Third, it was noted that, in the absence of EU law provisions in this area, also after the 2007 revision, it is for the internal legal order of each Member State to determine the applicable criteria once these conditions have been complied with, subject to the principles of equivalence and effectiveness.[112]

Third and finally, of relevance is the *Stadt Graz* case, which also dates from 2010.[113] At issue here was a contract award procedure for a contract to supply asphalt to the city of Graz in Austria. An unsuccessful tenderer disputed that the winning undertaking had complied with all the relevant requirements. The contract having been awarded to the latter, the applicant claimed damages from the contracting authority. National law made such claims dependent on the contracting authority being at fault, whereby a rebuttable presumption that this was the case was provided for. In its judgment, the Court of Justice started by noting that the implementation of the directives' provision on damages in principle comes under the procedural autonomy of the Member States. However it found the rule of national law at issue nonetheless to be precluded. It observed that the wording of the directives did not establish a connection between the right to damages and a requirement of fault, a conclusion that it considered to be borne out by the general context and aim of the remedy of damages as provided for in these directives.[114] The Court added that it makes little difference in this respect that in the case at hand national law provided for a rebuttable presumption of fault, as it nonetheless creates the risk that a private party is deprived of the right to damages or at least that it is only belatedly being able to obtain such compensation. This was seen as incompatible with the effective and rapid judicial remedies that the Procurement Remedies Directives seek to guarantee.

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111 CoJ joined cases C-6/90 and C-9/90, *Francovich*, discussed in para. 59 above. Such a link between these two directives and the principle of Member State liability had already been suggested earlier in the legal literature. See e.g. Leffler (2003), p. 154; Arrowsmith (2005), p. 1425; Treumer (2006), pp. 161 and 165.

112 On these two latter principles, see further section 2.2 above.

113 CoJ case C-314/09, *Stadt Graz*, para. 34-43.

114 See also CoJ case C-275/03, *Commission v. Portugal*, para. 37.

### *3.2.3. Contractual remedy*

89. It has been seen in the previous subsection that in the context of the 2007 revision of the Procurement Remedies Directives their provisions on actions for damages were left untouched. By contrast that revision did lead to the introduction of an entirely new *contractual remedy*, i.e. a class of action intended to make good infringements of EU law by seeking to nullify or to otherwise make ineffective the contractual arrangements entered into by the parties concerned. The introduction of this new remedy should be seen against the background of the case law of the Court of Justice. In particular, initially the Court had held that under the Procurement Remedies Directives as they stood before the revision the fate of concluded contracts was essentially a matter for national law.[115] This was in line with an express provision in these directives according to which the effects of the exercise of the powers of the courts after the conclusion of the contract were to be determined by national law and that gave the Member States the possibility to limit these powers to awarding damages.[116] Most Member States used this latter possibility.[117] Many believed this to be in conformity with the Procurement Remedies Directives.[118]

This belief appeared to have been put in doubt however by subsequent case law, in particular the Court's 2007 ruling in *Commission v. Germany*.[119] The latter case was a follow-up to an earlier decision by the Court in infringement proceedings brought by the Commission that Germany had not respected its EU law obligations, because two German local governments had each concluded a contract with an undertaking in violation of EU public procurement law.[120] Subsequently one of the two disputed contracts was not terminated. The Commission therefore brought a second case, now seeking a declaration by the Court of Justice that Germany had not complied with the earlier judgment. In the latter case it was held that, as long as the disputed contract remains in force, the infringement of EU public procurement law continued. The Court dismissed Germany's arguments based on the aforementioned specific provision of the Procurement Remedies Directives on concluded contracts, the legitimate expectations of the private parties with whom the contract had been concluded and the principles of *pacta sunt servanda* and legal certainty, as these can play no role in infringe-

115 CoJ case C-314/01, *ARGE*, para. 40 and 48-50.

116 Art. 2(7) Public Sector Remedies Directive 89/665 and Art. 2(6) Utilities Remedies Directive 92/13, as they stood before the 2007 amendment. Subsequently these provisions have been retained in an amended form, clarifying that they are subject to the directives' provisions on ineffectiveness.

117 See para. 75 above.

118 See Treumer (2011b), pp. 32-33, with further references.

119 CoJ case C-503/04, *Commission v. Germany*, para. 33-36. See also CoJ case C-125/03, *Commission v. Germany*, para. 15. In addition see CoJ case C-81/98, *Alcatel*, discussed in para. 97 below.

120 CoJ joined case C-20/01 and C-28/01, *Commission v. Germany*, para. 36-39.

ment proceedings, which are essentially a matter between the Commission and the Member State concerned.[121] This largely leaves open the question what importance should be attached (if any) to those arguments in proceedings initiated by a private party before a national court. The introduction of the new contractual remedy of ineffectiveness, discussed in further detail below, is therefore not merely a codification of the above case law.[122] Nonetheless it evidently put the issue of how to deal with contracts concluded in violation of EU public procurement law firmly on the legislative agenda.

90. Since 2007 both Procurement Remedies Directives stipulate that Member States must ensure that "*a contract is considered ineffective*" by the competent national court.[123] This remedy must be made available in relation to what are considered the *most serious infringements* of substantive EU public procurement law.[124] It concerns in particular the illegal direct award of contracts (i.e. without any prior publication and competition in violation of the applicable EU public procurement rules) and the conclusion of a contract during a mandatory standstill period that is meant to allow the other private parties concerned to challenge the contract award decision.[125]

The logic behind this is that the ineffectiveness of a contract will normally mean that (the remainder of) the contract will be put out to (re-)tender. That implies that all interested parties have in principle a new and fair chance of winning it. Consequently competition is restored.[126] This can be an important incentive for private parties to apply for this remedy. As was noted above, they are often more interested in winning contracts than obtaining damages awards.[127] The risk of a public contract being considered ineffective, as well as the subsequent obligation to (re-)start a contract award procedure, is moreover likely to be an unattractive outcome for contracting authorities, if only because of the delays this would involve. As such it can act as a deterrent for those authorities.

91. Concerning the precise *legal effects* of this new remedy, the recitals of the Procurement Remedies Amending Directive clarify that this ineffectiveness should not be 'automatic'. Instead it is to be ascertained by, or the result of,

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121 See further subsection 2.4.1 above.

122 That is illustrated by the timing of the relevant events. The Commission's proposal for the amendment dates from May 2006 and political agreement was reached by June 2007, whereas the above judgment was rendered in July 2007. In this sense, see also Pries & Friton (2011), pp. 523-524. For another view, see Caranta (2011), p. 77.

123 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13.

124 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13. As regards the position of contract having been concluded pursuant to other infringements of EU public procurement law than the ones mentioned above, see para. 304 below.

125 Concerning these illegal direct awards and standstill periods, see para. 75 above and para 97 below respectively.

126 Recital 14 Procurement Remedies Amending Directive 2007/66.

127 See para. 87 above.

a decision by a court.[128] For that reason the provision in question speaks of the contract being "*considered*" ineffective, rather than it 'being' ineffective. The recitals state that the term 'ineffectiveness' implies that "*the rights and obligations of the parties under the contract […] cease to be enforced and performed*".[129] The Court of Justice has further held that, in the situations contemplated in this provision on ineffectiveness, the measures that may be taken are to be determined solely by the rules laid down in these directives.[130]

Other than that Member States are however generally left considerable flexibility as to how to give effect to this provision in their respective domestic legal systems. In particular, the directives stipulate expressly that the consequences of a contract being considered ineffective are provided for by national law.[131] They specify that national law may either provide for the retroactive cancellation of all contractual obligations (i.e. *ex tunc*) or limit the scope of the cancellation to those obligations which still have to be performed (i.e. *ex nunc*). It appears that in practice good use has been made of this flexibility. For instance, German law provides for ineffectiveness 'from the beginning', which is presumed to refer to *ex tunc* effects, while Romanian law relies on the concept of nullity which also presupposes retroactive effects.[132] By contrast in Denmark the main rule is *ex nunc* with the possibility of imposing *ex tunc* effects in certain specific cases and in England the national legislature opted instead for 'prospective ineffectiveness', i.e. the possibility of nullifying only those contractual obligations that are still to be performed.[133] In Italy and France the court seised may hold the contract to be ineffective even where the applicant did not make an express request to this effect.[134]

This flexibility is nonetheless limited under the Procurement Remedies Directives in that, where the national legislator opts for *ex nunc* effects, certain 'alternative penalties' must also be imposed. In a separate provision these directives further expand on what these penalties entail.[135] To begin with, they must be effective, proportionate and dissuasive. More specifically, the directives stipulate that they can consist of the imposition of fines or the shortening of the duration of the contract. A damages award does not qualify as such however. It is also explicitly stated in the directives that review bodies may be conferred broad discretion to take into account all relevant factors in this regard.

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128 Recital 13 Procurement Remedies Amending Directive 2007/66.
129 Recital 21 Procurement Remedies Amending Directive 2007/66.
130 CoJ case C-19/13, *Fastweb*, para. 42.
131 Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13. Cf. CoJ case C-19/13, *Fastweb*, para. 52.
132 Burgi (2011), p. 138; Dragos, Neamtu & Veliscu (2011), pp. 191-193.
133 Treumer (2011c), p. 279; Trybus (2011), p. 222.
134 Comba (2011), p. 249; Lichère & Gabayet (2011), p. 319.
135 Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13.

The margin of manoeuvre that is thus left to the Member States is greater than what the Commission had originally proposed. For the latter had suggested using the term 'invalid' rather than 'ineffective'.[136] In addition, pursuant to the Commission's proposal it would have been for the national courts to "*draw all the consequences on the illegal contract, such as those concerning the recovery of any sums which may have been paid by the awarding authority*".[137] No reference to national law was provided for in this respect. Quite to the contrary, implicit in this proposed approach was that, as a general rule, the contracts at issue would not have effects either between the parties concerned or with regard to third parties.[138] The fact that during the legislative process amendments were made on these points can, just as the aforementioned rather narrow scope of this remedy (in that it is limited to only the most serious infringements), largely be ascribed to the reservations of at least some Member States in relation to EU involvement with matters of contract law.[139]

92. The Procurement Remedies Directives allow for certain *exceptions* to be made in relation to the foregoing. These come in various forms. One such exception is the possibility for contracting authorities to publish a notice of its intention to 'directly' award the contract, including a justification of why this is deemed compatible with the EU public procurement rules, followed by a standstill period of at least 10 days before actually concluding the contract in question.[140] The idea is that this allows potentially interested undertakings to be aware of the intended direct award and the underlying reasons, so that they can contest it before the courts should they wish to do so. Where such 'voluntary' *ex ante* transparency has been ensured, the resulting contract can, after the expiry of the standstill period and in the absence of a legal challenge, no longer be considered ineffective under these directives. That means that the Member States are precluded from enacting any other rule, pursuant to which the effects of the contract would still not be maintained in a situation, even though the above requirements were met.[141]

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136 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 24 (Art. 2f(2)).

137 *Ibid*., p. 12 (recital 13).

138 See *ibid*., p. 24 (Art. 2f(3)).

139 E.g. Council, doc. DS 650/07. In this document three Member States argue that "*[t]he basis of validity and effectiveness of contracts belong to the sphere of civil law, which belongs exclusively to the competence of the Member States*". See e.g. also Council, doc. DS 703/06; Council, doc. DS 802/06. Cf. Art. 73 New Public Sector Procurement Directive 2014/24 and Art. 90 New Utilities Procurement Directive 2014/25 on the possible "*termination*" of concluded contracts during their term in certain cases, "*under the condition determined by the applicable national law*".

140 Art. 2d(4) Procurement Remedies Directives 89/665 and 92/13.

141 CoJ case C-19/13, *Fastweb*, para. 33-54.

The Member States further have the option under these directives of providing that the national court seised may decide to dismiss the application for ineffectiveness where there are "*overriding reasons relating to a general interest*".[142] Also in that case provision must be made for 'alternative penalties' of the type discussed in the previous paragraph. The directives stipulate that economic interests in the effectiveness of the contract only qualify as such overriding reasons if, in exceptional circumstances, ineffectiveness would lead to disproportionate consequences. Economic interests directly linked to the contract can in any case not be overriding reasons for the present purposes. Examples of the latter are cited, namely the costs resulting from the delay of the execution of the contract, the launching of a new procurement procedure, the change of economic operator performing the public contract in question or the legal obligations resulting from that contract. It has been noted that this possibility of exceptions in the general interest might become a loophole.[143] This fear seems on the one hand all the more realistic, given the experiences gained in relation to the balance of interests test that can be applied in relation to actions for interim measures, discussed earlier.[144] On the other hand the provision in question seeks to reduce this risk as much as possible through the rather restrictive formulation of this exception, as set out above. Indeed, it has also been argued that this provision now seems to have been formulated so restrictively that it might be difficult to give examples of considerations that could fall under the scope of this exception.[145] All in all the idea has clearly been leave a degree of flexibility and discretion to the courts when applying this remedy, while at the same time seeking to minimise the risk of abuse.

93. Finally, *practical experience* with the contractual remedy of ineffectiveness is so far limited as a consequence of its relatively recent introduction. There are reasons to believe that this remedy could prove a valuable private enforcement instrument. The possibility of being awarded the contested public contract can act as an important incentive to potential applicants, which are generally undertakings that are interested in that contract. For the contracting authorities concerned it can also have an important deterrent effect, given that the negative consequences of a contract being considered ineffective can be considerable (delays, extra costs, possible political fall-out, etc.).

Yet there are also several factors that might mean that the system created under these directives will be less frequently and successfully used than intended. In particular, its potential importance appears to be restricted by the aforementioned limitation to the most serious infringements, the considerable leeway left to the Member States as regards the precise effects of this

142 Art. 2d(3) Procurement Remedies Directives 89/665 and 92/13.
143 Cf. e.g. Caranta (2011), p. 77; Trybus (2011), p. 224.
144 See para. 80 above.
145 Treumer (2011b), p. 36.

remedy, the various exceptions, as well as the relatively strict limitation periods that can apply.[146] On a more practical level, it remains to be seen whether, especially in cases of illegal direct awards, (potential) applicants will be able to obtain sufficient evidence and information so as to be in a position to bring a case and if so, whether the said incentives to sue are sufficient to overcome any hesitations that aggrieved bidders often have.[147] The practical use of this remedy has therefore sometimes been questioned in the legal literature.[148]

### 3.3. Procedural provisions and related issues

The above remedies are complemented by a number of provisions of a procedural nature, the most important of which are assessed in this section. First, the rules on the directives' scope and on legal standing are discussed. This is followed by an assessment of the rules on limitation periods and standstill periods. Finally, the provisions on forum, procedure and what is referred to here as the 'general rules' are considered.

#### *3.3.1. Scope and legal standing*

94. The *scope* of the Procurement Remedies Directives essentially coincides with the Substantive Procurement Directive to which they relate.[149] Accordingly a contract that is covered by the Public Sector Procurement Directive is also covered by the Public Sector Remedies Directive. The same parallelism applies as regards the Utilities Procurement Directive and Utilities Remedies Directive in relation to contracts in the utilities sector.[150] In this manner the two Procurement Remedies Directives thus cover in principle all decisions that are taken by contracting authorities concerning contract award procedures falling under the EU's Substantive Procurement Directives. As was noted earlier, under the new substantive EU public procurement regime this logic is retained, subject to a widening of the scope of the Procurement Remedies Directive so as to cover also infringements of the substantive rules set out in the more recently adopted Concessions Awards Directive.[151] In this context the term 'decision' is to be interpreted broadly. It covers any act of a contracting authority adopted in relation to a public contract which falls within the material scope of one of the Substantive Procurement Directives and which is capable of producing legal effects, regardless of whether that act is adopted outside a formal contract award procedure or as part

146 On these limitation periods, see para. 96 below.
147 See para. 87 above.
148 E.g. Lichère & Gabayet (2011), p. 317; Trybus (2011), p. 224; Reich & Shabat (2014), p. 65.
149 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13.
150 Cf. CoJ case C-214/00, *Commission v. Spain*, para. 50 and 79.
151 See para. 76 above.

thereof.[152] This means that a decision *not* to initiate such a procedure can also be covered. The scope of the Procurement Remedies Directives is therefore rather wide.

However that evidently does not mean that there are no limits to these directives' scope. Two such limits stand out. To begin with, not all infringements of the rules of substantive EU public procurement law are covered. In particular, the Procurement Remedies Directives do not cover infringements of the Defence Procurement Directive. This latter directive contains a set of enforcement-related provisions of its own.[153] Although there are certain differences, which generally provide for additional flexibility, these provisions of this latter directive are largely similar to those of the Procurement Remedies Directives. In addition only contracts covered by substantive *EU* law on public procurement are covered by these directives. Contracts covered by 'purely' *national* public procurement rules, notably national rules other than those transposing the Substantive Procurement Directives, are not covered. The Commission had originally proposed to include the latter rules as well.[154] This would have meant that the Procurement Remedies Directives also apply for instance to disputes relating to public contracts of a value below the thresholds set out in the Substantive Procurement Directives, but which are nonetheless subject to national public procurement rules. The EU legislature (at the time only the Council) rejected this aspect of the Commission's proposal however. In the Procurement Remedies Directives this issue is now merely addressed in an indirect manner, in that it is stipulated that there should be no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by these directives between national rules implementing EU law and other ('purely') national rules.[155]

95. Under the Procurement Remedies Directives the Member States must further ensure that review procedures are available "*under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*".[156] Through this rule it is thus established which private parties have *legal standing* (*locus standi*) before the courts des-

152 CoJ case C-26/03, *Stadt Halle*, para. 34-35. See also CoJ C-92/00, *Hospital Ingenieure*, para. 48-52.

153 Art. 55-64 Defence Procurement Directive 2009/81.

154 See Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134, p. 6 (Art. 1).

155 Art. 1(2) Procurement Remedies Directives 89/665 and 92/13.

156 Art. 1(3) Procurement Remedies Directives 89/665 and 92/13. In addition, at the time of the aforementioned revision Art. 2a(2) was inserted, clarifying in which cases a private party is "*concerned*" by a particular provision of these directives. This is no rule on legal standing proper. However it indirectly establishes which private parties are entitled to contest an alleged infringement, given that a party that is not 'concerned' in the abovementioned sense will normally not have a sufficient interest.

ignated by the Member States. In essence under this provision any – legal or natural[157] – person that has, or has had, a legitimate interest in the outcome of the award procedure is entitled to bring legal proceedings.[158] The requirement of a (legitimate) interest, which is common to the laws of most Member States, was inserted in the text of this provision by the Council.[159] The Commission had proposed to grant legal standing to *any person entitled to tender* for the award at issue. The eventual wording, which is somewhat more restrictive, has been designed to allow any private party concerned to institute a review procedure under these directives, without however "*jeopardising*" the procedural laws of the Member States as they stood.[160] It follows that the Member States are not required to allow *any* private party to bring legal proceedings under these directives.[161]

The Court of Justice has clarified that the above provision ensures legal standing for the aggrieved private parties bringing a claim, but that it does not necessarily extend to the defendants, i.e. the contracting authorities that allegedly infringed the EU procurement rules and which may wish to appeal a decision taken in first instance (although Member States are not precluded from ensuring legal standing also for these latter parties on the basis of national law).[162] It further appears that persons invoking merely a general or public interest or making an obviously unmeritorious claim can be barred.[163] Similarly a tenderer that has had its own bid declared invalid, and therefore is no longer a participant in the contract award procedure, can be held to have insufficient interest in having subsequent decisions taken in the context of that procedure reviewed, provided however that this party has been in a position to previously contest the decision as regards its own bid.[164] On the other hand the Court has held that the interest of a private party in initiating legal proceedings cannot be made conditional on a prior referral to a non-judicial conciliation committee.[165] Nor can the formal capacity of tenderer or candidate be required. Thus, a private party which

157 CoJ case C236/95, *Commission v. Greece*, para. 11.

158 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 17.

159 Cf. Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 7. See also Fernández Martín (1996), p. 207.

160 Council, doc. 7834/89 ADD 1, p. 7. See also the statement by the Council and the Commission that "*within the meaning of this Directive any person excluded from participation in a procedure for the award of a public contract owing to an alleged infringement is a person having or having had an interest in obtaining a public contract and who has been harmed or risks being harmed. In particular, the fact of having suffered financial loss shall not be considered a requirement for the admissibility of a review*", laid down in Council, doc. 7490/89, p. 10.

161 CoJ case C-249/01, *Hackermüller*, para. 18; CoJ case C-230/02, *Grossmann*, para. 26.

162 CoJ case C-570/08, *Simvoulio*, para. 35-36.

163 Cf. recital 122 New Public Sector Directive 2014/24; recital 128 New Utilities Procurement Directive 2014/25; Dahlgaard Dingel (1999), p. 228; Trepte (2007), p. 552.

164 CoJ case C-249/01, *Hackermüller*, para. 26-29. See also CoJ case C-100/12, *Fastweb*, para. 26-30.

165 CoJ case C-410/01, *Fritsch*, para. 31-34. See also CoJ case C-230/02, *Grossmann*, para. 42.

did not submit a bid because he found the specifications of the tender documents to be discriminatory will normally have legal standing, in as far as its actions relates to those specifications.[166] Yet, as the Court rules in *Grossmann*, such a party can be denied access to a court or another review body for lack of interest if that party did not seek any review of the decision to include these specifications until after the contract had been concluded. In this ruling it held that by acting in that manner that party compromised the directives' objective of effective and rapid review.[167] The Court has further repeatedly assessed national rules on legal standing in relation to members of a consortium, consisting of several legal persons, bringing actions under the directives. Here it distinguished between actions for the annulment of the award decision and actions for damages.[168]

### *3.3.2. Limitation periods and standstill periods*

96. Provisions concerning *limitation periods* applicable to private parties wishing to initiate legal proceedings were inserted in the Procurement Remedies Directives as part of the 2007 revision of these directives. These periods come in various forms. In particular, they vary in light of the remedy sought, as discussed in the previous section. In the first place, Member States may so set such limitation periods for applications for the *review of decisions* taking by contracting authorities.[169] This provision applies not only to applications for review of contract award decisions, but more generally to any application for review of decisions taken in the context of or in relation to a contract award procedure falling within the scope of the Procurement Remedies Directives. These periods should have a length of at least ten or 15 days, depending on the means of communication used. The fact that these periods are rather short is related to the predominance of the interest of the rapid resolution of public procurement disputes and consequently the completion of the contract award procedure.[170] In the second place, for actions seeking to have a concluded contract *considered ineffective* longer minimum time limits apply.[171] The latter must be either 30 days where a contract

166 CoJ case C-230/02, *Grossmann*, para. 25-30; CoJ case C-26/03, *Stadt Halle*, para. 40.

167 CoJ case C-230/02, *Grossmann*, para. 34-40.

168 For these first types of actions a requirement that the action be brought by all consortium members *collectively* (as opposed to one member individually) was held to be permissible, while for the second type it was not. See CoJ case C-57/01, *Makedoniko Metro*, para. 64-73; CoJ case C-129/04, *Espace Trianon*, para. 20; CoJ joined cases C-145/08 and C-149/08, *Club Hotel Loutraiki*, para. 65-80. Note that this latter case concerned a situation falling outside the scope of Procurement Remedies Directives 89/665 and 92/13, which was examined in particular under the principle of effective judicial protection. On the differences between these two types of actions, see also Opinion AG Sharpston joined cases C-145/08 and C-149/08, *Club Hotel Loutraki*, para. 99-125.

169 Art. 2c Procurement Remedies Directives 89/665 and 92/13.

170 See para. 78 above. As discussed in para. 79 above, the GPA provides in this respect for a minimum period of ten days.

171 Art. 2f Procurement Remedies Directives 89/665 and 92/13.

award notice has been published or the parties concerned have been informed directly, or six months from the conclusion of the contract. Finally, in all other cases, notably where *actions for damages* are concerned, the limitation periods are to be determined by national law.[172]

The above rules are largely a codification of abundant earlier case law of the Court of Justice on this topic. The general point of departure there is that reasonable limitation periods are in principle acceptable in contract award procedures, subject to the conditions that the effectiveness of the Procurement Remedies Directives is not compromised and the principles of equivalence and effectiveness are respected.[173] The Court has held that the full implementation of the objective of these directives to ensure effective and especially rapid review would be undermined if private parties were allowed to initiate legal proceedings at any time of the contract award procedure, thus possibly forcing the contracting authority to restart the entire procedure.[174] However the abovementioned conditions were found to have been infringed in cases where the limitation period had not been set out expressly or where the contracting authority had created uncertainty in this regard.[175] The Court has further clarified that the starting point for these periods ought to be the moment on which the infringement became known to the private parties concerned.[176] In this connection the importance of adequately informing these parties before any such time period can start to run has also been underlined.[177] Indeed, the occurrence of new events subsequent to the expiry of the set limitation period, of which the private party concerned was not and could not reasonably have been aware, can imply that this period will start to run again, as from the date at which that party was adequately informed by the contracting authority or otherwise became aware of the events in question.[178]

97. Also introduced in 2007 were three new articles concerning *standstill periods*. These provisions should also be understood against the background of earlier case law of the Court of Justice. Of particular relevance is its 1999 landmark ruling in *Alcatel*.[179] This case concerned a contract award procedure initiated by an Austrian ministry for the supply of automatic data transmission systems. Having completed the procedure, on the same day

172 Art. 2f(2) Procurement Remedies Directives 89/665 and 92/13.
173 On these two principles, see section 2.2 above.
174 CoJ case C-470/99, *Universale Bau*, para. 77; CoJ case C-327/00, *Santex*, para. 50-52; CoJ case C-241/06, *Lämmerzahl*, para. 50-51; CoJ case C-456/08, *Commission v. Ireland*, para. 51-52; CoJ case C-314/09, *Stadt Graz*, para. 37.
175 CoJ case C-327/00, *Santex*, para. 61; CoJ case C-241/06, *Lämmerzahl*, para. 57; CoJ case C-456/08, *Commission v. Ireland*, para. 57-58 and 74-75.
176 CoJ case C-470/99, *Universale Bau*, para. 78.
177 E.g. CoJ case C-406/08, *Uniplex*, para. 30-32; CoJ case C-251/09, *Commission v. Cyprus*, para. 57-58. See also CoJ case C-19/13, *Fastweb*, para. 48.
178 CoJ case C-161/13, *Idrodinamica*, para. 47.
179 CoJ case C-81/98, *Alcatel*, para. 29-43.

the contract award decision was taken and the contract was concluded with the successful tenderer. The other tenderers were only informed afterwards. Upon application by one of these other tenderers, the national court seised observed that EU public procurement law had been infringed in the course of the contract award procedure. However, the contract having already been concluded, in the circumstances of the case at hand national law only allowed for an action for damages. The Court of Justice essentially found this to be incompatible with the Procurement Remedies Directives, even if at that time they did not provide expressly for a standstill period to be respected between the contract award decision and the conclusion of the contract. For this would in effect render meaningless the directives' remedies that are meant to be exercised at the pre-contractual stage, i.e. interim measures and the setting aside of unlawful decisions.[180] The Court stressed that these directives seek to guarantee the availability of effective and rapid review at a stage where infringements can still be rectified. As a follow-up, the Commission launched a string of infringement cases against Member States that did not foresee such a standstill period in their national law. The resulting judgments confirmed and further elaborated on the *Alcatel* case. In particular, in *Commission v. Austria*, the Court of Justice highlighted the objective of complete legal protection.[181] It held that this principle presupposes that, prior to the conclusion of the contract, all parties concerned must have sufficient time to examine the validity of the contract award decision. It also underlined that this implies that those parties must be informed of that decision.[182] In other cases it ruled that, even where the possibility of judicial review can lead to a concluded contract being annulled *ex post*, this is in principle not sufficient to compensate for the impossibility of a private party to challenge the contract award decision before the conclusion of the contract.[183]

Subsequently the Commission found in the context of the 2007 revision of the Procurement Remedies Directives that there were significant differences in the manner in which the Member States had given effect to this earlier case law, leading to loopholes and uncertainties.[184] It therefore proposed codifying the relevant case law at EU level. The main objective of the rules in question is in essence to ensure that the pre-contractual stage is prolonged where necessary, so as to allow in particular for a realistic possibility for a private party to initiate proceedings for interim measures or the setting

180 See subsection 3.2.1 above. The CoJ's ruling in *Alcatel* concerned only the seting aside of unlawful decisions, but it would appear to apply also to the granting of interim relief. In a similar sense, see Trepte (2007), pp. 555 and 564.

181 CoJ case C-212/02, *Commission v. Austria*, para. 21-24.

182 See also CoJ case C-455/08, *Commission v. Ireland*, para. 30-34; CoJ case C-406/08, *Uniplex*, para. 30-31.

183 CoJ case C-444/06, *Commission v. Spain*, para. 45; CoJ case C-327/08, *Commission v. France*, para. 58.

184 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 10.

aside of unlawful decisions. Before this revision, lack of sufficient time was thought to have been an important reason why during the pre-contractual stage it could prove difficult to successfully bring a case. As was explained above, contracting authorities sometimes concluded the contract at issue as quickly as possible, in particular before any legal proceedings challenging a contract award decision could be brought or completed, given that such concluded contracts were normally left unaffected by the review (the so-called 'race to signature').[185]

The resulting articles in the revised Procurement Remedies Directives essentially provide for a standstill period, which is to be respected by the contracting authority, of at least either ten or 15 days (depending on the means of communication used). Subject to certain exceptions, the contract may not be concluded during this period.[186] Any such communication to the private parties concerned must moreover contain a summary of the reasons for the contracting authority's decision in question. These rules are complemented by similar provisions providing for the automatic suspension of ongoing contract award procedures pending the decision by the national court, at least where review in first instance is concerned.[187] Obviously, during this latter period the contract may not be concluded either, so as not to make the pending review largely meaningless in practice. The abovementioned provision on the Member States being able to provide that, after the conclusion of the contract, the powers of the courts under the directives are limited to merely awarding damages was retained. It was however made expressly subject to the directives' other provisions in this respect, notably those on ineffectiveness.[188]

### *3.3.3. Forum, procedure and general rules*

98. The Procurement Remedies Directives contain rules on *forum*, i.e. on the court or other body designated to rule on the cases brought under these directives. On the whole the Member States are left considerable freedom to make their own choices in this respect. The term generally used in these directives is 'review body', which is a very broad term indeed. As such the directives leave it in principle to the Member States to decide whether the claims brought are to be decided by a body that is judicial in character, i.e. a civil or administrative court, or by another body, such as a non-judicial administrative body. In certain cases the directives moreover specifically require these review bodies to be "*independent of the contracting authority*".[189]

185 See para. 75 above.

186 Art. 2a and Art. 2b Procurement Remedies Directives 89/665 and 92/13.

187 Art. 1(5) and 2(3) Procurement Remedies Directives 89/665 and 92/13; Art. 2(4) Public Sector Remedies Directive 89/665; Art. 2(3a) Utilities Remedies Directive 92/13.

188 Art. 2(7) Public Sector Remedies Directive 89/665; Art. 2(6) Utilities Remedies Directive 92/13.

189 Art. 2d and 2e Procurement Remedies Directives 89/665 and 92/13 (relating to the contractual remedy, discussed in subsection 3.2.3 above).

Where a Member State chooses the first option, i.e. it designates a *judicial* body, no further requirements apply. But specific requirements are set out for the situation where the designated bodies are *not judicial* in nature.[190] These requirements aim to ensure that these bodies nonetheless offer equivalent guarantees in terms of independence and impartiality.[191] They entail, in a nutshell, the following. First, the body concerned must hear both sides and must provide reasons for its decisions in writing. Second, it should be ensured that an appeal can be lodged before a body that is not only independent of the contracting authority, but that is also empowered under the EU Treaties to refer a preliminary question to the Court of Justice.[192] Third, the members of this independent appeal body must be appointed and leave office under the same conditions of the members of the judiciary as regards the authority responsible for their appointment, their period in office and their removal. And at least the president of this body must have the same legal and professional qualifications as members of the judiciary. Finally, the decisions of this appeal body must be legally binding. Thus, where a Member States designates a non-judicial body, at least the possibility of a review on appeal by a body of a quasi-judicial nature and through a quasi-judicial procedure is to be ensured, so as to guarantee an independent, impartial and fair review of the contracting authorities' decisions at least in second instance and also that preliminary questions can be referred where necessary. Yet those rules do not exclude review by administrative or specialised bodies.

The directives further provide that the power to award the remedies set out therein may be conferred on *separate bodies* responsible for different aspects of the review procedures.[193] This latter provision is meant to accommodate the Member States that require that an unlawful decision is first set aside by an administrative court, after which damages claims can be brought before a civil court.[194] In this respect the Member States represented in Council considered it "*not […] advisable to amend this general system of administrative law for the public procurement sector alone*".[195]

In light of the flexibility resulting from the above provisions, it is unsurprising that in practice the Member States' review systems differ considerably between them. As regards the review in first instance, most have established some form of specialised non-judicial or quasi-judicial public procurement review body, generally of an administrative nature. This can for example take the form of a special complaints board (Denmark), certain designated public procurement chambers (Germany), a competition office (Czech Republic) or a public procurement commission (Estonia). The deci-

190 Art. 2(9) Procurement Remedies Directives 89/665 and 92/13.

191 Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 9.

192 On the conditions for qualifying as a 'court or tribunal' within the meaning of Art. 267 TFEU on the preliminary reference procedure, see further para. 22 above.

193 Art. 2(2) Procurement Remedies Directives 89/665 and 92/13.

194 See para. 78 above.

195 Council, doc. 7834/89 ADD 1, p. 7.

sions taken by these bodies are normally subject to appeal before the – civil or administrative – courts of the Member States in question.[196] Yet in several Member States public procurement disputes covered by the Procurement Remedies Directives are to be brought immediately before the ordinary courts. These are mostly either exclusively or partially administrative courts, as is the case for instance in Italy, France and Portugal. Where Member States opted for a 'mixed' system of review by administrative as well as civil courts of the sort referred to above, the latter tend to be competent to consider actions for damages whereas the administrative courts are to rule in the other cases. By contrast in Member States such as the United Kingdom, Sweden and the Netherlands civil courts are in principle competent to hear all public procurement disputes brought under these directives.[197]

99. Turning to the relevant rules of procedure, most noticeable are the Procurement Remedies Directives' rules on '*pre-trial contacts*', according to which the Member States are entitled to require a party wishing to initiate proceedings to first notify the contracting authority of the alleged infringement and its intention to seek review.[198] A considerable number of Member States has made use of this option, including Germany, Greece and Poland.[199] Such pre-trial contacts may help to facilitate an amicable settlement, which can be attractive from the point of view of costs and speed. But it can also lead to delays. The directives therefore specify that this possibility should not lead to the limitation periods or standstill periods, discussed in the previous subsection, being affected. In other words, the delay that such pre-trial contacts involve should not be such that the private party-complainant is time-barred should it subsequently wish to bring legal proceedings, not should the contested public contract be concluded with another party in the meantime.

Along similar lines, but going a step further, is the possibility of requiring a private party to first *seek review* with the contracting authority.[200] Only a limited number of Member States have made use of this possibility. One of them is Spain, where reportedly over 90% of the disputes are settled pursuant to such a request for internal review by the authority concerned.[201] Also in this case the directives seek to ensure that there are no serious adverse consequences for the private party seeking review, notably by providing that such an application to the contracting authority must result in the

196 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 69-70.
197 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 34.
198 Art. 1(4) Procurement Remedies Directives 89/665 and 92/13.
199 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 69.
200 Art. 1(5) Procurement Remedies Directives 89/665 and 92/13.
201 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 33.

immediate suspension of the possibility to conclude a contract. Afterwards, the party concerned must again be left a minimum standstill period so as to ensure an opportunity to apply to the courts.[202]

The directives further require it to be ensured that the decisions taken by the national courts (or other review bodies) seised can be effectively *enforced*.[203]

100. Finally, certain what could be called '*general rules*' have been laid down in the Procurement Remedies Directives. This term refers to the generally formulated provisions that are not related to a specific remedy or procedural issue, but that rather apply across the board. It is stated that Member States must ensure that decisions taken by the contracting authorities "*may be reviewed effectively and, in particular, as rapidly as possible*" on the grounds that such decisions have infringed EU law in the field of public procurement or national law transposing that law.[204] This provision sums up the essence of what these directives seek to achieve.[205] These general rules have proven to be an important interpretative aid in several cases. An example is the aforementioned *Grossmann* ruling, where the Court held that under the Procurement Remedies Directives a private party can be denied access to court for lack of interest if that party failed to seek review of the decision to include certain specifications in the tender documents until after the contract had been concluded, as such behaviour compromises the directives' objective of effective and rapid review.[206] Another example is the *Stadt Graz* case, which has also already been discussed above. In this case it was found, for largely similar reasons as in *Grossmann*, that even a rebuttable presumption of fault set under national law in relation to actions for damages are incompatible with the Procurement Remedies Directives.[207]

### 3.4. Other enforcement issues

Apart from the measures facilitating the private enforcement of EU law discussed in the foregoing sections, other means of ensuring the compliance with and the enforcement of substantive EU public procurement law are not entirely absent. Below two alternative compliance mechanisms that are peculiar to the Utilities Remedies Directive and the scope for alternative dispute resolution are first discussed. Attention then turns to the role of public enforcement in the present context.

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202 On these standstill periods, see also para. 97 above.
203 Art. 2(8) Procurement Remedies Directives 89/665 and 92/13.
204 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13.
205 Indeed, the CoJ has at times identified this as their objective, even if it has not always been consistent in this respect. See para. 74 above.
206 CoJ case C-230/02, *Grossmann*, para. 37. See para. 95 above.
207 CoJ case C-314/09, *Stadt Graz*, para. 43. See para. 88 above.

### 3.4.1. Alternative compliance mechanisms and alternative dispute resolution

101. Up until 2007 the Utilities Remedies Directive contained two specific *alternative mechanisms to ensure compliance* with the relevant rules of substantive EU public procurement law. It concerns, in the first place, the 'attestation mechanism'.[208] This entailed a voluntary system under which contracting authorities had the possibility of having the conformity of their contract award procedures assessed through periodic audits. The second mechanism is the 'conciliation procedure'.[209] The latter allowed aggrieved private parties to request the Commission to appoint an independent conciliator. If the Commission agreed, this conciliator was then to be drawn from a list established by the former in consultation with the representatives of the Member States. This procedure could only be used with the agreement of the contracting authority and would not result in any legally binding decisions. At the time of the adoption of the Utilities Remedies Directive, in 1992, considerable attention was paid to these two innovative forms of dispute prevention and resolution.[210] This suggests that it they were thought to be able to play an important role in practice. In the context of the 2007 revision the Commission observed however that they had failed to generate any significant interest on the side of the parties concerned. Having regard also to the administrative costs associated with keeping them in place, it was decided that these mechanisms were no longer to be retained.[211] The provisions in question were therefore deleted from these directives.

102. Although the provision on the abovementioned centralised 'conciliation procedure' was thus deleted in 2007, that is not to say that *alternative dispute resolution* cannot play a role in resolving disputes relating to the application of EU public procurement law. It has been seen in the foregoing that the Court of Justice has held it to be incompatible with the Procurement Remedies Directives' rules on legal standing if national law makes recourse to a non-judicial reconciliation a mandatory requirement for having legal standing.[212] Many Member States have nonetheless set up bodies that aim at finding extrajudicial solutions to public procurement disputes, such as an

208 Art. 3-7 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

209 Art. 9-11 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

210 By means of a rough illustration, 12 of the 18 articles of the initial Commission proposal for this directive related to these two mechanisms. The importance attached to these mechanisms is moreover illustrated by the attention paid to them in the explanatory memoranda to the initial and amended Commission proposal. See Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297; Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158.

211 Recitals 29 and 30 Procurement Remedies Amending Directive 2007/66. See also Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 13-14.

212 CoJ case C-410/01, *Fritsch*, para. 31-34. See para. 95 above.

arbitration panel or an ombudsman.[213] On the whole especially aggrieved private parties generally tend to prefer settling disputes amicably whenever possible, in light *inter alia* of the aforementioned fears of harming the business relationship with the contracting authority and the length and costs of legal proceedings.[214] Field research carried out in England and the Netherlands reveals for example a clear preference on the side of those parties for non-judicial forms of dispute resolution in one form or another.[215]

However, despite these advantages, resolving public procurement disputes in this manner can also entail certain risks and drawbacks. In particular, public procurement rules generally aim at ensuring transparency and competition, rather than 'one-on-one' negotiations behind closed doors between contracting authorities and certain undertakings. Alternative dispute resolution mechanisms are typically based precisely on the latter approach however.[216] For example, the Procurement Remedies Directives would not reach their underlying aim of strengthening compliance with substantive EU public procurement law if an out-of-court settlement were to lead to an aggrieved private party agreeing to drop its claim in return for being awarded a future contract without competitive tendering. In other words, there is a risk that a dispute is resolved at the expense of the public interest or the interests of third parties. The resulting tension comes to light in relation to the EU level 'conciliation procedure', mentioned above. With a view to avoiding the abovementioned risk, this mechanism included the requirement that any agreement reached must be in accordance with EU law and that interested third parties (notably other undertakings interested in the public contract at issue) should be allowed to intervene in the conciliation proceedings.[217] At the same time these requirements are likely to be among the reasons why this mechanism generated so little interest in practice, leading to its abolishment.

### *3.4.2. Public enforcement*

103. In the introduction to this chapter it was noted that over the years serious shortcomings have been identified as regards the compliance with EU public procurement law. Despite the adoption and subsequent revision of the Procurement Remedies Directives, these difficulties are not a thing of the past. Indeed, as the EU legislature noted in 2014, "*there is still considerable*

213 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 69.

214 See para. 87 above. See also Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 71-73.

215 See Wood Report (2004), p. 54; study carried out on behalf of the Netherlands' Ministry of Economic Affairs, published as Hebly, De Boer & Wilman (2007), p. 147.

216 Cf. Trepte (2007), pp. 373-374 and 376-577. See also Arrowsmith (2005), p. 1435; Caranta (2011), p. 84.

217 Art. 10(4) and Art. 11 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

*room for improvement*" in this regard.[218] One conceivable response to these shortcomings would be to ensure, as a matter of EU law, that effective public enforcement structures are in place.[219] At central, EU level this could entail granting the Commission particular powers to investigate and address (alleged) infringements. As regards public enforcement at national level one could further think in particular of the establishment of authorities charged with supervising and enforcing the correct application of the EU's substantive rules on public procurement. This is generally not the case at present however. As is set out below, with respect to the enforcement of the rules in question, public enforcement in effect plays only a modest role as a matter of EU law. This might well be related to the fact that the addressees – and therefore the potential infringers – of those rules are typically (semi-)public authorities themselves. It appears that the EU legislature is rather hesitant to make those authorities subject to significant public enforcement powers entrusted to other public authorities, regardless of whether the latter are EU or national authorities, thus leaving the burden of enforcement instead to the private parties concerned.

104. Concerning the possibilities at *EU level*, especially in its 1987 proposal for the Public Sector Remedies Directive the Commission initially placed considerable emphasis on certain innovative forms of public enforcement.[220] It had sought to obtain for itself rather far-going powers to intervene directly at national level. This took two forms. First, it was proposed to entitle the Commission to intervene in national review procedures, as a sort of *amicus curiae*, regarding matters of EU law. Second, this proposal included a suggestion for the Commission to be empowered to suspend on-going contract award procedures in certain cases. Arguably in the Commission's view these two proposed forms of centralised public enforcement were at least as important as the proposed measures that sought to facilitate the private enforcement of EU public procurement law, discussed in the foregoing.[221] But the EU legislature (at that time only the Council) judged this proposed form of direct intervention to be "*foreign to the system for the application of [EU] law provided for in the [EU] Treaties [and] to the legal systems of the Member States*" and it did not wish "*to introduce so fundamental a change in the procedural law of the Member States and to apply it only to one sphere of*

218 Recital 121 New Public Sector Directive 2014/24; recital 127 New Utilities Procurement Directive 2014/25. See further para. 76 above.

219 See also section 2.4.2 above.

220 See Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134. See also Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733.

221 Again by means of a rough illustration, in the initial Commission proposal only one article concerned the remedies available to private parties, whereas three articles related to the proposed Commission's powers. The importance that the Commission attached to these powers is moreover evident from the attention paid thereto in the explanatory memoranda to the initial and amended Commission proposal.

*[EU] law*".[222] This aspect of the proposal was therefore rejected. In the case of the proposed powers for the Commission to suspend on-going contract award procedures this rejection was even unanimous.[223] A few years later, when discussing the proposal for Utilities Remedies Directive, the European Parliament argued in favour of granting the Commission similar powers to intervene directly in national proceedings. However this time the Commission itself decided against proposing such an arrangement. It argued that, given its limited resources, it could not verify the compliance of each and every entity with the applicable EU public procurement rules and that more costs-effective alternatives existed.[224]

The Commission was nevertheless not left entirely empty-handed however. Both Procurement Remedies Directives contain a 'corrective mechanism'.[225] This foresees that the Commission can notify a Member State when it considers that a "*serious infringement*" of EU procurement law has been committed and request its correction. Within 21 days, the Member State concerned must then confirm that the infringement has been corrected, explain why no such correction has been made or inform the Commission that the contract award procedure in question has been suspend. But the directives contain no provisions as to possible subsequent steps. The Court of Justice has clarified that in this regard the Member State concerned are not obliged to 'automatically' comply with the Commission's request.[226] Where a Member State refuses to do so, this effectively leaves the Commission only the option of initiating 'regular' infringement proceedings.[227] Evidently, as the Court has confirmed, this corrective mechanism can neither derogate from nor replace the system established by the EU Treaties in this respect.[228] In 2007 the Commission observed that this corrective mechanism had not been used since the early 1990s. It cited difficulties in acting swiftly before the conclusion of the contract and in gathering convincing evidence of the alleged infringement.[229] As part of the revision amendments were made so as to 'refocus' this mechanism on serious infringements of EU public procurement law.[230] However, as such, these amendments seem unlikely to substantially alleviate the said difficulties. Neither do they alter the fact that, as was

222 Council, doc. 7834/89 ADD 1, p. 5.
223 Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 10. See Fernández Martín (1996), p. 221.
224 Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, pp. 4-6 and 14.
225 Art. 3 Public Sector Remedies Directive 89/665; Art. 8 Utilities Remedies Directive 92/13.
226 Cf. CoJ Order case C-387/08 P, *VDH*, para. 23-25.
227 On these infringement proceedings, see subsection 2.4.1 above.
228 CoJ case C-359/93, *Commission v. Netherlands*, para. 13; CoJ case C-79/94, *Commission v. Greece*, para. 11. As is illustrated by these two cases, in practice the Commission tends to consider the notification issued under the corrective mechanism as a letter of formal notice initiating the infringement proceedings.
229 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 13.
230 Recital 28 Procurement Remedies Amending Directive 2007/66.

explained above, the Commission's powers under this mechanism are actually rather limited. It remains to be seen therefore whether this mechanism will be used more frequently and with more success in the time to come.

105. Turning to what could be called the more 'classical' forms of public enforcement in the EU legal order, i.e. through the involvement of *national authorities* charged with supervising and enforcing the application of EU public procurement law, the EU's approach has been somewhat ambivalent. In its 1996 green paper on public procurement the Commission noted that the establishment of such authorities might have advantages, arguing that their very existence could already help prevent infringements. The Member States were therefore "*invited*" to consider this option.[231] In its communication of two years later the Commission underlined that it did not have the resources to act itself as "*a kind of 'super enforcement authority'*".[232] It therefore instead "*encouraged*" the setting-up of independent authorities by the Member States as contact points for rapid, informal solution of public procurement-related problems and for authorities from other Member States and the Commission.[233] Neither the Procurement Remedies Directives nor the Substantive Procurement Directives at present set out an obligation to this effect however. The latter directives merely provide (since 2004) that the Member States *may* establish national public procurement authorities of this kind.[234] This seems little more than stating the obvious. Most Member States have actually established a public supervision authority of some sort, although this is often only an *ex post* audit body or a non-independent procurement office with limited powers.[235]

The more recent amendments to the EU's public procurement rules did not fundamentally alter this situation.[236] In the context of the 2007 revision of the Procurement Remedies Directives the possibility of including an EU law obligation to establish an independent national authority, empowered to notify alleged infringements to contracting authorities and if necessary bring cases before the national courts, was again raised. The Commission acknowledged that this could help solve disputes quickly and in an informal manner. An important further advantage is that enforcement measures would not necessarily depend on the decision of an undertaking whether or not to initiate legal proceedings. As was noted above, apart from possible legal constraints, in practice private parties are often deterred from doing so for fear of repercussions and financial constraints.[237] But in 2007 a majority

231 Commission, Green paper on public procurement in the EU, COM(96) 583, p. 17.
232 Commission, Communication on public procurement in the EU, COM(1998) 143, p. 13.
233 *Ibid*.
234 Art. 81 Public Sector Procurement Directive 2004/18; Art. 72 Utilities Procurement Directive 2004/17.
235 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 63-65.
236 See subsection 3.1.3 above.
237 See in particular para. 87 above.

of Member States took an unfavourable view of this option. Invoked were fears of being 'overwhelmed' by nuisance cases, as well as the costs of setting up and operating the authorities.[238] This obligatory public enforcement option was therefore discarded, despite having received strong support from the private sector.[239] What remains as a matter of EU law at present is the Public Procurement Network. This is principally an informal forum for the exchange of information and best practices between the public authorities concerned.[240]

This issue later re-emerged in the context of the aforementioned revision of the EU's substantive public procurement rules in 2014.[241] In that context the Commission proposed an obligation for the Member States to designate a single, independent 'oversight body', which would be charged *inter alia* with monitoring the application of the relevant rules, issuing own initiative opinions and helping to settle complaints.[242] These already not very ambitious proposals were watered down further during the legislative process. The new substantive public procurement directives only provide for an obligation to designate "*one or more authorities, bodies or structures*" that are responsible for 'monitoring' the application of the relevant rules and for 'indicating' possible problems to "*national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof*".[243] This seems a very modest step indeed.

It is therefore clear that in this field EU law does not provide for 'proper' public enforcement at national level, in the sense that neither under the rules that are currently in force, nor under the recently adopted new substantive public procurement directives the Member States are required to designate an authority with significant powers to investigate and effectively address (alleged) infringements of EU public procurement law.

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238 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 25, 26 and 39-42; Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, pp. 4-5.

239 In the consultation preceding the 2007 revision over 85% of the undertakings expressed a preference for obliging the Member States to set up such an independent authority. Of the consulted lawyers and professional and non-governmental organisations, around 60% and almost 70% respectively held this view. See Commission, Responses to the consultation on the operation of national review procedures in the field of public procurement, 2004. Similar strong support has been found during field research carried out in the Netherlands. See Hebly, De Boer & Wilman (2007), p. 147.

240 See further http://www.publicprocurementnetwork.org.

241 See para. 76 above.

242 See Commission, Proposal for New Utilities Procurement Directive 2014/25, COM(2011) 895, pp. 107-108 (Art. 93); Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896, pp. 101-102 (Art. 84).

243 Art. 83 New Public Sector Directive 2014/24; Art. 99 New Utilities Procurement Directive 2014/25. See also Art. 45 Concessions Awards Directive 2014/23. As regards the possibility for interested parties to bring possible infringements to the attention of the competent national authorities, see recital 122 New Public Sector Directive 2014/24 and recital 128 New Utilities Procurement Directive 2014/25.

### 3.5. Summary

106. Having been adopted in 1989 and 1992, the two – very similar – Procurement Remedies Directives seek to strengthen compliance with substantive EU public procurement law, such against the background of the objective of realising an EU-wide internal market for public contracts. Member States are obliged under these directives to ensure that four remedies are available to the private parties concerned in proceedings before the national courts. It concerns interim measures, the setting aside of unlawful decisions, actions for damages and, since their revision in 2007, a contractual remedy in the form of concluded contracts being considered ineffective. These remedies are complemented by a set of common rules on a number of procedural issues, which include rules on legal standing that specify which parties are entitled to initiate legal proceedings under these directives and rules of forum regarding the bodies competent to decide on the actions in question. The Procurement Remedies Directives also provide for rules on limitation periods and standstill periods, so as to ensure respectively that the aforementioned actions are brought rapidly and that the private parties concerned have a realistic possibility to do so. In this field EU law imposes only very limited specific public enforcement obligations on the Member States.

# 4. Intellectual property law

This chapter focuses on the IPR Enforcement Directive, which seeks to ensure the enforcement of intellectual property rights in the EU. The outline of this chapter largely mirrors that of the foregoing chapter. Accordingly the first section below outlines the background and context of this directive. The next sections then analyse its main content. In the latter context the remedies for which this directive provides are discussed, whereby a distinction is made between measures of a preliminary, provisional and precautionary nature, actions for damages and other decisions on the merits under this directive. Attention then turns to the most relevant procedural provisions. The final section of this chapter is dedicated to other enforcement-related issues concerning infringements of intellectual property rights, in particular the public enforcement dimension.

## 4.1. Introduction

This section introduces the IPR Enforcement Directive. To this aim the first subsection below briefly sketches its background, notably the EU's involvement with substantive intellectual property law, the infringements thereof that this directive seeks to address as well as the process of its adoption, implementation and possible revision. Then, before analysing the content of this directive in further detail in the subsequent sections, some more general remarks are made with a view to clarifying the context in which it is applied.

### *4.1.1. Substantive law and infringements*

107. Intellectual property rights are the rights given to persons over the creation of the mind, usually giving those persons an exclusive right over the use of their creations for a certain period of time. The term 'intellectual property' in its classical sense encompasses two main categories. To begin with, it covers copyrights and related rights, i.e. rights granted to authors of literary or artistic works and rights of performers, procedures of phonograms and broadcasting organisations. It further covers industrial property, thus including distinctive signs protected by trademarks and geographic indications, as well as inventions protected by patents and industrial designs. Although not a 'classical' form of intellectual property, this term can also include trade secrets. Trade secrets are typically used as a complement or alternative to protection under intellectual property law strictly

speaking, either because the latter is legally not possible or because this is simply seen as a preferable form of protecting know-how and business information in a given situation. They thus result from a policy decision of the undertaking concerned, rather that they are statutory rights. On a broader understanding of this term, internet domain names can also be considered a form of intellectual property.

108. Over the years many acts of secondary EU law concerning *substantive* intellectual property law have been adopted, in particular with a view to levelling the playing field for undertakings operating on the EU's internal market. At present virtually all types of intellectual property rights are, to a greater or lesser extent, affected by EU law.[1] These substantive EU rules are all based on internal market-related provisions of the EU Treaties, namely Articles 53, 62, 114 and/or 352 TFEU. It is only since 2009 (Treaty of Lisbon) that a specific legal basis has been inserted in the EU Treaties for the creation of European intellectual property rights in the context of the internal market, i.e. Article 118 TFEU.

In this connection a distinction can be made between two forms of such EU legislative activity. First, there is EU legislation *harmonising* the rules of substantive intellectual property law of the Member States. Such harmonisation has taken place for instance concerning national laws on trade marks,[2] designs,[3] and copyrights and related rights, the latter leading *inter alia* to the adoption of Directive 2001/29 concerning copyrights and related rights in the information society ('Infosoc Directive').[4] Second, the EU has adopted legislation that *creates EU unitary rights*. This latter legislation is not concerned with the harmonisation of national laws, but instead creates new, self-standing intellectual property rights at EU level, which offer direct protection in all Member States. Examples include Regulation 207/2009 on the Community trade mark ('Community Trade Mark Regulation'),[5] Regulation 6/2002 on Community designs ('Community Designs Regulation')[6] and

1 Cf. recital 3 IPR Enforcement Directive 2004/48: "*the substantive law on intellectual property […] is nowadays largely part of the acquis communautaire*".

2 Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks, OJ 2008, L 299/25. In 2013 the Commission proposed recasting this directive. See Commission, Proposal for a directive to approximate the laws of the Member States relating to trade marks, COM(2013) 162.

3 Directive 98/71/EC on the legal protection of designs, OJ 1998, L 289/28.

4 Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001, L 167/10. See also Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ 1993, L 248/15; Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ 2006, L 372/12; Directive 2009/24/EC on the legal protection of computer programmes, OJ 2009, L 111/16.

5 Regulation (EC) No 207/2009 on the Community trade mark, OJ 2009, L 78/1.

6 Regulation (EC) No 6/2002 on Community designs, OJ 2002, L 3/1.

Regulation 2100/94 on Community plant variety rights ('Community Plant Variety Rights Regulation').[7]

Furthermore in 2012 a *patent package* was adopted. It consists of two regulations,[8] complemented by an Agreement on a Unified Patent Court ('Patent Court Agreement').[9] This agreement has been signed (but for the time being not yet ratified) by almost all Member States.[10] After several earlier attempts over the past decades,[11] this package creates an EU regime on unitary rights for patents. It differs from the abovementioned regimes providing for EU unitary intellectual property rights however, as it creates the possibility of giving unitary effect to European patents granted pursuant to the European Patent Convention rather than an EU unitary right proper. Procedurally this regime came into being as a form of 'enhanced cooperation'.[12] That implies that it does not (or at least not necessarily) involve all Member States. The Patent Court Agreement is an intergovernmental agreement, which is not part of EU law strictly speaking. This agreement not only designates the competent courts, as it names already indicates, but it also sets out the applicable rules on remedies and procedures for the private enforcement of the rights in question.[13] In this respect it thus constitutes, as it were, a form of 'harmonised transposition' of the IPR Enforcement Directive by the Member States concerned regarding the enforcement of this specific intellectual property right.

109. Infringements of intellectual property rights can take many forms. One could think of the production and sale of clothing containing a protected brand name without the authorisation of the trade mark holder or the reproduction of a film in violation of copyright law. It is generally acknowledged that intellectual property rights infringements of this kind take place on a very significant, and probably also increasing, scale. In its 1998 green paper on this subject-matter the Commission called this a "*wide-*

7 Regulation (EC) No 2100/94 on Community plant variety rights, OJ 1994, L 227/1.

8 Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012, L 361/1; Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ 2012, L 361/89. In 2013 Spain filed an action for the annulment of these regulations; see CoJ case C-146/13, *Spain v. Parliament and Council*, and CoJ case C-147/13, *Spain v. Council* (pending).

9 Council, Notice Agreement on a Unified Patent Court, OJ 2013, C 175/1. See also CoJ Opinion 1/09, *Patent Court Agreement*.

10 For the most recent state of play as regards the signature and ratification of the Patent Court Agreement, see http://ec.europa.eu/internal_market/indprop/patent/ratification/index_en.htm.

11 See e.g. Commission, Proposal for a regulation on the Community patent, COM(2000) 412.

12 Art. 20 TEU; Art. 326-334 TFEU. See CoJ joined cases C-274/11 and C-295/11, *Spain and Italy v. Council*. See further e.g. Pistoa (2014), p. 247.

13 See Art. 56-82 Patent Court Agreement.

*spread phenomenon with a global impact*".[14] Precise and undisputed figures about the scale of these infringements are scarce however. World-wide trade in counterfeit and pirated products[15] has been estimated to represent a value of $ 250 billion in 2007, up from $ 100 billion in 2000.[16] More specifically regarding the EU, the Commission held that these infringements are detrimental to the proper functioning of the internal market, as they give rise to a deflection of trade and distort competition, leading to a loss of confidence and less investment and outlay on innovation and creativity.[17] They are also said to have negative consequences in terms of consumer protection, as 'fake' products may not offer the same quality as 'real' ones. It has been estimated that infringements of intellectual property rights could lead to losses reducing the EU's cumulative gross domestic product by € 8 billion per year.[18] In 2000 the Commission found that its concerns were largely shared by the respondents to the consultation that it had initiated through the 1998 green paper.[19] In this connection it noted that "*[c]ounterfeiting and piracy, which were once craft activities, have become almost industrial-scale activities*".[20] It appears that these activities regularly involve organised crime.[21] As the Commission observed in 2014, such commercial-scale infringements are "*both insidious and a moving target*".[22]

### *4.1.2. Proposal, adoption, objective and possible revision*

110. In light of, first, the EU's involvement with substantive intellectual property law and, second, the scale and possible consequences of the infringements of this law, as discussed in the foregoing, the question arose whether legislative measures should be taken at EU level as regards the

14 Commission, Green paper on combating counterfeiting and piracy in the single market, COM(98) 569, p. 4.

15 The term 'counterfeiting and piracy' is regularly used as an alternative for infringements of intellectual property rights, without there being a material difference (at least as used by the Commission). See Commission, Green paper on combating counterfeiting and piracy in the single market, COM(98) 569, pp. 6-7; Commission, Communication on enhancing the enforcement of intellectual property rights in the internal market, COM(2009) 467, p. 3 (n. 1).

16 Commission, Communication on a single market for intellectual property rights, COM(2011) 287, p. 17.

17 Commission, Green paper on combating counterfeiting and piracy in the single market, COM(98) 569, p. 5.

18 Commission, Communication on a single market for intellectual property rights, COM(2011) 287, p. 17.

19 Commission, Communication on the follow-up to the green paper on combating counterfeiting and piracy in the single market, COM(2000) 789.

20 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 12,

21 Commission, Communication towards a renewed consensus on the enforcement of intellectual property rights, COM(2014) 392, p. 2. Here a UK study is cited, according to which 81% of intellectual property rights infringing products are estimated to be associated with organised crime.

22 *Ibid*.

remedies and procedures applicable in proceedings before the national courts relating to the enforcement of the rights in question by the private parties concerned. In January 2003 the Commission essentially answered this question in the affirmative by adopting a *proposal* for a new directive on this subject-matter.[23]

In the explanatory memorandum to this proposal the Commission called EU involvement with the enforcement of intellectual property rights a "*logical extension*" of the EU's involvement with substantive intellectual property law.[24] There it also expanded on the scale and consequences of these infringements. This was called "*a constantly growing phenomenon*" that constitutes "*a serious threat to national economies and governments*".[25] According to the Commission disparities between national laws in the EU had a "*major impact, in particular on the effectiveness and costs of procedures, time scales and the amounts of damages granted*".[26] This was said to have direct repercussions on trade between the Member States and a direct impact on the conditions governing competition in the market. The Commission found this "*difficult to reconcile with guaranteeing rights holders an equivalent level of protection in the internal market*".[27] Other negative effects of intellectual property rights infringements were also noted, such as their impact on innovation and competitiveness, the cultural sector, employment, tax revenues and market stability, consumer protection and public order.[28] The Commission found combating this phenomenon of "*vital importance*" and proposed a directive "*to tackle this situation by harmonising national legislation on the enforcement of intellectual property rights*".[29]

111. After a relatively speedy legislative process, this proposal led to the adoption by the EU legislature of the *IPR Enforcement Directive* in April 2004.[30] Agreement between the EU's co-legislators, i.e. the European Parliament and the Council, was reached little more than a year after the publication of the Commission proposal. The imminent 'eastern' enlargement of the EU with ten new Member States as per May 2004 is widely believed to have acted as an important incentive to reach an agreement beforehand.[31]

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23 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46.

24 *Ibid*., p. 5. Cf. Reinbothe (2010), p. 6, where the provisions on the enforcement of intellectual property rights are called "*a corollary*" of harmonisation of EU Member States' intellectual property rights.

25 *Ibid*., p. 3.

26 *Ibid*., p. 15.

27 *Ibid*., p. 5. On these differences between national enforcement systems, see further e.g. Vandermeulen (2005), p. 30.

28 *Ibid*., pp. 4-12.

29 *Ibid*., p. 3.

30 For an overview of the process leading to the directive's adoption, see Kur (2004), p. 821.

31 Kur (2004), p. 821; Reinbothe (2010), p. 8; Lakits-Josse (2011), p. 520.

Whereas the *adoption* process may have been rather smooth, the same cannot be said of the process of *transposition*. Member States were obliged to transpose the directive into national law by April 2006.[32] Only five Member States did so on time.[33] The overall transposition process was not fully completed until 2009, Germany, Sweden and Luxemburg being the last Member States to ensure transposition.[34] This also means that, to date, the rules set out in this directive have been applicable at national level and available to aggrieved private parties for only a relatively modest period of time. As a consequence the experiences with its practical application and the case law generated in this regard are somewhat limited.

112. The directive's *legal basis* is Article 114 TFEU, i.e. the EU Treaties' provision that allows for the adoption of measures for the approximation of national laws having as their object the establishment and functioning of the internal market.[35] This link between the legislative measures in question and the internal market is extensively explained in the directive's recitals. There the protection of intellectual property is called an essential element of the success of the internal market.[36] The negative consequences of an absence of "*effective means of enforcing intellectual property rights*" are also highlighted.[37] It is said to be necessary therefore to ensure that the substantive law on intellectual property is "*applied effectively*" in the EU. The recitals further note the "*major disparities*" between the Member States as regards the means of enforcing intellectual property rights, for instance as regards provisional measures, the preservation of evidence, the calculation of damages and injunctive relief.[38] This was seen as "*prejudicial to the proper functioning of the internal market and [making] it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the [EU] [and leading] to a weakening of the substantive law on intellectual property rights and to a fragmentation of the internal market in this field*".[39]

113. The IPR Enforcement Directive' *objective* is, according to its recitals, "*to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market*".[40] This has also been identified as its

32 Art. 20 IPR Enforcement Directive 2004/48.
33 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 27.
34 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 4; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 27.
35 On Art. 114 TFEU and legal basis issues generally, see further subsection 10.1.1 below.
36 Recital 1 IPR Enforcement Directive 2004/48.
37 Recital 3 IPR Enforcement Directive 2004/48.
38 Recital 7 IPR Enforcement Directive 2004/48.
39 Recitals 8-9 IPR Enforcement Directive 2004/48.
40 Recital 10 IPR Enforcement Directive 2004/48.

objective in the case law of the Court of Justice.[41] In other cases the Court has however referred in this respect to ensuring simply the "*effective protection of intellectual property*"[42] or "*the enforcement of intellectual property rights by means of the introduction, for that purpose, of various measures, procedures and remedies within the Member States*".[43] The provisions of this directive thus govern the aspects of intellectual property rights related to, first, the enforcement of those rights and, second, infringements of them, by requiring that there must be effective legal remedies designed to prevent, terminate or rectify any such infringement.[44]

114. In its 2010 report on the application of this directive, as well as in several subsequent (consultation) documents, the Commission discussed a possible revision of this directive. For now it remains uncertain whether a legislative amendment will actually be proposed in the near future. The available documents suggest that, if and when such an amendment were to be proposed, it would in all likelihood address a limited number of specific issues, such as the directive's application in an online environment, the clarification of its scope, the involvement of third party-intermediaries and the difficulties that small and medium-sized enterprises are said to experience when trying to enforce their intellectual property rights.[45] Where relevant, these issues are further discussed below.

### *4.1.3. Additional general remarks*

115. The first additional remark to be made here concerns the directive's *impact on the domestic laws* of the Member States. On the one hand, as any other such directive, the IPR Enforcement Directive evidently seeks to harmonise the relevant rules of national law. Consequently it obliges the Member States to amend those laws, be it to varying degrees and in various manners, where they relate to the remedies and procedures for the enforcement of intellectual property rights.[46] On the other hand efforts have been made to ensure that the pre-existing national legal regimes are respected as much as possible. The Commission has stressed that "*account should be taken of the*

41 CoJ case C-406/09, *Realchemie*, para. 49.
42 CoJ case C-324/09, *L'Oréal v. eBay*, para. 131.
43 CoJ case C-180/11, *Bericap*, para. 73; CoJ case C-435/12, *ACI Adam*, para. 60.
44 CoJ case C-180/11, *Bericap*, para. 75; CoJ case C-435/12, *ACI Adam*, para. 61.
45 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, pp. 5-9. See also Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011; Commission, Communication on a single market for intellectual property rights, COM(2011) 287, p. 19; Commission, Consultation on the civil enforcement of intellectual property rights, 2012; Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013; Commission, Communication towards a renewed consensus on the enforcement of intellectual property rights, COM(2014) 392, p. 7.
46 Cf. Speyart (2005), p. 271; Norrgård (2005), p. 507; Harbottle (2006), p. 721; Schaffner (2010), p. 178.

*legal traditions and situation of each Member State*" and that "*the question is to ensure that intellectual property rights are enforced in an equivalent fashion throughout the [EU], but within the existing national frameworks*".[47] The directive explicitly allows Member States to retain or adopt further-going national legislation, in so far as such measures are more favourable for holders of intellectual property rights.[48] Some of its provisions are moreover merely optional.[49] The Commission has described the directive as "*a minimum but standard toolbox*" to combat infringements of intellectual property rights in legal proceedings before the national courts.[50]

116. It can further be noted that the (draft) directive was on the whole rather *critically received* by academics and other interested parties. Some criticized it for not going far enough in harmonising the laws of the Member States.[51] Others questioned in contrast the justification for amending those laws.[52] The latter doubted especially the underlying assessment by the Commission that infringers of intellectual property rights exploited disparities in the domestic laws of the Member States.[53] It was argued that the matters at issue should be left to national law pursuant to the principle of subsidiarity. The 'fragmenting' effects that the directive would have on national laws were also noted. The latter refers to the fact that the directive applies only to infringements of intellectual property rights, whereas the national laws that it affects are typically designed to apply across the board, i.e. also in relation to infringements of other rules of law. Other commentators found several of the directive's provisions too vague and elastic.[54]

117. A third remark is that other rules of EU law may also be of relevance in relation to infringements of EU intellectual property law. To begin with, *substantive EU intellectual property law* can be of importance, not only for the relevant substantive rules it lays down, but also for the enforcement-related provisions it occasionally contains. For instance, the Infosoc Directive set outs some (rather rudimentary) rules on sanctions and remedies in respect of infringements, including actions for damages, injunctions and the seizure of infringing material.[55] The abovementioned legislation establishing EU unitary rights typically contains rather detailed rules on the designa-

47 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 15.
48 See in particular Art. 2(1) and recitals 13 and 14 IPR Enforcement Directive 2004/48. Cf. Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 5.
49 E.g. Art. 12 and Art. 13(2) IPR Enforcement Directive 2004/48.
50 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 5.
51 Massa & Strowell (2004), p. 246.
52 Cornish *et al.* (2003), p. 448.
53 See also Massa & Strowell (2004), p. 244.
54 Kur (2004), p. 830; Gielen (2005), p. 10. In a similar sense, see Geiger, Raynard & Rodà (2011), p. 546; Norrgård (2005), p. 503.
55 Art. 8 Infosoc Directive 2001/29.

tion of specialised national courts, applicable law, jurisdiction, sanctions and provisional and protective measures. Such rules can for example be found in the Community Design Regulation and the Community Trade Mark Regulation.[56] The Community Plant Variety Rights Regulation also includes rules on civil law claims.[57] Those rules specify that infringers may be sued to enjoin such infringements and/or to pay reasonable compensation and make good any further damages. Restitution of unlawfully made profits by the infringer may also take place under this regulation, in accordance with national law. Moreover, pursuant to the implementing rules, where in certain cases a party has repeatedly and intentionally not complied with its obligations, there is an obligation to compensate damages covering at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production of a corresponding quantity.[58]

The IPR Enforcement Directive should further be understood against the background of certain *other provisions of EU law* that can have an impact on the enforcement of intellectual property rights. This directive complements Regulation 608/2013 ('Customs Enforcement Regulation'), which provides the basis for cooperation between private parties holding intellectual property rights and the customs authorities of the Member States.[59] This regulation (and its predecessor) is seen as an important means for fighting intellectual property right infringements where customs matters are concerned.[60] The E-Commerce Directive also contains rules that can be relevant in the present context, especially in relation to liability of online intermediaries in relation to infringements of intellectual property rights.[61] The rules of the IPR Enforcement Directive are without prejudice to those rules set out in the E-Commerce Directive.[62] There is further often a strong fundamental rights dimension to intellectual property rights-related disputes, which means that the Charter can be of particular importance too.[63] The provisions of the Charter that can come into play, depending on the case at hand, include Article 47 on the right to effective judicial protection,[64] Article 17(2), which stipulates that intellectual property shall be protected,[65] and

56 See e.g. Art. 80, 88-90 and 93 Community Designs Regulation 6/2002; Art. 95, 101-103 and 109 Community Trade Mark Regulation 207/2009.

57 Art. 94 and 97 Community Plant Variety Rights Regulation 2100/94. See e.g. also its Art. 101, 103, 104 and 107 concerning jurisdiction, rules of procedure, legal standing and penalties respectively.

58 Art. 18(2) Commission Regulation (EC) No 1768/95 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community plant variety rights, OJ 1995, L 173/14.

59 Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights, OJ 2013, L 181/15.

60 See e.g. Daele (2004), p. 214. See further Vrins & Schneider (2006).

61 Art. 12-15 E-Commerce Directive 2000/31.

62 Art. 2(3)(a) IPR Enforcement Directive 2004/48.

63 Cf. recitals 2 and 32 IPR Enforcement Directive 2004/48.

64 On Article 47 Charter, see further para. 43 above.

65 On Article 17(2) Charter, see further Geiger (2009), p. 113, with further references.

Articles 7 and 8 on the right to respect for private life and protection of personal data respectively.[66]

118. Finally, the IPR Enforcement Directive's *international law context* should not be overlooked.[67] Of particular importance is the Agreement on Trade-Related aspects of Intellectual Property Rights ('TRIPS Agreement'), concluded in the context of the WTO.[68] This agreement, which came into effect on 1 January 1995, applies to all WTO members, including all EU Member States and the EU itself.[69] It sets out general obligations, such as most-favoured nation treatment, national treatment of non-nationals and intergovernmental dispute resolution,[70] as well as substantive rules on the protection of intellectual property rights.[71] Most importantly for the present purposes, the TRIPS Agreement lays down rules on the enforcement of these rights by private parties.[72] The IPR Enforcement Directive being one of the measures through which the EU has given effect to its obligations under the TRIPS Agreement,[73] in many respects the former builds on the latter. In the explanatory memorandum to its proposal for this directive, the Commission repeatedly highlighted this kinship, while noting that on various points the obligations contained in this directive go beyond those set out in the agreement.[74] Consequently the relevant provisions of EU law are, as far as possible, to be interpreted in accordance with the TRIPS Agreement.[75]

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66 Concerning the protection of personal data, Art. 2(3)(a) IPR Enforcement Directive 2004/48 provides explicitly that it does not affect Data Protection Directive 95/46. In addition Art. 16 Charter on the freedom to conduct a business and Art. 11 Charter on the freedom of expression and information can e.g. be of relevance. See also para. 124 below.

67 On the external dimension of intellectual property rights enforcement from an EU perspective, see further Matthews (2010), p. 104.

68 See recitals 4 and 5 IPR Enforcement Directive 2004/48.

69 See Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994, L 336/1.

70 Parts I and V TRIPS Agreement.

71 Part II TRIPS Agreement. In many instances these rules reproduce and extend provisions of pre-existing international conventions established under the aegis of a specialised agency of the United Nations, the World Intellectual Property Organisation ('WIPO'). The main WIPO conventions are the Paris Convention for the protection of industrial property ('Paris Convention') and the Berne Convention for the protection of literary and artistic works ('Berne Convention'). Both conventions also contain certain (rather rudimentary) provisions relating to enforcement. See Art. 2(1) and 9-10 Paris Convention; Art. 15-16 Berne Convention.

72 Part III TRIPS Agreement.

73 CoJ case C-180/11, *Bericap*, para. 73.

74 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 12. See also Commission, Communication on the follow-up to the green paper on combating counterfeiting and piracy in the single market, COM(2000) 789, p. 6.

75 CoJ case C-53/96, *Hermès International*, para. 28.

The parties to the TRIPS Agreement must "*permit effective action*" against any act of infringement, including expeditious and deterrent remedies.[76] The relevant procedures must be "*fair and equitable […] and not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays*".[77] In particular, civil judicial procedures must be available, fulfilling certain minimum requirements as regards the course of proceedings.[78] The TRIPS Agreement further stipulates that the competent judicial authorities must have the authority to order the defendant to produce evidence lying within its control, where the applicant has presented reasonable available evidence sufficient to support its claims.[79] Similarly, but on an optional basis, these authorities may be authorised to order infringing parties to provide information on third parties involved in the production or distribution of the goods or services concerned.[80] Specific remedies are also provided for, including injunctions (i.e. orders to a party to desist from an infringement) and damages, which must be adequate to compensate for the injury suffered because of the infringement.[81] It must further be possible to order the disposal or destruction of the infringing goods, as well as prompt and effective provisional measures.[82] Lastly, the parties to the TRIPS Agreement are under an obligation to provide for criminal sanctions, at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.[83]

Apart from the foregoing, in 2010 agreement was reached at international level on the Anti-Counterfeiting Trade Agreement ('ACTA'). This international agreement was negotiated on an *ad hoc* multilateral basis, outside existing structures such as the WTO. In essence ACTA seeks to further strengthen the possibilities to enforce intellectual property rights worldwide. It builds on the TRIPS Agreement, but it contains further-going provisions on various points, including on enforcement via civil law procedures and criminal law.[84] ACTA has been signed by countries such as the US, Canada, Japan and South Korea, as well as by the EU and most of its Member States. The Commission took the view that ACTA's provisions are fully in line with currently existing EU *acquis*.[85] It proposed finalising the process of ratification that follows the signature.[86] However within the EU

76 Art. 41(1) TRIPS Agreement.
77 Art. 41(2) TRIPS Agreement.
78 Art. 42 TRIPS Agreement.
79 Art. 43(1) TRIPS Agreement.
80 Art. 47 TRIPS Agreement.
81 Art. 44 and 45 TRIPS Agreement respectively.
82 Art. 46 and 50 TRIPS Agreement respectively.
83 Art. 61 TRIPS Agreement.
84 Art. 7-12 and 23-26 ACTA. See also Art. 27 ACTA, which lays down specific provisions relating to enforcement in the digital environment.
85 E.g. Commission, Communication on a single market for intellectual property rights, COM(2011) 287, p. 20.
86 See Commission, Proposal for a decision on the conclusion of ACTA, COM(2011) 380.

this international agreement proved to be very controversial. From various sides criticism was voiced, relating *inter alia* to the non-transparent manner in which ACTA had been negotiated, the correctness of the Commission's above assessment, the impact it might have on the right to privacy and protection of personal data and more generally the absence of a sufficiently balanced approach.[87] In the end the European Parliament refused to give its consent, which is required for an international agreement such as this one to be ratified at EU level.[88] As a consequence the EU did not ratify ACTA and is therefore not bound by it.

### 4.2. Remedies

The core of the IPR Enforcement Directive consists of a set of specific private enforcement remedies, which for the present purposes can be divided into five categories. To begin with, there are measures related to obtaining and preserving evidence and information relevant to intellectual property disputes. These measures, which take an important place under this directive, are largely of a preliminary nature, in that they normally precede any assessment on the merits of the case. In the second place, the directive sets out a number of measures of a provisional and precautionary nature. It concerns in particular interlocutory injunctions, to be issued by means of interim measures. As regards possible decisions on the merits, in the third place, the directive foresees the possibility for the competent court to order certain corrective measures and 'permanent' injunctions. The fourth remedy concerns another possible decision on the merits, namely as regards actions for damages. Fifthly and finally, there is the possibility for the national court to order two complementary measures under this directive, namely the payment of legal costs and publicity measures. These five categories are subsequently discussed in the following.

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87 E.g. European Parliament, Resolution on the transparency and the state of play of ACTA negotiations, P7_TA(2010)0058; European Data Protection Supervisor, Opinion on the current negotiations by the EU of an Anti-Counterfeiting Trade Agreement (ACTA), OJ 2010, C 147/1; European Parliament, Resolution on the Anti-Counterfeiting Trade Agreement (ACTA), P7_TA(2010)0432. See also European academics (2011), p. 65. For the Commission's reply to this latter submission, see Commission, Comments on the "opinion of European academics on ACTA", April 2011. For a further explanation from the side of the Commission officials involved in the ACTA negotiations, see Devigne, Velasco-Martins & Iliopoulou (2010), pp. 33-42.

88 European Parliament, Legislative resolution on the draft Council decision on the conclusion of ACTA, P7_TA-PROV(2012)0287. The European Parliament's consent was required under Art. 218(6) TFEU.

### 4.2.1. Disclosure measures

119. The recitals of the IPR Enforcement Directive state that "*evidence is an element of paramount importance for establishing the infringement of intellectual property rights*".[89] This view is widely shared by academics, practitioners and other stakeholders alike.[90] The EU legislature also considered it of importance, with a view to ensuring a high level of protection, to allow a rightholder to obtain precise information on the origin of infringing goods or services, relevant distribution channels or the identity of any third parties involved in the infringement.[91] Against this background, the IPR Enforcement Directive lays down three sorts of measures relating to evidence and information.

120. In the first place, the directive provides in a general manner that the competent national court may order the defendant to *present evidence* lying within the latter's control, subject to the protection of confidential information. However this can only be done upon the private party initiating the proceedings having first presented "*reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party*".[92] Thus, not only is a court order required and is confidential information protected, the applicant must also establish a *prima facie* case and specify which evidence is concerned. This provision is modelled on the TRIPS Agreement.[93] The directive adds that on an optional basis Member States may provide that "*a reasonable sample of a substantial number of copies of a work or any other protected object*" is considered to constitute reasonable evidence.[94]

Apart from this general provision, under the same conditions the Member States must also ensure, more specifically, that their courts can order, where appropriate, the communication of banking, financial or commercial documents under the control of the opposing party.[95] Under the directive this latter measure is limited however to cases of infringements committed on a commercial scale. In the recitals it is clarified that this refers to acts carried out for direct or indirect commercial advantage, and that this would normally exclude acts carried out by end consumers acting in good faith.[96] In this manner the directive seeks to ensure a degree of proportionality between

89 Recital 20 IPR Enforcement Directive 2004/48.
90 See e.g. Gielen (2005), p. 8; Bonadio (2008), p. 321; Hess (2008), pp. 289-290; Cornish, Llewelyn & Aplin (2010), pp. 88-89; Lakits-Josse (2011), pp. 529 and 531. See also Study European observatory on counterfeiting and piracy (undated-a), p. 2.
91 Recital 21 IPR Enforcement Directive 2004/48.
92 Art. 6(1) IPR Enforcement Directive 2004/48.
93 Art. 43 TRIPS Agreement. Cf. Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 20.
94 Art. 6(1) IPR Enforcement Directive 2004/48.
95 Art. 6(2) IPR Enforcement Directive 2004/48.
96 Recital 14 IPR Enforcement Directive 2004/18.

the (scale of) the infringements and the measures imposed as a consequence thereof.

121. In the second place, particularly when confronted with the possibility of having to present evidence lying within its control, discussed above, a party having infringed intellectual property rights might be inclined to destroy or otherwise dispose of relevant evidence.[97] It must therefore be ensured under the IPR Enforcement Directive that, even before proceedings on the merits of the case are initiated, a court can order "*prompt and effective*" provisional measures to *preserve evidence*.[98] The applicable conditions are essentially similar to the ones mentioned in the previous paragraph as regards the presentation of evidence. The directive specifies that these preservation measures may take the form of the detailed description (with or without taking samples) or the physical seizure of the infringing goods or in the production or distribution of those goods or of documents relating thereto. This thus entails the issuing of *ex parte* search orders, allowing a private party to enter the premises of another party for the preservation of evidence of alleged infringements of intellectual property rights.

The IPR Enforcement Directive indicates that in certain cases this remedy may be granted without the other party having been heard. On the one hand such an approach is understandable, because hearing that party might mean that he has an opportunity to destroy the evidence before a court order is issued. On the other hand this obviously goes rather far, as it denies that party of its right to contest the claims made by the applicant. Therefore this measure can only be ordered where it is necessary, "*in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed*".[99] A set of additional procedural safeguards are also provided for, including an obligation to inform the party that is subject to this measure afterwards, the possibility of an *ex post* review and hearing, the lodging of adequate security by the applicant, revocation if no proceedings on the merits are initiated within a set time period and compensation to be paid where it turns out that the measure was incorrectly applied for.[100]

This provisional measure to preserve evidence has been modelled upon arrangements that already existed in various Member States, in particular what used to be known as 'Anton Pillar orders' under English law and the French *saisie-contrefaçon* procedure.[101] This English law equivalent has been said to have greatly contributed to the speed and effectiveness of the civil

97 Cf. Study European observatory on counterfeiting and piracy (undated-a), p. 2.
98 Art. 7(1) IPR Enforcement Directive 2004/48.
99 Art. 7(1) IPR Enforcement Directive 2004/48.
100 Art. 7(1)-(4) IPR Enforcement Directive 2004/48.
101 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 13 and 20; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 8.

process in dealing with infringers of intellectual property rights.[102] Its inclusion in the IPR Enforcement Directive means that this measure has been 'generalised', in that it must be made available in all Member States and in relation to all intellectual property rights covered by the directive. In some cases this 'generalisation' has gone even further, for instance in the Netherlands, where the rules in question have been applied by analogy also to cases that do not concern (alleged) infringements of intellectual property rights.[103]

122. In the third place, the IPR Enforcement Directive also provides for what it calls a private party's '*right of information*'.[104] This provision is modelled on the pre-existing laws of certain Member States, notably the Benelux countries and Germany.[105] According to the Commission, its 'elevation' to the European level, upon a suggestion by the European Parliament, found unanimous support of interested circles.[106] This right is concerned with information on the origin and the distribution networks of the infringing goods or services, such as names and addresses of producers or suppliers. It can also concern information on quantities produced and prices obtained. Whereas the former information can be of obvious importance to determine whether and how an infringement has been committed, the latter information can *inter alia* be of relevance to determine its scale and the damage it may have caused. In response to a "*justified and proportionate request*", under this directive the national court must be able to order the disclosure of the aforementioned information.

One possibility is that this order is addressed to the (alleged) infringer. However the directive also provides for the possibility that the order is addressed to certain *third parties*, namely where the latter were found to be in possession of the infringing goods, using the infringing services or providing services used in the infringing activities. Covered are also third parties that have been indicated by any of the aforementioned persons as being involved in the production, manufacture or distribution of the goods and services in question. In each of these cases the third party in question can only be involved if its activities take place on a commercial scale. Consumers acting in good faith are consequently in principle excluded.[107] The providers of services used in the infringing activities are known as intermediaries.[108] One can think of undertakings transporting the goods concerned or, in an online environment, providers of internet access or of services for online market places. This extension of the right of information so as to cov-

102 Cornish, Llewelyn & Aplin (2010), pp. 89-90.
103 HR case 12/05529, *UGH*.
104 Art. 8 IPR Enforcement Directive 2004/48.
105 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 20.
106 *Ibid*.
107 See recital 14 IPR Enforcement Directive 2004/48.
108 Cf. recital 23 IPR Enforcement Directive 2004/48.

er also certain third parties is an example of a situation where the directive goes beyond the regime of the TRIPS Agreement, as the latter provides for this measure only on an optional basis.[109]

123. As regard the *functioning in practice* of the abovementioned measures, the Commission's 2010 assessment of the application of this directive suggests that the overall picture is rather positive. For instance, the abovementioned possibility of using samples as evidence is said to have be on the whole considered favourably by stakeholders.[110] Even if the provision in question is only optional, it has been introduced in many Member States. This was found to have led to a general improvement in the enforcement possibilities. The abovementioned provisional measures for the preservation of evidence were also highlighted as having helped rendering the enforcement of intellectual property rights more effective.[111] By contrast the possibility of description orders, included on an optional basis in the directive, was reported to have been little used by the Member States. Many found this to be more common in a criminal law context than in a civil law context.[112] As regards the abovementioned right of information, the possibility of requiring information from third parties-intermediaries was reported to be novel to most Member States. It was said to have significantly increased the ability to trace and obtain knowledge of parties infringing intellectual property rights and to have facilitated the calculation of damages.[113]

That is not to say that no critical comments were made in this context. The collection of evidence in cross-border cases reportedly remains difficult for example.[114] Broadly speaking, this refers to situations where the applicant and the defendant are not established in the same Member State or where an element relevant to the dispute falls within the jurisdiction of another Member State. In addition gathering evidence in relation to infringements committed via the internet was singled out as a particular difficulty, both in light of the anonymity that this medium can offer and the formal requirements in terms of acceptable evidence that apply in some national jurisdictions.[115] Lastly, some stakeholders considered several specific issues to be in need of clarification, including the *prima facie* evidence needed in

109 Art. 47 TRIPS Agreement.

110 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 3; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, pp. 7-8.

111 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 3.

112 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 8.

113 *Ibid*., p. 11. As regards the calculation of damages, see also para. 133 below.

114 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 9; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 8. See also Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, p. 18. See further Hess (2008), p. 289.

115 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 8.

order to obtain a court order, the degree to which applicants must specify the information to which their request for disclosure relates, the requirement that the evidence must be under the control of the other party and the scope of the protection offered to confidential information.[116] As regards the aforementioned *ex parte* search orders, rightholders asked for a further strengthening, while academics and consumer organisations warned against risks of abuse.[117]

124. Finally, and more generally, the involvement of *third party-intermediaries* in the context of the aforementioned right of information has proven to be particularly controversial, especially in online situations. This possibility regularly leads to litigation where, besides the IPR Enforcement Directive, various other acts of secondary EU law as well as a number of fundamental rights are involved.[118] A particular concern in this respect is often the protection of the right to privacy and protection of personal data. One such case is *Promusicae*, decided by the Court of Justice in 2008 on the basis of a Spanish preliminary reference.[119] Promusicae, a non-profit organisation of holders of intellectual property rights, applied for a court order addressed to an internet access provider to disclose the identities and addresses of some of the latter's clients. The persons in question had allegedly infringed intellectual property rights held by Promusicae's members by using a 'peer-to-peer' file exchange programme. Promusicae needed this information to be able to initiate legal proceedings against those persons. The Court of Justice held that, although this is not excluded, the IPR Enforcement Directive's aforementioned right of information does not mean that the Member States are *obliged* to provide for the disclosure personal data, which are protected *inter alia* under the E-Privacy Directive,[120] in the context of civil proceedings.[121] As regards the relevant fundamental rights, at issue were on the one hand the right to protection of intellectual property and right to an effective remedy on the side of the rightholders and on the other hand the right to privacy and protection of personal data of the persons concerned.[122] The Court ruled that *a fair balance* needs to be struck between these various fundamental rights, taking account also of the principle of proportionality.[123] In subse-

116 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 9; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 9. See also Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, pp. 18-19.

117 Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, p. 19.

118 See further Van Eecke (2011), p. 1455.

119 CoJ case C-275/06, *Promusicae*. See also CoJ Order case C-557/07, *LSG*.

120 See in particular Art. 5(1) E-Privacy Directive 2002/58.

121 CoJ case C-275/06, *Promusicae*, para. 57-58. See Art. 8(3)(e) IPR Enforcement Directive 2004/48.

122 Art. 17(2), 47, 7 and 8 Charter respectively.

123 CoJ case C-275/06, *Promusicae*, para. 68.

quent case law it added that national legislation that provides for such a possibility of disclosure of personal data is likely to ensure the required fair balance, where it enables the court seised to weigh the conflicting interests involved on the basis of the facts of each case and taking due account of the requirements of proportionality.[124]

In 2010 the Commission limited itself in this respect to the statement that "*[f]urther evaluations could be needed*" regarding the extent to which the Member States complied with the requirements resulting from the above case law.[125] The fate of ACTA, discussed above, where similar concerns played an important role, underlines the sensitivity of this matter.[126] This is further confirmed by the responses to the consultations on the function and future of the IPR Enforcement Directive, including from the side of several Member States.[127] This possible involvement of third party-intermediaries in the context of civil proceedings between holders of intellectual property rights and alleged infringers has been justified essentially on the basis of the central role of these (online) intermediaries as 'gatekeepers' and the information that they often possess in that capacity.[128] The Court of Justice seems receptive to this view.[129] Predictably, (organisations of) rightholders tend to be in favour of such an approach involving third party-intermediaries. But organisations concerned with the protection of online freedoms, consumer organisations and intermediaries themselves speak of a 'privatisation' of enforcement and stress the risk of 'private censorship'. These opponents argue that intermediaries should not act as a sort of 'internet police', forcing them to take arbitrary decisions with respect to their customers based on allegations, and that in this connection personal data should only be disclosed to the competent public authorities and not to other private parties.

### *4.2.2. Interlocutory injunctions and seizures*

125. The IPR Enforcement Directive specifies a number of *provisional and precautionary measures* that national courts must be able to take. In all cases the measures in question, further discussed below, are to be ordered at the applicant's request. The applicable requirements to be fulfilled before such

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124 CoJ case C-461/10, *Bonnier*, para. 57-60.

125 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, pp. 7-8. Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, pp. 12-13.

126 See para. 118 above.

127 Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, pp. 4-7 and 11-14. See also Commission, Responses to the public hearing on IPR Enforcement Directive 2004/48, June 2011; Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 14.

128 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 16. See also Frabboni (2010), p. 119.

129 See e.g. CoJ case C-314/12, *UPC Telekabel Wien*, para. 27, where it is held in connection to the injunctions referred to in Art. 8(3) Infosoc Directive 2001/29 that "*such intermediaries are, in many cases, best placed to bring such infringing activities to an end*".

an order can be made are essentially similar to those discussed in the foregoing subsection as regards the preservation of evidence.[130] Accordingly the applicant must submit reasonably available evidence and there must be a possibility for these orders to be made in appropriate cases without having heard the opposing party, subject to a set of specific safeguards.[131]

126. A first type of measure of this kind is an *interlocutory injunction*. In its 2003 proposal for the IPR Enforcement Directive the Commission took the view that provisional measures are of paramount importance in the event of an infringement of intellectual property rights.[132] Under this directive this remedy entails preventing any imminent infringement as well as provisionally forbidding the continuation of an alleged infringement.[133] This being an interim measure, there is no need to await a decision on the merits of the case, as is clarified in the recitals.[134] There it is further said that these measures are particularly justified where any delay would cause irreparable harm to the private party holding the intellectual property right. In other words, this remedy is meant for cases where rapid interference is required by means of the establishment of interim measures. The definitive legal situation can subsequently be determined in an action on the merits. However, as the relevant recital also recalls, this should not come at the expense of the defendant's rights of defence and the requirements of proportionality.

In this connection the directive sets out several complementary rules. For instance, it is specified that this remedy may also entail making the continuation of the allegedly infringing activity subject to the lodging of a guarantee. That guarantee can then be used to ensure that the rightholder is compensated, should it later emerge that he is entitled thereto. The directive also specifies that, under the same conditions, these interlocutory injunctions can also be issued against intermediaries, i.e. third parties whose services are being used to infringe intellectual property rights. In those cases the relevant conditions and procedures are to be determined by national law, according to the relevant recital.[135] As was the case with the extension of the right of information to intermediaries,[136] also in this case the coverage of these third parties marked a step beyond the regime of the TRIPS Agreement.[137] This approach was novel to most Member States.[138] Lastly, it is stipulated that the above injunctions can be made subject to a recurring penalty payment, where provided for by national law. That is for instance the

130 See para. 121 above.
131 Art. 9(3)-(7) IPR Enforcement Directive 2004/48.
132 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 21.
133 Art. 9(1)(a) IPR Enforcement Directive 2004/48.
134 Recital 22 IPR Enforcement Directive 2004/48.
135 Recital 22 IPR Enforcement Directive 2004/48.
136 See para. 122 above.
137 Art. 50 TRIPS Agreement. On this agreement, see para. 118 above.
138 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 15.

case in the Netherlands, where these payments are due to the applicant, as well as in Slovakia and Germany, where they are instead to be paid to the court that imposed this measure.[139]

127. It appears that the *functioning in practice* of the above remedy is mostly considered rather positively. Interlocutory injunctions are said to be granted relatively quickly.[140] Reportedly these injunctions, being interim measures, often lead to a settlement between the parties, thus making legal proceedings on the merits unnecessary. The Commission therefore called this the "*main enforcement remedy*" for most private parties concerned.[141] Also the possibility of issuing such injunctions against third party-intermediaries was reported to be relatively frequently used, once again especially in relation to alleged online infringements.[142] This can for instance lead to the blocking of a website or taking down specific information. This generally rather favourable assessment of this remedy is echoed in other studies and in the legal literature.[143] This is consistent with the finding that stopping the infringing activity is, together with dissuading future infringements, typically the prime objective of private parties that are confronted with infringements of their intellectual property rights.[144]

Yet in the context of the said assessment certain complaints were also observed. These include the level of evidence required in some Member States, such as Finland, among other things as regards the level of certainty that an infringement has actually taken place before these provisional measures are granted.[145] Other sources suggest however that evidence is generally not a major concern in this respect.[146] The Commission further reported that the legal costs (lawyers, court fees, experts, etc.) involved in obtaining

139 *Ibid*., p. 13.

140 *Ibid*., pp. 13-15.

141 *Ibid*., p. 14. See also Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 15.

142 As regards the issues related to the involvement of third party-intermediaries under IPR Enforcement Directive 2004/48, see in particular para. 124 above and 131 below.

143 See e.g. Study European observatory on counterfeiting and piracy (undated-b), p. 4. As regards the legal literature, see e.g. Bonadio (2008), p. 322; Cornish, Llewelyn & Aplin (2010), p. 75. See also Reinbothe (2010), p. 7 (concerning Art. 8(3) Infosoc Directive 2001/29). Note that interlocutory injunctions often already played an important role before the entry into force of this directive. See e.g. Kur (2004), p. 825; Meier-Beck (2004), pp. 113-114.

144 Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 7.

145 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 14.

146 Study European observatory on counterfeiting and piracy (undated-b), p. 5. According to this study, in most Member States rightholders encounter no difficulties in providing the required evidence as regards the applicant being the rightholder and the imminent infringement of this party's right.

this remedy can be a concern.[147] However again there are other reports suggesting that the amounts involved are on the whole comparably modest.[148] In the legal literature this remedy is in fact mostly seen as relatively cheap to obtain.[149] An arguably more substantial – or, it appears, at least more widely shared – concern with respect to especially interlocutory injunctions is their functioning in cross-border situations.[150] That applies especially where the intellectual property right at issue is not an EU unitary right.[151] In the latter case, pursuant to the relevant EU regulations, as explained by the Court of Justice, both the jurisdiction of the national court seised and the territorial scope of the right granted cover in principle the entire EU.[152] Although also in these cases stakeholders have reported difficulties in practice in obtaining cross-border interlocutory injunctions,[153] these difficulties are typically considerably greater in relation to intellectual property rights based on national law (notably patents[154]). For here the general rule is that jurisdiction and territorial scope are limited to national borders.[155]

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147 In Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 14 (n. 35), amounts ranging from € 3.500 to € 25.000, and up to € 40.000 in patent infringement cases are cited. These amounts appear to be based on Study European observatory on counterfeiting and piracy (undated-b), pp. 6-7. However the relevant section in this latter report relates specifically to measures to preserve evidence, and not to interlocutory injunctions.

148 Study European observatory on counterfeiting and piracy (undated-b), pp. 6-7. Here it is reported that obtaining interlocutory injunctions (and other provisional and precautionary remedies) can be rather costly in some Member States, but much less so in other Member States. The amounts cited entail at most a few thousands euros and often less.

149 Bonadio (2008), p. 322; Cornish, Llewelyn & Aplin (2010), p. 75.

150 Note that these concerns generally apply in much the same way to the 'permanent' injunctions, discussed in para. 130 below. For practical reasons both issues are discussed jointly here. See Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 8. See further Kur (2006), p. 844; Joseph (2006), p. 850; Döring & Van Velsen (2006), p. 858. As regards EU unitary rights, see Fields (2011), p. 597; Schnell (2011), p. 210.

151 See para. 108 above.

152 Art. 103(2) Community Trade Mark Regulation 207/2009; Art. 90(3) Community Design Regulation 2006/6. See e.g. CoJ case C-235/09, *DHL Express*, para. 50.

153 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 18.

154 In particular before the patent package, referred to in para. 108 above, having entered into force.

155 In the late 1990s certain national courts (especially in the Netherlands, but later also in other Member States, such as Germany) issued injunctions which had effects also beyond the borders of the jurisdiction in question. This can obviously be attractive for rightholders, for example where various infringers belonging to the same group infringe a patent in several jurisdictions in an identical manner. However in 2006 the CoJ marked certain clear limits to these practices. It did so on the basis of (what is now) Brussels I Regulation 44/2001 (see its Art. 22(4)). See in particular CoJ case C-539/03, *Roche Nederland*, para. 41. See also CoJ case C-4/03, *GAT v. LUK*, para. 31. Cf. Nuyts (2008); Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 18.

128. Apart from these interlocutory injunctions, the IPR Enforcement Directive provides for two other sorts of provisional and precautionary measures, both of which involve the *seizure of certain goods*. To begin with, there is the possibility for the court to order the seizure or delivery up of the goods suspected of infringing an intellectual property right.[156] This serves to prevent their entry into or movement within the channels of commerce. In other words, the idea is create a possibility to intervene before the goods in question disappear out of sight or become difficult to trace for the private party wishing to initiate private enforcement proceedings. The national court must in addition be able to order the precautionary seizure of movable and immovable property of the alleged infringing party, including the blocking of bank accounts and other assets.[157] This latter provision has been modelled on an arrangement found in English law, known as a 'freezing' (or 'Mareva') injunction.[158] Under the directive it can only be ordered in cases of infringements committed on a commercial scale. It is further limited to situations where the applicant has demonstrated that there are circumstances likely to endanger the recovery of damages. It is specified that, to this end, the competent authorities may order the communication of back, financial or commercial documents, or appropriate access to the relevant information. It follows that here the emphasis is not so much on the prevention of the infringement or limiting the damage that may emerge as a result thereof, but that this latter remedy rather aims to ensure that any such damage, if and when it emerges, can actually be compensated as much as possible.

#### *4.2.3. Corrective measures and 'permanent' injunctions*

129. Turning to the various remedies for which the IPR Enforcement Directive provides as a result of a decision by the competent national court on the merits of the case, a first type concerns what the directive calls *corrective measures*. This refers to the "*appropriate measures*" that must be available with regard to the infringing goods or the materials principally used in their creation.[159] These measures can take (at least) three forms, namely recall from the channels of commerce, definitive removal from those channels or destruction of the goods and materials in question. These measures are to be taken in principle at the expense of the infringing party.[160] Proportionality as well as respect for the interests of third parties must be ensured when requests for these measures are considered.[161] In a sense the measures

156 Art. 9(1)(b) IPR Enforcement Directive 2004/48.
157 Art. 9(2) IPR Enforcement Directive 2004/48.
158 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 13 and 21.
159 Art. 10(1) IPR Enforcement Directive 2004/48.
160 Art. 10(2) IPR Enforcement Directive 2004/48.
161 Art. 10(3) IPR Enforcement Directive 2004/48.

referred to here can be seen as the 'permanent' version of the possibilities of seizure on a provisional basis, discussed in the previous subsection.[162]

The possibility of recall and definitive removal of infringing goods from the channels of commerce, which has been developed originally in the national laws of the Netherlands and Belgium, was new to most other Member States.[163] These measures appear to be generally little used in practice, something that is said to be due largely to the fact that they are difficult to enforce where the goods are no longer in the infringer's possession.[164] The possibility of having infringing goods destructed, based on the TRIPS Agreement,[165] has been reported to be the most common corrective measure.[166] Nonetheless the costs of these measures are often seen as a particular problem. Even if the directive makes it clear that these costs are to be borne by the defendant, in practice they are often first incurred by the applicant. Having these costs reimbursed may then prove difficult, for instance because the former is unknown or insolvent.[167]

130. On the whole of greater practical importance is the possibility under the IPR Enforcement Directive for a private party to apply for *injunctions* aimed at prohibiting the continuation of an infringement.[168] Also this is, as it were, the 'permanent' version of the possibility of issuing interlocutory injunctions, discussed earlier.[169] According to the directive, where provided for by national law, non-compliance with these 'permanent' injunctions shall, where appropriate, be subject to a recurring penalty payment with a view to ensuring compliance. As was the case with those interlocutory injunctions, also these 'permanent' injunctions appear to be regularly used in practice.[170] The remarks made in the foregoing as regards the functioning of this remedy in cross-border situations also apply here, *mutatis mutandis*.[171]

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162 See para. 128 above.
163 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 22.
164 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 19.
165 Art. 46 TRIPS Agreement. Cf. Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 22.
166 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 20. See also Study European observatory on counterfeiting and piracy (undated-c), p. 1.
167 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 8; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 20.
168 Art. 11 IPR Enforcement Directive 2004/48. See also Art. 8(3) Infosoc Directive 2001/29.
169 See para. 126 above.
170 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 17.
171 See para. 127 above.

The IPR Enforcement Directive expressly stipulates that these 'permanent' injunctions may also be addressed to intermediaries, i.e. a third party whose services are used for the infringement.[172] For most Member States this was a novelty.[173] The Commission has singled out this remedy as one of the elements that have helped render the enforcement of intellectual property rights in the EU more effective.[174] However, once more, this possible involvement of these third parties in civil disputes has led to legal complexities and controversies. This debate is to some extent similar to the one on their involvement in relation to the right of information. Reference is therefore made to the foregoing.[175] In addition there has been some discussion as to whether it must first be established that these intermediaries can be held liable or have infringed certain duties before interlocutory injunctions can be granted, as is reported to be the case in Member States such as Austria, the Czech Republic, Germany and Latvia.[176] If so, that then raises the question of the relationship between this measure and the liability exemptions for online intermediaries laid down in the E-Commerce Directive.[177] The Commission stressed that injunctions are not intended as penalties and that the IPR Enforcement Directive contains no such liability requirement.[178] It considered that the establishment of liability is therefore not required.[179] In 2010 it stated its intention to explore how to involve intermediaries more closely.[180]

131. In the meantime the Court of Justice has clarified a number of issues related to the issuing of injunctions against (online) intermediaries.[181] Of particular importance is the 2011 judgment in *L'Oréal v. eBay*.[182] In this case, an English preliminary reference, a number of persons had sold products protected by intellectual property rights held by an undertaking (L'Oréal) on an online market place (eBay). Before the competent national court, the rightholder applied *inter alia* for an injunction under the IPR Enforcement Directive against the online market place in its capacity as intermediary. The

172 See the last sentence of Art. 11 IPR Enforcement Directive 2004/48.
173 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 17.
174 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 3.
175 See para. 124 above.
176 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 16; Study European observatory on counterfeiting and piracy (undated-b), p. 9.
177 Art. 12-15 E-Commerce Directive 2001/31. Cf. Study European observatory on counterfeiting and piracy (undated-b), pp. 5 and 9.
178 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 16.
179 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 7.
180 *Ibid*.
181 On the concept of an (online) 'intermediary' (in connection to Art. 8(3) Infosoc Directive 2001/29), see CoJ case C-314/12, *UPC Telekabel Wien*, para. 30-39.
182 CoJ case C-324/09, *L'Oréal v. eBay*.

injunction applied for entailed an order to take the necessary measures to prevent future infringements occurring on its website. The following four aspects of the Court's ruling in this case, as confirmed by and further elaborated on in subsequent rulings, stand out for the present purposes.

First, it was held that the term 'injunction', when used in connection to intermediaries, is to be understood more broadly than when an infringing party is the addressee thereof. In the latter case, as is apparent from the wording of the directive, such injunctions are limited to prohibiting the continuation of an infringement.[183] But in relation to intermediaries it simply speaks of 'injunctions'. From this the Court deduced that in those cases the injunction can also be aimed at *preventing* future infringements.[184] Second, it was clarified that the rules for the operation of these injunctions, such as the conditions to be met and the procedures to be followed, are in principle a matter for *national* law.[185] Yet those rules of national law, as well as their interpretation by the national courts, must be such that the directive's objective can be achieved and its limitations are respected.[186] In particular, an online market place cannot be obliged to actively monitor all the data of each of its customers, as this would be against the express prohibition to this effect laid down in the E-Commerce Directive.[187] It would also be contrary to the IPR Enforcement Directive's 'general rules' which state that any measure to be taken must be fair and proportionate and not be excessively costly.[188] Third, the need to strike a *fair balance* between the various (fundamental) rights and interests at stake when imposing any of the measures at issue here was highlighted.[189] Finally, implicit in this ruling appears to be that, in line with the Commission's abovementioned submissions, there is no need for the *liability* of the intermediary to be established before injunctions can be imposed.

132. As a final point it should be noted that the IPR Enforcement Directive offers the Member States to provide for what are called '*alternative measures*'.[190] This is meant as an alternative to the corrective measures and the 'permanent' injunctions discussed above. This possibility entails, in appro-

183 See the first sentence of Art. 11 IPR Enforcement Directive 2004/48.

184 CoJ case C-324/09, *L'Oréal v. eBay*, para. 128-134. See also CoJ case C-70/10, *Scarlet Extended*, para. 31; CoJ case C-360/10, *SABAM*, para. 29.

185 Cf. recital 23 IPR Enforcement Directive 2004/48.

186 See also CoJ case C-314/12, *UPC Telekabel Wien*, para. 43-44 (concerning the injunctions referred to in Art. 8(3) Infosoc Directive 2001/29).

187 CoJ case C-324/09, *L'Oréal v. eBay*, para. 135-139. See Art. 15(1) E-Commerce Directive 2000/31. See also CoJ case C-70/10, *Scarlet Extended*, para. 32-36; CoJ case C-360/10, *SABAM*, para. 30-34.

188 Art. 3(1) IPR Enforcement Directive 2004/48. See also para. 144 below.

189 CoJ case C-324/09, *L'Oréal v. eBay*, para. 143. Here a reference was made to CoJ case C-275/06, *Promusicae*, discussed in para. 124 above. See also CoJ case C-70/10, *Scarlet Extended*, para. 41-46; CoJ case C-360/10, *SABAM*, para. 39-51; CoJ case C-314/12, *UPC Telekabel Wien*, para. 46.

190 Art. 12 IPR Enforcement Directive 2004/48.

priate cases and at the request of the person liable to be subject to the measure in question, a court order for the defendant to pay pecuniary compensation to the injured party. In other words, where the Member State in question has made use of this optional provision, it allows the defendant to 'buy off' for instance an imminent order to recall infringing goods or a particular injunction. In essence the underlying idea is to prevent disproportionate outcomes from occurring.[191] The directive makes this possibility subject to certain conditions however. The defendant must have acted unintentionally and without negligence, it must emerge that the execution of the measure in question would cause the defendant disproportionate harm, and the compensation to be paid to the injured party must appear reasonable satisfactory. In 2010 less than half of the Member States (including Denmark, Poland, Romania, Sweden and Germany) had made use of this option.[192]

#### *4.2.4. Actions for damages*

133. The provision of the IPR Enforcement Directive on *actions for damages* proved to be one of a limited number of issues that were controversial in the course of the legislative process leading to this directive's adoption. This aspect of the Commission's proposal was hotly debated and underwent significant changes.[193] A key issue was the means of qualifying and quantifying the damages due. The point of departure was that private parties holding intellectual property rights were reported to generally encounter difficulties establishing and proving the precise level of damages suffered.[194] As was noted above, the TRIPS Agreement provides that damages should be "*adequate*" to compensate for the injury suffered in cases of wilful or negligent infringements.[195] At the level of the Member States at least three different methods were in use before the adoption of the directive, whereby the details of each of them varied widely and some Member States also allowed for combining several of these methods. In a nutshell, these three methods entailed calculating the amount of damages due on the basis of: (i) the actual loss suffered by the applicant; (ii) the infringer's unlawful profits made in

191 Cf. recital 25 IPR Enforcement Directive 2004/48. See also Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 22.

192 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, pp. 20-21.

193 Cf. Reinbothe (2010), p. 19.

194 Cf. Commission, Green paper on combating counterfeiting and piracy in the single market, COM(98) 569, pp. 20-21.

195 Art. 45(1) TRIPS Agreement. In its Art. 45(2) it is added that the parties to this agreement *may* authorise their judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or without reasonable grounds to know, engage in infringing activity.

connection to the infringement; or (iii) the royalties or fees that would have been due had the infringer requested authorisation from the rightholder.[196]

134. In its *proposal* the Commission sought to supplement the TRIPS Agreement and to tackle the abovementioned disparities.[197] It proposed taking this agreement's 'adequate damages' criterion as the starting point in cases of wilful or negligent infringements. On that basis it then specified this further through two – alternative – methods of calculating the damages due. The first of these methods was the establishment of fixed-rate damages, amounting to *double the royalties or fees* that would have been due. The second method entailed the award of damages corresponding to the *actual prejudice suffered*, including lost profits. On an optional basis it was proposed that this latter method would also encompass elements other than economic factors (i.e. non-material damage), such as the moral prejudice caused. It would also include the recovery, for the benefit of the rightholder, of all the profits made by the infringer attributable to the infringement in question. In the Commission's view, the latter was meant to act as a "*deterrent*", particularly with respect to intentional infringements perpetrated on a commercial scale.[198] Regarding these 'unfair profits' it also proposed including a *rule of evidence*, pursuant to which it would be for the rightholder to submit evidence only with regard to the amount of the gross income achieved by the infringer. It would then be for the latter to provide evidence of its deductible expenses and profits attributable to factors other than the protected object.[199]

Especially this first proposed method was critically received by the Member States represented in Council however.[200] No clear single reason for this opposition emerges from the available preparatory documents; this is likely to have varied per Member State. The abovementioned diversity at national level probably played a role, in that most Member States may well have been keen to avoid having to amend their national laws as they stood. Another probable factor is that – even if the Commission had argued the contrary[201] – many understood the proposed fixed-rate 'double royalties' arrangement as constituting, or at least coming (too) close to, a form of punitive damages, i.e. damages that are not so much aimed at compensating the injury suffered, but rather at punishing and deterring infringers.[202]

196 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 14.
197 *Ibid*., pp. 14 and 23.
198 *Ibid*., p. 23.
199 *Ibid*., pp. 23 and 38-39 (Art. 17(2)).
200 Council, doc. 12055/03, p. 9-10.
201 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 23.
202 Cf. Kur (2004), p. 827; Meier-Beck (2004), p. 122; Benhamou (2009), p. 147; Cohen & Mottet Haugaard (2010), p. 376-377; Lakits-Josse (2011), p. 545.

135. The *final text* of the IPR Enforcement Directive does not include the provision on the doubling of the royalties or fees, referred to above. Instead the directive's damages regime builds on the second method proposed by the Commission. It takes as the central criterion, for wilful and negligent infringements, the award of damages "*appropriate to the actual prejudice suffered*".[203] Two more detailed methods of setting these damages are then provided for. These somewhat resemble, but nonetheless differ from the ones initially proposed by the Commission.

The first method is based on taking into account "*all appropriate aspects*", including lost profits of the rightholder, unfair profits made by the infringer and, "*in appropriate cases*", non-economic factors such as moral prejudice. In deviation from the Commission's proposal, no rule of evidence has been included as regards the extent of these unfair profits. The second – alternative – method provided for in the IPR Enforcement Directive is the setting of damages as "*a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due*". Thus, the Commission proposal to provide for compensation of twice the royalties has been reduced to (at least) once. In the recitals of this directive it is clarified that the aim is not to introduce an obligation to provide for punitive damages. Rather the idea is to allow for compensation based on objective criteria, while taking account of the expenses incurred by the rightholder.[204]

On an optional basis, in cases other than wilful or negligent infringements, Member States may furthermore provide that the competent national court is empowered to order "*the recovery of profits or the payment of damages, which may be pre-established*".[205]

136. The EU legislature thus rejected the Commission's relatively innovative suggestions to provide for pre-fixed 'double royalties' damages as well as the proposed rule of evidence. The provision that was finally adopted is in fact *rather modest*. The damages regime seems to add little of substance as compared to the regime of the TRIPS Agreement. It follows from the foregoing that several elements are either rather vaguely worded or only addressed on an optional basis. As a consequence considerable leeway continues to be left to the Member States when transposing the above provision into their respective national laws. Indeed, the Commission reported in 2010 that most Member States had found it unnecessary to amend their pre-existing national laws, as these were deemed to be already compatible with the damages regime of the IPR Enforcement Directive.[206] As is discussed further in the following paragraph, the introduction of this provision on actions for damages further seems to have had limited effect in practice.

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203 Art. 13(1) IPR Enforcement Directive 2004/48.

204 Recital 26 IPR Enforcement Directive 2004/48.

205 Art. 13(2) IPR Enforcement Directive 2004/48.

206 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 5.

And yet *two qualifications* are in place here. First, the IPR Enforcement Directive's provision on damages nonetheless appears to have had some impact at national level, even if this may not always be a direct consequence. For instance, the possibilities for claiming unfair profits made by the defendant reportedly improved in France and Italy.[207] In the Netherlands, the possibility of setting damages as a lump sum was made explicit,[208] whereas Swedish law was amended so as to clarify that non-material damage can be compensated as well.[209] In Spain provision has been made in certain cases for the recovery of a lump sum equal to 1% of the infringer's relevant turnover.[210] Second, it should probably not be assumed too readily that the directive's provision on damages is not very 'demanding'. On various points its wording is such that a more extensive reading is also conceivable.[211] For example, "*all appropriate aspects*", account of which must be taken when setting the damages, is not an unequivocal term. An argument could be made that this includes not necessarily either the negative economic consequences or the unfair profits made by the infringer, to which the directive refers, but both in accumulation.[212] Different views can also be taken as to who is to decide, and on which basis, what "*an appropriate case*" is in which non-material damages are to be made available. The directive similarly makes it clear that, when quantifying the damages due, its 'all appropriate aspects' and the 'lump sum' methods are alternatives. It is less evident however whether these two alternatives should be available to the private party-applicant and the competent court or that instead the national legislature can select and impose one of these two methods.[213] There thus remains scope for debate and interpretation on several points. This also implies that it cannot be excluded that the Court of Justice will interpret the said provision more extensively than what is sometimes presumed.

137. Concerning the *effects in practice*, in 2010 damages awarded for intellectual property right infringements were said to remain rather low, with only few Member States reporting an increase as a result of the directive.[214]

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207 Urbanchuk & Tumbridge (2008), pp. 578-579; Benhamou (2009), p. 125; Hassan (2010), pp. 756-757; Schaffner (2010), p. 184.

208 Brinkhof, Van Gardingen & Hermans (2010), p. 179.

209 Lundgren & Ulfsdotter (2010), p. 218.

210 Study European observatory on counterfeiting and piracy (undated-d), p. 2; Adamov, Fazekas & Tivadar (2009), p. 344; Pérez, Rabadán & Serano (2010), p. 201.

211 That may apply even more so when the provision is read in conjunction with the 'general rules' laid down in Art. 3 IPR Enforcement Directive 2004/48, discussed in para. 144 below.

212 Cf. Rognstad (2011), p. 50. On this issue in relation to English law, see Fitzgerald & Firth (2014), p. 737.

213 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 23.

214 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 8.

The Commission observed that "*damages awards in intellectual property cases are not requested by rightholders as a matter of course*".[215] Various legal and practical difficulties were reported, including lengthy procedures, high costs and difficulties in assessing and demonstrating the amount of damages allegedly suffered, resulting in low amounts awarded.[216] It appears that as a consequence actions for damages are generally not the preferred remedy in cases of infringements of intellectual property rights.[217]

The Commission has therefore floated several ideas for the directive's possible *amendment* on this point. These include granting damages commensurate with the infringer's unfair profits even where they exceed the actual damage suffered so as to prevent unjust enrichment and claiming damages from managing directors in case of insolvent legal person-infringers.[218] Especially this latter suggestion has however generally not been received favourably by respondents. More generally, rightholders tend to favour legislative change, arguing *inter alia* for lump sums to be included.[219] By contrast potential defendants tend to oppose it, invoking the risk of non-professionals and intermediaries being sued and the possible chilling effects on innovation and the sharing of cultural expressions. The latter parties insist on the determination of damages on the basis of concrete data regarding the material loss suffered. Most respondents, including all Member States that reacted to the 2010 report in which the Commission made these suggestions, argued against punitive damages. Provisions of this kind were held to be inconsistent with the European legal tradition, even if the 2010 Commission report and other reports indicate that such measures are available in certain cases under the domestic laws of the Member States.[220] More generally, most Member States argued against any amendment to the currently existing IPR Enforcement Directive's damages regime.[221] This would appear to make substantial changes of the directive in this regard unlikely in the near future.

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215 *Ibid*., p. 21.

216 *Ibid*., pp. 21-23. See also Study European observatory on counterfeiting and piracy (undated-d); Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 20; Roland (2014), p. 297.

217 *Ibid*., p. 21.

218 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 8.

219 Cf. Study European observatory on counterfeiting and piracy (undated-d), p. 11.

220 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 24. This report indicates that under Slovenian law provision is made for punitive damages. Punitive damages are further reported to be available in certain cases in Bulgaria and Ireland, as well as in Austria and in the UK. See respectively Cohen & Mottet Haugaard (2010), p. 376; Study European Communities Trade Mark Association (undated); Beetz & Tremmel (2010), pp. 21-22; Cornish, Llewelyn & Aplin (2010), pp. 81-82; Till (2010), pp. 131 and 133. On the potential disadvantages of punitive damages in the present context, see also Geiger, Raynard & Rodà (2011), p. 547.

221 Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, pp. 14-16.

### *4.2.5. Legal costs and publicity measures*

138. As regards the last two remedies to be discussed here, the IPR Enforcement Directive contains, in the first place, a provision on the allocation of *legal costs*. It stipulates that "*reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this*".[222] As the Court of Justice has clarified, this provision aims to strengthen the level of protection of intellectual property rights by avoiding the situation in which an injured party is deterred from initiating legal proceedings in order to protect its rights. In the Court's view, it follows that the infringer "*must generally bear all the financial consequences of his conduct*".[223] This broadly corresponds with the Commission's original intention, which was to ensure that the legal costs, lawyer's fees and any other expenses incurred by the successful party are, in principle, borne in full by the other party.[224]

This provision on legal costs has led to several concerns however. To begin with, at the time of the adoption of the IPR Enforcement Directive several Member States initially wished to delete it altogether, because in their perception it did not respect the principle of subsidiarity and the EU lacked competence to legislate on this subject-matter.[225] The European Parliament objected to the explicit reference to lawyer's fees that the Commission's proposal originally contained.[226] It pointed in this connection to the particularities of the laws of various Member States in this regard.[227] This reference was therefore eventually deleted. The resulting article is largely similar to the corresponding provision laid down in the TRIPS Agreement.[228] Moreover this article has been formulated in such a broad manner that most Member States did not deem it necessary to amend their pre-existing national rules in order to comply with this provision of the directive.[229] Yet there are exceptions. Most notably in the Netherlands an amendment to the national rules of civil proceedings was introduced, which has in turn led to a judicial practice whereby the legal costs are typically deemed to be recoverable in their entirety in intellectual property cases, such in deviation

222 Art. 14 IPR Enforcement Directive 2004/48.
223 CoJ case C-406/09, *Realchemie*, para. 48-49.
224 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 23.
225 Council, doc. 13027/03, p. 5. See also Council, doc. 16289/03, p. 16.
226 See Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 41 (Art. 18). Here reference was made to "*legal costs, lawyer's fees and any other expenses*", while including a sentence stating that "*[t]he responsible authorities shall determine the sum to be paid*".
227 European Parliament, Report on the proposal for IPR Enforcement Directive 2004/48, A5_0468/2003, p. 29.
228 Art. 45(2) TRIPS Agreement. Cf. Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 23.
229 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 24.

of the ordinary rules in civil law proceedings. In the legal literature it has been questioned whether this is in all respects in accordance with the requirements of the directive, in particular where the rather rigid application of this rule is concerned, which appears to leave little or no space for taking account of the particular circumstances of the case at hand.[230]

Also after the adoption of the IPR Enforcement Directive stakeholders furthermore continue to complain that the legal costs reimbursed in the cases covered by it are in practice often far below the costs actually incurred by the successful private party-applicant.[231] Estimates of the recoupable percentage of the legal costs incurred differ considerably between the Member States, ranging from for instance 30% in Italy to 80% in Ireland.[232] Adequate rules on the compensation of legal costs are considered of considerable importance, as litigation costs in intellectual property cases are said to be often high.[233] Such costs can for example be incurred for using technical experts or for making test purchases in order to gather evidence and substantiate a claim. That applies even more so in cross-border situations. Also in light of the seemingly diverging interpretation of the directive's provision on legal costs across the EU, calls have therefore been made for its clarification.[234] The Commission has seemed to be inclined to act upon these concerns, at least where the enforcement of intellectual property rights by small and medium-sized enterprises is concerned.[235] However it remains for now uncertain whether any such action will involve proposing legislative changes to the directive.

139. A final remedy to be mentioned here entails what the IPR Enforcement Directive calls *publicity measures*. In this connection Member States must ensure that a national court may order "*appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part*" can be ordered.[236] It is added that Member States may also allow for other additional publicity measures, including prominent advertising. In its proposal for this directive the Com-

230 For an overview, discussion and further references, see Vrendenbarg (2013), p. 160. The fact that all preliminary references relating to this provision of the directive to date were made by Dutch national courts should probably be seen in light of this legislative change and the resulting case law and discussions. See CoJ case C-406/09, *Realchemie*; CoJ case C-180/11, *Bericap*; CoJ case C-435/12, *ACI Adam*. See also CoJ case C-681/13, *Diageo Brands* (pending).

231 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 24. Cf. Study European observatory on counterfeiting and piracy (undated-d), p. 9.

232 Study European observatory on counterfeiting and piracy (undated-d), p. 10.

233 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 24.

234 Geiger, Raynard & Rodà (2011), p. 548.

235 Commission, Communication towards a renewed consensus on the enforcement of intellectual property rights, COM(2014) 392, p. 7.

236 Art. 15 IPR Enforcement Directive 2004/48.

mission had stated that the publication of judicial decisions is generally considered an effective measure for informing the public and a deterrent against infringements of intellectual property rights.[237] The recitals clarify accordingly that this measure is meant to act as "*a supplementary deterrent to future infringers and to contribute to the awareness of the public at large*".[238] In some jurisdictions, for instance in Ireland and the United Kingdom, the introduction of this remedy implied a notable innovation, which is occasionally used in practice.[239] However on the whole this provision of the IPR Enforcement Directive tends to receive only limited attention.[240]

## 4.3. Procedural provisions and related issues

Having introduced the IPR Enforcement Directive and having discussed the remedies laid down therein in the foregoing, attention now turns to the directive's most important procedural provisions and several related issues. The first subsection below discusses the rules on its scope and on the legal standing of private parties wishing to initiate legal proceedings under this directive. The subsequent subsection then concentrates on issues of forum, procedure and what is referred to here as the directive's 'general rules'.

### *4.3.1. Scope and legal standing*

140. The Commission's proposal for the IPR Enforcement Directive underwent several changes during the law-making process where the provision on the directive's *scope* is concerned. The EU legislature extended the scope of this directive in two manners. In the first place, the Commission had proposed a general restriction to infringements of intellectual property rights committed for *commercial purposes or causing significant harm* to the rightholder. This was considered too limited by the EU legislature.[241] This general limitation was therefore dropped at an early stage of the legislative deliberations, although a similar restriction has been retained in a number of specific provisions.[242] A second extension of the scope of the directive was the inclusion of a provision specifying that this directive not only relates to

237 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 23.
238 Recital 27 IPR Enforcement Directive 2004/48.
239 Gibbons (2014), p. 23.
240 Cf. e.g. Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 24, where this provision is not mentioned at all. Neither does it appear to have been raised by the respondents to the ensuing consultation. See Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011.
241 Council, doc. 11107/03; Council, doc. 12450/03; European Parliament, Report on the proposal for IPR Enforcement Directive 2004/48, A5_0468/2003, p. 6. See also Massa & Strowell (2004), pp. 247-253.
242 See Art. 6(2), 8(1) and 9(2) IPR Enforcement Directive 2004/48. See also its recital 14.

infringements of intellectual property rights established or harmonised by *EU* law, as the Commission had proposed,[243] but also to 'purely' *national* laws (i.e. national laws other than those transposing obligations stemming from the relevant EU directives on substantive intellectual property law). One could think of acts involving unfair competition, including parasitic copying, or similar activities.[244]

The Commission had further proposed listing the relevant instruments of substantive EU law on intellectual property in an annex to the IPR Enforcement Directive.[245] The directive as finally adopted does not list the legal instruments or rights concerned however. It is stipulated instead in a general manner that the directive applies to "*any infringement of intellectual property rights as provided for by [EU] law and/or by the national law of the Member State concerned*".[246] In the recitals it is added that the scope of the directive should be defined as widely as possible.[247] In 2005 the Commission published a statement listing the intellectual property rights that it considers to be covered by the directive.[248] This list is not legally binding however. Neither is it exhaustive. If and when the aforementioned possible revision of this directive takes place, a list might be annexed to it for clarification purposes.[249] For the time being the current arrangement means however that the scope of IPR Enforcement Directive is not always entirely clear. In any case not included in the said Commission list are trade secrets. As was noted earlier, whereas trade secrets are not intellectual property rights in a 'classical' sense, they can be considered as such when this term is understood in a broad manner.[250] They are covered for instance by the TRIPS Agreement.[251] Rather than extending the scope of the IPR Enforcement Directive so as to clarify that trade secrets are covered as well and inserting relevant rules, in 2013 the Commission published a proposal for a separate directive on the protection of trade secrets.[252] At the heart of this draft directive lie a set of remedial and procedural rules meant to ensure the availability of civil redress against unlawful acquisition, use and disclosure of trade secrets.[253]

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243 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 18 and 32 (Art. 2).
244 Cf. recital 13 IPR Enforcement Directive 2004/48.
245 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 44-45 (annex).
246 Art. 2(1) IPR Enforcement Directive 2004/48.
247 Recital 13 IPR Enforcement Directive 2004/48.
248 Commission, Statement concerning Article 2 IPR Enforcement Directive 2004/48, OJ 2005, L 94/37.
249 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 7.
250 See para. 107 above.
251 Art. 39 TRIPS Agreement. On this agreement, see para. 118 above.
252 Commission, Proposal for a trade secrets directive, COM(2013) 813. On this proposal, see further Grassie (2014), p. 677.
253 *Ibid*., pp. 19-24 (Art. 5-15).

These rules are evidently inspired on, and to a high extent similar to, the rules set out in the IPR Enforcement Directive, without however being exactly the same. In the recitals of this draft directive it is said that, should the scope of these two acts overlap, the draft Trade Secret Directive takes precedence as a *lex specialis*.[254]

141. The IPR Enforcement Directive further lays down common rules on *legal standing*, i.e. rules regarding the persons that are considered to have the legal capacity to initiate legal proceedings for an alleged infringement of the intellectual property rights covered by the directive before the competent national courts. The directive lists four categories of persons.[255] Unsurprisingly, the first category is made up by the *holders* of the intellectual property rights in question. The second category consists of all other persons *authorised* to use these rights, such as licensees. And also intellectual property *collective rights-management bodies* that are regularly recognised as having a right to represent rightholders are mentioned. The fourth and last category consists of *professional defence bodies* that are regularly recognised as having a right to represent rightholders.

In all four cases the directive contains certain further specifications. As regards the rightholders, it has been added that these private parties have legal standing "*in accordance with the provisions of the applicable law*". That same specification also applies to all three other categories mentioned above. In addition, for these latter categories of persons, the further specification has been included that they have legal standing "*in so far as permitted by and in accordance with the provisions of the applicable law*". The precise meaning of these phrases remains to be clarified by the Court of Justice. A likely reading appears to be that these latter three categories of persons *can* have a sufficiently direct interest and (therefore) legal standing under the IPR Enforcement Directive, but *only in so far as* permitted by the applicable (presumably: national) law.[256] In contrast the first category, the rightholders, *must* have legal standing as a matter of EU law. In all cases the further detailed rules in this respect remain in principle to be determined by the applicable national law. Presuming that this reading is correct, it implies a step back from the Commission's proposal, which was more ambitious in this regard. The latter essentially foresaw all abovementioned categories of person having legal standing as a matter of EU law, including the specification that the collective rights-management bodies and the professional defence bodies were to have legal standing regardless of the Member State in which they are established.[257]

254 *Ibid*., p. 16 (recital 28).
255 Art. 4 IPR Enforcement Directive 2004/48.
256 See also recital 18 IPR Enforcement Directive 2004/48.
257 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 19 and 33 (Art. 5).

*4.3.2. Forum, procedure and general rules*

142. No detailed rules on the *forum* competent to rule on the actions brought pursuant to it have been laid down in the IPR Enforcement Directive. At various places throughout the directive reference is simply made to "*the competent judicial authorities*".[258] This appears to imply that the cases brought under this directive are to be decided on by a body that is judicial in character, i.e. a national court and not a non-judicial dispute resolution body. Although this is neither made explicit nor necessarily the case,[259] the assumption is that these actions are normally to be brought before a national *civil* court. This is implicit in the statement in the recitals that the directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decision in civil and commercial matters or deal with applicable law, there being other instruments of EU law governing such matters which equally apply to intellectual property cases.[260] This assumption also finds expression in the Commission's statement that "*[t]he Directive's provisions (only) relate to civil law measures to enforce intellectual property rights*", incorporating the TRIPS Agreement's civil law measures.[261]

143. Regarding the *rules of procedure* applicable to the disputes covered by the IPR Enforcement Directive before the national courts, the IPR Enforcement Directive is even less detailed than in respect of the rules on those courts themselves. In fact, no such rules on procedural matters are provided for. That means that issues such as the possibility of pre-trial contacts between the parties to the dispute or on the limitation periods for initiating legal proceedings remain unregulated in as far as this directive is concerned.

144. Finally, the directive sets out what can be called its '*general rules*'. This refers to its broadly formulated provisions concerning the manner in which the directive is to be understood and applied in general. In particular, the directive stipulates that the measures, procedures and remedies set out therein must be "*fair and equitable and […] not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays*".[262] It adds that they must also be "*effective, proportionate and dissuasive*" and that they must be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.[263] The first phrase cited above clearly echoes the wording of the TRIPS Agreement,[264] whereas

258 See e.g. Art. 6(1), 7(1) and 8(1) IPR Enforcement Directive 2004/48.
259 Cf. recital 28 IPR Enforcement Directive.
260 Recital 11 IPR Enforcement Directive 2004/48.
261 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, pp. 4-5.
262 Art. 3(1) IPR Enforcement Directive 2004/48.
263 Art. 3(2) IPR Enforcement Directive 2004/48.
264 Art. 41(2) TRIPS Agreement.

the latter reference to effectiveness, proportionality and dissuasiveness has evidently been inspired on the case law of the Court of Justice on Member States' penalties, as discussed earlier.[265]

In some situations these general rules can be applied independently, i.e. without them being read in conjunction with some of the directive's more detailed provisions, in particular so as to address situations not expressly regulated by it. This occurred for instance in *L'Oréal v. eBay*, a case that has already been discussed earlier.[266] It will be recalled that this case concerned the compatibility with the IPR Enforcement Directive of an injunction issued against an online intermediary for alleged trade in counterfeit products. The injunction sought by the rightholder consisted of an obligation for the intermediary to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights. The Court of Justice held that this injunction would not be compatible with the abovementioned general rule that the measures, procedures and remedies enacted pursuant to it must be fair, proportionate and not excessively costly. Therefore it could not be granted. Other situations in which these general rules may play an important role are not hard to imagine. One possible example relates to the aforementioned absence in the directive of specific rules of procedure.[267] In light of the above general rules, a particular rule of national procedural law may nonetheless have to be disapplied or interpreted in a particular manner, for example so as to avoid unwarranted delays or abuses. Moreover these general rules can fulfil an important function as an aid for the interpretation and application of the directive's more detailed provisions. One could for example imagine that the requirement for the directive's remedies to be effective and dissuasive could tilt the balance in favour of an interpretation of its – not always entirely clear – provision on actions for damages in favour of the applicant in respect of unfair profits or non-material damage.[268]

### 4.4. Other enforcement issues

This final section briefly addresses a number of other issues relating to the enforcement of intellectual property law generally and the IPR Enforcement Directive in particular. More specifically, it concerns alternative dispute resolution and public enforcement. It is shown that, at least as a matter of EU law, these two issues play at present at most a very limited role in the enforcement of intellectual property law.

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265 See subsection 2.4.2 above.
266 CoJ case C-324/09, *L'Oréal v. eBay*, para. 139. See para. 131 above.
267 See para. 143 above.
268 See para. 135-136 above.

### *4.4.1. Alternative dispute resolution*

145. In settling intellectual property-related conflicts alternative dispute resolution certainly can play some role in practice.[269] This applies in particular where such disputes emerge in situations where the parties have a contractual relationship of some sort, for instance relating to licences or research and development activities. Concerning disputes founded on non-contractual liability of a private party resulting from (alleged) infringements of intellectual property rights, beyond direct negotiations between the parties before initiating legal proceedings, alternative dispute resolution is generally used to a rather limited extent however.[270] In particular, generally speaking, in this field no EU-level mechanisms aimed at encouraging this manner of resolving the intellectual property-related disputes at issue here exist at present. A notable exception is however the alternative dispute resolution procedure for disputes relating to the registration of '.eu' top-level internet domain names, provided for by Commission Regulation 874/2004.[271] Disputes of this kind are to be brought before the Czech Arbitration Court, which has settled many of them since its designation in 2005.[272]

### *4.4.2. Public enforcement*

146. The IPR Enforcement Directive does *not* contain any provisions on the *public enforcement* of the relevant substantive rules. The directive limits itself to requiring the designation of Member States' correspondents for questions on the implementation of the measures set out in the directive.[273] These national correspondents are meant to create between them a network for administrative cooperation and exchange of information.[274] The directive further includes a very general reference to Member States being entitled (but not obliged) to apply "*other proportionate sanctions*".[275] This refers especially to sanctions of a criminal nature. For in the corresponding recital it is

269 Cf. e.g. Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 6. See e.g. also Gardner (2014), p. 565.

270 Cf. Vitoria (2006), p. 398; Hanotiau (2010), p. 155; Jabaly (2010), p. 730; Theurich (2010), p. 175.

271 Art. 22 and 23 Commission Regulation (EC) No 874/2004 laying down public policy rules concerning the implementation and functions of the .eu Top level Domain and the principles governing registration, OJ 2004, L 162/40.

272 See further http://www.adr.eu/. On this type of dispute resolution more generally, see De Werra (2012), p. 39.

273 Art. 19 IPR Enforcement Directive 2004/48.

274 Recital 30 IPR Enforcement Directive 2004/48. See also Commission, Communication towards a renewed consensus on the enforcement of intellectual property rights, COM(2014) 392, pp. 8-10, where the Commission discusses manners to improve the cooperation between the various national authorities concerned and announces the establishment of a Member State export group on this subject-matter.

275 Art. 16 IPR Enforcement Directive 2004/48.

clarified that, in addition to the civil and administrative procedures and remedies provided under the directive, "*criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights*".[276] It follows that under the IPR Enforcement Directive Member States are not required to establish some sort of public enforcement mechanism or authority that seeks to ensure the effective application and enforcement of substantive intellectual property law.

147. More in particular, although this is not precluded, under the directive the Member States are not obliged to provide for *criminal* sanctions for infringements of that law. Quite to the contrary, it is stipulated that the directive does not affect any national provisions relating to criminal procedures or penalties in respect of IPR infringements.[277] On this point the IPR Enforcement Directive deviates from the Commission's proposal. Already in its 1998 green paper the Commission had argued that sanctions of this kind have certain advantages over civil law actions, in particular "*greater dissuasive effect [and] more effective gathering of evidence*".[278] In this respect it should be recalled that, at the time of the Commission's proposal for the IPR Enforcement Directive, all Member States already provided for criminal sanctions, as is also required under the TRIPS Agreement.[279] However the Commission noted considerable differences in the level of punishment and the method of calculating fines.[280] It therefore held in the explanatory memorandum to its 2003 proposal that "*although this directive does not aim to harmonise criminal penalties as such, the effective application of genuinely deterrent sanctions in all Member States would help greatly in combating counterfeiting and piracy*".[281] In concrete terms the Commission proposed stipulating that all infringements committed intentionally and for commercial purposes should be treated as criminal offences. It also proposed including a rule that the available sanctions should consist of imprisonment, fines and the confiscation of goods.[282] In appropriate cases, certain further sanctions would also have to be provided for, such as the destruction of infringing goods, the closure of the establishment concerned, a ban on engaging in commercial activities and judicial winding up.[283]

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276 Recital 28 IPR Enforcement Directive 2004/48.

277 Art. 2(3) IPR Enforcement Directive 2004/48.

278 Commission, Green paper on combating counterfeiting and piracy in the single market, COM(98) 569, p. 18. See also Commission, Communication on the follow-up to the green paper on combating counterfeiting and piracy in the single market, COM(2000) 789, p. 9.

279 Art. 61 TRIPS Agreement. See e.g. also Study Westkamp (2007), pp. 75-78.

280 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 15.

281 *Ibid*., p. 15.

282 As to the latter, cf. Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, OJ 2005, L 86/49.

283 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 40 (Art. 20).

However, as has been observed elsewhere, the reaction of the Member States to this aspect of the proposal "*could not have been more negative*".[284] They unanimously rejected it, mainly on grounds related to the proposal's legal basis. The Member States considered – unlike the Commission – that Article 114 TFEU on measures related to the internal market, which was part of the then so-called 'first pillar',[285] did not allow for the adoption of measures relating to criminal law.[286] By implication, in the Member States' view such measures could only be adopted under the then 'third pillar', which concerned matters related to justice and home affairs. The provision concerned was consequently deleted from the draft. All that currently remains, by means of a compromise with the European Parliament,[287] is the aforementioned provision that Member States may apply other proportionate sanctions. Already at the time the Commission announced that it stuck to its views that criminal sanctions were required to effectively fight infringements of intellectual property law and that this could be done under Article 114 TFEU however.[288] Therefore it soon presented a new proposal, based on that article.[289] This proposal is largely similar to the 2003 one, but it goes further by proposing to include minimum levels of maximum penalties (four years of imprisonment, fines up to € 300.000).[290] The proposal also includes rules on powers of confiscation, rightholders being allowed to form 'joint investigation teams' with the competent Member States' authorities and the *ex officio* initiation of criminal proceedings.[291] Yet also this new proposal proved to be very controversial especially in the Council.[292] Not only

284 Reinbothe (2010), p. 21.

285 Before the entry into force of the Lisbon Treaty in 2009, the EU edifice rested on three so-called 'pillars'. The first pillar consisted of the EC Treaty and encompassed *inter alia* internal market-related provisions. The 'third pillar' concerned justice and home affairs, as provided for under the (then) EU Treaty.

286 Council, doc. 6052/04, pp. 2-3.

287 Cf. European Parliament, Report on the proposal for IPR Enforcement Directive 2004/48, A5_0468/2003, p. 30

288 Council, doc. 8285/04, p. 2.

289 Initially, in 2005, the Commission had submitted two new proposals: a draft directive and a Council framework decision, based on the (then) first and the third pillar respectively. In 2006 it replaced these two proposals by a single proposal however. In the Commission's view, the ruling in CoJ case C-176/03, *Commission v. Council*, on criminal measures in the field of environmental law, another former 'first pillar' matter, implied that provisions of criminal law required for the effective implementation of first pillar instruments of EU law could be established under that pillar. See Commission, Proposal for a directive on criminal measures for the enforcement of intellectual property rights, COM(2006) 168, p. 2. On the Commission's reading of the said ruling more generally, see Commission, Communication on the implications of the Court's judgment of 13 September 2005 (Case C-176/03, Commission v. Council), COM(2005) 583.

290 Commission, Proposal for a directive on criminal measures for the enforcement of intellectual property rights, COM(2006) 168, p. 10 (Art. 5).

291 *Ibid*., p. 11 (Art. 6, 7 and 8 respectively).

292 Seville (2009), p. 413. Cf. Hilty, Kur & Peukert (2006), p. 970; Geiger (2010), p. 629. See however also Schneider & Vrins (2006), p. 173.

did certain doubts as to its legal basis remain, some Member States also doubted the necessity of an EU instrument on this matter in light of the nature and scale of the problem, noting that the effects of the IPR Enforcement Directive could at that stage not yet be properly assessed.[293] This proposal therefore did not lead to the adoption of a directive.

### 4.5. Summary

148. The IPR Enforcement Directive seeks to facilitate the private enforcement of rules of EU and national law on intellectual property. Having been adopted in 2004 after a relatively smooth legislative process, it can be seen as a complement to the EU's extensive involvement with substantive intellectual property law in the context of the internal market. The content of the directive has been heavily influenced by an instrument of international law, the WTO TRIPS Agreement, even if the former goes further on a number of points. At the core of this directive are a set of specific remedies. These include remedies to be applied for in proceedings on the merits, such as corrective measures (recall, removal or destruction of the infringing goods), 'permanent' injunctions aimed at prohibiting the continuation of the infringement, actions for damages and publicity measures given publicity to the judicial decision. Arguably at least equally important in practice are the remedies that are to be applied for on a preliminary or provisional basis, notably a range of measures related to the disclosure of evidence and interlocutory injunctions. The IPR Enforcement Directive further provides for a – rather broadly formulated – rule on the allocation of legal costs. Regarding procedural issues the directive is generally more modest. The rules on its scope are rather ambitious if imprecise, whereas its provision on legal standing leaves considerable leeway to the Member States. The directive's 'general rules' can play an important complementary or interpretative role, but rules on forum and procedure are (almost) entirely absent. The latter also applies for alternative dispute resolution and public enforcement, despite the Commission's so far mostly unsuccessful efforts to lay down as a matter of EU law certain rules on criminal sanctions.

293 Council, doc. 10329/06.

# 5. Consumer protection law

The present chapter is concerned with selected legislative developments in the field of EU consumer protection law. Contrary to the fields assesses in the foregoing two chapters, in this case no one single, self-standing EU legal act exists that is exclusively concerned with private enforcement and that covers in principle all substantial rules at issue. That is not to say however that there is no legislation in force that is relevant for the present purposes. Quite to the contrary, consumer protection law may well be one the fields of EU law with the greatest regulatory focus on remedial and procedural issues, even if in this case the relevant provisions is mostly embedded in and interlinked with the substantive regulatory activity.[1] With some notable exceptions, the measures related to enforcement (be it private or public) are typically not restricted to specific legislative acts, but instead many 'substantive' legal acts also contain certain enforcement-related provisions. These measures moreover tend to be rather diverse. Without being exhaustive, a number of legal acts and other legislative developments, considered to be particularly relevant for the present purposes, are assessed below. It concerns in particular the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive. When discussing these and a number of related directives, the focus is each time especially on the three main (substantive) private enforcement remedies provided for therein, namely, injunctions, contractual remedies and actions for damages respectively. First, EU consumer protection law generally is briefly introduced however. At the very end of this chapter, relevant developments related to three other enforcement-related issues are discussed, i.e. collective redress, alternative dispute resolution and public enforcement.

## 5.1. Introduction

By means of an introduction this section first briefly sketches the background of EU consumer protection law. Subsequently an overview is given of the most important substantive rules applicable in this field of law. The early developments as regards consumers' rights of redress are also sketched.

1 Cf. Storskrubb (2008), p. 27.

### 5.1.1. Background

149. Consumer protection is one of various fields of action that developed at EU level in the 'slipstream' of the drive to establish and complete the EU's internal market. This drive implied the disapplication of national rules seeking to protect consumers where those rules had the (incidental or deliberate) side-effect of "*crystallising given consumer habits so as to consolidate an advantage acquired by national industries*" and where as such they constituted an obstacle to the free movement of especially goods and services within the EU.[2] In the case law of the Court of Justice it has been clarified that consumer protection can be a justified reason to restrict such free movement, but only under certain relatively strict conditions, notably non-discrimination and proportionality.[3] Establishing the EU's internal market thus led to a degree of deregulation at national level ('negative harmonisation'). Partially as a consequence thereof, the need was felt for a degree of re-regulation at EU level ('positive harmonisation').[4] For, as the European Parliament stated in 1987, "*the protection of the interest of the consumer […] must be considered a corollary of the free movement of goods and services*".[5] As such consumer protection has also been seen as a means to increase the credibility of the project of European integration in the public eye and to bring that project 'closer to the citizens'.[6]

150. EU activity related to consumer protection can be traced back (at least) until the 1970s. In several 'soft law' instruments, i.e. non-legally binding acts such as resolutions and recommendations, the rights of the European consumers were stressed. These rights include the right to protection of health and safety and the right to information and education.[7] By the mid-1980s, the EU legislature adopted the first 'hard law' consumer protection measures, i.e. legally binding instruments such as directives or regulations.[8] Yet it was not until 1993 (Treaty of Maastricht) that consumer protection was recognised as an EU competence in its own right. Under the current EU Treaties this competence is shared by the EU and the Member States.[9] Article 12 TFEU requires that account is taken of consumer protection requirements

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2 CoJ case 178/84, *Commission v. Germany*, para. 32.

3 E.g. CoJ case 120/78, *Cassis de Dijon*, para. 8; CoJ case 178/84, *Commission v. Germany*, para. 28; CoJ case C-76/90, *Säger*, para. 15; CoJ joined cases C-105/12 to C-107/12, *Essent*, para. 58.

4 See further Unberath & Johnston (2007), p. 1237; Weatherill (2011), pp. 838-846.

5 European Parliament, Resolution on consumer redress, OJ 1987, C 99/203, recital B.

6 See e.g. Commission, Green paper on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576, p. 7.

7 Cf. Council, Resolution on a preliminary programme of the EEC for a consumer protection and information policy, OJ 1975, C 92/1.

8 See e.g. Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984, L 250/17.

9 Art. 4(2)(f) TFEU.

when defining and implementing EU policies and activities, whereas pursuant to Article 38 Charter EU policies must ensure a high level of consumer protection.[10] This means that consumer protection has a 'cross-cutting' dimension.

More specifically, Article 169(1) TFEU states that "*in order to promote the interests of consumers and to ensure a high level of consumer protection, the [EU] shall contribute to protecting the health, safety and economic interests of consumers, as well as promoting their right to information, education and to organise themselves in order to safeguard their interests*". The following paragraphs of this article provide for two legal bases for the adoption of secondary EU law in this field. In the first place, reference is made to Article 114 TFEU for the adoption of measures in the context of the completion of the internal market so as to contribute to the attainment of the aforementioned consumer protection objectives.[11] In addition a proper self-standing legal basis for the adoption of measures to support, supplement and monitor the consumer protection policy pursued by the Member States is provided for.[12] The latter measures cannot prevent the Member States from maintaining or introducing more stringent protective measures.[13] In other words, unlike under the former legal basis, the measures adopted on the basis of the latter are necessarily limited to 'minimum harmonisation'. That means that Member States remain at liberty to retain or adopt further-going rules of national law. The latter provision has hardly been used to date.[14] Instead, as is discussed in further detail in the following, Article 114 TFEU tends to be the preferred option when adopting secondary EU law in this field.

### *5.1.2. Substantive EU consumer law and consumers' rights of redress*

151. Since the mid-1980s a relatively broad and diverse range of EU legal acts related to consumer protection have been adopted.[15] In many cases this legislation has since been updated and replaced by more recent acts. Generally speaking, the EU legislation can be taken to confer rights on the private parties concerned, as the Court of Justice has had occasion to confirm expressly in several cases.[16] The traditional core of the EU's body of

10 On the Charter more generally, see para. 43 above.

11 Art. 169(2)(a) TFEU. On Art. 114 TFEU and legal basis issues generally, see further subsection 10.1.1 below.

12 Art. 169(2)(b) and (3) TFEU.

13 Art. 169(4) TFEU.

14 Stuyck (2009), p. 68. The only example cited of a legal act adopted on this basis is Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, OJ 1998, L 80/27.

15 For an overview and a general discussion, see Weatherill (2005); Micklitz, Reich & Rott (2009); Weatherill (2011), pp. 837-867.

16 See e.g. CoJ case C-91/92, *Faccini Dori*, para. 28 (regarding what is now Consumer Rights Directive 2011/83); CoJ joined cases C-178/94, C-179/94 and C-188/94 to C-190/94, *Dillenkofer*, para. 33-46 (regarding Art. 7 Package Travel Directive 90/314); CoJ case C-144/99, *Commission v. Netherlands*, para. 18 (regarding Unfair Terms Directive 93/13).

consumer protection law consists of rules that regulate *pre-contractual* sales practices. In this context particular emphasis is typically placed on the provision of information so as to allow consumers to take informed decisions. As to Court of Justice has held, "*information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer*".[17] Prominent examples of this approach can be found in Directive 2005/29 on unfair commercial practices ('Unfair Commercial Practices Directive'), Directive 2008/48 on consumer credit agreements ('Consumer Credit Directive') and Directive 2011/83 on consumer rights ('Consumer Rights Directive').[18]

In addition a number of other consumer protection directives regulate, at least to some degree, the actual *content* of consumer contracts. Examples of the latter include the aforementioned Unfair Terms Directive and Directive 99/44 on certain aspects of the sale of consumer goods and associated guarantees ('Consumer Sales Directive').[19] Elements of both of these two regulatory approaches can be found in Directive 90/314 on package travel, package holidays and package tours ('Package Travel Directive').[20] Understood in a wider sense, EU consumer protection law also includes *advertising law*, notably Directive 2006/114 on misleading and comparative advertising[21] ('Misleading Advertising Directive') and Directive 2003/33 on tobacco advertising ('Tobacco Advertising Directive').[22] There is further a considerable body of EU *product safety law*, such as Directive 2001/95 on general product safety[23] ('Product Safety Directive') and Directive 2009/48 on toy safety ('Toy Safety Directive').[24] The Product Liability Directive can also be included in this latter category, even if it is somewhat of an outlier, given that, different from these other directives, it seeks to protect consumers by laying down certain rules on civil liability in case of defects, rather than by setting out certain specific prohibitions or prescriptions.

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17 CoJ case C-92/11, *RWE Vertrieb*, para. 44.

18 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149/22; Directive 2008/48/EC on consumer credit agreements for consumers, OJ L 1333, 22.5.2008, p. 66; Directive 2011/83/EU on consumer rights, OJ 2011, L 304/64.

19 Unfair Terms Directive 93/13; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999, L 171/12.

20 Directive 90/314/EEC on package travel, package holidays and package tours, OJ 1990, L 158/59. In 2013 the Commission proposed replacing this directive. See Commission, Proposal for a new package travel directive, COM(2013) 512.

21 Directive 2006/114/EC concerning misleading and comparative advertising, OJ 2006, L 376/12.

22 Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 2003, L 152/16.

23 Directive 2001/95/EC on general product safety, OJ 2002, L 11/4. In 2013 the Commission proposed replacing this directive. See Commission, Proposal for a regulation on consumer product safety, COM(2013) 78.

24 Directive 2009/48/EC on the safety of toys, OJ 2009, L 170/1.

Although this may vary to some extent depending on the legal act at issue, in EU consumer protection law the term 'consumer' is normally understood to refer to a natural person acting for purposes falling outside his trade, business, craft or profession.[25]

152. From the outset considerable emphasis has been placed on the importance of the consumers' *right of redress*. This was already the case in the aforementioned 'soft law' instruments dating from the 1970s, where this was identified as one of the basic consumer rights. The Council held in this respect that "*consumers are […] entitled to proper redress for […] injury or damage [resulting from purchase or use of defective goods or unsatisfactory services] by means of swift, effective and inexpensive procedures*".[26] The Commission noted that "*this right [of redress] will not be applied at [EU] level but remains within the jurisdiction of each Member State. Only where the situation requires it, will the Commission present proposals for improving existing systems and putting them to better use*".[27]

The difficulties involved in dealing with minor claims (in monetary terms) were acknowledged early on. As the Commission noted in its 1984 memorandum on consumer redress, such difficulties can result from comparatively high legal costs, lengthy proceedings and psychological barriers.[28] Already in the late 1970s and early 1980s especially the European Parliament therefore called for the adoption of secondary EU law to improve and harmonise legal procedures available in consumer cases, *inter alia* so as to ensure that consumer associations have legal standing to initiate legal proceedings and to facilitate alternative dispute resolution.[29] More generally, this latter institution considered that "*the substantive rights conferred by [EU] legislation on the consumer must be* supplemented *by appropriate procedural mechanisms to ensure their enforcement*".[30] Initially the Commission maintained that enacting EU legislation of this kind would be difficult and time-consuming.[31] But by 1987 it announced its intention to examine the opportunity of drafting a directive introducing a general right for consumer

25 See e.g. Art. 2(1) Consumer Rights Directive 2011/83; Art. 2(b) Unfair Terms Directive 93/13; Art. 2(a) Unfair Commercial Practices Directive 2005/29.

26 Council, Resolution on a preliminary programme of the EEC for a consumer protection and information policy, OJ 1975, C 92/1, p. 8.

27 Commission, Information memo on the adoption by the Council of a preliminary programme for a consumer protection and information policy, P-19/75, p. 2.

28 Commission, Memorandum on consumer redress, COM(84) 629 final, p. 7.

29 Cf. the 1977 report and resolution by the European Parliament and the 1979 opinion by the Economic and Social Committee, cited in Commission, Memorandum on consumer redress, COM(84) 629 final, p. 7.

30 European Parliament, Resolution on consumer redress, OJ 1987, C 99/203, recital C.

31 Commission, Memorandum on consumer redress, COM(84) 629 final, pp. 11-12. The annex to this document sets out several options that exist in the laws of certain Member States and third countries.

associations to act in the courts of the Member States in the general interest of the consumers.[32] In the Commission's subsequent green paper on consumers' access to justice, dating from 1993, the idea of facilitating actions for injunctions brought by bodies representing consumer interests was further outlined.[33] This document also identified several issues in respect of which further steps could possibly be taken at EU level, such as the granting of legal aid, the simplified settlement of cross-border disputes, the promotion of self-regulation by industry and cooperation between the competent authorities of the Member States.

## 5.2. Consumer Injunctions Directive: injunctions

This subsection concentrates on the Consumer Injunctions Directive. Exceptionally in EU consumer protection law, this is a self-standing legal act that is exclusively concerned with enforcement-related issues. It concentrates on facilitating injunctive relief, to be obtained in the collective interest of consumers. In the first subsection below the directive is introduced. Its system of mutual recognition as regards legal standing to bring a case and the remedies available under the directive are also outlined. In the following subsection attention turns to the directive's other provisions, its functioning in practice and other EU legislation that is relevant in connection to actions for injunctions to address infringements of certain rules of substantive consumer protection law.

### *5.2.1. Introduction, mutual recognition and remedies*

153. As was observed in the foregoing section, the idea of adopting secondary EU law facilitating the bringing of actions for injunctions by bodies representing the interests of consumers dates back to the very beginning of EU consumer protection law. Although provisions on this subject-matter can also be found elsewhere, the most prominent example of legislation of this kind is the *Consumer Injunctions Directive*. This directive was originally

32 Commission, Supplementary communication on consumer redress, COM(87) 210, p. 3. This statement should be seen against the background of especially the European Parliament's insistence on the adoption of legislative measures. Cf. European Parliament, Resolution on consumer redress, OJ 1987, C 99/203.

33 Commission, Green paper on access of consumers to justice and the settlement of consumer disputes in the single market, COM(93) 576, pp. 77-86. See also Commission, Communication on an action plan on consumer access to justice and the settlement of consumer disputes in the internal market, COM(96) 13.

adopted in 1998 after a comparatively smooth legislative process.[34] It was codified in 2009, in light of the amendments made to its annex.[35] Its legal basis is Article 114 TFEU.[36]

According to its recitals, the directive was adopted in light of "*an urgent need for some degree of approximation of national provisions*" on the matters covered by it.[37] At the same time the Commission underlined in its proposal that "*historical and legal traditions will be in no way compromised*" by the adoption of this directive.[38] There it was added that "*the proposed text in no way prejudices established remedies at national level: these rights may be far broader in certain Member States […] than in others, but their harmonisation does not seem warranted given the current state of [EU] law*".[39]

154. At the basis of the Consumer Injunctions Directive lies the idea that most Member States had already designated one or more entities qualified to take legal action in the *collective* interests of consumers.[40] Its recitals explain that this latter term does not include the cumulation of interests of individual private parties that have been harmed by an infringement.[41] At stake are thus rather the interests of the consumers as a whole, and not the interests of individual consumers regardless of whether the latter are pursued individually or 'bundled' in a collective claim. The directive leaves it in principle to the Member States to determine which entities are qualified to bring these kinds of claims under their respective national laws. The central concept of a '*qualified entity*' is defined broadly. It encompasses "*any body or organisation which, being properly constituted under the law of a Member State, has a legitimate interest in ensuring that the provisions [of substantive consumer protection law at issue] are complied with*".[42] These entities may in particular be either independent *public bodies* specifically responsible for protecting the

34 See Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712. See also Commission, Amended proposal for Consumer Injunctions Directive 2009/22, COM(96) 725. The European Parliament was mostly supportive of the Commission proposal. See European Parliament, Report on the proposal for Consumer Injunctions Directive 2009/22, A4-0354/96. Although on a number of issues the Member States represented in the Council introduced amendments (indicated below), an agreement between the co-legislators was reached relatively quickly. The final text of this act resembles to a high extent that of the Commission's original proposal.

35 In the EU's legal terminology the term 'codification' refers to the adoption of a new legal act that incorporates amendments made to the initial legal act, without however making any substantive changes.

36 On Art. 114 TFEU and legal basis issues generally, see further subsection 10.1.1 below. On the function of Art. 114 TFEU specifically in a consumer protection context, see also para. 150 above.

37 Recital 7 Consumer Injunctions Directive 2009/22. On the background of this directive, see further Rott (2001), p. 401.

38 Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712, p. 8.

39 *Ibid*., p. 8.

40 Cf. *ibid*., p. 10.

41 Recital 3 Consumer Injunctions Directive 2009/22.

42 Art. 3 Consumer Injunctions Directive 2009/22.

aforementioned interests or *private organisations*, such as consumer associations, whose purpose it is to protect those interests in accordance with the criteria laid down by the national law.[43] The Member States can either chose between or combine these two options.[44]

This implies that the Member States have considerable leeway when determining which entities they wish to regard as being qualified, and thus to have legal standing, for the purposes of this directive. That reflects the diversity across the EU as regards the responsibility for enforcing consumer protection law. Historically Member States such as France and Belgium have tended to rely on actions brought by consumer associations, whereas for instance in the United Kingdom, Ireland, Denmark and Sweden specific public authorities were responsible and in Germany, the Netherlands and Italy this was left open to any entity meeting certain predetermined criteria.[45] In practice also after the adoption of the Consumer Injunctions Directive the Member States continue to retain widely diverging criteria in force for the recognition of such entities.[46] That said, virtually all Member States now grant legal standing to consumer associations.[47] Facilitating actions brought by these latter parties is one of the main purposes of this directive.[48] Although less common, many Member States also empower certain specialised national consumer authorities, an ombudsman or another public authority to take legal action under this directive.[49]

155. The Consumer Injunctions Directive concentrates on *cross-border situations*, i.e. situations where infringements of substantive EU consumer protection law produce effects in other Member States. Before its adoption most Member States reserved the right to take legal action against such infringements to entities that they had expressly recognised.[50] A situation could therefore occur whereby an undertaking established in Member State A sold a product to a consumer in Member State B, while for instance imposing a contract term that is considered unfair under the Unfair Terms Directive.[51]

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43 Art. 3 Consumer Injunctions Directive 2009/22. Note that organisations representing firms or federations of firms are not mentioned here. In this regard this provision deviates from the Commission's proposal and from certain other consumer protection directives, such as Art. 23(2)(c) Consumer Rights Directive 2011/83. Cf. Council, doc. 11674/96.

44 Recital 11 Consumer Injunctions Directive. See also its recitals 9 and 10.

45 Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712, pp. 6 and 10.

46 Study University of Bielefeld (2008), p. 611.

47 Study University of Leuven (2007), p. 331.

48 Cf. Cafaggi & Micklitz (2009), pp. 408-409.

49 Study University of Leuven (2007), pp. 331-332.

50 Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712, pp. 5-11.

51 Unfair Terms Directive 93/13 is one of the directives listed in Annex I to Consumer Injunctions Directive 2009/22 (see point 5 of this annex).

An entity qualified to take legal action in Member State A might then well be unaware, unwilling or legally unable to act against such an infringement. After all the infringement had its effects in Member State B. As it stood, a qualified entity from Member State B would often not be qualified to take legal action in Member State A.[52] As a consequence the effectiveness of the EU consumer protection rules was considered to be at risk. Against this background the Consumer Injunctions Directive essentially seeks to ensure that "*the effectiveness of national measures transposing the [substantive EU consumer protection directives concerned] […] is [not] thwarted where the [unlawful] practices produce effects in a Member State other than that in which they originate*".[53] This is done with a view to avoiding disruptions to the smooth functioning of the internal market and distortions of competition, as well as ensuring that consumer confidence in the internal market is not diminished.[54]

The directive seeks to tackle these abovementioned so-called 'intra-EU infringements' essentially by providing for a system of *mutual recognition*.[55] It works as follows. The Member States must inform the Commission of the entities that, pursuant to their respective national laws, are qualified to initiate legal proceedings under this directive. On that basis the Commission publishes a list of notified qualified entities.[56] The Member States must then ensure that, in the case of an infringement originating in their territory, "*any qualified entity from another Member State where the interests protected by that entity are affected by the infringement, may apply to the [competent] court or administrative authority*".[57] The list must in these cases be accepted as proof of the entity's legal capacity to bring a case. However the national court[58] seised retains the right "*to examine whether the purpose of the qualified entity justifies its taking action in a specific case*".[59] This latter provision thus restricts to some extent the application of the abovementioned principle of mutual recognition by allowing for further verifications in individual cases. It was not part of the Commission's proposal, but it was inserted at the insistence of the Member States in the course of the legislative process leading to the adoption of this directive.[60]

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52 The applicable rules of private international law can of course also be of relevance in this regard. Cf. Art. 2(2) and recital 7 Consumer Injunctions Directive 2009/22.

53 Recital 4 Consumer Injunctions Directive 2009/22.

54 Recitals 5 and 6 Consumer Injunctions Directive 2009/22.

55 Art. 4 Consumer Injunctions Directive 2009/22. See also its recital 12.

56 See e.g. OJ 2012, C 97/1. In 2006 276 qualified entities had been notified, whereby two Member States (Germany and Greece) together accounted for over half of these. See Study University of Bielefeld (2008), p. 632.

57 Art. 4(1) Consumer Injunctions Directive 2009/22.

58 For the sake of brevity reference is made here only to national courts, even if this directive also allows for cases being brought before a national administrative authority. On the rules on the forum that apply in this connection, see para. 158 below.

59 Art. 4(1) Consumer Injunctions Directive 2009/22.

60 Cf. Council, doc. 5382/1/97, 7 February 1997.

156. As to the types of actions that can be brought, the Consumer Injunctions Directive lists three remedies. The main one is an action for the "*cessation or prohibition*" of the infringement at issue.[61] As is also evident from the title of this legal act, as well as that of its particular provision setting out the remedies, this directive is thus primarily concerned with actions for (prohibitive) *injunctions*.[62] It is added here that this measure is to be ordered "*with all due expediency, where appropriate by way of summary procedure*". Two other remedies are also provided for. Where appropriate, an applicant may seek the imposition of *publicity measures*, i.e. the publication of the decision in question in full or in part or of a corrective statement with a view to eliminating the continuing effects of the infringement. In addition the directive refers to the availability of *penalty payments*, to be paid into the public purse or to any other designated beneficiary. These payments are to be made in the event of a failure to comply with the decision rendered within a set time limit, so as to ensure compliance. At the insistence of the Member States represented in Council, this latter measure however only applies "*in so far as the legal system of the Member State concerned so permits*".[63] A majority of Member States nonetheless provides for this possibility.[64]

### *5.2.2. Other provisions, practical effects and other legislation*

157. The aforementioned remedies must be made available in relation to *infringements*, which are defined as any act contrary to the directives listed in Annex I to the directive as transposed into the internal legal order of the Member States that harms the collective interests of consumers.[65] After several additions over the years, this annex currently lists 13 consumer protection directives. According to the Commission, this means that "*a large proportion*" of the substantive EU rules in this domain are now within the scope of the Consumer Injunctions Directive.[66]

In the recitals it is suggested that this directive applies not only to infringements of the national measures transposing the directives listed in its Annex I, but also the protective measures that go beyond the level required by those directives.[67] In other words, although this is not expressly stated, it appears that where those directives provide only for minimum harmonisation and a Member States chooses to also enact further-going

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61 Art. 2(1)(a) Consumer Injunction Directive 2009/22.

62 This limitation to injunctions does not imply however that other remedies, such as actions for damages, cannot be available under national law in relation to the infringements in question. Several Member States provide for this possibility. See Study University of Leuven (2007), p. 340.

63 Cf. Council, doc. 11674/96.

64 Study University of Bielefeld (2008), pp. 611 and 622-624.

65 Art. 1(2) Consumer Injunctions Directive 2009/22.

66 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 4.

67 Recital 4 Consumer Injunctions Directive 2009/22.

measures, infringements of the latter can also be covered by the Consumer Injunctions Directive. In any case the directive does not prevent Member States from granting qualified entities or other persons concerned more extensive rights to bring actions at national level.[68] Accordingly Poland and the Netherlands for instance apply the directive to *any* practice harming the collective interests of consumers, while Portugal and Latvia also permit action where the interest of an *individual* consumer is at stake.[69]

158. The above provisions are complemented by certain *rules on the forum* before which proceedings under this directive are to be brought. The rules in question are formulated in a very general manner. The Consumer Injunctions Directive provides that Member States must designate "*the courts or administrative authorities competent to rule on proceedings commenced by qualified entities*".[70] No further requirements are set out, other than the statement in the recitals that the courts or administrative authorities concerned should have the "*right to examine the effects of previous decisions*".[71] There it is also stated in general terms that the specific features of national legal systems must be taken into account to every extent possible by leaving Member States free to choose between different options having equivalent effect. Presumably, that means that Member States are in principle free to designate either a court or a (non-judicial) administrative authority to rule on the actions brought under this directive and arguably that, where an administrative authority is competent, safeguards must be provided for that ensure a degree of independence and impartiality equivalent to those of the national judicial authorities. In any case a clear majority of the Member States has opted for designating a national court and not an administrative authority.[72]

The directive further contains a separate article on '*prior consultation*'.[73] It allows the Member States to require a private party that intends to seek an injunction to first try to achieve the cessation of the infringement at issue with the alleged infringer and, if the Member State concerned so decides, also with the qualified entity of the Member State in which the injunction would be sought, before it can initiate legal proceedings. This is meant to give the defendant an opportunity to 'spontaneously' bring the infringement to an end.[74] This possibility of requiring pre-trial contacts between the

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68 Article 7 Consumer Injunctions Directive 2009/22.

69 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 5; Study University of Bielefeld (2008), pp. 610 and 638-640.

70 Art. 2 Consumer Injunctions Directive 2009/22.

71 Recital 9 Consumer Injunctions Directive 2009/22.

72 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 3.

73 Art. 5 Consumer Injunctions Directive 2009/22. See also Notice from the Member States, Rules governing prior consultation adopted pursuant to Article 5 of Consumer Injunctions Directive 2009/22, OJ 2009, C 181/6.

74 Recital 14 Consumer Injunctions Directive 2009/22. Cf. Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712, p. 12.

parties is subject to a time limit; if the consultation does not lead to the cessation of the infringement within two weeks, an action may be brought without delay. A considerable number of Member States, including Italy, Romania, Sweden and the United Kingdom, made use of the option offered by this provision.[75]

159. The Commission observed in 2008 that the directive's *effects in practice* were "*disappointing*" in as far as tackling cross-border infringements of the relevant rules of substantive EU consumer protection law is concerned.[76] It could only point to two (successful) cases where the abovementioned system of mutual recognition had been used. Subsequent reports suggest that there may have been an increase since then; stakeholders reported 70 cases with a cross-border dimension over the 2008-2011 period. However this is still only a fraction of the total number of actions for injunctions reportedly brought during that latter period (namely 5632 cases, i.e. slightly over 1%).[77] Moreover this reported increase seems mainly due to a broader understanding of what constitutes a cross-border case. Included are also situations where a qualified entity initiates legal proceedings in its 'home' Member State against an (alleged) infringer that is established in another Member State but that operates in that 'home' Member State. By contrast the abovementioned mutual recognition mechanism that is meant to allow qualified entities to act outside their 'home' Member State continues to be "*rarely used*".[78]

The view is widely shared that an important explanation for this limited use of this remedy with respect to cross-border infringements lies in the difficulties relating to costs and funding, especially where consumer associations are concerned.[79] Also when assessing the use of actions for injunctions under this directive more generally are the costs of the legal proceedings mentioned as an obstacle. More specifically, this appears to concern not necessarily the legal costs of the applicant itself, but rather the potential costs associated with the risk of having to pay the opponents costs under the 'loser pays' principle. Some Member States therefore provide for financial support for qualified entities.[80] Likewise complexities of the legal proceedings, real or perceived, are seen as a general concern, which is however aggra-

75 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 4. See also Study University of Leuven (2007), p. 336; Study University of Bielefeld (2008), pp. 609 and 634-636.

76 *Ibid*., p. 5.

77 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 4.

78 *Ibid*., p. 6.

79 See e.g. Study University of Leuven (2008), pp. 612-613, 641 and 644; Cafaggi & Micklitz (2009), p. 422; Poncibò (2009), pp. 297-298; Rott (2001), p. 410. See also Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 6.

80 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 11.

vated in cross-border situations.[81] Other concerns mentioned are the length of proceedings and the limited effects that judgments typically have, namely in principle only between the parties to the dispute and in the jurisdiction concerned (and not *erga omnes*).[82] The effectiveness of the directive's rules on penalty payments has also been questioned, whereas the possibility of ordering the publication of the court or authority's decision or a corrective statement appears not be used frequently in practice.[83] More generally, while acknowledging that it marks an important step, the directive has been widely criticised for addressing "*but very few of the complex legal questions involved in cross-border litigation with a view to private enforcement of [EU] law*".[84] One of the suggestions made in this connection is covering not only injunctive relief, but also actions for damages.[85]

Having said that, these continuing difficulties with respect to cross-border infringements and the fact that certain obstacles remain should not distract from the fact that actions for injunctions are a widely used remedy in consumer cases. Generally speaking, it is moreover a rather effective one, as the success rate tends to be high.[86] Injunctions consequently have been held to be "*a successful tool for policing markets*".[87] Presumably in this light, in 2008 and again in 2012, the Commission decided against proposing amendments to this directive.[88] It appears that, specifically in relation to the difficulties encountered in cross-border cases, other (comparatively) recent EU legislative measures are hoped to have a positive effect. It concerns in particular the 2001 Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments and the 2007 Rome II Regulation on the law applicable to non-contractual obligations,[89] as well as the increased coopera-

81 *Ibid*., p. 12.

82 *Ibid*., pp. 12-13. See also Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, pp. 6-8; Study University of Leuven (2007), pp. 342-348.

83 Study University of Leuven (2007), pp. 341-342. In relation to these penalties and the enforcement of court decisions, see also Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, pp. 13-14.

84 Betlem (2007), p. 703. For comparable criticism, see Bogdan (1998), p. 374; Micklitz (2001), p. 867; Storskrubb (2008), pp. 29-30; Azar-Baud (2010), p. 199. See also Study University of Leuven (2007), pp. 347-348.

85 Study University of Bielefeld (2008), pp. 613 and 644. At the time of its adoption, the Economic and Social Committee had argued in favour of also making provision for actions for damages. See Economic and Social Committee, Opinion on the proposal for a directive on injunctions for the protection of consumers' interests, OJ 1997, C 30/112. For a discussion of this option, see Poncibò (2009), p. 283.

86 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 4.

87 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 7. See also Study University of Leuven (2007), pp. 346-347.

88 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, p. 8; Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 16.

89 Brussels I Regulation 44/2001 and Rome II Regulation 864/2007. See further para. 14 above.

tion between consumer protection authorities under the EU's rules relating to public enforcement.[90]

160. It is further noteworthy that many *other consumer protection directives* also contain provisions facilitating actions for injunctions. These provisions are typically part of directives that principally set out certain substantive rules. A common element tends to be the requirement for the Member States to ensure that "*adequate and effective means*" exist to enforce compliance with the rules at issue.[91] In some cases it is then merely added that these means shall include provisions whereby public bodies and consumer and professional organisations having a legitimate interest may take action under national law before the courts or before the competent administrative authorities.[92]

In other cases more detailed rules are provided for, such as in the *Unfair Terms Directive*. This directive specifies that persons or organisations, having a legitimate interest under national law in protecting consumers, must be allowed to initiate legal action before a national court or administrative authority. The purpose of these actions is to obtain "*a decision as to whether contractual terms drawn up for general use are unfair, so that they apply appropriate and effective means to prevent the continued use of such terms*".[93] Also here the idea is to facilitate some form of 'representative' action, in particular (but not necessarily) by consumer associations.[94] While these actions are typically aimed at obtaining injunctive relief, under national law they can also take other forms, such as a contractual remedy.[95] Such actions can be brought even where the unfair term has not (yet) been used in a specific contract, in light of the deterrent nature and dissuasive purpose of these measures and their independence of any particular dispute.[96] In terms of forum, although many Member States also provide for a system of administrative control in one form or another, the above actions are normally to be brought before their civil courts, whereby many provide for what the

90 See further subsection 5.5.3 below.

91 E.g. Art. 23 Consumer Rights Directive 2011/83. Further specifications are sometimes added, e.g. "*in the interest of consumers, competitors and the general public*", "*in the interests of traders and competitors*" or "*in the interests of consumers*" in Art. 7 Unfair Terms Directive 93/13, Art. 5 Misleading Advertising Directive 2006/114 and Art. 11 Unfair Practices Directive 2005/29 respectively.

92 E.g. Art. 23 Consumer Rights Directive 2011/83.

93 Art. 7(2) Unfair Terms Directive 93/13. On this directive, see also section 5.3 below.

94 Cf. Commission, First amended proposal for Unfair Terms Directive 93/13, COM(92) 66, p. 3. See also CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 27; CoJ case C-372/99, *Commission v. Italy*, para. 14; Study University of Bielefeld (2008), pp. 430-431.

95 Cf. e.g. CoJ case C-472/10, *Invitel*, para. 35-40. See also Opinion AG Trstenjak case C-472/10, *Invitel*, para. 39 (n. 12); Study University of Bielefeld (2008), pp. 428-429.

96 CoJ case C-372/99, *Commission v. Italy*, para. 15-16; CoJ case C-472/10, *Invitel*, para. 37. Such independence of a specific dispute also implies however that these associations are not entitled to intervene in individual cases under this directive. See CoJ case C-470/12, *Pohotovost*, para. 43-57.

Commission called in its 2000 report on this directive a "*substantial 'administrative' admixture*".[97] The latter refers to the possibility of certain public authorities (such as a national consumer authority or an ombudsman) bringing a case before the competent national civil courts. More generally, the introduction of the abovementioned rules is said to have led to a significant increase in the number of cases brought, even if its effects vary considerably per Member State.[98] The shortcomings in its application broadly resemble those identified in relation to the Consumer Injunctions Directive, discussed above.[99]

The *Unfair Commercial Practices Directive*[100] provides for rather detailed rules that are comparable to the ones set out in the Unfair Terms Directive, discussed above, but that go further in that they specify that the competent courts or administrative authorities must be empowered to order the cessation of the infringement and to prohibit imminent infringements "*even where there is no proof of actual loss or damage or of intention or negligence*".[101] An accelerated procedure, either with interim or with definitive effect, must further be made available to decide on these actions.[102] Under the Unfair Commercial Practices Directive Member States may also provide for the possibility of the publication of the decisions or of corrective statements to be ordered.[103] Where a Member State designates an administrative authority as the competent forum, the latter must be composed so as not to cast doubts on its impartiality, have adequate powers to monitor and enforce the observance of their decisions, give reasons for its decisions and be subject to judicial review.[104] Also in this case the Member States remain free to require prior recourse to other means of dealing with complaints.[105] Finally, the competent courts or authorities must be able to require the defendant, where appropriate, to furnish evidence to underpin any factual claims made in relation to a commercial practice and to consider these claims inaccurate if the evidence is deemed to be insufficient.[106]

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97 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 21. See also Study University of Bielefeld (2008), pp. 423-432.

98 *Ibid*., p. 32. See also Study University of Bielefeld (2008), pp. 433-434.

99 *Ibid*., pp. 22-23. Here the length of proceedings and the general lack of *erga omnes* effect of decisions taken are cited in particular. See also para. 159 above.

100 Unfair Commercial Practices Directive 2005/29. See also Art. 5-7 Unfair Advertising Directive 2006/114; Art. 7 Tobacco Advertising Directive 2003/33.

101 Art. 11(2), first subparagraph Unfair Commercial Practices Directive 2005/29.

102 Art. 11(2), second subparagraph Unfair Commercial Practices Directive 2005/29.

103 Art. 11(2), third subparagraph Unfair Commercial Practices Directive 2005/29.

104 Art. 11(3) Unfair Commercial Practices Directive 2005/29.

105 Art. 11(1) Unfair Commercial Practices Directive 2005/29.

106 Art. 12 Unfair Commercial Practices Directive 2005/29.

### 5.2.3. Summary

161. The Consumer Injunctions Directive can be seen as both modest and ambitious at the same time. It is modest in that it is largely limited to actions for injunctions, brought by qualified entities in the collective interests of the consumers, with a particular emphasis on addressing infringements having cross-border effects. The effects in practice of this directive have so far on the whole also been modest. On the other hand the directive is ambitious. It is one of the few self-standing EU legal acts with 'horizontal' aspirations, i.e. covering a relatively wide range of substantive rules, that is concerned with a number of particular remedies (injunctions, publicity measures, penalty payments) as well as other aspects of national procedural law (forum, pre-trial contacts) for the enforcement of EU law at national level. It is particularly innovative where it seeks to apply the principle of mutual recognition to the legal standing of such qualified entities. Several other consumer protection directives, such as the Unfair Terms Directive and the Unfair Commercial Practices Directive, also contain rules aiming to facilitate the bringing of actions for injunctions. These latter two directives furthermore both set out complementary rules on a number of related issues, such as legal standing, forum, accelerated procedures and evidence.

## 5.3. Unfair Terms Directive: contractual remedies

In the present section attention turns from actions for injunctions to what is referred to in this study as contractual remedies, i.e. the measures affecting the validity or effectiveness of contracts concluded in breach of EU law. Of particular importance in this respect is the Unfair Terms Directive.[107] This directive is therefore first briefly introduced, after which its provision laying down a contractual remedy is assessed. The second subsection then discusses the obligation of the competent national courts to raise of its own motion the unfairness of a contract term and its possible consequences for the contract, the effects of this contractual remedy in practice and the other EU legislation that is relevant in this connection.

### 5.3.1. Introduction and contractual remedy

162. The *Unfair Terms Directive*, adopted in 1993 on the basis of Article 114 TFEU,[108] has been called "*a first incursion of EU law into the heartland of national contract thinking*".[109] The process of drafting and adopting it took

107 Unfair Terms Directive 93/13.

108 On Art. 114 TFEU and legal basis issues generally, see further subsection 10.1.1 below. On the use of Article 114 TFEU specifically in a consumer protection context, see also para. 150 above.

109 Weatherill (2005), p. 115.

almost two decades.[110] In its proposal the Commission was careful to underline that "*the time is not ripe for approximating or unifying the national laws relating to the whole field of contractual and quasi-contractual obligations or even to the limited sphere of the sale of goods and provision of services*".[111] Nevertheless heated debates took place in the Council before the directive was eventually adopted, not in the last place concerning the provision discussed below.[112] The Commission has described the end result as "*a delicate compromise*".[113]

163. In essence this directive seeks to harmonise the laws of the Member States as regards the prevention of the use of unfair terms in 'standard' contracts concluded between consumers and undertakings (sellers or suppliers).[114] Under the directive a term is qualified as '*unfair*' if it has not been individually negotiated and causes, contrary to the requirements of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[115] Its annex contains an indicative and non-exhaustive list of such terms.[116] Examples include contract terms obliging the consumer concerned to pay a disproportionately high compensation where he fails to fulfil his obligations, allowing the undertaking concerned to terminate a contract without reasonable notice or excluding or hindering the consumer's right to take legal action.

Against the background of the aim of progressively establishing the EU's internal market, the directive seeks to avoid or lessen the "*many disparities*" and "*marked divergences*" that were observed to exist in this respect.[117] In the recitals it is further noted that "*more effective protection of the consumer can be achieved by adopting uniform rules*",[118] while also noting that "*as they now stand, national laws allow only partial harmonisation to be envisaged*".[119]

164. Of particular importance for the present purposes is the Unfair Terms Directive's provision stating that Member States must provide that unfair terms "*shall, as provided for under their national law, not be binding on the*

110 Early drafts were discussed as far back as 1975. It was however not until 1990 that the Commission actually submitted a proposal. See Commission, Proposal for Unfair Terms Directive 93/13, COM(90) 322, pp. 9-12. See also Commission, Communication on unfair terms in contracts concluded with consumers, COM(84) 55.

111 Commission, Proposal for Unfair Terms Directive 93/13, COM(90) 322, p. 13.

112 See further Weatherill (2005), pp. 115-116; Micklitz, Reich & Rott (2009), pp. 123-126.

113 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 5.

114 Art. 1(1) Unfair Terms Directive 93/13. See also its recital 4. On matters falling outside the scope of this directive pursuant to its Art. 1(2), see e.g. CoJ case C-92/11, *RWE Vertrieb*, para. 25-31; CoJ case C-280/13, *Barclays*, para. 38-45. Regarding the capacity of the persons concerned, see CoJ case C-488/11, *Asbeek Brusse*, para. 24-30.

115 Art. 3 Unfair Terms Directive 93/13.

116 Cf. e.g. CoJ case C-472/10, *Invitel*, para. 25.

117 Recitals 1-3 Unfair Terms Directive 93/13.

118 Recital 10 Unfair Terms Directive 93/13.

119 Recital 12 Unfair Terms Directive 93/13.

*consumer*".[120] It continues by stipulating that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. The Court of Justice has clarified that this concerns a mandatory provision, which aims to replace the formal balance that the consumer contract in question establishes between the rights and obligations of the parties concerned with an effective balance that re-establishes equality between them.[121]

Originally the Commission had proposed laying down an obligation for the Member States to prohibit the use of unfair terms in combination with a provision stipulating that such contracts would be "*void*" if used nonetheless.[122] However the Council deleted this prohibition as it was seen as partially redundant and excessive, while also replacing the term 'void' by 'not binding' as this latter term was considered legally more appropriate.[123] The latter term is a more neutral legal concept, thus allowing the Member States a wider margin of manoeuvre, in light of diverging legal systems and traditions in respect of civil law.[124] This is underlined by the explicit reference to national law that the Council also inserted. The addition of the words 'on the consumer' makes it explicit that this remedy can be invoked only to the benefit of the consumer and not (also) of the undertaking concerned.[125] The Commission explained that the intention of the resulting provision is "*to ensure that no unfair term may be enforced to the detriment of a consumer*", while leaving the precise legal classification to the domestic legal system of each Member State.[126] It suggested that this could be done through legal concepts of national law such as relative or absolute nullity, non-existence or 'voidance'.[127]

165. Seen against this background, it is not surprising that the relevant provision of the Unfair Terms Directive has been transposed into national law in many different ways. Effect has been given to the term 'not binding on the consumer' through national law concepts such as non-existence, nul-

120 Art. 6(1) Unfair Terms Directive 93/13.

121 E.g. CoJ case C-618/10, *Banco Español de Crédito*, para. 40; CoJ case C-169/14, *Sánchez Morcillo*, para. 23.

122 Commission, Proposal for Unfair Terms Directive 93/13, COM(90) 322, p. 69 (Art. 3); Commission, First amended proposal for Unfair Terms Directive 93/13, COM(92) 66, p. 11 (Art. 7).

123 See Council, doc. 8406/1/92; Council, doc. 8406/1/92, p. 5. See also Commission, Communication on the Council's position on the proposal for Unfair Terms Directive 93/13, SEC(92) 1944, p. 6; Commission, Second amended proposal for Unfair Terms Directive 93/13, COM(93) 11, p. 2.

124 Opinion AG Trstenjak case C-472/10, *Invitel*, para. 48.

125 Cf. Micklitz, Reich & Rott (2009), p. 144 (see also p. 207).

126 Commission, Second amended proposal for Unfair Terms Directive 93/13, COM(93) 11, p. 2.

127 *Ibid*., p. 2. See also Council, doc. 4884/93, p. 2, where the Council expressed the view that this term can imply *inter alia* that the relevant part of the contract is void.

lity, revocability, voidability and unenforceability.[128] Under Bulgarian, German and Spanish law for instance an unfair term within the meaning of the directive is automatically null and void.[129] A largely similar concept of non-existence is applied in France.[130] The laws of the Czech Republic and the Netherlands provide for relative nullity, whereby the unfair term can be declared void upon application.[131] In Italy provision is made for a somewhat comparable concept of 'protective' nullity, allowing the consumer to rely on the term so long as it suits him, as only this party can invoke the nullity.[132] Under the laws of certain Member States, such Hungary and Poland, a court ruling establishing the unfairness of a term can in certain cases have effects *erga omnes*. This means that the ruling applies in respect of all consumers that concluded a contract containing this term with that particular undertaking or even with other undertakings.[133]

166. This raises the issue what, from an EU law perspective, the *limits* are to the leeway that this provision leaves to the Member States. In 2000 the Commission took the view that it should at least be ensured that the consumer in question is free to refuse to honour the contractual obligation imposed by the unfair term before the competent court has adjudicated on the matter.[134] In addition it argued that any court judgment finding a term to be unfair should take effect from the time of conclusion of the contract, i.e. with retroactive effect (*ex tunc*).[135] This would thus significantly limit the possibilities available under national law.

It appears however that the Court of Justice is inclined to take more of a 'hands-off' approach. It mostly respects the Member States' leeway under this provision, while at the same time seeking to ensure that the aim of this provision is achieved. More specifically, the Court has confirmed that the Member States have "*a certain degree of autonomy so far as concerns the definition of the legal arrangements applicable to unfair terms*".[136] In line with the wording of the Unfair Terms Directive, the central issue is that Member States must ensure that these terms are not binding on the consumer.[137] The Court has left it to the national court seised to draw all the necessary consequences

128 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, pp. 19-20.
129 Study University of Bielefeld (2008), pp. 357, 361, 373 and 407.
130 *Ibid*., pp. 360 and 407.
131 *Ibid*., pp. 358, 368 and 407. Under Netherlands' law an unfair term can also not be applied on the basis of the principles of reasonableness and equity ('*redelijkheid en billijkheid*'; Art. 6:248 BW).
132 *Ibid*., p. 365.
133 *Ibid*., pp. 431-432. See also Keirsbilck (2013), pp. 1468-1469. As such these rules address some of the concerns noted in Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, pp. 22-23.
134 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 19.
135 For a similar view, see Opinion AG Trstenjak case C-472/10, *Invitel*, para. 47.
136 CoJ case C-618/10, *Banco Español de Crédito*, para. 62.
137 *Ibid*., para. 62.

under national law so as to achieve this result, and to assess whether the contract in question can continue to exist without that term.[138] To this aim that court must "*do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that [Article 6(1)] is fully effective and achieving an outcome consistent with the objective pursued by it*".[139] This also applies with regard to the future.[140] For the Court of Justice, the key is therefore that a national court does not apply a term that it considers to be unfair, without such non-application being qualified further as a matter of EU law.[141]

The Court has further ruled that, at least in cases where a contract term is found to be unfair pursuant to a 'representative' action brought under this directive,[142] that term should generally not be binding on consumers who have concluded a contract containing this term with that particular undertaking, regardless of whether these consumers were party to the proceedings in question.[143] Yet whilst this result can be achieved through a ruling having effects *erga omnes*,[144] it also noted that this does not exclude the possibility of other types of national measures.[145] Concerning the remainder of the contract, i.e. the other terms than the unfair ones, it has been held that, although national law may provide otherwise, the directive itself does not imply that a national court could or should annul the entire contract containing an unfair term where this would be advantageous for the consumer concerned.[146] Neither does it allow the national court to amend the contract other than by deleting the unfair term, to the extent that such continuity is legally possible under national law.[147]

### *5.3.2. Own motion judicial review, practical effects and other legislation*

167. The Court of Justice has shown considerably less restraint on another issue relating to the aforementioned contractual remedy set out in the Unfair Terms Directive. This concerns the question whether a national court should verify *of its own motion* (*ex officio*) whether a given term is unfair and there-

138 CoJ case C-40/08, *Asturcom*, para. 57-58; CoJ Order case C-76/10, *Pohotovost*, para. 61-62; CoJ case C-453/10, *Pereničová*, para. 30.
139 CoJ case C-618/10, *Banco Español de Crédito*, para. 72.
140 CoJ case C-472/10, *Invitel*, para. 43.
141 CoJ case C-243/08, *Pannon*, para. 35; CoJ case C-488/11, *Asbeek Brusse*, para. 49.
142 Pursuant to Art. 7(2) Unfair Terms Directive 93/13. See further para. 160 above.
143 CoJ case C-472/10, *Invitel*, para. 38. See also Opinion AG Trstenjak case C-472/10, *Invitel*, para. 59-60, where it was argued that serious doubts from the viewpoint of proportionality and protection of fundamental rights would arise however if the effects of such a ruling were to extent also to *other* undertakings that use the same term in their contracts but that are not party to the proceedings in question.
144 See para. 159 above.
145 CoJ case C-472/10, *Invitel*, para. 39-40.
146 CoJ case C-453/10, *Pereničová*, para. 31-35.
147 CoJ case C-618/10, *Banco Español de Crédito*, para. 64-71.

fore not binding on the consumer. On this issue the Commission had principally argued that the competent national court should be *empowered* to do so.[148] The Court has held in a remarkable and much commented upon string of cases, starting with its 2000 judgment in *Océano Grupo*, that this is not only a possibility, but in principle also an *obligation* for that court.[149]

*Océano Grupo* concerned a preliminary reference by a Spanish court. Several consumers had bought certain products (encyclopaedias), but they failed to pay the sums due. The undertakings that had sold them the products then initiated legal proceedings. In application of the relevant term of the contract, these cases were brought before the court located at the undertakings' principal place of business, rather than at the place where the consumers were domiciled, as is the general rule. The national court seised doubted whether it had jurisdiction, considering the possible unfairness of the term in question. In addition it was unsure whether it could raise this issue of the possible unfairness of its own motion. In its judgment the Court of Justice confirmed that a term such as the one at issue had the object or effect to exclude or hinder the consumers' right to take legal action and is therefore unfair. As regards the second question, it held that the Unfair Terms Directive is founded on the idea that the consumer is in a weak position *vis-à-vis* the undertaking concerned as regards both his bargaining power and his level of knowledge. It found that the aim of the contractual remedy for which it provides would not be achieved if the consumer were himself obliged to raise the unfair nature of the term. Especially where the amounts involved are limited, the consumer may be deterred by the lawyer's fees. In the Court's view there is thus a real risk that the consumer does not challenge the unfair term himself, particularly because of ignorance of the law.

It was therefore found that the effective protection of the consumer can be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion. The Court also noted that the system of protection laid down in this directive is based on the notion that the imbalance between the consumer and the undertaking concerned may only be corrected by positive action unconnected with the actual parties to the contract. Here it referred to the aforementioned possibility of 'representative' actions being brought under this directive by certain third parties, such as consumer associations.[150] In conclusion it was held that "*the [national] court's power to determine of its own motion whether a term is unfair must be regarded as constituting a proper means both of achieving the result sought by Article 6, namely, preventing an individual consumer from being bound by an unfair*

148 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, pp. 19-20.

149 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 22-29. On this case and subsequent case law, see e.g. Stuyck (2001), p. 719; Ebers (2010), p. 823; Stuyck (2010), p. 879; Schebesta (2010), p. 847; Trstenjak & Beysen (2011), pp. 119-121; Keirsbilck (2013), p. 1467.

150 Art. 7(2) Unfair Terms Directive 93/13. See para. 160 above.

*term, and of contributing to achieving the aim of Article 7, since if the court undertakes such an examination, that may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers*".[151]

168. In subsequent cases the Court of Justice has held that the competent national court should not only be *empowered* to act of its own motion, but that it is in principle *obliged* to do so.[152] In light of the nature and importance of the public interest underlying this directive, it was found – in the context of the possible annulment of an arbitration award – that the provision in question must be regarded as having standing equal to national rules of public policy (*d'ordre public*).[153] As a general rule, the national court is therefore under an obligation to assess whether a term is unfair within the meaning of the Unfair Terms Directive and therefore not binding on the consumer, to the extent that the necessary legal and factual elements are available to it, as a means to compensate for the imbalance between the private parties concerned.[154]

Although broad and far-going, this obligation is however *not unqualified*. For instance, the Court has clarified that where this own motion assessment leads to the finding that the term is unfair, the national court should normally inform the parties to the dispute and invite them to comment.[155] When the consumer then still does not wish to assert the unfairness of the term, the national court is not obliged to consider it unfair.[156] Neither does such an obligation necessarily exist in the context of the enforcement of a previous arbitration award which has since become final (*res judicata*).[157] In addition this obligation does not apply in cases brought by consumer protection associations, given that here the same imbalance between the parties is not presumed to exist.[158]

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151 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 28.

152 In addition to the cases mentioned above and below, see also CoJ case C-473/00, *Cofidis*; CoJ case C-137/08, *Pénzügyi Lízing*. Note that the CoJ has since applied essentially the same reasoning also to other consumer protection directives, namely (what are now) Consumer Credit Directive 2008/48 and Consumer Rights Directive 2011/83. See CoJ case C-429/05, *Rampion*; CoJ case C-227/08, *Martín Martín*.

153 CoJ case C-168/05, *Mostaza Claro*, para. 35-38; CoJ case C-40/08, *Asturcom*, para. 52-53. For an alternative approach, rejecting an extensive interpretation of the concept of 'public policy' and concentrating instead on an infringement of the right to a fair hearing, see Opinion AG Tizzano case C-168/05, *Mostaza Claro*, para. 55-61. On the term 'public policy' within the meaning of Brussels I Regulation 44/2001, see e.g. CoJ case C-7/98, *Krombach*, para. 37; CoJ case C-394/07, *Gambazzi*, para. 27.

154 E.g. CoJ case C-618/10, *Banco Español de Crédito*, para. 42-43; CoJ case C-415/11, *Aziz*, para. 46-47; CoJ case C-169/14, *Sánchez Morcillo*, para. 24.

155 CoJ case C-472/11, *Banif Plus Bank*, para. 31. See also CoJ case C-488/11, *Asbeek Brusse*, para. 52.

156 CoJ case C-243/08, *Pannon*, para. 33.

157 CoJ case C-40/08, *Asturcom*, para. 34-38.

158 CoJ case C-413/12, *ACICL*, para. 49-50.

In this line of case law the EU law principles of *equivalence and effectiveness* have been repeatedly applied.[159] Article 6(1) Unfair Terms Directive having been held to be of equal standing as a national rule of public policy, the former principle implies that the effects of earlier, final judgments may still need to be reassessed, where national law provides for this possibility in cases of breaches of national rules of public policy. Here the Court underlined that, where national law gives the competent national court the *discretion* to do so, this must be taken to imply an *obligation*.[160] It has further held that specific national proceedings for the simplified and rapid recovery of uncontested claims can be incompatible with the principle of effectiveness, where such procedures completely prevent the court from considering of its own motion whether a term is unfair. Here the risk that a consumer would not lodge his objections, because of the short time period, associated costs or his unawareness, was stressed once more.[161] On similar grounds, in certain cases, interim relief must be available against enforcement proceedings.[162] Yet the Court has also ruled that in this context the principle of effectiveness cannot be "*stretched*" so far as to mean that the national court must compensate not only for a procedural omission on the part of the consumer, but also his "*total inertia*".[163]

169. Apart from the rules on actions for injunctions, discussed earlier,[164] the Unfair Terms Directive contains no further provisions in respect of the remedies and procedures applicable in proceedings before the national courts regarding unfair terms. No provision is made for example for actions for damages. In respect of the contractual remedy at issue here the directive also leaves it open which body is to rule on the actions in question. Neither does it touch upon the issue of limitation periods for actions bought under that directive.

170. As regards its *functioning in practice*, doubts have been expressed as to whether the current system of protection that the Unfair Terms Directive offers to private parties is adequate.[165] In its report on this directive, dating from 2000, the Commission was critical, observing that unfair terms continue to be used on a wide scale and calling the said system "*very ineffective*".[166] It noted that the situation where a term has been held to be non-binding

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159 On these two principles, see further section 2.2 above.

160 E.g. CoJ case C-40/08, *Asturcom*, para. 51-54; CoJ case C-488/11, *Asbeek Brusse*, para. 46.

161 CoJ case C-618/10, *Banco Español de Crédito*, para. 53-55.

162 CoJ case C-415/11, *Aziz*, para. 57-63. CoJ case C-34/13, *Kušinová*, para. 66.

163 CoJ case C-40/08, *Asturcom*, para. 47. See also CoJ case C-34/13, *Kušinová*, para. 56.

164 See para. 160 above.

165 Cf. CoJ case C-144/99, *Commission v. Netherlands*, para. 18; CoJ case C-478/99, *Commission v. Sweden*, para. 16 and 18; CoJ case C-243/08, *Pannon*, para. 21. Here it is clarified that Art. 6(1) Unfair Terms Directive 93/13 is intended to accord a right to the citizen in his role of consumer.

166 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 35 (see also p. 20).

differs little from the situation where the term had not been used in the first place, which implies that the undertakings using those terms in effect run little risks. The Commission further argued that its effectiveness depends also on the ease of the consumers' access to justice and, perhaps primarily, on sufficient information being available to them. This report therefore raised the options of reinforcing this 'civil penalty' or complementing it by providing for criminal sanctions or actions for damages.

The abovementioned *Océano Grupo* case law, which dates from after the publication of the Commission's report, appears to have helped to address its latter concern about consumers being insufficiently informed. However to a large extent the former concern about undertakings in effect hardly running any risks seems still equally valid today. A more recent study also warned against the possible lack of effectiveness as a consequence of the rather rudimentary regulation of the legal consequences of a finding that a contract term is unfair as well as consumers' lack of knowledge in this respect.[167] Nonetheless, when in 2008 the Commission proposed replacing the Unfair Terms Directive, its intended successor (i.e. the Consumer Rights Directive[168]) contained a provision that is essentially the same as the one discussed above.[169] The EU legislature eventually decided against repealing this directive however.[170] The aforementioned provision consequently remains in force today.

171. Finally, several other directives in the domain of consumer protection also contain provisions on contractual remedies. For example, the *Consumer Sales Directive* provides that a consumer may have the contract "*rescinded*" where the consumer goods to which the contract relates are not in conformity.[171] In the recitals of this directive it is specified that the detailed arrangements whereby the recession of the contract is effected may be laid down in national law.[172] The consequences of exercising this right of rescission are sometimes seen as unclear.[173] In addition under this directive any contractual term or agreement concluded before the lack of conformity is brought to the seller's attention which waives or restricts the rights resulting from the directive "*shall, as provided for by national law, not be binding on the consumer*".[174] The similarity in wording between this latter provision and

167 Study University of Bielefeld (2008), pp. 347 and 434.
168 Consumer Rights Directive 2011/83.
169 Commission, Proposal for Consumer Rights Directive 2011/83, COM(2008) 614, p. 34 (Art. 37).
170 See e.g. Council, doc. 8992/11, pp. 5-6.
171 Art. 3(2), (5) and (6) Consumer Sales Directive 1999/44.
172 Recital 15 Consumer Sales Directive 1999/44.
173 Study University of Bielefeld (2008), p. 706. Some clarity is provided by CoJ case C-404/06, *Quelle*, para. 39; CoJ joined cases C-65/09 and C-87/09, *Weber*, para. 72. Regarding the implementation of this directive, see also Commission, Report on Consumer Sales Directive 1999/44, COM(2007) 210.
174 Art. 7 Consumer Sales Directive 1999/44.

Article 6(1) Unfair Terms Directive is evident. In the absence of any relevant indications in the preparatory documents, the case law of the Court of Justice or otherwise, it remains for now an open question whether it should be understood in the same manner.[175]

Another example of contractual remedies in the field of EU consumer protection law can be found in the *Package Travel Directive*, which allows consumers to "*withdraw from the contract*" without penalty, in case the undertaking concerned does not honour its primary commitments under the contract in question.[176] It has been held that this is to be understood as a right for the consumer to cancel the contract, similar to the right of rescission as provided in the Consumer Sales Directive.[177] The Commission's 2013 proposal to replace this directive speaks in this regard of the right to "*terminate*" the contract.[178] This suggests that this right is to be distinguished from the 'right of withdrawal' which can be found in several other consumer protection directives.[179] In these latter cases, this concept relates primarily to a 'cooling-off period', meaning that a consumer can withdraw from a concluded contract under certain conditions and within a limited time period.[180]

### *5.3.3. Summary*

172. The Unfair Terms Directive provides for a contractual remedy, pursuant to which a consumer is 'not bound' by an unfair term in a consumer contract. The broad and rather imprecise wording of this provision, in combination with the explicit reference to national law laid down therein, means that it can be – and indeed has been – transposed into national law in different manners. To date, while stressing that the effectiveness of this provision must be safeguarded, the Court of Justice has on the whole been rather tolerant of the Member States' leeway in this respect and the resulting diversity at national level. It has however opted for a rather extensive interpretation on another point related to this provision, namely the obligation, as a gen-

175 Cf. Commission, Proposal for Consumer Sales Directive 1999/44, COM(95) 520, p. 16. As regards the transposition into national law, see Study University of Bielefeld (2008), p. 692.

176 Art. 4(5) Package Travel Directive 90/314. See also its Art. 4(6).

177 Study University of Bielefeld (2008), pp. 213 and 298-299.

178 Commission, Proposal for a new package travel directive, COM(2013) 512, p. 24 (Art. 9(2)(b) and 10).

179 E.g. Art. 6 Distance Marketing Directive 2002/65; Art. 14 Consumer Credit Directive 2008/48; Art. 9 Consumer Rights Directive 2011/83.

180 On the effects of such a withdrawal, cf. CoJ case C-481/99, *Heininger*, para. 35; CoJ case C-350/03, *Schulte*, para. 66-69 and 92; CoJ case C-229/04, *Crailsheimer*, para. 46-49. Note that these cases relate to Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985, L 372/31 ('Doorstep Selling Directive'), which has since been replaced by Consumer Rights Directive 2011/83. Different from its predecessor, the latter directive contains a relatively detailed harmonised arrangement concerning this right of withdrawal and its effects and uses somewhat different terminology (see its Art. 9-16).

eral rule, for the competent national court to raise of its own motion (*ex officio*) the unfair nature of a term. Other than this provision and its provision on injunctions discussed earlier, the Unfair Terms Directive does not contain for any other remedial or procedural provisions that are relevant for the present purposes. Although less broadly construed and mostly differently worded, somewhat similar contractual remedies can be found in certain other consumer protection directives, most notably the Consumer Sales Directive and the Package Travel Directive.

### 5.4. Product Liability Directive: damages

A third, quite different approach from the ones discussed in the foregoing two subsections has been laid down in the Product Liability Directive.[181] This directive seeks to facilitate the private enforcement of the relevant substantive rules of EU law by focusing on another remedy, namely civil liability for damages. After a brief general introduction of this directive, its central principle of no-fault liability is outlined below. There it is also explained what is understood in this context by the term 'damage'. Subsequently the manner in which this liability is limited and the other relevant legislation are discussed.

#### *5.4.1. Introduction, no-fault liability and damage*

173. The *Product Liability Directive* dates from 1985. This directive is considered not only a corner stone of the EU's consumer protection *acquis*, but also as an important step on the path towards the gradual harmonisation of the law on non-contractual liability and private law generally.[182] Based on Article 115 TFEU, it aims to address divergences between national laws on product liability, so as to ensure undistorted competition between economic operators, facilitate the free movement of goods and avoid differences in levels of consumer protection.[183] The Court of Justice has described this directive as reflecting "*a complex balancing of different interests, [including] guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice*".[184] The Court has also held that the directive confers rights on the injured private parties concerned.[185]

181 Product Liability Directive 85/374.
182 E.g. Izquierdo Peris (1999), p. 331; Weatherill (2005), p. 137; Fairgrieve & Howells (2007), pp. 692-693.
183 Cf. recital 1 Product Liability Directive 85/374. On Art. 115 TFEU and legal basis issues generally, see subsection 10.1.1 below.
184 CoJ case C-52/00, *Commission v. France*, para. 29.
185 Cf. CoJ case C-177/04, *Commission v. France*, para. 49 (regarding Art. 3(3) of the directive).

174. The Commission initially published its proposal for this directive in 1976, followed by an amended version in 1979.[186] These proposals proved to be *controversial*.[187] Certain Member States, in particular Germany, feared that extended liability for damages would harm industry.[188] There was also a fear of excessive litigation, especially regarding small claims.[189] No less than nine years of discussions by the EU legislature (at that time only the Council, the European Parliament merely having a consultative role[190]), numerous statements at the time of its adoption as well as various exceptions, limitations and merely optional provisions, discussed below, were required before agreement could finally be reached. As imposed by its legal basis, i.e. Article 115 TFEU, this agreement was in the end unanimous.

In a sense controversies continued after its adoption. France for instance did not transpose the directive into national more than a decade later, after having been condemned by the Court of Justice for not having done so earlier.[191] Whereas some Member States, such as Germany, feared that the liability regime would be too harsh, France's reluctance related rather to the higher level of consumer protection for which its national law provided.[192] Particularly problematic from this perspective is the Court's ruling that the directive provides for 'complete' (or 'maximum') harmonisation (as opposed to 'minimum' harmonisation) of the matters regulated by it.[193] This means that Member States remain at liberty to retain or establish their domestic regimes on product liability only for matters not regulated by this directive, such as liability based on other grounds or concerning other products.[194] But other national rules, such as those on the liability of suppliers, which existed *inter alia* in France, cannot be maintained, because this matter is exhaustively covered by the directive.[195]

175. The Product Liability Directive starts by providing that "*the producer shall be liable for damage caused by a defect in his product*".[196] It defines what constitutes a 'product' and which undertakings qualify as 'producers' for

186 Commission, Proposal for Product Liability Directive 85/374, COM(76) 372; Commission, Amended proposal for Product Liability Directive 85/374, COM(79) 415.
187 Commission, Third report on Product Liability Directive 85/374, COM(2006) 496, p. 6. See also Study Lovells (2003), p. 135; S. Weatherill (2005), p. 135; Micklitz, Reich & Rott (2009), pp. 220-221.
188 Reich (1986), p. 137. See e.g. Council, doc. 5555/80, pp. 4 and 13.
189 Van Doorn (1989), p. 11. See e.g. Council, doc. 7020/81, p. 19; Council, doc. 7413/84, p. 9.
190 For the latter's opinion, see European Parliament, Opinion on the proposal for Product Liability Directive 85/374, OJ 1979, C 127/61.
191 CoJ case C-52/00, *Commission v. France*.
192 Van Dam (2006), pp. 371 and 374-375.
193 E.g. CoJ case C-52/00, *Commission v. France*, para. 14-24; CoJ case C-154/00, *Commission v. Greece*, para. 10-20; CoJ case C-495/10, *Dutrueux*, para. 20-22.
194 E.g. CoJ case C-183/00, *González Sánchez*, para. 30-31; CoJ case C-285/08, *Moteurs Leroy Somer*, para. 25.
195 Art. 3(3) Product Liability Directive 85/374.
196 Art. 1 Product Liability Directive 85/374.

the purposes of this directive.[197] It also explains when a product is defective, i.e. when it does not provide the safety which a person is entitled to expect, taking all circumstances into account.[198] The directive then continues by specifying its central principle of *liability without fault*. It stipulates in this regard that "*the injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage*".[199] By implication, a private party-applicant does *not* need to prove – and, presumably, does not even need to submit – that the producer was *at fault* for the latter's liability in damages to be incurred.[200]

The Product Liability Directive thus establishes no-fault ('strict') liability of the producer for any defects in the products covered. This approach relies on the view that it is extremely difficult or even impossible for a consumer to provide proof of fault on the side of the producer, meaning that imposing such a requirement would leave consumers unprotected.[201] According to its recitals, the no-fault liability provided for is the "*sole means*" of adequately solving the perceived problem related to product liability, i.e. the fair apportionment of risks inherent in modern technological production.[202] Even so, this approach was new to most Member States.[203]

176. The directive adds that where two producers are liable for the same damage, they are *jointly and severally liable*.[204] The rights of contribution or recourse in such a case are expressly left to be regulated by national law. It is further made explicit that the producer cannot limit or exclude its liability under this directive.[205] The rules in question are thus mandatory in nature.

177. Another important provision is the directive's description of what is understood in this connection by the concept of '*damage*'.[206] This was another particularly controversial issue during the legislative process.[207] Two heads of damage are specified, namely, first, *damage caused by death or by personal injuries* and, second, damage to, or the destruction of, any *item of property*, other than the product itself, with a lower threshold of € 500, provided that the item of property is of a type ordinarily intended for private use and that it was used by the injured person mainly for his own private

197 Art. 2 and 3(1) Product Liability Directive 85/374 respectively. Pursuant to its Art. 3(3) the liability established under this directive extends in certain cases to the supplier of the product in question.
198 Art. 6(1) Product Liability Directive 85/374.
199 Art. 4 Product Liability Directive 85/374.
200 Cf. CoJ case C-402/03, *Skov*, para. 19.
201 Commission, Proposal for Product Liability Directive 85/374, COM(76) 372, p. 1.
202 Recital 2 Product Liability Directive 85/374.
203 Cf. Van Gerven, Lever & Larouche (2000), p. 674 (concerning the legal systems of England, France and Germany). See also e.g. Council, doc. 10512/81, p. 2.
204 Art. 5 Product Liability Directive 85/374.
205 Art. 12 Product Liability Directive 85/374.
206 Art. 9 Product Liability Directive 85/374.
207 Taschner (2002), p. 390.

use or consumption. Accordingly claims for compensation in respect of damage to or the destruction of the defective product itself are not covered. This implies that these latter claims are to be settled under national law.[208] Under the directive issues relating to *non-material damage*, such as compensation for pain and suffering, are expressly left to be dealt with by the laws of the Member States.[209] This is in line with the Commission's initial proposal.[210] However, further to a suggestion to this effect by the European Parliament, the amended proposal did include this head of damage.[211] The Council nonetheless decided to exclude it from the final text of the directive, in light of the differing understandings of this concept in the Member States and because it was felt inappropriate to harmonise this aspect only for this particular domain.[212]

178. The Court of Justice has since clarified what is to be understood by this concept of 'damage' within the meaning of the Product Liability Directive, particularly in its ruling in *Veedfald*.[213] This case, dating from 2001, was referred by a Danish court. It concerned a defective perfusion fluid used for kidney transplantations. In the context of the resulting litigation, the question arose how the abovementioned provision is to be interpreted. In its reply the Court began by pointing out that, while two heads of damages are specified, the term 'damage' itself is not defined in the directive. It also held that the directive exhaustively sets out the heads of damages that may be possible. Thus, a national court may not decline to award any damages at all under the directive on the ground that, where the other conditions of liability are fulfilled, the damage incurred is not such as to fall under any of the abovementioned heads mentioned in the directive. The Court ruled that, although it is left to the national legislatures to determine the precise content of these two heads of damages, it must be ensured that "*full and proper compensation*" is available for damage resulting from death or personal injury or from damage to or destruction of an item of property. A Member State can therefore not restrict these types of material damage which are to be made good. By contrast the reparation of non-material damage is governed solely by national law, meaning that this latter type of damage may or may not be recoverable.

208 Cf. Commission, Proposal for Product Liability Directive 85/374, COM(76) 372, p. 13.
209 Art. 9, last subparagraph Product Liability Directive 85/374. See also its recital 9.
210 Commission, Proposal for Product Liability Directive 85/374, COM(76) 372, p. 12.
211 Commission, Amended proposal for Product Liability Directive 85/374, COM(79) 415, p. 6.
212 Council, doc. 7669/85, pp. 4-5.
213 CoJ case C-203/99, *Veedfald*, para. 23-33.

179. As regards the abovementioned *threshold* of € 500, the recitals of the Product Liability Directive clarify that this is meant to "*avoid litigation in an excessive number of cases*".[214] This threshold was introduced as part as an overall compromise on the contentious issue of which damages are to be covered by the directive.[215] In the view of the Court of Justice it should not be regarded as unduly affecting injured parties' rights of access to court.[216] For, despite this exclusion of minor material damage from the scope of this directive's special liability regime, these parties can still bring an action under the ordinary law of contractual or non-contractual liability.

### *5.4.2. Limits, practical effects and other legislation*

180. The Product Liability Directive limits and moderates the effects of the aforementioned no-fault liability in various manners. In fact, it does so to the extent that it has been held that the provisions in question "*fail to live up to the ideal*" of no-fault liability.[217] An important element in this connection is that a producer cannot be held liable under the directive if he proves the existence of certain *exonerating circumstances*. These are set out in an exhaustive list.[218] They include the defence that the state of science and technological knowledge when the product was put into circulation was not such as to enable the existence of the defect to be discovered, known as the 'development risk defence'.[219] The provision making this defence available is optional, in that the directive entitles Member States not to include it in their national laws.[220] Only very few Member States (Finland, Luxembourg) decided however to completely exclude this defence.[221]

181. In addition the Product Liability Directive provides for certain time bars. These come in two forms. First, there is a *limitation period* of three years as from the day the injured party becomes aware or should reasonably have become aware of the damage, the defect and the identity of the producer.[222] Setting such a uniform period was seen as being in the interest of both the

214 Recital 9 Product Liability Directive 85/374. Note that some uncertainty exists as to whether this is a proper threshold or rather that this is a deductible amount (which may in part be due to the differences between the various language versions of this directive). See Fairgrieve & Howells (2007), pp. 674-975.

215 Taschner (2002), p. 390.

216 CoJ case C-52/00, *Commission v. France*, para. 29-32; CoJ case C-154/00, *Commission v. Greece*, para. 29-32.

217 Van Gerven, Lever & Larouche (2000), p. 678.

218 Art. 7 Product Liability Directive 85/374. This possibility was largely absent in the Commission's proposals. Cf. CoJ case C-203/99, *Veedfald*, para. 15; CoJ case C-127/04, *O'Byrne*, para. 25.

219 Art. 7(e) Product Liability Directive 85/374. On the development risk defence, see CoJ case C-300/95, *Commission v. UK*, para. 25-29. See also Study Fondazione Rosselli (2004).

220 Art. 15(1)(b) Product Liability Directive 85/374.

221 Howells (2008), p. 126.

222 Art. 10(1) Product Liability Directive 85/374.

injured private party and the producer.[223] The suspension and interruption of this period is left to be settled by national law.[224] Second, the directive specifies a time period of ten years as from the moment the product was put into circulation, at the expiry of which the consumer's rights under this directive are *extinguished*, unless legal proceedings have been instituted in the meantime.[225] This latter provision rests on the thought that it would be unreasonable to make the producer liable for an unlimited period.[226]

182. Pursuant to the directive liability may further be reduced or disallowed when, having regard to all the circumstances, the damage is caused by a defect in the product and by the fault of the injured person or any person for whom the injured person is responsible.[227] This thus covers the situation of *contributory negligence* by the private party concerned.[228] By contrast under the directive the act or omission of a *third party* may not be reason to reduce the liability of the producer. In the latter case any right of contribution or recourse for the producer *vis-à-vis* that third party is to be determined in accordance with the applicable national law.[229]

183. A final measure that limits the effects of the no-fault liability for which the directive provides is that it leaves the Member States the option to *cap the producer's liability* for damage resulting from death or personal injury and caused by identical items with the same defect at an amount not lower than € 70 million.[230] The fact that this latter provision is accompanied by an express requirement for the Commission to report, after ten years, on the effects of this provision and the statement that on that basis the Council shall decide whether or not to repeal this cap illustrates that also this issue was contentious.[231] The recitals explain that in most Member States it was seen as inappropriate to set such a financial ceiling, but that legal traditions in this regard differed and that therefore the possibility of a derogation from the principle of unlimited liability should be foreseen.[232]

184. As to the *practical effects* of the Product Liability Directive, the picture that emerges on the basis of various reports and studies is that the relevant national regimes on product liability continue to differ significantly.[233] That

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223 Recital 10 Product Liability Directive 85/374.
224 Art. 10(2) Product Liability Directive 85/374.
225 Art. 11 Product Liability Directive 85/374. On the application of this ten year period, see CoJ case C-127/04, *O'Byrne*; CoJ case C-358/08, *Aventis Pasteur*.
226 Recital 11 Product Liability Directive 85/374.
227 Art. 8(2) Product Liability Directive 85/374.
228 Cf. recital 8 Product Liability Directive 85/374.
229 Art. 8(1) Product Liability Directive 85/374.
230 Art. 16(1) Product Liability Directive 85/374.
231 Art. 16(2) Product Liability Directive 85/374.
232 Recital 17 Product Liability Directive 85/374.
233 See in particular Study Lovells (2003), pp. 9-23.

is the case for instance as regards the assessment of damages, group actions, rules on evidence, pre-trial discovery of evidence and recovery of legal costs. Many stakeholders reportedly consider these procedural differences of more importance than differences in the applicable substantive law. It further appears that on the whole under this directive only limited numbers of cases are brought before the competent national courts, in part because a considerable number of cases are thought to be settled.[234] Accordingly it has been held that the Product Liability Directive has been more debated than utilised in litigation.[235] A modest increase in litigation has been observed in more recent years. But the Product Liability Directive is reported to have played only a limited role in this increase; more important factors are thought to have been greater consumer awareness and access to information, as well as increased media attention.[236]

The Commission appears to find neither the abovementioned legal differences nor the low level of litigation problematic, at least not to such a degree that it intends proposing legislative change. The only amendment made to the Product Liability Directive dates from 1999 when, in the aftermath of the 'mad cow' crisis, primary agricultural products were brought within its scope.[237] Various possible more profound amendments were discussed in a Commission green paper dating from the same year, further to suggestions by the European Parliament.[238] These include measures related to the following issues: (i) the relaxation of the burden of proof on consumers, for instance by inferring a causal relationship, establishing a lower standard of proof or imposing obligations on producers to disclose certain documentation or to bear the costs of an expert opinion; (ii) the possibility of abolishing the abovementioned development risk defence; (iii) reducing or abolishing the financial threshold of € 500; (iv) extending the concept of 'damage' so as to cover also non-material damage; and (v) improving access to justice for private parties by making provision for injunctions and/or collective redress mechanisms such as of the type know in the United States

234 Commission, First report on Product Liability Directive 85/374, COM(95) 617, p. 2; Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, p. 10; Commission, Fourth report on Product Liability Directive 85/374, COM(2011) 547, p. 4. See also Study McKenna (1994), p. 14; Weatherill (2005), p. 146; Howells (2008), p. 130; Micklitz, Reich & Rott (2009), p. 247.

235 Howells (2008), p. 121.

236 Study Lovells (2003), pp. 31-38.

237 Directive 1999/34/EC amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1999, L 141/20 ('Product Liability Amending Directive').

238 Commission, Green paper on liability for defective products, COM(1999) 396. See also Commission, Communication on the Council's position on the proposal for Product Liability Directive 85/374, SEC(1998) 2232. See further Izquierdo Peris (1999), pp. 339-344; Whittaker (2005), pp. 440-450.

class actions. But in 2001,[239] and again in 2006[240] and 2011,[241] the Commission decided against proposing any amendments. It did so despite the persistent pressure to do so from consumer associations and certain national authorities, generally (if cautiously) supported by the European Parliament.[242] The Commission argued that there was insufficient proof of major problems and that the differences in the application of the directive did not affect the functioning of the internal market.[243] It also recalled the controversies that existed at the time of the adoption of this directive. It held that the resulting compromise constitutes a delicate balance between the various interests concerned, which it did not wish to upset.

185. Looking beyond the Product Liability Directive to other relevant EU legislation, it can be noted that in 1990 the Commission proposed a directive on the liability of *suppliers of services*.[244] The Commission explained in its proposal that here it had originally intended to propose a no-fault liability system, similar to that of the Product Liability Directive. But this approach had encountered strong resistance from interests groups and was considered to deviate too much from the national laws in force. Therefore the Commission instead proposed a fault-based liability regime, subject to a reversal of the burden of proof to the advantage of the injured private party.[245] This proposal was rather negatively received by the European Parliament, the Economic and Social Committee and interests groups however. The Commission concluded that the proposal stood no chance of being adopted and withdrew it in 1994.[246] It follows that, despite certain subsequent efforts by the Commission in this regard, services providers' civil liability in damages continues at present essentially to be left to be regulated by the laws of the Member States.[247]

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239 Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, p. 28.

240 Commission, Third report on Product Liability Directive 85/374, COM(2006) 496, pp. 11-12.

241 Commission, Fourth report on Product Liability Directive 85/374, COM(2011) 547, p. 4.

242 European Parliament, Resolution on the Commission green paper on liability for defective products, A5-0061/2000.

243 Cf. Study Lovells (2003), pp. 15-28.

244 Commission, Proposal for a services liability directive, COM(90) 482. See further Pfenningstorf (1991), p. 493. On the liability of undertakings under Product Liability Directive 85/374 and the liability of service providers, see CoJ case C-495/10, *Dutrueux*.

245 Commission, Proposal for a services liability directive, COM(90) 482, p. 8.

246 Commission, Communication on new directions on the liability of suppliers of services, COM(94) 260.

247 See e.g. Study View (2004). See also Commission, Proposal for Services Directive 2006/123, COM(2004) 2. Here it was proposed stipulating that contractual liability of service providers would be covered by the country of origin principle, whereas non-contractual liability would not (see its Art. 16-17). This aspect of the proposal was not retained by the EU legislature however. Recital 51 Directive 2006/123/EC on services in the internal market, OJ 2006, L 376/36 ('Services Directive') now states that "*[i]ssues such as liability for providing incorrect or misleading information should be determined by Member States*".

The *Package Travel Directive* contains provisions that are to some extent comparable to those of the Product Liability Directive.[248] It provides in essence that Member States must ensure that undertakings organising or offering such holidays are liable for damages resulting from the failure to properly perform the contract at issue. This liability is subject to an exception in case of lack of fault of that undertaking, because of failures in the performance attributable to the consumer or a third party or to *force majeure*. As such the Package Travel Directive can be said to be based on an approach that is somewhere in between no-fault and fault-based liability.[249] In the context of its currently on-going revision, moving towards clear no-fault liability was an option that received considerable support from Member States.[250] The Commission's 2013 proposal for a directive replacing the Package Travel Directive does not address this matter expressly however.[251] Of particular relevance is also the 2002 *Leitner* ruling of the Court of Justice.[252] This case concerned an Austrian preliminary reference that arose as a result of salmonella poisoning during an all-inclusive package holiday. Austrian law did not foresee compensation for non-material damages (in this case: loss of holiday enjoyment). The Package Travel Directive does not expressly address this issue, but it does stipulate that Member States may limit compensation for damage other than personal injury. The Court ruled that the type of damage at issue is covered by this directive. It pointed first to its objective, which is to eliminate disparities. It held that divergences as to whether non-material damage is covered would cause significant distortions of competition, given that non-material damage is a frequent occurrence in the field of package holiday. It further recalled that the directive and particularly its provision on liability are designed to protect consumers and that compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers. While noting that the directive refers in a general manner to 'damage', the Court took the abovementioned possibility of limiting compensation for damage other than personal injury as an implicit recognition of the right to compensation also of non-material damage.

248 Art. 5 Package Travel Directive 90/314.

249 Cf. European Parliament, Study on safety and liability issues relating to package travel, January 2008, p. 4. See also Study University of Bielefeld (2008), p. 321. According to the latter study, whether or not a fault requirement applies is left to the Member States.

250 Commission, Responses to the consultation on Package Travel Directive 90/314, March 2010, p. 5.

251 Commission, Proposal for a new package travel directive, COM(2013) 512, p. 26 (Art. 12). Here no longer mention is made to the absence of fault as a reason for not incurring liability, but there are other exonerating circumstances. According to the Commission's proposal (p. 9), the underlying principles remain unaltered, while certain clarifications are provided for and certain gaps are closed.

252 CoJ case C-168/00, *Leitner*, para. 20-24.

### *5.4.3. Summary*

186. The Product Liability Directive, which came about after a long and complex legislative process, lays down the principle of no-fault ('strict') liability of a producer of defective products. This means that, for a private party to obtain compensation, it only needs to prove (and presumably first submit) that there is the damage, a defect and a causal relationship between the two – but not that the producer was at fault. The directive requires the compensation of damage caused by death or by personal injuries and damage to property other than the product itself, with a lower threshold of € 500. Whereas under these two heads of damages the compensation must be full and proper, the compensation of non-material damage is expressly left to be settled by national law. The 'strictness' of the resulting liability under this directive is however significantly limited and moderated, notably by the possibility of a development risk defence, the establishment of limitation and expiry periods as well as an (optional) financial ceiling. Despite the adoption of the Product Liability Directive, at national level the relevant rules continue to differ significantly. Moreover, although much debated, relatively few cases are brought under this directive. To date, the Commission has nonetheless rejected suggestions to propose amending it. While a proposed parallel directive on the liability of suppliers of services has never been adopted, especially the Travel Package Directive contains liability rules that are to some extent comparable.

## 5.5. Other enforcement issues

Notwithstanding the range of legislative measures discussed in the preceding sections, the Commission held in 2007 that enforcement and redress remained priority areas for further action in the field of EU consumer protection law.[253] Generally speaking, what appears to be emerging is a partial move away from the dominant 'corporatist' approach that underlies the reliance on actions for injunctions brought by representative organisations, as provided for in the Consumer Injunctions Directive and numerous other directives.[254] In 2006 the Commission suggested providing for a set of general contractual remedies, including a right to terminate the contract, and a general right to damages.[255] These suggestions proved controversial however. The European Parliament argued against any such further-going EU measures, submitting that these issues are generally best left to be settled

253 Commission, Communication on the EU consumer policy strategy 2007-2013, COM(2007) 99, pp. 8 and 10-11.

254 Poncibò (2009), pp. 293 and 306 respectively. See section 5.2 above.

255 Commission, Green paper on the review of the consumer acquis, COM(2006) 744, pp. 22-23 and 30.

under national law, whereas Member States proved to be divided.[256] The rather modest provisions on these points that the Commission eventually included in its subsequent proposal for the Consumer Rights Directive were deleted by the EU legislature.[257] More recent developments tend to concentrate mainly on the specific issues of facilitating collective redress actions by private parties, promoting alternative dispute resolution and ensuring stronger public enforcement.[258] These three topics are discussed below.

### *5.5.1. Collective redress*

187. As was noted earlier, already in the 1980s collective redress in consumer cases was identified as an area where EU legislative action might need to be taken.[259] However only in more recent years did this topic reappear on the EU's law-making agenda, in particular through the Commission's 2008 green paper on collective redress.[260] At the heart of this discussion lies the concern that certain infringements of EU law – notably, but not exclusively, consumer protection law – may lead to harm that, on the individual level, is comparatively modest in monetary terms, but that, taken together, may have significant negative consequences, including the distortion of the market. Without specific measures, in such a case a typical individual consumer is likely to decide against initiating legal proceedings, considering the efforts, litigation costs, complexities and uncertainties involved doing so, which are likely to outweigh the possible gains even if those proceedings result in a favourable outcome. This is known as the '*rational apathy*' of the private parties concerned. As a consequence the infringement in question can remain unaddressed, the damage uncompensated and the infringed provision ineffective, thus leading to 'under-enforcement'.[261] Where the aggrieved individual private parties nevertheless do decide to initiate legal proceedings, reasons of procedural efficiency and consistency may also argue in favour of treating these claims collectively, rather than adjudicating each of them separately.

The perceived problem of rational apathy can be tackled in various manners. Public enforcement could be strengthened for example.[262] One could also seek to reduce the costs, risks and complexities of the private parties concerned when they act individually. Certain measures to this effect have

256 Commission, Report on the outcome of the public consultation on the review of the consumer acquis, 2007, pp. 10-11; Study Civic Consulting (2007), pp. 14-15 and 85-90.

257 Commission, Proposal for Consumer Rights Directive 2011/83, COM(2008) 614, in particular pp. 30-32 (Art. 25 and 27).

258 Cf. Commission, Communication on the enforcement of the consumer acquis, COM(2009) 330, p. 3.

259 See para. 152 above.

260 Commission, Green paper on consumer collective redress, COM(2008) 794.

261 Cf. Loos (2011), p. 487.

262 As regards the public enforcement of EU consumer protection law, see subsection 5.5.3 below.

already been taken at EU level, notably through ensuring the availability of legal aid and simplified small claims procedures.[263] Another possible manner is facilitating collective redress. In this context this latter term encompasses any mechanism that may accomplish the cessation or prevention of unlawful business practices that affect a multitude of applicants or the compensation for the harm caused by such practices.[264] Accordingly the focus is typically on two remedies, i.e. (prohibitive) injunctions and actions for damages. In the EU's terminology the term 'collective redress' generally covers cases where several individual claims are bundled in one single claim ('collective action') as well actions brought by certain third parties (e.g. consumer associations, other non-governmental organisations, an Ombudsman) on behalf of the parties that actually suffered harm without the latter being party to the proceedings themselves ('representative action').[265]

188. The problem analysis set out in the abovementioned 2008 green paper relied mainly on two studies.[266] Both highlighted that at national level the relevant legal environment tends to be very dynamic and very diverse. In 2008 13 Member States had some form of collective redress mechanism in place. A total of 326 'consumer-relevant' collective redress cases had been documented.[267] It was found that the existing collective redress mechanisms had not led to unreasonable costs or other disproportionate negative consequences for business, whereas they did have an added-value for consumers' access to justice. Their costs were identified as the main potential obstacle preventing consumers from obtaining satisfactory redress in mass cases, followed by formal requirements, length of judicial proceedings, lack of awareness and information, as well as the lack of any collective redress mechanisms in certain Member States. These obstacles were said to lead to significant adverse immediate economic consequences for consumers and structural effects on consumer markets, even more so in cross-border situations. Yet the lack of collective redress mechanisms in 14 Member States led only to a very modest loss in consumer welfare (in total € 2,1 million per year). Consumers were further found to be generally not motivated to participate in 'opt-in' group actions, whereby they expressly need to sig-

263 Legal Aid Directive 2003/8 and Small Claims Regulation 861/2007.

264 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 3.

265 See e.g. Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 18-22. Actions by qualified entities under Consumer Injunctions Directive 2009/22, discussed in subsection 5.2.1 above, are thus representative actions.

266 Study Civic Consulting (2008a); Study Civic Consulting (2008b). See also European Parliament, Study on collective redress in antitrust, June 2012.

267 The period under consideration covered roughly the decade up to 2008. A clear majority of these cases came from just one Member State (namely France; 196 cases). The three most 'productive' Member States (France, Germany and Spain) together accounted for almost 85% of all documented cases.

nal their willingness to participate in the collective redress proceedings, in case of large-scale low-value damage. No significant deterrent effect was observed as a result of collective redress mechanisms, unless where collective actions receive particular media attention. The amount of awarded damages appeared a less important factor in this regard. Finally, the impact on trade and competition between Member States of the differing national approaches was said to remain very modest, although this might change depending on future developments.

189. The Commission found this existing situation unsatisfactory.[268] It therefore embarked on a *consultation process* with a view to establishing whether and if so, which measures ought to be taken at EU level in relation to collective redress. According to the 2008 green paper, the areas of particular attention included the financing of procedures, the issue which parties are to have legal standing to initiate proceedings, the question of whether collective redress procedure should have an 'opt-in' or 'opt-out' character (in the latter case, the consumer's participation is presumed, unless he expressly indicates otherwise) and how to distribute the compensation obtained.[269] Here it was further stated that "*elements which are said to encourage a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements*" should be avoided.[270] In 2011 a second round of consultation aimed at identifying common legal principles on collective redress and examining how these principles could fit into the EU legal system and the domestic legal orders of the Member States, so as to "*guide any possible initiative for collective redress in legislation*".[271] Notably this second consultation sought to ensure a 'coherent' (or 'horizontal') approach. This refers to a possible initiative that is not limited to infringements of EU consumer protection law, but that would instead apply across the board, i.e. in principle in any field of EU law. Infringements of EU competition law, which had initially been excluded, would therefore

268 Commission, Green paper on consumer collective redress, COM(2008) 794, pp. 3-7.

269 On the issues that can arise in relation to opt-in and opt-out models of collective redress (as well as collective redress generally), see also para. 445 below.

270 Commission, Green paper on consumer collective redress, COM(2008) 794, pp. 12-14. The term 'contingency fees' refers to lawyers' fees that are granted as a percentage of the damages awarded. Cf. Civil Consulting (2008b), p. 54.

271 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 5. The following principles were mentioned: (i) effective and efficient redress; (ii) the importance of information and the role of representative entities; (iii) need to take account of collective consensual resolution as a means of alternative dispute resolution; (iv) strong safeguards to avoid abusive litigation; (v) appropriate financing mechanisms, notably for citizens and small and medium-sized enterprises; and (vi) effective enforcement across the EU. See also Commission, Responses to the collective redress benchmark consultation, 2008.

also be covered.[272] This is in line with the situation in most Member States that provide for collective redress mechanisms.[273]

The responses to these consultations indicated that views on the possibility of EU legislative action relating to collective redress tend to differ considerably.[274] Broadly speaking, *consumer associations* expressed their support for such an initiative. They pointed to the difficulties that consumers were said to encounter in obtaining effective redress and the expected positive effects in terms of compliance and equal treatment. Representatives of *business* in contrast generally took a negative view. These parties submitted that the existence of an enforcement problem with a European dimension had not been demonstrated and warned against creating an 'US-style' litigation culture. Many legal practitioners and academics expressed doubts as to whether a sufficient legal basis could be found in the EU Treaties, in particular if such action were to extend to situations without a clear cross-border dimension. The positions taken by the *public authorities* that responded largely echoed these diverging views. A majority supported introducing new EU level mechanisms for collective redress, as these were expected to have beneficial effects on the enforcement of substantive law, the protection of consumers' rights, the right to equal access to justice and legal certainty. Some also thought that such measures could serve as a deterrent. Other respondents, including for instance the German government, expressed doubts however as regard the need and added-value of EU action. Concerns related to legal basis and subsidiarity issues were also voiced, in particular in case of a 'horizontal' approach. At the same time many noted that a sector-specific approach would be detrimental to the internal cohesion of the national legal systems of civil procedure. A great majority of public authorities also cautioned against creating a 'claims culture'. Making provision for punitive damages or contingency fees was almost unanimously opposed. The 'loser pays' principle for the allocation of legal costs and discretion for the judge on points such as admissibility were mentioned as important safeguards in this respect. The European Parliament found that possibilities for injunctive relief should be improved. It also argued that any possible legislative initiative should be of horizontal application and be based on an 'opt-in' approach, that there should not be an obligation for defendants to disclose relevant evidence and information ('discovery'), that punitive

272 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 12. On the initial exclusion of competition law infringements, see Commission, Green paper on consumer collective redress, COM(2008) 794, p. 3.

273 See European Parliament, Study on collective redress in antitrust, June 2012, p. 19; Buccirossi & Carpagnano, p. 4.

274 See Commission, Responses to the consultation on consumer collective redress, 2009; Commission, Responses to the hearing on collective redress, October 2011; Commission, Responses to the consultation and hearing on collective redress, October 2011.

damages should be prohibited and that the allocation of legal costs should be left to be settled in accordance with the applicable national law.[275]

190. In 2013 the foregoing cumulated in the adoption of *Commission Recommendation 2013/396 on common principles for injunctive and compensatory collective redress mechanisms* in the Member States concerning violations of rights granted under Union law ('Collective Redress Recommendation').[276] Its aim is to facilitate access to justice, stop illegal practices and enable injured private parties to obtain compensation in mass harm situations caused by violations of rights granted under EU law, while ensuring appropriate procedural safeguards to avoid abusive litigation.[277] The scope of this recommendation is consequently truly 'horizontal', in that the recommendation covers in principle all fields of EU law. Expressly mentioned are, besides consumer protection law, EU law on competition, environment protection, protection of personal data, financial services and investor protection.[278] It moreover sets the threshold for something being considered a 'mass harm situation' rather low, as this is understood to cover any situation where two or more persons claim to have suffered harm causing damage resulting from the same illegal activity.[279]

The Collective Redress Recommendation states that all Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief in accordance with the basic principles laid down therein.[280] Such mechanisms can cover group actions as well as representative actions.[281] In the latter case actions can be brought by (non-profit) representative entities, either designated in advance or certified on an *ad hoc* basis and/or by certain public authorities.[282] In cross-border situations the bringing of a single action in a single forum should not be prevented and representatives entities designated in advance should also have legal standing in other Member States.[283] Other recommendations relate to the allocation of legal costs ('loser pays' principle; contingency fees in principle prohibited) and funding (transparency, conditions for third party financing, as a general rule no

275 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021.

276 Commission, Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, OJ 2013, L 201/60. See also Commission, Communication towards a European horizontal framework for collective redress, COM(2013) 401. For a (critical) discussion, see Hodges (2013), p. 67. On this recommendation, see also Stadler (2013a), p. 483; Benöhr (2014), p. 243; Tzakas (2014), p. 225.

277 Point 1 Collective Redress Recommendation 2013/396.

278 Recital 7 Collective Redress Recommendation 2013/396.

279 Point 3(b) Collective Redress Recommendation 2013/396.

280 Point 2 Collective Redress Recommendation 2013/396.

281 Recital 17 Collective Redress Recommendation 2013/396.

282 Points 4, 6 and 7 Collective Redress Recommendation 2013/396.

283 Points 17 and 18 Collective Redress Recommendation 2013/396.

remuneration related to damages award).[284] Particularly as regards *injunctive* collective redress it is said that such actions should be treated with all due expediency, where appropriate by way of summary proceedings.[285] Sanctions are recommended against the losing defendant with a view to ensuring compliance with the court's order, including the payment of a fixed amount per day's delay.[286] As to the recommendations that particularly relate to *compensatory* collective redress, here the general rule is the 'opt-in' approach, as explained above.[287] Alternative dispute resolution and out-of-court settlements are to be encouraged in this connection, but not imposed.[288] Limitation periods should be suspended during any such attempt to resolve the dispute consensually, whereas it is also said that the binding outcome thereof should be verified by the courts.[289] According to the recommendation, punitive damages should be prohibited and collective redress actions should normally only start after the conclusion of any public enforcement proceedings.[290]

191. The recommendation specifies that the Member States should implement the principles set out therein within two years from its adoption, i.e. by June 2015.[291] Whereas this instrument can certainly have an influence in practice, it is important to note however that in the EU legal order a recommendation has no binding force.[292] The Court of Justice has clarified that recommendations are not capable of creating rights on which private parties can rely before national courts.[293] But it also insists that recommendations "*are not without any legal effect*" and that "*national courts are bound to take them into consideration in order to decide disputes brought before them, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law*".[294] Recommendations are thus a 'soft law' instrument of a particular sort. That being so, it remains to be seen to which extent the Collective Redress Recommendation will help to achieve the aforementioned objectives. The Commission committed to evaluating its impact after four years and assessing whether any further measures – including legally binding legislative measures – should be proposed.[295]

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284 Points 13-16, 29-30 and 32 Collective Redress Recommendation 2013/396. The latter points only relate to compensatory collective redress.
285 Point 19 Collective Redress Recommendation 2013/396.
286 Point 20 Collective Redress Recommendation 2013/396.
287 Point 21-24 Collective Redress Recommendation 2013/396. See para. 189 above.
288 Points 25-26 Collective Redress Recommendation 2013/396.
289 Points 27-28 Collective Redress Recommendation 2013/396.
290 Points 31 and 33-34 Collective Redress Recommendation 2013/396.
291 Point 38 Collective Redress Recommendation 2013/396.
292 Art. 288 TFEU. Art. 292 TFEU empowers the Commission to adopt recommendations.
293 See e.g. CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 40.
294 *Ibid*.
295 Point 41 and recital 26 Collective Redress Recommendation 2013/396.

### 5.5.2. Alternative dispute resolution

192. The second more recent enforcement-related development concerns efforts to facilitate *alternative dispute resolution* in consumer protection cases. This refers to the out-of-court resolution of disputes arising between consumers and undertakings through the intervention of an external entity of some sort. It encompasses mediation procedures as well as non-judicial procedures of an adjudicatory nature, such as procedures before complaint boards, arbitration and conciliation. In this context direct negotiations between the parties and internal complaint handling are not covered by the term alternative dispute resolution.[296] This development overlaps in part with the one discussed in the previous subsection, given that, as was noted above, alternative dispute resolution is seen as one of the means to facilitate collective redress, although here the emphasis is on individual consumer cases.

193. Studies carried out in the second half of the 2000s found that alternative dispute resolution can offer a *low cost and speedy* means for settling consumer disputes.[297] In practice this often does not cost more than € 50, while taking on average 90 days to conclude. It was also observed in these studies that the vast majority of existing arrangements at the national level are voluntary in nature. Alternative dispute resolution tends to be often and increasingly used across the EU, but only to a limited extent for collective or cross-border cases. The diversity of existing mechanisms was found to be high however, *inter alia* as regards the composition of the external entity involved and the effects of the positions it takes. The shortcomings identified include the generally very limited awareness of the availability of such mechanisms and gaps in their coverage. Funding was also found to be a sensitive issue. Consultations of stakeholders revealed that, certainly as compared to the issue of collective redress discussed in the previous subsection, the facilitation of alternative dispute resolution in consumer cases is not particularly controversial.[298] According to the Commission, the need to further develop it was generally acknowledged, a majority of the respondents also supporting the idea of the EU taking action on this point.[299]

296 Commission, Proposal for Consumer ADR Directive 2013/11, COM(2011) 793, pp. 2 and 4.

297 Study University of Leuven (2007); Study Civic Consulting (2009). See also European Parliament, Study on cross-border alternative dispute resolution in the EU, June 2011.

298 Commission, Consultation paper on the use of alternative dispute resolution, 2011.

299 Commission, Proposal for Consumer ADR Directive 2013/11, COM(2011) 793, p. 3. On the legal effects of recommendations, see para. 191 above.

Over the years certain measures to encourage and facilitate alternative dispute resolution have already been enacted at EU level, including several Commission recommendations.[300] Certain legislative measures have also been taken, such as Directive 2008/52 on certain aspects of mediation in civil and commercial matters ('Mediation Directive') and the inclusion of specific provisions in several consumer protection directives, although the latter tend to be limited in scope and detail.[301] On the back of the aforementioned studies and consultations, the Commission considered it necessary to address this issue in a more general manner. This should be understood against the background of an effort to improve the functioning of the internal market at retail level.[302] As the Commission explained, considering that consumers tend to be concerned about difficulties relating to the resolution of disputes when buying cross-border and that a majority of consumer complaints currently remain unresolved, alternative dispute resolution procedures can be a means to empower consumers and put them at the heart of the EU's internal market.[303]

194. The EU legislature has since adopted, in 2013, *Directive 2013/11 on alternative dispute resolution for consumer disputes* ('Consumer ADR Directive').[304] This directive seeks to ensure, in a nutshell, that EU wide in all economic sectors alternative dispute resolution procedures are available

300 Commission, Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of disputes, OJ 1998, L 115/31; Commission, Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ 2011, L 109/56. See also Commission, Recommendation 2010/304/EC on the use of a harmonised methodology for classifying and reporting consumer complaints and enquiries, OJ 2010, L 136/1. Reference can further be made to the existence of ECC-Net, an EU-wide network of European consumer centres that seek to inform consumers about their right and assist them in the resolution of disputes in cross-border cases. See further http://ec.europa.eu/consumers/ecc/about_ecc_en.htm. FIN-Net does something similar in relation to financial services. See further http://ec.europa.eu/consumers/ecc/about_ecc_en.htm.

301 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ 2008, L 136/3. Concerning the said individual directives, see e.g. Art. 24 Consumer Credit Directive 2008/48.

302 Cf. Commission, Communication on a digital agenda for Europe, COM(2010) 245, p. 13; Commission, Communication on a Single Market Act, COM(2011) 206, p. 9.

303 Commission, Communication on alternative dispute resolution for consumer disputes in the single market, COM(2011) 791, pp. 2-3.

304 Directive 2013/11/EU on alternative dispute resolution for consumer disputes, OJ 2013, L 165/63. For a (critical) assessment of this directive, see Wagner (2014), p. 165. Together with this directive a complementary act was adopted, which is specifically concerned with the resolution of consumer disputes in the online sphere, i.e. Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, OJ 2013, L 165/1 ('Consumer ODR Regulation'). In this connection, see also the draft procedural rules on online dispute resolution for cross-border electronic commerce transactions, established in the context of the UN Commission on International Trade Law (Uncitral), available via www.uncitral.org/uncitral/commission/working_groups/3online_dispute_resolution.

for consumer disputes. These procedures are to be used in principle on a voluntary basis.[305] At the heart of these procedures are alternative dispute resolution entities which seek to propose or impose a solution or to bring together the parties concerned with the aim of facilitating a solution to both domestic and cross-border consumer disputes.[306] The directive provides that these procedures should be easily accessible and that certain common quality requirements are to be respected, in terms of expertise, independence, impartiality, transparency and effectiveness.[307] During an attempt to settle out-of-court a dispute, any applicable limitation and prescription period for initiating legal proceedings is to be suspended.[308] Rules are further set out as regards informing and where necessary assisting consumers and as regards the cooperation between the abovementioned entities amongst themselves and with the competent public enforcement authorities that the Member States must designate under this directive.[309] The latter have as their main task the supervision of those entities, including the verification of compliance with the said quality requirements and the creation of a list of compliant entities.[310] The directive is to be transposed into national law by July 2015.[311]

### *5.5.3. Public enforcement*

195. Although there are significant differences between Member States, EU-wide *public enforcement* has traditionally not occupied a central position in relation to consumer protection law. By 2003 several Member States had still not established any form of public authority with specific consumer protection enforcement responsibilities.[312] They were not obliged to do so under EU law. Most acts of substantive EU consumer protection law only set out the general and rather rudimentary obligation for the Member States to ensure the availability of effective, proportionate and dissuasive penalties to address infringements.[313] It has been seen earlier that under the Consumer Injunctions Directive public bodies can act as a 'qualified entity' and initiate legal proceedings in that capacity.[314] Yet this does not concern what is normally understood by public enforcement.[315] Moreover, even if this possibility has reportedly contributed to public bodies playing an increasingly

305 Art. 1 Consumer ADR Directive 2013/11.
306 Art. 2(1) Consumer ADR Directive 2013/11.
307 Art. 5-11 Consumer ADR Directive 2013/11.
308 Art. 12 Consumer ADR Directive 2013/11.
309 Art. 13-18 Consumer ADR Directive 2013/11.
310 Art. 19-20 Consumer ADR Directive 2013/11.
311 Art. 25(1) Consumer ADR Directive 2013/11.
312 Commission, Proposal for CPC Regulation 2006/2004, COM(2003) 443.
313 E.g. Art. 11 Distance Marketing Directive 2002/65; Art. 13 Unfair Practices Directive 2005/29; Art. 24 Consumer Rights Directive 2011/83. See also subsection 2.4.2 above.
314 See para. 154 above.
315 See para. 22 above.

important role in the enforcement of consumer protection law, neither is there an obligation under EU law to provide for the involvement of public authorities in this respect.[316]

196. Especially as from the early 2000s onwards the above picture began to change however. Since then *stronger emphasis* has been placed on the public enforcement of the EU consumer protection rules. The Commission's overall policy is now said to be to push Member States to establish public enforcement authorities charged with enforcing EU consumer protection law.[317] This is illustrated by the fact that the Commission's 2009 communication on the enforcement of the EU consumer protection rules is concerned almost exclusively with public enforcement. There it is stated that action by public authorities "*occupies a central role, because it underpins all other strategies and is a prerequisite for their success*".[318] This increased attention at EU level for the public enforcement of EU consumer protection law is illustrated by the following two specific developments.

In the first place, measures related to public enforcement can be found in certain specific EU legal acts, especially those relating to *product safety*. Most notably the 2001 Product Safety Directive specifies not only that Member States must ensure that producers and distributors comply with the substantive rules at issue. It also stipulates that public authorities must be established at national level to monitor compliance.[319] These public authorities are charged with taking certain specified measures where necessary, such as checks, warnings or product recalls. The Commission must be informed when these measures are taken. Under this directive a network has also been established to facilitate cooperation between all public authorities involved. In addition it empowers the Commission to intervene directly by requiring the national authorities concerned to take one of the said specified measures. This possibility is subject to strict conditions and a degree of overview by the Member States, which is testimony to the controversial nature of

316 Cf. Study University of Leuven (2007), p. 331.

317 Micklitz & Reich (2009), p. 514. See also Micklitz (2011a), p. 581.

318 Commission, Communication on the enforcement of the consumer acquis, COM(2009) 330, p. 2. See e.g. also Commission, Green paper on European consumer protection, COM(2001) 531. The chapter of this latter document dealing with enforcement (pp. 16-18) is dedicated almost exclusively with public enforcement. See also Commission, Communication on the follow-up to the green paper on EU consumer protection, COM(2002) 289. Cf. Cafaggi & Micklitz (2009), p. 405.

319 Chapters IV and V Product Safety Directive 2001/95. See also chapter IV Toy Safety Directive 2009/48.

this mechanism, at least at the time of its adoption.[320] This system is complemented by the framework established under Regulation 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products.[321] As part of this framework Member States must establish public authorities charged with certain market surveillance and intervention tasks. These measures are considered to have had a mostly positive effect, although certain shortcomings have also been observed.[322] Against this background the Commission published in 2013 its 'product safety and market surveillance package'.[323] An important element of this package is a proposal for a new regulation that would in effect merge the abovementioned regimes, so as to simplify the applicable market surveillance rules.[324]

In the second place, of broader importance is *Regulation 2006/2004 on consumer protection cooperation* ('CPC Regulation').[325] This regulation seeks to tackle similar issues as the Consumer Injunctions Directive, discussed earlier, namely infringements of EU consumer protection legislation with a cross-border dimension.[326] But unlike this directive, the CPC Regulation relies primarily on 'classic' public enforcement means, even if, in the course

320 As regards these conditions, there must be a 'serious risk' to the health or safety of consumers in various Member States. Three specific (cumulative) conditions must further have been met, in effect providing that Commission intervention is a last resort in cases with an EU dimension. In addition the Member States, and where relevant also an EU scientific committee, must be consulted before any decision can be taken. See further Weatherill (2005), pp. 209 and 212-213. The controversial nature of this direct intervention mechanism is underlined by the (unsuccessful) legal challenge. See CoJ case C-359/92, *Germany v. Council*, para. 37.

321 Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ 2008, L 218/30 (see its chapter III).

322 Cf. Commission, Report on Product Safety Directive 2001/95, COM(2008) 905; Commission, Responses to the consultation on Product Safety Directive 2001/95, November 2010. These shortcomings include a lack of resources on the side of the competent national authorities, difficulties related to the cooperation between these authorities and regulatory fragmentation.

323 See Commission, Communication on more product safety and better market surveillance in the single market for products, COM(2013) 74. This package includes Commission, Proposal for a regulation on consumer product safety, COM(2013) 78.

324 Commission, Proposal for a regulation on market surveillance of products, COM(2013) 75.

325 Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ 2004, L 364/1. On the functioning of this regulation, see Study Civic Consulting, Van Dijk & ICF GHK (2012).

326 Accordingly the provisions of CPC Regulation 2006/2004 on mutual assistance (chapters II and III) cover 'intra-EU infringements', i.e. acts or omissions contrary to the legislation covered that harms or is likely to harm the collective interests of consumers residing in a Member State other than the one where the act or omission took place or originated, where the infringing undertaking is established or where relevant evidence or assets can be found. Cf. Art. 2(1) and 3(b) CPC Regulation 2006/2004. On Consumer Injunctions Directive 2009/22, see section 5.2 above. Recital 14 and Art. 2(5) CPC Regulation 2006/2004 clarify that this directive and this regulation are meant to apply in parallel.

of the legislative process, various clauses allowing Member States a considerable degree of flexibility were introduced.[327] In a nutshell, it obliges Member States to designate public authorities with specific responsibilities to enforce the consumer protection rules set out in its annex.[328] It also specifies the powers that these authorities must possess. They must *inter alia* be empowered to request information from any person, carry out on-site inspections and require the cessation or prohibition of infringing activities.[329] The CPC Regulation further aims to facilitate cooperation between these authorities, for instance as regards the exchange of information and the provision of assistance in enforcement actions. The Commission has certain tasks at the central level, including maintaining a database with information concerning the various actions taken under this regulation.[330] Provision is also made for more general coordination and cooperation activities between all public authorities concerned.[331] These authorities cooperate in the CPC Network.[332]

197. As a final point in relation to public enforcement, it can be noted that some Member States (e.g. France) provide for *criminal* sanctions for certain infringements of consumer protection legislation.[333] In addition to the 'standard' clause on effective, proportionate and dissuasive penalties, the Toy Safety Directive stipulates that these penalties "*may include criminal sanctions for serious infringements*".[334] Provisions of this kind have also been included in the aforementioned Commission proposals relating to product safety.[335] However, beyond these rather basic references, which moreover still leave it to the Member States to decide whether or not they wish to provide for penalties of this kind, no provision is made regarding criminal sanctions under EU law.

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327 In particular, pursuant to Art. 4(2) and (4) CPC Regulation 2006/2004 other public or non-public bodies may also be designated in certain cases and the competent national authorities may exercise their powers either directly under their own authority or under the supervision of the judicial authorities, or by application to the competent courts. Cf. Commission, Proposal for CPC Regulation 2006/2004, COM(2003) 443; Council, doc. 7073/04; European Parliament, Resolution on the proposal for CPC Regulation 2006/2004, P5_TA(2004)0296.

328 Art. 3(a) and (c) and Art. 4(1) CPC Regulation 2006/2004.

329 Art. 4(3) and (6) CPC Regulation 2006/2004.

330 Art. 10 CPC Regulation 2006/2004.

331 Art. 16-17 CPC Regulation 2006/2004.

332 Implementing rules concerning this cooperation have been laid down in Commission Decision 2007/76/EC implementing Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance, OJ 2007, L 32/192.

333 Study University of Bielefeld (2008), p. 610; Cafaggi & Micklitz (2009), p. 408; Azar-Baud (2010), p. 204.

334 Art. 51 Toy Safety Directive 2009/48.

335 E.g. Commission, Proposal for a regulation on consumer product safety, COM(2013) 78, p. 21 (Art. 18(2)).

### 5.5.4. Summary

198. This final section of chapter 5 has made it clear that, especially in recent years, the private enforcement-related measures set out in the legislation discussed earlier in this chapter have been complemented by a number of other measures. These include, in the first place, the adoption in 2013 of the Commission's Collective Redress Recommendation. EU involvement with this form of redress having proved to be controversial, this document only gives non-legally binding guidance. It seeks to facilitate collective actions for injunctions or damages for infringements of EU consumer protection law as well as other EU law. In the second place, the 2013 Consumer ADR Directive sets out common rules on alternative dispute resolution in consumer protection cases. Lastly, although public enforcement has traditionally played only a limited role in this field, that has changed more recently. Particularly under the 2004 CPC Regulation the Member States must establish certain public enforcement mechanisms to address infringements of EU consumer protection law.

# 6. Competition law

This final chapter of part B is concerned with the private enforcement-related developments regarding EU competition law.[1] In this field both the oldest as well as the most recent EU legislative measures of the type under consideration in this study can be found. Since the very beginning of EU law the EU Treaties contain an important contractual remedy, laid down in Article 101(2) TFEU. And in 2014 the EU legislature reached agreement on the Competition Damages Directive. A discussion of these two measures, and in particular this directive, lies at the heart of this chapter. In the following this field of law is first introduced. Discussed are the relevant rules of substantive EU competition law and their application, the infringements of those rules and the damage caused as a consequence thereof, as well as the said contractual remedy. Attention then turns to the Competition Damages Directive. First the road towards the adoption of this directive is outlined in some detail, considering its long history and the insights this offers as regards the coming into being of this recent private enforcement-related act of secondary EU law. Next the content of this directive is analysed. In the final section several other issues relevant to the enforcement of EU competition law are discussed, most notably the applicable public enforcement mechanisms.

## 6.1. Introduction

This section begins with a brief outline of the main rules of substantive EU competition law and the rules of secondary EU law that regulate their application. It then discusses some of the typical sorts of competition law infringements that are of relevance here and the damage that these infringements cause to individual parties and to society as a whole. In the last subsection the contractual remedy laid down in Article 101(2) TFEU is discussed.

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1 Here the term 'competition law' is used in a narrow sense, covering the substantive rules laid down in Articles 101 and 102 TFEU and the corresponding rules of national law. As such this term is used interchangeably with the term 'antitrust law'. It excludes most notably the rules of EU law on state aid and merger control, set out in Art. 107-109 TFEU and Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004, L 24/1, respectively. On the private enforcement of these latter rules, see e.g. Bailey (2007), p. 101; Grzeszick (2011), p. 907; Honoré & Eram Jensen (2011), p. 265; Hohler (2012), p. 369.

### *6.1.1. Substantive EU competition law and its application*

199. The main provisions of EU competition law, set out in Articles 101 and 102 TFEU, have always played an important role in the EU's legal order. The Court of Justice has held that Article 101 TFEU constitutes a fundamental provision that is "*essential for the accomplishment of the tasks entrusted to the [EU] and, in particular, the functioning of the internal market*".[2] Already at an early stage the Court clarified, notably in its ruling in *BRT*, that Articles 101 and 102 TFEU produce direct effects in relations between private parties and create rights in respect of the parties concerned that national courts must safeguard.[3] The primary function of EU competition law is generally understood to be protecting the competitive process and, in so doing, consumer welfare, against the background of the EU's internal market imperative.[4] Subject to these substantive EU competition rules are 'undertakings', which term is understood to mean any entity, regardless of its legal status or the way it is financed, engaged in economic activity, i.e. that is offering goods or services on a given market.[5]

200. The first pillar of substantive EU competition law is *Article 101 TFEU*, which prohibits in its first paragraph agreements between undertakings, decisions by associations of undertakings and other concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market. This article thus prohibits in particular cartels. In more concrete terms, it is for instance illegal under this provision for competing undertakings to agree between them to set prices at a certain level or to divide the market by restricting their respective activities to certain territories or segments.

Article 101 TFEU also reflects the thought that agreements, decisions or concerned practices that would normally be prohibited under its first paragraph can in some cases have overall positive effects. One could think of certain forms of cooperation between undertakings in the field of research and development, the training of personnel or the distribution of their products or services. Article 101(3) TFEU therefore stipulates that the prohibition set

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2 CoJ case 126/97, *Eco Swiss*, para. 36. This statement was made with reference to Art. 3(1)(g) EC, as it stood before the entry into force of the Treaty of Lisbon in 2009. Cf. Art. 3(1)(b) TFEU, where it is stipulated that the EU has exclusive competence as regards the establishment of the competition rules necessary for the functioning of the internal market.

3 CoJ case 127/73, *BRT*, para. 16; GC case T-458/04, *Au Lys de France*, para. 70.

4 Commission, Guidelines on the application of Article 81(3) EC, OJ 2004, C 101/97, para. 13. See e.g. also Monti (2003), p. 3; C. Ehlermann (2008), p. x; Komninos (2008), p. 190; Whish & Bailey (2012), pp. 19-24. This does not mean however that opinions cannot differ as to how 'consumer welfare' is to be understood in this connection. See e.g. Ottervanger (2010).

5 E.g. CoJ case C-41/90, *Höfner*, para. 21; CoJ joined cases C-180/98 to C-184/98, *Pavlov*, para. 75.

out in the first paragraph may be "*declared inapplicable*". This possibility is subject to the conditions that the cooperation leads to efficiency gains, that consumers get a fair share of the resulting benefits, that the restriction of competition is indispensable to achieve these benefits and that competition is not entirely eliminated.[6]

201. The second cornerstone of substantive EU competition law is *Article 102 TFEU*. Whereas Article 101 typically covers coordinated behaviour between several undertakings, Article 102 covers unilateral anti-competitive behaviour by one undertaking alone.[7] More specifically, it prohibits undertakings from abusing a dominant position within the internal market or a substantial part thereof, in so far as this may affect trade between Member States. This article is thus concerned with undertakings having a particular strong position on the relevant market, possibly (but not necessarily) a monopoly. Having such a dominant position is, in and by itself, not prohibited under Article 102 TFEU; what is not allowed is the *abuse* of such a position.

Article 102 TFEU does not include a provision that is equivalent to Article 101(3) TFEU, mentioned above. In this case the prohibition can therefore not be declared inapplicable where the behaviour in question is deemed to have overall beneficial effects. However, despite the absence of such an 'Article 102(3)', the Court of Justice has made it clear that there is scope for an undertaking that infringed the prohibition set out in Article 102 to argue that its conduct is objectively necessary or that it produces substantial efficiencies that outweigh any anticompetitive effects on consumers.[8]

202. While the abovementioned rules of primary EU law on competition have in substance been left unaltered since the very beginning of EU law, the same cannot be said of the rules of secondary EU law that regulate the *application* of Articles 101 and 102 TFEU. Regulation 1/2003 on the implementation of the EU competition rules ('Competition Regulation') is of particular importance in this regard.[9] This regulation, adopted in 2003 and applicable as from May 2004, is the result of a fundamental reform of the previously existing supervision and enforcement structure.[10] This "*legal and cultural*

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6 Cf. Commission, Guidelines on the application of Article 81(3) EC, OJ 2004, C 101/97.

7 Exceptionally Art. 102 TFEU can also cover cases of 'collective dominance' by more than one undertaking. See e.g. CoJ joined cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge*.

8 See e.g. CoJ case 311/84, *Centre belge d'etudes de marché*, para. 26; CoJ case C-95/04 P, *British Airways*, para. 69 and 86. See also Commission, Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings, OJ 2009, C 45/7, para. 28-30.

9 Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, OJ 2003, L 1/1.

10 Commission, White paper on modernisation of the rules implementing Articles 85 and 86 EC, OJ 1999, C 132/1.

*revolution*"[11] sought to modernise and decentralise the application of EU competition law. At the heart of this reform lay the manner in which Article 101(3) TFEU is applied. Under the old system only the Commission was empowered to grant exemptions under this provision.[12] It did so upon prior notification by the undertakings concerned. Undertakings could also ask the Commission to certify that an agreement, decision or concerted practice did not violate the EU competition rules. All this led to an extensive system of notifications of intended actions to the Commission, with a view to obtaining such exemptions and clearances. In practice a parallel system of informal guidance by the Commission also developed.

The Competition Regulation takes a radically different approach. Under the reformed regime the Commission no longer has the exclusive power to grant the exemptions referred to in Article 101(3) TFEU.[13] Instead each undertaking must in principle make its own assessment as to the compliance of its behaviour with the EU competition rules, including the conditions set out in this third paragraph. National competition authorities as well as the competent national courts are empowered to assess whether these rules and conditions have been complied with.[14] In this respect it is provided that, whereas the burden of proving an infringement of Articles 101 and 102 TFEU rests on the party or authority alleging the infringement in question, undertakings that claim the benefit of Article 101(3) must prove that the conditions set out therein have been met.[15] Similarly under the aforementioned case law relating to possible defences under Article 102 TFEU it is for the undertaking concerned to raise this defence and to demonstrate the existence of the facts and circumstances on which it seeks to rely in this connection.[16]

203. Especially in light of the decentralisation that it brought about, the Competition Regulation also contains several rules on the application and enforcement of EU competition law at national level. Three such rules are of particular relevance here. First, where the competition authorities or the courts of the Member States apply national competition law to agreements, decisions or concerted practices covered by Article 101(1) TFEU that may affect trade between Member States or to any abuse prohibited by Article 102 TFEU, they must also this EU law provision *in parallel*.[17] Second, the Commission and national competition authorities each have the possibility

11 Ehlermann (2000), p. 537.
12 See Council Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962, 13/204.
13 Art. 1(2) Competition Regulation 1/2003.
14 Cf. Art. 5 and 6 Competition Regulation 1/2003.
15 Art. 2 Competition Regulation 1/2003.
16 E.g. GC case T-201/04, *Microsoft*, para. 688. See also Commission, Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings, OJ 2009, C 45/7, para. 30.
17 Art. 3(1) Competition Regulation 1/2003.

to submit, upon request or on their own initiative, *amicus curiae observations* in proceedings before the national courts relating to EU competition law.[18] The Commission is entitled to do so where the coherent application of Articles 101 and 102 TFEU so requires, regardless of whether the proceedings in question are of an administrative, civil or criminal nature.[19] Third and finally, the Competition Regulation stipulates that national courts *cannot* take decisions in respect of agreements, decisions and concerted practices that *run counter* to earlier decisions adopted by the Commission and that these courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.[20]

204. Subject to the applicable rules of EU law such as the ones referred to above, the application of Articles 101 and 102 TFEU at national level is in principle governed by the *procedural rules* of the Member States.[21] Accordingly, as confirmed in the Court of Justice's 1995 landmark ruling in *Van Schijndel*, as a general rule, EU law does not require national courts to abandon the passive role assigned to them in civil proceedings in order to raise a point of EU competition law of their own motion (*ex officio*).[22] But this rule is not without exceptions. For one thing, as was held in *Van Schijndel* itself, pursuant to the principle of equivalence an obligation of own motion judicial review can exist where the court seised has an obligation or discretion to raise comparable points of law under national law.[23] For another thing, in *Eco Swiss*, a subsequent case that concerned proceedings for the annulment of an arbitration award whereby national law required the court seised to raise certain issues of public policy (*d'ordre public*) of its own motion, such an obligation was also found to exist.[24] There the Court pointed to the above-mentioned fundamental importance attached to EU competition law, meaning that it should be seen as a matter of public policy. It also noted that own motion judicial review ensured that preliminary questions could be referred to the Court of Justice, given that arbitration panels are in principle not allowed to do so in so far as they are not courts or tribunals within the meaning of Article 267 TFEU.[25]

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18 Art. 15 Competition Regulation 1/2003. See also Commission, Cooperation notice, OJ 2004, C 101/54.

19 Recital 21 Competition Regulation 1/2003; Commission, Cooperation notice, OJ 2004, C 101/54, para. 4. Cf. CoJ case C-429/07, *Inspecteur van de Belastingdienst v. X*.

20 Art. 16(1) Competition Regulation 1/2003. Cf. CoJ case C-344/98, *Masterfoods*, para. 60. On the interpretation of the resulting rule, see also Opinion AG Cruz-Villalon case C-199/11, *Otis*, para. 46-47.

21 Cf. e.g. CoJ case C-60/92, *Otto v. Postbank*, para. 14.

22 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 13-14 and 22. See also para. 39 above.

23 On the principle of equivalence, see subsection 2.2.1 above.

24 CoJ case 126/97, *Eco Swiss*, para. 40-41; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para 31.

25 See also para. 22 above.

More recently the Court has at times stated, also in proceedings that did not concern the possible annulment of arbitration awards, that Articles 101 and 102 TFEU are "*a matter of public policy which must be automatically applied by national courts*".[26] For now it remains to be clarified what is precisely meant by this statement. In particular, in light of the earlier *Van Schijndel* judgment and the fact that, as the Court later confirmed on another occasion,[27] the application of the principle of equivalence was central to the outcome reached in *Eco Swiss*, it is uncertain whether this more recent case law should be understood as implying an obligation on national courts to raise of their own motion rules of EU competition law wherever relevant, including in situations where domestic law does not foresee such a possibility even for matters of public policy.[28]

### *6.1.2. Infringements and damage*

205. Infringements of EU competition law can take many forms. Some infringements are the result of *bona fide* unawareness or misunderstanding of the applicable rules. Yet in many other instances the illegal anticompetitive behaviour is deliberate and considerable efforts are made to conceal it.[29] Article 102 TFEU itself expressly lists various forms of forbidden abuses of a dominant position. This includes the undertaking concerned charging excessive prices, differentiating its prices between trading partners without objective justification or refusing to supply its products or services to certain customers. Article 101 TFEU in contrast does not itself cite any examples of forbidden behaviour. Various sorts of anticompetitive acts can be covered by the prohibition set out in its first paragraph. Such behaviour can take place in a 'vertical' context, i.e. between undertakings that do not operate – and compete – at the same level of the supply chain. By means of an example one could think of a so-called 'beer tie' agreement. Many pubs are owned by beer brewers and subsequently leased to a tenant. Yet it can be contrary to Article 101 TFEU for the lease agreement to stipulate that the tenant is obliged to purchase all the beer served in the pub from that brewer, thus excluding other brewers.

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26 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 31. See also CoJ case C-8/08, *T-Mobile Netherlands*, para. 49.

27 CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 40.

28 See also recital 1 Competition Damages Directive, where it is stated that "*Articles 101 and 102 [TFEU] are a matter of public policy*". While this statement appears to echo the above-mentioned CoJ rulings in *Manfredi* and *T-Mobile Netherlands*, no further explanation is provided for in this directive. Notably, contrary those rulings, in this recital it is not stated that these provisions "*must be automatically applied*"; instead it is said that these articles "*should be applied effectively throughout the Union*".

29 Cf. e.g. CoJ case C-453/99, *Courage*, para. 27, where such behaviour is observed to be "*frequently covert*".

A typical example of an infringement of Article 101 TFEU for the present purposes is however a 'horizontal' cartel, whereby several undertakings supplying a particular product or service coordinate their market behaviour. Take for instance the so-called 'elevator cartel', which was discovered in 2007.[30] Instead of competing, the four major European manufacturers of elevators and escalators were found to have allocated tenders and other contracts between them in several Member States, thus sharing markets and fixing prices in violation of the prohibition set out in Article 101(1) TFEU. These undertakings had also exchanged information on sales volumes and prices, operated a mutual compensation scheme, participated in regular meetings and established other contacts in order to decide on these competition restrictions and the implementation thereof. With a view to concealing their illegal anti-competitive behaviour, the meetings in question mostly took place in hotels and restaurants instead of at the premises of the undertakings concerned. For the same reason the employees concerned regularly used their private and prepaid mobile phones instead of their company phones.

206. Infringements of the kind referred to above can cause considerable harm. Although the amounts at issue may vary considerably, there is research suggesting that nine out of ten cartels lead to an 'overcharge', i.e. an amount that is higher than what the customers of the conspiring undertakings would have had to pay under normal competitive conditions.[31] At macro-level, the damage caused by price-fixing and other particularly serious 'hard-core'[32] cartels alone has been estimated to amount to somewhere between € 25-69 billion per year EU-wide, which corresponds to a negative impact on consumer welfare of around 0,2-0,55% of EU GDP.[33] At the same time, as it stands, the chances of detecting such illegal cartels are generally rather low, probably no more than 10-20%.[34] Acknowledging on the one hand that not all infringements are detected and on the other hand that also other infringements of Articles 101 and 102 TFEU than the aforementioned 'hard-core' cartels incur damage, foregone amounts of compensation for these competition law infringements have been estimated to amount to a total of between € 5,7 and 23,3 billion each year across the EU.[35]

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30 See Commission, Decision C(2007) 512, *Elevators and escalators cartel*; GC joined cases T141/07, T142/07, T145/07 and T146/07, *Otis*; CoJ Order case C-493/11 P, *United Technologies*; CoJ case C-199/11, *Otis*.

31 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 18. See further Study Oxera Consulting (2009), p. 91.

32 On 'hard-core' restrictions in the context of Art. 101(1) TFEU, see Commission, *De minimis* notice, OJ 2001, C 368/13, para. 11.

33 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 22 (relating to EU GDP in 2011).

34 *Ibid*., p. 23.

35 *Ibid*.

### 6.1.3. Article 101(2) TFEU: contractual remedy

207. Already from the very beginning of EU law an important private enforcement remedy has been laid down in the EU Treaties. It concerns the *contractual remedy* provided for in Article 101(2) TFEU,[36] which stipulates that any agreement or decision prohibited under that article shall be "*automatically void*". This is in fact the only instance where primary EU law provides for such a measure. Article 102 TFEU does not contain a similar provision regulating the contractual consequences of an infringement of the prohibition of the abuse of a dominant position set out in that article.[37] Neither do the EU Treaties expressly foresee a comparable remedy for infringements of other rules of substantive EU law.

The Court of Justice has clarified that this term 'automatically void' is an autonomous concept of EU law, which is intended to ensure compliance with the relevant substantive rules prohibiting anticompetitive cartels.[38] It is absolute, the agreement or decision concerned having no effect either between the parties concerned or *vis-à-vis* third parties, with retro-active effect (*ex tunc*).[39] Under the Court's case law the further consequences of a finding of an agreement or decision being void within the meaning of Article 101(2) TFEU are in principle to be determined in accordance with national law however. This includes the question to which extent other provisions of the agreement, or of related agreements, that do not in themselves imply a breach of the prohibition set out in this article can be severed and can continue to apply.[40]

208. The *practical importance* of the above contractual remedy especially lies in the fact that the agreements in question cannot be enforced in court. This can lead to uncertainty for the infringing undertakings concerned, which in turn can act as a strong disincentive for undertakings to conclude agreements that may not be in conformity with the prohibition set out in this article.[41] Accordingly it "*intensifies the conflicts of interests and the internal centrifugal force among the participants of a cartel*".[42] For instance, there is little point in including a 'beer tie' in a lease agreement for a pub, as was explained above, when the brewer knows that he cannot enforce that provision if the

36 Milutinovic (2014), p. 350, considers that this is not a remedy, but rather a sanction.
37 That does not necessarily mean however that there cannot be such consequences as a matter of EU law. See further para. 303 below.
38 CoJ case 56/65, *Société Technique Minière*, p. 250.
39 CoJ case 319/82, *Société de Vente de Ciments*, para. 11; CoJ case 48/72, *Brasserie de Haecht*, para. 26-27; CoJ case C-453/99, *Courage*, para. 22; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 57.
40 CoJ case 56/65, *Société Technique Minière*, p. 250; CoJ case 319/82, *Société de Vente de Ciments*, para. 11; CoJ case 10/86, *VAG France*, para. 14-15. See further Cauffman (2012), p. 95.
41 Wils (2003a), p. 474.
42 Möschel (2013), p. 2.

pub tenant refuses to respect that contractual obligation. Likewise, undertakings operating a cartel comparable to the aforementioned elevator cartel may sometimes be able to secretly divide the market, fix prices and operate a compensation scheme between them. But the moment one of the cartel members no longer respects the agreement, none of the other members can (threaten to) bring legal proceedings to enforce what had been agreed in violation of EU competition law.

Yet this remedy also has its limitations. As the above examples already illustrate, Article 101(2) TFEU tends to be used mainly as a 'defensive' instrument in litigation between private parties.[43] That means that it is typically invoked by one of the parties to the agreement with a view to avoid being bound by a particular obligation resulting from the agreement in question (e.g. to purchase beer exclusively from one brewer or to respect agreed market shares). Third parties may generally have little incentive to bring private enforcement proceedings relying on this remedy, as they are not a party to the agreement and are therefore at most only indirectly affected. The foregoing also illustrates that the relevance of this contractual remedy for especially the most serious ('hard-core') infringements of Article 101(1) TFEU can be limited. Given the evident illegality of the scheme operated by the elevator cartel members, normally none of the undertakings concerned will anyway consider enforcing the agreement in court.[44]

This contractual remedy is thus of considerable practical importance, but it is generally not very well suited as an 'offensive' tool for private parties wishing to address these most serious infringements.

## 6.2. Towards the Competition Damages Directive

The thought that the aforementioned contractual remedy laid down in Article 101(2) TFEU might need to be complemented by other private enforcement-related measures, provided for as a matter of secondary EU law, is far from new. In many respects the road towards the Competition Damages Directive had been particularly long and winding indeed. This section sketches the main developments that eventually led to the adoption of this directive in 2014. Four stages are distinguished for these purposes. First, an overview is given of the early developments in this regard (1960-2000). Second, two subsequent developments – one legislative and one jurisprudential – are discussed, which go a long way in explaining why this subject-matter then re-appeared on the EU's law-making agenda (2000-2005). Third, the Commission's green paper and white paper outlining possible EU legislative measures in this respect are analysed, together with its following aborted

43 Wils (2003a), pp. 474-475; Eilmansberger (2007), p. 433; Komninos (2008), p. 149; Milutinovic (2010), p. 144; Peyer (2012), p. 350.

44 Whish & Bailey (2012), p. 320.

initiative to propose a directive (2005-2010). Lastly, attention is paid to subsequent jurisprudential developments and the Commission's proposal for this directive (2010-2013).

### *6.2.1. Early developments (1960-2000)*

209. Already in the *1960s* a study was carried out that looked into the possibilities for what it now known as the private enforcement of EU competition law.[45] It concluded that in all of the then six Member States private parties affected by a violation of the EU competition rules could take legal action before the national courts to obtain civil law remedies, such as damages, injunctions, periodic penalty payments and the publication of court judgments.[46] A few years later the Commission added that actions for damages brought by private parties could provide "*useful support*" for the public enforcement of these rules, while noting that the civil law consequences, other than those resulting from the application of Article 101(2) TFEU, "*are generally considered as being governed by the national laws of the Member States*".[47]

210. In the following decades this issue re-surfaced repeatedly. In particular, in the *1980s* the Commission floated the idea of adopting secondary EU law on the private enforcement of the EU competition rules. The Commission's 1983 report on competition policy noted that, while "*[s]cant use has yet been made of the possibility of actions for damages for breaches of the [EU] competition rules*", "*[t]he Commission believes it desirable that the judicial enforcement of Articles [101 and 102 TFEU] should also include the award of damages to injured parties, because this would render [EU] law more effective*".[48] This report indicated that the Commission was therefore looking at what steps could be taken to facilitate damages actions of this kind.[49]

In the same period a similar point was made in various academic publications (many of them written by a Commission official).[50] These publications not only set out the legal framework and highlighted some successful

45 European Parliament, *'Rapport fait au nom de la commission du marché intérieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européenne par le Conseil de la Communauté économique européenne sur un premier règlement d'application des articles 85 et 86 du traité de la C.E.E.'*, doc. 104/1960-1961, cited in Milutinovic (2010), pp. 27-28.

46 Study '*La réparation des conséquences dommageables d'une violation des articles 85 et 86 du traite instituant la CEE*', p. 5, cited in Temple Lang (1981), p. 338.

47 Reply to European Parliament question 519/72 from Mr Vredeling, OJ 1973, C 67/54, cited in Temple Lang (1981), p. 339.

48 Commission, Thirteenth report on competition policy, 1984, p. 136. Cf. Komninos (2008), p. 163.

49 *Ibid*.

50 Temple Lang (1981), p. 335; Jacobs (1983), p. 353; Temple Lang (1983), p. 219; Temple Lang (1985), p. 29; Steiner (1987), p. 102. Mr Temple Lang worked at the time for the Commission's legal service (only one of these publications states that the opinions expressed there are personal).

examples of such actions that had been brought before national courts. It was also suggested here that the EU should adopt a directive, with the purpose of "*[making] it clear that actions for compensation, declarations and injunctions could be brought in national courts, harmonising national law remedies for breaches of [EU] antitrust law, [which] would substantially improve the general level of compliance with [EU] antitrust law*".[51] In these publications the deterrent effect of these measures and the scarce manpower of the Commission and national authorities charged with the public enforcement of this law were also emphasised, noting that such a 'decentralisation' of EU competition law enforcement to the national courts would allow the Commission to focus on the more complex and particularly serious and cross-border cases.[52]

Moreover in the second half of the 1980s the Commission reportedly considered the possibility of proposing an EU regulation on the application of EU competition law by national courts. But it eventually decided against doing so, in light of negative reactions by legal experts of the Member States.[53]

211. Next, in the *early 1990s* again some relevant statements were made in this regard, this time in particular in relation to cases brought before the EU courts. For instance, the General Court touched upon this issue in passing in 1992. It held that "*among the consequences which an infringement of [Article 101(1) TFEU] may have in civil law, only one is expressly provided for in Article [101(2)], namely the nullity of that agreement. The other consequences attaching to an infringement of Article [101 TFEU], such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract […], are to be determined under national law*".[54] This shows that here the emphasis was still firmly on the private enforcement possibilities under *national* law, as was the case in the aforementioned Commission statements made in the 1960s.

In 1993 Advocate General Van Gerven suggested however an altogether different approach in his opinion in the *Banks* case.[55] Building on the Court's 1991 *Francovich* ruling relating to the liability of Member States for infringements of EU law, discussed earlier,[56] he argued that – even in the absence of any specific rules of secondary EU law – such actions for damages are primarily a matter of *EU* law. In an extensive opinion it was said that "*the general basis established by the Court in the Francovich judgment for [Member] State*

51 Temple Lang (1983), pp. 302. See also Temple Lang (1981), pp. 341-342

52 On the public enforcement of EU competition law, see subsection 6.4.2 below.

53 Komninos (2008), p. 163 (n. 131).

54 GC case T-24/90, *Automec*, para. 50.

55 Opinion AG Van Gerven case C-128/92, *Banks*, para. 36-54. The fact that this case concerned the ECSC Treaty appears to be of little relevance here (cf. para. 36 of the opinion). In its judgment the CoJ did not rule on the issue raised by the AG. See CoJ case C-128/92, *Banks*.

56 CoJ joined cases C-6/90 and C-9/90, *Francovich*. See further para. 59 above.

*liability also applies where an individual infringes a provision of [EU] law to which he is subject, thereby causing loss and damage to another individual*". It was added that "*in a field such as competition law*" there are two "*powerful addition arguments*" that mitigate in favour of private parties having the possibility under EU law of obtaining reparation for loss and damages caused by these infringements, as this would be the logical conclusion of the horizontal direct effect of the EU competition rules and it would help making these rules more operational.[57]

In the slipstream of the *Francovich* ruling and the *Banks* opinion, calls were made in the legal literature for EU legislative intervention on this matter.[58] However, apart from the publication of an additional report assessing the situation at national level,[59] at this stage still no concrete steps were taken in the direction of the adoption of secondary EU law facilitating the private enforcement of EU competition law.

### *6.2.2. Legislative reform and Courage case law (2000-2005)*

212. The first of the two subsequent developments that go a long way in explaining why possible EU legislative intervention in this domain re-emerged more recently has already been touched upon earlier.[60] It concerns the *fundamental reform* of the rules on the application of Articles 101 and 102 TFEU that led to the adoption of the Competition Regulation in 2003. This reform, which in effect amounted to a significant decentralisation from the EU to the national level, was mainly meant to allow the Commission to focus on actively uncovering particularly serious and covert infringements of EU competition law rather than handling the routine notifications and clearances that were typical of the pre-existing system.[61] It is to be noted that the Competition Regulation contains no provisions that directly relate to the private enforcement of EU competition law. As the discussion of the early developments in the previous subsection illustrates, this reform was not a *conditio sine qua non* for private enforcement to take place.[62] Indeed, it has been argued that, if anything, the reform mainly helped to facilitate 'defensive' actions by private parties,[63] as opposed to the 'offensive' type whereby

57 Opinion AG Van Gerven case C-128/92, *Banks*, para. 43-44.
58 E.g. Smith (1992), p. 129; Benedict (1995), p. 247.
59 Commission, The application of Articles 85 and 86 EC by national courts in the Member States, July 1997.
60 See para. 202 above.
61 Cf. recital 3 Competition Regulation 1/2003. See also Commission, White paper on modernisation of the rules implementing Articles 85 and 86 EC, OJ 1999, C 132/17. Note that although the solutions enacted differ, this reasoning is comparable to the one invoked in relation to the pleas for encouraging private enforcement in the early 1980s, referred to in para. 210 above.
62 For an extensive discussion of the 'pre-modernisation' and the 'modernised' system in relation to private enforcement, see Komninos (2008), pp. 24-139.
63 See para. 208 above.

for instance a claim for damages is brought by a third party.[64] However the resulting devolution of powers to the national level is still thought to have helped create the conditions under which private enforcement could take off, notably by forcing undertakings to think and act more independently on competition law issues and by empowering the national courts.[65] The energy and resources required to conceive, draft, adopt and implement this reform further probably explain in large part why EU legislative action on private enforcement was not properly discussed until after its completion. As the then Commissioner for competition policy, Mr Monti, noted in 2001 in relation to the Commission's proposal for what was to become the Competition Regulation, "*[o]ur reform proposal already introduces substantial changes [and] [w]e should not try to achieve too much all at once if we want to obtain real progress in reasonable time*".[66]

213. The second development is the Court of Justice's *Courage case law*.[67] The 2001 *Courage* ruling has already been introduced earlier,[68] but its importance in the present context justifies assessing it in further detail here. Courage Ltd, a brewery, and Mr Crehan, a pub tenant, had agreed on a 'beer tie' as part of a lease agreement for the pub in question. As was explained above, this means that the latter was contractually obliged to purchase the beer sold in that pub exclusively from this particular brewer.[69] When Courage sued Mr Crehan for unpaid deliveries of beer, the latter argued that the beer-tie contract was contrary to Article 101(1) and thus automatically void under Article 101(2) TFEU.[70] In addition Mr Crehan made a counter-claim for damages. He argued that he had been forced to buy its beers at prices higher than those that Courage charged to independent pub tenants. However under English law this latter claim was barred even if an infringement of competition law was to be found, because it does not allow a party to rely on its own illegal actions to obtain damages. The question referred to the Court of Justice by the English court seised was essentially whether such an absolute bar is compatible with EU law.

In its reply the Court first recalled three general points, namely that EU law constitutes an own legal order intended to give rights to private parties, that Article 101 TFEU is a fundamental provision, as is underlined by prin-

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64 Wils (2003a), p. 475; Eilmansberger (2007), p. 434.

65 Cf. e.g. recital 7 Competition Regulation 1/2003; Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 30; Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 11.

66 Monti (2003), p. 8.

67 Earlier the CoJ had already touched upon private enforcement-related aspects, yet without being particularly clear in this respect. See CoJ case C-282/95 P, *Guérin*, para. 39; CoJ case C-242/95, *GT-Link*, para. 58-61.

68 CoJ case C-453/99, *Courage*. See para. 60 above.

69 See para. 205 above.

70 See subsection 6.1.3 above.

ciple of automatic nullity laid down in Article 101(2) that can be relied on by anyone and that has absolute consequences, and that Article 101(1) produces direct effects in relations between private parties and creates rights for the parties concerned which national courts must safeguard.[71] It follows, according to the Court, that "*any individual can rely on a breach of Article [101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision*".[72] Specifically in relation to the action for damages it added that "*[t]he full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down [therein] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the [EU] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU]*".[73] It was therefore found that there should not be an absolute bar to the actions at issue here.

The Court continued by recalling that, subject to the principles of equivalence and effectiveness, it is for the domestic legal system of each Member State to designate the competent courts and to lay down the detailed procedural rules governing such actions. It held that EU law does not prevent national courts from taking steps to ensure that the protection of rights guaranteed by that law does not entail the unjust enrichment of those who enjoy them. Similarly EU law does in principle not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contract party, as a litigant should not profit from its own illegal conduct. In that regard account is to be taken, according to the Court, of the economic and legal context in which the parties find themselves and of their respective bargaining power and conduct and in particular whether the party claiming damages was in a markedly weaker position such as to seriously compromise or even eliminate its freedom to negotiate the terms of the contract and its capacity to avoid the loss or reduce its extent.[74]

214. In 2006 the Court of Justice returned to this topic in *Manfredi*.[75] This case, an Italian preliminary reference, concerned a 'follow-on' action, meaning that the competent national competition authority had already found that the defendants (several undertakings offering civil liability auto insurance) had entered into an unlawful price-fixing agreement. Subsequently

71 CoJ case C-453/99, *Courage*, para. 19-23.
72 *Ibid*., para. 24.
73 *Ibid*, para. 26-27.
74 *Ibid*., para. 29-35.
75 CoJ joined cases C-295/04 to C-298/04, *Manfredi*.

Mr Manfredi and a number of other clients of these undertakings demanded to be compensated for the increase in the premiums that they had paid as a consequence of this coordinated anti-competitive behaviour. The questions referred to the Court of Justice in this case concerned not so much the existence of the right to compensation as such, but rather the more detailed rules that apply in this respect. The Court started by confirming what it had already held in *Courage*. In particular, it recalled that the full effectiveness and practical effect of the prohibition laid down in Article 101(1) TFEU would be at risk if such damages claims could not be brought, pointing to the discouraging effect thereof on possible infringements and the significant contribution that these claims can make to the maintenance of effective competition.[76] On this basis the Court clarified that *any party* can claim compensation where there is a *causal relationship* between the harm suffered and the infringement at issue. In the absence of rules of EU law on this subject-matter, subject to the principles of equivalence and effectiveness, it is for the Member States to lay down the detailed rules on the application of the concept of 'causal relationship'.[77] Under the same conditions it also for them to designate the courts before which the case is to be brought, to provide for the limitation periods that may apply to the bringing of these actions for damages and to set the criteria for determining the extent of the damages.[78]

On these latter two points the Court also offered further clarification however. In respect of the applicable *limitation periods* it held that, where pursuant to the national law such a period begins to run from the day of the establishment of the agreement or concerted practice, this would make it practically impossible to exercise the right to seek compensation, particularly if this is combined with a short limitation period that is not capable of being suspended. For in such a situation, where there are continuous or repeated infringements, it is possible that this period expires even before the infringement is brought to an end. This would mean that it is impossible for a private party that suffered harm after the expiry of that period to initiate legal proceedings.[79] Concerning the *extent of the damages* due, the Court first held that, pursuant to the principle of equivalence, it must be possible to award punitive damages for infringements of EU competition law if the award of such damages is available for infringements of similar actions founded on national law. It added that EU law does not prevent national courts from taking steps to prevent unjust enrichment. The Court further ruled that in case of infringements of EU competition law injured private parties must be able to seek compensation not only for actual loss (*damnum emergens*), but that it must also be possible for them to be compensated for

76 *Ibid*., para. 60 and 90-91.
77 *Ibid*., para. 61-64.
78 *Ibid*., para. 71, 77 and 92.
79 *Ibid*., para. 78-79.

loss of profit (*lucrum cessans*). A total exclusion of this latter head of damage cannot be accepted, according to the Court. Interest must also be paid, this being called an essential component of the compensation due.[80]

215. The above line of case law has since been confirmed on many occasions.[81] It has been instrumental for the present purposes particularly in two respects. To begin with, in line with what Advocate General Van Gerven had already argued in his opinion in *Banks*,[82] this case law confirmed that private parties injured by infringements of Article 101 TFEU have, *as a matter of EU law*, the right to claim damages. Unlike what sometimes had been assumed earlier,[83] this is therefore not something that is left primarily to national law. Rather, in the absence of any specific EU rules, only the more detailed rules are to be determined by national law, pursuant to the principle of national procedure autonomy and subject to the principles of equivalence and effectiveness.[84] Yet the above cases still leave many questions unanswered, such as whether the same reasoning applies to Article 102 TFEU, which conditions apply precisely in relation to these private enforcement actions and whether they may also encompass other remedies than actions for damages. Without in itself necessitating any further measures to be taken by the EU legislature, the *Courage* case law placed the issue of private enforcement firmly in the spotlight.[85]

In addition the above case law underlines the significant contribution that private enforcement proceedings can make to the maintenance of *effective competition* in the EU. In other words, these actions are not only about a private party's right to obtain compensation for the harm suffered. They also fulfil an important role in contributing to the achievement of one of the EU's key policy objectives, i.e. the maintenance of effective competition, thus complementing the public enforcement efforts in this field. Thus, "*[w]hile pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest*".[86] This highlights on the one hand the general interest associated with private enforcement actions, while on the other hand it leaves the question unaddressed how both forms of enforcement precisely relate to each other.

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80 *Ibid*, para. 93-96.

81 E.g. CoJ case C-421/05, *City Motors*, para. 33; CoJ case C-360/09, *Pfleiderer*, para. 28; CoJ case C-199/11, *Otis*, para. 40-43; CoJ case C-536/11, *Donau Chemie*, para. 21-27; CoJ case C-557/12, *Kone*, para. 20-24.

82 Opinion AG Van Gerven case C-128/92, *Banks*. See para. 211 above.

83 See in particular para. 209-211 above.

84 On these principles, see sections 2.1 (national procedural autonomy) and 2.2 (equivalence and effectiveness) above.

85 See e.g. Komninos (2002), p. 447; Ehlermann & Atanasiu (2003); Wils (2003a), p. 473; Andreangeli (2004), p. 758; Jones (2004), p. 13.

86 EFTA Court case E-14/11, *Schenker*, para. 132.

### *6.2.3. Green paper, white paper and draft proposal (2005-2010)*

216. On the back of this legislative reform and the *Courage* case law, the Commission judged the time ripe to renew its thinking on a possible legislative initiative. Therefore in 2005 it published a *green paper on damages actions* for infringements of the EU's competition rules.[87] This document aimed to identify obstacles to a more efficient system for bringing such actions and to outline various options for solving these problems. It reflected the view that there is a state of "*total underdevelopment*" where actions for damages for infringements of EU competition law under the laws of the Member States are concerned.[88] This assessment rested largely on the findings of an external study that was published in 2004, which spoke in this connection of "*astonishing diversity and total underdevelopment*".[89] It observed that, by 2004, there were EU-wide only around 60 judged cases for damages actions for infringement of EU or national competition law, around half of which had led to an award of damages.[90] It identified a number of obstacles to bringing successful claims and suggested possible manners to tackle them.

217. Building on this assessment and the comments received, in 2008 the Commission published a *white paper* on the same subject-matter.[91] It acknowledged that, since the publication of the green paper three years earlier, specific legislation had been adopted in some Member States, such as Germany, Italy and the United Kingdom, and that generally awareness and the number of cases brought (and probably also the number of out-of-court settlements reached) had increased.[92] Indeed, a subsequent study identified 96 damages actions in the 2004-2007 period.[93] But that study also found that these cases were restricted to only ten Member States and that it mainly concerned 'clustered' 'follow-on' actions initiated following findings of infringements by the competition authorities. Proper 'stand-alone' actions, i.e. cases brought independently of a preceding finding of an infringement

87 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672. See also Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732.

88 *Ibid*., p. 4.

89 Study Ashurst (2004), p. 1.

90 *Ibid*.

91 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165. See also Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404; Commission, Impact assessment relating to the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 405.

92 For an overview of these developments at national level, see e.g. Komninos (2008), pp. 183-186; Nazzini (2009), pp. 402-403.

93 Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 39. Unlike the aforementioned 2004 study by Ashurst, this later study concerns only claims for damages as a consequence of breaches of *EU* competition law, thus excluding cases concerning infringements of *national* competition law.

by a competition authority, were found to make up only a relatively small part of the total. Here it was therefore submitted that the aforementioned state of 'total underdevelopment' had only marginally changed.[94] On that basis the Commission considered that the problems identified earlier essentially remained unchanged and that victims of infringements of EU competition law were still only rarely compensated for the harm suffered.[95] It pointed to the amount of foregone compensation and it argued that a great deal of legal uncertainty existed.

While the main line thus remained unchanged, there are however certain notable *differences in emphasis* between the green paper and the white paper.[96] Initially public and private enforcement of competition law had been said to be part of a common enforcement system and to serve the same aims, namely to deter forbidden anti-competitive practices and to protect undertakings and consumers.[97] Actions for damages were thus seen as serving the twin purpose of compensating and deterring. By contrast in the white paper allowing for the full compensation of the harm caused by competition law infringements was held to be the "*first and foremost guiding principle*".[98] This was said to "*inherently*" also produce beneficial effects in terms of deterrence of future infringements and greater compliance with the substantive rules at issue.[99] In this later document the importance of following a "*genuinely European approach*" was also reinforced, involving "*balanced measures that are rooted in European legal culture and traditions*".[100] The importance of preserving strong public enforcement was also underlined.[101] Another difference in emphasis can be found in the Commission highlighting that the intended legislative exercise would on various points concern (merely) a codification of the relevant case law of the Court of Justice.[102]

94 *Ibid*., pp. 28 and 39-40.

95 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 9.

96 This occurred presumably in response to the comments made on the preceding green paper. Cf. Cauffman (2011a), pp. 182-183; Wils (2013), p. 6.

97 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 3.

98 Commission, White paper on damages actions for breach of the EC antitrust rules, p. 3.

99 *Ibid*.

100 *Ibid*.

101 *Ibid*.

102 While this point is also made in the white paper (see p. 7), this emphasis on codification is particularly evident in the accompanying staff working paper, in which many sections discussing the various measures suggested contain an overview of the body of EU law as it stands. See in particular Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 90-91. On this proposed codification exercise, see further Milutinovic (2010), p. 301.

218. The 2008 white paper outlined several *specific measures* that could be taken to address the obstacles that private parties wishing to bring actions for damages for alleged infringements of EU competition law were said to encounter.[103] As these measures are mostly discussed in further detail below,[104] suffice to note here that – without expanding on the concrete form or legal basis of any legislative measures that it might propose[105] – the following nine measures were identified: (i) ensuring that all injured private parties have *legal standing* to bring an action for damages, including parties lower down the supply chain (so-called 'indirect purchasers') and collective redress; (ii) facilitating *access to evidence* by providing for a disclosure mechanism; (iii) providing for the *binding effect* of decisions finding an infringement by national competition authorities (and the national courts reviewing those decisions); (iv) providing for a rebuttable presumption that the defendant was *at fault* when committing the infringement, where national law contains a fault requirement; (v) taking measures on the *qualification and quantification* of the damages due; (vi) allowing defendants to invoke the so-called '*passing-on defence*', i.e. the argument that the applicant did not suffer any harm because the overcharge resulting from the anticompetitive behaviour was passed on to indirect purchasers, coupled with a rebuttable presumption to the benefit of these indirect purchaser that this overcharge was passed on to them in its entirety; (vii) harmonising rules on the applicable *limitation periods*; (viii) addressing the issue of *legal costs*; (ix) regulating the *interaction between public and private enforcement*, in particular the non-disclosure of documents in which undertakings confess to the competent public authorities their infringements of the competition rules in the hope of obtaining a reduction of, or even full immunity from, any fines that these authorities could impose, as part of the latter's so-called 'leniency programmes', as well as the possible limitation of the successful leniency applicants' civil liability in damages.[106]

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103 Commission, White paper on damages actions for breach of the EC antitrust rules, pp. 4-10. See also Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, pp. 5-11, for earlier reflections and options in this regard.

104 I.e. in the context of the discussion of the Competition Damages Directive in section 6.3 below.

105 Cf. Commission, White paper on damages actions for breach of the EC antitrust rules, p. 2, where reference is made to "*a combination of measures at both [EU] and national level, in order to achieve effective minimum protection of the victim's right to damages under Articles [101 and 102 TFEU] in every Member State and a more level playing field and greater legal certainty across the EU*". See also Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 97-98. In this latter document a preference is expressed for a binding EU legal act, without specifying this any further however. It was also suggested there that certain issues would be addressed through 'soft law' instruments, such as non-binding Commission guidelines.

106 On these leniency programmes, see further para. 269 below.

219. The two abovementioned official documents generated a *lively debate*. In academic circles they set many pens in motion.[107] Many stakeholders, academics, practitioners and public authorities also used the possibility offered to comment on to these documents.[108] The reactions from the side of the *business* community were largely negative.[109] These parties voiced *inter alia* principled and practical objections against using actions by private parties to further the general interest associated with the effective application of EU competition law and concerns that the contemplated EU private enforcement rules might create a 'US-style' litigation culture. Most *consumer associations* spoke out in favour of taking action at EU level.[110] The *lawyers and academics* that responded were on the whole rather nuanced.[111] These latter respondents mostly recognised that there was room for improvement. But they also cautioned against a litigation culture, stressed the primacy of public enforcement and expressed doubts as to whether the obstacles identified indeed explained the relatively low number of damages claims brought, considering for instance that many cases are settled out-of-court. The logic of treating competition cases differently from other civil litigation was also questioned. Some further recalled that in certain Member States private competition litigation was already rather developed and that more recently there had been a significant increase in the number of cases brought.

Reactions from the side of *public authorities* were rather mixed. Many stressed the compensatory – and not punitive – nature of damages awards.[112] Several public authorities also highlighted the risks posed to the coherence

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107 See e.g. Hodges (2006), p. 1381; Komninos (2006), p. 5; Wilsher (2006), p. 27; Eilmansberger (2007), p. 431; Komninos (2008); Nebbia (2008b), p. 23; Andreangeli (2009), p. 229; Wils (2009), p. 3; Komninos (2009, p. 363; Zippro (2009b); Milutinovic (2010); Nazzini (2011), p. 131; Basedow, Terhechte & Tichý (2011); Peyer (2011), p. 627; Frese (2011), p. 397.

108 For the responses submitted to the green paper and the white paper, see http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

109 See e.g. the comments on the green paper submitted by Association of French undertakings (MEDEF); Internal Chamber of Commerce (ICC); American Chamber of Commerce to the EU (Amcham EU); European Chemical Industry Council (Cefic); Confederation of Finish Industries (EK); association of the European insurance industry (CEA); the association of German industry (BDI); UK business lobby CBI; Union of Industrial and Employers Federation of Europe (UNICE; now called BusinessEurope).

110 See e.g. the comments on the green paper submitted by European Consumer's Organisation (*Bureau européen des Unions de consommateurs*, BEUC); UK-based consumer organisation Which?.

111 See e.g. comments on the green paper submitted by law firms Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters and CMS; UK bars and law societies; Europa Instituut Leiden University; Max Planck Institute; Dutch Bar Association; International Bar Association.

112 See e.g. the comments on the green paper submitted by the French government and *Cour de cassation*; Danish Ministry for Economic and Business Affairs; Netherlands government and national competition authority; competent German federal ministry; UK government and national competition authority; Irish Competition Authority. Cf. Study Ashurst (2004), p. 84, where it is observed that punitive damages are only available, in certain cases, for infringements of the competition rules in three Member States, namely the UK, Ireland and Cyprus.

of their respective domestic legal systems if specific action with regard to competition cases were to be taken. Arguments against a litigation culture were again voiced. The German and French governments were among those that took a rather negative stance.[113] They essentially contested the need for EU legislation, raised questions as to its legal basis and submitted that, in accordance with the principles of national procedural autonomy and subsidiarity, the aforementioned issues should be left to be regulated by the Member States. It was argued that, if any legislative action were to be taken, those issues would fall under the rules of the EU Treaties on judicial cooperation in civil matters.[114] That said, while expressing some concerns, many other public authorities generally did not respond outright negatively; some actually spoke out in favour of an EU legislative initiative in this field.[115] The European Parliament, from its side, also expressed certain hesitations.[116] It requested clarification on the legal basis of any future legislative action and insisted on the use of the ordinary legislative procedure, meaning that it decides on a par with the Council on the proposed EU legislation.[117] Just as several other public authorities, it argued in favour of a consistent and horizontal approach on collective redress,[118] whereas it looked unfavourably upon the suggestion of giving binding effect to decisions by national competition authorities. The European Parliament further considered that rules on limitation periods (for 'stand-alone' actions), quantification of damages and legal costs should be left to be regulated by national law. Notably, while it had initially urged the Commission to publish a white paper, in response to this latter document it did not expressly invite or encourage the

113 Apart from the submissions by the competent German ministries and *Bundesrat* and the French government, see e.g. also the comments on the white paper submitted on behalf of Ireland, Luxembourg, Austria and Denmark.

114 Cf. Art. 81 TFEU on judicial cooperation in civil matters, further discussed in para. 432 below. At the time, these latter matters were part of the so-called 'third pillar', which implied that different requirements for the adoption of any secondary EU law applied as compared to the 'first pillar' provisions of the EU Treaties on competition (Art. 103 TFEU) or the internal market (Art. 114 TFEU). Since the entry into force of the Treaty of Lisbon in 2009 this pillar structure has been abolished however, although certain differences in the applicable requirements remain.

115 See e.g. the comments on the white paper submitted by the Netherlands government as well as the Belgian, UK, Czech and Romanian competition authorities.

116 European Parliament, Resolution on the green paper on damages actions for breach of the EC antitrust rules, P6_TA(2007)0152; European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187. See also Economic and Social Committee, Opinion on the green paper damages actions for breach of EC antitrust rules, OJ 2006, C 324/1; Economic and Social Committee, Opinion on the white paper on damages actions for breach of the EC antitrust rules, OJ 2009, C 228/40.

117 Art. 289 TFEU.

118 Besides the question whether collective redress should be regulated 'horizontally' or rather in a competition specific manner, a key issue in this respect is whether or not an express 'opt-in' by the private parties having suffered harm would be required. On collective redress, see also subsection 5.5.1 above.

Commission to submit a legislative proposal. Only in 2011 it made a suggestion to this effect.[119]

220. In 2009 the Commission services set out to draft a directive on damages claims for infringements of EU competition law.[120] However the resulting *draft proposal* for a directive never past the internal hurdles. That is to say, while this draft circulated informally also outside the Commission, it was never adopted by its College of Commissioners. Consequently neither was it formally published, let alone discussed or adopted by the EU legislature. It is therefore important to note that this draft proposal is non-existent in formal terms (a 'non-proposal', if you will[121]), although it nonetheless offers an interesting insight into the thinking of the Commission services at that point in time.

In terms of content the approach set out in this draft proposal was largely in line with the 2008 white paper. Its main objective would be to ensure that private parties could obtain full compensation for harm suffered as a consequence of infringements of Articles 101 and 102 TFEU. Punishing and deterring infringers would not be a primary objective, although deterrence would remain a welcome side-effect. The draft further contained specific measures on the following issues: the concept of *full compensation* (covering actual loss, loss of profit and interests); *collective redress* (either as a 'group action' or as a 'representative action' by a qualified entity, without that entity being required to individually identify the parties it represents but with a right of opt-out); *disclosure* of evidence (by the parties to the proceedings and third parties, to be ordered by the court upon the presentation of reasonably available facts and evidence, subject to certain conditions and exceptions, including for leniency statements); *passing-on defence* (permitted); *binding effect* across the EU of final decisions by competition authorities (and review courts) finding an infringement; *fault* (rebuttable presumption of fault upon the establishment of an infringement); and *limitation periods* (which would not begin to run before the end of the infringement and not end, in 'follow-on' cases, until two years after the final decision by a national competition authority).

The draft proposal was abandoned in the autumn of 2009, reportedly shortly before it was due to be adopted by the Commission. The reasons for this last-minute change of course remain unclear. The abovementioned hesitations and opposition expressed by business organisations and certain Member States, in particular Germany, are widely believed to have played a

119 European Parliament, Resolution on the report on competition policy 2009, P7_TA(2011)0023, para. 15.

120 Commission, Draft Proposal for a Council directive on the rules governing damages actions for infringements of Articles 81 and 82 of the Treaty. The text of this draft proposal has been published in Lowe & Marquis (2014) (see its Annex III). On this draft proposal, see also Alfaro & Reher (2010), p. 43; Cupa (2012), p. 524.

121 Cf. Marquis (2014), p. lxv.

role in this decision.[122] The same can probably be said of the potential for inter-institutional conflicts relating to the choice of legal basis, i.e. Article 103 TFEU, which implied that the European Parliament would only have had a consultative role in the legislative process,[123] as well as the need felt by many of the parties involved not to endanger the central role of public enforcement mechanisms.[124] Personnel changes within the College of Commissioners in 2009 may also have been a relevant factor.[125] In any case after this aborted attempt to establish a proposal, plans for such a directive were shelved for several years.

### *6.2.4. Pfleiderer case law and proposal (2010-2013)*

221. Yet another important jurisprudential development – this time relating not so much to the right to claim damages as such, but rather to the interaction between public and private enforcement in this field – was arguably required to reanimate the project. For in 2011 the Court of Justice issued its ruling in *Pfleiderer*.[126] In this case, a German preliminary reference, the competent national competition authority had imposed fines on several undertakings for infringements of Article 101 TFEU. In the context of those public enforcement proceedings, some of these undertakings had submitted a leniency application to this authority. Pfleiderer AG was a customer of one of the infringing undertakings. With a view to preparing a claim for damages, it applied to the competition authority requesting full access to the case file, including the said leniency applications. After access had been refused, this private party appealed to the national court. The latter essentially asked the Court of Justice whether EU law precluded the granting of such access.

In its judgment the Court started by observing that there are no binding EU rules in respect of national leniency programmes or the right to access to documents related thereto. It is therefore in principle for the Member States to establish and apply such rules.[127] But these rules may not render the implementation of EU law impossible or excessively difficult and, more spe-

122 Cf. Chellel (2009); Milutinovic (2010), pp. 324-327; Vrcek (2010), pp. 277-278; Siragusa (2014), pp. 237-238.

123 Cf. e.g. Boylan (2009). On the legal basis issues arising in this connection, see further para. 228 below.

124 See e.g. Reich (2010), p. 119.

125 Commission president Mr Barroso was re-elected for a second term in office in September 2009. It has been suggested that this re-election was linked to developments (or rather the lack thereof) in respect of the present subject-matter. See e.g. Micklitz (2011b), p. 102; Beumer & Karpetas (2012), p. 143 (n. 143); Hodges (2013), p. 72. Subsequently portfolios were redistributed within the Commission, including the replacement of Ms Kroes by Mr Almunia as Commissioner for competition policy. The new Commission took formally up its tasks on 1 February 2010.

126 CoJ case C-360/09, *Pfleiderer*. Cf. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 13-14.

127 *Ibid*., para. 19-23.

cifically, it must be ensured that the effective application of Articles 101 and 102 TFEU is not jeopardised. The Court noted in this connection that leniency programmes are useful tools to uncover and end competition law infringements that serve the objective of effective application of the said articles. It acknowledged that the effectiveness of these programmes could be compromised if documents related thereto were to be disclosed, because the possibility of such disclosure could deter undertakings from participating.[128] However, with reference to its *Courage* case law,[129] it was also recalled that any private party has the right to claim damages for loss caused to him by an infringement of EU competition law and that the resulting actions for damages can make a significant contribution to the maintenance of effective competition.[130]

In this light the Court held that, apart from the application of the principles of equivalence and effectiveness,[131] it is necessary "*to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant of leniency*" and that "*[t]hat weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case*".[132] In so doing, it chose a different route than the one outlined by Advocate General Mazák, who had essentially argued that self-incriminating statements made by leniency applicants should be protected from disclosure.[133] The Court instead found that EU law does not preclude giving access to the documents in question, but that it is for the national courts, on the basis of their national law, to determine the relevant conditions by weighing the interests protected under EU law.[134]

222. Two years later the Court of Justice built on this judgment in *Donau Chemie*.[135] This latter case also concerned a request, submitted by (an association of) undertakings allegedly having suffered harm as a consequence of an infringement of Article 101 TFEU for which fines had been imposed, to be granted access to the file of a national competition authority with a view to gathering the evidence needed for bringing a damages claim. In this case the applicable national (Austrian) legislation did not allow the national court seised to weigh the interests at stake. The national legislature had in effect itself decided to give priority to the interest associated with keeping documents relating to public enforcement proceedings confidential, making the disclosure subject to the consent of all parties to the proceedings for the access to documents. The referring court's question to the Court of Justice

128 *Ibid*., para. 24-27.
129 See para. 213-215 above.
130 CoJ case C-360/09, *Pfleiderer*, para. 28-29.
131 On these two principles, see further section 2.2 above.
132 CoJ case C-360/09, *Pfleiderer*, para. 30-31.
133 Opinion AG Mazák case C-360/09, *Pfleiderer*, para. 44.
134 CoJ case C-360/09, *Pfleiderer*, para. 32.
135 CoJ case C-536/11, *Donau Chemie*.

was whether this legislation is to be considered compatible with EU law, in particular the principle of effectiveness.

The Court of Justice answered this question in the negative. It insisted that pursuant to the principle of effectiveness a national court must have the possibility to weigh up the respective interests in favour and against disclosure. This weighing-up was held to be necessary because "*any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals*".[136] On the one hand, where the parties adversely affected by the infringement have no other way of obtaining the evidence needed to establish their claim, in the Court's view a refusal to grant them access renders nugatory the right to compensation under EU law. On the other hand it held that generalised access is not necessary and could harm the legitimate interests of the undertakings concerned (e.g. relating to their right to protection of business secrets) and the general interest (by deterring undertakings from cooperation with public enforcement authorities).[137] Specifically as regards documents relating to leniency programmes, the Court acknowledged both the importance of these programmes and the possibility that undertakings will be deterred by the possibility of disclosure. But this was not seen as sufficient to systematically refuse all access to such documents. Given the importance of actions for damages, a mere abstract risk of undermining the effectiveness of leniency programmes was found not to suffice. Instead for non-disclosure to be justified there must be overriding reasons relating to each specific document, i.e. a risk that disclosure of that particular document would actually undermine the public interest relating to the effectiveness of leniency programmes.[138]

223. Just a few days after the Court issued its ruling in *Donau Chemie* the Commission published its *proposal* for the Competition Damages Directive.[139] Whilst the content of this proposal is discussed where relevant in the following section together with the text of the directive, the following points merit being noted at the outset. To begin with, the proposal is in many respects a continuation of the line that was set out in the aforementioned official documents.[140] The proposal accordingly aims to ensure that parties having suffered harm as a consequence of infringements of the EU competition rules can obtain full compensation.[141] In this connection the Commission acknowledged that there had been "*some recent signs of improvement*

136 *Ibid*., para. 31.
137 *Ibid*., para. 32-33.
138 *Ibid*., para. 40-48.
139 Commission, Proposal for the Competition Damages Directive, COM(2013) 404. See also Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203.
140 See subsection 6.2.3 above.
141 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 3.

*in a few Member States*".[142] Several Member States adopted specific rules or were contemplating (further) amendments to their national laws relating to actions for damages for competition law infringements. Hungarian law for example now provides for a rebuttable presumption that ('hard-core') cartels lead to an illegal overcharge of 10%.[143] A rise in the number of damages actions brought was also observed, while noting however that the vast majority of large actions of this kind are brought in just three Member States, namely the UK, Germany and the Netherlands.[144] The Commission therefore found that the situation had not significantly changed in this respect since 2005.[145] In its view there is still "*a clear deficit in terms of compensatory justice*".[146] This was attributed to the obstacles resulting from the applicable national laws that were mentioned in its earlier documents.[147]

Yet there are some noticeable differences in the general approach followed by the Commission. In particular, apart from the aforementioned obstacles that private party-applicants are said to encounter, the proposal also emphasised the *diversity* in the rules of national law that regulate actions for damages for infringements of the EU competition rules. This diversity was said to lead to legal uncertainty and 'uneven enforcement' of the EU right to compensation and therefore to competitive advantages for some undertakings and distortions of the internal market.[148] The proposal thus aims not only to shift the costs away from the victims and to act as an incentive for better compliance, but it also seeks to contribute to a more level playing field.[149] In addition optimising the *interaction between public and private enforcement* is no longer one issue to be addressed among several others in the context of the overall objective of ensuring full compensation for injured parties, as was the case earlier. The proposal instead identified this as a second objective in its own right, on a par with full compensation.[150] This was said to be due to "*a new issue*" that showed that "*the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement*

142 *Ibid*., p. 4.

143 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 17 (and its Annex 3). On this Hungarian law, see further Nagy (2011), p. 63.

144 *Ibid*., p. 19.

145 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 4; Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18. On these earlier documents and the said obstacles, see subsection 6.2.3 above.

146 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 15.

147 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 4.

148 *Ibid*.; Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 18-20.

149 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 4. See also Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 15-20.

150 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 3-4.

*of the EU*".[151] This refers to the aforementioned *Pfleiderer* ruling.[152] Whilst admitting that there is no evidence that this ruling has had or will have a negative impact on the functioning of leniency programmes operated by the competent public enforcement authorities, it was thought to have led to uncertainty. In light of the required case-by-case assessment on questions of disclosure, an undertaking does not know in advance whether or not its leniency application will be disclosed by the public enforcement authority concerned. In the Commission's view, this could negatively affect the willingness of undertakings to cooperate and thus the public enforcement of EU competition law.[153]

224. Lastly, as to the *reception* of this proposal in the legal literature, it should first be noted that there is a widespread perception that the degree of damages litigation for infringements of competition law (predominantly 'follow-on' actions) has been increasing over the past years, not only in the few Member States to which the Commission referred, but also in the EU more generally.[154] Many further considered that, 'post-*Pfleiderer*', the tension between actions for damages for competition law infringements and leniency programmes needed to be addressed at EU level so as to preserve the effectiveness of these programmes.[155] This is also the view of the European competition authorities.[156] The Commission proposal itself was on the whole received in – cautiously – favourable terms. Criticism concerned mainly the generally rather modest degree of detail and the related fears that some uncertainty and divergences might persist also after its adoption.[157]

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151 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 5.

152 CoJ case C-360/09, *Pfleiderer*. See para. 221 above.

153 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 12-15 and 28.

154 See e.g. Barone & Amore (2010), p. 346; Jalabert-Doury (2010), p. 316; Milutinovic (2010), p. 346; Danov & Becker (2013), p. 77; Danov & Dnes (2013), p. 51; Kammin & Becker (2013), p. 61; Hodges (2013), p. 71; Wils (2013), p. 6; Guttuso (2014), p. 12; Ratliff (2014), p. 272.

155 See e.g. Nascimbene (2013), p. 269; Campbell & Feunteun (2014), pp. 34 and 38; Burrichter & Ahlenstiel (2014), p. 103; Hummer & Cywinski (2014), pp. 117-118; Kumar Singh (2014), p. 117; Milutinovic (2014), p. 363; Pietrini (2014), p. 262; Ratliff (2014), p. 287; Silva Morais (2014), p. 128. See however also Danov & Dnes (2013), pp. 56 and 59, where it is suggested that the possible friction between increasing numbers of actions for damages and leniency programmes may be overstated to some degree.

156 Heads of the European competition authorities, Resolution on the protection of leniency materials in the context of civil damages actions, 23 May 2012.

157 See e.g. Batchelor, Pike & Ghiorghies (2013), p. 165; Gamble (2013), pp. 619-620; Babirad (2013), p. 160; Guttuso (2014), pp. 20-22; Howard (2014), p. 53; 55; Louis (2014), p. 90; Milutinovic (2014), p. 376; Nordlander & Abenhaïm (2014), pp. 7-8; Silva Morais (2014), pp. 137-138; Stauber (2014), p. 38; Wisking, Dietzel & Herron (2014), p. 185. For a critical assessment, see in particular Kumar Singh (2014), pp. 120-122; Weidt (2014), p. 438.

## 6.3. Competition Damages Directive

In this section the Competition Damages Directive is discussed. To this aim the first subsection below addresses a number of general (and interrelated) issues concerning its adoption, objectives, scope and legal basis. The following subsection concentrates on the directive's principal (substantive) remedy, i.e. actions for damages, and the rules directly relating thereto regarding the qualification and quantification of the harm caused by the infringements at issue. Attention then turns to the measures related to the disclosure of evidence, followed by a discussion of the rules on joint and several liability, the 'passing-on defence' and the position of indirect purchasers. The last subsection examines the directive's relevant procedural provisions and certain related issues.

### *6.3.1. Adoption, objectives, scope and legal basis*

225. Even when excluding the discussions on a possible legislative initiative on the private enforcement of EU competition law that took place in the 1980s and 1990s,[158] the Competition Damages Directive has been a long time in the making. Yet, after an incubation time of almost a decade (taking the 2005 green paper as the starting point), the actual *law-making process* was relatively speedy. That is to say, less than a year elapsed between the publication of the Commission proposal in June 2013 and the political agreement that was reached in March 2014. At the time of writing this directive had not yet been adopted and published, but that is expected to take place before the end of 2014.[159] Upon its entry into force 20 days after the date of publication, the Member States are required to transpose the directive into national law within two years, i.e. by the end of 2016. Although several important changes were made in the course of the legislative process, which are discussed in further detail below, the main features of the Commission's proposal remained unaltered. The end result has been described as "*a finely-tuned compromise that goes to the limits of the flexibility of the co-legislators*".[160]

Although a range of factors is likely to have played a role, three elements stand out when seeking to explain the fact that, after having proved controversial at an earlier stage, the Competition Damages Directive was in the end adopted rather speedily.[161] First, there is the 2011 *Pfleiderer judgment*, which, as was discussed above, led to the protection of the effectiveness of public enforcement (especially leniency programmes) being elevated as an objective in its own right, on a par with the actual facilitation of private enforcement.[162] This meant that those that consider the public enforcement

158 See subsection 6.2.1 above.
159 See para. 13 above.
160 Council, doc. 8088/14.
161 On this issue, cf. Hodges (2013), pp. 74-75.
162 See para. 221 above.

of EU competition law to be of particular importance now also had a stake in seeing this directive adopted. The second factor relates to the *position of the European Parliament*. As is explained below, a solution was found for the question relating to the involvement of this institution in the legislative process, ensuring that it could co-decide together with the Council.[163] The upcoming elections for the European Parliament in May 2014 probably gave the negotiations on the draft directive an (extra) sense of urgency. Lastly, the Commission, and with it the EU legislature, *moderated its ambitions*. Several issues that had earlier been identified as obstacles but that had also proved controversial were excluded from this legislative initiative. It concerns especially possible EU rules on collective redress,[164] but also on fault requirements[165] and, at an earlier stage, legal costs.[166] The issue of the causal relationship between the infringement and the harm is also left unaddressed in the directive.[167]

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163 See further para. 228 below.

164 In line with the Commission's proposal, recital 12 Competition Damages Directive states that "*[t]his Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 [TFEU]*". See further Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 55, where the Commission noted that competition law is not the only field in which scattered harm frequently occurs and in which it may be difficult to obtain compensation for the harm suffered. It was also acknowledged that following such a 'horizontal' approach could avoid unnecessary fragmentation of national civil laws. The Commission therefore stated its preference for addressing this issue in a more 'horizontal' manner, i.e. through an initiative that relates not only to infringements of EU competition law but also to other infringement of EU law. See further the discussion of Collective Redress Recommendation 2013/396 referred to in subsection 5.5.1 above. This exclusion of collective redress from the directive has been perceived as the Commission "*bend[ing] to the will of industry*". See Marquis (2014), p. xx.

165 The Commission's 2008 white paper and its 2009 draft proposal, discussed in subsection 6.2.3 above, provided for a rebuttable presumption of fault. By contrast the Commission's proposal did not address this issue at all, because the suggested provisions "*were particularly criticised by some business respondents*". See Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 35. Recital 11 Competition Damages Directive states in this regard that Member States should, in principle, be able to maintain "*other conditions for compensation under national law, such as imputability, adequacy or culpability*". Note that in CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 61-63, discussed in para. 214 above, no explicit reference was made to a fault requirement. On that basis it was suggested in Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 51, that no such requirement can apply in respect of actions for damages for infringements of EU law. This view has been contested however. See Eilmansberger (2007), p. 458.

166 Already in its 2008 white paper the Commission had limited itself to 'inviting' Member States to 'reflect' on their rules on legal costs and the allocation thereof between the parties to the proceedings. See Commission, White paper on damages actions for breach of the EC antitrust rules, pp. 9-10. See also para. 328 below.

167 Recital 11 Competition Damages Directive.

226. The *objectives* of the Competition Damages Directive remained essentially unchanged as compared to the Commission's proposal, discussed above.[168] There are therefore two objectives.[169] Largely in line with the 2005 green paper and the 2008 white paper, its first objective is to ensure that anyone who has suffered harm caused by an infringement of the relevant rules of competition law can effectively exercise the right to claim *full compensation* for that harm and to ensure the proper functioning of the internal market by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.[170] In addition, particularly in the aftermath of the aforementioned *Pfleiderer* case law, the directive seeks to *coordinate the public and private enforcement* of the competition rules in as far as actions for damages before the national courts are concerned.[171] In fact, speaking of 'coordination' (or 'interaction'[172]) between public and private enforcement seems a bit of a euphemism. As is seen below, the measures taken in connection with this second objective essentially determine the degree to which the private enforcement possibilities provided for are to be limited so as to safeguard the effectiveness of the existing public enforcement mechanisms (and especially leniency programmes).[173] It thus seems more accurate to speak of the 'protecting' or 'preserving the central role' of effective public enforcement in the EU, as the Commission did earlier.[174] In any case it follows from this second objective that the directive does not wholeheartedly seek to facilitate private enforcement, but it also restricts the possibilities to do so in some respects.

227. The main point to note as regards the *scope* of the directive is that it covers not only infringements of substantive *EU* competition law, i.e. Articles 101 and 102 TFEU. It also covers certain rules of substantive *national* competition law. Not all rules of national competition law are covered however. The measures set out in the directive relate only those provisions of national competition law that "*predominantly pursue the same objective as*

168 See para. 223 above.
169 See also recital 50 Competition Damages Directive.
170 Art. 1(1) Competition Damages Directive.
171 Art. 1(2) Competition Damages Directive. On the said case law, see para. 221-222 above.
172 Cf. recital 6 Competition Damages Directive. See also Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 3.
173 See in particular Art. 6 and 11 Competition Damages Directive, discussed in para. 235 and 238 below concerning the non-disclosure of certain documents and the limits to the joint and several liability of infringers respectively. See also its Art. 9, discussed in para. 243 below, on the effects of infringement decisions by national competition authorities in proceedings before national courts (but not *vice versa*).
174 See Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 25; Commission, Work programme 2012 (Annex), COM(2011) 777, p. 3.

*Articles 101 and 102 [TFEU] and that are applied to the same case and in parallel to [EU] competition law pursuant to Article 3(1) of [the Competition Regulation]*".[175]

This inclusion of certain rules of national competition law, which is in line with the Commission's proposal, can be seen as somewhat of a surprise.[176] For the 2005 green paper, the 2008 white paper and the 2009 draft proposal were all concerned only with the private enforcement of *EU* competition law.[177] Not even the possibility of such an extension so to also cover national law had been suggested there, nor was this issue raised in the subsequent comments by stakeholders on these earlier documents.[178] Neither does this extended scope seem immediately evident in light of the fact that the Court's *Courage* case law, on which the directive builds in many respects, linked a private party's right to compensation under EU law only to the effectiveness of the EU competition rules.[179] The directive's recitals explain this approach by pointing out that, otherwise, the position of applicants would be adversely affected by the application, in the same case, of diverging rules on civil liability for infringements of EU and national competition law, which is seen as constituting an obstacle to the proper functioning of the internal market.[180] According to the Commission, this would have made it unworkable for judges to handle a case and it would have led to legal uncertainty and possible conflicting results, depending on whether the case is considered as relating to an infringement of the EU or of national competition law.[181] Actions for damages for infringements of national competition law that do not affect trade between the Member States within the meaning of Articles 101 and 102 TFEU remain unaffected however.[182]

228. The Competition Damages Directive rests on a *dual legal basis*, i.e. Articles 103 and 114 TFEU.[183] The choice for Article 103(1) TFEU seems unsurprising. This provision allows for the adoption of "*appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 [TFEU]*". Although private enforcement is not among the possible measures specifically mentioned in its second paragraph, both the broad formulation of the first paragraph and the non-exhaustive character of its second paragraph

175 Art. 4(2) Competition Damages Directive. There it is added that this does not include national laws which impose criminal penalties on national persons except to the extent that such penalties are the means whereby competition rules applying to undertakings are enforced. As regards this parallel application pursuant to Art. 3(1) Competition Regulation 1/2003, see also para. 203 above.

176 Cf. Milutinovic (2014), pp. 368 and 374.

177 As is e.g. evident from the titles of these three documents, which all refer only to the EU (EC) competition rules. On these documents, see further subsection 6.2.3 above.

178 On these consultations, see para. 219 above.

179 On the *Courage* case law and its relevance in this connection, see para. 213-215 above.

180 Recital 10 Competition Damages Directive.

181 Commission, Proposal for Competition Damages Directive, COM(2013) 404, pp. 12-13.

182 Recital 10 Competition Damages Directive.

183 On Art. 103 and 114 TFEU and legal basis issues generally, see further subsection 10.1.1 below.

appear to make this provision in principle a sufficient legal basis. Indeed, before the adoption of this directive it was widely agreed that this provision seemed the most appropriate legal basis for a legislative initiative on the private enforcement of EU competition law.[184] It was also the legal basis cited in the (non-official) draft proposal for a directive that the Commission services prepared in 2009.[185] By contrast adding Article 114 TFEU, which empowers the EU to legislate when necessary for the purposes of its internal market, seems less obvious.[186] For one thing, it is settled case law that a dual legal basis is only to be used exceptionally, and even then only on the condition that the legislative procedures for the adoption of the act in question foreseen by the articles concerned are not incompatible.[187] For another thing, the 'internal market dimension' of the private enforcement of competition law was a theme that received only comparatively little attention in the Commission's earlier official documents and the associated consultations.[188] It was only in the Commission's 2013 proposal that this issue was given real emphasis.[189] In line with the reasoning underpinning this proposal, the recitals of the Competition Damages Directive explain that the divergences between the pre-existing rules of the Member States in this regard lead to uncertainty, an uneven playing field and uneven enforcement of the right to compensation.[190] The explanatory memorandum accompanying the proposal for this directive goes at considerable length in further explaining this choice for this dual legal basis. It is said there that the directive pursues "*two equally important goals which are inextricably linked*", namely, first, giving full effect to Articles 101 and 102 TFEU and, second, ensuring a more level playing field for undertakings operating in the internal market and making it easier for citizens and businesses to make use of the rights that they derive from the internal market.[191] Article 103 TFEU alone was considered not to be sufficient, in particular because, while that provision only foresees measures to give effect to *EU* competition law, as was noted above, the directive also covers certain rules of *national* competition law. Given that, according to the Commission, the latter abovementioned objective is not merely ancillary to the former and there is an indissociable link between them and the measures they entail, it is concluded there that the directive is to be based on Article 114 as well as on Article 103 TFEU.[192]

184 Van Gerven (2003a), p. 410; Eilmansberger (2007), pp. 440-441; Komninos (2008), pp. 180-181; Milutinovic (2010), pp. 315-319. Specifically in relation to collective redress for competition law infringements, see also Leskinen (2011), p. 113; European Parliament, Study on collective redress in antitrust, June 2012, p. 60; Buccirossi & Carpagnano (2013), p. 9.

185 See para. 220 above.

186 On Art. 114 TFEU and legal basis issues generally, see subsection 10.1.1 below.

187 E.g. CoJ case C-155/07, *Parliament v. Council*, para. 35-37 and 76-85; CoJ case C-130/10, *Parliament v. Council*, para. 43-47.

188 See subsection 6.2.3 above.

189 See para. 217 above.

190 See recitals 7-9 Competition Damages Directive.

191 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 8.

192 *Ibid*., pp. 9-10.

This explanation for the choice of legal basis of the Competition Damages Directive seems reasonable enough in itself.[193] Yet there may also be another element that helps explaining this choice. For the legal basis chosen for an act of secondary EU law also determines which legislative procedure is to be followed when adopting that act and thus in particular the degree of involvement of the European Parliament in that procedure. In the present context this institution had long insisted on it being allowed to decide on a par with its co-legislator, the Council, under the ordinary legislative procedure.[194] Article 103 TFEU prescribes that the Council acts alone and gives the European Parliament merely a consultative role, whereas Article 114 TFEU in contrast provides for the use of the ordinary legislative procedure. Adding this article as a second legal basis thus provided a justification for using this latter procedure when adopting the Competition Damages Directive. The aforementioned somewhat surprising extension of the initiative's scope so as to cover also certain rules of national competition law, which in turn necessitated the use of Article 114 and the ordinary legislative procedure it prescribes, should therefore perhaps (also) be seen in this light.[195] In other words, one could be forgiven for thinking that this extension served as much to remedy obstacles of an EU inter-institutional nature as it was meant to address any problems of substance. While none of this necessarily leads to the conclusion that this choice of legal basis is incompatible with the EU Treaties,[196] it does mean that the directive's legality in this respect relies on the correctness of the assumptions that underpin the view that this is a case where: (i) exceptionally, a dual legal basis can be used (because the two cited objectives and the measures corresponding thereto are indeed inseparably linked, without one being ancillary to the other); and (ii) the two distinct legislative procedures foreseen under the two abovementioned articles are moreover not incompatible. The fact that legal basis issues were a matter of debate in the course of the legislative process, in particular for the Council, suggests that there is scope for debate on these points, even if the Council eventually concluded that the dual legal basis proposed by the Commission could be retained.[197]

193 Cf. e.g. Cauffmann (2013), p. 634.

194 See para. 219 above.

195 In a similar sense, see Milutinovic (2014), p. 375.

196 The EU legislature has after all generally considerable scope in determining the aim and content of an act of secondary EU law, in light of which whereas the choice of legal basis of that act is to be assessed. See further para. 381 below.

197 See Council, doc. 16176/13, which concerns an opinion of the Council's legal service on the choice of legal basis of the draft directive (which was, at the time of writing, only partially accessible to the public). On this opinion, see also Crofts (2013), p. 1. See e.g. also Council, doc. 15979/13, p. 2; Council, doc. 15983/13, p. 2. See also European Parliament, Study on collective redress in antitrust, June 2012, p. 60, where doubts are expressed with regard to the compatibility of the two legislative procedures at hand.

### 6.3.2. Actions for damages, qualification and quantification

229. Much of the discussion over the past decade on what was to become the Competition Damages Directive took place under the broad banner of the 'private enforcement' of EU competition law generally. However this directive concentrates on only one main (substantive) private enforcement remedy, namely *actions for damages*.[198] Its recitals confirm that this remedy is an "*example*" and "*only one element of an effective system of private enforcement*".[199] This focus on actions for damages was not always apparent when the possible facilitation of private enforcement of EU competition law was discussed at an earlier stage.[200] Only more recently actions for damage have become the "*legal and political fashion*" where the private enforcement of EU competition law is concerned.[201] Indeed, all of the official documents discussed in the foregoing – ranging from the Commission's 2005 green paper up until its 2013 proposal – acknowledged that other remedies could play a role too in this respect, but nonetheless concentrated solely on this particular remedy.[202]

230. The Competition Damages Directive expressly lays down and further details the right to *full compensation*. Accordingly it is stated that the Member States must ensure that "*any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm*".[203] Here it is also explained what 'full compensation' entails, namely placing the person concerned in the position that that person would have been in had the infringement not been committed. According to the directive, covered are "*therefore*" three heads of damages, i.e. compensation for actual loss, loss of profit and interest.[204] The recitals explain that this is meant as a reaffirmation of the relevant case law of the Court of Justice,[205]

198 Cf. Art. 1 Competition Damages Directive.
199 Recitals 3 and 5 Competition Damages Directive respectively.
200 See subsection 6.2.1 above.
201 Milutinovic (2010), p. 143.
202 See Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 3; Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 9 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 7 (n. 5); Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 12. In Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 2, it is simply said that damages claims are "*an important area of private enforcement of EU competition law*". On the possibilities of injunctive relief in a competition law context, see further para. 291 below.
203 Art. 2(1) Competition Damages Directive.
204 Art. 2(2) Competition Damages Directive.
205 Recital 12 Competition Damages Directive.

presumably in particular the Court's ruling in *Manfredi*.[206] The Commission had held earlier that such a codification increases legal certainty and awareness.[207] Specifically as regards the obligation to compensate interest, the recitals add that this is without prejudice to the qualification of such interest as compensatory or default interest and to whether the effluxion of time is taken into account as a separate category or rather as part of the actual loss or loss of profit.[208] The clarification proposed by the Commission's that it concerns "*interest from the time the harm occurred until the compensation in respect of that harm has actually been paid*"[209] was not retained by the EU legislature however. Although the directive does not mention this expressly, the Commission further appears to consider that non-material damage is also compensable.[210]

The directive further stipulates that full compensation under this directive shall not lead to *overcompensation*, whether by means of punitive, multiple or other types of damages.[211] This too is a deviation from the proposal, where no such provision was foreseen. The Commission had agreed that certain safeguards ought to be provided for, but it had also held that no risk of 'overcompensation' had occurred in the Member States.[212] This provision is in line with the position expressed by many respondents to the earlier consultations and by the European Parliament.[213] It appears that accordingly this provision was inserted particularly at the insistence of this latter institution.[214] The directive also codifies the principles of equivalence and effectiveness in relation to the damages actions covered by the directive.[215]

231. The Competition Damages Directive states that *quantifying the harm* resulting from the infringements that it covers is "*a very fact-intensive process and may require the application of complex economic models*", which is said to be "*often very costly*" and the cause of "*difficulties for claimants in terms of obtain-*

206 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 95-97, discussed in para. 214 above. Cf. Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 4 and 13; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 56-59.

207 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 7.

208 Recital 12 Competition Damages Directive.

209 *Ibid*., p. 31 (Art. 2(2)).

210 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 13.

211 Art. 2(2) Competition Damages Directive.

212 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18. See also its p. 26, where it is noted that a trade-off exists between a higher chance of full compensation and a risk of overcompensation.

213 See para. 219 above.

214 European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 17 (Art. 2(2a)).

215 Art. 3 Competition Damages Directive. On these two principles generally, see further section 2.2 above.

*ing the necessary data to substantiate their claims*".[216] This is therefore considered to constitute a "*substantial barrier preventing effective claims for compensation*".[217] This view is widely shared.[218] Against this background, the Competition Damages Directive sets out the following four specific measures in an attempt to address this situation.

In the first place, the Member States must ensure that the *burden and the standard of proof* required for the quantification of harm is not such as to render the exercise of the right to damages practically impossible or excessively difficult.[219] This is in effect a restatement of the EU law principle of effectiveness that would otherwise have applied anyway in the absence of more specific EU rules.[220] The second measure is that the national court must be empowered to *estimate* the amount of harm.[221] This is meant to take account of the fact that the quantification of the damage is, by definition, a hypothetical exercise which cannot be made with complete accuracy.[222] Most (although not all) national jurisdictions already provided for the possibility of *ex aequo et bono* determination or similar manners of leaving the national court seised some leeway in determining the amount of damages.[223] Different from the Commission's proposal,[224] this obligation under the directive is qualified in two ways however, as it is to take place "*in accordance with national procedures*" and it must be practically impossible or excessively difficult to precisely quantify the harm suffered.

In the third place, the directive provides for a *rebuttable presumption* that cartel infringements cause harm.[225] This rests on findings that in practice the great majority of these infringements do indeed lead to harm being caused.[226] From the side of the European Parliament this provision had initially been criticised for being "*a generalisation of reality which is not entirely*

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216 Recital 41 Competition Damages Directive.

217 Recital 41 Competition Damages Directive. On issues of quantification, see also Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 7; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 60-61.

218 See e.g. Komninos (2008), p. 210; Whish & Bailey (2012), p. 311; Calisti & Haasbeek (2013), p. 5; Danov & Becker (2013), p. 79; Butz (2014), p. 331. See however also Wisking, Dietzel & Herron (2014), p. 190, who note that experience in the UK shows that damages can be assessed without significant issues.

219 Art. 17(1) Competition Damages Directive.

220 On this principle, see subsection 2.2.2 above. See also recital 42 Competition Damages Directive.

221 Art. 17(1) Competition Damages Directive.

222 Recital 42 Competition Damages Directive.

223 Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 40. See also Study Ashurst (2004), pp. 70-71; Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 451-452.

224 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 39 (Art. 16(2)).

225 Art. 17(2) Competition Damages Directive.

226 See para. 206 above.

*accurate*",[227] but it was retained nonetheless. Its reference to cartels implies that this rule does not apply to other sorts of infringements to which the Competition Damages Directive applies.[228] This is in fact not a rule on quantification properly speaking, as it merely provides *that* harm was caused, rather than that it relates to the question *how much* harm was caused.[229] Crucially, neither does it indicate *to whom* the harm was caused. That seems to imply that each individual applicant must still demonstrate that it suffered harm.[230] The fourth and last measure on quantification provided for in the directive is new as compared to the Commission's proposal, although it had been suggested earlier in the legal literature.[231] It concerns the possibility for *national competition authorities to assist* national courts regarding the determination of the quantum of damages.[232] While the directive obliges the Member States to create this possibility, it also specifies that this is to occur upon request by the court and only where the authority deems this appropriate. To some extent similar arrangements already exist in some Member States, such as Spain and Finland.[233]

232. The four abovementioned measures on quantifying the harm should moreover be understood in their *broader context*. In as far as the directive itself is concerned, especially the directive's measures on the disclosure of evidence, discussed below, can be of importance in relation to the quantification of the harm caused by a competition law infringement.[234] For this can allow an applicant to obtain the information necessary for it to be able to adequately substantiate its claim where issues of quantification are concerned. Furthermore in 2013, together with its proposal for the Competition Damages Directive, the Commission issued non-legally binding guidance.[235] This includes a practical guide that aims to assist national courts and parties involved in actions for damages for competition law infringements by outlining economic and practical insights that may be of use when quan-

227 European Parliament, Draft report on the proposal for the Competition Damages Directive, 2013/0185(COD), p. 47. See also Batchelor, Pike & Ghiorghies (2013), p. 164.

228 The term 'cartel' is defined in Art. 4(14) Competition Damages Directive. Its recital 43 explains that this limitation to cartels is considered justified in light of the secretive nature of cartels, which makes it more difficult for applicants to obtain the necessary evidence.

229 Cf. recital 43 Competition Damages Directive. Cf. Calisti & Haasbeek (2013), p. 5.

230 Cf. Council, doc. 8088/14, p. 12.

231 See e.g. Rüggeberg & Schinkel (2006), pp. 407-418. See also Study CEPS, Erasmus University Rotterdam & LUISS, pp. 200-201.

232 Art. 17(3) Competition Damages Directive.

233 Komninos (2014), p. 155 (describing this as a "*well-intended but flawed idea*").

234 See subsection 6.3.3 below.

235 Cf. recital 42 Competition Damages Directive, where it is said that the Commission should provide general guidance at EU level in order to ensure coherence and predictability.

tifying the harm caused by an infringement.[236] The guide sets out various methods and techniques that can be used to establish as precisely as possible the 'non-infringement' or the 'counterfactual' scenario, i.e. what would probably have happened had the infringement not occurred, for instance in terms of the development of prices. On the basis of such a counterfactual scenario a comparison can be made with what actually happened, whereby the difference can thus (possibly) be taken as a yardstick to determine the extent of the harm.

### *6.3.3. Disclosure measures*

233. One of the key elements of the Competition Damages Directive is a set of measures relating to the *disclosure, preservation and use of evidence* in the context of the actions for damages covered. Before the adoption of the directive, the great majority of the Member States already provided for the possibility of some form of disclosure of evidence in private enforcement proceedings.[237] But these rules can be interpreted in a restrictive manner, thus making disclosure difficult in practice, as is the case for instance in Italy, the Netherlands and Spain.[238] Moreover in many Member States, such as Germany, France and the Czech Republic, only specifically designated pieces of evidence (as opposed to entire categories of evidence) are disclosable.[239] Rules on the involvement of third parties and the disclosure of evidence included in the file of competition authorities also differ across the EU. According to the Commission, this thus constituted "*the primary example of divergence*", while holding that many of these national rules are inadequate to guarantee effective access to evidence.[240] The directive's disclosure regime could only be agreed after "*intense negotiations*" between the two EU co-legislators.[241] While the main features of the Commission's proposal remain intact, it was considerably altered during the legislative process.[242]

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236 Commission, Practical guide on quantifying harm in actions for damages based on breaches of Article 101 and 102 TFEU, SWD(2013) 205. See also Commission, Communication on quantifying harm in actions for damages based on breaches of Articles 101 and 102 TFEU, OJ 2013, C 167/19.

237 *Ibid*., p. 17. See also Study Ashurst (2004), pp. 61-65; Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 345-357.

238 Barone & Amore (2010), p. 355; Callol (2010), p. 388; Lunsingh Scheurleer *et al*. (2010), p. 372; Siragusa (2014), p. 254.

239 See e.g. Jalabert-Doury (2010), pp. 318 and 338; Uřičař (2011), p. 144; Stauber (2014), p. 32.

240 Commission, Practical guide on quantifying harm in actions for damages based on breaches of Article 101 and 102 TFEU, SWD(2013) 205, p. 19.

241 Council, doc. 8088/14, p. 5.

242 Commission, Proposal for Competition Damages Directive, COM(2013) 404, pp. 33-35 (Art. 5-8).

In essence this regime reflects an effort to reconcile two conflicting considerations, leading to what has been called a "*Faustian dilemma*".[243] On the one hand the litigation at issue here is said to typically require a complex factual and economic analysis, notably as regards establishing the infringement, quantifying the damage caused and establishing causality, and to be characterised by an 'information asymmetry'.[244] This refers to much of the relevant evidence often being in the possession of the defendant and third parties, without it being sufficiently known or accessible to the private party-applicant. The crucial importance of adequate access to evidence is widely agreed.[245] All this thus points to a need to provide for rules on the disclosure of evidence that are, seen from the point of view of the (potential) applicant, generally 'permissive'. On the other hand the disclosure of some of the evidence that is included in the file of a competition authority (i.e. the Commission or a national authority[246]) is considered to be potentially harmful for the public enforcement of the rules at issue.[247] That applies in particular for leniency statements and settlement submissions, in which undertakings confess or agree not to contest their infringements with a view to obtaining immunity from fines or ending the public enforcement proceedings respectively.[248] This thus corresponds to the directive's second objective, i.e. coordinating public and private enforcement. As the Court of Justice made clear in its aforementioned *Pfleiderer* case law, in the absence of specific rules of EU law it cannot simply be presumed that this type of evidence is barred from being disclosed.[249] This thus corresponds to what could be called the 'restrictive' element of the directive's disclosure regime.

234. The main rule for which the Competition Damages Directive provides against this background is that, upon request of the applicant, the competent national court must be able to order the defendant or a third party to *disclose* relevant evidence that lies in their control.[250] To this aim the private party requesting the disclosure must present "*a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of*

243 Völcker, (2012), p. 695. On this tension, see further e.g. Canenbley & Steinvorth (2011), p. 315; Cauffman (2011a), p. 181; Rizzuto (2012), p. 1; Beumer & Karpetas (2012), p. 123.

244 See in particular recitals 13-14 Competition Damages Directive. See e.g. also Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 28-29; Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 13-14.

245 See e.g. Bruns (2011), p. 130; Batchelor, Pike & Ghiorghies (2013), p. 161; Danov & Dnes (2013), p. 43; Kammin & Becker (2013), p. 67; Howard (2014), p. 53.

246 Cf. Art. 2(7) Competition Damages Directive.

247 See in particular recitals 18 and 21 Competition Damages Directive.

248 On these leniency and settlement programmes, see further subsection 6.4.2 below.

249 CoJ case C-360/09, *Pfleiderer*. See further subsection 6.2.4 above. See also CoJ case C-557/12, *Kone*, para. 36.

250 Art. 5(1) Competition Damages Directive.

*its claim for damages*".[251] For reasons of equality of arms,[252] the defendant can also make such a request, presumably subject to the same conditions.

The directive aims to give a central function to the national courts that are to decide on these requests for disclosure.[253] They are expected to exercise strict control.[254] That is consistent with the legal tradition in the great majority of Member States.[255] The national courts must be able to order the disclosure of specified pieces of evidence or of relevant categories of evidence circumscribed as precisely and as narrowly as possible, while ensuring however that any disclosure is limited to what is proportionate in light of the legitimate interests of all parties concerned.[256] In that connection the courts must consider in particular three explicitly mentioned factors, namely: (i) the extent to which the claim or defence is supported by available facts and evidence justifying the request; (ii) the scope and cost of the disclosure, especially for any third parties concerned, also to avoid non-specific searches of information which is unlikely to be of relevance (i.e. so-called 'fishing expeditions'[257]); and (iii) whether the evidence in question contains confidential information, especially concerning any third parties, and the arrangements for the protection of such information.

As is already implicit in this last factor, confidential information can in principle be disclosed under the directive, where the court considers this relevant. However Member States must ensure that effective measures are available to protect this information.[258] Full effect must further be given to applicable legal professional privileges under EU or national law.[259]

251 Art. 5(1) Competition Damages Directive.
252 Cf. recital 14 Competition Damages Directive.
253 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 14.
254 Recital 15 Competition Damages Directive.
255 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 14. See also Bruns (2011), p. 129.
256 Art. 5(2) and (3) Competition Damages Directive. See also its recital 15. Art. 5(4) of this directive stipulates that the interest of an undertaking to avoid actions for damages does not constitute an interest that warrants protection.
257 Cf. Council, doc. 8088/14, p. 5; European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 21 (Art. 5(3)(b)). See also recital 21 Competition Damages Directive.
258 Art. 5(5) Competition Damages Directive. See also its recital 17.
259 Art. 5(6) Competition Damages Directive.

235. Turning to the more 'restrictive' part of the rules at issue, additional requirements apply where the possible disclosure concerns *evidence in the file of a competition authority*.[260] Three points stand out in this regard. First, several *additional factors* are spelled out that the national courts must take into account in the context of the abovementioned proportionality assessment. In these cases the courts must also consider: (i) the specificity of the request for disclosure as regards the nature, object or content of the document submitted to the competition authority; (ii) whether the party requesting disclosure is doing so in relation to an actions for damages; and (iii) the need to safeguard the effectiveness of the public enforcement of the rules of competition law concerned.[261]

Second, and most importantly, the directive distinguishes several categories of evidence. For certain categories there is a *temporal ban* on disclosure, namely until the moment the competition authority concerned has closed its proceedings. This 'grey list' covers information that the undertaking in question specifically prepared for those public enforcement proceedings, information drawn up and sent by these authorities as well as any withdrawn settlement submissions.[262] This is meant to avoid undue interference with ongoing investigations by public enforcement authorities.[263] Leniency statements and settlement submissions are on a 'black list', meaning that these pieces of evidence cannot be disclosed at any time. This *absolute protection* reflects the thought that leniency and settlement procedures are important public enforcement tools and that undertakings could be deterred from participating if these self-incriminating documents were disclosed, thus exposing them to civil liability.[264] The disclosure of evidence in a competition authority's file that is not covered by either of these two lists can in principle be ordered at any time.[265]

Third and finally, there are limits as regards the *use* of evidence that is obtained *solely through access to the file* of a competition authority. Such access is given to undertakings so as to allow them to exercise their rights of defence in public enforcement proceedings.[266] But this information could

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260 Pursuant to Art. 6(1) Competition Damages Directive the above rules are without prejudice to the rules and practices on public access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145/43 ('Transparency Regulation'). On the possible disclosure of documents in the Commission's file under that regulation, see CoJ case C-365/12 P, *EnBW Energie*. On this latter line of case law, see further Kellerbauer (2014), p. 56. According to Bentley & Henry (2014), p. 277, the directive leaves this case law intact and reaffirms that the route to disclosure via that regulation if effectively barred.

261 Art. 6(4) Competition Damages Directive.

262 Art. 6(5) and (6) Competition Damages Directive respectively. Pursuant to its Art. 6(8) partial disclosure of evidence falling within the 'grey list' is to be ordered where possible.

263 Recital 23 Competition Damages Directive.

264 Recital 24 Competition Damages Directive.

265 Art. 6(9) Competition Damages Directive.

266 Cf. Art. 27(2) Competition Regulation 1/2003.

also be used in private enforcement proceedings. 'Black listed' evidence obtained in this manner is therefore to be deemed inadmissible in legal proceedings covered by the directive.[267] The same applies for 'grey listed' evidence, as long as the public enforcement proceedings in question have not been closed.[268] For all other evidence obtained through this access to file there is also a restriction as to its use, namely that it can only be used in an action for damages by the party that the party in question or its legal successor, including a party that acquired this party's claim.[269] This latter rule is meant to prevent the information in question from becoming the object of trade.[270]

236. For the time being it remains an open question how – if and when asked – the Court of Justice would assess the above regime in light of its earlier rulings in *Pfleiderer* and especially *Donau Chemie*.[271] It will be recalled that in those ruling the Court essentially refused, on the basis of the law as it stood prior to the directive, to prioritise the interest associated with public enforcement – and in particular the protection of leniency programmes – over the interests of private parties having suffered harm. It instead stressed the importance of both interests and insisted on a case-by-case weighting by the judiciary. On the one hand a legislative rule providing for absolute non-disclosure precludes by definition such a weighting exercise. This could be understood to mean that therefore (also) the EU legislature cannot provide for such a rule. Concerns of this kind arose during the legislative process leading to the adoption of the Competition Damages Directive, especially on

267 Art. 7(1) Competition Damages Directive. Instead of being deemed inadmissible, the evidence in question may also be otherwise protected under the applicable national rules so as to ensure the full effect of the rule on the non-disclosure of this type of evidence.

268 Art. 7(2) Competition Damages Directive.

269 Art. 7(3) Competition Damages Directive.

270 Recital 23 Competetion Damages Directive.

271 CoJ case C-360/09, *Pfleiderer*; CoJ case C-536/11, *Donau Chemie*. See further para. 221-222 above. For the sake of brevity it is presumed here that, despite the legal and factual differences, the logic underpinning this case law is also applicable to the situations covered by the Competition Damages Directive, including where evidence in the Commission's file is concerned. Cf. Cauffman (2011b), pp. 608 and 611. It can further be noted that the EU legislature is not bound by the principle of effectiveness, discussed in subsection 2.2.2 above, which was at issue in the abovementioned rulings. Any possible assessment by the CoJ would therefore probably rather concern compliance with the principle of proportionality and the principle of effective judicial protection guaranteed under Art. 47 Charter. On the relationship between the principle of effectiveness and the principle of effective judicial protection, see also para. 44 above. On the CoJ's review of compliance by the EU legislature with the principle of proportionality and the fundamental rights set out in the Charter, see further subsection 10.1.2 below. Lastly, as this case law did not relate to settlement programmes, it remains an open question how the CoJ would rule on the absolute and temproral protection of the documents relating thereto.

the side of the European Parliament,[272] and in the legal literature.[273] Considering the approach eventually chosen some scope for discussion on this point therefore remains also after the adoption of this directive.[274]

Yet it must be acknowledged on the other hand that the abovementioned 'black list' is limited to the documents that touch upon the very essence of this public enforcement tool, namely the leniency applications themselves. The temporal non-disclosure of the documents on the more extensive 'grey list' is moreover 'compensated' for by the extension of the applicable limitation periods.[275] Arguably the above regime does not leave a private party-applicant worse off as compared to a situation where no such public enforcement mechanisms exist at all, as is the case elsewhere in EU law and in civil litigation generally. That party is thus 'merely' denied a weapon that it would not have had anyway in an 'ordinary' tort case, whereas there seems no reason to believe that a private enforcement action in a competition case can generally only succeed where the applicant has access to the documents concerned.[276] That applies even more so in light of the other measures provided for in this directive, which in many cases are favourable to the applicants.[277]

237. The Competition Damages Directive further provides for several *complementary rules* relating to the above measures on the disclosure and non-disclosure of evidence. One of these is that the party from whom disclosure is sought must be provided with an opportunity to be heard before the order is granted.[278] Another one is that an applicant must be able to request the national court to verify whether that a document is indeed a leniency state-

272 See European Parliament, Draft report on the proposal for the Competition Damages Directive, 2013/0185(COD), p. 26; Council, doc. 6493/14, p. 3. See also the suggestion to provide for the non-disclosure of these documents "*as a general rule*" (i.e. allowing exceptions in certain cases), set out in European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 22 (Art. 6(2a)).

273 E.g. Cauffmann (2013), p. 632; Gamble (2013), pp. 619-620; Guttuso (2014), p. 20; Kersting (2014), p. 2; Murphy (2014), p. 224; Nordlander & Abenhaïm (2014), p. 5; Stauber (2014), p. 26; Weidt (2014), pp. 440 and 444; Wisking, Dietzel & Herron (2014), p. 188. On this question, see also Opinion AG Jääskinen case C-536/11, *Donau Chemie*, para. 52-69.

274 As noted by Kumar Singh (2014), p. 118, the approach chosen by the EU lgislature is in effect closer to the one suggested by Advocate General Mazák in *Pfleiderer* than to the Court's ruling in that case. See Opinion AG Mazák case C-360/09, *Pfleiderer*, referred to in para. 221 above.

275 Art. 10(5) Competition Damages Directive. See further para. 244 below.

276 Cf. CoJ case C-536/11, *Donau Chemie*, para. 33; CoJ case C-365/12 P, *EnBW Energie*, para. 132.

277 See e.g. the relatively 'generous' disclosure regime set out in Art. 5 Competition Damages Directive, discussed in para. 234 above, but e.g. also other rules of evidence set out in its Art. 9, 14(2) and 17(1) and (2), discussed in para. 243 and 240 below and para. 231 above respectively. As is discussed in para. 351 below, there is evidently a relationship between the rules on the *access* to evidence (or the lack thereof) and the rules on the *burden and the standard of proof*.

278 Art. 5(7) Competition Damages Directive.

ment or a settlement submission, as defined by the directive.[279] In this connection the court can ask (only) the competent competition authority for assistance, while the author of the document in question may also be heard. Furthermore a competition authority may, on its own initiative, state its views on the proportionality of a disclosure request concerning evidence included in its file.[280] Under the directive that authority is to be addressed itself by a disclosure order only as a last resort, i.e. only where the parties to the proceedings or a third party cannot reasonably do so.[281] While there seems something to say for instead turning to the competition authorities first, given the availability of these documents in their files and the associated reduced costs, efforts and intrusion on the side of the private parties concerned,[282] this was however considered as too much of a burden on these authorities.[283]

Penalties are to be provided for in case of non-compliance with a disclosure order, the destruction of evidence, non-compliance with an obligation to protect confidential information and breaches of the abovementioned limits on the use of evidence.[284] The directive specifies that these penalties must be effective, proportionate and dissuasive and, more specifically, that they must include the possibility for the court to draw adverse inferences (e.g. presuming something to be proven, or dismissal of the claim or defence), which is seen as a particularly effective penalty in this regard, as well as the possibility to order the payment of costs.[285] Lastly, the directive stipulates that the Member States may provide for rules that lead to wider disclosure, without prejudice however to the aforementioned rules on the disclosure of confidential information, the right to be heard and the disclosure of evidence included in the file of a competition authority.[286]

### *6.3.4. Joint and several liability and passing-on*

238. Under the Competition Damages Directive the undertakings that committed an infringement through joint behaviour, such as a cartel, are jointly and severally liable for the harm caused. This means that each of those undertakings is bound to compensate the harm in full and that a private party having suffered harm can require full compensation from any of

279 Art. 6(7) Competition Damages Directive. For these two definitions, see its Art. 4(16) and (18).
280 Art. 6(11) Competition Damages Directive. See also its recital 27.
281 Art. 6(10) Competition Damages Directive. See also its recital 26.
282 Cf. Rosch (2014), p. 192; Siragusa (2014), p. 254.
283 Council, doc. 6493/14, p. 4. Cf. European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 20 (Art. 5(1a)).
284 Art. 8 Competition Damages Directive.
285 Cf. recital 30 Competition Damages Directive. It would seem however that penalties of this kind are of little relevance where third parties fail to comply with disclosure orders addressed to them. See also Bruns (2011), pp. 136-137.
286 Art. 5(8) Competition Damages Directive.

them until it is fully compensated.[287] Where relevant it is then for the undertaking concerned to recover a contribution from its co-infringers. The amount of that contribution is to be determined in light of the undertakings' relative responsibility for the harm in question, in accordance with the applicable rules of national law.[288] In certain cases specific rules apply where the infringing undertaking is a small or medium-sized enterprise.[289]

Whereas these rules clearly seek to further the objective of ensuring full compensation, the objective of coordinating public and private enforcement also plays a role here. Undertakings that have been granted immunity from fines under a leniency programme are protected from "*undue exposure to damages claims*".[290] This was deemed necessary because the competition authority's decision finding an infringement is likely to become final at an earlier stage with respect to these undertakings than with respect to the co-infringing undertakings that were not granted leniency (and which may therefore contest that decision). This could mean that the immunity recipient becomes the most likely target in a ('follow-on') action for damages, where he would risk being required to compensate the applicant in full.[291] For that reason the directive relieves immunity recipients in principle from joint and several liability for the full damage caused. That undertaking remains jointly and severally liable only *vis-à-vis* its direct or indirect purchasers or providers, whereas other injured parties can only claim damages from this undertaking where they cannot obtain full compensation from the other infringing undertakings.[292] These co-infringers can similarly only recover a contribution from that undertaking that does not exceed the amount of harm caused to the latter's direct or indirect purchasers or providers.[293]

239. A separate issue is the so-called '*passing-on defence*', in respect of which considerable divergences were observed to exist at national level before the directive's adoption.[294] The Competition Damages Directive harmonises these national rules by expressly permitting this defence. This means that a

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287 Art. 11(1) Competition Damages Directive.

288 Art. 11(4) Competition Damages Directive. See also its recital 33.

289 Art. 11(3) Competition Damages Directive. See also its recital 33.

290 Recital 28 Competition Damages Directive.

291 Cf. Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 16-17.

292 Art. 11(3) Competition Damages Directive. See also its recital 33.

293 Art. 11(4) Competition Damages Directive. See also its Art. 11(5). The Council initially considered that this contribution regime, as proposed by the Commission, went further than necessary to neutralise the negative effects of actions for damages on leniency programmes, described above. But at the insistence of the European Parliament it later accepted the Commission proposal on this point, as this was considered to increase the efficiency of enforcement. See Council doc. 15983/13, p. 3; Council, doc. 6493/14, p. 5.

294 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 16-17. On issues related to passing-on, see further Bulst (2011), p. 67.

defendant can argue that the private party claiming damages passed-on, in whole or in part, the alleged harm resulting from the infringement to its own customers in the form of higher prices ('overcharge').[295] After all, if it emerges that such passing-on did indeed occur, it was this 'indirect purchaser' that actually suffered the harm and not the initial applicant.[296] Compensating the latter in such a case would thus result in overcompensation, which is expressly precluded under the directive.[297] It is for the defendant that wishes to rely on the passing-on defence to prove not only the existence, but also the extent of the pass-on.[298] The national courts concerned must be empowered to estimate which share of the overcharge was passed on, in accordance with the applicable rules of national law.[299] The directive requires the Commission to issue guidelines on how to make such estimates.[300]

240. The availability of the passing-on defence logically leads to the question whether the said *indirect purchaser* can claim damages for the harm suffered lower down the supply chain as a consequence of this passing-on. The directive expressly answers this question in the affirmative.[301] In this case the burden of proving the existence and the extent of the pass-on rests in principle with this applicant however.[302] Apart from the abovementioned possibility for the national court to *estimate* the share of the overcharge that was passed-on, which also applies here, the directive seeks to alleviate this burden on the indirect purchaser also in another manner. For it is provided that this private party is deemed to have proven that the passing-on to it occurred, where it can make a *prima facie* case to this effect.[303] This means that the indirect purchaser must show that the defendant committed an infringement resulting in an overcharge and that it purchased the goods or services that were the subject of this infringement. It is then for the defendant to rebut this presumption.[304]

When assessing whether the burden of proof relating to actions by indirect purchasers is satisfied, national courts must, by means available under Union and national law, take due account of actions for damages and judg-

295 Art. 13 Competition Damages Directive. See also its recital 35.
296 Note that the higher prices resulting from the passing-on of an overcharge can result in reduced sales and thus a loss of profit for the applicant. The rights to claim compensation for such loss of profit remains unaffected by the availability of the passing-on defence. See Article 12(3) and recital 36 Competition Damages Directive.
297 Art. 12(1) and (2) Competition Damages Directive.
298 Art. 13 Competition Damages Directive.
299 Art. 12(5) Competition Damages Directive. This presumes that the overcharge is passed-on in full. If the passing-on is only partial, the applicant remains capable of claiming the remaining part as damage from the infringing undertaking.
300 Art. 16 Competition Damages Directive.
301 Art. 12(1) Competition Damages Directive.
302 Art. 14(1) Competition Damages Directive.
303 Cf. recital 37 Competition Damages Directive.
304 Art. 14(2) Competition Damages Directive.

ments relating to the same infringement brought by applicants from other levels in the supply chain, as well as relevant information in the public domain resulting from public enforcement cases.[305] The same applies as regards the burden of proof relating to the aforementioned passing-on defence. The underlying aim here is to ensure consistency and to avoid both undue multiple liability and an undue absence of liability for damage caused by the infringements at issue, without disregarding the rights of defence and right to effective judicial protection of the parties concerned.[306]

### *6.3.5. Procedural provisions and related issues*

241. The first of the five remaining issues to be discussed here is that of *legal standing*. The Competition Damages Directive contains no specific provision that outlines which private parties are entitled to bring legal proceedings under this directive. But that does not mean that this subject-matter is not regulated with a degree of detail. In fact, several provisions contain relevant indications. Most important is the provision that the directive seeks to ensure that "*[a]nyone who has suffered harm caused by an infringement of competition law*" can exercise the right to compensation.[307] This is a reaffirmation of earlier case law.[308] This wording makes it clear that a wide category of private parties is to have legal standing under the directive. That is confirmed elsewhere in the directive, where reference is made in this connection to "*any natural or legal person*"[309] and where it is moreover clarified that this applies "*irrespective of whether they are direct or indirect purchasers*".[310] The recitals further explain that this term 'anyone' includes consumers, undertakings and public authorities alike, irrespective of the existence of a direct contractual relationship with the infringing undertaking and regardless of whether or not a competition authority has previously found an infringement to exist.[311]

242. The second issue is the *forum* before which the actions for damages at issue are to be brought. In this regard the directive simply refers to "*national courts*".[312] This term has been defined as "*any court or tribunal of a Member*

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305 Art. 15(1) Competition Damages Directive.

306 See recital 40 Competition Damages Directive. See also Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 17-18.

307 Art. 1(1) Competition Damages Directive.

308 See recital 12 Competition Damages Directive. See in particular CoJ case C-453/99, *Courage*, para. 24, discussed in para. 231 above.

309 Art. 2(1) Competition Damages Directive.

310 Art. 12(1) Competition Damages Directive.

311 Recital 12 Competition Damages Directive. See also its recital 3. For an example of a private enforcement action brought by a public authority (i.e. the Commission), see CoJ case C-199/11, *Otis*.

312 See e.g. Art. 1(2) Competition Damages Directive.

*State within the meaning of Article 267 [TFEU]*".[313] This latter article sets out the preliminary reference procedure. In this manner it is ensured that the national court seised by an action for damages under the directive can refer preliminary questions to the Court of Justice. This reference to Article 267 TFEU moreover means that these national courts must meet the conditions set in the Court's case law on this Treaty article.[314] Thus, while the competent body need not necessarily be judicial in character, account is taken, among other things, of whether it has a basis in law, it is independent and the proceedings are *inter partes*. Although this is not required under the directive, the presumption is that it is normally for the national *civil* courts to rule on the damages claims in question.[315] As the Commission noted in its proposal, "*[a]warding compensation is […] within the domain of national courts and of civil law and procedure*".[316] While this statement is undoubtedly correct, it appears that in several Member States a degree of specialisation is ensured with respect to competition-related private enforcement actions. That is the case for instance in England and Wales (Competition Appeal Tribunal) and France (specialised chambers in a limited number of courts).[317]

243. Furthermore there is the issue of the *effect of decisions by national competition authorities* (and by the national courts reviewing those decisions) finding a competition law infringement in legal proceedings brought under the directive. Pursuant to the Competition Regulation national courts cannot take decisions in those proceedings that run counter to the decisions taken by the *Commission*.[318] Whether these *national* authorities can and should be treated on a par with the Commission in this respect remained contested however. The relevant national rules pre-dating the directive vary considerably. While binding effect for decision by the 'home' competition authority is not uncommon, only very few Member States (notably Germany) extend this rule to decisions by 'foreign' authorities.[319] Providing for such a rule at EU level would clearly be helpful to applicants in private enforcement cases. It could also help avoid diverging rulings across the EU. But it would also mean that a national court would no longer be free to make its own judg-

313 Art. 4(9) Competition Damages Directive.

314 See also para. 22 above.

315 See e.g. recital 6 Competition Damages Directive, where reference is made to "*private enforcement actions under civil law*". See e.g. also the reference to Evidence Regulation 1206/2001, laid down in Art. 5(1) Competition Damages Directive. That regulation only applies to the taking of evidence on civil and commercial matters (see its Art. 1(1)).

316 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 2.

317 Jalabert-Doury (2010), p. 320; Smith, Maton & Cambell (2010), pp. 301-302. See also Study Ashurst (2004), pp. 31-36.

318 Art. 16(1) Competition Regulation 1/2003. See para. 203 above.

319 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 16 and 57. See also Buccirossi & Carpagnano (2013), p. 5; Esteva Mosso (2013), p. 51. Here it is reported that, apart from Germany, Sweden also provides for such a rule under its national law, whereas Austria is in the process of implementing one.

ment on the important point of whether or not an infringement occurred. Instead that court would be bound by a finding to this effect by a public authority of another Member State, notwithstanding the fact that the standards and procedural safeguards applicable in national public enforcement proceedings vary between the Member States. Given these complexities, this was "*one of the more controversial issues*" at the stage of the consultations preceding the directive.[320] And also in the legal literature this issue proved to be controversial.[321]

This controversy continued during the legislative process. The Commission had proposed that a national court seised in an action for damages under the directive would be categorically barred from taking a decision running counter to a finding of an infringement by a national competition authority (or review court), regardless of whether it concerned a finding by the 'home' or a 'foreign' competition authority.[322] In view of the diverging view both between the Member States and between the two co-legislators, in the end a different compromise was struck however.[323] Such a finding is now deemed to be "*irrefutably established*" in the actions for damages covered by the directive only in so far as it does not concern a decision given in another Member State.[324] In the latter case, the decision may, in accordance with the relevant rules of national law, "*be presented before [the] national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other material brought by the parties*".[325]

244. The fourth issue concerns rules on *limitation periods* for initiating legal proceedings. According to the Commission, the fact that a vast majority of the Member States did not provide for limitation periods specifically for 'follow-on' actions constituted an important obstacle for successfully bringing actions for damages.[326] The Competition Damages Directive therefore requires Member States to lay down rules in this regard, without these rules being restricted to 'follow-on' actions only however. Under the directive the Member States are to specify when the limitation period begins to run, its duration and the circumstances under which it can be suspended or inter-

320 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 57.

321 See e.g. Komninos (2007), p. 1387; Milutinovic (2010), pp. 281-301; Bruns (2011), p. 140; Komninos (2014), pp. 147-149; Milutinovic (2014), pp. 357-360.

322 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 36 (Art. 9).

323 Council doc. 15983/13, p. 3; Council, doc. 6493/14, p. 3. See also European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 25 (Art. 9), from which it follows that this institution essentially supported the Commission's proposal on this point.

324 Art. 9(1) Competition Damages Directive.

325 Art. 9(2) Competition Damages Directive.

326 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 16 and 57. Cf. recital 32 Competition Damages Directive.

rupted.[327] On each of these three points further precision is provided for, which partly builds on earlier case law by the Court of Justice.[328] These rules boil down to the following.

First, as regards the *starting point*, it is specified that the limitation period for bringing actions for damages under the directive shall not begin to run before the injured party knows, or can reasonably be expected to know, three elements, namely: (i) the behaviour and that it constitutes an infringement; (ii) that that infringement caused harm to the applicant; and (iii) the identity of the infringer.[329] Second, the directive specifies that the *duration* of the limitation period must be at least five years.[330] Although hardly spectacular in itself, this provision is notable for being one of the few instances where the Commission's proposal, and subsequently the directive itself, went further than the 2008 white paper. For in that document the focus was squarely on 'follow-on' actions only, where this aspect is concerned.[331] Third, Member States are to ensure that the period is *suspended* (or interrupted) if a competition authority initiates an investigation or proceedings in respect of the infringement at issue. That suspension shall end not earlier than one year after the termination of these public enforcement proceedings.[332] This latter provision can be expected to be of significant importance in practice. It implies that 'follow-on' actions can sometimes be brought many years after the moment at which the infringement had been committed, considering that it can take a long time for public enforcement proceedings to be concluded with a final decision.

245. By means of a last comment, the Competition Damages Directive contains rules that have been designed to encourage *consensual dispute resolution*, which term includes out-of-court settlements, arbitration, mediation as well as conciliation.[333] A first measure to this effect is the requirement that limitation periods must be suspended for the duration of the consensual dispute resolution process in as far as the participants to that process are concerned. This is meant to give these parties sufficient time to reach an out-of-court settlement.[334] Likewise, where legal proceedings have already been initiated, there may be reason for the court seised to suspend those proceed-

327 Art. 10(1) Competition Damages Directive.

328 See in particular CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 77-82, discussed in para. 214 above.

329 Art. 10(2) Competition Damages Directive. In addition the Commission had proposed stipulating that the limitation period cannot begin to run before the day on which a continuous or repeated infringement ends, but this provision was not retained by the EU legislature. See Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 36 (Art. 10(3)).

330 Art. 10(3) Competition Damages Directive.

331 See Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 8-9.

332 Art. 10(3) Competition Damages Directive.

333 Cf. recital 44 Competition Damages Directive.

334 See recital 45 Competition Damages Directive.

ings. The directive requires the court to be empowered to do the latter, without this being an obligation for the court however and subject to a maximum of two years.[335]

Consensual dispute resolution is further facilitated under the directive by the rule that pursuant to a settlement having been agreed between an injured party and an infringing undertaking, in case of several infringers that would normally be jointly and severally liable, the remaining claim can only be exercised against the non-settling co-infringing undertakings, whereas the latter cannot recover contribution from the undertaking that settled.[336] This rule prevents settling undertakings from being worse off as a consequence of the rules on joint and several liability, discussed earlier.[337] Also more generally national courts are to take due account of any damages paid pursuant to a prior consensual settlement when determining the amount of contribution that co-infringers can recover from each other.[338]

As a last measure prescribed by the directive in this connection, competition authorities may consider that compensation paid as a result of a consensual settlement prior to its decision to impose a fine is a mitigating factor in the setting of that fine.[339] This measure had not been included in the Commission's proposal; it was inserted at the request of the European Parliament.[340] This latter institution had initially sought the inclusion of a 'voluntary compensation mechanism' as part of the relevant public enforcement proceedings, in the form of a provision on the suspension of those proceedings so as to allow for the conclusion of an out-of-court settlement and an obligation for the competition authority concerned to consider this a mitigating factor when establishing the level of the fine.[341] Suggestions along these lines were also raised in the legal literature, where it is also noted that this approach has in fact at times already been put in practice both at EU and national level.[342] The provision finally agreed upon is considerably less stringent however, considering especially that the directive merely provides for a possibility for these authorities to do so, rather than an obligation.

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335 Art. 18(2) and (3) Competition Damages Directive. This requirement is without prejudice to provisions of national law in matters of arbitration. See also recital 46, where reference is made in this connection to the interest of an expedious procedure.

336 Art. 19(1) Competition Damages Directive. This provisions foresees an exception to this rule in cases where the non-settling co-infringers cannot pay the damages corresponding to the remaining claim, subject however to the possibility to expressly exclude this possibility in the settlement agreement.

337 Cf. recital 47 Competition Damages Directive. See para. 238 above.

338 Art. 19(2) Competition Damages Directive.

339 Art. 18(4) Competition Damages Directive.

340 Cf. Council, doc. 6493/14, p. 4; European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 29 (Art. 17(2b)).

341 European Parliament, Draft report on the proposal for the Competition Damages Directive, 2013/0185(COD), p. 43.

342 See Neruda (2011), pp. 245-247; Rivas & Eclair-Heath (2012), p. 1; Ratliff (2014), pp. 291-293; Silva Morais (2014), pp. 131-132.

## 6.4. Other enforcement issues

This final section concentrates on the role of alternative dispute resolution and out-of-court settlements, as well as on the applicable public enforcement regime that has traditionally been of particular importance in this domain.

### *6.4.1. Alternative dispute resolution and settlements*

246. As in many other fields of law, alternative dispute resolution, for instance through arbitration or mediation, can certainly be of relevance for resolving disputes concerning EU competition law.[343] Indeed, it has been held that the growing importance of arbitration in settling competition law disputes is too often ignored and underestimated, and that there may well be grounds for regulating certain aspects thereof at EU level.[344] However for the time being it appears that especially out-of-court settlements directly negotiated between the parties to the dispute play an important role in practice, at least where competition disputes of the type under discussion here are concerned. Even if it is hard to obtain concrete data, as has already been briefly mentioned earlier, many private enforcement disputes are thought to be settled out-of-court, i.e. before a final judgment is rendered or even before a case is brought.[345] Indeed, it may well be that at least in certain jurisdiction a majority of these disputes are settled, as is for example reportedly the case in the United Kingdom.[346]

247. The EU law measures in this regard are on the whole rather modest however. As was set out above, the Competition Damages Directive contains several rules that are expressly meant to encourage consensual dispute resolution.[347] This illustrates that this manner of resolving disputes between private parties relating to infringements of EU competition law is generally looked upon favourably by the Commission and the EU legislature. The Commission has pointed to its potential to provide for a speedy solution, reduce costs for the parties concerned and avoid overburdening the courts.[348] Of the two co-legislators especially the European Parliament tends

343 Cf. e.g. CoJ case 126/97, *Eco Swiss*.
344 Silva Morais (2014), pp. 115-117 and 134.
345 See para. 219 above.
346 Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 44; Danov & Dnes (2013), p. 49. See also Komninos (2008), p. 187, where a study is cited that suggests that in the US more than 80% of private enforcement cases in this domain are settled before the courts awarded any damages.
347 See para. 245 above.
348 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 27-28. See e.g. also Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 3; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 75-76.

to take a favourable view of this form of dispute resolution, as do many stakeholders.[349] But the rules set out in this directive essentially do no more than *encouraging and facilitating* consensual dispute resolution, for instance by suspending limitation periods and by removing disincentives resulting from rules on joint and several liability. The directive contains no rules on the circumstances or the manner in which these alternative dispute resolution procedures *themselves* are to take place. The Commission expressly rejected the option of introducing an obligation to engage in an effort at consensual dispute resolution before a private party would be able to bring an action for damages under the directive.[350]

248. Finally, it can be noted that out-of-court settlements of competition disputes are not necessarily to be assessed solely in positive terms, as they may also well have certain downsides.[351] In particular, unlike court judgments, these kinds of settlements are, almost by definition, not transparent. This mean that they therefore cannot act as precedents and do not contribute to the development of the law. Moreover they can lead to outcomes that are, if not outright anti-competitive, then at least not desirable from a competition policy point of view. For the parties concerned settling their dispute is after all the dominant objective, rather than ensuring compliance with the law and contributing to the establishment of effective and optimal competition as such.

### *6.4.2. Public enforcement*

249. The private enforcement-related developments discussed earlier in this chapter notwithstanding, public enforcement has traditionally been, and in all likelihood will also continue to be, the *dominant manner* in which the competition rules are enforced in the EU. At EU level as well as in most Member States this public enforcement is generally primarily ensured by public authorities governed by administrative law.[352]

250. As far as public enforcement at *EU level* is concerned, the Competition Regulation grants the Commission far-reaching powers to investigate and punish (alleged) infringements of EU competition law. It can among other things make unannounced visits (known as 'dawn raids') in order to inves-

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349 See e.g. European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 7. As regards the view of stakeholders, see Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18.

350 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 35.

351 See Wils (2003a), p. 483; Wilsher (2006), p. 35; Milutinovic (2010), pp. 242 and 356.

352 Cf. e.g. Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 29; Whish & Bailey (2012), p. 295.

tigate business and private premises.[353] When an infringement is established it can impose a range of penalties, including injunctions, structural remedies and fines of up to 10% of the undertaking's annual turnover.[354] These powers of the Commission are subject to review by the EU courts.[355]

Private parties that have a sufficient interest can play a role in this context by bringing alleged infringements of the EU competition rules to the Commission's attention.[356] They can use what could be called a 'reinforced' complaint procedure, as compared (and in addition) to the 'general' possibility for private parties to file complaints with the Commission regarding alleged infringements of EU law in the context of the latter's power to bring infringement proceedings against Member States.[357] This complaint procedure plays an important role in practice. As such it can sometimes function as an alternative for private parties that otherwise might have brought a private enforcement action against the alleged infringing undertaking before the national courts.[358] Yet the fact remains that this complaints procedure essentially only grants private party-complainants certain procedural rights, such as being kept informed.[359] The public enforcement proceedings themselves that may (or may not) be initiated upon the reception of a complaint remain firmly public in nature. In particular, filing such a complaint can never lead to the award of damages by the Commission or the EU courts to the private party that filed the complaint. The amounts raised by any fines that the Commission might eventually impose flow to the EU budget.

251. As has already been touched upon in the foregoing, *leniency programmes* play an important role in connection to the public enforcement in this field of law. The Competition Damages Directive defines a leniency programme as "*a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations of his knowledge of the cartel and his role therein, in return for which the participant receives, by decision or a discontinuation of proceedings, immunity*

353 Art. 20 and 21 Competition Regulation 1/2003.

354 Art. 104 TFEU; Art. 7, 17-21 and 23-24 Competition Regulation 1/2003. As to these fines, see also Commission, Guidelines on fines, OJ 2006, C 210/2.

355 Cf. Art. 31 Competition Regulation 1/2003, where it is specified that the EU courts have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payments.

356 Cf. Art. 7 Competition Regulation 1/2003; Art. 6-7 Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 EC, OJ 2004, L 123/18 ('Competition Proceedings Regulation'); Commission, Complaints notice, OJ 2004, C 101/5.

357 See subsection 2.4.1 above.

358 Cf. Jacobs & Deisenhofer (2003), p. 197.

359 Cf. GC case T-24/90, *Automec*, para. 71-98; GC case T-306/05, *Scippecercola*, para. 66 and 91-97; GC case T-432/05, *EMC Development*, para. 55-60 (upheld on appeal in CoJ Order case C-367/10 P, *EMC Development*).

*from any fine to be imposed for the cartel or a reduction of such fine*".[360] The Commission's leniency programme was introduced in 1996.[361] The EU courts have held that, for the undertakings concerned to qualify for a reduction of the fine under this programme, they must demonstrate "*a genuine spirit of cooperation*".[362] Undertakings wishing to blow the whistle can do so by submitting 'leniency statements' to the Commission, in which they describe their knowledge of the cartel and their role therein.[363]

Especially considering that the fines imposed by the Commission can be very high, this programme thus creates an important incentive for undertakings to turn in their fellow cartel participants, while they themselves might escape punishment entirely. This incentive is increased by the rule that only the *first* leniency applicant can qualify for full immunity, provided that the Commission did not already have sufficient incriminating evidence and that the leniency applicant concerned is also actually the first to provide such evidence. One of the key aspects of leniency programmes is therefore that they create distrust between the cartel members.[364] For the undertakings concerned cannot be certain that one of them will not turn to the competent competition authorities so as to obtain immunity, whereas the others could then be confronted with hefty fines. In this manner leniency programmes allow the unravelling of cartels, which are otherwise generally difficult to detect. In the words of the Court of Justice, "*leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU*".[365] Indeed, the practical importance of the Commission's leniency programme for its public enforcement activities in this field can hardly be overstated. The vast majority of the cartels it discovers come to light after one or more undertakings concerned having applied for leniency. In the 2008-2011 period, no less than 21 of the Commission's 24 decisions in cartel cases (i.e. 88%) resulted from applications made under its leniency programme.[366]

360 Art. 4(15) Competition Damages Directive.
361 Cf. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 70-71; Commission, Leniency notice, OJ 2006, C 298/17.
362 CoJ case C-301/04 P, *SGL Carbon*, para. 68.
363 Cf. Art. 4(16) Competition Damages Directive.
364 Cf. Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 493-499.
365 CoJ case C-360/09, *Pfleiderer*, para. 25.
366 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 21.

252. Since 2008 the Commission's competition policy also includes the possibility of reaching *settlements* in the context of public enforcement proceedings.[367] Under this settlement procedure undertakings that infringed EU competition law, having seen the evidence against them in the Commission's file, may choose to cooperate rather than to contest the finding of an infringement and the imposition of a fine by the Commission. In that case they must file a settlement submission, in which they acknowledge their participation in and responsibility for the infringement.[368] In return, the undertaking concerned can receive a reduction (by 10%) of the fines to be imposed.

The main aim of this settlement procedure is to simplify the public enforcement proceedings, reduce public enforcement litigation before the EU courts and, in so doing, free Commission resources. This procedure thus serves a different purpose than the abovementioned leniency programme. Whereas the former is primarily focused on improving detection, the latter mainly serves the aim of efficient prosecution. According to the Commission the practical importance of its settlement programme has been increasing, with five cartel cases having been settled in the 2008-2011 period.[369] The Commission considers that this, too, is an important tool for the public enforcement of EU competition law.[370]

253. *National competition authorities* also have an important role to play in the public enforcement of EU competition law. In fact, in quantitative terms (i.e. in light of the number of decisions taken) they have been said to have become "*the primary public enforcers of Articles 101 and 102 TFEU*".[371] The Competition Regulation obliges the Member States to designate such authorities, empowering them to apply Articles 101 and 102 TFEU and to take decisions *inter alia* requiring an infringement to be brought to an end, ordering interim measures or imposing fines and periodic penalty payments.[372] These national competition authorities are also empowered to carry out inspections.[373] Although there are notable differences between the various national public enforcement systems in the EU, the competition authorities designated by the Member States thus generally possess pow-

367 Cf. Art. 10a Competition Proceedings Regulation 773/2004; Commission, Settlement notice, OJ 2008, C 167/1. On the EU's settlement regime, see further Hinds (2014), p. 292. These 'public enforcement settlements' are not to be confused with the 'private enforcement settlements' between private parties amongst themselves, referred to in subsection 6.4.1 above.

368 Cf. Art. 4(18) Competition Damages Directive.

369 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 21.

370 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 25 (recital 19).

371 Wils (2013), p. 4.

372 Art. 5 and 35 Competition Regulation 1/2003.

373 Art. 22 Competition Regulation 1/2003.

ers that are similar to those of the Commission.[374] The national competition authorities cooperate among themselves and with the Commission in the context of the European Competition Network (ECN).[375] In virtually all Member States leniency programmes are in place, which are largely similar to the Commission's programme, described above.[376] As is the case with the latter, these national leniency programmes also tend to take an important place where public enforcement at national level is concerned.[377]

254. It has already been seen in the foregoing that *coordinating public and private enforcement* of competition law is an important objective of the Competition Damages Directive.[378] According to the rules pre-dating the directive, any leniency granted by the Commission does not affect the undertaking's situation before national courts in private enforcements actions.[379] The same applies where public enforcement settlements of the type discussed above are concerned. It is important to note that this remains the general rule also after the entry into force of the Competition Damages Directive and the rules of national law transposing it. This directive limits the effects of the private enforcement-facilitating measures laid down therein on two points however, with a view to safeguarding the effectiveness of the abovementioned public enforcement instruments. It provides, first, for the temporal and (for leniency statements and settlement submissions) absolute *non-disclosure of documents* in the file of a competition authority in legal proceedings under the directive and, second, it *limits the joint and several liability* of undertakings that have been granted immunity from fines under a leniency programme.[380]

It is further worth recalling that the Competition Damages Directive establishes a degree of integration in *procedural terms*, over and above the aforementioned already existing possibility under the Competition Regulation for competition authorities to make *amicus curiae* interventions in proceedings before national courts.[381] As was discussed in the foregoing, it does so in several manners. Under the directive these authorities may intervene in pending private enforcement proceedings, by submitting observations on the proportionality of a disclosure request and by providing assistance on

374 Cf. recital 35 of Competition Regulation 1/2003. See e.g. also Study European Competition Network (2012a); Study European Competition Network (2012b).
375 Art. 11-15 and 22 Competition Regulation 1/2003. See also Council and Commission, Joint statement on the functioning of the network of competition authorities, 2002; Commission, Network notice, OJ 2004, C 101/43.
376 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 71. See e.g. also Wils (2008), p. 121.
377 Cf. *ibid*., p. 21.
378 See in particular para. 226 above.
379 Cf. Commission, Leniency notice, OJ 2006, C 298/17, para. 39.
380 Art. 6 and 11 Competition Damages Directive. See para. 235 and 238 above respectively.
381 Art. 15 Competition Regulation 1/2003. See para. 203 above.

the determination of the quantum of damages.[382] In addition findings of infringements by national public enforcement authorities (and the courts reviewing these decisions) constitute either binding evidence or at least *prima facie* evidence in actions for damages under the directive.[383] The effect of this latter rule can be reinforced by the suspension of limitation periods until after the termination of the public enforcement proceedings.[384] Under the directive competition authorities may also consider any compensation payments made as part of consensual settlements as a mitigating factor when they set fines for the infringements in question.[385]

255. Finally, there is also another form of public enforcement of competition law, namely through *criminal law*. In competition cases criminal sanctions can, for example, take the form of imprisonment of directors of undertakings having been found guilty of prohibited anti-competitive behaviour. Over the past years the feasibility and desirability of such measures has regularly been discussed and it has increasingly been put into practice at national level.[386] Several Member States, including Ireland and the United Kingdom, provide under their national laws for criminals sanctions for competition law infringements. The sanctions imposed by the Commission itself are not of a criminal nature.[387] Yet the EU could conceivably still play a role in this respect, especially by establishing an EU law obligation on the Member States to make provision for this type of sanctions at national level and by setting certain common rules in this regard.[388] To date no such EU legislative measures have however been adopted or proposed.

### 6.5. Summary

256. In the field of EU competition law there has been, and continues to be, no lack of attention for private enforcement-related measures of EU law. Article 101(2) TFEU has long provided for a contractual remedy, pursuant to which anticompetitive agreements are automatically void. This remedy is regularly used in practice, mainly in a 'defensive' manner. Furthermore, after almost a decade of studies, consultations, debates and reflections, in 2014 agreement was reached on the Competition Damages Directive. This directive concentrates on one particular substantive private enforcement remedy, namely actions for damages. The directive aims to ensure, in the

382 Art. 6(11) and 17(3) Competition Damages Directive. See para. 237 and 231 above respectively.
383 Art. 9 Competition Damages Directive. See para. 243 above.
384 Art. 10(5) Competition Damages Directive. See para. 244 above.
385 Art. 18(4) Competition Damages Directive. See para. 245 above.
386 See e.g. Wils (2003b), pp. 409-450; Zuleeg (2003), p. 451-461; Cseres, Schienkel & Vogelaar (2006); Wils (2008), pp. 155-201; Zippro (2009b), pp. 147-159; Baker (2014), pp. 41-62.
387 Cf. Art. 23(5) Competition Regulation 1/2003.
388 Cf. Wils (2003b), pp. 448-449; Zuleeg (2003), pp. 455-457. See also Wils (2005), pp. 156-159.

first place, that any private party having suffered harm as a consequence of an infringement can obtain full compensation. To this aim it provides *inter alia* for rules on the disclosure of evidence, the qualification, quantification and passing-on of harm, joint and several liability of infringers, the effects of decisions by public enforcement authorities, limitation periods and consensual dispute resolution. However a second key objective of the Competition Damages Directive is the coordination of public and private enforcement proceedings, considering that public enforcement is the dominant manner in which competition law is being enforced in the EU. In practice this means limiting some of the private enforcement possibilities laid down in this directive where that is deemed necessary to safeguard the effectiveness of public enforcement (in particular the leniency and settlement programmes that the public enforcement authorities operate). The temporal and absolute non-disclosure of certain documents in legal proceedings covered by the Competition Damages Directive and the directive's limits to the joint and several liability of infringing undertakings should be seen in that light.

# C. Comparison and contextualisation: remedies and procedures

# 7. Actions for damages and actions for injunctions

In part A of this study the most important legal principles and case law were assessed, together with the relevant public enforcement mechanisms. Part B subsequently outlined and analysed, on an individual basis, selected EU legislation relating to private enforcement in four fields of EU law. It concerned in particular the Procurement Remedies Directives, the IPR Enforcement Directive, the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive, as well as Article 101(2) TFEU and the Competition Damages Directive. Building on the foregoing, part C essentially seeks to analyse this legislation in a comparative and contextual manner, with a particular emphasis on the remedies and procedural rules provided for therein. Where appropriate, the findings that thus emerge are placed in their broader context, especially as regards legislation and case law concerning fields of EU law other than those assessed in part B. To this aim the present chapter 7 concentrates on two of the three 'main' (substantive) remedies that can be identified in this context, namely actions for damages and actions for injunctions. The following chapter 8 continues this assessment by analysing the third 'main' class of action for private enforcement purposes, i.e. contractual remedies, as well as the 'other' relevant remedies. Chapter 9 then discusses the most relevant procedural provisions and related other issues.

## 7.1. Actions for damages

In the foregoing chapters it has been seen that the Procurement Remedies Directives, the IPR Enforcement Directive, the Product Liability Directive and the Competition Damages Directive all aim to facilitate the bringing of actions for damages. Actions for damages are therefore evidently an important remedy when discussing EU legislation facilitating the private enforcement of EU law. The respective particularities of each of the aforementioned fields of law notwithstanding, in the first subsection below four general observations are made on this remedy as it has been provided for in the EU legislation under consideration, followed by an interim conclusion. Next five more specific issues are addressed in each of the following subsections, namely: fault; causality; quantification of the harm; qualification of damages, including joint and several liability; and damages awards going beyond mere compensation of the injury suffered, in particular punitive damages.

### 7.1.1. General: contradictions and paradoxes

257. The first general observation regarding the EU legislative measures on actions for damages discussed in part B is that the relevant provisions laid down in the EU legislation concerned are often only *modestly prescriptive*.

That is, to begin with, evidently the case under the Procurement Remedies Directives. Here the relevant provision says in fact little more than that Member States should ensure that damages can be awarded to persons harmed by an infringement of the substantive rules at issue.[1] It is thus not specified whether or not the infringer must be at fault for liability in damages to be incurred, there is at best only an implicit causality requirement and it is not specified what the damages to be awarded should entail. Only one of these two directives, the Utilities Remedies Directive, contains some further details on one particular issue. This latter directive specifies that, where bidding costs are claimed, the applicant "*only*" needs to prove the existence of an infringement, that he had a "*real chance*" of winning the contract and that as a consequence of the infringement that chance was adversely affected.[2] By implication where this provision applies the burden on the applicant is alleviated in that he does *not* need to demonstrate that he would have won the contract but for the infringement.

The IPR Enforcement Directive provides that infringers that acted knowingly or with reasonable grounds to know are to be ordered to pay "*damages appropriate to the actual harm suffered by him/her as a result of the infringement*".[3] It clarifies that these damages can be set in two manners. One option is setting them on the basis of "*all appropriate aspects*". Mentioned in this connection are the negative economic consequences, including lost profits on the side of the injured party, unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused. The alternative is setting these damages as a lump sum, to be determined on the basis of elements such as (at least) the amount of royalties or fees that would have been due had authorisation been requested from the holder of the intellectual property right in question. It follows that on the one hand the rules on actions for damages applicable in intellectual property cases are on the whole somewhat more detailed than those applicable in public enforcement cases. On the other hand the fact remains however that these rules are still formulated in rather general and non-committal terms. Several relevant elements are touched upon (causality, extent of damages), but often rather by means of an illustration or as an option than in specific and prescriptive manner.

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1 Art. 2(c) Public Sector Remedies Directive 89/665; Art. 2(d) Utilities Remedies Directive 92/13. See subsection 3.2.2 above.

2 Art. 2(7) Utilities Remedies Directive 92/13.

3 Art. 13(1) IPR Enforcement Directive 2004/48. See further subsection 4.2.4 above. An (almost) identical regime has been set out in Commission, Proposal for a trade secrets directive, COM(2013) 813, p. 24 (Art. 13).

The picture concerning the Product Liability Directive's provisions on actions for damages is to some extent similar.[4] Also here a degree of detail is provided. But at the same time several relevant issues are left either unaddressed or to be decided on an optional basis by the Member States. Central to this directive is the principle of no-fault liability of the producer of a defective product. It specifies that an injured party must prove the damage, the defect and the causal relationship between the defect and the damage.[5] Hence, there is no requirement to prove that the producer was at fault. It is further stipulated what the term 'damage' entails in this connection, namely damage caused by death or personal injuries and/or damage to property, while non-material damage is expressly left to be regulated by national law.[6] The Product Liability Directive further contains provisions on contributory negligence by the injured party and on the producer not being able to limit or exclude its liability.[7] But issues such as causality or the quantification of the harm are not addressed. Furthermore under the Product Liability Directive a party that risks being held liable has a number of defences at its disposal, but one of the most important of these, the so-called 'development risks defence', is only provided for on an optional basis.[8] Similarly Member States may or may not decide to cap the producer's liability under this directive.[9] Thus, as the Commission acknowledged, the directive is "*only an initial step towards establishing a genuine producer liability policy at [EU] level*".[10]

Finally, in many respects the Competition Damages Directive goes furthest in setting out common EU rules on damages claims.[11] This directive stipulates that anyone who has suffered harm has a right to full compensation of the harm caused, while specifying how the harm caused is to be qualified and quantified as well as how to deal with situations where the harm may have been 'passed-on'.[12] It also contains rules on related matters such as the disclosure of evidence, the effects of infringement decisions taken by national competition authorities, limitation periods and the joint and several liability of certain infringers.[13] However on several points the directive does in fact little more than codifying the case law of the Court of Justice. This is, to a greater or less extent, the case with respect to its rules on the qualification of the harm, legal standing and limitation periods.[14] Also

4 See section 5.4 above.
5 Art. 4 Product Liability Directive 85/374.
6 Art. 9 Product Liability Directive 85/374.
7 Art. 8(2) and 12 Product Liability Directive 85/374.
8 Art. 7 and 15(1)(b) Product Liability Directive 85/374.
9 Art. 16 Product Liability Directive 85/374.
10 Commission, Green paper on liability for defective products, COM(1999) 396, p. 11.
11 See section 6.3 above.
12 Art. 1, 2, 12-15 and 17 Competition Damages Directive respectively.
13 Art. 5-6, 9, 10 and 11 Competition Damages Directive respectively..
14 Art. 1(1), 2 and 10 Competition Damages Directive respectively. See also its Art. 3, which provides for a codification of the EU law principles of equivalence and effectiveness, discussed in section 2.2 above.

the directive's provision on the quantification of harm seems in fact somewhat less substantial than what might appear at first glance.[15] Moreover several issues that had been initially identified as obstacles to the effective bringing of actions for damages remain unaddressed in this directive, such as collective redress, fault requirements, legal costs and causality.[16]

258. A second point is that for the EU legislature it has often been particularly *difficult to agree* on the above EU legislative measures relating to actions for damages. Almost without exception the provisions in question were only adopted after lengthy and intense discussions and several amendments. While that applies to some extent for the Procurement Remedies Directives and the IPR Enforcement Directive,[17] it may be no coincidence that the two legal acts that are *exclusively* concerned with this substantive remedy, i.e. the Product Liability Directive and the Competition Damages Directive, proved to be particularly controversial. As regards the former, after the Commission had taken years to prepare its proposal, this directive was eventually only adopted after a difficult legislative process that lasted no less than another nine years.[18] As regards the latter, it is true that the law-making process itself was relatively speedy. But this should not distract from the fact that the Competition Damages Directive only came into being after an incubation time of almost a decade, during which this initiative proved to be highly controversial and the Commission aborted an earlier attempt to submit a proposal at the last moment.[19] There is furthermore a case to be made that the fact that this directive was eventually proposed and adopted can be ascribed as much to a desire to protect the existing public enforcement mechanisms from possible negative consequences from increased private enforcement as to the ambition to facilitate private enforcement.[20]

259. The third general observation concerns the *practical importance* of this remedy. In qualitative terms the Commission has over the years regularly observed that applicants wishing to bring actions for damages under the Procurement Remedies Directives, the IPR Enforcement Directive and the

15 See para. 271 below.
16 See para. 225 above. On fault and causality under this directive, see also subsections 7.1.2 and 7.1.3 below respectively. On collective redress and legal costs, see also subsections 5.3.1 above and 8.2.5 below respectively.
17 See in particular para. 72, 75 and 85 above (concerning Procurement Remedies Directives 89/665 and 92/12) and para. 111 and 134 (concerning IPR Enforcement Directive 2004/48) above.
18 See para. 174 above.
19 See in particular subsection 6.2.3 above.
20 See in particular para. 223 and 226 above.

Product Liability Directive are typically confronted with many obstacles.[21] These obstacles include the length of the proceedings, high legal costs, difficulties in obtaining evidence and meeting the required standard of proof, as well as problems when seeking to quantify the harm caused by the infringement. As far as the quantitative aspect is concerned, successful actions for damages for infringements of the relevant substantive rules of EU law brought under these directives are reported to be generally rather scarce. For instance, in 1996 a study found that EU-wide there had been "*no more than a handful*" of damages cases for infringements of EU public procurement law.[22] Since there may have been a modest increase, but the overall level of damages litigation remains low.[23] The situation is largely similar where the Product Liability Directive is concerned. Roughly a decade after its adoption a study noted that "*almost no cases have been reported under this directive*".[24] Also here an increase has been observed more recently, but again the overall numbers of damages actions remain modest and the directive is moreover thought to have hardly contributed to this increase.[25] In relation to the IPR Enforcement Directive the Commission observed in 2010 that "*damages awards in intellectual property cases are not requested by rightholders as a matter of course*".[26]

This suggests that the much-discussed picture of "*astonishing diversity and total underdevelopment*" identified in a study dating from 2004 relating to actions for damages for infringement of EU competition law,[27] which was subsequently echoed by the Commission and provided the basis for its initiative in this field,[28] is not exceptional. It rather seems to be in line with the state of play in EU law generally, certain variations between the different fields of law and between the different national jurisdictions notwithstanding. That such a situation exists in the abovementioned other fields than competition law is all the more striking, given that in those fields EU legislative measures that aim to facilitate the bringing of these actions were enacted years or even decades ago. The situation seems to a high extent

21 E.g. Commission, Green paper on public procurement in the EU, COM(96) 583, pp. 15 and 19; Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, pp. 13-27; Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 12-14; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, pp. 21-23; Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 20.

22 Study Herbert Smith (1996), p. 18. See also Brown (1998), p. 93.

23 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 16-17. See further para. 86 above.

24 Study McKenna (1994), p. 45.

25 Study Lovells (2003), pp. 31-38. See further para. 200 above.

26 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 21.

27 Study Ashurst (2004), p. 1.

28 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 4. See further subsection 6.2.3 above.

comparable where actions for damages brought pursuant to the principle of Member State liability are concerned.[29]

It consequently appears that the secondary EU law at issue here has on the whole been at best only modestly successful in this respect. It remains to be seen whether the situation will be fundamentally different in relation to actions for damages for competition law infringements once the Competition Damages Directive has been transposed into national law and can thus be relied upon by private parties wishing to claim damages for competition law infringements. In this field the number of damages actions brought appears already to be increasing, even in the absence of applicable EU legislative measures.[30]

260. That leads to the fourth observation. Across the different fields of law at issue in this study there appears to be a *discrepancy in the conclusions* drawn, especially by the Commission, on the basis of the findings referred to in the previous paragraph. In particular, the observation that generally few actions for damages are brought, that the relevant national laws differ and that private parties wishing to bring such actions tend to encounter various obstacles has been reason for intense activity in the field of EU competition law. This activity includes the publication of official documents, the commissioning of studies, the consultation of stakeholders, an attempt to propose a directive that was aborted at the last moment and, eventually, the submission of a proposal for and the agreement on the Competition Damages Directive.[31] In this field this remedy is thus clearly the "*legal and political fashion*".[32]

In contrast similar activities are notably absent in relation to the three other fields mentioned above, where the relevant directives have been in place already for years, if not decades. Take the Product Liability Directive. As noted above, relatively few damages claims have been brought under this directive. Having published a green paper in 1999 with possible measures aimed at facilitating the bringing of such claims,[33] the Commission observed in 2001 amongst other things that "*[i]n practice it may be difficult to*

29 See Van Dam (2006), p. 40, where it is noted that the applicants bringing actions for damages pursuant to the principle of Member State liability often "*entered the hall of fame, but lost the case*". This refers to the fact that in landmark cases such as *Francovich*, *Brasserie du Pêcheur* and *Köbler* the applicants were ultimately unsuccessful in their efforts to obtain compensation in damages. See also Lock (2012), p. 1675. On the principle of Member State liability generally, see para. 59 above. In addition the situation might well be comparable where the liability of the EU under Art. 340 TFEU is concerned. See e.g. Kaleda (2014), p. 193, regarding actions for damages in the context of public procurement by the EU institutions and other EU bodies.

30 See para. 224 above.

31 See in particular subsections 6.2.3 and 5.2.4 above.

32 Milutinovic (2010), p. 143.

33 Commission, Green paper on liability for defective products, COM(1999) 396.

*prove that a product was defective and/or that a causal link exists*".[34] It also noted there that the legal situation in the Member States differed, including for instance the national rules on the disclosure of evidence.[35] However neither at that time nor at a later stage has this led to any amendments to the directive or other legislative measures to increase the effectiveness of this remedy being proposed. The Commission maintains that there is a lack of evidence that the abovementioned divergences cause significant trade barriers or distortions of competition.[36] Yet it seems to have made little effort to obtain such evidence.[37] Its references to the controversies that existed when adopting this directive and the delicate balance that it establishes between the various interests at stake give the impression that this inaction is at least in part motivated by political considerations.[38]

This contrast between the shortcoming observed and the lack of even an attempt of a legislative response is arguably most striking in the field of EU public procurement law. Facilitating actions for damages was originally an important element of the EU's private enforcement-facilitating approach in this field.[39] It seems however that in this field this remedy has over the years become particularly 'unfashionable'. When the Procurement Remedies Directives were revised in 2007 it was expressly decided not to concentrate on this remedy.[40] The Commission explained this choice by arguing that damages awards had "*little deterrent effect on [contracting] authorities, especially because [private parties] who feel that their interests have been harmed must prove that they had serious chances of being awarded the contract*".[41] More generally, it pointed to the "*inherent limits*" of damages actions, notably the (alleged) absence of real corrective effects, practical difficulties and the length and costs of the legal proceedings.[42] In other words, here the abovementioned obstacles typically encountered by injured private parties seek-

34 Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, p. 13. See also Commission, Fourth report on Product Liability Directive 85/374, COM(2011) 547, pp. 7-8.

35 *Ibid*., pp. 14-15.

36 Commission, Fourth report on Product Liability Directive 85/374, COM(2011) 547, p. 11. See further para. 184 above.

37 Note that the officially commissioned study by Study Lovells (2003), pp. 15-28, dates from almost a decade earlier.

38 E.g. Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, p. 12; Commission, Third report on Product Liability Directive 85/374, COM(2006) 496, p. 6. See European Parliament, Resolution on the Commission green paper on liability for defective products, A5-0061/2000; Council, Resolution on amendment of the liability for defective products directive, OJ 2002, C 26/2. These latter documents suggest opposing views by the two branches of the EU legislature.

39 Cf. e.g. Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 19: "*the possibility of claims for damages will be a particularly important part of the system*".

40 Instead a new contractual remedy was introduced. See further subsection 3.2.3 above.

41 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 2.

42 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 12. See also its p. 20 and pp. 26-27.

ing compensation (costs, burden of proof, quantification, etc.) were cited as reasons *not* to take legislative action on this point, whereas essentially the same obstacles were seen as reasons to take such action where infringements of competition law were concerned. The particularities of a given field of EU law can of course justify a policy choice to concentrate for instance on other remedies. Nonetheless the contrast in the approach followed by this same institution at around the same time in these two fields of law is striking. That applies all the more so in light of the (at best) questionable explanation given for this difference.[43]

261. By means of a concluding remark concerning the above general issues, it appears that EU legislative involvement with actions for damages for infringements of EU law is a topic that is not without *contradictions*. This remedy is provided for in most of the legislation at issue in this study. It generally receives also considerable attention from stakeholders, academics and institutional actors alike. But the degree of harmonisation provided for is all in all typically rather modest. Moreover in practice this remedy often functions in a manner that leaves much to be desired. Whereas the shortcomings observed do not tend to vary much across the various fields of law at hand, these findings are in some cases reason for putting a lot of energy into trying to address them through the EU legislative measures (competition law), while in other fields the legislative response has more recently been largely muted (product liability law, intellectual property law) or this

43 See Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 27 (n. 32). Here it is argued that the situation in procurement law is substantially different from notably the one existing in relation to competition law, because in the former case the damages are paid from the public purse whereas in the latter case compensation is paid by an undertaking. As a matter of fact, this observation generally seems correct. However, in the first place, this appears to overlook the fact that private undertakings can in certain cases be subject to EU public procurement law, just as public bodies can be subject to EU competition law. More importantly, from the perspective of the private party having suffered damage, *any* damages award will serve to compensate the harm caused, regardless from which purse it is paid. As such this award does have a corrective effect. Furthermore the underlying suggestion that exposing contracting authorities to the risk of financial consequences in cases of infringements does not have a corrective or deterrent effect is contestable, to say the least. This suggestion is at odds with the logic underlying the principle of Member State liability for infringements of EU law, discussed in para. 59 above (even if the provision on actions for damages set out in Procurement Remedies Directives 89/665 and 92/13 gives concrete expression to precisely this principle of Member State liability; as was clarified in CoJ case C-568/08, *Combinatie Spijker*, discussed in para. 88 above). This argumentation also seems internally inconsistent. During the very same 2007 revision of the said directives, the possibility of imposing a fine on contracting authorities was introduced (Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13). And already since 1993 Art. 2(1)(c) and (5) Utilities Remedies Directive 92/13 provides for the possibility of a payment by the contracting authorities of a 'dissuasive sum'. See also Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 9 (n. 3).

remedy even seems to have largely been given up altogether (public procurement law). Indeed, in this light one may be inclined to agree with Advocate General Sharpston's description of damages claims as being "*generically awkward*".[44]

Yet the above observation relating to the difficulties that the EU legislature often experiences in trying to agree on measures to facilitate the bringing of actions for damages for infringements of EU law probably goes a long way in explaining this at first sight perhaps somewhat confusing state of affairs. Most of the aforementioned contradictions may in effect rather be paradoxes. At the risk of oversimplification, those difficulties probably explain in large part the generally only modestly prescriptive character of the EU law provisions in question. For where a particular issue proves controversial, a (political) solution may well be found in addressing it only in vague terms, leaving it entirely unaddressed or by inserting an optional provision.[45] Such solutions might in turn well provide at least a partial explanation for the practical problems that injured parties tend to continue to encounter when seeking to obtain compensation. It might also explain the tendency, where EU legislation on this remedy exists, to either not propose further amendments to that legislation or to concentrate on other remedies instead. Seen against this background, it also seems hardly surprising that the initiative leading to the Competition Damages Directive proved to be controversial, just as the observed state of 'diversity' and 'total underdevelopment' at national level that provided the thrust for this initiative seems considerably less exceptional, and therefore perhaps also less 'astonishing', than sometimes seems to be presumed.

### *7.1.2. Fault*

262. The first of five more specific issues relating to the secondary EU law on actions for damages under consideration here concerns *fault requirements*. The Procurement Remedies Directives do not expressly address this subject-matter at all. Under the IPR Enforcement Directive the abovementioned provision on actions for damages refers to the infringing party having acted knowingly or with reasonable grounds to know.[46] This is normally understood as a fault requirement of sorts.[47] By contrast the absence of a fault requirement is central to the 'strict' liability approach set out in the Product Liability Directive.[48] Finally, concerning EU competition law, after having considered a number of options, including no-fault liability, in its 2008 white paper (and in its 2009 unofficial draft proposal) the Commission suggested

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44 Opinion AG Sharpston case C-432/05, *Unibet*, para. 49

45 See further para. 394 below.

46 Art. 13(1) IPR Enforcement Directive 2004/48. Its Art. 13(2) contains an optional rule for cases where the infringer did *not* act knowingly or with reasonable grounds to know.

47 Cf. e.g. Lukas (2008), p. 82.

48 Art. 4 Product Liability Directive 85/374.

opting for a sort of middle way in the form of a rebuttable presumption of fault.[49] But in its subsequent proposal for the Competition Damages Directive this issue was in the end entirely left out, in light of the criticism that those earlier suggestions received particularly from the side of businesses.[50] As a result this directive does not address issues of fault, other than a statement in the recitals that the Member States should be able to provide for a requirement of this kind, in as far as they comply with the case law of the Court of Justice, the principles of equivalence and effectiveness and the directive itself.[51]

The foregoing shows that the question whether and if so, to which extent an applicant must demonstrate that the defendant was at fault when infringing the applicable rules of EU law in order to obtain compensation in damages is answered *very differently* in the four fields of law under consideration in this study. The more general picture of EU law being "*extremely heterogeneous*"[52] on this point therefore also holds true where these four fields of law are concerned. In several other acts of secondary EU law a range of approaches on fault-related matters can be found. This can involve an express fault requirement,[53] something in between an express fault requirement and the express absent of such a requirement,[54] or a rebuttable presumption of fault.[55]

263. The case law of the Court of Justice is also to be considered. Of particular relevance is the Court's 2010 ruling in *Stadt Graz*.[56] In that case it was clarified that the Procurement Remedies Directives *preclude* a fault requirement established on the basis of national law in relation to damages claims brought under these directives, even where national law provides for a presumption of fault which is for the defendant to rebut. The Court noted that the wording of the relevant provisions do not indicate that the infringement giving rise to a right to damages is to be connected to fault. It also took account of the function that this remedy plays under these directives. It noted that a fault requirement means that an injured party runs the risk of not,

49 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 6-7. On the said unofficial draft proposal, see para. 220 above.

50 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 35.

51 Recital 11 Competition Damages Directive.

52 Lukas (2008), p. 101.

53 Art. 35a(1) Credit Rating Agencies Regulation 1060/2009, which refers to the commiting of infringements "*intentionally or with gross negligence*". Cf. recital 33 Regulation 462/2013, which inserted this Art. 35a into the regulation. Note however that pursuant to its Art. 35(4) the terms 'intention' and 'negligence' are to be interpreted and applied in accordance with the applicable national law.

54 Art. 5 Package Travel Directive 90/314. See further para. 185 above.

55 E.g. Art. 6(1) and (2) Directive 1999/93/EC on a Community framework for electronic signatures, OJ 2000, L 13/12 ('Electronic Signatures Directive'); Art. 20(3) Public Limited Liabilities Companies Directive 2012/30.

56 CoJ case C-314/09, *Stadt Graz*, para. 30-45. See further para. 88 above.

or only belatedly, being compensated. This was deemed to be contrary to the objective of these directives, i.e. ensuring effective and rapid review. This ruling is of evident importance for public procurement cases, but it may also be of broader relevance. The question is then whether, in analogy to the Court's reasoning in *Stadt Graz*, a more general argument can be made that EU law precludes fault requirements established on the basis of national law in relation to actions for damages for EU law infringements. In this respect a distinction should be made, it is submitted, between the following two situations.

In the first place, there is the situation where *specific EU legislation* concerning liability in damages applies, but does not expressly deal with issues of fault. In such cases reasoning similar to *Stadt Graz* may well be applied. Indeed, in *Dekker*, a case dating from 1990 relating to the Gender Equality Directive, the Court of Justice came to a similar conclusion as the one formulated in *Stadt Graz*.[57] There it was also found that the directive in question did not allow for a fault requirement. Also this conclusion was based on the absence of any explicit reference thereto in the directive in question, combined with the need to safeguard the practical effect of the principles underlying it. The Court added in a subsequent case that this applies "*no matter how easy it would be to adduce proof of fault*".[58] This case law thus suggests that, where the applicable specific EU legislation provides for civil liability in damages without the issue of fault being expressly addressed therein, a fault requirement established under national law for the award of damages for infringements of the relevant substantive rules of EU law may well be precluded, no matter how low the threshold to prove fault actually is. It is for now an open question how the Competition Damages Directive is to be assessed in this light. The fact that it does not contain an express fault requirement could be understood to imply that the above logic is also applicable here and that therefore such a requirement is precluded. However in this particular case this view seems to be contradicted by the abovementioned statement in the recitals of this directive that the Member States should in principle continue to be able to impose fault-related conditions. While the latter therefore appears to be the better view, there is certainly some scope for debate in this respect, especially in light of the not unequivocal reference in the recitals to the need to comply with the Court's case law, the principles of equivalence and effectiveness and the directive itself.

All this is to be distinguished from the second situation, where *no specific EU legislation* of the type at issue in *Stadt Graz* and *Dekker* applies. This thus concerns cases where there is no specific EU law regulating the possibility of bringing actions for damages for infringements of EU law. Then the logic followed in those rulings is probably not applicable. After all, as was explained above, the outcome in *Stadt Graz* and in *Dekker* was based on two key considerations. In the first place, arguably the main point was the

57 CoJ case C-177/88, *Dekker*, para. 22-25. See Gender Equality Directive 2006/54.
58 CoJ case C-180/95, *Draehmpaehl*, para. 21.

*absence of an explicit provision* on fault in the specific EU legislation at issue. The Court of Justice essentially seemed to reason that the decision by the EU legislature not to address this issue explicitly as a matter of EU law should be taken to mean that there cannot be a requirement of fault under national law. In the second place, the result reached was closely tied to the need to ensure the *effectiveness* of the applicable EU legislation regulating the damages claim. That seems to imply that, where no such EU legislation applies, there are no grounds for drawing comparable conclusions. Put differently, the interests associated with safeguarding the effectiveness of *substantive* EU law alone is unlikely to be sufficient to justify the conclusion that a fault requirement established in national law is as such unacceptable.[59] These two points therefore both suggest that the said case law does not imply that EU law *generally* precludes a fault requirement in relation to actions for damages for infringements of that law.[60] It follows that, at the law stands, in cases where EU law does not expressly address this issue, it is to be determined in accordance with the applicable national law whether or not such a requirement applies (and if so, what it entails), subject to the principles of equivalence and effectiveness.[61]

264. Another potentially relevant line of case law relates to the principle of *Member State liability*.[62] In this context the Court of Justice has repeatedly addressed the issue of fault. In particular, it held that one of the three conditions for incurring Member State liability in damages is the existence of "*a sufficiently serious breach*" of the applicable rule of EU law.[63] Relevant factors in this respect include the clarity and precision of the rule in question, the measure of discretion, whether there was any intention and whether the

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59 Admittedly, this may be somewhat less clear from *Dekker*, because that ruling (para. 22-25) can be read as indicating that the CoJ was (also) concerned with the effectiveness (practical effect) of the *substantive* rules in question, and not (only) with the relevant provisions on enforcement. However in CoJ case C-180/95, *Draehmpaehl*, para. 21, the absence of an express fault requirement in the relevant directive is highlighted, rather than this effectiveness argument.

60 See also the discussion in para. 64 above on the nascent EU law principle of private party liability and the 'constitutive' EU law conditions for incurring such liability.

61 Cf. e.g. CoJ case C-348/98, *Mendes Ferreira*, para. 28-29. On the principles of equivalence and effectiveness, see section 2.2 above.

62 On the principle of Member State liability generally, see para. 59 above. Note that in CoJ case C-568/08, *Combinatie Spijker*, para. 87, it was held that the provision on actions for claims of Procurement Remedies Directives 89/665 and 92/13 gives expression to this principle of Member State liability. In that case reference is also made to the requirement of a sufficiently serious breach. That raises some questions as to how this ruling relates to the aforementioned *Stadt Graz* ruling. For the present purposes it suffices to note that there are no indications that this link with Member State liability made in *Combinatie Spijker* played any role in the Court's ruling in *Stadt Graz* in respect of fault requirements. For a discussion of these two rulings, see para. 88 above.

63 CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, in particular para. 51 and 55-57. It has been observed that for an applicant it is in practice often particularly difficult to demonstrate that this condition has been met. See Lock (2012), pp. 1693-1697.

error of law was excusable.[64] The Court noted that such factors may well be connected with the concept of fault as it exists in a national legal system.[65] Indeed, this test seems to come close to a test of negligence.[66] However it was also held that, beyond the condition of a sufficiently serious breach, there is no scope for any requirement based on fault, whether intentional or negligent, for Member State liability to be incurred.[67] It further appears that the requirement of a sufficiently serious breach applies only where the Member State that infringed EU law did so in relation to an issue where it had discretion, notably where it exercises its legislative function.[68] There is case law suggesting that where there is only reduced or no discretion, a mere infringement may be sufficient to incur liability.[69] In the legal literature a parallel has regularly been drawn in this respect between the liability in damages of Member States and of private parties. In particular, it is widely agreed that in disputes between private parties there is hardly any scope (if at all) to require a sufficiently serious breach.[70] After all private parties normally do not have the 'State-type' discretion referred to here, as Member States when exercising their law-making function.

On that basis it is sometimes suggested that therefore *any* infringement of a rule of EU law by a *private party* could lead to an obligation to compensate the damage caused, without there being scope for any requirement of fault.[71] It is however submitted that this view is contestable. For one thing, it is open to question whether the abovementioned case law on Member State liability can be simplified to the point that, in the absence of discretion, it necessarily implies 'automatic' (i.e. no-fault) liability.[72] The formulation used by the Court of Justice on this issue tends to be rather cautious, suggesting that a mere infringement "*may*" be sufficient. Discretion seems furthermore less and less the only decisive criterion in the relevant case law. Instead account can also be taken of other factors, including a duty of care,

64 *Ibid*., in particular para. 56.
65 *Ibid*., para. 78.
66 Cf. Van Dam (2006), p. 254.
67 CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 75 and 79. See e.g. also CoJ joined cases C-178/94, C-179/94 and C-188/94 to C-190/94, *Dillenkofer*, para. 28.
68 *Ibid*., in particular para. 38 and 46. See e.g. also CoJ case C-224/01, *Köbler*, para. 51-56. In this latter case it was clarified that, where breaches of EU law by the *judiciary* are concerned, the said requirement should be understood as meaning that a *manifest* infringement of EU law is required in order to incur Member State liability.
69 E.g. CoJ case C-4/94, *Hedley Lomas*, para. 28.
70 E.g. Dougan (2004), pp. 37 and 242; Van Gerven (2004a), p. 522; Tridimas (2006), p. 544; Komninos (2009), p. 398; Milutinovic (2010), p. 112. For a different approach, see e.g. Reich (2010), pp. 126-127.
71 In this sense, see e.g. Opinion AG Van Gerven case C-128/92, *Banks*, para. 53; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 51.
72 In a similar sense, see Eilmansberger (2007), pp. 458-459.

complexity and intention.[73] Indeed, it has been held that, where the non-contractual liability of the EU under Article 340 TFEU is concerned, "*illegality as such never leads automatically to liability*", while "*[t]he convergence [of Member State liability and EU non-contractual liability] argument can also be used to set aside the idea that no-fault liability might exist in Member State liability*".[74] Unlike discretion, there is no reason to believe that such other factors are inherently inapplicable in situations where a private party infringed EU law. For another thing, even while there is certainly a degree of parallelism between Member State and private party liability for breaches of EU law, it is as yet still largely an open question to which extent the abovementioned case law on the former can and should be transposed to the context of the latter.[75] There are certain differences that may well argue against a 'one-to-one' transplant, the issue of discretion not being the least among them.[76] It follows that the case law on Member State liability may well be of some relevance in the present context, but that it does not necessarily imply that there is no scope for a fault requirement in relation to damages claims for infringements of EU law brought by one private party against another.

265. As a final point it is worthwhile to consider the effects of the EU rules on fault, discussed above. The first observation in this regard concerns their *effects on national law*. It is true that, in the words of the Court of Justice, "*the concept of fault does not have the same content in the various legal systems*" of the Member States.[77] Nonetheless almost all legal orders of the Member States have in common that, as a general rule, they perceive a fault requirement, in one form or another, as a criterion for the imputation of damages liability.[78]

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73 That applies in particular (but not exclusively) as regards the case law on the non-contractual liability of the EU. See e.g. CoJ case C-47/07 P, *Masdar*, para. 90-91; GC case T-437/10, *Gap SA granen & producten*, para. 15 and 28; GC case T-333/10, *ATC*, para. 61-63. As regards Member State liability, see e.g. Opinion AG Léger case C-224/01, *Köbler*, para. 138-139; CoJ case C-424/97, *Haim*, para. 42-43. See further Hilson (2005), p. 677; Van Dam (2006), pp. 500-504; Biondi & Farley (2009), p. 130; Wakefield (2009), p. 406; Gutman (2011), p. 723.

74 Aalto (2011), p. 204. On the said convergence, see also para. 59 above.

75 See also para. 64 above.

76 In the words of CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 42, even if we assume that the conditions under which a private may incur liability for damages cannot differ from those governing the liability of a Member State, this only applies in "*like circumstances*" and "*in the absence of a particular justification*" for any such difference.

77 CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 76 (in the context of Member State liability in damages). See also e.g. Van Gerven, Lever & Larouche (2000), pp. 300-306; Van Dam (2006), pp. 113-116.

78 Lukas (2008), p. 81; Kellner (2009), p. 139. See e.g. also Opinion AG Cosmos case C-348/98, *Mendes Ferreira*, para. 50; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 50. There are exceptions however, e.g. in relation to intellectual property rights. See Study European observatory on counterfeiting and piracy (undated-d), pp. 1 and 6. In some Member States the issue of fault is addressed primarily through the concept of attribution.

That means that where EU law precludes such a requirement, the consequences for national law can be significant indeed. It has been seen above that this is the case under the Product Liability Directive as well as, as construed by the Court of Justice, the Procurement Remedies Directives and the Gender Equality Directive and – arguably – any other comparable act of secondary EU law. Accordingly, where secondary EU law precludes a fault requirement, national law often needs to be amended and, where this has not (yet) been done, national courts must disapply any such national fault requirements in concrete cases.

The second observation concerns the *effects in practice* of the EU rules under consideration here. Above it was noted that many different approaches in relation to fault requirements can be found in the legislation under consideration, ranging from an (almost) explicit fault requirement to an (almost) explicit lack of such a requirement, with certain intermediate approaches. One would logically presume that where a private party has to demonstrate fault for liability to be incurred, it will normally be more difficult to successfully bring an action for damages. Indeed, this presumption was central to the adoption of the Product Liability Directive.[79] It also was an important element in the reasoning of the Court of Justice in *Stadt Graz* and *Dekker*.[80] However, as was noted earlier, in each of the fields of law at issue here successful actions for damages are generally rather scarce.[81] That applies for actions brought on the basis of EU legislation that imposes a fault requirement (e.g. the IPR Enforcement Directive) as much as it does for actions brought under EU legislation that insists on the absence of such a requirement (e.g. the Product Liability Directive). Therefore, contrary to what one might expect, there seems to be no clear relationship between the degree of (successful) damages litigation on the one hand and the existence or absence of a fault requirement as a matter of EU law on the other hand. Even if this does not necessarily mean that it is irrelevant whether or not the relevant secondary EU law provides for a fault requirement, the foregoing suggests that, in and by itself, this is unlikely to be a decisive factor. In that sense the effects of EU legislative intervention in relation to fault should probably not be overstated.

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79 See e.g. Commission, Proposal for Product Liability Directive 85/374, COM(76) 372, p. 13: "*It is extremely difficult or even impossible to [proof fault on the part of the producer]*".

80 See para. 263 above. See e.g. also CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 79: "*[i]mposition of such a supplementary condition [of fault, beyond a sufficiently serious breach] would be tantamount to calling in question the right to reparation founded on the [EU] legal order*".

81 See in particular para. 259 above.

This latter finding can be explained, at least in part, by the fact that the differences between 'fault' and 'no-fault' approaches referred to above are often not as clear-cut as this terminology might suggest.[82] The transition between both approaches rather tends to be more fluent.[83] Take for instance the apparently most 'extreme' no-fault ('strict') liability approach, set out in the Product Liability Directive. Its effects are in fact significantly limited and moderated through a range of specific provisions, such as particular defences, time bars, financial ceilings and limited heads of damages to be compensated.[84] Similarly the phrase 'knowingly or with reasonable grounds to know', laid down in the IPR Enforcement Directive, allows for a range of nuanced approaches. Paradoxically the most 'extreme' result may well emerge where issues of fault have not been dealt with at all in the EU legislation at hand. As has been seen above, this absence of explicit rules was one of the reasons for the Court of Justice to rule that the Procurement Remedies Directives preclude a fault requirement. These directives thus in effect also establish no-fault liability in damages, as is the case in the Product Liability Directive. But given that the issue of fault is not expressly addressed in the Procurement Remedies Directives, they do not contain limiting or moderating measures of the sort found in the Product Liability Directive.

### *7.1.3. Causality*

266. Most of the secondary EU law considered in part B goes at least some way in making it explicit that, for liability in damages to be incurred, it needs to be demonstrated that there is a *causal link* between the infringement at issue and the harm suffered before. Both the IPR Enforcement Directive and the Product Liability Directive expressly require such a causal link, be it in somewhat different wording. Whereas the former speaks of prejudice suffered "*as a result*" of the infringement,[85] the latter expressly refers to the requirement of a "*causal relationship*" between the defect in the product and the damage.[86] The Procurement Remedies Directives are less explicit, but it is beyond doubt that also in this connection a causality requirement

82 There are in all likelihood several other factors that are of relevance when explaining the lack of a clear correlation between the number of successful damages claims and the presence or absence of a fault requirement as a matter of EU law. These probably include other applicable rules of EU or national law on issues such as legal standing, limitation periods, quantification of harm, etc., as well as 'unwritten obstacles', such as cultural attitudes towards litigation. On the latter, see further para. 416 below.

83 Lukas (2008), p. 81. See also Van Dam (2006), p. 12.

84 See subsection 5.4.2 above.

85 Art. 13(1) IPR Enforcement Directive 2004/48.

86 Art. 4 Product Liability Directive 85/374.

applies.[87] That also applies in relation to the Competition Damages Directive, which establishes a right to compensation for anyone who has suffered harm "*caused by*" the infringements at issue.[88] This latter rule is essentially a codification of the Court's ruling in *Manfredi*, where it was held that a private party wishing to claim damages for a competition law infringement must demonstrate the existence of a "*causal relationship*" between the harm suffered and that infringement.[89]

A similar picture emerges when we look beyond the EU legislation assessed in part B of this study. For instance, much like the IPR Enforcement Directive, the Gender Equality Directive refers to the compensation of the loss or damage sustained by a person injured "*as a result of*" discrimination on grounds of sex.[90] In relation to the principle of Member State liability in damages for infringements of EU law the Court of Justice has furthermore long made it clear that a causality requirement applies, holding that a "*direct causal link*" must be demonstrated between the damage and the infringement.[91] It has called this an "*indispensable condition governing the right to compensation*".[92] In most national jurisdictions a causality requirement also applies in relation to action for damages, even if there can be considerable differences in what is understood precisely by this concept.[93] All in all it therefore seems safe to say that causation is inherent in damages liability.[94]

267. Providing for a causality requirement is one thing however, clarifying how the concept of causality is to be *understood precisely* can be quite another matter. In practice there are many acts or events that can 'break the causality

87 A causality requirement is inherent in these directives' provisions on damages, i.e. Art. 2(c) Public Sector Remedies Directive 89/665 and Art. 2(d) Utilities Remedies Directive 92/13, which speak of the "*award of damages to persons injured by the infringement*". See also Art. 2(7) Utilities Remedies Directive 92/13 on the compensation of bidding costs, discussed in para. 85 above, where it is stipulated that the applicant must demonstrate that its chance of winning the contract in question was adversely affected "*as a consequence*" of the infringement. See also CoJ case C-568/08, *Combinatie Spijker*, para. 87, where reference is made to the requirement of a "*direct causal link*".

88 See Art. 1(1) and 1(2) Competition Damages Directive. See also its Art. 2(2), pursuant to which a private party that has suffered harm must be placed in a position in which that party would have been had the infringement not been committed.

89 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 61. See further para. 214 above.

90 Art. 18 Gender Equality Directive 2006/54.

91 E.g. CoJ 5 joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 51; CoJ case C-118/08, *Transportes Urbanos*, para. 30. As regards the use of the word 'direct' in this connection, although some uncertainty exists, it is not immediately evident that this is meant to point to any significant difference in substance as compared to the causality test applied in the abovementioned EU legislation or the *Manfredi* judgment. Note that in CoJ case C-557/12, *Kone*, which builds on *Manfredi*, the CoJ refers to the existence of "*a direct causal link*" (see para. 33).

92 CoJ case C-420/11, *Leth*, para. 45.

93 See further e.g. Study Ashurst (2004), pp. 72-74; Van Dam (2006), pp. 270-279; Kellner (2009), pp. 142-14.

94 Cf. Durant (2008), p. 47.

chain' and can thus prevent (full) liability from being incurred. Just to give one example, it may not always be easy to prove that the existence of an anti-competitive cartel agreement within the meaning of Article 101(1) TFEU caused damage to a particular party that purchased the products to which the cartel relates. An applicant having suffered harm may need to convincingly address a number of issues when seeking to demonstrate that the cartel caused or contributed to the harm, and not certain other factors, such as the acts or omissions of third parties (subcontractors, intermediaries, etc.) or the own behaviour of the applicant. This can be challenging especially where the commercial and economic context is complex.

It can therefore be of particular importance how, legally speaking, the concept of causation is understood precisely. Yet only the Product Liability Directive goes some way in specifying this, and then only on one particular point. This directive provides for the possibility of the liability to be reduced or even disallowed entirely where there is contributory negligence on the side of the party claiming damages (while excluding this where the damage is also caused by a third party).[95] Apart from this, none of the legal acts considered in part B specifies in any detail what is meant precisely by the requirement of causality. In the recitals of the Competition Damages Directive it is stated that this is a matter not dealt with in that directive, implying that it is in principle left to national law.[96]

268. Also the Court of Justice seems mostly to take something of a 'hands-off' approach in respect of causality. For instance, rulings that go into detail on the requirement of causality that applies in the context of the principle of *Member State liability* are rather scarce.[97] In this connection the Court has at times applied a requirement of reasonable diligence on the side of the injured party in limiting the extent of the loss or damage, whereby a failure to do so can break the causality chain in whole or in part.[98] This entails a particular form of contributory negligence, whereby the negligence of the applicant does not relate to the occurrence of the act leading to liability being incurred, but rather to the extent of the damage resulting from that act. The Court's finding that this requirement of due diligence on the side of the applicant constitutes a general principle common to the legal systems of

95 Art. 8 Product Liability Directive 85/374. The issue of contributory negligence is not always assessed in the context of causality. But these two issues seem in any case closely connected. Indeed, this connection is such that it has been held that it is impossible to divorce any theory of contributory negligence from the concept of causation. See Van Dam (2006), p. 268.

96 Recital 11 Competition Damages Directive.

97 On the principle of Member State liability generally, see para. 59 above.

98 E.g. CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 84-85; CoJ case C-445/06, *Danske Slagterier*, para. 61.

the Member States suggests that it can be applied more broadly.[99] It can therefore probably also be invoked in relation to the EU legislation discussed in part B. Other than that, the Court has however restricted itself to clarifying that the applicable test is whether the damage claimed "*flows sufficiently directly from the breach of [EU] law to render the [Member] State liable to make it good*".[100] This provides only limited further precision as to the precise meaning of the concept of causality.[101] Indeed, it has been observed that, while the Court tends to maintain control over the other conditions that apply in this regard, it seems to have 'decentralised' this aspect of the Member State liability test by typically leaving it to the national courts to determine the question of causation.[102]

Furthermore in *Manfredi*, which concerned the liability of *private parties* for infringements of competition law, the Court held that – in the absence of EU rules governing this matter – it is for the domestic legal system of each Member State to prescribe the detailed rules on the application of the concept of a causal relationship, provided that the principles of equivalence and effective are observed.[103] In other words, while in this case the *existence* of a causality requirement was established as a matter of EU law, the precise *meaning* of this concept was left to be determined, in principle, in accordance with the applicable rules of national law. Subsequent case law seems to indicate that the standard set by national law will only be deemed to be incompatible with EU law in rather 'extreme' cases, such as where in certain circumstances the causal link is by definition considered to have been broken under that law, without allowing for any assessment of the circumstances of the case at hand.[104] Considering the general lack of precision on this subject-matter in the abovementioned EU legislation, it therefore seems not unlikely that the Court will take a comparable stance where questions of causality under that legislation are concerned.

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99 This principle has also been applied in relation to the non-contractual liability of the EU. See e.g. CoJ case 145/83, *Adams*, para 53-54; CoJ joined cases C-104/89 and C-37/90, *Mulder*, para. 26 and 33; GC case T-437/10, *Gap SA granen & producten*, para. 81. Cf. e.g. also Study Expert group on European contract law (2011) (Art. 166-167).

100 CoJ case C-446/04, *Test Claimants*, para. 218. See also CoJ case C-319/96, *Brinkmann*, para. 29. In this respect the CoJ's case law on the non-contractual liability of the EU, with which the case law on Member State has converged, as discussed in para. 59 above, occasionally offers more clarification. For a discussion, see Gutman (2011), pp. 725-734. See also Durant (2008), pp. 56-79.

101 Even if this is rather broadly formulated as well, more helpful may be the following description that the requirement of causality has been met where "*the damage arises directly from the conduct of the wrongdoer and does not depend on the intervention of other causes, whether positive or negative. That means that the cause may not be too remote or too broad and unspecific. It also means that intervening causes, such as contributory negligence of the applicant, may break the chain of causation*". See Van Gerven (2004b), p. 238.

102 Biondi & Farley (2009), p. 55. See e.g. also Lock (2012), pp. 1697-1698.

103 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 64. See further para. 214 above.

104 CoJ case C-557/12, *Kone*, para. 33.

269. It follows that under the secondary EU law at issue, as well as in EU law more generally, the concept of causality tends to be somewhat of a black box. This is not the same as saying that it has no meaning whatsoever however. Given that the aforementioned EU legislation expressly provides for such a requirement it cannot simply be disregarded. That being so, arguably the *condition sine qua non* should be seen as a minimum standard.[105] Yet apart from that, and its importance in practice notwithstanding, it may well be that there is actually only *limited need and scope* for providing further details as regards the causality test at EU legislative level. For, while submitting the required proof that the applicable causality requirement has been met can be problematic in practice and 'decentralising' this aspect to the national level inevitably leads to some divergences, to date there generally seems to be no clear evidence that the *legal notion* of causality is problematic from an EU law viewpoint. That is to say, it appears not to constitute a serious and structural bar to successfully bringing actions for damages against a private party that infringed EU law where the other applicable conditions have been met, nor is it clear that the said divergences substantially affect trade or distort competition.[106]

Moreover the concept of causality might generally not lend itself well to being further pinned down by means of legislative measures. An assessment of whether the condition of causality has been met may be principally legal in nature, but it is often particularly closely connected to the facts of the case at hand. The broad range of circumstances that may be of relevance in a particular case are often difficult to 'catch' in a general rule. It therefore seems legitimate – if not inevitable – to leave the national courts some discretion in this respect so as to allow for a proper case-by-case assessment, as generally tends to be the case under the domestic legal systems of the Member States.[107] Where concerns from an EU law perspective nonetheless emerge, it would appear that they can normally be addressed by either reasoning on the basis of the objective and the effectiveness of the EU legislation at issue (and thus possibly the conclusion that the inclusion of a causality requirement is to imply a *condition sine qua non* test as a minimum) or else the principles of equivalence, effectiveness and effective judicial protection.[108]

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105 Cf. Opinion AG Kokott case C-557/12, *Kone*, para. 33-36

106 Cf. e.g. Study European observatory on counterfeiting and piracy (undated-d), p. 4, where difficulties as regards the legal notion of causality were not singled out as a particular practical difficulty in intellectual property cases. Nor was further action on this point considered necessary in the field of competition law. See C Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 77. In respect of Member State liability, cf. Biondi & Farley (2009), pp. 55-57; Lock (2012), pp. 1697-1699.

107 Van Dam (2006), p. 266 (regarding the French, German and English legal system); Kadner Graziono & Oertel (2008), p. 465 (regarding the German legal family); Tichý (2008), p. 533 (regarding the Eastern-European legal family); Troiano (2008), p. 413 (regarding the Romanic legal family). See also Study Ashurst (2004), p. 73.

108 On these three principles, see sections 2.2 (equivalence and effectiveness) and 2.3 (effective judicial protection) above.

### *7.1.4. Quantification of damages*

270. In order to be compensable the harm suffered as a consequence of the infringement of EU law at issue must be quantifiable, i.e. assessable in monetary terms.[109] The issue of quantification of the extent of the damage is therefore of considerable practical importance. But private parties harmed by infringements of rules of substantive EU law at issue often encounter difficulties in substantiating, to the satisfaction of the competent national court, the full extent of the harm that they claim to have suffered.[110] Indeed, this issue is among the *key bottlenecks* for successfully bringing actions for damages. The practical use made of this remedy is therefore likely to increase significantly if the applicable EU rules would somehow help to reduce the burden on the applicant in this regard.

271. The *Competition Damages Directive*, which declares this to be a "*substantial barrier*" for effectively bringing actions for damages,[111] is noteworthy for containing a range of measures regarding the quantification of the harm.[112] These measures relate to the standard and burden of proof that apply in this regard, the empowerment of national courts to estimate the extent of the damage, a rebuttable presumption that harm is caused and assistance by the competent public enforcement authorities. In addition in 2013 the Commission issued a guidance document to assist the parties to the proceedings and the courts seised when they are being confronted with quantification issues in a competition law context.[113] These measures can certainly be helpful for an applicant trying to quantify the harm suffered, particularly when they are considered collectively and in combination with the measures on the disclosure of evidence for which this directive also provides.[114]

Yet on closer inspection these measures may be somewhat less impressive than what might appear at first sight. For instance, the rule that the burden and standard of proof that apply in this respect may not render the right to damages practically impossible or excessively difficult is no more than a restatement of the principle of effectiveness that applies anyway under the Court's case law.[115] The obligation for the Member States to empower the courts to estimate the harm is further significantly qualified by the fact that – different from what the Commission had proposed – it applies

109 Cf. e.g. Rebhahn (2008), p. 206; Vaquer (2008), p. 30.

110 See e.g. Study Herbert Smith (1996), p. 18; Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 15; Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 18.

111 Recital 41 Competition Damages Directive.

112 Art. 17 Competition Damages Directive. See further para. 231 above.

113 See in particular Commission, Practical guide on quantifying harm in actions for damages based on breaches of Article 101 and 102 TFEU, SWD(2013) 205.

114 On these disclosure measures, see further subsections 6.3.3 above and 8.2.2 below.

115 On the principle of effectiveness, see subsection 2.2.2 above.

only where it is established that the applicant suffered harm and where a precise quantification thereof is practically impossible or excessively difficult. Most Member States moreover already provided for such a power in one form or another. The directive's rebuttable presumption that harm is caused in addition only applies in relation to cartels and it leaves open the key question to whom that harm was caused. In fact, as it does not address the extent of the harm, this is not a rule of quantification properly speaking. Finally, the possibility for national competition authorities to assist the courts may be an interesting innovation, its effects in practice will however largely depend on the assertiveness and available resources of the authorities concerned. This is after all a possibility and not an obligation, subject to a request by the court in question.

272. As regards the *other fields than competition law* at issue here, it must be observed that neither the Procurement Remedies Directives, nor the IPR Enforcement Directive, nor the Product Liability Directive contain any specific provision that seeks to address the quantification-related difficulties that applicants experience also in these fields. This is not for lack of trying on the side of the Commission however. Take for example the Commission's proposal for the Utilities Remedies Directive, dating from 1990. There it was suggested setting the compensation for bidding costs at 1% of the value of the contract put out to tender, by means of "*a limited step designed to ensure that in all Member States claims for damages are a realistic possibility*".[116] This part of the proposal was already limited, in that it was not concerned with the issue of compensation for lost profits. The Commission considered that "*[a] high level of harmonisation of the quantification of damages is an unrealistic objective at this stage*".[117] Even this was seen as too far-going however. The European Parliament (which then only had a consultative role in the legislative process) insisted that these costs had to be determined on a case-by-case basis. The Commission therefore decided to drop this suggestion from its proposal.

Over a decade later, in 2003, the Commission made a comparable suggestion in its proposal for the IPR Enforcement Directive. There it proposed making provision for the payment of damages consisting of a lump sum equal to twice the royalties or fees that would have been due had proper authorisation been requested to the rightholder instead of the illegal use.[118]

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116 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 13 and 19. See further para. 85 above. The Commission also proposed setting at the same level the penalty payment for which Member States can make provision under Art. 2(1)(c) Utilities Remedies Directive 92/13 by means of an alternative for interim measures or the order to set aside decisions. Also this suggestion was rejected by the EU legislature however. See further para. 82 above.

117 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 13 and 19.

118 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 40 (Art. 17(1)). See further para. 134 and 135 above.

The EU legislature however considerably watered down this aspect of the proposal. This resulted in the current (optional) provision on lump sum payments, which refers to the amount of the royalties or fees only by means of an example and which does not entail a doubling of that amount.[119] Worth mentioning is also another rule that the Commission included in this proposal, meant specifically to enlighten the burden on the applicant wishing to claim the 'unfair profits' made by the infringer. It concerned a rule of evidence that the applicant would only have to prove the amount of the gross income achieved by the defendant, after which it would be for the latter to provide evidence of its deductible expenses and profits attributable to factors other than the protected object.[120] But the EU legislature struck out also this aspect of the Commission's proposal.

273. The foregoing underlines the Commission's awareness of the difficulties that applicants experience when seeking to quantify the harm suffered. Yet it also illustrates the challenges encountered when trying to address them through EU legislative measures. The overall picture that thus emerges is that the EU legislature is *generally rather averse* of rules that aim to tackle these difficulties in a straightforward, but (therefore) also in a rather rigid and inaccurate manner, namely by providing for some kind of predetermined and simplified standard or mechanism to calculate what is presumed to be the harm caused to an individual applicant. The Competition Damages Directive suggests that, subject to certain limitations, rules allowing for somewhat more flexibility – such as those providing for certain rebuttable presumptions or estimates by the courts – may stand a better chance of being adopted. This is probably due to the fact that overly rigid rules can lead to overcompensation, which is generally seen as something that is to be avoided both at EU and at national level.[121]

274. In this light it is somewhat ironic that the only instance under consideration where the EU legislature did adopt a rule involving the rigid *ex ante* quantification of damages is the possibility of setting a *financial ceiling* (of € 70 million) for the amount of damages that may be due under the Product Liability Directive.[122] This thus entails what is essentially a 'negative' rule, i.e. a rule that, rather than helping the applicant in a 'positive' manner, aims instead to protect the defendant by setting an absolute limit for the amount of damages due. In the recitals of this directive it is explained that in the legal traditions of most Member States it is inappropriate to set such an

119 Art. 13(1)(b) IPR Enforcement Directive 2004/48.

120 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 40 (Art. 17(2)). See further para. 134 above.

121 See further subsection 7.1.5 below.

122 Art. 16(1) Product Liability Directive 85/374. See e.g. also Art. 30(2) of Annex I to Rail Passengers' Rights Regulation 1371/2007.

absolute ceiling, but that these traditions differ. It was therefore considered to be "*possible to derogate from the principle of unlimited liability*".[123]

This ceiling should probably be seen in light of the fact that the Product Liability Directive provides for no-fault ('strict') liability. The 'stricter' the liability in damages, the more justification there arguably is for moderating its effects by capping the amount of damages to be paid. Conversely, setting such an absolute ceiling may well be seen as inappropriate in cases of less 'strict', fault-based liability.[124] That applies all the more so given that in other fields of EU law the Court of Justice has generally shown itself to be critical of absolute ceilings, at least when they are established under national law.[125]

### *7.1.5. Qualification of damages and joint and several liability*

275. Whereas the EU legislature can thus be said to be generally somewhat hesitant as to the adoption of rules on the quantification, the picture in relation to the qualification of damages is quite different. The issue here is not how much damage is to be compensated, but rather *which type* of damage is compensable under the applicable legislation. In respect of this latter issue it did prove possible to adopt EU rules that provide for a degree of precision, even if the Commission not always succeeded in having its more ambitious proposals adopted and the rules in question tend to differ considerably between them.

276. Each of the four directives under consideration here is characterised by a distinct approach. First, the approach set out in the Procurement Remedies Directives can be best described as *unspecific*. The Commission's 1987 proposal for the Public Sector Remedies Directive was comparatively ambitious, in that it specified that the compensation due should include the costs of unnecessary studies, foregone profits and lost opportunities.[126] However this aspect of the proposal was left out from the text finally adopted. This directive now does not contain any further qualification of the term 'damage'. The same applies for its sibling, the Utilities Remedies Directive. While this latter directive does contain a specific arrangement for the compensation of bidding costs,[127] also in this case the more sensitive – and arguably also more important – issue of compensation for lost profits is not addressed.

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123 Recital 17 Product Liability Directive 85/374.

124 See however Art. 35a Credit Rating Agency Regulation 1060/2009, which does not cap the civil liability of infringers, but nonetheless allows limiting it in advance, provided that the limitation is reasonable and proportionate and allowed under the applicable national law.

125 E.g. CoJ case 14/83, *Von Colsen*, para. 24; CoJ case C271/91, *Marshall*, para. 34; CoJ case C-180/95, *Draehmpaehl*, para. 40. See also Art. 18 Gender Equality Directive 2006/54.

126 Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134, p. 7 (Art. 1(3)). See further para. 84 above.

127 Art. 2(7) Utilities Remedies Directive 92/13. See further para. 85 above.

When proposing this latter arrangement in 1990, the Commission had deliberately not included a rule on the compensation of lost profits, in anticipation of difficulties in the legislative process.[128]

Second, the Product Liability Directive's rules on the qualification of damages are rather *selective.* Here two heads of damages are specified, namely damage caused by death or personal injuries and damage to property.[129] This directive does not provide any further details on what is understood precisely by these terms. It further leaves the issue of non-material damage expressly to be settled in accordance with national law. This is in line with what the Commission had originally proposed (even if, at the suggestion of the European Parliament, it later suggested bringing also this latter head of damage within the directive' scope).

Third, the position under the IPR Enforcement Directive in respect of the qualification of damages is rather *mixed*. The main rule laid down in this directive is that the damages must be "*appropriate to the actual prejudice suffered*".[130] This provision then continues by stipulating that, when setting the damages, account is to be taken of "*all appropriate aspects, such as the negative economic consequences, including lost profits which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement*".[131] Yet the directive also foresees the possibility of a lump sum approach as an alternative to the aforementioned rule.[132] Thus on the one hand this directive mentions several elements that can be relevant to the setting of damages, while on the other hand it does so in a rather lose and non-committal manner.

Lastly, the Competition Damages Directive is *relatively detailed* as regards the available heads of damages. It expressly seeks to ensure that 'full compensation' can be awarded, stipulating that this means placing the private party having suffered harm in the position in which that party would have been had the infringement in question not been committed.[133] It further specifies that this therefore covers the right to compensation for actual harm and loss of profit, plus payment of interest. With respect to the interest due the directive leaves the Member States a degree of flexibility however.[134]

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128 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 13 and 19.

129 Art. 9 Product Liability Directive 85/374. See further para. 177 above.

130 Art. 13(1)(a) IPR Enforcement Directive 2004/48. See further para. 135 above.

131 Cf. Art. 68 Patent Court Agreement, where a similar rule is provided for, while adding however that, to the extent possible, the injured party must be placed in the position it would have been in if no infringement had taken place and that the infringer should not benefit from the infringement. On this agreement, see further para. 108 above.

132 Art. 13(1)(b) IPR Enforcement Directive 2004/48. See further para. 135 above and para. 279 below. On an optional basis, Art. 13(2) further allows Member States to provide for the recovery of profits or the payment of (possibly pre-established) damages in cases of infringements where the infringer did not knowingly or with reasonable grounds to know engaged in infringing activity.

133 Art. 2 Competition Damages Directive. See further para. 230 above.

134 See recital 12 Competition Damages Directive.

277. Looking beyond these legislative provisions, the case law of the Court of Justice suggests that, as a general rule, EU law requires that any loss or damage caused by an infringement of EU law can be *compensated in full*. This follows for instance from *Veedfald*, a case relating to the Product Liability Directive.[135] The Court of Justice clarified here that, although it is for national law to determine the precise content thereof, under the abovementioned heads of damages for which this directive provides "*full and proper compensation*" must be available. This is broadly in line with earlier rulings in other fields of EU law. Most notably in *Marshall*, a case relating to the Gender Equality Directive, the Court held that financial compensation must be "*adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules*".[136] Interestingly the situation may not be fundamentally different where no rules of secondary EU law on damages liability apply. This was the case in the 2006 *Manfredi* ruling relating to actions for damages for infringements of EU competition law.[137] Here the Court held that, in the absence of specific EU rules (given that the Competition Damages Directive had at that time not yet been enacted), it is in principle for national law to set the criteria for determining the extent of the damages. It added however that pursuant to the principle of effectiveness and the right of any individual to seek compensation for loss caused by infringements of the competition rules such compensation must cover actual loss, loss of profit as well as interest. This thus seems to boil down to a requirement of full compensation; as such it has subsequently been codified in the abovementioned provisions of the Competition Damages Directive.[138]

It further seems likely that, unless EU law expressly provides otherwise, full compensation in principle also covers *non-material damage*,[139] such as pain and suffering.[140] It has been said to be an "*almost universally accepted principle*" that, at least where natural persons are concerned, compensable harm may in principle also include damage which goes beyond mere pecu-

135 CoJ case C-203/99, *Veedfald*, para. 25-28. See further para. 178 above. In Opinion AG Ruiz-Jarabo Colomer case C-203/99, *Veedfald*, it had been argued that this term 'damage' is an autonomous concept of EU law, but in its ruling the CoJ did not touch upon this point.

136 CoJ case C271/91, *Marshall*, para. 26. See also e.g. CoJ case C-63/01, *Evans*, para. 68, where a similar line was followed in relation to (what is now) Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, OJ 2010, L 263/11 ('Motor Vehicle Insurance Directive').

137 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 92-97. See further para. 214 above.

138 Cf. recital 12 Competition Damages Directive. See also Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 4 and 13. See further para. 230 above.

139 Generally speaking, the term 'non-material damage' can be understood as referring to damage that is not assessable in monetary terms on the basis of any standard financial yardstick and that affects personal feelings, such as pain and suffering or loss of reputation. See Vaquer (2008), p. 39.

140 Cf. Reich (2010), p. 149.

niary loss.[141] Pursuant to the express wording to this effect of the Product Liability Directive in *Veedfald* it was found that this matter is to be determined by national law.[142] By contrast in *Leitner*, a case relating to the Package Travel Directive, which does not touch upon this issue expressly,[143] the Court held that the term 'damage' as used in that directive implied that it must be possible for non-material damage to be compensated.[144] This latter ruling is in line not only with what, despite considerable variations, generally applies under the laws of the Member States.[145] It is also consistent with case law relating to other instruments of EU law, such as Article 340 TFEU on the non-contractual liability of the Union,[146] the Motor Vehicle Insurance Directive[147] and the Air Passengers' Rights Regulation.[148] The Court of Justice has also held that, in international law, the ordinary meaning of the term 'damage' includes material as well as non-material damage.[149] In this light the Commission may therefore well be correct in considering that non-material damage can also be compensable under the Competition Damages Directive.[150]

278. By means of a last comment, it is noticeable that the two legal acts under consideration that specifically concentrate on damages liability, i.e. the Product Liability Directive and the Competition Damages Directive, in a sense take the general objective of full compensation a step further. Both directives provide that, where two or more undertakings are liable for the same damage, these parties are *jointly and severally liable* for that damage.[151] This appears to be in line with the general rule provided for in the national laws of the Member States where non-contractual liability (tort) is concerned.[152] The Competition Damages Directive specifies that this means that the co-infringing undertakings are bound to compensate the damage in full

141 Opinion AG Wahl case C-371/12, *Petillo*, para. 39.
142 CoJ case C-203/99, *Veedfald*, para. 33.
143 Package Travel Directive 90/314. See further para. 185 above.
144 CoJ case C-168/00, *Leitner*, para. 21-23.
145 See e.g. Van Gerven, Lever & Larouche (2000), p. 140; Opinion AG Tizzano case C-168/00, *Leitner*, para. 30 and 40-42; Study Expert group on European contract law (2011) (Art. 2(12)); Opinion AG Wahl case C-371/12, *Petillo*, para. 40; Study European observatory on counterfeiting and piracy (undated-d), p. 4.
146 E.g. CoJ case C-308/87, *Grifoni*, para. 37. In the context of EU personnel disputes, see also e.g. CoJ joined cases 169/83 and 136/84, *Leussink*, para. 18-20; CoJ case C-343/87, *Culin*, para. 29. See further Oliphant (2008), pp. 264-270; Basedow (2010a), p. 459.
147 Motor Vehicle Insurance Directive 2009/103. See CoJ case C-22/12, *Haasová*, para. 39-50; CoJ case C-371/12, *Petillo*, para. 35. See also EFTA Court case E-8/07, *Nguyen*, para. 26.
148 Air Passengers' Rights Regulation 261/2004. See CoJ case C-83/10, *Sousa Rodríguez*, para. 47.
149 CoJ case C-63/09, *Walz*, para. 27-29. See also Opinion AG Tizzano case C-168/00, *Leitner*, para. 39.
150 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 13.
151 Art. 5 Product Liability Directive 85/375; Art. 11 Competition Damages Directive. See further para. 176 and 238 above respectively.
152 See e.g. Vrcek (2010), p. 283.

and that the injured party has the right to require full compensation from any of them. The same essentially follows from the recitals of the Product Liability Directive.[153]

Also on two other points the regime on joint and several liability laid down in the Competition Damages Directive is more elaborate than the one set out in the Product Liability Directive. To begin with, subject to certain conditions, the former directive *limits* the joint and several liability of three categories of undertakings, namely: (i) small and medium-sized enterprises; (ii) undertakings having received leniency in the context of public enforcement proceedings and (iii) undertakings that reached a consensual settlement with the injured private party.[154] The Product Liability Directive leaves the issue of *contribution* – i.e. the right for the undertaking that was held to be jointly and severally liable and thus had to compensate the damage in full to recover part of this damages award from the other co-infringing undertakings – to national law.[155] The Competition Damages Directive in contrast expressly provides for a right to recover a contribution. It specifies that the amount of that contribution is to be determined in light of the relative responsibility of the parties concerned for the damage caused. But also under this latter directive it is left to national law to establish how this is to be determined precisely.[156]

### *7.1.6. Punitive damages and other damages going beyond compensation*

279. A last issue to be assessed in connection with actions for damages is the possibility of providing for damages awards that go beyond the mere compensation of the harm suffered, in particular punitive damages.[157] In this respect it should be underlined at the outset that none of the legal acts considered in part B make provision for the award of this type of damages.

That is not to say however that no *discussions* have taken place on this matter. As was noted above, the Commission's 2003 proposal for the IPR Enforcement Directive included a provision that set the damages due at lump sum of *twice* the royalties or fees that would have been due had the infringer asked authorisation from the rightholder.[158] The Commission's

153 Recital 5 Product Liability Directive 85/375.

154 Art. 19 Competition Damages Directive. See also para. 245 above.

155 Most national legal systems provide for such a right of contribution. See Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 516.

156 Recital 33 Competition Damages Directive.

157 For the present purposes the term 'punitive damages' also covers what are sometimes called 'exemplary damages'. On punitive damages, see also para. 443 below. The 'flipside', as it were, of the issue discussed above is the award of *nominal or symbolic* damages. The award of the latter damages does generally not seem excluded under EU law, but, as was held in CoJ case 26/74, *Roquette frères*, para. 24, *"[t]he fact that the applicant has reduced its claim to nominal damages does not relieve it of providing conclusive proof of the damages suffered"*. See further Vaquer (2008), pp. 26-28.

158 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 40 (Art. 17(1)). See further para. 134 and 272 above.

1996 green paper on public procurement further contained a suggestion to make provision for "*liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered*".[159] And in the Commission's 2005 green paper on actions for damages for infringements of EU competition law the option of *doubling the damages* in certain cases was raised.[160] Each of these suggestions was met with mostly negative responses however. Therefore, while the final text of the IPR Enforcement Directive does provide for an (optional) provision on damages awards in the form of lump sums, unlike the Commission's proposal, there is no longer a mention of the doubling of the sum in question.[161] This directive's recitals moreover emphasise that here the aim is not to introduce an obligation to provide for punitive damages.[162] As to the suggestions made in relation to public procurement and competition law, in both instances the Commission did not further pursue them, in light of the negative reactions from interested parties.[163] Consequently, unlike the 2005 green paper, the 2008 white paper on competition damages stressed that damages awards primary serve a compensatory function, rather than a punitive one.[164] The same view underlies the Commission proposal for the Competition Damages Directive.[165]

Therefore *virtual consensus* seems to have emerged that punitive damages are not to be provided for by EU law.[166] It can thus be said that, "*[s]een from the perspective of [EU] law, compensation for harm suffered as a result of the infringement of [EU] law should be appropriate to the harm suffered*".[167]

280. It is important to note however that the foregoing does *not* mean that punitive damages are *necessarily precluded* under EU law. The IPR Enforcement Directive's provision on lump sums, referred to above, includes for

159 Commission, Green paper on public procurement in the EU, COM(96) 583, p. 15.
160 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 7.
161 Art. 13(1)(b) IPR Enforcement Directive. See also its Art. 13(2). See para. 135 above.
162 Recital 26 IPR Enforcement Directive 2004/48.
163 See para. 86 and 219 above.
164 See para. 217 above.
165 See e.g. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 39-40, where it is said that increasing deterrence is not a primary objective of this initiative. Cf. Esteva Mosso (2013), p. 52.
166 Note however that in many national laws provision is made for the award of interest over the sum due during the period preceding the trial and the judgment, the effect of which has been compared to the availability of punitive damages. See Jones (2003), pp. 102-105.
167 Opinion AG Geelhoed joined cases C-295/04 to C-298/01, *Manfredi*, para. 69. In the context of EU non-contractual liability under Art. 340 TFEU, see e.g. GC case T-260/97, *Camar*, para. 97 and 101, where it is held that: "*[i]t is settled case law that compensation for loss in the context of non-contractual liability is intended so far as possible to provide restitution for the victims*" and that "*compensation for loss must in principle allow the applicant to be placed in the position, financially, in which it would have been if the [EU institution or body concerned] had refrained from the unlawful conduct which caused the loss*".

instance the words "*at least*".[168] That implies that Member States that wish to do so are not barred from making provision for further-going measures under national law.[169] In the Procurement Remedies Directives and the Product Liability Directive the issue of punitive damages is simply left unaddressed. This can be taken to mean that the question whether or not they are available is in principle left to national law. The Court of Justice, for its part, has so far not expressed any principled objections against the availability of punitive damages under national law. It rather assessed the matter primarily under the principle of equivalence.[170] Neither can it be said that there is consensus in the legal doctrine on the *per se* unacceptability of punitive damages as a matter of EU law.[171]

More generally, it would appear that the argument that punitive damages are to be rejected as being *incompatible with European legal tradition* (or, perhaps, tradition*s*), as is sometimes maintained in the context of the abovementioned discussions, is incorrect, or at least incomplete. In fact, there are EU legal acts that contain provisions that would appear to provide for compensation going beyond the harm actually suffered.[172] More significantly perhaps, when the Commission proposed in 2003 to provide in the Rome II Regulation on the law applicable to non-contractual obligations that punitive damages are against EU public policy, this was rejected by the EU legislature.[173] Besides, whilst it is true that in the legal systems of the Member States damages awards serve, first and foremost, to compensate a party for the injured suffered, this is by no means an absolute rule.[174] In many nation-

168 Art. 13(1)(b) IPR Enforcement Directive 2004/48.

169 Similarly the statement in its recital 26 that the IPR Enforcement Directive 2004/48 does not aim to introduce an obligation to provide for punitive damages does not exclude that Member States do so under national law.

170 CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 99. See also CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 90; CoJ case C-174/12, *Hirmann*, para. 40. On the principle of equivalence, see subsection 2.2.1 above.

171 Cf. e.g. Van Gerven (2003b), p. 92.

172 See e.g. Art. 18(2) Plant Variety Rights Implementing Regulation 1768/1995. Here it is stipulated that compensation equal to *four times* the normal license fee can be due. It is not explicitly stated that this arrangement aims to punish and deter infringers, but both the high amount and the limitation to cases of repeated and intentional infringements appear to point in that direction. Cf. also Art. 2(6) Directive 2011/7/EU on combating late payment in commercial transactions, OJ 2011, L 48/1, where provision is made for a legal interest rate for late payment which is at least *eight percentage points* above the rate applied by the European Central Bank.

173 Commission, Proposal for Rome II Regulation 864/2007, COM(2003) 427, p. 40 (Art. 24). Recital 32 of Rome II Regulation 864/2007 provides in essence only that *excessive* punitive damages *could be* held to be contrary to the public policy *of the forum*, depending on the legal order of the Member State concerned.

174 Cf. e.g. Van Gerven, Lever & Larouche (2000), p. 740; Study Ashurst (2004), p. 80; Study View (2004), p. 7; Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 68; Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 417; Komninos (2008), pp. 160 and 211; Kellner (2009), p. 138; Milutinovic (2010), p. 119; Hazelhorst (2010), p. 767.

al jurisdictions it is acknowledged that, to a greater of lesser extent, damages liability can also fulfil a (secondary) function in deterring and punishing infringers.[175] A significant number of Member States actually have provisions in place that allow for the award of damages that are, or at least can be, considered punitive in nature.[176]

281. It follows from the foregoing that EU law is largely neutral in respect of punitive damages; they are generally not required as a matter of EU law, but neither are they necessarily precluded. That said, there appears to be a more recent trend towards taking a *more restrictive* stance as a matter of EU law. Most notably the 2014 Competition Damages Directive expressly states that "*[f]ull compensation under this directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*".[177] This provision, which did not feature in the Commission's proposal, appears to have been inserted mainly at the insistence of the European Parliament.[178] Similarly, in line with an earlier suggestion to this effect from the side of the European Parliament,[179] the Commission's 2013 Collective Redress Recommendation states that "*punitive damages […] should be prohibited*".[180] The 2012 Patent Court Agreement also provides that the damages to be awarded in the cases covered by the rules in question "*shall not be punitive*".[181]

Thus, where earlier discussions were mainly concerned with opposition against *requiring* the availability of such damages at EU level, which led to the largely neutral position referred to above, there now appears to be a trend (or at least some first steps in that direction) towards actively *prohibiting* them under EU law. This trend can probably be ascribed to the fact that punitive damages are often associated with the 'litigation culture', which is said to exist in the United States and which many seek to avoid in the EU.[182]

282. A last – related yet distinct – observation is that, even apart from the aforementioned virtual consensus and the said more recent trend, in several respects scope for discussion remains. That is in large part related to the fact that there is not always a uniform understanding of what is meant precisely by the term 'punitive damages'. One understanding is that whether or not

175 Cf. Van Gerven, Lever & Larouche (2000), pp. 25-26, 69 and 741; Van Dam (2006), p. 12 and 302-303; Kelliher (2008), pp. 10-11.

176 Namely the UK, Ireland, France, Cyprus, Slovenia, Bulgaria and Austria. See para. 137 and 219 above. See also Kelliher (2008), pp. 10-11.

177 Art. 1(3) Competition Damages Directive.

178 See para. 230 above.

179 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021.

180 Point 31 Collective Redress Recommendation 2013/396. See further para. 190 above.

181 Art. 68(2) Patent Court Agreement. On this agreement, see further para. 108 above. A similar rule had already been included in Commission, Proposal for a regulation on the Community patent, COM(2000) 412, p. 56 (Art. 44(2)).

182 See further para. 460 below.

damages awards are to be qualified as 'punitive' is to be determined on the basis of their *objective*, i.e. whether or not the aim is to punish and deter infringers. This view finds broad support.[183] When understood in such an 'objective-based' manner, there indeed appears to be a virtual consensus as to the undesirability of punitive damages under EU law. However others appear to have a somewhat different understanding of this term. The emphasis is then not so much on the objective pursued, but rather on the *effects* in practice of the damages awards. On this latter understanding the key issue is whether or not the amount awarded is greater than the damage actually suffered by the party receiving it. This distinction can be of particular relevance whether matters of quantification and qualification of the harm are concerned.[184]

One example of a situation where the relevance of the above distinction can come to light relates to the possibility of setting damages as a pre-determined lump sum. As has been seen, this can be done for instance either as a percentage of the value of the public contract at issue in public procurement cases or in function of the fees or royalties that would have been due had authorisation been requested in intellectual property cases. In competition cases one could think of a certain percentage of the total price charged, which is presumed to be the 'overcharge' caused by the cartel.[185] Another example relates to the possibility of providing for the award of gain-based damages (disgorgement). Put briefly, the latter are damages awarded on the basis of the profit made by the defendant as a result of the infringement. These 'unfair profits' are an element that can be taken into account in various Member States, especially for intellectual property-related infringements but sometimes also in the field of competition law.[186] In respect of these two fields of law the Commission has suggested establishing or further elaborating this possibility as a matter of EU law.[187] When the focus is

183 See e.g. Study Ashurst (2004), p. 80; Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 36; Zippro (2009b), p. 432; Milutinovic (2010), p. 119; Hazelhorst (2010), p. 764. See however also Kellner (2008), p. 580.

184 On these matters generally, see subsections 7.1.4 and 7.2.5 above.

185 See the Hungarian competition law, referred to in para. 223 above. Note that this latter law establishes a (rebuttable) presumption of a *price increase* as a consequence of the competition law infringement, which is not necessarily the same as the amount of *harm* suffered.

186 As regards intellectual property law, see Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 14; Study European observatory on counterfeiting and piracy (undated-d), pp. 1-4. As regards competition law, see Study Ashurst (2004), p. 80; Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 427. See also Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, pp. 35-36; Milutinovic (2010), p. 118.

187 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 7; Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 8. Note that under Art. 13(1)(a) IPR Enforcement Directive 2004/48 unfair profits are already one the relevant aspects to be taken into account when setting the damages. See also subsection 8.2.6 below.

on the *objective* of the measure in question, it seems evident that none of the above measures are to be considered as punitive damages. These rules on lump sums are after all essentially meant to reduce the burden on the applicant in terms of the quantification of the harm, so as to make this remedy more effective. This leaves the main (compensatory) objective of the damages award itself unaffected. Likewise, the objective of gain-based damages is principally to compensate the injured party as well as to prevent the wrongdoer's unjust enrichment, rather than to punish the latter.[188] Providing for these kinds of measures could however be seen as objectionable if one focuses on their possible *effects*. For in all of the above cases, irrespective of the objective pursued, it cannot be excluded that in certain instances the sum paid will be higher than the harm actually suffered. Part of the objections expressed in relation to aforementioned Commission's proposal for the provision on lump sums in the IPR Enforcement Directive seem to be attributable to these differences in understanding as to what constitutes punitive damages.[189] Similarly, in relation to the possibility of taking account of unfair profits, it has been stressed that this should not entail a 'camouflaged' form of punitive damages.[190]

### *7.1.7. Summary*

283. Several contradictions and paradoxes exist in relation to EU legislation providing for liability in damages for infringements of EU law. On the one hand this remedy has been made available in all fields of law and has been regulated in most of the legislation under consideration in this study. It generally also receives considerable attention in discussions on the private enforcement of EU law. On the other hand the provisions in question often harmonise the relevant rules of national law only to a limited extent. The functioning in practice of this remedy moreover tends to leave much to be desired. The EU's approach on this matter can further vary considerably between the different fields of law at issue here. A common feature thats may go at least some way in explaining this mixed state of affairs is that attempts to adopt EU legislation on actions for damages are often rather controversial. They tend to be met with opposition, especially from the side of the Member States, but often also from stakeholders and legal scholars.

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188 See further e.g. Van Gerven, Lever & Larouche (2000), p. 872; Kelliher (2008), p. 11.

189 See e.g. Meier-Beck (2004), p. 122; Kur (2004), p. 827; Cohen & Mottet Haugaard (2010), pp. 376-377; Lakits-Josse (2011), p. 545. See Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 23, where the Commission held that this aspect of its proposal did not entail punitive damages, but rather a provision that "*allows for compensation based on an objective criterion while taking account of the expenses incurred by the right-holder*".

190 Meier-Beck (2004), p. 121; Till (2010), p. 136. See also Commission, Responses to the collective redress benchmark consultation, 2008, p. 7, where various stakeholders argue against providing for gain-based damages in a collective redress context on the grounds that this would entail a form of punitive damages.

More specifically, the issue of *fault* in relation to actions for damages is a particularly thorny one. The approaches followed in the directives assessed in part B differ substantially between them, ranging from something approaching an explicit fault requirement (IPR Enforcement Directive) to an express no-fault approach (Product Liability Directive). Where the legislation leaves this issue either entirely or mostly unaddressed (Public Procurement Directives, Competition Damages Directive), this can, depending on the case at hand, be construed by the Court of Justice as implying that the application of a fault requirement under national law is precluded. Considering that such requirements for liability in damages to be incurred are common in the laws of the Member States, this can be a far-going conclusion indeed. At the same time there are also reasons to believe that the practical consequences of these differing approaches should not be overstated. For it appears that whether provision is made for no-fault liability, an express fault requirement or some sort of intermediate solution, this is in itself not decisive for the degree of successful damages litigation under the directive in question. In practice the dividing line between these approaches may well be more fluent than what might appear at first sight. Turning to the issue of *causality*, the general lack of structural difficulties and debate that this issue raises as a matter of EU law is noticeable. It is generally provided, and widely accepted, that there must be a causal link between the infringement and the damage suffered for liability to be incurred. Even if this can certainly be an important issue in practice, the concept of causality remains somewhat of a 'black box' however, as it has hardly been fleshed out either by the EU legislature or by the EU judiciary. It seems that there are generally rather few objections – and indeed perhaps also few alternatives – to leaving national courts considerable discretion in deciding on a case-by-case basis whether or not this requirement has been met.

It has further been seen that the EU legislature can be quite averse of laying down specific rules that would assist a private party-applicant in *quantifying* the harm that he claims to have suffered as a consequence of an infringement of EU law, especially where these rules are rigid. This is the case despite the fact that this has frequently been identified as an important practical bottleneck for successfully bringing actions for damages and that therefore the Commission has over the years repeatedly proposed rules to alleviate this burden on the applicant. The EU's legislative involvement with the *qualification* of damages, i.e. the question which heads of damages are to be compensated, is in contrast typically more substantial. Although there are significant differences between them, most of the EU legal acts under consideration in this study address this matter with some degree of detail. Certainly when read in conjunction with the available case law, it appears that, as a general rule, EU law requires that any damage suffered as a consequence of an infringement thereof must be compensated in full. Subject to possible precisions or deviations in the EU legislation at issue, this will normally entail an obligation to compensate costs, lost profit and interest, as well as non-material damage. The Product Liability Directive and the

Competition Damages Directive further provide for the possibility of several infringers being held jointly and severally liable for the full damage incurred. This latter directive is alone in also providing for a right of contribution between the infringers concerned in such a case. Finally, although none of the EU legislative acts under consideration here provides for *punitive damages*, this tends to be another contentious topic. The dust now largely seems to have settled however. A virtual consensus has emerged that EU law should not provide for punitive damages. The position under EU law mostly seems neutral, meaning that these kinds of damages awards are neither required nor precluded. That said, more recently there appears to be a trend towards prohibiting them in secondary EU law. Discussions moreover continue, notably in relation to possible rules on lump sum awards and gain-based damages, in light of a sometimes (overly) broad understanding of the term 'punitive damages' that relates not to the objective of the damages award but to its possible effects in practice.

## 7.2. Actions for injunctions

This section is concerned with the second main '(substantive) remedy, namely injunctive relief. It is shown below that although this remedy tends to receive less attention than actions for damages in discussions on private enforcement of EU law, it is of considerable importance. The first subsection in the following contains a comparative overview and analysis of the provisions regarding injunctions laid down in the legislation discussed in part B of this study. Subsequently the functioning of this remedy in practice and the applicable conditions are considered. The final subsection discusses two specific issues, namely the possible implications of the foregoing for the private enforcement of competition law and the functioning of actions for injunctions in cross-border situations.

### *7.2.1. Comparative overview and general remarks*

284. Injunctive relief can essentially take two forms, namely the award of *prohibitive* and *mandatory* injunctions.[191] In its first form it entails an order by a court or an administrative authority for the defendant to *refrain from acting* in a particular manner that has already led or that would lead to an infringement of a legal norm. In its second form it refers to a court order to *act* in a certain manner. In that case the order thus entails a positive obligation on the defendant, as opposed to a negative one.

191 See e.g. Chisholm (1997), p. 73; Van Dam (2006), p. 301; Komninos (2008), p. 215; Peyer (undated), p. 7. Note however that in practice the distinction between both forms of injunctive need not be a fundamental one, as this can depend in part on the manner in which the applicant formulates its claim and the court seised formulates the operative part of its judgment.

Such prohibitive injunctions are a particularly important remedy for the enforcement of EU consumer protection law. This remedy is central to the Consumer Injunctions Directive, as its name already indicates.[192] Under this directive judicial or administrative authorities must be empowered to order "*the cessation or prohibition of any infringement*" of the substantive consumer protection rules covered by this legal act, set out in its annex.[193] Several other consumer protection directives also provide for this remedy.[194] For instance, under to the Unfair Terms Directive it must be possible to "*prevent the continued use*" of unfair terms in consumer contracts.[195] A comparable arrangement has been laid down in the Unfair Commercial Practices Directive in connection to the cessation or the prohibition of unfair commercial practices.[196]

EU rules on prohibitive injunctions can further be found in EU intellectual property law. The IPR Enforcement Directive stipulates that it must be possible for the competent national courts to issue interlocutory as well as 'permanent' injunctions.[197] These interlocutory injunctions serve to prevent an imminent infringement of an intellectual property right, to provisionally forbid the continuation of an alleged infringement or to make such continuation subject to the lodging of a guarantee.[198] Said 'permanent' injunctions aim to prohibit the continuation of infringements on a permanent basis.[199] In addition, even if in this directive itself the term 'injunction' is only used in its narrow, prohibitive sense, it also provides for mandatory injunctions.[200] In this respect the IPR Enforcement Directive requires in particular the possibility for a court to order the seizure, delivery up, recall, definitive removal from the channels of commerce or destruction of goods infringing intellectual property law.[201] The Infosoc Directive and the proposed Trade Secret Directive contain comparable provisions.[202]

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192 See subsection 5.2.1 above. However Consumer Injunctions Directive 2009/22 also provides for penalty payments and publicity measures. See further subsections 8.1.3 and 8.1.4 below respectively.

193 Art. 2(1)(a) Consumer Injunctions Directive 2009/22. As was discussed in para. 157 above, this annex covers most of the body of substantive EU consumer protection law.

194 See para. 160 above.

195 Art. 7(1) Unfair Terms Directive 93/13.

196 Art. 11(2) Unfair Commercial Practices Directive 2005/29. See e.g. also Art. 5(3) Misleading Advertising Directive 2006/114.

197 See subsections 4.2.2 and 4.2.3 above.

198 Art. 9(1)(a) IPR Enforcement Directive.

199 Art. 11 IPR Enforcement Directive 2004/48.

200 In the Commission's proposal for this directive the term 'injunction' was used also in its broader sense, encompassing also mandatory injunctions. See Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 14.

201 Art. 9(b) and Art. 10 IPR Enforcement Directive 2004/48.

202 Art. 8(2) and (3) Infosoc Directive 2001/29; Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 21-24 (Art. 9-12).

The Procurement Remedies Directives do not expressly refer to the possibility of granting injunctive relief. The possibility to apply for an order to set aside an unlawful decision taken in the course of a contract award procedure, set out therein can nonetheless be seen as a mandatory injunction, as it concerns the granting of a court order for the defendant to act in a certain manner.[203] These directives specify that such an order can entail the removal of discriminatory specifications in the tender documents. On an interim basis, the Procurement Remedies Directives also refer to possible ordering of measures aiming to correct the (alleged) infringement or to prevent further damage to the interests concerned.[204] One could think of the revocation by the contracting authority of a decision to exclude a tenderer from the contract award procedure, taken in violation of the applicable EU public procurement rules.

Finally, concerning the field of EU competition law, suffice to note that the Competition Damages Directive does not make provision for actions for injunctions. In terms of substantive remedies this directive is only concerned with actions for damages.[205] Neither is Article 101(2) TFEU of relevance here, as it contains only a contractual remedy.[206]

285. The foregoing indicates that the EU legislative provisions here on injunctive relief at issue have two key characteristics. A first characteristic is that there is a *great deal of variety*. At the most general level there is the aforementioned distinction between prohibitive and mandatory injunctions, both of which are provided for. And also within these two broad categories there is considerable variety. To begin with, the abovementioned prohibitive injunctions are not formulated in the same manner, nor are the mandatory ones. Moreover also the substance of what can be ordered precisely under the provisions of EU law in question tends to differ. In fact, even within one and the same field of law what appears to be the same sort of injunction can be provided for in diverging terms. This is best illustrated by the provisions set out in the various consumer protection directives, referred to above.

A second characteristic is the *flexibility* that the provisions in question tend to leave. In particular, with the partial exception of the IPR Enforcement Directive, those provisions tend to be worded in the rather broad terms. Terms such as 'to order the cessation or prohibition', 'to prevent the continued use' or 'to set aside or to ensure the setting aside' leave it largely to the Member States and to the competent national courts how effect is to be given precisely to these rules of EU law. Apart from that, there are two instances where an addition degree of diversity can emerge in rela-

203 Art. 2(1)(b) Procurement Remedies Directives 89/665 and 92/13. See subsection 3.2.1 above. As was noted in para. 62 above, the setting aside of an act or decision contrary to EU law can also be seen as a 'general' remedy in its own right.

204 Art. 2(1)(a) Procurement Remedies Directives 89/665 and 92/13.

205 See para. 229 above.

206 See subsection 6.1.3 above.

tion to the question whether the remedy for which EU law makes provision applies in the first place. For both the Utilities Remedies Directive and the IPR Enforcement Directive contain an optional clause that essentially allows for the defendant to *'buy off'* the specific obligation that may be imposed on the defendant by means of an injunction. The former directive provides for the possibility of ordering the payment of "*a particular sum*", which must be dissuasive and ensure effectiveness in preventing injury being caused, instead of the setting aside of an unlawful decision.[207] The latter directive allows for the aforementioned 'permanent' injunctions to be replaced by the payment of "*pecuniary compensation to be paid to the injured party*", subject to a number of conditions, such as that the infringer acted unintentionally and without negligence.[208]

286. A first factor that helps explain the state of affairs described above is that, inherently, injunctions are to a large extent a *'tailor-made' remedy*. Even though there can also be considerable variety in relation to other remedies such as actions for damages, as has been shown in the previous section, their essence is rather straightforward: the loss and damage caused by an infringement of EU law must be compensated through the payment of a certain sum. Measures aimed at halting or preventing such infringements by contrast tend to be more closely linked to that infringement itself. Given that – certainly across various fields of law but also with each field – these infringements of the applicable substantive rules can take many forms, this will often also apply for the injunctive relief to be ordered to address them. Hence the diverging formulation of the provisions and the leeway that is typically left, both of which serve to allow for the tailoring of the measure to be imposed as much as possible to the infringement at issue. Here the nature, effect and formulation of these measures thus depend to a high extent on the specifics of the situation at hand.

A second factor is that the *national legal environments* in which the abovementioned EU legislative measures are to be embedded differ significantly between them. Consider for instance the field of consumer protection law. As was noted earlier, injunctive relief tends to play an important role here. Whereas under certain national legal systems actions for injunctive relief for infringements of this law are to be brought before an administrative authority, in other systems the civil courts are competent to rule on these disputes.[209] A similar situation exists in relation to public procurement law.[210] These divergences as regards the nature of the applicable law and of the competent courts adds an extra 'layer' of diversity, in addition to the diver-

207 Art. 2(1)(c) and 2(5) Utilities Remedies Directive 92/13.

208 Art. 12 IPR Enforcement Directive 2004/48. See also Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 23-24 (Art. 12(3)).

209 See para. 158 and 160 above. On the rules on forum generally, see also subsection 9.2.1 below.

210 See para. 98 above.

sity that generally often already exists between the various domestic legal systems within the EU. These divergences can be a reason for formulating the relevant provisions of EU law in such a manner that a minimum degree of 'fit' is ensured between the EU legislative measures and the legal environments in which they are to embedded and function after the transposition of the directives in question.

A third factor may also play a role in this connection, especially in relation to mandatory injunctions. It can sometimes be seen as *inappropriate* for a court to *prescribe in detail* how a defendant is to act. That applies particularly (but not exclusively) where the defendant is a State entity of some sort. This factor can be particularly relevant in relation to the Procurement Remedies Directives, where the defendants are normally (semi-)public bodies.[211] For this reason the (mandatory) injunction for which these directives provide is formulated in such a broad manner ('to set aside or to ensure the setting aside'). The wish not to unduly affect the autonomy of the bodies in question also lies behind the possibility, referred to in the previous paragraph, under the Utilities Remedies Directive to 'buy off' any such court order by paying a dissuasive sum.[212] Where the defendants are typically private parties, as is the case under the IPR Enforcement Directive, the issue is not so much one of autonomy, but rather of avoiding disproportionate outcomes. That was the reason behind the insertion of the possibility of paying pecuniary compensation instead of awarding a 'permanent' injunction, which was also discussed in the previous paragraph.[213] Elsewhere in EU law other illustrations of this potential sensitivity of mandatory injunctions can be found. For example, where in a direct action the EU courts annul an act of an EU institution, the latter must take the necessary measures to comply with the judgment in question.[214] But in this respect the EU courts tend to leave it to the institution concerned to decide how to do so.[215] To some extent comparably, perhaps, under the EU law principle of Member State liability the obligation on the latter to make good the consequences of their infringements of EU law normally consists of paying pecuniary compensation and not a (positive) court order for the Member State in question to take certain specific measures.[216]

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211 See para. 78 above.

212 See para. 82 above.

213 See para. 132 above.

214 Art. 266 TFEU.

215 See e.g. GC case T-338/08, *Stichting Natuur en Milieu*, para. 14.

216 Cf. Dougan (2004), pp. 256-258; Prechal (2005), pp. 296-297; Tridimas (2006), p. 539; Granger (2007), p. 190; Rebhalm (2008), p. 183; Biondi & Farley (2009), p. 83. Note that the *retroactive application* of national law transposing a directive has at times been held to be an acceptable solution, unless the applicants suffered complementary losses due to them not being able to benefit at the appropriate time of the rights granted to them under the belatedly transposed directive. See e.g. CoJ case C-94/95, *Bonifaci*, para. 51-53. On the principle of Member State liability generally, see further para. 59 above.

### 7.2.2. *Injunctions: practice and applicable conditions*

287. As regards the *practical functioning* of the EU legislation on actions for injunctions at issue here, it appears that actions of this kind are brought rather frequently and successfully under consumer protection directives such as the Consumer Injunctions Directive, the Unfair Terms Directive and the Unfair Commercial Practices Directive.[217] The experiences with the actions for injunctions provided for in the IPR Enforcement Directive are on the whole also positively assessed by the Commission, stakeholders, practitioners and legal scholars alike.[218] Indeed, the Commission has called this the directive's "*main enforcement remedy*".[219] With respect to the Procurement Remedies Directives the situation seems less clear. Yet it nonetheless appears that, at least by comparison, it generally is a rather attractive means to address alleged infringements, in that also in this domain actions for injunctions tend to be initiated more frequently and with more success than the other remedies for which these directives provide.[220]

Therefore injunctions are on the whole often not only an important private enforcement remedy on paper, but also in practice. As such the contrast with actions for damages, discussed in the previous section, is particularly striking.[221] When seeking to explain this relative success, it is important to note at the outset that this depends always to some extent on the applicable detailed national rules. That applies all the more so given that, as was indicated above, the provisions in question tend to leave considerable leeway to the Member States. That said, it seems that – seen from a legal perspective and in as far as EU law is concerned – especially the applicable *conditions* for obtaining injunctive relief are likely to play a crucial role in explaining this relative success. Or, to be more precise, it seems that the conditions that do *not* apply under the abovementioned EU legislation are of particular importance. This can be further explained as follows.

288. To begin with, whereas in order to be able to obtain compensation in damages an applicant must demonstrate that he *suffered harm*, it is widely assumed that such a requirement does *not* apply in the case of actions for

217 See para. 159-160 above.
218 See para. 127 above. This observation concerns prohibitive injunctions; the aforementioned mandatory injunctions for which this directive makes provisions generally appear to be used less frequently.
219 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 14 (regarding interlocutory injunctions).
220 See para. 80-81 and 86 above.
221 See in particular para. 259 above.

injunctions.[222] At first sight this may seem obvious enough. Injunctions typically seek to prevent or terminate unlawful conduct, with a view to preventing (further) harm from occurring.[223] If no compensation in damages is claimed, why would there be a need to demonstrate the occurrence of damage? Yet the EU legal acts on which this study concentrates do not address this matter expressly. Only the Unfair Commercial Practices Directive and the Misleading Advertising Directive stipulate that the injunctions provided for therein must be available even in cases where there is no proof of actual loss or damage.[224] Comparable provisions are notably absent in the EU legislation on which this study concentrates.

That leads to the question what the legal consequences are, if any, of this absence of such an express statement. In particular, the question is whether this implies that a requirement to demonstrate harm could be imposed on the basis of national law, should a Member State wish to do so. It is submitted that, in all likelihood, this question is to be answered in the negative. The express statement to this effect in the two abovementioned directives should probably be seen as a mere confirmation, and not as giving rise to an argument *a contrario* that there is scope to apply such a requirement under national law where no such express statement is made in the directive in question. This view rests on the absence of an express requirement as a matter of EU law, in combination with the fact that the application of such a requirement would probably prevent the objective of the EU rules in question from being achieved, as it would considerably raise the threshold for an applicant to obtain an injunction. In other words, it would appear that the Court's reasoning relating to a fault requirement in the context of actions for damages, set out in the abovementioned rulings such as *Stadt Graz* and *Dekker*, can be 'transplanted' to the present context.[225]

It might appear that in *L'Oréal v. eBay* the Court of Justice took a different view, pursuant to which this subject-matter would essentially be left to be regulated by national law. For in that case it was held that "*the rules for the operation of the injunctions for which the Member States must provide under the third sentence of Article 11 [IPR Enforcement Directive], such as those relating to the conditions to be met and the procedure to be followed, are a matter of national law*".[226] However this statement only relates to the directive's provision on actions for injunctions against *third parties*.[227] As the Court recalled in its rul-

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222 E.g. Jacobs & Deisenhofer (2003), p. 196; Eilmansberger (2007), p. 433; Cauffman (2010), p. 59. In several Member States account is taken however of the *potential* harm occurring in the absence of this remedy being granted, particularly in relation to the award of interim relief. See e.g. Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, pp. 15-16.

223 Cf. CoJ case C-167/00, *Henkel*, para. 39 and 48.

224 Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(3) Misleading Advertising Directive 2006/114.

225 CoJ case C-314/09, *Stadt Graz*; CoJ case C-177/88, *Dekker*. See para. 263 above.

226 CoJ case C-324/09, *L'Oréal v. eBay*, para. 135. See further para. 131 above.

227 See further para. 130 above.

ing, the recitals of the IPR Enforcement Directive specify that the conditions for this specific form of injunctive relief should be left to be set by national law.[228] The directive does not contain any similar provisions in relation to the *other* forms of injunctive relief set out in this directive. Already on this basis it would seem that the above statement by the Court cannot be generalised so as to apply to all provisions of secondary EU law on actions for injunctions. Moreover in *L'Oréal v. eBay* the Court also underlined that the relevant rules of national law must respect a number of EU law requirements, including that they allow for the directive's objective being achieved and that they respect the applicant's right to an effective remedy.[229] Although this issue was not further addressed in this judgment, a national law requirement to prove damage for an injunction to be granted may well be seen as being incompatible with these EU law requirements. It is submitted therefore that, on closer reading, this judgment does not generally invalidate the view set out above; in fact, it may rather confirm it. Yet this case nonetheless provides a useful reminder that each situation must be assessed on its own merits and that the starting point of each analysis remains the wording of the EU legislation at issue, including where relevant the recitals.

289. A further issue is whether in relation to actions for injunctions the said directives allow for a *fault requirement*, in one form or another, to be set under national law.[230] Of the abovementioned EU legal acts containing provisions on injunctive relief, the Consumer Injunctions Directive, the Unfair Terms Directive, the Procurement Remedies Directives and the IPR Enforcement Directive are largely silent on this matter. Again, only the Unfair Commercial Practices Directive and the Misleading Advertising Directive deal with this issue expressly. These two latter directives stipulate that no proof of intention or negligence on the side of the defendant is required for this form of relief to be granted.[231] It would appear however that, following essentially the same reasoning as the one set out in the foregoing paragraph, this is unlikely to point to any difference in substance between any of the abovementioned directives.

The resulting conclusion that, for injunctions to be granted under the EU law provisions at issue, the applicant cannot be required to demonstrate that the defendant was at fault, finds further support in the Court's ruling in

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228 Recital 23 IPR Infringement Directive 2004/48. See CoJ case C-324/09, *L'Oréal v. eBay*, para. 135. Cf. also CoJ case C-314/12, *UPC Telekabel Wien*, para. 43 (relating to the injunctions referred to in Art. 8 Infosoc Directive 2001/29).

229 CoJ case C-324/09, *L'Oréal v. eBay*, para. 136 and 142. Cf. CoJ case C-314/12, *UPC Telekabel Wien*, para. 44. On the fundamental right to an effective remedy under Art. 47 Charter, see further para. 43 above.

230 For a more elaborate assessment of the issue of fault in relation to actions for damages, see subsection 7.1.2 above. That assessment would appear to be also largely applicable here, *mutatis mutandis*, subject to the above comments.

231 Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(3) Misleading Advertising Directive 2006/114.

*Stadt Graz*, discussed earlier.[232] It will be recalled that in this case it was held that the Procurement Remedies Directives preclude a fault requirement in relation to actions for damages. However, although this was not expressly stated, here the Court also implied that that these directives equally preclude such a requirement in relation to the *other* remedies set out therein, i.e. also for actions for injunctions.[233] In addition, unlike for actions for damages, it appears that most national legal systems do not require proof of fault for injunctions to be granted.[234] This would seem to make the conclusion all the more likely that the abovementioned directives are not to be understood as implying such a requirement. It also suggests that the view that the said directives actually preclude the application of such a requirement is unlikely to lead to significant controversies.

Once again it could conceivably be argued that the IPR Enforcement Directive is different in this respect. As was noted earlier, it includes an (optional) arrangement on pecuniary compensation as an 'alternative measure' to be imposed instead of the 'permanent' injunctions foreseen in this directive.[235] This alternative is only available where the infringer acted "*unintentionally or without negligence*". From this one could deduct, *a contrario*, that for those injunctions themselves to be granted, normally a requirement of the infringing party having acted intentionally or negligently applies, or at least that the application of such a requirement is not necessarily precluded. Yet, then again, one could also argue on the basis of the presence in this directive of an express provision on fault in relation to actions for damages,[236] and the absence of such an express provision in relation to actions for injunctions, that in the latter instance no such requirement can apply. Consequently, while some uncertainty exists in this respect, also with respect to this directive the better view appears to be that there is in principle no scope for a fault requirement in relation to actions for injunctions.

290. The absence of an obligation for the applicant to demonstrate that he suffered loss or damage or that the defendant was at fault for injunctive relief to be granted makes this remedy easier to obtain, not only in the sense that the legal threshold is lower in respect of these two points, as discussed above. This normally also has *indirect repercussions* that are beneficial to private party-applicants. For instance, where such a party does not need to demonstrate harm, neither can there be any discussion on the qualification or quantification thereof. It also follows that there is no requirement of a causal link between the infringement and the damage. Moreover, as a conse-

232 CoJ case C-314/09, *Stadt Graz*. See further para. 88 and 263 above.
233 CoJ case C-314/09, *Stadt Graz*, para. 39. In a similar sense, see Kotsonis (2011b), p. NA62.
234 Van Dam (2006), p. 301 (regarding English, French and German law). See also Peyer (undated), p. 20 (regarding German law in a competition context).
235 Art. 12 IPR Enforcement Directive 2004/48. See further para. 132 and 285 above.
236 Art. 13 IPR Enforcement Directive 2004/48. See further para. 262 above.

quence of the absence of all of these requirements, proceedings for injunctions will mostly also be less lengthy and less costly as compared to in particular actions for damages.[237] It has already been seen that these legal and practical factors are often important thresholds in relation to the latter remedy.[238] A final point to be noted here is that, again different from damages awards, injunctive relief can normally be granted by means of interim measures, i.e. in proceedings which can lead to a decision with provisional effects and which are normally (relatively) speedy, uncomplicated and not overly costly.[239] In that sense the relative success referred to above is probably partially a shared success of the remedy discussed here and that of interim measures.

### *7.2.3. Competition law and cross-border litigation*

291. A first further specific issue to be discussed here is the question what the foregoing implies specifically for the discussions on the private enforcement of *EU competition law*. As was observed earlier, while Article 101(2) TFEU only provides for a contractual remedy, in terms of substantive remedies the Competition Damages Directive is exclusively focused on ensuring compensation in damages. Indeed, actions for damages have long had the Commission's particular attention in this context.[240] Where EU legislative involvement is concerned, actions for injunctions therefore do not play a role in this field. Yet it would be wrong to presume that this choice not to include measures on injunctive relief in the Competition Damages Directive is somehow obvious or inevitable. Both the directive itself and the Commission documents preceding acknowledged that – in this field of law as in any other – private enforcement can also take place through the bringing of actions for injunctions.[241] In fact, the important role that this latter remedy can play also with respect to competition law infringements is widely acknowledged in the legal literature.[242] This is not surprising, especially in light of the aforementioned relative attractiveness of injunctive relief for potential applicants when compared to actions for damages. Practical experience in Germany suggests for instance that, for private parties affected by competition law infringements, especially the (relatively) low costs and flex-

237 Cf. Jacobs & Deisenhofer (2003), p. 196; Eilmansberger (2007), p. 433; Cauffman (2010), p. 59.

238 See in particular para. 259 above.

239 On interim relief, see further subsection 8.2.1 below.

240 See para. 209-210 and 260 above.

241 See Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, pp. 3-4; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 7 (n. 5); recital 3 Competition Damages Directive.

242 E.g. Komninos (2008), p. 215; Eilmansberger (2007), p. 437; Cauffman (2010), p. 60; Whish & Bailey (2012), p. 301; Hjelmeng (2013), p. 1011; Louis (2014), p. 87; Ottervanger (2014), p. 18; Ratliff (2014), p. 272; Wisking, Dietzel & Herron (2014), p. 187.

ibility associated with injunctive relief makes this the preferred private enforcement remedy.[243] It is also reported to have a significantly higher success rate than actions for damages.[244] It further appears that private parties affected by infringements of EU law are in practice not seldom more interested in bringing to an end to those infringements than in obtaining compensation for the damage suffered as a consequence thereof. This has been observed to be the case for instance in relation to infringements of EU intellectual property law.[245] There seems little reason to believe that this would be fundamentally different where infringements of EU competition law are concerned.[246]

This being so, it is remarkable not only that the Commission decided to exclude from its initiative on the private enforcement of EU competition law other remedies than actions for damages and especially injunctions, but also that this choice has never been properly *explained*.[247] One can therefore only speculate as to the reasons that underlie the current "*shadowy existence*" and "*[astonishing] neglect of this remedy on the policy level*".[248] A factor may have been the influence from the approach to the private enforcement of competition law taken in the United States, where damages claims tend to play a central role. This may in particular have had an effect on the academic debate.[249] Another factor could be that landmark rulings of the Court of Justice, such as *Courage*, on which the Commission's initiative built,[250] related only to the possibilities for the private parties concerned to claim damages. However it is submitted that this latter factor would provide a largely unsatisfactory explanation in legal terms. For the Court's reasoning in *Courage* may well be applicable beyond the narrow confines of actions for damages. Indeed, already in 2003 Advocate General Jacobs argued that this reasoning

243 S. Peyer (undated). Here it is also reported however that few such actions are brought in England. See also Peyer (2012), p. 350.

244 Peyer (2012), p. 353.

245 Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 7.

246 Cf. Cauffman (2010), p. 59; Whish & Bailey (2012), p. 301.

247 In Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, pp. 9-11, this issue is discussed in some detail, without however actually explaining the choice made to concentrate exclusively on actions for damages.

248 Peyer (undated), pp. 1 and 51.

249 Cf. Opinion AG Van Gerven case C-128/92, *Banks*, para. 44. See e.g. Jones (1999); Jones (2003), p. 94.

250 CoJ case C-453/99, *Courage*. The same applies for CoJ joined cases C-295/04 to C-298/04, *Manfredi*. On these two cases and their relevance in the present context, see para.213-214 above. Similarly in Opinion AG Van Gerven case C-128/92, *Banks*, referred to in para. 211 above, attention concentrated on actions for damages. Cf. Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 9, where reference is made to the *Courage* judgment as well as the AG's opinion in *Banks*.

is essentially equally applicable to actions for injunctions.[251] Also the Court's ruling in *Muñoz*, which related to the field of EU agricultural law, would seem to point in that direction.[252] The Court's reasoning in this latter case is very similar to the one followed in *Courage*, but the question at issue concerned not actions for damages but civil proceedings more generally. A third factor could lie in the underlying objective, for instance in terms of which types of infringements are to be addressed or the anticipated deterrent or corrective effects of such actions. However it seems uncertain whether clear conclusions could be drawn on any of these points.[253] In any case there are at present no indications that an in-depth assessment thereof underpins the choice to concentrate the Commission's legislative initiative, which resulted in the adoption of the Competition Damages Directive, solely on actions for damages. The directive's narrow scope in terms of private enforcement remedies may well be seen as a missed opportunity.

292. A second specific point relating to actions for injunctions constitutes essentially an important qualification of the aforementioned relative success thereof as a private enforcement remedy. Very little use tends to be made of this remedy in *cross-border situations*, i.e. in situations where the applicant and the defendant reside or are established each in another Member State. A prime example relates to the provision on so-called 'intra-EU infringements' laid down in the Consumer Injunctions Directive.[254] Under this directive a qualified entity from one Member State may in certain cases bring an action for an injunction in another Member State. One could say that the very essence of this directive is to facilitate precisely these kinds of actions. But in 2008 the Commission concluded that the effect given to this provision has so far been "*disappointing*".[255] This seems somewhat of an understatement, given that at the time the mechanism had been used in no more than two instances EU-wide. It appears that since then this situation has

251 Opinion AG Jacobs joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOB Bundesverband*, par. 105. In Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 9 (n. 2), reference was made to this opinion, seemingly in a concurring manner. In a similar sense, see Peyer (undated), pp. 10-14.

252 CoJ case C-253/00, *Muñoz*. For a discussion of this case and a comparison with *Courage*, see para. 61 and 65 above respectively.

253 It has e.g. been suggested that damages actions might be more suitable in relation to cartels, whereas injunctive relief may be more suitable with respect to abuse of market power and anticompetitive vertical constraints. See Peyer (2011), p. 655; Peyer (undated), p. 46. However others have argued e.g. for concentrating efforts regarding the facilitation of private enforcement not on 'hard-core' competition law infringements, but rather on 'grey area' cases. See Eilmansberger (2007), p. 478.

254 Art. 4 Consumer Injunctions Directive. See further para. 155 below.

255 Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, pp. 5-9.

hardly improved, if at all.[256] Another example is the IPR Enforcement Directive. The Commission has observed that the relative success of this directive's provisions on injunctive relief does not seem to extend to cross-border situations,[257] while stakeholders identify cross-border infringements as a significant and increasing concern.[258] As regards the Procurement Remedies Directives, applications for cross-border reviews in procurement cases, of which actions for injunctions typically make up a considerable share, have been found to be scarce.[259]

It is important to note that these findings probably do not stand on their own. Within the EU generally only a relatively limited amount of cross-border litigation takes place, regardless of what form of relief is sought precisely.[260] The above observations are therefore likely to reflect a *broader issue*. Arguably this difference between 'domestic' and 'cross-border' litigation is only more striking where injunctions are concerned, because these latter actions are comparatively successful in situations that are confined to one Member State. This limited degree of cross-border litigation is often explained by pointing to the (anticipated) extra costs, delays and complications connected to bringing an action for an injunction before a court in another Member State.[261] To some extent this may say as much about the perceptions and expectations in this regard as it does about actual experiences in practice. Actual experiences with cross-border litigation are after all limited. It also does not seem self-evident that cross-border litigation is necessarily overly complex, in an age where all legal systems are influenced by EU law and many law firms have branches in several Member States or are part of international networks. But fully justified or not, perceptions and expectations of this kind still matter, as they can play an important role in a private party's decision as to whether or not to initiate private enforcement proceedings in another Member State. Linguistic differences can obviously be a relevant factor too.[262]

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256 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 6. See further para. 159 above.

257 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 18.

258 See e.g. Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 8. See also para. 127 and 130 above.

259 See e.g. Commission, Responses to the consultation on the operation of national review procedures in the field of public procurement, 2004 (economic operators and lawyers).

260 See e.g. Rosas & Armanti (2010), pp. 172-173; Loos (2011), p. 499-502. This finding also extends to alternative dispute resolution mechanisms. See e.g. European Parliament, Study on cross-border alternative dispute resolution in the EU, June 2011, p. 9.

261 Cf. e.g. Eurobarometer, Consumer redress in the EU, August 2009, p. 39: "*Consumers anticipate that the difficulties they would experience in their home countries would be multiplied if they were to seek out information on redress mechanisms and the processes consumers need to follow in order to seek compensation for cross-border complaints. As a result, consumers are even less likely to pursue these complaints*".

262 Cf. Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 13; Stadler (2013b), p. 151.

That being so, the Commission seems to prefer addressing the above situation through measures of broader application rather than in the sectoral legislation at issue in this study.[263] It seems to have largely vested its hopes in improvements that may result from EU legislation applicable to litigation in civil and commercial matters, such as the 2001 Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments or the 2007 Rome II Regulation on the law applicable to non-contractual obligations.[264] These regulations contain several specific rules for the fields of law under consideration in this study.[265] Complementary measures have also been taken, such as the establishment of the European judicial network in civil and commercial matters.[266] An important objective of this network is the dissemination of information with a view to facilitating effective access to justice.[267] While all these measures can undoubtedly be helpful for a private party that considers bringing a case before a court in another jurisdiction,[268] it would seem that there are limits to what can be expected in this regard. For example, these measures are mostly limited to litigation in civil and commercial matters.[269] They will therefore be of little help in proceedings under administrative law. Neither have they been designed to address col-

263 See in particular Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 9; Commission, First report on Consumer Injunctions Directive 2009/22, COM(2008) 756, pp. 8-9; Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 12.

264 Brussels I Regulation 44/2001; Rome II Regulation 864/2007.

265 Concerning Brussels I Regulation 44/2001, see in particular its Art. 15-17 (regarding consumer contracts) and 22(4) (regarding intellectual property rights). See also Art. 2(a), 35 and 42 New Brussels I Regulation 1215/2012. According to its recital 25, this new regulation is meant to cover also the orders referred to in Art. 6 and 7 IPR Enforcement Directive 2004/48. Concerning Rome II Regulation 864/2007, see in particular its Art. 5 (regarding product liability), 6(3) (regarding restrictions of competition) and 8 (regarding intellectual property rights).

266 Cf. Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters, OJ 2001, L 168/35.

267 See also the European e-Justice website and the European Judicial Atlas in civil matters, available via https://e-justice.europa.eu/home.do?action=home&plang=en and http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm, respectively.

268 However the rules set out in Brussels I Regulation 44/2001 can also lead to unintended (and what many would consider undesirable) consequences. The most well-known example is the possible pre-emptive exercise of jurisdiction in application of the *lis pendens* rule (see its Art. 27), known as 'torpedo' actions. This entails bringing a case before a court that may not have jurisdiction (typically seeking a declaration of non-infringement), in a jurisdiction where proceedings can take a long time to be completed. In this manner the jurisdiction of another national court in the EU can be pre-empted. See Commission, Report on Brussels I Regulation 44/2001, COM(2009) 174, pp. 6-7. See further e.g. Gardella (2008), p. 181. On this subject-matter in relation to New Brussels I Regulation 1215/2012, see Nielsen (2013), pp. 518-522.

269 As such they do not apply to actions brought by or against public authorities acting in the exercise of their powers or situations otherwise regulated by administrative law. See Art. 1(1) Brussels I Regulation 44/2001; Art. 1(1) Rome II Regulation 864/2007. See e.g. CoJ case C-292/05, *Lecouritou*, para. 28-34; CoJ case C-406/09, *Realchemie*, para. 38-44.

lective redress situations.[270] These measures may further help clarify certain legal aspects that are relevant to cross-border litigation (which court is competent, which law applies, etc.), but they do little to address the aforementioned practical concerns that are cited to explain the limited degree of cross-border litigation (perceptions, costs, linguistic differences, etc.).[271]

### *7.2.4. Summary*

293. Actions for injunctions are an important private enforcement remedy in several respects. Most of the EU legal acts facilitating the private enforcement of EU law under consideration here provide for this remedy. It takes a particularly prominent place in the consumer protection directives (Consumer Injunctions Directive, Unfair Terms Directive, Unfair Commercial Practices Directive), but relevant provisions can also be found in the Procurement Remedies Directives and the IPR Enforcement Directive. The provisions in question are rather diverse however, both in what they entail precisely and in the manner in which they have been formulated. This can probably be ascribed to 'case-by-case nature' of this remedy, the variety in the domestic legal enforcement environments in which these provisions are to be embedded and, in some cases, the sensitivity associated with injunctive relief especially where it concerns an order by the court for the defendant to take certain particular measures. Actions for injunctions are moreover also an important remedy in the sense that its functioning *in practice* is mostly positively assessed. The difference in this regard with actions for damages is particularly striking. In all likelihood this is closely linked to the conditions that have to be met – and especially those that need *not* to be met – for injunctive relief to be granted. Even if the directives under consideration here are largely silent on this issue, which admittedly leaves some scope for debate, there are good grounds to believe that an applicant is not required to demonstrate that he has suffered loss or damage as a consequence of the infringement, nor that the defendant was at fault when committing the infringement. This considerably enlightens the burden on the private party-applicant, both directly (lower legal threshold) and indirectly (speedier proceedings, lower costs). Combined with the fact that this remedy can often be obtained by means of interim measures, this probably goes a long way in explaining this remedy's relative success in practice.

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270 See Stadler (2013a), pp. 484-488.

271 Small Claims Regulation 861/2007 may e.g. be of some help in this respect, but its practical use is limited due to it covering claims with a monetary value of no more than € 2000. Reference can further be made to Consumer ADR Directive 2013/11, discussed in para. 194 above. But this directive essentially provides for an alternative to litigation before the courts, while it is moreover limited to consumer disputes only.

These findings lead to two specific further remarks. In the first place, the question arises why the *Competition Damages Directive* does not contain any provisions on injunctive relief. To date this question has largely been left unanswered. The decision to exclude this remedy from this directive does not seem self-evident, especially given that actions for injunctions can be of considerable practical importance also in this domain and that in legal terms such a narrow approach does not seem necessary. In the second place, the aforementioned relative success of this remedy is qualified by the generally limited use that tends to be made of it in *cross-border contexts*. The Consumer Injunctions Directive sought to specifically address this through its arrangement on 'intra-EU infringements', but it has not been very successful in this regard. None of the other EU legal acts at issue here contain specific measures on this point. Neither is their introduction being contemplated. Given that these findings probably reflect a broader issue, it is understandable that hopes are mainly vested in improvements that may result from (comparatively recent) EU legislation of broader application seeking to facilitate cross-border litigation, such as the Brussels I Regulation and the Rome II Regulation. Even if these latter regulations contain provisions that have been specifically designed to apply to infringements of the type at issue here, it remains for now to be seen whether this will suffice to properly address this situation.

# 8. Contractual and other remedies

In the previous chapter the relevant EU rules on actions for damages and on actions for injunctions have been considered. By means of a continuation of the comparative and contextual analysis set out there, the present chapter turns to the remaining remedies for private enforcement purposes laid down in the selected EU legislation discussed in part B of this study. To that end this chapter consists of two sections. In the first section below the third and final 'main' (substantive) class of actions distinguished here, i.e. contractual remedies, is analysed. The following section then discusses the 'other' remedies laid down in the said legislation.

## 8.1. Contractual remedies

This section concentrates on actions intended to make good infringements of EU law by seeking to nullify or to otherwise make ineffective the contractual arrangements entered into by the parties concerned, which are referred to here as contractual remedies. After a brief overview, the terminology used in the legislation at issue as well as the nature and practical functioning of this remedy are discussed. The following subsection then assesses, first, in further detail the flexibility left to the Member States in relation to this remedy and, second, the position of the parts of the contract that are not incompatible with EU law. In the third and final subsection attention turns to the regime applicable to what are called 'excluded' contracts, i.e. contracts that fall entirely outside the scope of the EU rules at issue here, but which are covered by primary EU law.

### *8.1.1. Terminology, nature and functioning in practice*

294. Contractual remedies can be found in three of the four fields of law under consideration in part B, namely EU public procurement, consumer protection and competition law. Each time this remedy has been set out in *different terms* however. Since their revision in 2007, whereby the relevant provision was introduced, the Procurement Remedies Directives speak of the possible 'ineffectiveness' of concluded contracts.[1] By contrast the main provision in the field of consumer protection law, laid down in the Unfair

1 Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.3 above.

Terms Directive, refers to contracts that are 'not binding' on the private party concerned.[2] In other consumer protection directives different terms are used, such as contracts being 'rescinded' or the possibility of 'withdrawal' from a contract (while this latter term is moreover used in different legal acts with two apparently distinct meanings).[3] Finally, in relation to competition law infringements, Article 101(2) TFEU speaks of contracts being 'automatically void'.[4]

This evidently raises the question what *explains* this divergent terminology. Departing from the presumption that it is preferable to use consistent terminology across the entire body of EU law wherever possible, the question also emerges to which extent there may be scope for a more coherent approach in this respect.[5] These questions are answered by subsequently considering in the following the terms used in each of the three abovementioned provisions of EU law.

295. An appropriate starting point is the term '*automatically void*' within the meaning of Article 101(2) TFEU. This seems the most obvious candidate for broader application in acts of secondary EU law providing for contractual remedies. This term has after all been in use since the entry into force of the EEC Treaty in 1958. It is moreover the only concept to have primary law status.[6] The Court of Justice has furthermore over the course of the years had the opportunity to clarify the meaning of this term.[7] In particular, it has held that this term is an autonomous concept of EU law. As such it has a particular meaning, independent from the laws of the Member States. It has retro-active effects (*ex tunc*), meaning that, when this provision is successfully invoked, it is as if there had never been a contract in the first place. These effects are also absolute, i.e. they apply in principle *vis-à-vis* all parties to the contract as well as third parties.

2 Art. 6(1) Unfair Terms Directive 93/13. See further subsection 5.3.1 above.

3 Art. 3(2), (5) and (6) Consumer Sales Directive 1999/44; Art. 4(5) and (6) Package Travel Directive 90/314. See further para. 171 above. Cf. the use of 'withdrawal' e.g. in Art. 6 Distance Marketing Directive 2002/65, Art. 14 Consumer Credit Directive 2008/48 and Art. 9 Consumer Rights Directive 2011/83. There this term appears to have a different meaning than in Art. 4(5) and (6) Package Travel Directive 90/314.

4 See subsection 6.1.3 above. Art. 101(2) TFEU relates to "*agreements and decisions*" that are prohibited pursuant to that article. For reasons of simplicity and ease of comparison, here the emphasis is only on the effects of this provision on contracts.

5 On issues of coherence and fragmentation more generally, see section 10.4 below.

6 See also Art. 264 TFEU. There it is stated that if an act of an EU institution or other body is annulled pursuant to Art. 263 TFEU, the EU courts shall declare that act to be "*void*". Note that this latter provision speaks of acts being "*declared*" void, whereas the former refers to prohibited anti-competitive agreements or decisions being "*automatically*" void.

7 See para. 207 above.

296. It is interesting to note in this connection that the Commission's proposal for the Unfair Terms Directive, dating from 1990, contained the term 'void'.[8] However the Member States represented in the Council subsequently changed this to the current term, i.e. '*not binding*'.[9] Already in itself 'not binding' is a more neutral legal term than 'void'. Especially in combination with the express reference to national law, which was also inserted in the Unfair Terms Directive by the EU legislature, this leaves the Member States more scope when transposing this provision in national law. Although there can be some debate on this point, it would appear that, unlike the term 'automatically void' within the meaning of Article 101(2) TFEU, this allows for instance for the possibility of leaving the past application of the contract intact (*ex nunc*). In any case at national level a wide range of concepts are currently used to give effect to this provision (non-existence, revocability, voidability, unenforceability).[10]

It can further be noted that the absolute effect associated with the term 'void' could lead to evidently undesirable outcomes when applied here. Such an effect may generally be appropriate pursuant to, say, a price-fixing agreement between two undertakings caught by the prohibition laid down in Article 101(1) TFEU. However in cases covered by the Unfair Terms Directive the 'standard' contract at issue is in effect imposed on the consumer, who finds himself generally in a weak position *vis-à-vis* his contracting party (the latter being a seller or supplier acting in a professional capacity). It would then be contrary to the aim of protecting consumers if also the latter could free himself from his contractual obligations by invoking the consequences of the unfairness of a term, for the drafting of which he himself is responsible. In these cases this remedy should thus only be invoked for the benefit of the consumer. Put differently, the desired result under this directive is relative, not absolute.[11] This is reflected in the use of the words not binding "*on the consumer*".

297. The story behind the use of the term '*ineffectiveness*' in the Procurement Remedies Directives is not dissimilar. Also in this case the Commission proposal was significantly more prescriptive than the text of the legal act eventually adopted. Most notably the Commission had suggested using the term 'invalid'. It had also proposed including certain precisions as regards its meaning under EU law, in principle providing for absolute effects.[12] However once more the EU legislature (in particular the Member States represented in the Council) opted for using a less precise term, i.e.

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8 Commission, Proposal for Unfair Terms Directive 93/13, COM(90) 322, p. 69 (Art. 3); Commission, First amended proposal for Unfair Terms Directive 93/13, COM(92) 66, p. 11 (Art. 7).

9 See para. 164 above.

10 See para. 165 above.

11 Cf. Van Gerven (2003b), p. 57.

12 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 24 (Art. 2f(2) and (3)).

'ineffectiveness'.[13] Unlike the Commission's proposal, the Procurement Remedies Directives now also stipulate expressly that the consequences of a contract being considered ineffective are provided for by national law. They further stipulate that this national law may either provide for retroactive cancellation of all contractual obligations (i.e. *ex tunc*) or limit the scope of the cancellation to those obligations which still have to be performed (i.e. *ex nunc*). As a result, the domestic laws of the Member States give effect to this EU law provision in diverging manners.[14] In line with the Commission's proposal there is in this case no 'automatic' effect, in the sense that a preceding finding by a court or another review body is required for the contract to be considered ineffective.[15]

Furthermore also in this case there are certain particular characteristics that, to a certain extent, set a typical procurement case apart from a typical competition case. Most notably, different from Article 101 TFEU, under the EU public procurement rules the conclusion of the contract as such does not constitute an infringement. In this case the infringement rather relates to the *pre-contractual* stage, i.e. the selection of the private party-contractor by the contracting authority. This is connected to the fact that the former is not subject to these rules in the first place. That said, it is questionable whether these differences justify granting the private party concerned particular protection in this respect, as essentially occurs under the Unfair Terms Directive. For one thing, in procurement cases both parties to the contract operate on a professional basis. It seems not unreasonable to expect from the private party-contractor a degree of knowledge and diligence as regards the correct application of the law by the contracting authority.[16] That applies all the more so because the cases covered by the Procurement Remedies Directives concern public contracts with a significant value and the infringements in question are by definition very serious.[17] For another thing, in these cases any such protection would necessarily come at the expense of third parties, namely the private party's (potential) competitors. For having the contract considered ineffective normally results in the contracting authority putting the contract out to (re-)tender, allowing these parties a (renewed) possibility to compete.[18] All in all in this case there would thus seem to be considerably

13 See para. 91 above.

14 *Ibid*.

15 *Ibid*.

16 Pursuant to the case law of the CoJ a tenderer is expected to be reasonably well-informed and normally diligent. See e.g. CoJ case C-19/00, *SIAC*, para. 43. Cf. also the diligence required on the side of the undertaking concerned in state aid cases; see e.g. CoJ case C-24/95, *Alcan*, para. 25.

17 As regards the value of the contracts in question, as was explained in para. 69 above, certain threshold values must be exceeded for the substantive rules in question to apply. As regards this limitation to the most serious infringements, see further para. 90 above.

18 Cf. recital 14 Procurement Remedies Amending Directive 2007/66, where it is observed that this is "*the most effective way to restore competition and to create new business opportunities*".

less convincing legal or factual reasons for not opting for an approach similar to Article 101(2) TFEU.[19]

298. In contrast to the abovementioned legal acts, no contractual remedy has been included in the IPR Enforcement Directive. This illustrates that this remedy is somewhat *more selective*, or less general, than the two remedies discussed in the previous chapter. Whereas actions for damages and actions for injunctions are (or at least can be) in principle relevant in relation to *any* infringement of EU law, providing for a contractual remedy obviously only makes senses where the relevant infringements have what could be called a 'contractual dimension' of some sort. In the field of intellectual property law, this dimension of the infringements in question is normally limited. That is to say, although this can be different in certain specific cases, the infringements of intellectual property law that the IPR Enforcement Directive seeks to address do not typically – and certainly not necessarily – result from or relate to a contractual relationship.[20]

In the three other aforementioned fields of law under consideration the situation is different. In public procurement cases the conclusion of a contract between the contracting authority and the selected tenderer is both the very objective and the logical conclusion of the preceding contract award procedure. The fact that public procurement law has been infringed in the course of this procedure will often imply that the contract should not have been concluded with the tenderer in question, or at least that not all interested private parties have had a fair chance of winning it. As was noted earlier, the continuous application of the contract also means that it will not be put out to tender again. As regards the Unfair Terms Directive, the relevance of contractual issues is somewhat different in nature, but no less evident. After all this directive seeks to prevent the use of unfair terms used in 'standard' consumer contracts. Where such terms are used nonetheless, it is not illogical to provide for a contractual remedy to address their continuous application. Finally, concerning the EU competition rules, the very fact that two or more undertakings concluded an anti-competitive (cartel) agreement can constitute a violation of Article 101(1) TFEU. Also in this case the importance of contractual remedies is therefore almost a given.

The selective character of this remedy is not only evident from a comparison *between* the various aforementioned fields of law. It often also applies *within* the abovementioned fields. This can be best illustrated with reference to the field of EU competition law. The importance of contractual remedies may almost be a given in relation to certain type of infringements of this law, but this by no means applies for *all* infringements. The prohibition set out in Article 101(1) also covers anti-competitive concerted practices that do not involve the conclusion of a contract. Moreover substantive EU competition law also entails the prohibition of abuse of a dominant position,

19 In a similar sense, see Clifton (2009), p. 170.

20 See further para. 109 above.

set out in Article 102 TFEU. Yet the contractual remedy provided for in Article 101(2) TFEU does not extend to contracts concluded in violation of Article 102 TFEU, whereas this latter article itself does not contain an equivalent provision.[21] And also the scope of the contractual remedy laid down in the Procurement Remedies Directives is limited. It applies only to the contracts concluded pursuant to what the EU legislature considered to be the most serious infringements.[22] This implies that many other infringements of the substantive EU public procurement rules cannot lead to this provision being invoked.[23] Only under the Unfair Terms Directive (and many other consumer protection directives) does the remedial provision at issue here coincide with the relevant substantive rules, both of which have been laid down in the same legal act.[24]

299. When the use of the aforementioned contractual remedies *use in practice* is considered, the situation appears to be somewhat *mixed*. The aforementioned diversity and selectivity also come to light here. To begin with Article 101(2) TFEU, this provision tends to be used rather frequently and effectively in litigation between private parties. But this use is mainly 'defensive', i.e. by one of the parties to the contract that seeks to avoid being bound by an obligation set out in the contract concerned. This remedy is little used in an 'offensive' manner. Third parties may generally have little incentive to do so. And at least where particularly serious ('hard-core') violations of Article 101(1) TFEU are at issue, the same mostly goes for the undertakings that are party to the contract, as this would evidently expose their illegal behaviour.[25]

Concerning the contractual remedy provided for in the Unfair Terms Directive, its use is necessarily 'offensive', in that it can only lead to the consumer concerned not being bound. Nonetheless in 2000 the Commission called the system thus established "*very ineffective*".[26] It noted that the undertakings that include unfair terms in their contracts typically stand to lose little where this remedy is applied. This has been linked to the aforementioned flexibility that the Directive leaves to the Member States in this respect.[27] Moreover, as the Commission also observed, its effectiveness

21 See para. 207 above. For a discussion of the possible contractual consequences of a violation of Art. 102 TFEU, see para. 303 below.

22 See further para. 90 above.

23 For a discussion of the possible contractual consequences of other violations of EU public procurement law, see para. 304 below.

24 This does not mean that the scope of the contractual remedy set out in this directive is particularly wide. Rather the scope of the substantive rules is relatively narrow. Given that here the substantial and the remedial rules of EU law coincide, the same then consequently applies for the said remedy.

25 See para. 208 above.

26 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 35. See further para. 170 above.

27 Study University of Bielefeld (2008), p. 347.

relies to a large extent on consumers being aware of their rights, which is in practice often not the case.[28] The Court of Justice has picked up on the latter point. In particular, central to its *Océano Grupo* case law, discussed earlier, is the thought that the objective of this contractual remedy would not be achieved if it were left to the consumer to raise himself the unfair nature of a term in a consumer contract.[29] The Court pointed in this connection to the deterrent effect that high lawyer's fees may have on consumers and the fact that these consumers themselves may not be aware of their rights. It thus seems to consider that this remedy could only properly function in practice if a third party, including a national court acting of its own motion, actively intervenes.[30]

Finally, it is for now too early to adequately assess the functioning in practice of the contractual remedy of ineffectiveness set out in the Procurement Remedies Directives, given its relatively recent introduction.[31] It would appear nonetheless that this remedy has considerable potential as an 'offensive' private enforcement instrument. The typical private parties concerned (i.e. rejected bidders or other undertakings that might be interested in the contract at issue) will often have the knowledge, the means and also an incentive to bring legal proceedings seeking to have the contract in question being declared ineffective. It can also have an important deterrent effect for the contracting authorities that are subject to the EU's public procurement. Having said that, there are also several factors that imply that this remedy might well be used less frequently in practice. These factors are both legal (e.g. limitation to most serious infringements, flexibility as to the precise effects, multiple exceptions, limitation periods) and practical (e.g. possible absence of evidence and information concerning 'illegal direct awards', general hesitance to sue) in nature.

All this suggests that, although contractual remedies of the type at issue here can certainly have a role to play in practice, particularly as they are currently provided for in the abovementioned provisions of primary and secondary EU law they are not without limitations as a remedy in private enforcement proceedings.

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28 See also *ibid*., p. 434.

29 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*. See further para. 167 and 168 above.

30 On own motion judicial review generally, see further subsection 9.2.4 below. Another option can be a third party, such as a consumer association, bringing a 'representative' action under Art. 7(2) Unfair Terms Directive 93/13. Read together with Art. 7(1) and 6(1) of this directive, an action of this kind could lead to a finding of a term being unfair and therefore not binding with certain *erga omnes* effects. See CoJ case C-472/10, *Invitel*, para. 38-40.

31 See further para. 93 above.

### *8.1.2. Member States' flexibility and non-infringing provisions*

300. It has been noted in the previous subsection that in relation to the contractual remedies discussed here especially the Unfair Terms Directive and the Procurement Remedies Directives leave considerable *flexibility* to the Member States. That facilitates the 'embedment' of these provisions of EU law into the latter's respective bodies of national law. This applies both with regard to the transposition of the relevant provisions of the aforementioned directives in national law and the subsequent application of the resulting national laws by all parties concerned more generally. There can thus be good reasons for allowing for a degree of flexibility. As Advocate General Ruiz-Jarabo Colomor observed in relation to the more general question which legal consequences are to be drawn at the national level from the fact that EU law has been infringed, "*[t]he Court's case law could, in theory, have had recourse to some of the legal categories well known in the general theory of law (such as, for example, 'non-existence', 'invalidity', 'nullity', 'ineffectiveness', 'loss of force', 'illegitimacy' or other similar categories) in order to identify the defect which affects national provisions where they are incompatible with the [EU] legal order. […] However, the Court has carefully avoided employing such concepts in its decisions, no doubt because it is aware that the choice of any of these concepts – whose meaning, moreover, varies from one legal system to another – is more a matter for the individual legal systems*".[32] Considerations of this type arguably carry particular weight in relation to contractual remedies, given that contract law has mostly been left to be regulated by the Member States. Indeed, the Court of Justice has held that "*the question of the conclusions to be drawn in the main proceedings […] as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract […], is a question governed by national law, in particular as regards the rules and principles of contract law which admit or adjust that sanction in order to render its severity proportionate to the particular defect found*".[33]

But this flexibility can still have important *downsides*. It is important to note that the above statements by the Advocate General and the Court of Justice related to situations where no specific rules of EU law applied. In such a situation recourse is had, by default as it were, to national law.[34] The same need not to apply where EU law does address this issue specifically, at least to some extent, as is the case in the situations under consideration here. The very point of providing for a contractual remedy there is after all to

32 Opinion AG Ruiz-Jarabo Colomer joined cases C-10/97 and C-22/97, *IN.CO.GE '90*, para. 18-19. This statement was made in connection to the case law of the CoJ holding that, in case of an infringement of EU law, the relevant provision of national law must be disapplied, as set out in particular in CoJ case 106/77, *Simmenthal*, discussed in para. 57 above.

33 CoJ case C-159/00, *Sapod*, para. 52.

34 In relation to contractual remedies specifically, see further subsection 8.1.3 below. On the relationship between the EU legislation at issue here and national law more generally, see subsection 10.1.3 below.

harmonise, at least to some extent, the relevant national laws and to specify, as a matter of EU law, the consequences for a concluded contract of an infringement of EU law.[35] In those cases the desire to ensure a degree of flexibility can seem to be as much related to a (political) desire to 'shield' the field of contract law as much as possible from EU legislative intervention, than that it is related to any inherent (legal or factual) imperative. Either way, this flexibility may put at risk the objectives of the very harmonisation which the EU legislative measures in question seek to achieve. It is one thing to leave Member States with flexibility as to *how* a certain result is to be achieved in their respective legal systems.[36] But it is quite another thing where this flexibility relates to the *result itself*. It follows from the discussion in the previous subsection that the latter (also) appears to have occurred here. For instance, whether a contractual remedy has effects *ex nunc* or rather *ex tunc* is evidently not merely a matter of form or details. It rather touches upon the essence of EU law measure in question. It might be too far-going to speak of purely 'fictitious harmonisation' that allows the Member States to pursue "*fundamentally divergent approaches under the camouflage of a platitudinous framework measure*", but it certainly is not too far off either.[37]

The Procurement Remedies Directives offer a good illustration of the *complex compromises* that may be required when seeking to balance the potentially conflicting desires for an effective EU law remedy on the one hand and retaining a certain margin of manoeuvre at national level on the other hand.[38] As was noted above, these directives stipulate expressly that the consequences of a contract being considered ineffective are determined by national law and that this may entail effects either *ex nunc* or *ex tunc*. But in the recitals the result sought is specified, namely that "*the rights and obligation of the parties under the contract should cease to be enforced and performed*".[39] These directives also provide that in case of *ex nunc* effects certain 'alternative penalties', such as fines, must be imposed in addition,[40] which implies that both options are not treated as fully equivalent. They further offer additional flexibility via a provision holding that ineffectiveness need not follow where there are "*overriding reasons relating to the general interest*",[41] yet this potential loophole is then in turn narrowed as much as possible by speci-

35 Cf. e.g. Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 2: "*In the absence of legislative action at [EU] level, the very different situations among the Member States with regard to the effectiveness of review procedures available to enterprises would continue to exist or even be aggravated. Situations of legal uncertainty and serious and repeated infringements of the [substantive] public procurement Directives would continue*".

36 As is generally the case where an EU legal act takes the form of a directive pursuant to Art. 288 TFEU.

37 Weatherill (2000), p. 96.

38 Unfair Terms Directive 93/13 has similarly been described as being the result of "*a delicate compromise*". See Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 5.

39 Recital 21 Procurement Remedies Amending Directive 2007/66.

40 Art. 2d(2) and Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13.

41 Art. 2d(3) Procurement Remedies Directives 89/665 and 92/13.

fying in a rather restrictive manner what these reasons are (and what not) and there is a requirement to impose alternative penalties also in that case.[42] Not dissimilarly the Court of Justice has acknowledged that the Member States have "*a certain degree of autonomy*" when defining the applicable legal arrangements concerning the concept of 'not binding' within the meaning of the Unfair Terms Directive.[43] But it stressed at the same time the importance of ensuring the full effectiveness of, and achieving an outcome consistent with, the objectives pursued by the provision of EU law in question.[44] The latter implies that a national court that finds that a contract term is unfair must "*draw all the consequences that follow under national law, so that the consumer is not bound*".[45] The Court has made similar statements in relation to other contractual remedies in the field of consumer protection law.[46]

301. The assessment thus far has focused on the provisions of the contract that were deemed to violate EU law. A connected issue is the position of what could be called the '*non-infringing provisions*' of the contract in question. In other words, what is the fate of contractual provisions that themselves do not imply a violation of EU law, but that are part of a contract that includes other provisions that are deemed not to be compliant? When assessing the provisions under consideration here it becomes clear, once more, that the approaches followed in the three EU law provisions under consideration here differ considerably between them.

First, in relation to the Procurement Remedies Directives one could speak of the general rule being an *all-or-nothing* approach. Under these directives it must be ensured that, where a sufficiently serious infringement has been established, "*a contract*" is considered ineffective.[47] This remedy thus seems to relate in principle to *entire* contract.[48] That is not surprising.

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42 Art. 2d(3) and Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13.

43 CoJ case C-618/10, *Banco Español de Crédito*, para. 62.

44 E.g. *ibid*., para. 72.

45 CoJ case C-453/10, *Pereničová*, para. 30.

46 Cf. e.g. CoJ case C-350/03, *Schulte*, para. 66-69 and 92. Here the CoJ ruled in a similar manner in relation to the abovementioned right of 'withdrawal', provided for in (what is now) Consumer Rights Directive 2011/83. It concluded that the result sought must correspond to the restoration of the *status quo ante*.

47 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13.

48 Also this rule is not without an exception however. Pursuant to Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13, when specifying the precise legal consequences of the ineffectiveness, national law may either provide for the retroactive cancellation of "*all contractual obligations*" or limit this to "*those obligations which still have to be performed*". In the latter case 'alternative penalties' within the meaning of Art. 2e must be provided for. These include, besides fines, also the shortening the duration of the contract. Under this latter provision account may be taken of "*the extent to which the contract remains in force*". It follows that this possible exception thus does not allow for considering some provisions of the contract ineffective and others effective. Rather it allows in essence for distinguishing between the parts of the contract that already have been performed and the parts that are still to be performed. This dividing line is thus purely factual, without it being related to the legal content of the provisions at issue.

Public procurement law applies particularly at the pre-contractual stage. That means that the contested contract as such will normally be the result of the earlier defective contract award procedure or the unjustified absence of such a procedure. There is therefore normally not one particular provision of that contract that violates EU law. It follows that the question of severance between the 'infringing' and the 'non-infringing' provisions of the contract will not arise in a typical public procurement case.

Second, the Unfair Terms Directive approaches this subject-matter differently, in a manner that can be described as *restraint*. This directive states expressly that "*the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms*".[49] The Court of Justice has clarified this further.[50] It duly noted that the objective pursued consists in "*restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms*".[51] This can thus be understood as a preference for leaving the 'non-infringing' provisions of the contract unaffected whenever possible. Whether or not this is possible, is principally to be determined at national level. It has further been held that this directive does not imply that the national court could or should annul the entire contract containing an unfair term. Nor is the national court allowed to amend the contract; all it can do in this respect is to delete the unfair term.[52] Consequently here the general rule is that the remainder of the contract is meant to continue to bind the parties. This is understandable, considering that such unfair terms typically take the form of unbalanced (one-sided) rights in terms of liability, termination, amendment or compliance.[53] These issues thus relate to matters that are ancillary to the main subject-matter of the contract, i.e. the purchase of certain goods or services by the consumer.[54]

Third and finally, concerning Article 101(2) TFEU, EU law can be said to be largely *neutral* as to the continued application of the 'non-infringing' provisions of the contract in question. It is noticeable that this provision itself does not contain any particular specifications on this point. The Court of Justice has long made clear that the extent to which severance is possible is one of the further consequences of the finding of a contract being void, which is to be settled under national law.[55] Further guidance, comparable to that provided related to the Unfair Terms Directive discussed above, is notably absent. Presumably this 'neutrality' nonetheless finds its limits where the effectiveness of this rule of EU law might be at risk.

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49 Art. 6(1) Unfair Terms Directive 93/13. See e.g. also Art. 15 Consumer Rights Directive 2011/83, which provides that the exercise of the 'rights of withdrawal' provided for in this latter directive also has the effect that "*any ancillary contracts shall be automatically terminated*".

50 See para. 166 above.

51 CoJ case C-453/10, *Pereničová*, para. 31.

52 CoJ case C-618/10, *Banco Español de Crédito*, para. 64-71.

53 See the annex to Unfair Terms Directive 93/13. See further para. 163 above.

54 Cf. recital 19 Unfair Terms Directive 93/13.

55 CoJ case 56/65, *Société Technique Minière*, p. 250. See further para. 207 above.

### *8.1.3. Excluded contracts*

302. At the end of the previous subsection it has been assessed what, as a matter of EU law, the position is of the 'non-infringing' provisions of contracts that fall within the scope of the aforementioned EU rules providing for a contractual remedy. A related yet distinct question is what the position is of contracts that fall entirely outside the scope of the rules on contractual remedies at issue here. This question is relevant for several reasons. On the general level, an assessment of the position of such '*excluded contracts*' sheds light on what applies in situations where no specific EU legislative action has (yet) been taken on this point. It may also help to clarify the nature of this remedy. Besides, and more specifically, this question is of direct practical relevance in relation to the EU legislation discussed above. It has already been seen earlier that the scope of those rules is in fact rather limited. That leaves open the question how to deal with contracts that have been concluded in violation of the applicable rules of substantive EU law, without this situation being expressly covered by the EU legislative provisions discussed in the two foregoing subsections.

303. Let us begin once more by considering the situation under *EU competition law*. It has already been seen that Article 102 TFEU, which prohibits the abuse of a dominant position, does not contain a contractual remedy similar to the one set out in Article 101(2) TFEU.[56] This thus leaves unanswered the question what, as a matter of EU law, the position is of contracts concluded in breach of Article 102 TFEU, in particular whether they are nonetheless also 'automatically void' or whether they can continue to apply.

The Court of Justice has so far not expressly addressed this question. It has been argued in the legal literature however that the absence of a provision similar to Article 101(2) TFEU is not decisive and that a similar result can, and indeed should, be achieved through interpretation.[57] One line of reasoning relies on the finding by the Court that Article 102 TFEU, read in conjunction with the principle of sincere cooperation set out in Article 4(3) TEU, "*imposes a duty on Member States not to adopt or maintain in force any measure which would deprive [Article 102 TFEU] of its effectiveness*".[58] A (slightly) different approach starts by pointing to the particular background and nature of Article 102 TFEU. On this reading the absence of an equivalent to Article 101(2) TFEU can be explained by the fact that – different from cartels and other concerted practices – the abuse of a dominant position does not usually take the form of a contract. The aforementioned absence should therefore not be understood as deliberately differing from Article 101 TFEU in this respect. Where the abuse of a dominant position exceptionally does

56 See para. 201 above.
57 E.g. Eklöf & Pehrson (2008), p. 196.
58 CoJ case 13/77, *INNO*, para. 31. See further Milutinovic (2010), pp. 11 and 148. In a similar sense, see Temple Lang (2008), pp. 101-102.

take the form of a contract, the argument goes, it should still be deemed to be automatically void, by analogy to Article 101(2) TFEU, so as to safeguard the effectiveness of the prohibition concerned.[59]

In both cases it is thus essentially argued that, in the situation described here, the concluded contract must be terminated.[60] These views largely build on judgments such as *Simmenthal* and *Francovich*, discussed earlier in this study.[61] It will be recalled that in the former case it was essentially held that national courts must have the power to "*set aside national legislative provisions which might prevent EU rules from having full force and effect*", so as to safeguard the effectiveness of EU law.[62] In the latter case the Court of Justice ruled that pursuant to the duty of sincere cooperation set out in Article 4(3) TEU "*Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of their obligation under [EU] law. Among these is the obligation to nullify the unlawful consequences of a breach of [EU] law*".[63] A similar line of reasoning is also followed in certain more recent cases relating to other fields of EU law.[64]

304. Turning to *EU public procurement law*, it has already been noted that the relevant contractual remedy is limited to only the most serious infringements, notably illegal direct awards of public contracts and awards during a mandatory standstill period.[65] When considering the question what applies in relation to contracts concluded pursuant to *other* infringements, the first point of reference is the Court's ruling in *Commission v. Germany*, discussed earlier.[66] This case concerned the Procurement Remedies Directives as they stood before the introduction of the contractual remedy of ineffectiveness in 2007. Here the Court of Justice held in essence that neither the possible legitimate expectations of the undertaking with whom the contract had been concluded, nor the principles of *pacta sunt servanda* and legal certainty could be relied upon in order to justify the Member State concerned not taking the necessary measures to give effect to the Court's earlier finding that the applicable EU public procurement rules had been infringed in the course of the foregoing contract award procedure. At first sight this case law might

59 Komninos (2008), p. 159.

60 For reasons of simplicity, in this subsection the term 'terminate' is used in a general manner, i.e. without implying any particular type of legal effect under EU or national law.

61 See para. 57 and 59 above respectively.

62 CoJ case 106/77, *Simmenthal*, para. 22.

63 CoJ joined cases C-6/90 and C-9/90, *Francovich*, para. 36. Here reference was made to CoJ case 6/60, *Humblet*, p. 572, where it had been held that "*[i]f the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to [EU] law, that Member State is obliged, by virtue of [the provision of the ECSC Treaty that corresponds with the principle of sincere cooperation set out in Article 4(3) TEU], to rescind the measure in question*".

64 E.g. CoJ case C-41/11, *Inter-Environnement Wallonie*, para. 42-46; CoJ case C-518/11, *UPC Nederland*, para. 59-63.

65 See further para. 90 above.

66 CoJ case C-503/04, *Commission v. Germany*. See further para. 89 above.

thus seem to hint at a general obligation to terminate contracts concluded after a non-compliant contract award procedure. However this case was decided in the context of infringement proceedings brought by the Commission against a Member State. These proceedings are essentially a matter between the various public authorities concerned, without there being a role for private parties.[67] It is evident from the Court's reasoning that this fact played an important role in this case, as this allowed it to leave aside the aforementioned principles.[68] For this reason one should be careful, it is submitted, in drawing general conclusions on the basis of this case.

More enlightening is therefore the Court's ruling in *Wall*, which dates from 2010.[69] This case concerned a contract award procedure that fell entirely outside the scope of the EU's directives on public procurement. It was instead decided on the basis of EU Treaties' fundamental freedoms, in particular the right of establishment and the freedom to provide services, from which the Court of Justice already deduced an obligation of transparency.[70] In *Wall* the Court first observed that, where this latter obligation has not been respected, "*all necessary measures would have to be taken, in accordance with the national legal system of the Member State concerned, to restore the transparency of the procedure, which might extend to a new award procedure*".[71] Although no explicit reference was made, this wording clearly echoes earlier rulings in cases such as *Francovich*, referred to in the previous paragraph. But in *Wall* the Court had also been asked expressly whether, as a matter of EU law, there is an obligation to terminate the contract at issue. The Court essentially answered this question in the negative. It held that this matter is to be settled on the basis of the domestic legal system, subject to the principles of equivalence and effectiveness.[72] According to the Court, the said provisions of the EU Treaties do not require such termination "*in every case of an alleged breach*".[73] This ruling evidently leaves various questions unanswered.[74] Yet it nonetheless suggests that there is no unqualified rule under primary EU law to the effect that contracts that were concluded following

67 See subsection 2.4.1 above.
68 See CoJ case C-503/04, *Commission v. Germany*, para. 36.
69 CoJ case C-91/08, *Wall*.
70 *Ibid.*, para. 33-36, and the case law cited there. See also Commission, Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006, C 179/2.
71 *Ibid*, para. 42.
72 *Ibid.*, para. 63-65.
73 *Ibid.*, para. 65.
74 E.g. the statement that termination is not required 'in every case' does not exclude that this may nonetheless be required in *certain* cases. The following question is then of course in which cases there is such an obligation and in which cases there is not.

infringements of the applicable substantive EU law must always be terminated.[75]

It seems unlikely that the insertion in 2007 of the aforementioned provision on ineffectiveness in the Procurement Remedies Directives fundamentally alters this picture in respect of contract that are covered by these directives but that do not fall within the scope of that provision. Indeed, there are good reasons to believe that primary EU law does not require those contracts to be terminated. First, only this outcome would appear to do justice to the EU legislature's express decision to restrict the contractual remedy of ineffectiveness to contracts concluded after only the most serious infringements of substantive EU public procurement law. Second, the Procurement Remedies Directives provide for a carefully balanced regime in this respect, including certain exceptions.[76] Therefore, if an obligation to terminate contracts were to be assumed also for situations falling outside the scope of the said provision on ineffectiveness, then the paradoxical situation could emerge that the regime applicable to the most serious infringements of EU public procurement law is more lenient the one that applies to all other – less serious – cases. Third, (also) after their revision the Procurement Remedies Directives explicitly refer to national law to decide the effects of concluded contracts concerning situations falling outside the scope of the provision on ineffectiveness.[77] If anything, these legislative developments thus seem to confirm the aforementioned conclusion that there is no 'universal' EU law obligation to terminate contracts of the type at issue in this subsection.

305. In *EU consumer protection law* the scope of the substantive rules and that of the contractual remedy often coincide, which implies that a contract that is covered by the substantive rules of the Unfair Terms Directive will also be covered by the contractual remedy for which this directive provides. It follows that the issue of 'excluded' contracts plays less of a role here.[78] Still issues similar to those discussed above can arise in relation to the *effects* given to the provision constituting the contractual remedy. Take the 2010 judgment of the Court of Justice in *Friz*.[79] This case related to a consumer

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75 This is all the more noticeable given that *Wall* did not concern a 'horizontal' relationship between two private parties, but rather a situation whereby one of the parties to the contract was a public authority. As such the latter is undoubtedly bound by the abovementioned provisions of the EU Treaties and the principle of sincere cooperation. On the distinction between of 'horizontal' and 'vertical' situations and its relevance in the present context, see further section 11.2 below.

76 See para. 92 above.

77 Art. 2(7) Public Sector Remedies Directive 89/665 and Art. 2(6) Utilities Remedies Directive 92/13. These provisions also stipulate that, on an optional basis, Member States may provide that in the situations referred to here, the powers of the review bodies are limited to awarding damages.

78 Cf. however Art. 15 Consumer Rights Directive 2011/83 concerning 'ancillary' contracts.

79 CoJ case C-215/08, *Friz*.

protection directive on contracts negotiated away from business premises ('doorstep selling'), which has since been incorporated in the Consumer Rights Directive. The former directive granted consumers the right to "*renounce the effects of his undertaking*" by sending a notice within a certain time period, which "*[releases] the consumer from any obligations under the cancelled contract*".[80] In *Friz*, the Court first recalled that the termination by a consumer of a contract normally entails a restoration of the *status quo ante* for all parties to the contract.[81] However it then added that "*in certain specific cases*" it is not precluded that the consumer has to bear "*certain consequences resulting from the exercise of his right of cancellation*".[82] The Court reached that conclusion with reference to the relevant rule of national law that intended to ensure, in accordance with "*the general principles of civil law*", a satisfactory balance and a fair division of risks among the various interested parties.[83] Once more this ruling leaves several questions unanswered.[84] But it nonetheless underlines that, at least in certain cases, account can be taken of general principles of (national) civil law when determining the effects to be given to the rule of EU law at issue.[85]

306. What then is the *overall picture* that emerges on the basis of the foregoing? To begin with, the issues discussed here are complex, especially where they relate to the relationship and interaction between EU law and national contract law, as is inevitably the case where contractual remedies of the type under consideration here are concerned.[86] Much remains to be clarified, which is a task that typically falls upon the Court of Justice. But this institution too has been criticised for not providing sufficient clarity and coherence

80 Art. 5 Doorstep Selling Directive 85/577. This directive further specified that the legal effects of such renunciation are governed by national law (see its Art. 7). This directive has since been replaced by Consumer Rights Directive 2011/83.

81 CoJ case C-215/08, *Friz*, para. 45. In this sense, see also CoJ case C-350/03, *Schulte*, para. 88.

82 *Ibid*.

83 CoJ case C-215/08, *Friz*, para. 48-49. Here it was also noted that this allowed the consumer in question to recover his holding while taking on a proportion of the risks inherent to any capital investment and enables third parties not to have to bear the financial consequences of the termination, which occurred following the signature of a contract to which they were not party.

84 E.g. it is uncertain which types of cases qualify as 'special' for the present purposes, what the 'certain consequences' entail precisely and which 'general principles of private law' the CoJ actually referred to.

85 In other cases the CoJ has come to similar conclusions. See e.g. CoJ case C-412/06, *Hamilton*, para. 42; CoJ case C-489/07, *Messner*, para. 26. This latter case concerned the provision on 'withdrawal' from a contract, set out in Art. 6 Directive 97/7, which has since also been replaced by Consumer Rights Directive 2011/83. See however also CoJ case C-209/12, *Endress*, para. 30-31.

86 For a more in-depth discussion, which falls outside the scope of this study, see e.g. Storme (2007), p. 233; Hartkamp (2010a), p. 527; Reich (2010), p. 142; Safjan & Miklaszewicz (2010), p. 475.

when addressing the issues mentioned above.[87] What does seem clear however is that – different from what is sometimes suggested – it should probably not too readily be assumed that the principles of (civil) law, such as *pacta sunt servanda*, the protection of the rights of third parties and legitimate expectations and the freedom of contract, will always and unconditionally be sacrificed at the altar of effectiveness of EU law and sincere cooperation. There can, of course, be little doubt that the latter considerations generally constitute persuasive and powerful arguments in an EU law context.[88] Rulings such as *Simmenthal* and *Francovich* have long made this clear. But these cases related primarily to *legislative or administrative* measures taken by the *public* authorities of the Member States. It may well be that the reasoning employed there does not lend itself to a simple 'one-to-one' transfer to situations which are concerned with *contracts* concluded with or between *private parties*, as cases such as *Wall* and *Fritz* seem to illustrate. That applies all the more so because the EU courts have equally acknowledged the fundamental importance of the aforementioned principles.[89] For all the issues that remain to be clarified, it would rather seem that the Court is seeking to achieve a sort of balance between the various interests at stake.[90] It may well be seen as appropriate to leave the Member States in this connection a certain margin of manoeuvre, to be exercised within relatively broad boundaries set by EU law, so as to provide for a solution that is compatible with their respective domestic legal systems.[91]

Finally, it appears that the precise legal and factual circumstances of the case at hand are likely to determine to a high extent the outcome in an individual case. It may for instance make a difference whether the contract in question has been concluded either between a public and a private party (e.g. in a public procurement case) or in an entirely 'horizontal' context (e.g. in a consumer protection or competition case).[92] A connected factor that has

87 See e.g. Clifton (2009), p. 168; Basedow (2010a), pp. 454-460; Harmathy (2010), p. 429; Weatherill (2012), pp. 1298 and 1303-1305.

88 On considerations related to effectiveness, see also section 11.1 below.

89 In CoJ case C-162/96, *Racke*, para. 49, the principle *pacta sunt servanda* was e.g. held to be "*a fundamental principle of any legal order*". See e.g. also GC case T-154/01, *Distilleria F. Palma*, para. 45. The principle that acquired rights must be respected and the principle of legitimate expectations have also been recognised as fundamental principles of EU law. See e.g. CoJ case C-168/09, *Flos*, para. 50. On several occasions the CoJ has further underlined the importance of the principle of freedom of contract, as an element of the broader fundamental right to conduct a business guaranteed under Art. 16 Charter. See e.g. CoJ case C-240/97, *Spain v. Commission*, para. 99-100; CoJ case C-283/11, *Sky Österreich*, para. 42-43.

90 Cf. Hartkamp (2010b), p. 256.

91 Cf. Opinion AG Sharpston case C-209/12, *Endress*, para. 38-39. Note e.g. also the express reference to the procedural autonomy of the Member States in CoJ case C-41/11, *Inter-Environnement Wallonie*, para. 45.

92 Even if this is not immediately clear from *Wall*, as was noted in para. 304 above. It also follows from the foregoing that it may well matter whether or not the questions under consideration here emerge in the context of infringement proceedings, as was also noted there.

already been touched upon is whether or not the infringed rule of EU law imposes obligations on all parties to the contract.[93] Conceivably the behaviour or (relative) position of the parties concerned can also be of relevance.[94] Yet another relevant factor can be whether the infringed rule of EU law is mandatory in nature,[95] as may be the case in fields such as consumer protection,[96] free movement,[97] competition[98] and gender equality.[99]

### *8.1.4. Summary*

307. The Procurement Remedies Directives, the Unfair Terms Directive (as well as various other consumer protection directives) and Article 101(2) TFEU regarding certain competition law infringements all provide for a contractual remedy, whereas the IPR Enforcement Directive does not. Where provision is made for this remedy in EU law, the approaches followed differ considerably between them. That is already evident from the terminology used; the three aforementioned legal acts speak of 'ineffectiveness', 'not bound' and 'automatically void' respectively. But this diversity extends beyond mere terminology. Most notably there are differences with respect to the 'absolute' or 'relative' and the *ex nunc* or *ex tunc* effects of this remedy.

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93 In particular, EU public procurement law imposes in principle obligations only on the contracting authority and not to the latter's private party-contractor, whereas all parties to the contested contract can be subject to Art. 101 TFEU.

94 E.g. it may matter whether one of the parties is a consumer or where the parties are otherwise in an unequal position. As explained in para. 297 above, there may also be less reason to protect acquired rights pursuant to a public contract concluded with a professional party following a clearly defective contract award procedure. Cf. CoJ case C-209/12, *Endress*, para. 30, where it was held that an undertaking cannot rely on reasons of legal certainty in order to redress a situation caused by its own failure to comply with a requirement under EU law. Cf. e.g. also CoJ case C-453/99, *Courage*, para. 32-33.

95 Cf. Basedow (2010a), p. 451, who considers that most EU legal acts dealing with issues of substantive private law are mandatory. As regards the issue of EU law being mandatory and/or of public policy ('*d'ordre public*'), particularly connected to a court raising that rule of law of its own motion, see also subsection 9.2.4 below.

96 Cf. e.g. Art. 6(2) and recital 22 Unfair Terms Directive 93/13; Art. 12 Product Liability Directive 85/374. For a critical discussion of the ('unilaterally') mandatory nature of EU law on consumer contracts generally, see Eidenmuller *et al*. (2011), pp. 1079-1090.

97 Cf. e.g. CoJ case 58/80, *Dansk Supermarked*, para. 17. Note that, even if there may well be a need to differentiate between the EU Treaties' free movement provisions, this ruling seems difficult to reconcile e.g. with the aforementioned *Wall* judgment (regarding the freedom of establishment and the freedom to provide services). See also Opinion AG Sharpston case C-325/08, *Olympique Lyonnais*, para. 43 (regarding the free movement of workers), where it was held that "*it is clear from the Court's case law that Article [45 TFEU] does indeed cover restrictions on freedom to contract if they are such as to preclude or deter a national of one Member State from exercising his right to freedom of movement in another Member State, at least as long as they derive from actions of public authorities or rules aimed at regulating gainful employment in a collective manner*". See also para. 451 below.

98 Cf. para. 204 above.

99 Cf. CoJ case 43/75, *Defrenne*, para. 39. For an application of the rule set out in the aforementioned *Simmenthal* judgment (see para. 57 above) to a collective labour agreement, see e.g. CoJ case C-184/89, *Nimz*, para. 19-20.

The question what the fate is of the other, non-infringing provisions of the contract is also answered differently. The abovementioned legislation also differs in the extent to which the above issues are determined by EU law (as opposed to by national law) in the first place. Not surprisingly, these differences are also reflected in the manner in which this remedy tends to be used in practice.

In relation to the contractual remedies under consideration heterogeneity is thus the key word. On the one hand several of these differences can be explained by the differing legal and factual environments in which these remedies typically operate. For instance, whereas 'absolute' effect (i.e. *vis-à-vis* all contract parties as well as third parties) seems entirely appropriate in relation to the competition law infringements at issue here, the same can be said of the 'relative' effect (i.e. only protecting the consumer) foreseen in the Unfair Terms Directive. And whereas it is understandable that under the latter directive the contractual remedy is limited to the unfair term in question while leaving the remainder of the contract unaffected, it is equally understandable that under the Procurement Remedies Directive it relates in principle to the entire contract. On the other hand, these different contexts and objectives by no means make this heterogeneity always unavoidable or appropriate. The relevant differences between EU competition and public procurement law would for example not seem to be such as to preclude a greater degree of consistency between these two regimes. The arrangement found in the Procurement Remedies Directives is however characterised by a set of complex compromises, leaving many aspects to be determined by national law. This illustrates that, besides the aforementioned legal or factual reasons, another relevant factor 'shaping' the legislation at issue is the tension that can exist between the wish to provide for an effective contractual remedy as a matter of EU law on the one hand and the desire to prevent too great an "*incursion of EU law into the heartland of national contract thinking*"[100] on the other hand.

This tension is not only evident in relation to the EU legislative measures under consideration here. It is also visible outside the – generally rather limited – scope of those measures, for instance as regards infringements of Article 102 TFEU or other infringements of EU public procurement law than the most serious ones to which the Public Procurement Remedies Directives' contractual remedy applies. Although much remains to be clarified in this respect, it appears that the Court of Justice tends to seek to achieve a balance between the various interests at stake. On the one hand ensuring the effectiveness of EU law and the duty of sincere cooperation are undoubtedly of paramount importance. On the other hand that does not mean however that these considerations necessarily 'trump' arguments based on leaving the Member States a certain margin of manoeuvre in the field of contract law and, in particular, on the application of fundamental

100 Cf. Weatherill (2005), p. 115.

principles of (civil) law, such as *pacta sunt servanda*, the protection of the rights of third parties, legitimate expectations and the freedom of contract, where relevant. Especially where contractual remedies are concerned, for the EU judiciary, as for the EU legislature, a carefully balanced case-by-case assessment thus mostly seems preferable to a cruder one-size-fits-all approach.

## 8.2. Other remedies

This second section is concerned with the remedies set out in the EU legislation assessed in part B other than the actions for damages, actions for injunctions and contractual remedies already discussed in the foregoing. It concerns interim relief, measures on the disclosure of evidence, recurring penalty payments, publicity measures and measures related to legal costs. As is shown below, several of these remedies can also be of considerable importance to a private party that has initiated or that considers initiating private enforcement proceedings. These latter remedies can nonetheless be distinguished from the 'main' (substantive) remedies discussed earlier on several grounds. To begin with, with the exception of interim relief, these 'other' remedies are generally less broadly provided for in the EU legislation under consideration. In addition they tend to be concerned with more specific issues and therefore have a more limited scope of application. Lastly, they are not 'self-standing'. That is to say, as is explained below, either as a matter of law or in practice, the remedies discussed below are essentially all ancillary to a main claim of some sort being brought in the legal proceedings concerned. At the very end of this section it is briefly noted that certain other remedies are notably absent from the legislation at issue.

### *8.2.1. Interim relief*

308. As regards interim relief, the Procurement Remedies Directives' regime is most elaborated in this respect. The provision in question is formulated in a rather broad and general manner.[101] It speaks of "*interim measures with the aim of correcting alleged infringements and preventing further damage to the interests concerned*". Further precision is added through three additional clauses. First, it is provided that the said measures must be made available "*at the earliest opportunity and by way of interlocutory procedures*". Second, these directives stipulate that this includes "*measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority*". Third, they contain a separate (optional) provision on the weighting of the various interests at stake, which allows Member States to provide that account is taken of

101 Art. 2(1)(a) Procurement Remedies Directives 89/665 and 92/13. See further para. 80 above.

"*the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest*" and "*not to grant such measures when their negative consequences could exceed their benefits*".[102] While the application of such a balance of interests test is not uncommon in proceedings for interim relief,[103] none of the below directives contains a similar provision.

Several other directives nonetheless also require this remedy to be made available to aggrieved private parties. The IPR Enforcement Directive contains two specific references to the granting of interim relief. One of the 'provisional and precautionary measures' foreseen concerns the possibility of granting interlocutory injunctions aimed at preventing imminent infringements or prohibiting the continuation thereof.[104] Under this directive the national court seised must further be empowered to "*order prompt and effective provisional measures to preserve relevant evidence*", such as the detailed description or the physical seizure of the allegedly infringing products.[105] And whereas the Product Liability Directive is silent in this respect, most consumer protection directives assessed in part B of this study also provide for this remedy. Here the formulation is generally less specific and less committal however. Under the Consumer Injunctions Directive the cessation or prohibition of an infringement must be ordered "*with all due expediency*" and "*where appropriate*" by way of summary procedure.[106] The Unfair Commercial Practices Directive specifies that an "*accelerated procedure*" must be made available, while leaving it to the Member States to decide whether that should entail a procedure leading to an outcome with interim or with definitive effects.[107]

It follows that, while the scope and the level of detail provided for may differ, *most of the legislation* considered in part B of this study provide for the possibility for the national court to grant interim relief in one form or another. Of the fields of EU law at issue here only in relation to competition law infringements no such EU law provisions can be found on interim measures available to private parties that consider themselves harmed. For neither Articles 101 and 102 TFEU, nor the Competition Damages Directive contains any rule in this regard.

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102 Art. 2(5) Public Sector Remedies Directive 89/665 and Art. 2(4) Utilities Remedies Directive 92/13.

103 A similar weighting of the interests at stake takes place in proceedings for interim measures before the EU courts. See e.g. GC Order case T-392/02 R, *Solvay v. Council*, para. 120-127; GC Order case T-37/04 R, *Azores v. Council*, para. 192-195. Cf. e.g. also Art. 62(2) Patent Court Agreement; Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 21-22 (Art. 10(2)); Peyer (undated), pp. 23 and 32-33 (concerning interim relief in the German and the English legal systems respectively).

104 Art. 9(1)(a) IPR Enforcement Directive 2004/48. See further para. 126 above.

105 Art. 7(1) IPR Enforcement Directive 2004/48. See further para. 121 above.

106 Art. 2(1)(a) Consumer Injunctions Directive 2009/22. See further para. 156 above.

107 Art. 11(2) Unfair Commercial Practices Directive 2005/29. See e.g. also Art. 5(3) Misleading Advertising Directive 2006/114. See further para. 160 above.

309. The fact that most legal acts under consideration in this study contain provisions on interim relief is consistent with the *general emphasis* that the Court of Justice tends to place on the availability of this remedy in the EU legal order. It did so most notably in cases such as *Factortame* and *Unibet*, discussed earlier.[108] With reference to these two earlier cases the Court of Justice observed more recently that "*it is apparent from settled case law that a national court seised of a dispute governed by [EU] law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under [EU] law*".[109] Essentially the same applies in litigation before the EU courts themselves.[110] In the latter connection it has been held that "*the purpose of interlocutory proceedings is to guarantee the full effectiveness of the final future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice*".[111]

These statements not only underline the fundamental importance that is attached to the availability of interim relief in the EU legal order. They also give an indication of *why* this is considered important. These measures serve in essence to safeguard the rights of private parties conferred to them by EU law. In particular, without interim relief being available, pending a definitive ruling in the dispute at hand the situation 'on the ground' may well evolve in such manner that this latter ruling will prove to be devoid of practical effects. This would, in the words of the Court, lead to a "*lacuna in the legal protection*" of the private parties concerned. In other words, the function of interim relief is to "*preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo*" in situations where this is deemed necessary.[112]

310. The issue of interim relief is thus to be distinguished, but nonetheless closely connected to the *rapidity* with which the *proceedings on the merits* are being decided. Put simply, the less time is needed to complete these latter proceedings, the less need there generally is for the award of interim measures. This is well illustrated by the provisions of the consumer protection directives outlined above. For both the Consumer Injunctions Directive and the Unfair Commercial Practices Directive place the emphasis primarily on the rapid resolution of the dispute. It is only in this context that reference is made to interim relief, which is to be made available 'where appropriate' or where the Member State concerned decides to do so respectively. In that sense the availability of interim relief can thus said to be of secondary importance under these directives, the main issuing being ensuring speedy

108 CoJ case C-213/89, *Factortame*; CoJ case C-432/05, *Unibet*. See further para. 58 above.
109 CoJ case C-416/10, *Križan*, para. 107.
110 Art. 279 TFEU.
111 CoJ Order case C-278/13 P(R), *Pilkington*, para. 36.
112 International institute for the unification of private law ('UNIDROIT'), Principles of Transnational Civil Procedure (Art. 8(1)), available via http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

proceedings. Whether this rather 'loose' approach in consumer protection cases suffices to have the intended effect in practice is however another matter.[113] In any case the more recent Collective Redress Recommendation is worded similarly.[114]

This also explains why this remedy has been most elaborated in the Procurement Remedies Directives. For in public procurement cases the speedy resolution of a dispute, if only provisionally, is often particularly important, notably where the review of decisions relating to the contract award procedure are concerned (e.g. the decision to exclude a tenderer for failure to meet the applicable requirements, or the contract award decision). Indeed, one of the key objectives of these directives is to ensure that decisions taken in relation to contract award procedures can be reviewed "*as rapidly as possible*".[115] Consider for instance the situation where a contracting authority decided to award a public contract for the construction of a building to an undertaking. Where a competitor seeks to have that decision annulled for infringements of the public procurement rules, the award may already have led to the (partial) execution of the contract by the time the court seised takes a decision in the proceedings on the merits. Even if the latter then agrees with the applicant, it is unlikely to order the demolition of the building. This could thus deprive the applicant from its right to effective review. Rapid proceedings generally and the availability of interim measures in particular are therefore often a key concern in a public procurement context.

Compare this to a typical intellectual property dispute covered by the IPR Enforcement Directive. Clearly, as in almost all cases, the speedy conclusion of the proceedings is certainly also of interest here. For that reason this directive stipulates for example in a general manner that there should be no "*unwarranted delays*".[116] However there is normally no 'general' urgency of the sort that tends to exist in public procurement cases, as described above. Rather in typical cases under the IPR Enforcement Directive the urgency tends to relate to more *specific* issues, such as the halting of an infringement or ensuring that relevant evidence is not being destroyed. For that reason the aforementioned interim measures foreseen in the IPR Enforcement Directive are more narrowly focused on those specific issues in the manner indicated above.

311. Accordingly interim measures serve in particular to bridge the period needed to settle the dispute in the case at hand in a definitive manner and to preserve any rights in this respect. This illustrates that the *provisional and*

113 See the critical comments made in this connection by stakeholders, set out in Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, pp. 12 and 15.

114 Point 19 Collective Redress Recommendation 2013/396. See further para. 190 above.

115 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13. See further para. 72, 78 and 100 above. See also subsection 9.2.5 below.

116 Art. 3(1) IPR Enforcement Directive 2004/48. See further para. 144 above. See also subsection 9.2.5 below.

*'dependent' character* of this remedy. That is to say, the term 'interim relief' refers first and foremost to the *effects* of the relief sought by the applicant, while leaving it open *what* the measures to be ordered might entail in concrete terms. Legally speaking, the granting of interim relief does not lead to a definitive settlement of the dispute. As the Court has held, "*by its nature, an interim measure does not finally determine the legal situation*".[117] Often an application for interim measures will therefore be preceded or accompanied, or at least followed, by an action on the merits of the case. Interim measures retain their provisional character, even in cases where the parties to the dispute consider that there is no longer a need to bring or to continue the proceedings on the merits.[118] Put differently, while *de facto* the result may well be a final settlement, *de jure* the dispute has then only have been settled provisionally.

It is noticeable in this connection that the aforementioned directives are largely silent on the precise relationship between the proceedings for interim relief and the proceedings on the merits. Only the IPR Enforcement Directive addresses this issue with some detail. Here it is said that the provisional measures to preserve evidence foreseen in this directive are to be made available "*even before the commencement of proceedings on the merits of the case*".[119] Although the Procurement Remedies Directives do not address this point expressly, the Court of Justice has held that they preclude making the filing of an application for interim measures dependent on a requirement that proceedings on the merits must first have been brought.[120] That applies even where the latter is mere a formality. According to the Court, such a requirement would mean that the system of interim judicial protection offered is inadequate.[121] It follows that the *presumption* may be that an action for interim measures is preceded or accompanied by an action on the merits, but that at least under the abovementioned directives this cannot be *required* as a matter of EU law. In that sense the 'dependent' nature of this remedy therefore only goes that far.

312. As to the question what these interim measures can entail in terms of content, under the EU legislation referred to above they tend involve the granting of *injunctions* on a provisional basis.[122] For instance, the IPR

117 CoJ case C-568/08, *Combinatie Spijker*, para. 61. See e.g. also Peyer (undated), p. 6.

118 Cf. CoJ case C-53/96, *Hermès International*, para. 44 (regarding the provisional measures provided for in Art. 50 TRIPS Agreement).

119 Art. 7(1) IPR Enforcement Directive 2004/48. No such statement is made in Art. 9(1)(a) IPR Enforcement Directive 2004/48 however.

120 CoJ case C-214/00, *Commission v. Spain*, para. 99-100.

121 Notably this ruling seems to be at odds with the rules applicable in proceedings before the EU courts themselves, which require, for an application for interim measures under Art. 279 TFEU to be admissible, that an action on the merits is pending. See Art. 160 CoJ Rules of procedure, OJ 2012, L 265/1. Cf. Pijnacker Hordijk, Van der Bend & Van Nouhuys (2009), p. 562.

122 On actions for injunctions generally, see further section 7.2 above.

Enforcement Directive foresees the granting of interlocutory injunctions "*intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis […] the continuation of the alleged infringements of that right*".[123] The possibility under this directive for a court to order provisional measures to preserve evidence is also a (specific) form of injunctive relief. The same essentially applies under the aforementioned consumer protection directives and the Collective Redress Recommendation. This is especially evident from the link established under the Consumer Injunctions Directive between interim relief and "*the cessation or prohibition of an infringement*".[124] The same will normally apply under the Procurement Remedies Directive, even if here the relevant provision has been drafted in a more general manner. All this illustrates that, generally speaking, interim measures lend themselves well to bringing an (alleged) infringement to a (provisional) halt and/or to prevent the occurrence of damage in one form or another.

By contrast interim relief is normally not available in relation to *actions for damages*.[125] As a general rule, damages claims are not seen as particularly urgent, as no irreparable damage will be done in the absence of interim relief being granted.[126] The objective in those cases is after all to obtain monetary compensation. Even if such a claim is upheld only after a considerable time period, the award of damages can still have the effect of compensating the applicant for the injury suffered. Thus, certain exceptions aside, in those cases the 'facts on the ground' are not presumed to be evolving in such a manner, that they justify the granting of interim relief. Once again this is also the position before the EU courts.[127] It may be presumed that this is the reason why the EU legislation discussed above does not provide for interim relief in relation to actions for damages. For the same reason it is also not surprising that neither the Product Liability Directive nor the Competition Damages Directive contains any provisions on interim relief, as in terms of substantive remedies these two legal acts are concerned exclusively with actions for damages.

It is less clear where to place *contractual remedies* in this respect.[128] *A priori* there seems to be no reason to presume that, inherently, the continuous application of a contract could not lead to serious and irreparable damages. In that sense contractual remedies differ from damages claims. From this

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123 Art. 9(1)(a) IPR Enforcement Directive 2004/48.

124 Art. 2(1)(a) Consumer Injunctions Directive 2009/22.

125 On actions for damages generally, see further section 7.1 above.

126 Cf. e.g. CoJ joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, para. 29: "*purely financial damage cannot, as the Court has held on numerous occasions, be regarded in principle as irreparable*".

127 E.g. CoJ Order case C-278/13 P(R), *Pilkington*, para. 50: *"Damage of a pecuniary nature cannot, otherwise than in exception circumstances, be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage*".

128 On contractual remedies generally, see further section 8.1 above.

perspective the granting of interim measures thus need not be excluded. Yet this question remains largely unaddressed in the legislation under consideration here. Arguably this is related to the flexibility that is mostly left to the Member States in determining the precise effects of invoking the contractual remedies in question.[129] It may not always be possible to invoke or establish these effects by means of measures that only apply provisionally. Where this is otherwise, given its broad formulation, the aforementioned provision on interim relief laid down in the Procurement Remedies Directives could conceivably also be applied, in principle, in relation to the contractual remedy for which these directives provide.[130] The Unfair Terms Directive in contrast does not contain any provisions on interim relief, while it does provide for a contractual remedy.[131] Still one could well imagine a situation where a consumer would suffer serious and irreparable damage if he were to continue to be bound by such a term during the full duration of ordinary court proceedings. Also under this latter directive interim measures might thus be called for. It appears that in this case a solution would need to be found primarily on the basis of the applicable national law, subject however to the principles of equivalence, effectiveness and effective judicial protection.[132]

313. *In summary*, interim relief is a remedy that is of considerable importance in the present context. Most legal acts at issue here require the availability of this form of relief, even if the relevant provisions can be either broadly formulated (Procurement Remedies Directives), more narrowly targeted (IPR Enforcement Directive) or rather rudimentary and largely optional (Consumer Injunctions Directive, Unfair Commercial Practices Directive). This corresponds with the importance attached to the availability of this remedy in the EU legal order generally as a means to ensure that the rights of private parties based on EU law can be effectively enforced. Different from the 'main' remedies discussed in the foregoing, interim measures are provisional and 'dependent' in character however. For one thing, the 'demand' for this remedy will typically be greater where proceedings on the merits take a long time to conclude. For another thing, in legal terms, they only lead to a provisional settlement of the dispute in question. For a final settlement an action on the merits is necessary. At the same time, at least under the Procurement Remedies Directives and the IPR Enforcement Directive, their 'dependent' nature does not mean that the applicant can be required to have already initiated an action on the merits. Finally, as to the content of this remedy, the measures in question mostly entail the granting of injunctions of a certain type. They are not available in relation to actions

129 See in particular subsection 8.1.2 above.
130 Art. 2d Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.3 above.
131 Art. 6(1) Unfair Terms Directive 93/13. See further subsection 5.3.1 above.
132 Cf. CoJ case C-415/11, *Aziz*, para. 57-63. As regards the said principles, see also sections 2.2 (equivalence and effectiveness) and 2.3 (effective judicial protection) above.

for damages, which explains the absence of this remedy in the Product Liability Directive and the Competition Damages Directive.

### *8.2.2. Disclosure measures*

314. When discussing measures on the disclosure of evidence and other relevant information in the context of private enforcement proceedings, two directives are the *natural points of reference*, namely the IPR Enforcement Directive and the Competition Damages Directive.[133] The former sets out three types of measures in this regard. To begin with, it provides that a defendant may be ordered by the competent national court to *present* (i.e. disclose) certain evidence lying within its control.[134] In cases of infringements committed on a commercial scale, the communication of banking, financial or commercial documents may be ordered. In the second place, it must be possible for a court to order certain measures to *preserve* relevant evidence.[135] This may include the detailed description, taking of samples or physical seizure of goods or the materials or implements used to produce or distribute them. Finally, defendants and certain third parties can be ordered under this directive to *provide information* on the origin of the infringing goods or services and the distribution networks used, such as the name of the producers and distributors, the quantities produced or the prices obtained.[136]

The Competition Damages Directive's disclosure regime has been inspired on the one found in the IPR Enforcement Directive.[137] It is therefore comparable in several respects. The Competition Damages Directive establishes the main rule that national courts must be able to order the defendant or a third party to disclose evidence.[138] This is to be done upon request by either the applicant or the defendant. There are specific limitations concerning the disclosure of evidence included in the file of a competition authority, as well as corresponding restrictions on the use of that evidence.[139] This directive also addresses the issue of preserving evidence.[140] But it does so in a different manner than the IPR Enforcement Directive. Rather than relying on court orders to ensure preservation, it foresees penalties to be imposed *inter alia* in cases where a party destroys relevant evidence.

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133 See further subsections 4.2.1 and 6.2.3 above. Cf. also Art. 3(6) International Bar Association ('IBA'), Rules in the taking of evidence in international commercial arbitration, 1 June 1999, available via http://www.int-bar.org.

134 Art. 6 IPR Enforcement Directive 2004/48.

135 Art. 7(1) Enforcement Directive 2004/48.

136 Art. 8 IPR Enforcement Directive 2004/48.

137 Cf. Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 5; Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 14.

138 Art. 5 Competition Damages Directive.

139 Art. 6 and 7 Competition Damages Directive.

140 Art. 8 Competition Damages Directive.

The above two directives are exceptional. The Procurement Remedies Directives, the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive all do not contain provisions that are even remotely similar. Neither does any other act of secondary EU law appear to provide for measures on the disclosure of evidence *inter partes* that are comparable to the regimes on this subject-matter set out in the two abovementioned directives.

315. That raises the question *why* the two abovementioned fields of EU law have been *singled out* for particular EU legislative action on this point, whereas the other aforementioned directives remain entirely silent on this point. This question comes all the more to the fore in light of the generally rather positive assessment by stakeholders of the IPR Enforcement Directive's regime on the disclosure of evidence, which suggests that it might also be helpful for the purposes of private enforcement in other fields.[141] The answer is, in a nutshell, that access to evidence is generally deemed to be of particular importance in private enforcement proceedings relating to infringements of EU law on intellectual property and competition, more so than in relation to other infringements of substantive EU law. With respect to this first field of law, the EU legislature has called this importance "*paramount*".[142] In this connection reference is often made to the fact that the evidence and information that is crucial to a private party wishing to initiate private enforcement proceedings for an infringement of its rights, is typically only in the possession of the infringer. Intellectual property right infringements are moreover regularly committed on a commercial scale, involving organised crime.[143] Therefore, unless the (potential) applicant is given access in one way or another, he may well experience very considerable difficulties when trying to take legal action pursuant to an alleged infringement. In some cases these difficulties may be such, that the private party concerned is practically barred from doing so. Largely similar arguments have been made in connection to competition law infringements. Here the EU legislature considers that evidence is an "*important element*" for bringing actions for damages, in particular in light of the complexity and facts-intensity of competition cases, whereas such litigation is "*characterised by an information asymmetry*", meaning that relevant evidence and information is often only in the possession of the infringer or a third party.[144] Also in this case infringements can be committed in a secretive and professional manner.[145]

141 See para. 123 above.
142 Recital 20 IPR Enforcement Directive 2004/48. See further para. 119 above.
143 See para. 109 above.
144 Recitals 13 and 14 Competition Damages Directive. See further para. 233 above.
145 See para. 205 above.

Is this reasoning convincing, in the sense that it sets these two fields of law apart from other infringements of EU law? An obvious objection is that many (potential) private party-applicants tend to be confronted with the abovementioned evidence-related difficulties, regardless of the subject-matter of the case.[146] It may for example be equally important and equally difficult for a private party that suspects that a contract has been directly awarded to a competitor in violation of the EU public procurement rules to obtain the evidence and information necessary to substantiate its claim. However contracting authorities will normally be under an obligation to act in a transparent manner and to provide reasons for their decisions.[147] Moreover a private party that wishes to bring a claim under, say, the Unfair Terms Directive or the Product Liability Directive may – at least as compared to the aforementioned infringements in competition or intellectual property cases – often indeed be less dependent on the infringer. The content of a term in a consumer contract is plain for all parties concerned to see. The assessment of whether that term is unfair may not always be easy, but it does not typically depend on evidence or information that is solely in the possession of the alleged infringer or a third party. Similarly, while it may be far from easy to determine and demonstrate the defectiveness of a product (and the damage caused as a consequence of that defect), there is no reason to believe that this cannot be done without involving the alleged infringer or a third party. Infringements of these latter rules are probably also to a lesser extent typically committed in a professional and concealed manner.

Although the above reasoning involves a high degree of generalisation, [148] it would appear that, all in all, there are therefore grounds for distinguishing intellectual property and competition law from the other fields of EU law mentioned above. Whether or not these differences are such that EU interference and the 'fragmenting' effect on national procedural law that will almost inevitably be the consequence of these sector-specific regimes

146 Cf. Bruns (2011), p. 130. See e.g. also Grassie (2014), p. 682, where the absence of any rules in this regard in Commission, Proposal for a trade secrets directive, COM(2013) 813, is seen as a notable missing element.

147 Cf. Art. 2 Public Sector Procurement Directive 2004/18 and Art. 10 Utilities Procurement Directive 2004/17. Cf. e.g. also CoJ case C-406/08, *Uniplex*, para. 30-32.

148 There seems e.g. no reason to presume that *all* (or even most) infringements of intellectual property or competition law are committed in a secretive and professional manner. Also, in many instances the applicants may in fact well have certain relevant pieces of evidence either in their possession or can have access thereto. That particularly applies as regards 'follow-on' competition actions, where the private enforcement action is brought pursuant to a finding of an infringement by a public enforcement authority and where the applicant can thus benefit, at least to some extent, from the efforts made by the competent public enforcement authorities (if not through obtaining access to their file, than at least through these authorities' decisions finding an infringement of the substantive rules at issue).

are to be taken for granted remains a matter for (political) debate.[149] Further, where no such EU legislative measures on the disclosure of evidence and information apply, these issues remain regulated primarily by 'ordinary' national law. The latter may or may not provide for similar measures.[150] Yet it is not to be forgotten that also in these cases EU law requirements can play a significant role. Most notably under the principle of effectiveness a national court may be required to order certain measures of inquiry foreseen by national law, including imposing an obligation on the defendant or a third party to produce a particular document.[151]

316. Generally speaking, the importance for a private party that claims to be affected by an infringement of EU law to be able to obtain access to all relevant evidence and information is thus rather clear. But there is also another side to this matter, which relates to the resulting *burden* as well as the *risk of abuse* associated with rules on the disclosure of evidence of the type discussed above. That is to say, any such disclosure obligations almost inevitably constitute a burden on the parties which are subject to them, while overly generous disclosure rules can also lead to abuses. The parties subject to the disclosure order may well have a legitimate interest in keeping certain information to themselves, or at least in preventing the opposing party in private enforcement proceedings from being granted access thereto. That applies especially where the parties involved in the dispute are competitors. Giving insight in an undertaking's internal production process, distribution channels, pricing policy or other commercially sensitive information can obviously be problematic. More generally, there can be a risk of so-called 'fishing expeditions', i.e. a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence might be found. Concerns of this kind were raised particularly in relation to the Competition Damages Directive.[152] Yet they may well apply more generally.[153] Indeed, also in relation to the IPR Enforcement Directive's regime the risk of abuse has been noted.[154]

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149 Doubts on these points were expressed e.g. in the context of the consultations relating to a possible initiative in the field of EU competition law, referred to in para. 219 above. On issues of coherence and fragmentation at national level more generally, see further subsection 10.4.2 below.

150 According to Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 19, national rules regarding access to evidence are "*the primary example of divergence*". See also European Parliament, Study on collective redress in antitrust, June 2012, p. 29.

151 E.g. CoJ case C-526/04, *Laboratoires Boiron*, para. 55. See further para. 38 above.

152 See e.g. Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 23-24.

153 See e.g. CoJ case C-450/06, *Varec*, in relation to EU public procurement law.

154 Commission, Responses to the report on IPR Enforcement Directive 2004/48, July 2011, p. 19. See further para. 123 above.

Here especially the difficulties connected to involving third parties have become visible.[155]

The IPR Enforcement Directive and the Competition Damages Directive both seek to address these concerns by establishing a *balance* between the various interests at stake. They do so in various manners. A first – and fundamental – safeguard comes in the form of judicial oversight. An order by the national court seised is required before any evidence or information is to be disclosed. These courts are thus expected to exercise strict control,[156] in line with the legal traditions of most Member States.[157] Second, under both directives it is for the party seeking such an order to first present reasonably available evidence supporting its claim ('fact pleading').[158] In other words, the court must be satisfied that there is a reasonable case before ordering disclosure. Third, both regimes require confidential information (and, in competition cases, also information covered by legal professional privileges) to be protected.[159] Fourth, in light of the aforementioned concerns, especially the Competition Damages Directive limits the disclosure orders to either specified pieces of evidence or categories of evidence circumscribed as precisely and as narrowly as possible and requires the court seised to make a proportionality assessment, *inter alia* in light of the scope and costs of disclosure, especially for third parties, also so as to prevent non-specific searches.[160] Although more implicitly, similar requirements would appear to apply under the IPR Enforcement Directive.[161] Finally, the Competition Damages Directive requires that the parties subject to the possible disclosure order are given an opportunity to be heard.[162] This latter safeguard is however not foreseen in the IPR Enforcement Directive. Quite to the contrary, in the sense that, where measures relating to the *preservation* of evidence are concerned, this latter directive expressly provides that such measures can in some situations be ordered without the other party have been heard.[163]

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155 See para. 124 above.

156 Recital 15 Competition Damages Directive.

157 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 14. See also Bruns (2011), p. 129.

158 See Art. 6(1) and 7(1) IPR Enforcement Directive 2004/48; Art. 5(1) Competition Damages Directive. Art. 8(1) IPR Enforcement Directive 2004/48 requires a 'justified request'.

159 Art. 6(1) and (2), 7(1) and 8(3)(e) IPR Enforcement Directive 2004/48; Art. 5(5) and (6) Competition Damages Directive. See also Art. 5(3)(c) and Art. 8(1)(c) Competition Damages Directive.

160 Art. 5(3) Competition Damages Directive.

161 Art. 6(1) IPR Enforcement Directive 2004/48 refers more generally to "*specified evidence* ", while its Art. 8 refers to "*a justified and proportionate request*". See also the 'general rules' laid down in Art. 3(2) IPR Enforcement Directive 2004/48, discussed in para. 157 above and subsection 9.2.5 below, which requires, among other things, proportionality and safeguards against abuses when applying the measures set out in this directive.

162 Art. 5(7) Competition Damages Directive.

163 Art. 7(1) IPR Enforcement Directive 2004/18. See further para. 121 above.

317. *In summary*, both the IPR Enforcement Directive and the Competition Damages Directive provide for a rather elaborate regime on the disclosure of evidence and information. None of the other legal acts assessed contain provisions that are even remotely similar. Having adequate access to relevant evidence and information is obviously of importance to any private party that may wish to initiate private enforcement proceedings for an (alleged) infringement of EU law, regardless of its subject-matter. However there is a case to be made that the difficulties that these parties encounter in this regard tend to be more serious where (alleged) infringements of intellectual property law and competition law are at stake, given that in those cases the relevant evidence and information is typically in the sole possession of the infringer and/or of certain third parties and the infringements may well be committed in a concealed and professional manner. Whether or not these arguments are seen as sufficient to justify the establishment of specific EU legislative measures in these two fields (and possibly other fields with comparable characteristics) but not in others depends mainly on the importance that one attaches to retaining a coherent and uniform set of rules on disclosure at national level. Rules on disclosure of the type provided for in the IPR Enforcement Directive and the Competition Damages Directive can further raise concerns about disproportionate burdens and possible abuses. It would appear however that on the whole both directives provide for adequate safeguards in this respect. These safeguards include judicial oversight, fact-pleading, the protection of confidential information and a requirement to specify and limit the orders as much as possible.

### *8.2.3. Recurring penalty payments*

318. Regardless of what the competent court decides in a private enforcement case (or in any other case, for that matter), this decision will only have effect in practice where it is effectively complied with. An instrument to *ensure compliance* with such decisions is a penalty payment, typically imposed on a recurring basis, for instance per day that the non-compliance continues. Once this remedy has been imposed, a certain amount will be due if and when the party to the proceedings concerned does not comply with the judgment rendered within a set time period. Unlike damages awards, it seeks to ensure the (timely) compliance with the judgment in question; it therefore does not aim to compensate any loss or damage caused by the infringement itself. That is illustrated by the fact that if the party subject to this measure complies with the judgment in a correct and timely manner, no payment will be due. As the Court of Justice has held, the aim is to place the defendant under "*economic pressure which induces it to put an end to the breach established*".[164]

164 CoJ case C-177/04, *Commission v. France*, para. 91. This statement was made in relation to Article 260(2) TFEU, pursuant to which a (recurring) penalty payment can be imposed on a Member State where the latter has not taken the necessary measures to comply an earlier finding of an infringement by the CoJ. For another example of recurring penalty payments in a public enforcement context, see Art. 5 and 24 Competition Regulation 1/2003.

319. As regards the EU legislation considered in part B of this study, provision is made for this remedy in two legal acts. The most detailed arrangement has been laid down in the *Consumer Injunctions Directive*. One of the remedies to be made available pursuant to that directive is "*an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or the administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions*".[165] In addition the *IPR Enforcement Directive* also refers to recurring penalty payments on two particular points, namely in relation to interlocutory and 'permanent' injunctions.[166] In the latter case it is specified that this is to be done "*with a view to ensuring compliance*".

Whereas the other directives under consideration in this study do not make provision for this remedy, the Procurement Remedies Directives illustrate that the same subject-matter can also be addressed in a different manner. These latter directives require, more generally, that the Member States ensure that the decisions taken by the courts and other review bodies can be effective enforced.[167] Similar provisions can be found elsewhere in EU law.[168] On a similar note the Commission's Collective Redress Recommendation refers to penalty payments as one of several types of possible sanctions against the losing defendant that serve to ensure compliance with the court order in question.[169]

320. For the present purposes three further comments can be made in relation to recurring penalty payments. First, this remedy is ancillary in nature, in that it is *not* a proper *self-standing measure*. As was set out above, it serves to ensure that the court's decision, as requested by the applicant, is complied with. Accordingly no penalty payment can be imposed if the applicant did not also bring another, self-standing claim that was upheld by the court seised. More specifically, the aforementioned provisions of the Consumer Injunctions Directive and the IPR Enforcement Directive make clear that these payments are typically ancillary to actions for injunctions. As was the case with interim measures, discussed earlier,[170] they are not connected to actions for damages. Once again that also explains why neither the Product

165 Art. 2(1)(c) Consumer Injunctions Directive 2009/22. See further para. 156 above.

166 Art. 9(1)(a) and 11 IPR Enforcement Directive 2004/48. See further para. 126 and 130 above respectively. See also Commission, Proposal for a trade secrets directive, COM(2013) 813, p. 25 (Art. 15).

167 Art. 2(8) Procurement Remedies Directives 89/665 and 92/13. See further para. 99 above.

168 See e.g. Art. 102 Community Trade Mark Regulation 207/2009. On this provision, see CoJ case C-235/09, *DHL Express*, para. 59. See e.g. also Commission, Proposal for a regulation on the protection of individuals with regards to the processing of personal data and on the free movement of such data, COM(2012) 11, p. 90 (Art. 74(5)).

169 Point 20 Collective Redress Recommendation. See further para. 190 above.

170 See para. 312 above.

Liability Directive nor the Competition Damages Directive makes any mention of recurring penalty payments, given that these two directives focus exclusively on actions for damages in as far as substantive remedies are concerned.

Second, the legislative history of especially the Consumer Injunctions Directive suggests that EU involvement with this remedy can be a *rather sensitive affair*.[171] Most notably, at the insistence of the Member States, the abovementioned reference to penalty payments laid down in that directive is preceded by the phrase "*in so far as the legal system of the Member State concerned so permits*". This remedy therefore must only be provided for under this directive to the extent that the domestic law of the Member State in question allows this. Largely comparably the IPR Enforcement Directive stipulates in this respect that recurring penalty payments must be available "*where appropriate*" and "*where provided for under national law*".[172] The use of phrases of this kind makes the provisions in question in effect rather non-committal, which in turn can mean that their effects in practice can be uncertain and difficulties with respect to the enforcement of court rulings under the legal acts can remain.[173]

Third, and related to the previous point, is the fact that recurring penalty payments are *viewed very differently* in the various national jurisdictions across the EU.[174] A clear majority of Member States provides for this remedy in one form or another. But English domestic law for instance does not provide for a remedy of this type (although the rules of 'contempt of court' can to some extent fulfil a comparable function). Both French and German law do, but there are significant differences between these two legal systems. In particular, under German law a (recurring) penalty payment is due to the *State*, whereas in France it is normally to be paid to the *private party-applicant*. Most other jurisdictions in the EU largely follow one of these three basic models. It appears that where the EU legislation at issue touches upon recurring penalty payments, it has been drafted in such a manner that all three models can be retained. As explained above, there is mostly no requirement to introduce this remedy where domestic law does not already provide for it. The Consumer Injunctions Directive refers in addition to "*payments into the public purse or to any beneficiary designated in or under national legislation*". It follows that neither the German nor the French approach is precluded under this directive. Without addressing this matter expressly, the IPR Enforcement Directive also leaves it open to whom the penalty payments are to be made where they are due.

171 See para. 156 above.

172 Note that this latter phrase has been included in Art. 11, but not in Art. 9(1)(a) IPR Enforcement Directive 2004/48.

173 Cf. Study University of Leuven (2007), pp. 341; Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, pp. 13-14.

174 See further Jongbloet (2003), pp. 198-242; Study University of Bielefeld (2008), pp. 611 and 622-624; Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 13.

321. *In summary*, where there are concerns as to the compliance by losing parties with judgments issued in private enforcement cases, notably those whereby injunctive relief is granted, the inclusion of EU legislative provisions on recurring penalty payments can offer a solution. At present, the Consumer Injunctions Directive sets out this remedy with a considerable degree of detail, whereas it is also mentioned in some provisions of the IPR Enforcement Directive. However at national level there are diverging understandings of what this remedy entails. Some national jurisdictions are even unfamiliar with the very concept of recurring penalty payments. Combined with an apparent reluctance on the side of the Member States to deviate from these different domestic legal traditions, this seems to significantly reduce this remedy's potential as an instrument to ensure compliance in situations where this is deemed necessary. Indeed, the relevant provisions of the two abovementioned directives are in effect largely dependent on national law, both as to whether penalty payments can be imposed in the first place and as to what this entails precisely.

### *8.2.4. Publicity measures*

322. The term 'publicity measures' refers for the present purposes to the possibility for the court competent to rule on a private enforcement action to *order the publication* of either its decision in the case before it or of other relevant texts giving publicity to the infringement that was established. While no such measures have been foreseen in either the Procurement Remedies Directives or the Competition Damages Directive, in the two other fields of EU discussed in this study provision has been made for this remedy as a matter of EU law.

This remedy features most prominently in the IPR Enforcement Directive. This directive requires the Member States to ensure that the competent national courts can order "*appropriate measures for the dissemination of information concerning the decision, including displaying the decision and publishing it in full or in part*".[175] These measures are to be imposed at the request of the applicant and implemented at the expense of the party found to have infringed the intellectual property right at issue. On an optional basis Member States may also make provision under this directive for "*additional publicity measures which are appropriate to the particular circumstances, including prominent advertising*". A largely similar regime has been included in the Commission's proposal for a trade secrets directive.[176] The Consumer Injunction Directive contains a similar remedy, which is to be ordered "*where appropriate*".[177] Apart from the publication of the decision itself, this directive also refers to the possibility of "*the publication of a corrective statement with a view to eliminating the continuing effects of the infringement*" being ordered.

175 Art. 15 IPR Enforcement Directive 2004/48.
176 Commission, Proposal for a trade secrets directive, COM(2013) 813, p. 24 (Art. 14).
177 Art. 2(1)(b) Consumer Injunctions Directive 2009/22.

Comparable – optional – arrangements can be found in other consumer protection directives, such as the Unfair Commercial Practices Directive.[178]

323. The recitals of the IPR Enforcement Directive explain that the purpose of these publicity measures is to act as a "*supplementary deterrent*" and to "*contribute to the awareness of the public at large*".[179] This makes two things clear. In the first place, this remedy is essentially meant to fulfil only a *supplementary function*. Although such publication can be of relevance, a private party will not initiate private enforcement proceedings merely to have a judgment published. The object of the legal proceedings will typically be a substantive claim of some sort, whether it is for compensation in damages, injunctive relief or at least a declaration by the court seised that an infringement occurred.[180]

In the second place, this remedy serves a dual purpose of *informing and deterring*. It can accordingly be expected to be normally most effective where the general public is directly affected by the infringements at issue and/or where the infringing party is sensitive to the harm to its reputation that may result from the publication. This explains its inclusion in the IPR Enforcement Directive and in the aforementioned consumer protection directives, as in these two fields these two conditions will often be met. Likewise, neither is it entirely surprising that no such remedy has been laid down in the Procurement Remedies Directives. In public procurement cases infringements can certainly affect the public at large, but this occurs mostly only in an indirect manner. Moreover the (semi-)public bodies that are subject to these rules are on the whole probably not sensitive to negative publicity in the same manner as commercial, consumer-oriented undertakings may be. This logic also suggests that at least in some cases publicity measures could be a relevant remedy in relation to infringements of EU competition law.[181] This remedy has so far not been part of the Commission's private enforcement agenda in this field however. It therefore does not feature in the Competition Damages Directive.

324. To the foregoing one should add that this remedy tends to play only a *rather modest role in practice*. It generally receives little attention in relation to the IPR Enforcement Directive.[182] In respect of the Consumer Injunctions Directive it appears not be used very frequently.[183] This may be due in part to the generally rather vague and non-committal wording of the abovemen-

178 Art. 11(2) Unfair Commercial Practices Directive 2005/29. See e.g. also Art. 5(4) Misleading Advertising Directive 2006/114.

179 Recital 12 IPR Enforcement Directive 2004/48.

180 On declaratory relief, see also subsection 8.2.6 below.

181 On the possible relevance of reputational effects in a competition law context, cf. Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 152-153.

182 See para. 139 above.

183 Study University of Leuven (2007), pp. 341-342.

tioned provisions. The use of terms such as 'appropriate' measures, 'including', 'where appropriate' and of optional provisions means that much is left to be determined by the Member States and their courts.[184] The situation might have been different had the possibility for a court to order 'prominent advertising' or the publication of a 'corrective statement' been required as a matter of EU law, rather than leaving this to the Member States on an optional basis. Having said that, it seems fair to acknowledge that there are on the whole few indications that publicity measures can make more than a modest contribution to the private enforcement of EU law. Crucially the interest in this remedy from the side of the private parties concerned seems mostly limited.[185] This may well be connected to its aforementioned dual purpose of informing and deterring, which may generally be only of limited interest to a private party that is being confronted with an infringement of EU law. Arguably, especially in light of this purpose, it is more suitable as a public enforcement instrument.[186]

325. *In summary*, EU law provisions on publicity measures can be found in the field of intellectual property law (IPR Enforcement Directive) and consumer protection (Consumer Injunctions Directive, Unfair Commercial Practices Directive). This remedy, which mostly fulfils a supplementary function, is meant to serve the dual purpose of informing the public about infringements and deterring infringers. It will therefore normally be most effective in situations where the general public is directly affected by the infringements in question and/or where the infringing parties are sensitive to the reputational damage that may result from such publications. That suggests that there may also be some scope to use this remedy in other fields, such as competition law, whereas it may be less suitable for instance in public procurement cases. That said, probably partly as a consequence of the non-committal manner in which this remedy tends to be set out in the aforementioned EU legislation at hand, its practical significance is generally rather modest. All in all it appears that publicity measures can play a relevant, largely supplementary role in certain specific cases, but it is unlikely to be of major importance across the board for the private enforcement of EU law.

184 For an application by the EU courts, see GC case T-19/07, *Systran*, para. 331 (annulled for reasons that are not of relevance here in CoJ case C-103/11 P, *Systran*). Here the GC held that the issuing of a press release by the GS itself should suffice in response to the applicant's request for an order to have the judgment published, at the defendant's expense, in specialist journals and reviews and on specialist websites.

185 See however Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 15.

186 Cf. e.g. Art. 30 Competition Regulation 1/2003.

### *8.2.5. Measures on legal costs*

326. Stakeholders, practitioners, legal scholars and the Commission have all regularly noted that high *legal costs* can be an *important obstacle* in practice for the application of the EU legislative measures discussed in this study. These costs generally entail especially lawyer's fees, but they can also arise in the form of court fees or deposits and costs for involving experts. High legal costs have been observed to be a significant discouraging factor for initiating legal proceedings under the Procurement Remedies Directives, the IPR Enforcement Directive and the Product Liability Directive.[187] Indeed, in relation to the enforcement of intellectual property rights this has been called a "*key deterring factor*" for initiating legal proceedings, particularly for small and medium-sized enterprises.[188] Similar observations have been made in connection to the Consumer Injunctions Directive[189] and EU competition law,[190] as well as more generally the private enforcement of consumer protection law[191] and civil litigation.[192] Financial considerations have also been identified as an important element in the discussions on collective redress.[193] The EU courts, from their side, have also regularly acknowledged the importance of legal costs in relation to the private enforcement of EU law. A good example is the aforementioned *Océano Grupo* case law issued under the Unfair Terms Directive, where the Court of Justice noted that (relatively) high legal costs can deter consumers from raising themselves the unfairness of a term in a consumer contract.[194] The EU courts have at times also taken account of this element in their assessments of rules of national law under the principles of equivalence, effectiveness and effective judicial protection.[195] In certain cases this latter principle can also require the provision of legal aid to the parties to the proceedings.[196]

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187 See para. 86 and 87 (concerning Procurement Remedies Directives 89/665 and 92/13), 127 and 138 (concerning IPR Enforcement Directive 2004/48) and 184 (concerning Product Liability Directive 85/374) above respectively.

188 Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 9.

189 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 11. See further para. 159 above.

190 E.g. Study Ashurst (2004), pp. 8-9 and 92-96; Vrcek (2010), p. 292; Danov & Becker (2013), p. 77.

191 E.g. Loos (2011), p. 491. See also para. 152 above.

192 E.g. Tulibacka (2009), p. 1533; Hodges, Vogenauer & Tulibacka (2010), p. 7

193 E.g. Civil Consulting (2008b), p. 4. See further para. 187 and 188 above.

194 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 26, where reference is made specifically to lawyers' fees. Later rulings in this connection refer more generally to the costs of legal proceedings. See e.g. CoJ case C-618/10, *Banco Español de Crédito*, para. 54. See further para. 167 and 168 above.

195 E.g. CoJ case C-78/98, *Preston*, para. 60; CoJ case C-63/01, *Evans*, para. 53-55 and 76-78; CoJ case C-268/06, *Impact*, para. 51; CST Order case F-55/08 DEP, *De Nicola*, para. 36. On the principles of equivalence and effectiveness generally, see section 2.2 above. On the principle of effective judicial protection generally, see section 2.3 above.

196 CoJ case C-279/09, *DEB*, para. 36.

Such concerns related to high legal costs emerge most notably – although certainly not exclusively – in relation to the EU law provisions seeking to facilitate the bringing of *actions for damages*. This is obviously the case where the Product Liability Directive and the initiative leading to the Competition Damages Directive are concerned, given that both directives concentrate on this remedy. But also with respect to the EU legal acts that provide for several (substantive) remedies, such as the Procurement Remedies Directives and the IPR Enforcement Directive, have the abovementioned concerns mostly – although not exclusively – been raised in relation to their provisions on actions for damages. Indeed, high legal costs were amongst the reasons why in the context of the 2007 revision of the Procurement Remedies Directives the Commission decided not to focus on (further) facilitating damages claims for breaches of the EU public procurement rules, but rather to concentrate on other remedies instead.[197] The underlying reason is that the bringing of actions for damage tends to lead to rather complex and lengthy proceedings. This often translates into high legal costs. Another regularly heard complaint is that, even when damages are awarded, the sums in question tend to be (relatively) modest. When a substantial part of those sums is needed to cover lawyers' bills and other legal expenses, this can of course significantly reduce the attractiveness of this remedy.

327. Although the situation can differ considerable between the Member States,[198] there can therefore be little doubt that, generally speaking, legal costs can be a significant obstacle for the private enforcement of EU law. One would thus expect this issue to be addressed, at least to some extent, in the EU legislation under consideration in this study. But this is generally not the case. The legislation at issue is *mostly silent* on the issue of legal costs.

There is only one notable exception however. For the *IPR Enforcement Directive* addresses this issue in a general as well as in a specific manner. It stipulates that, generally, the measures, procedures and remedies to ensure the enforcement of the intellectual rights covered by this directive may not be "*unnecessarily complicated or costly*".[199] More specifically, this directive also requires Member States to ensure that "*reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this*".[200] The Court of Justice has clarified that this implies that the infringer "*must generally bear all the financial consequences of his conduct*".[201]

197 See para. 87 above.
198 Cf. e.g. Opinion AG Kokott case C-260/11, *Edwards*, para. 21. See further Hodges, Vogenauer & Tulibacka (2010).
199 Art. 3(1) IPR Enforcement Directive 2004/48. On this 'general rule', see further para. 144 above and subsection 9.2.5 below.
200 Art. 14 IPR Enforcement Directive 2004/48. See further para. 138 above.
201 CoJ case C-406/09, *Realchemie*, para. 49.

Yet, notable as it may be, it cannot be said that this directive's regime on legal costs is an unqualified success.[202] The continuing complaints by stakeholders about high legal costs in intellectual property cases suggest that it has not been very effective in addressing the aforementioned concerns. In all likelihood this is related to broad manner in which this EU law provision has been formulated. The term 'reasonable and proportionate legal costs and other expenses' obviously provides only limited clarity about the sorts and the level of the costs to be compensated. The provision in question is also (merely) a 'general rule' and it expressly allows for deviations for reasons of equity. Indeed, this formulation is so broad that, although there are certain exceptions and it remains in the end for the Court of Justice to establish whether or not this view is correct, most Member States did not consider it necessary to amend their pre-existing rules of national law in order to comply with it. It is therefore hardly surprising that its effects in practice have mostly been limited. This broad formulation is largely a consequence of the objections raised during the legislative process by certain Member States as well as the European Parliament against too far-going EU involvement with rules on legal costs.

328. It can further be noted that comparable discussions took place in *other fields* than intellectual property law, especially in relation to what was to become the Competition Damages Directive. Initially the Commission raised the option of providing for a rule that would limit the legal costs to be paid by the unsuccessful applicant ('one-way fee-shifting').[203] This suggestion received considerable criticism however.[204] The Commission subsequently decided to exclude this issue entirely from its legislative initiative. Instead its 2008 white paper merely 'encouraged' the Member States to amend their domestic rules where necessary.[205] In line with the Commission's proposal the eventual Competition Damages Directive therefore does not contain any rules on legal costs. The Commission's proposal in 2005 to include a (conditional) form of one-way fee-shifting in the Small Claims Regulation was similarly rejected by the EU legislature.[206] And while the

202 See para. 138 above.

203 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 9. Under the rule proposed there an unsuccessful applicant would only have to pay legal costs where he acted in a manifestly unreasonable manner by bringing the case. Mentioned is also the option of granting the national court the discretionary power to order at the beginning of the proceedings that the applicant will not be exposed to any costs recovery in case the action proves unsuccessful.

204 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 74. Cf. Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 181-183.

205 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 9-10. See also Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 75.

206 Commission, Proposal for Small Claims Regulation 861/2007, COM(2005) 87, p. 16 (Art. 14(2)). See further Loos (2011), p. 507.

rules on civil redress set out in the Commission's 2013 proposal for a trade secrets directive are mostly comparable to those of the IPR Enforcement Directive, rules on legal costs are notably absent from this proposal.[207]

The Collective Redress Recommendation, which is concerned with infringements of EU law more generally, does address the issue of legal costs.[208] It recommends that Member States ensure, first, that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party and, second, that contingency fees are not permitted.[209] However this recommendation is only that; a recommendation by the Commission. As such it is not an act of the EU legislature and it is not legally binding.[210] And even apart from that also in this case the wording used is in fact rather broad and flexible. Most notably the first recommendation mentioned above applies "*subject to the conditions provided for in the relevant national law*", while with respect to the latter recommendation it is said expressly that exceptions are permitted.

329. Therefore, while the importance of legal costs-related issues for the private enforcement of EU law is not in doubt, these issues are paradoxically *hardly addressed in a meaningful manner* in EU legislation relating to private enforcement proceedings. Only the Environmental Impact Assessment Directive, as interpreted by the Court of Justice, provides another scarce example of EU legislative action on this point.[211] Overlooking the foregoing, it appears that two factors play an important role in explaining this state of affairs.

A first factor is that on the side of the EU legislature (not only the Council, but also the European Parliament) there appears to be a general feeling that these matters are best left to be *regulated at national level*.[212] In this con-

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207 Commission, Proposal for a trade secrets directive, COM(2013) 813.

208 Collective Redress Recommendation 2013/396. On this recommendation, see further para. 190 above

209 Points 13 and 30 Collective Redress Recommendation 2013/396. Under a system based on 'contingency fees' (or other forms of 'success fees') lawyers' fees are charged not independently from the outcome of the proceedings, but e.g. as a percentage of the damages award if the action in question proves to be successful.

210 See para. 191 above.

211 Art. 11(4) Environmental Impact Assessment Directive 2011/92. Here it is stated that the review procedures provided for in that directive shall be "*not prohibitively expensive*". The CoJ has held that this implies that "*the costs of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable*". In this respect an objective analysis is required, whereby account may be taken of a range of circumstances (situation of the persons concerned; prospect of success; importance of what is at stake; complexity of the relevant law and procedure; potentially frivolous nature of the claim; existence of a legal aid scheme or a costs protection regime). See CoJ case C-260/11, *Edwards*, para. 40-48. See also CoJ case C-427/07, *Commission v. Ireland*, para. 92-94; CoJ case C-530/11, *Commission v. UK*, para. 33-72. For another form of EU legislative involvement with issues of legal costs, see Legal Aid Directive 2003/8.

212 In a similar sense, see e.g. Arrowsmith (2005), pp. 1436-1437.

nection reference is regularly made to the principle of subsidiarity.[213] The aforementioned objections raised during the legislative process relating to the IPR Enforcement Directive's provision on legal cost were largely motivated on these grounds.[214] In relation to the Commission's competition law initiative several respondents objected to EU interference that would lead to sector-specific rules on legal costs that would differ from those applicable in other civil cases.[215] As the European Parliament held with respect to a possible EU initiative on collective redress, "*Member States are to determine their own rules on the allocation of costs*".[216]

A second factor is that the possibility of establishing EU rules on legal costs tends to be particularly sensitive where the contemplated rules are seen as capable of *encouraging a 'litigation culture'*. This latter term refers, broadly speaking, to a situation whereby litigation between private parties takes place to a degree that is considered unreasonable and undesirable.[217] This especially plays a role where the contemplated EU rules would entail a deviation from the 'loser pays' principle. While the latter is certainly not absolute, it is widely accepted as the general point of departure for the allocation of legal costs between the parties to a dispute.[218] One of its key functions is to establish a threshold for unmeritorious litigation.[219] It does so mainly by creating a degree of financial risk for the (potential) applicant, which leads to a 'case selection effect'.[220] Thus the Commission held in 2008 that a possible judicial collective redress procedure should "*avoid elements*

213 On this principle, see also para. 389 below.

214 See para. 138 above.

215 See e.g. the responses to the 2005 green paper submitted by the German, UK and Dutch authorities in the context of the consultations referred to in para. 219 above.

216 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, para. 20. See also European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 20.

217 See further para. 460 below.

218 As regards the relevant rules established at EU level, see e.g. Art. 16 Small Claims Regulation 861/2007; Art. 138 CoJ Rules of procedure, OJ 2012, L 265/1; Art. 85(1) Community Trade Mark Regulation 207/2009; Art. 70(1) Community Designs Regulation 6/2002. As regards the rules applicable at national level, see e.g. Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 17 (n. 26); Hodges, Vogenauer & Tulibacka (2010), p. 17; European Parliament, Study on collective redress in antitrust, June 2012, p. 31. See also UNIDROIT, Principles of Transnational Civil Procedure (Art. 25), available via http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

219 Cf. e.g. Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 9.

220 Study CEPS, Erasmus University Rotterdam & LUISS (2007), p. 222. Cf. e.g. also Andrews (2005), p. 181. On the relationship between this 'loser pays' principle and the degree of litigation and the costs related thereto, see further Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 176-181. There it is explained in essence that, as compared to a situation where the parties bear their own costs, this principle can indeed reduce the likelihood of litigation, but that it can also discourage the bringing of meritorious suits and increase average total spending on legal costs by the parties.

*which are said to encourage a litigation culture […], such as […] contingency fees*".[221] This view found wide support in the subsequent consultation.[222] Along similar lines the European Parliament noted in 2012 that "*there can be no action without financial risk*" and that under the Member States' rules "*the unsuccessful party must bear the costs of the other party in order to avoid the proliferation of unmeritorious claims*".[223] Indeed, it has been observed that deviations from this 'loser pays' principle, notably in the form of contingency fees, tend to be met with strong cultural resistance.[224] That is the case despite the fact that such arrangements can also have certain positive effects, especially in terms of improved access to court for private parties that are affected by infringements of the substantive rules at issue.[225] It is for that reason that, despite such resistance, in several Member States (e.g. Sweden, Germany) certain forms of contingency fees were introduced in recent years.[226] It is probably no coincidence that the aforementioned – adopted – provision of the IPR Enforcement Directive is largely consistent with this 'loser pays' principle, whereas the rule that the Commission – unsuccessfully – suggested for competition law infringements and for small claims entailed a deviation from this principle. For similar reasons the Collective Redress Recommendation not only expressly refers to this principle,[227] it also states that "*the lawyer's remuneration and the method by which it is calculated [should] not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties*",[228] just as it limits the abovementioned recommendation not to permit contingency fees to situations where this would risk creating an incentive to such unnecessary litigation.[229]

330. *In summary*, it is widely acknowledged that financial considerations generally and rules on legal costs specifically can be an important factor in relation to the private enforcement of EU law. That applies especially, although not exclusively, with respect to actions for damages. However the EU legislation under consideration addresses this subject-matter only to a very limited extent. Despite earlier suggestions, the Competition Damages Directive is silent on this point. The Collective Redress Recommendation

221 Commission, Green paper on consumer collective redress, COM(2008) 794, p. 12.
222 Commission, Responses to the consultation and hearing on collective redress, October 2011, p. 15.
223 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, para. 20.
224 Hodges, Vogenauer & Tulibacka (2010), p. 25.
225 See e.g. Opinion AG Poiares Maduro case C-94/04, *Cipolla*, para. 94. See also Leskinen (2011), p. 87. For a broader assessment, see Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 201-205, where it is concluded that the legal and economic literature is split as to the impact of contingency fees on litigation expenditure, settlement rates and the quality of the lawsuits filed.
226 Leskinen (2011), p. 89.
227 Point 19 Collective Redress Recommendation 2013/396.
228 Point 29 Collective Redress Recommendation 2013/396.
229 Point 30 Collective Redress Recommendation 2013/396.

does address legal costs, but the recommendations in question are rather loosely formulated and this document is moreover not legally binding. Only the IPR Enforcement Directive contains a binding rule of EU law on the allocation of legal costs between the parties. Yet this rule has been formulated so broadly that, at least to date, it has had at most only a limited effect in practice. All in all it appears that the prospect of EU legislative intervention in relation to issues of legal costs remains a sensitive matter. This can be ascribed, in the first place, to the fact that many consider that rules this is best left to national law for reasons of subsidiarity and the internal coherence of the domestic legal systems. In the second place, views on this subject-matter tend to be shaped by an aversion of anything that could be seen as encouraging a 'litigation culture', in particular possible deviations from the 'loser pays' principle for the allocation of legal costs or the use of contingency fees for the remuneration of lawyers.

### *8.2.6. 'Unregulated' remedies: declarations, unjust enrichment, restitution*

331. At the end of this second and final chapter on the remedies provided for in the secondary EU law assessed in this study it is appropriate to note that the domestic laws of the Member States tend to provide for remedies other than the ones discussed above, which can nonetheless also be of relevance for the purposes of the private enforcement of EU law. The answer to the question whether and to which extent such 'unregulated' remedies are foreseen evidently depends on the legal system of the each individual Member State. Generally speaking, these remedies can include, to begin with, *declaratory relief*. In this case an applicant essentially simply requests the court to express itself on a particular legal question. This remedy is *inter alia* available in England and Wales, Italy, Spain and the Netherlands.[230] In addition one could think of claims brought by private parties that are founded on the *unjust enrichment* of the (alleged) infringer of EU law and/or for the *restitution* of unduly paid sums. Actions of this kind can be available *inter alia* in Germany, the Czech Republic, England and Wales, the Netherlands and Spain.[231] They typically involve the payment of certain monetary sums, but they can nonetheless be distinguished from the actions for damages discussed earlier. For they concentrate not on the harm caused on the side of the applicant, but on the gains made by the defendant. Whether or not the latter was at fault tends to be of lesser importance, if at all. German law also provides for a specific procedure for the 'skimming-off' of profits made as a result of certain infringements in actions brought by designated third parties (business or consumer associations), while the sums awarded flow to the public budget. This latter aspect probably explains why this procedure is

230 Barone & Amore (2010), p. 347; Callol (2010), p. 385; Lunsingh Scheurleer *et al.* (2010), p. 370; Smith, Maton & Cambell (2010), p. 311.

231 Callol (2010), p. 374; Lunsingh Scheurleer *et al.* (2010), p. 389; Smith, Maton & Cambell (2010), p. 310; Bej□ek (2011), pp. 49-50; Peyer (2012), p. 334.

reportedly little used.[232] Whilst an in-depth assessment of these 'unregulated' remedies and their potential in private enforcement proceedings of various kinds falls outside the scope of this study, it can still be of relevance to note the following three points.

332. In the first place, in certain cases there may well be grounds for *including* the abovementioned remedies in EU private enforcement-related legislation of the type at issue in this study. As regards declaratory relief, there admittedly appears to be generally limited 'demand' for this remedy where the private enforcement of EU law is concerned. Nonetheless in certain cases a 'mere' declaration that there has been an infringement can conceivably still be of importance to the private parties concerned. That may be so not only for symbolic reasons, but for instance also as a basis for subsequently negotiating a settlement between the parties to the dispute as to the further consequences to be drawn from that finding. This can, either *de jure* or *de facto*, thus function as part of a 'two-stage' procedure, whereby the illegality of the behaviour and the liability of the infringer is first established and whereby thorny questions, such as the quantification of the damage,[233] can then either be left to be settled out-of-court, or to be addressed at a second stage of the same legal proceedings or in separate proceedings.[234] The use of declaratory relief in its *negative* form has also been reported in competition cases.[235] In that case an undertaking requests the court to state that certain behaviour is not contrary to a particular rule of law and/or does not incur liability.

Concerning restitution, two broad categories can be distinguished for the present purposes.[236] First, there is what could be called 'pure' restitution. Such an action can typically be brought as a 'follow-up' (or addition) to a successful contractual remedy of the type discussed above, for instance to recover sums paid under a contract that is automatically void within the meaning of Article 101(2) TFEU or a term in a consumer contract that has been deemed to be unfair and therefore not binding on the consumer in question.[237] One could also think of actions brought by the customers of undertakings for the repayment of the 'overcharges' that resulted from those

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232 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 74-75. See also Micklitz (2011b), p. 115; Peyer (2012), p. 336.

233 See in particular subsection 7.1.4 above.

234 Cf. Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 8; Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 42. See also Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 74 (concerning a proposed Austrian law).

235 Siragusa (2014), p. 248.

236 Cf. Van Gerven (2003b), pp. 63-64. See also Van Gerven, Lever & Larouche (2000), pp. 770-816 and 872.

237 On these contractual remedies, see in particular subsection 8.1.1 above.

undertakings having participated in a cartel.[238] Second, there is what is sometimes called 'restitutionary damages'. Here the emphasis is not so much on the repayment of sums paid by the applicant, but rather on the gains made as a consequence of the infringements at issue. Actions of this kind may well be attractive private enforcement remedies, because it can sometimes be less problematic from a quantification point of view and/or because of the deterrent effects for the infringers concerned. Indeed, there is research suggesting that the chances of success of actions for restitution can be considerably higher than those of 'classical' damages claims that concentrate on the harm caused.[239]

333. In the second place, the above examples already illustrate that these 'unregulated' remedies can be closely connected with the ones that are expressly provided for in the EU legislation under consideration in this study. Indeed, it may not always be easy to *draw a dividing line* between them. This seems inevitable in a situation where the rules on some remedies are (to some extent) harmonised at EU level, whereas other remedies remain entirely unregulated as a matter of secondary EU law. For example, declaratory relief can resemble the publicity measures discussed earlier.[240] Or take the IPR Enforcement Directive. Its rules on actions for damages expressly stipulate that account can be taken of the 'unfair profits' of infringers when setting the amount of damages due and that the Member States may provide for a procedure for the recovery of profits made by the infringer.[241] This thus seems to point to a restitutory element, even if this should still be seen in light of the overall emphasis that this directive places on the 'classical' compensatory function of damages awards.[242] As was noted earlier, already at present there are discussions as to whether these rules could and should be extended so as to concentrate (even) more on the gains made by the infringer, rather than on the harm caused to the private parties concerned.[243]

The Competition Damages Directive provides another illustration of the questions that can arise in this connection. As its title ("*Directive […] on certain rules governing actions for damages […]*") already makes clear, this directive concentrates on actions for damages.[244] The scope of its regime on the disclosure – and on the non-disclosure – of certain evidence is expressly limited to these actions.[245] Should this be taken to mean that leniency applica-

238 Cf. Hjelmeng (2013), p. 1011.

239 See Peyer (2012), p. 354. Here a 50% success rate for restitution claims relating to completion law infringements in Germany is reported, which is considerably higher than for the actions for damages assessed in that study.

240 See subsection 8.2.4 above.

241 Art. 13(1)(a) and (2) IPR Enforcement Directive 2004/48. See further para. 135 above.

242 See the first subparagraph of Art. 13(1) and recital 26 IPR Enforcement Directive 2004/48.

243 See para. 137 and 282 above.

244 For a definition of the term 'actions for damages', see Art. 4(4) Competition Damages Directive.

245 Art. 5(1) and 6(1) Competition Damages Directive. See further subsection 6.3.3 above.

tions are not necessarily barred from being disclosed in a private enforcement action in which restitution is claimed under national law, or are these proceedings covered by the directive as well? Judging by the wording of the above provisions, one would be inclined to answer this last question in the negative. But that seems difficult to reconcile with the objectives of this directive generally and this provision on the non-disclosure of these documents specifically.[246] Similar questions can for instance arise in relation to the effects in legal proceedings for restitution of infringement decisions by national competition authorities and the directive's provisions on limitations periods.[247]

334. Lastly, the fact that the abovementioned remedies are not expressly provided for in the secondary EU law at issue in this study does not mean that *EU law generally* has no role to play in this respect. In particular, if private parties have an EU law right to damages in situations where their rights vested in that law are infringed, why would there not be an EU law right to restitution? As discussed earlier, a ruling such as *Muñoz* might well be understood as pointing in that direction.[248] That applies all the more so because there is already a considerable body of case law by the Court of Justice, pursuant to which the private parties concerned are entitled to the repayment of charges levied contrary to EU law by public authorities.[249] The Court has seemed careful in distinguishing this right to restitution from the right to damages under the principle of Member State liability.[250] This distinction has been criticized for being artificial and untenable,[251] which confirms that it can be difficult to draw a dividing line between the remedies at issue here. In any case it seems a comparatively limited step to transpose this logic to 'horizontal' situations, i.e. apply it in legal proceedings where one private party claims restitution from another private party on the grounds that the original payment was made as a consequence of an infringement of EU law, just as what was done in *Courage* with the principle of Member State liability.[252]

Unjust enrichment may well be a particularly complex concept in this connection however, essentially because it works in two ways. It is one thing to consider it unjustified for a party that infringed EU law to be enriched,

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246 See para. 226 and 235 above respectively.

247 Art. 9 and 10 Competition Damages Directive. See further para. 243-244 above respectively.

248 CoJ case C-253/00, *Muñoz*. See further para. 61 and 65 above.

249 See e.g. CoJ case 199/82, *San Giorgio*, para. 12; CoJ case C-147/01, *Weber's Wine World*, para. 93. See further Dougan (1999), p. 233; Milutinovic (2010), pp. 159-170.

250 See e.g. CoJ case C-66/95, *Sutton*, para. 23-24; CoJ case C-591/10, *Littlewoods*, para. 23. As regards the principle of Member State liability, see further para. 59 above.

251 Milutinovic (2010), p. 165. In a similar sense, see Dougan (1999), p. 262.

252 CoJ case C-453/99, *Courage*. See further para. 60, 63-64 and 213 above. In CoJ case C-242/95, *GT-Link*, para. 58-59, the CoJ already appeared to set a step in that direction, although there it was also emphasised that it concerns a public undertaking.

but it is quite another thing whether it then also follow that it is justified that the private party affected by that infringement is to be awarded more than the damage that it suffered as a consequence of that infringement. The latter would after all also seem to entail unjust enrichment. The Court of Justice seems receptive to arguments of this kind. In its abovementioned case law on unduly levied charges it has essentially accepted that this could be a reason for not repaying those charges.[253] And in Courage it expressly ruled that EU law does not prevent national courts from taking steps to ensure that the protection of rights guaranteed by EU law does not entail unjust enrichment.[254] The aforementioned discussions concerning restitution-related elements under the IPR Enforcement Directive also largely turn around this point. In this connection it can also to be noted that the Competition Damages Directive expressly precludes overcompensation, "whether by means of punitive, multiple or other types of damages".[255]

Matters are complicated further where the private party requesting restitution may be to blame as well, to a greater or a lesser extent, for the infringement in question.[256] Questions of this kind can occur in competition cases, for example when an undertaking that itself participated in the forbidden cartel requires restitution from a fellow cartel participant for payments made under a void contract. One could also think of restitution claims relating to public contracts that were illegally directly awarded (i.e. without public tendering in violation of the applicable EU public procurement rules) and that can therefore be considered ineffective under the Procurement Remedies Directives.[257] Again the Court's case law suggests that claims of this kind can be rejected on the basis of the principle that a litigant should not profit from its own illegal behaviour.[258] This touches upon the theme of contributory negligence, which under the Product Liability Directive can be reason to reduce or disallow liability, as well as questions of diligence and causality more generally.[259]

335. *In summary*, the main point here is that the overview of the remedies set out in this study is certainly not exhaustive. Although this can vary significantly, national law can, and often does, provide for other, 'unregulated' remedies that can also be of importance for private enforcement purposes. Examples include declaratory relief, unjust enrichment and restitution. Especially this latter remedy can be relevant here. In its 'pure' form, it can for instance act as a 'follow-up' to the contractual remedies discussed in

253 E.g. CoJ case 199/82, *San Giorgio*, para. 13; CoJ case C-309/06, *Marks & Spencer*, para. 41.
254 CoJ case C-453/99, *Courage*, para. 30. See also CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 94.
255 Art. 2(3) Competition Damages Directive.
256 Cf. Van Gerven (2003b), pp. 83-84.
257 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.3 above.
258 CoJ case C-453/99, *Courage*, para. 31.
259 Art. 8(2) Product Liability Directive 85/374. See further para. 182, 267 and 268 above.

this study. In the form of 'restitutionary damages' it can be a ground for reclaiming gains made by the infringer that can be attributed to the infringement, rather than the harm caused as a consequence of the infringement in question as is the case in a 'classical' damages action. In practice it may not always be easy to distinguish between these 'unregulated' remedies and the remedies expressly provided for in the EU legislation at issue in this study. Unjust enrichment can moreover be a particularly complex issue in this context, as it can act as a double-edged sword. For it can serve as a ground for reclaiming payments made to an infringer of EU law, but also as a ground for the latter to argue that this claim is to be rejected as it would lead to overcompensation of the applicant.

# 9. Procedural provisions and other issues

This chapter continues the comparative and contextual analysis of the EU legislation and other relevant developments discussed in part B commenced in the two previous chapters. It does so by analysing, in the two sections below, a range of procedural provisions and other issues that either have been laid down in the said legislation or that are otherwise of relevance in this connection, especially in light of the case law of the Court of Justice.

## 9.1. Scope, legal standing, limitation periods and rules of evidence

This first section subsequently addresses the relevant rules on four procedural and related issues, i.e. the scope of the legislation under consideration, legal standing, limitation periods and rules of evidence.

### *9.1.1. Scope*

336. The importance of the rules on scope set out in the secondary EU law at issue here lies, first and foremost, in the fact that they determine in respect of *which substantive rules* the remedies and procedures provided for can be relied upon. When overlooking this legislation, in essence the following two approaches can be distinguished.

The first approach is that the scope of the particular private enforcement-related legislation essentially *coincides* with that of the substantive rules of EU law in question. This approach is (inherently) followed in cases where the said measures have been laid down in the substantive legal acts themselves, i.e. in the Unfair Terms Directive and the Product Liability Directive.[1] A similar logic underlies the Procurement Remedies Directives. For each of these two latter directives corresponds to one of the two directives with substantive rules on public procurement.[2] Yet the substantive EU public procurement rules laid down in the Defence Procurement Directive are not covered. Instead the text of the Procurement Remedies Directives has essentially been 'copied into' into this latter directive, with some limited adaptations.[3] Slightly different is the Consumer Injunctions Directive.

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1 See subsections 5.3.1 and 5.4.1 above.

2 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13. These directives also cover infringements of the recently adopted Concessions Awards Directive 2014/23. See further para. 94 above.

3 Art. 55-64 Defence Procurement Directive 2009/81.

The annex to this directive lists a range of substantive EU consumer protection directives, the infringement of which could trigger legal action under the Consumer Injunctions Directive.[4] This approach should be understood against the background of the EU consumer protection *acquis* being scattered across many different legal acts.[5] Consequently this directive does not come into play following *any* infringement of substantive EU consumer protection law. Nonetheless, particularly since this list has been gradually been extended over the years, a large proportion of substantive EU consumer protection law is now covered by this directive.

The second approach, laid down in the IPR Enforcement Directive, differs more substantially from the former. To begin with, the delimitation of the scope of this directive is wide, without however being very precise. This directive applies in essence to "*any infringement*" of intellectual property rights, whereby the recitals add that the directive's scope should be as wide as possible.[6] More significant for the present purposes is however that the IPR Enforcement Directive applies not only to infringements of intellectual property rights provided for by *EU* law, but also those provided for by *national* law. Infringements of rights granted on the basis of rules of 'purely' national laws (i.e. rules of national laws other than those transposing EU directives) are therefore also covered as a matter of EU law. A comparable 'mixed' approach is also provided for in Competition Damages Directive, as it covers not only infringements of EU competition law, but also of certain provisions of national competition law.[7]

337. It would appear that, generally speaking, the former is the more logical approach. After all, generally speaking, the key objective of the EU legislation at issue here is facilitating the effective enforcement of *EU* law.[8] Although this need not be excluded, it may moreover not always be immediately evident that also covering rules of 'purely' national law is justified from an internal market perspective, as is required under the legal basis that is relied upon in virtually all cases, i.e. Article 114 TFEU.[9] As the Commission held in its proposal for the IPR Enforcement Directive, the EU's involvement with enforcement-related issues would be a "*logical extension*" of its

4 Art. 1(2) Consumer Injunctions Directive 2009/22. See further para. 157 above.

5 See para. 151 above.

6 Art. 2(1) and recital 13 IPR Enforcement Directive 2004/48. The Commission's list of intellectual property rights covered may be helpful in practice, but it is neither legally binding nor exhaustive. At the same time the Commission's 2013 proposal for a trade secrets directive contains its own set of – largely similar – private enforcement-related rules to address unlawful acquisition, use and disclosure of trade secrets. See Commission, Proposal for a trade secrets directive, COM(2013) 813. See further para. 140 above.

7 Art. 1(1) in conjunction with Art. 4(1) and (2) Competition Damages Directive. See para. 227 above.

8 See further para. 383 and 438 below.

9 See further para. 382 below.

involvement with the substantive law at issue.[10] Or, as the European Parliament noted in relation to consumer redress, "*the substantive rights conferred by [EU] legislation […] must be supplemented by appropriate procedural mechanisms to ensure their enforcement*".[11] The question is therefore in particular why that approach is not consistently followed.

In this connection it can first be noted that the Commission's proposal for the IPR Enforcement Directive was in fact only concerned with rights based on EU law. The provision, pursuant to which infringements of intellectual property rights provided for by 'purely' national law are also covered, referred to above, was introduced by the EU legislature.[12] Precisely the contrary had in fact happened earlier, at the time of the adoption of the first of the two Procurement Remedies Directives. In this latter case the Commission had proposed to cover also infringements of 'purely' national laws on public procurement, but the EU legislature (then only the Council) did not take up this part of the proposal.[13] And also in respect of the Competition Damages Directive a change of approach can be observed. Originally, the Commission's initiative was limited to infringements of EU law only. As has been explained above, the subsequent decision to cover also certain rules of national competition law seems to have been motivated, at least in part, by the fact that this provided a justification for involving the European Parliament in the legislative process as a proper co-legislator, something on which it had long insisted.[14] The foregoing indicates that, when determining the scope of the EU legislation at issue here, it is not always easy to discern a clear and consistent line. It appears that, in addition to strictly legal and policy-related ones, considerations of a political nature can also play a role. At the very least, the choices made in this connection seem to merit further reflection and explanation.

Having said that, the practical implications of the above discussions and the decision as to whether or not to cover also certain rules of 'purely' national substantive law should not be overstated either. As to intellectual property law, the EU's involvement with the substantive rules in this domain is very extensive.[15] That implies that relatively few intellectual property rights are provided for solely by 'purely' national law. That being so, the decision to cover *all* infringements of the applicable substantive rules can be seen not only as a comparably modest, but arguably also as a sensible one, given that this ensures that the same regime applies across the board.[16] It can further legitimately be argued that competition law is somewhat of a particular case in this respect. For under the Competition Damages Direc-

10 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 5.
11 European Parliament, Resolution on consumer redress, OJ 1987, C 99/203, recital C.
12 See further para. 140 above.
13 See further para. 94 above.
14 See para. 227 above.
15 See para. 108 above.
16 See also subsection 10.4.2 below.

tive not all infringements of the relevant rules of substantive national law are covered; this directive covers only situations where pursuant to the Competition Regulation there is a requirement of the *parallel application* of substantive EU and national competition law.[17] That means that its coverage of national law is restricted and moreover that this selected approach can be justified with reference to the need to avoiding different remedial and procedural rules being applied in one and the same legal proceedings.[18]

338. A separate issue in relation to scope is the *infringement of which provisions* of the rules of substantive law covered can lead to the remedies set out in the aforementioned EU legislation being invoked. The role of the concept of a 'right' is of particular importance in this regard.[19] Under the said legislation it is not always evident that it is the infringement of a right, conferred on a private party by the relevant rule of substantive EU (or national) law, that can 'trigger' the application of this legislation. Under the IPR Enforcement Directive the existence and subsequent infringement of an intellectual property *right* is clearly the central concept.[20] By contrast the Procurement Remedies Directives and the Consumer Injunctions Directive do not make reference to the concept of a 'right' at all.[21] The Procurement Remedies Directives stipulate essentially that it must be ensured that decisions taken by the contracting authorities may be reviewed on the grounds that they have infringed *EU law* in the field of public procurement.[22] The Consumer Injunctions Directive similarly defines the concept of an 'infringement' as any act contrary to the *directives* listed in its annex which harms the collective interests of consumers.[23] These directives thus appear to 'skip' the step whereby the question is asked whether the substantive rule of EU law that has been infringed actually confers a (legally enforceable) right on the private parties in question.[24]

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17 Art. 3(1) Competition Regulation 1/2003. See further para. 203 above.

18 See recital 10 Competition Damages Directive. See also Commission, Proposal for the Competition Damages Directive, COM(2013) 404, pp. 12-13.

19 As set out in para. 21 above, in this study the concept of a 'right' refers to a legal position which a party recognised as such by the law may have and which in its normal state can be enforced by that party against others before a court of law.

20 See in particular Art. 2(1) IPR Enforcement Directive 2004/48.

21 The Competition Damages Directive is somewhat ambiguous in this respect. It speaks generally of infringements of EU or national competition law, but it also places particular emphasis on private parties' right to full compensation. Its recital 3 explains that Art. 101 and 102 TFEU have direct effect and create rights and obligations for the private parties concerned. See also para. 199 above.

22 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13.

23 Art. 1(2) Consumer Injunctions Directive 2009/22.

24 Note that this state of affairs is arguably somewhat better understandable where Consumer Injunctions Directive 2009/22 is concerned, given that, as discussed in para. 154 above, this directive is exclusively concerned with the protection of the *collective* – and not the individual – interests of consumers (see its Art. 1(1)). However it would appear that, collective or not, these interests can only be deemed to be affected where the rights that the substantive EU law at issue grants to these private parties are infringed.

That is remarkable because, ambiguous as the concept of a 'right' may be in EU law,[25] it is a fundamental requirement for a rule of EU law to be enforceable by a private party before either a European or a national court. By concentrating on remedies without (explicitly) addressing the issue of rights these directives seem to disregard the link that exists between both concepts. The general position is that each right conferred ought to be accompanied by a remedy ensuring that it is capable of being enforced (*ubi ius, ibi remedium*). Conversely it seems to make little sense for the EU legislature to require the availability of certain remedies in the absence of the existence of a right. The importance of the question of conferral of rights is illustrated by the case law of the Court of Justice relating to the principle of Member State liability. One of the conditions for incurring such liability is that the rule of law that has been infringed was intended to confer rights to private parties.[26] Against this background it seems unlikely that the EU legislature meant to take a different line under the said directives. Probably it is simply *presumed* here that the substantive rules at issue confer rights on private parties. Although this does not necessarily hold true in relation to all provisions set out in these directives,[27] this presumption mostly seems justified, as (subsequent) case law has made clear.[28] This is in line with the position in EU law more generally, in the sense that this law, as construed by the Court of Justice, is often rather 'generous' in conferring rights.[29]

339. *In summary*, the question which substantive rules are covered by the private enforcement-related EU legislation at issue here is answered differently in the various legal acts. These acts tend to cover most, although not always all, substantive rules of EU law that apply in the fields concerned. However the scope of the IPR Enforcement Directive and the Competition Damages Directive is broader, in that they also cover certain provisions of ('purely') national law. Although in both cases arguments can be given for this extended scope, from a legal perspective this latter approach does not seem self-evident. Indeed, it appears that in this regard political considerations can sometimes play as much a role as strictly legal ones. Furthermore, different from what one would expect, not all legal acts under consideration

25 See para. 21 above. On the relationship between direct effect and the conferral of rights in the EU legal order, see also para. 31 above.

26 See para. 59 above.

27 See e.g. Art. 75 Public Sector Procurement Directive 2004/18 and Art. 8a Unfair Terms Directive 93/13 on the provisions on the submission of information by the Member States to the Commission, or Art. 13 Unfair Commercial Practices Directive 2005/29 on the Member States' obligations to lay down penalties and to ensure that they are being enforced. Provisions of this type are unlikely to be qualified as conferring rights. Cf. e.g. CoJ case C-159/00, *Sapod*, para. 61-62; CoJ case C-222/02, *Paul*, para. 40-46.

28 See para. 70 and 151 above.

29 See e.g. the CoJ's rulings on environmental matters. See e.g. CoJ case C-131/88, *Commission v. Germany*, para. 7; CoJ case C-72/95, *Kraaijeveld*, para. 56; CoJ 1996, case C-298/95, *Commission v. Germany*, para. 16; CoJ case C-420/11, *Leth*, para. 32. See further para. 446 below.

establish the infringement of a right as the central criterion that can 'trigger' the application of the remedies and procedures set out therein. Unlike the IPR Enforcement Directive, where this concept plays a central role, especially the Procurement Remedies Directives and the Consumer Injunctions Directive do not refer to the concept of a 'right' at all. Instead they refer more generally to infringements of the relevant substantive rules. This is unlikely to point to any difference in substance however. Rather it simply appears to be presumed (generally correctly) that the said rules confer rights on the private parties concerned.

### *9.1.2. Legal standing*

340. At first glance it might appear that the provisions on legal standing (*locus standi*, i.e. the rules on 'who can sue') in the legislation under consideration typically *harmonises to a high extent* the national laws concerned. Take for instance the Procurement Remedies Directives. There it is specified that "*any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*" has standing to bring a case.[30] The IPR Enforcement Directive is at least as detailed. It sets out four categories of persons having legal standing to initiate actions under that directive, namely rightholders, licensees, collective rights management bodies and professional defence bodies.[31] Issues of legal standing are further at the very heart of the Consumer Injunctions Directive. This latter directive seeks to ensure that 'qualified entities' (such as consumer associations) from one Member State can initiate legal actions in another Member State in cases of 'intra-EU infringements' of the substantive consumer protection rules at issue.[32] The Unfair Terms Directive also addresses the issue of legal standing. It specifies that persons or organisations having a legitimate interest in protecting consumers must be able to initiate legal proceedings under that directive.[33] Finally, pursuant to the Competition Damages Directive "*anyone who had suffered harm caused by an infringement*" of the relevant competition rules is to be entitled to bring an action for damages.[34] This term 'anyone' is to be understood broadly, covering consumers, undertakings (including 'indirect purchasers') as well as public authorities.[35]

341. However the abovementioned provisions nonetheless mostly continue to leave *significant leeway* to the Member States. This is ensured through the insertion of additional clauses that refer, in one way or another, to national law. These clauses mostly came about upon insistence of the Mem-

30 Art. 1(3) Procurement Remedies Directives 89/665 and 92/13. See further para. 95 above.
31 Art. 4 IPR Enforcement Directive 2004/48. See further para. 141 above.
32 Art. 4 Consumer Injunctions Directive 2009/22. See further para. 154-155 above.
33 Art. 7(2) Unfair Terms Directive 93/13. See further para. 160 above.
34 Article 1(1) Competition Damages Directive. See further para. 241 above.
35 Cf. recital 12 Competition Damages Directive.

ber States represented in the Council. The Procurement Remedies Directives expressly stipulate for example that it is for the Member States to establish the applicable "*detailed rules*" in this respect. As to the IPR Enforcement Directive, in relation to three out of four categories of persons having legal standing (i.e. licensees, collective rights management bodies and professional defence bodies) the phrase is added "*in so far as permitted by and in accordance with the provisions of the applicable law*". In respect of the fourth category (i.e. rightholders) only the latter part of this phrase has been added. This indicates arguably that (only) these rightholders must in any case have legal standing on the basis of this directive, while in that case the applicable detailed rules remain a matter of national law. As regards the three other categories of persons, even the question of whether they have legal standing as such seems to be determined by national law.[36]

A largely similar picture emerges when the Consumer Injunctions Directive is considered in further detail. Under this directive it remains for the Member States to determine which 'their' qualified entities are, meaning that it does not create a harmonised EU rule of legal standing for consumer associations.[37] It is true that this directive requires that 'foreign' qualified entities, i.e. entities considered qualified to initiate legal proceedings in accordance with the rules of another Member States than the one where proceedings are brought, in principle have legal standing across the EU. However the national court seised remains entitled to examine whether the purpose of the qualified entity in question justifies it taking action in that specific case. In other words, the 'mutual recognition' mechanism for the legal standing of these entities that this directive establishes is not unqualified, but it is subject to an additional verification in concrete cases. In addition from the abovementioned provision in the Unfair Terms Directive it follows that national law essentially determines which party has a legitimate interest. For here it is stated that having a legitimate interest "*under national law*" is required. Comparable statements can be found in other consumer protection directives and elsewhere in secondary EU law.[38] Only the Competition Damages Directive does not contain any such explicit reference to national law where matters of legal standing are concerned.

342. It follows that the actual harmonising effect of the EU involvement with issues of legal standing is typically *more modest* than what might appear at first sight. That applies even more so because, apart from the abovementioned clauses, more often than not the above provisions mainly seem to *confirm* – rather than amend or otherwise affect – already existing national

36 In this sense, see Reinbothe (2010), p. 14; Lakits-Josse (2011), p. 527.

37 Cf. Betlem (1999), p. 414.

38 E.g. Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(1) Misleading Advertising Directive 2006/114; Art. 17(2) Gender Equality Directive 2006/54; Art. 3(2) Free Movement of Workers Enforcement Directive 2014/54.

rules.[39] The Procurement Remedies Directives' requirement of the applicant having a (legitimate) interest was for instance inserted expressly with a view not "*jeopardise*" the logic of the existing legal systems of the Member States.[40] Something similar can be said in relation to the IPR Enforcement Directive. As set out above, under this directive the legal standing of rightholders is regulated most extensively as a matter of EU law. But in the various national legal systems precisely this category of applicants is normally capable of initiating legal proceedings under national law anyway.[41] A holder of an intellectual property right is after all evidently concerned by, and will generally have a legitimate interest in acting upon, an (alleged) infringement of its right. This may be less self-evident for the other categories listed in this directive, especially as regards collective rights management bodies and professional defence bodies.[42] And precisely in relation to these categories this directive continues to leave a great deal of flexibility to the national legal systems.

It further follows from the foregoing that the Competition Damages Directive harmonises the relevant national rules to a comparatively high extent, given that it does not contain an express reference to national law in this regard. However on this point this directive seems to do little more than *codifying* the earlier case law of the Court of Justice.[43] For in cases such as *Courage* and *Manfredi* it has long been held that "*any individual*" must be able to claim compensation for the damage suffered as a consequence of an infringement of the EU competition rules.[44] Seen from this perspective, also in this case the actual degree of harmonisation realised is thus in effect more limited than what might appear at first sight. This probably also explains why legal standing-related issues generated relatively little debate when adopting this directive. In this connection discussions focused especially on

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39 See e.g. also the statement made by the Commission and Greece at the time of the adoption of Public Sector Remedies Directive 89/665: "*the term 'interest' in [the provision on legal standing of this directive] is equivalent in the Greek legal system to the concept of 'legitimate interest' as consistently defined by the decisions of the Greek Council of State*". See Council, doc. 7490/89, p. 10.

40 Council, doc. 7834/89 ADD 1, p. 7.

41 Cf. e.g. Cornish, Llewelyn & Aplin (2010), p. 58. A majority of Member States are nonetheless reported to have amended their national laws in this regard pursuant to the adoption of IPR Enforcement Directive 2004/48. See Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 6.

42 Cf. e.g. Art. 47 Patent Court Agreement, pursuant to which the rightholder (i.e. the patent proprietor) and the holder of an (exclusive) licence are entitled to bring actions, whereas for other persons and bodies reference is made to national law. On this agreement, see para. 108 above. Cf. e.g. also Art. 104 Community Plant Variety Rights Regulation 2100/94, pursuant to which actions for infringements may be brought by the holder and, in principle, persons enjoying exploitation rights.

43 Cf. recital 12 Competition Damages Directive.

44 CoJ case C-453/99, *Courage*, para. 24; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 59 and 61. See further para. 213 and 214 above respectively.

collective redress, an issue that was eventually not addressed in the directive.[45]

343. Comparatively modest as the abovementioned provisions on legal standing may thus be, this does not mean that they are of no importance. That applies especially when account is taken of the (potential) role of the Court of Justice in *interpreting* these provisions. This point is best illustrated with reference to the *Fritsch* case, which concerned the application of the aforementioned provision on legal standing laid down in the Procurement Remedies Directives.[46] Under the national law applicable in the case at hand a dispute had first to be brought before a non-judicial conciliation committee for the applicant to have legal standing. The directives' provision being silent on this matter, the Court of Justice was asked whether such a rule is permitted. It answered in the negative. Specifically as regards the express reference to national law made in this provision, it held that this "*does not authorise [the Member States] to give the term 'interest in obtaining a public contract' an interpretation which may limit the effectiveness of that directive*".[47] This suggests that the effects of such an explicit reference to national law are not absolute. In particular, where the effect that is given thereto is such that in the eyes of the Court the effectiveness of the EU legal act in question might be at risk, it may well be brushed aside rather easily.

It remains for now an open question whether reasoning similar to that set out in *Fritch* is applicable in relation to the other provisions on legal standing discussed above. If so, this could obviously increase the degree of harmonisation actually achieved. Generally speaking, the potential to come to a rather extensive interpretation of these provisions on legal standing certainly seems to be present. Jurisprudential developments in relation to other fields of EU law, such as environmental law and state aid law, suggest that the Court might well be prepared to exploit this potential.[48] That could apply particularly when the provisions in question are interpreted in light of the principle of effective judicial protection, set out in the Charter.[49] Such

45 See e.g. Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 13-22. Cf. recital 12 Competition Damages Directive. See further para. 225 above. The issue of collective redress has instead been addressed in Collective Redress Recommendation 2013/396, discussed in para. 190 above. As discussed in para. 240 above, another legal standing-related issue that generated some debate concerns the position of indirect purchasers.

46 CoJ case C-410/01, *Fritsch*, para. 28-34. See also the other CoJ case law relating to the provision on legal standing of Procurement Remedies Directives 89/665 and 92/13, discussed in para. 95 above.

47 *Ibid*., para. 34.

48 In relation to (what is now) Art. 11 Environmental Impact Assessment Directive 2011/92, see e.g. CoJ case C-263/08, *Djurgården*, para. 40-52; CoJ case C-240/09, *Lesoochranárske zoskupenie*, para. 51; CoJ case C-115/09, *Bund für Umwelt und Naturschutz Deutschland*, para. 46; CoJ case C-72/12, *Altrip*, para. 42-54. In relation to Art. 107 TFEU, see e.g. CoJ case C-174/02, *Streekgewest Westelijk Noord-Brabant*, para. 18-20.

49 Art. 47 Charter. See further para. 43 above.

'Charter-consistent' interpretation may well mean that the applicable legal standing requirements are not to be interpreted too restrictively.[50]

The aforementioned *Muñoz* ruling is arguably of particular importance in this connection.[51] On the one hand in this case the Court appeared to signal that it wished to allow a relatively broad category of private parties the possibility to bring a case for an (alleged) infringement of certain quality standards for agricultural products set by EU law. It (implicitly) rejected Advocate General Geelhoed's suggestion to apply here the – restrictive – test of whether the applicant was directly and individually concerned, which applies to direct actions before the EU courts.[52] If that is the situation in a case where no specific private enforcement-facilitating EU legislation applies, it seems doubtful whether the Court would take a more restrictive line where such legislation applies. On the other hand in *Muñoz* the Court also seemed careful to stress that it must be possible for *competitors* of the infringing undertaking to enforce the applicable rules by means of civil proceedings. Arguably this served to emphasise that, as a matter of EU law, not necessarily *any* third party is entitled to bring a private enforcement action.[53] Indeed, many understand this reference in *Muñoz* as hinting at a requirement of the applicant having a sufficient *interest* to act.[54] There are also other rulings that appear to go in this direction,[55] although, as was noted above, in its *Courage* case law the Court has so far consistently emphasised that "*any*

50 On 'Charter-consistent' interpretation, see further para. 467 below.

51 CoJ case C-253/00, *Muñoz*. See further para. 61 above.

52 On these direct actions under Art. 263 TFEU, see para. 3 above. See Opinion AG Geelhoed C-253/00, *Muñoz*, para. 67-76. The CoJ's ruling in *Muñoz* on this point seems understandable, not only considering the restrictiveness of the test under Art. 263 TFEU, but also given that, if one wishes to make an analogy, it might be more appropriate to instead apply the test for legal standing relating to the EU's non-contractual liability under Art. 340 TFEU. Under this latter provision no requirement of direct and individual concern applies. See e.g. Gutman (2011), pp. 703-708. For possible other analogies, specifically in a competition law context, see Milutinovic (2010), pp. 222-228.

53 This is related to the question whether and if so, in which cases, as a matter of EU law, a requirement exists pursuant to which an applicant must fall within the *protective scope* of the rule of law that is allegedly infringed for him to be able to rely thereon in the course of law ('*Schutznorm*'). Such a requirement exists, in various forms, in Member States such as Germany, Denmark, the Netherlands and Portugal. See Van Gerven (1995), p. 696. See further e.g. Prechal (2005), pp. 122, 238-239 and 284; Tridimas (2006), p. 480; Eilmansberger (2007), pp. 463-467; Leczykiewicz (2010a), pp. 278-279; Reich (2010), p. 127.

54 Biondi (2003), pp. 1248-1249; Dougan (2004), p. 43. Cf. Temple Lang (2008), p. 98. In a similar sense, see Opinion AG Geelhoed C-253/00, *Muñoz*, para. 63, 65 and 76.

55 E.g. CoJ case C-132/05, *Commission v. Germany (Parmesan cheese)*, para. 68-71, discussed in para. 55 above. See also e.g. CoJ joined case C-261/01 and C-262/01, *Van Calster*, para. 64; CoJ case C-237/07, *Janecek*, para. 39; CoJ case C-426/05, *Tele2 Telecom*, para. 38; CoJ joined cases C-165/09 to C-167/09, *Stichting Natuur en Milieu*, para. 100. Note that also under Art. 263 TFEU a distinction is made between the tests for legal standing and for having an interest in bringing legal proceedings. The latter requires that there must a vested and present interest, evaluated at the date on which the action is brought, which exists only if the action, if successful, is likely to procure an advantage for the party who has brought it. See e.g. GC case T-79/12, *Cisco systems*, para. 34 and 35.

*individual*" is in principle entitled to bring such an action.[56] It follows that, while several issues remain to be clarified in this connection, generally speaking, there are grounds to believe that the Court may well be prepared to interpret the abovementioned provisions rather extensively, while at the same time seeking to prevent creating an *actio popularis*.[57]

344. *In summary*, the picture as regards legal standing is rather mixed. On the one hand the fact that almost all legal acts under consideration in this study address this issue in some detail is testimony to the importance that is attributed thereto in the present context. Ensuring that private parties have the legal capacity to act before the competent national courts is evidently a precondition for any effort to facilitate the private enforcement of EU law to be successful. In this sense the provisions discussed here signal both an understandable and an important inroad into the realm of national procedural autonomy. On the other hand these provisions have generally been drafted in such a manner that they continue to leave Member States very significant leeway to maintain or establish their domestic rules on legal standing. Although they set out a common minimum standard, the resulting threshold is typically rather low and moreover relies in many respects on national law. This difficulty in harmonising this subject-matter in a meaningful manner may be due precisely to the fact that the question which parties have access to court is such a crucial issue, going to the heart of any legal system and touching upon its underlying values and preferences. Be this as it may, the very fact that there are certain rules of EU law in place, together with their often somewhat ambiguous wording, implies that considerable scope for interpretation is left to the Court of Justice. Although the case law available to date is limited and not always free of ambiguity either, the Court may well be inclined to construe the provisions in question rather broadly, while at the same time arguably seeking to avoid creating an *actio popularis*.

### *9.1.3. Limitation periods*

345. Where a dispute emerges, it is in the interest of all parties concerned to know by which date a possible legal action needs to be brought. For a (potential) applicant this evidently marks the moment before he must act,

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56 See in particular CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 62-64, discussed in para. 214 above. There the CoJ added the phrase "*where there is a causal relationship*". Whereas in practical terms the outcome may be similar, legally speaking, the question whether an applicant has a sufficient interest to be considered admissible in a particular case is however to be distinguished from the question whether this party, once having been considered admissible, can demonstrate that the harm suffered was caused by the alleged infringement. On the requirement of a causal link, see further subsection 7.1.3 above.

57 Kornezov (2014), p. 258, where the prevention of *actio polpularis* is linked with the separation of powers, at least in as far as legislative acts are concerned.

if he wishes to do so. For the (potential) defendant, as well as for interested third parties, this marks the moment by which, in the absence of an action having been brought, they are 'safe'. Accordingly, as the Court of Justice has consistently held, it is in the interest of *legal certainty* to set reasonable limitation periods.[58] Indeed, such periods also apply for litigation before the EU courts themselves. Actions for damages for the EU's non-contractual liability must for example be brought before those courts within five years from the occurrence of the event giving rise thereto.[59] This period begins to run at the moment at which the decision produces its effects *vis-à-vis* the parties concerned, i.e. when the harm actually materialises in relation to these parties.[60]

The foregoing implies not only that limitation periods can be of considerable importance in the present context, it also underlines that setting rules on this subject-matter is to a high extent a balancing act between the various interests at stake.[61] Just as setting too strict rules would be detrimental to the possibilities of private parties to initiate legal proceedings for infringements of EU law before the competent national courts, imposing excessively long limitation periods can cause disproportionate harm to the interests of the (potential) defendants and certain third parties. It would further be mistaken to concentrate only on the length of these periods. The question at which moment they begin to run can be at least as important, as can the precise nature of the periods in question and the circumstances in which they are to be applied. All of these issues come to light when considering the following legal acts.[62]

346. Take, to begin with, the IPR Enforcement Directive, which is *very brief* on this point. That is to say, it only provides for a general reference to the need to avoid "*unreasonable time limits or unwarranted delays*".[63] It does not set out any specific rules on limitation periods.[64] This stands in market contrast with the comparatively detailed manner in which this directive regulates many other matters under discussion in this study. In part this can probably be ascribed to the lack of a general and 'inherent' urgency in the typical private enforcement disputes covered by this directive.[65] At the same

58 E.g. CoJ case C-30/02, *Recheio*, para. 18. See further para. 38 above.

59 See Art. 46 of Protocol No. 3 to the TFEU on the Statute of the Court of Justice of the European Union.

60 E.g. CoJ case C-460/09 P, *Inalca*, para. 60.

61 Cf. Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 535-536.

62 Rules on limitation periods are notably absent from the consumer protection directives under consideration here, such as Consumer Injunctions Directive 2009/22 and Unfair Terms Directive 93/13.

63 Art. 3(1) IPR Enforcement Directive 2004/48. On this 'general rule', see further para. 144 above and subsection 9.2.5 below.

64 Cf. Commission, Proposal for a trade secrets directive, COM(2013) 813, p. 20 (Art. 7), which does contain a rule on limitation periods.

65 See also para. 310 above.

time the interests of the parties wishing to enforce their intellectual property rights being the dominant policy concern here and existing limitation periods set on the basis of national law generally not being seen as an obstacle to be addressed, presumably, no need was felt to impose any particular requirements in this respect at EU level.

347. In contrast limitation periods play a *particularly important role* in public procurement cases. The contracting authority and the preferred bidder normally have a legitimate interest in concluding and executing the public contract in question as soon as possible and therefore in possible challenges by third parties (notably other bidders) being brought without delay.[66] The latter will nonetheless need to some time to determine whether they wish to, and can, contest the contracting authority's decision and if so, to prepare an application. Since their revision in 2007 the Procurement Remedies Directives therefore expressly allow for the setting of a range of limitation periods.[67] This is in line with earlier case law of the Court of Justice to this effect.[68] The length of these periods differs depending on the type of review sought, but they are generally very short. These directives foresee three types of limitation periods, which vary depending on the type of relief sought. First, there is a minimum period of 10 or 15 days (depending on the means of communication used) for requests for *review of the legality* of the contracting authority's decision, counting from its notification to the private party concerned.[69] Second, the minimum time period for actions seeking the *ineffectiveness* of a concluded contract has been set at either 30 days (upon notification of the party concerned) or six months (upon the conclusion of the contract).[70] Third, in relation to *actions for damages* no specific limitation periods have been laid down as a matter of EU law. This is thus one of the other situations where the relevant limitation periods are expressly left to be determined by nation law.[71]

Noticeable is further the explicit requirement laid down in the Procurement Remedies Directives that the abovementioned notifications to the private party concerned must include the *reasons* for the decision in question. This reflects the thought that there can be no effective judicial protection – and the relevant limitation period can therefore not begin to run – until the private party concerned has been properly informed. Again this is in line with earlier case law of the Court of Justice, both in respect of the principle of effective judicial protection generally and public procurement cases spe-

66 See para. 72 and 78 above. See e.g. CoJ case C-230/02, *Grossmann*, para. 38, discussed in para. 95 above.
67 See further para. 96 above.
68 E.g. CoJ case C-470/99, *Universale Bau*, para. 71-79; CoJ case C-327/00, *Santex*, para. 48-66; CoJ case C-241/06, *Lämmerzahl*, para. 50-64.
69 Art. 2c Procurement Remedies Directives 89/665 and 92/13.
70 Art. 2f(1) Procurement Remedies Directives 89/665 and 92/13.
71 Art. 2f(2) Procurement Remedies Directives 89/665 and 92/13.

cifically.[72] In this manner this requirement to adequately inform the private parties concerned acts as a sort of counter-balance for the short limitations periods that can apply in public procurement cases.

348. Time periods are also of relevance in relation to proceedings brought under the Product Liability Directive. The main issue here is however one of *limiting the effects* in time of the no-fault ('strict') liability for which this directive makes provision and not so much ensuring rapid review as such.[73] Accordingly this directive specifies two distinct types of time limits. In the first place, it sets out an *'ordinary' limitation period* for the bringing of actions for damages under the directive.[74] Its duration is comparatively short, namely three years. Unlike most of the other periods discussed in this subsection, this is moreover not a minimum period. This means that national law cannot provide for a longer period. The directive specifies that this limitation period begins to run on the day on which the applicant becomes aware, or should reasonably have become aware, of the damage, the defect and the identity of the infringer. Issues relating to the suspension or interruption of this period are expressly left to national law.

In the second place, the Product Liability Directive provides for another time period, at the expiry of which the rights of the (potential) applicant are *extinguished*.[75] Different from the aforementioned 'ordinary' limitation period, this latter period starts to run from the moment that the product has been put into circulation. Awareness on the side of injured private parties thus plays no role in this connection. The possible effects of this rather strict rule for these parties are offset to some extent by the longer duration of this period (ten years) and by the specification that no rights are extinguished if legal proceedings have been brought in the meantime. This latter rule ensures that, at least in this respect, the possible long duration of these legal proceedings does not come at the expense of the private party that filed a damages claim under this directive.

349. Finally, one of the key objectives of the Competition Damages Directive is facilitating the bringing of actions for damages, with a view to ensuring that injured private parties can obtain full compensation.[76] The aforementioned quest to establish an appropriate balance between the various interests at stake also underlies this directive's rules on limitation periods.[77] However here the emphasis is on ensuring that these periods do not "*unduly hamper the bringing of actions for damages*", particularly in 'follow-on' actions

72 See e.g. CoJ case 179/84, *Bozzetti*, para. 17 (concerning the principle of effective judicial protection); CoJ case C-406/08, *Uniplex*, para. 30-32 (concerning public procurement law). See e.g. also CoJ case C-19/13, *Fastweb*, para. 58-60.

73 See further para. 181 above.

74 Art. 10 Product Liability Directive 85/374.

75 Art. 11 Product Liability Directive 85/374.

76 Art. 1(1) Competition Damages Directive. See further para. 226 above.

77 Cf. Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 16.

(i.e. actions for damages brought pursuant to an earlier infringement decision by the competent public enforcement authority).[78] As a consequence this directive's provision on limitation periods is rather '*claimant-friendly*'.[79]

It is stipulated that the applicable limitation periods shall not begin to run before the injured party knows or can reasonably be expected to know: (i) the behaviour and the fact that it constitutes an infringement; (ii) that this infringement caused harm to that party; and (iii) the identity of the infringer. In this manner a comparatively high threshold has been set. In particular, this requirement of knowledge also of the fact that the behaviour *qualifies as an infringement* is an addition as compared to the abovementioned rule of the Product Liability Directive. The wording used moreover seems to imply that (even) higher thresholds could in principle be set under national law. Another illustration is the rule that limitation periods must be at least five years. Not only is this period longer that the one foreseen in the Product Liability Directive (although in itself not unusually long), it is also a *minimum* period. Finally, specific to competition, cases but therefore no less important, is the rule that limitation periods are to be *suspended* (or interrupted) if a public enforcement authority initiates proceedings, for the duration of at least one year after those proceedings are terminated. This latter rule facilitates the bringing of 'follow-on' actions, which can consequently be brought sometimes many years after the infringement was committed.

350. *In summary*, the secondary EU law discussed in part B regularly sets out harmonised rules on limitation periods with a considerable degree of detail. Broadly speaking, these periods all serve to ensure legal certainty. Yet the rules in question tend to be tailored each time to the specific characteristics and (perceived) needs of the typical situations at hand. For example, under the Procurement Remedies Directives the main interest is to ensure that cases are brought rapidly. The limitation periods applicable in these cases are therefore mostly short, making it particularly important for the applicant to be adequately informed before they start to run. The Product Liability Directive illustrates in turn a situation where the periods primarily serve as a sort of temporal counterbalance against a particularly strict form of liability. Here the limitation period is not only comparatively short (three years), but it is also accompanied by an additional period (of ten years) after which all relevant rights are extinguished. In respect of this latter period any awareness, or lack thereof, on the side of the injured party plays no role. Finally, in relation to competition law infringements the main concern is to encourage the bringing of successful damages claims. The Competition Damages Directive is therefore rather 'claimant-friendly'. It sets a comparatively high threshold for the moment at which the period begins to run, the period itself is not short (five years) and moreover only a minimum, and there is a 'generous' rule on its suspension. Secondary EU law thus provides

78 Recital 32 Competition Damages Directive.

79 Art. 10 Competition Damages Directive. See further para. 244 above.

by no means for a 'one-size-fits-all' approach to limitation periods. Rather the variety in dominant concerns means that the balance is struck each time in a somewhat different manner, leading a variety of detailed rules, particularly as regards the starting point, length and suspension of these periods.

### *9.1.4. Rules of evidence*

351. Above it has already been discussed which measures related to the *disclosure* of evidence that might be relevant in private enforcement proceedings are provided for in the EU legislation at issue.[80] The present subsection concentrates by contrast on the *rules of evidence*, i.e. the rules on the allocation of the burden of proof between the parties to the proceedings and on the manner in which the presented evidence is to be assessed by the national court seised. Although distinct, rules on disclosure and rules of evidence are related. Difficulties for a private party in obtaining the evidence needed to substantiate its claims are mainly problematic where the burden of proof is on this party. Such difficulties may be reason for the legislature to alleviate this burden, reverse it, provide for a lower standard of proof or create the possibility for the court seised to take decisions of this kind in certain cases. Both types of the measures can thus be different ways to address similar problems. Also more generally it is self-evident that rules of evidence can be crucial in determining the outcome of a private enforcement action, as they determine essentially who needs to proof what and how the evidence submitted is weighted by the court.

352. Overlooking the legislation assessed in part B of this study, it appears however that the (potential) importance of this subject-matter has generally not been a reason for the EU legislature to address rules of evidence in any detail. Rules of this kind are *mostly not provided for*. It seems for the most part to be simply presumed that, in accordance with the relevant national law, it is for each party to substantiate its claims and for the national court seised to assess the evidence brought before it.[81] Few, if any, specific obligations tend to imposed in this respect as a matter of EU law. That does not mean that EU law is irrelevant however. For one thing, the rules of national law at issue may not be such as to prevent the objectives of the EU legislation in question from being achieved.[82] For another thing, the familiar boundaries flowing from the EU law principles of equivalence, effectiveness and effective judicial protection apply.[83] On the basis of these principles the Court of Justice

80 See subsection 8.2.2 above.

81 Cf. UNIDROIT, Principles of Transnational Civil Procedure (Art. 21), available via http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

82 See e.g. CoJ case C-479/12, *Gautzsch*, para. 40-41 (concerning the burden of proof under Community Designs Regulation 6/2002).

83 On these principles, see further sections 2.2 (equivalence and effectiveness) and 2.3 (effective judicial protection) above.

has already issued several rulings relating to rules of evidence.[84] But it does mean that the situation under the EU legislation at issue is largely similar to the general point of departure in cases where no such specific secondary EU law applies. In that sense this legislation does little to alter the *status quo ante*. All the same, a more detailed assessment of this legislation does reveal a number of noteworthy points concerning the applicable rules of evidence.

353. The first of these points is that the *Product Liability Directive* could be seen as deviating from the above general rule that this matter is mostly left to the domestic legal systems of the Member States. Its key provision holds that "*[t]he injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage*".[85] Here EU law therefore obviously determines the burden of proof. It would appear however that this more a matter of drafting technique than one of substance. That is to say, the essence of this provision is to lay down the principle of 'strict' liability, which implies that it is not of relevance whether the producer of the defective product in question is at fault or not for liability in damages to be incurred under this directive.[86] In this case the EU legislature opted for formulating this in positive manner, i.e. listing the elements that must be proved – and presumably first *submitted*, although the directive is notably silent on this point – by the applicant for liability to be incurred under this directive. A negative formulation, stating that no fault requirement applies, would seem to have been conceivable as well. The Unfair Commercial Practices Directive stipulates for instance that the remedy for which that directive provides (in that case injunctive relief) must be available "*even without proof of […] intention of negligence on the part of the trader*".[87] None of this appears meant to indicate a difference in substance.

In other words, the essence here seems not so much that the applicant must demonstrate the elements listed in the above provision. That is generally presumed. The key is rather that the issue of whether the producer of the defective product is at fault is *irrelevant* and therefore need *not* to be proved (nor, presumably, first submitted) by the party that brings the private enforcement proceedings. A similar comment applies with respect to the Procurement Remedies Directives.[88] Likewise it is of course not without relevance that the Product Liability Directive specifies that the defendant must prove the existence of the possible exonerating circumstances listed in

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84 See in particular para. 38 and 47 above.

85 Art. 4 Product Liability Directive 85/374.

86 See para. 175 above.

87 Art. 11(2) Unfair Commercial Practices Directive 2005/29. See also para. 289 above.

88 Art. 2(7) Utilities Remedies Directive 92/13 concerning actions for damages for the costs of preparing the bid and participating in the contract award procedure, discussed in para. 85 above. Also here the essence is not so much that the applicant must prove the listed elements (infringement, real chance, causal relationship). The key is rather what has *not* been listed, i.e. a requirement for the applicant to demonstrate that he would have actually won the contract but for the infringement.

this directive, including the so-called 'development risk defence'.[89] Yet it would again probably be wrong to perceive this rule of evidence *per se*. The essence of this provision is rather that such defences are *available* under this directive. That being so, it seems rather self-evident that it is then for the defendant to raise this defence and to substantiate his claims in this regard.

354. Turning to *EU competition law*, the Competition Regulation contains a provision on the burden of proof that is relevant not only in public enforcement proceedings, but also for private enforcement cases.[90] It follows from this provision that in legal proceedings before national courts the burden of proving an alleged infringement of Articles 101 or of 102 TFEU rests on the private party bringing the claim. It is also stipulated here that, where the defendant claims the benefit of Article 101(3) TFEU, it is for that party to proof that the applicable conditions are fulfilled.[91] This is thus another rather scarce example of EU law providing for a rule of evidence where private enforcement proceedings are concerned. However, in terms of content, all that these rules appear to do in essence is confirming that it is in principle for the applicant to proof the infringement that he alleges to have been committed, whereas the defendant must proof the existence of an exonerating circumstance on which he may wish to rely. That hardly seems remarkable. That is illustrated by the fact that it remains possible for a defendant to argue and demonstrate that there are objective justifications for an infringement of Article 102 TFEU or that the behaviour in question on balance benefits consumers, although neither Article 102 TFEU itself nor the Competition Regulation expressly provides for such a rule.[92] Under the Competition Regulation rules on the standard of proof moreover remain to be determined by national law.[93]

Arguably of greater interest are therefore the rules of evidence set out in the more recent Competition Damages Directive. This directive relies quite heavily on rules of evidence of various types, designed to alleviate the burden on the applicant. Three such rules stand out in particular. First, there are the rules on the *effects of an infringement decision* of a national competition authority (or a review court), pursuant to which these decisions are either "*deemed to be irrefutably established*" or "*at least prima facie evidence*".[94] Second, where cartel infringements are concerned, the directive provides for a *rebuttable presumption* that this infringement caused harm.[95] Third, the directive

89 Art. 7 Product Liability Directive 85/374. See further para. 180 above.
90 Art. 2 Competition Regulation 1/2003. See further para. 203 above.
91 On Art. 101(3) TFEU, see further para. 200 above.
92 See para. 201 above.
93 Recital 5 Competition Regulation 1/2003.
94 Art. 9 Competition Damages Directive. This difference depends on whether it concerns a decision by an authority of the same Member State as the court before which the private enforcement action is brought or rather a decision by an authority from another Member State. See further para. 243 above.
95 Art. 17(2) Competition Damages Directive. See further para. 231 and 271 above.

addresses the issue of possible '*passing-on*' of the harm in part through establishing certain specific rules of evidence. In short, the so-called 'passing-on defence' is made available to alleged infringers, whereby it is specified that in such a case the burden of proof is on the party invoking it.[96] 'Indirect purchasers' are also entitled to bring actions for damages under this directive, in which case the burden of proving the existence and the extent of the pass-on rests with these parties, them being the applicants.[97] However, in those cases an indirect purchaser is "*deemed to have proven*" that a passing-on to him occurred where he has shown that the defendant committed an infringement resulting in an 'overcharge' (i.e. a price increase resulting from the infringement) and that he purchased goods or services that were the subject of that infringement.[98] This rule is the made subject to a possibility for the defendant to "*demonstrate credibly to the satisfaction of the court*" that the overcharge was not, or not entirely, passed-on to the indirect purchasers concerned.[99] This is therefore essentially another (conditional) rebuttable presumption.

355. When considering the present subject-matter in a *broader perspective*, it is on the one hand evident that the above rules – particularly those set out in the Competition Damages Directive – constitute a deviation from the aforementioned tendency of the EU legislature to leave it primarily to the Member States to determine the rules of evidence that apply in private enforcement proceedings. The IPR Enforcement Directive provides a good illustration of this tendency. In its 2003 proposal for this directive the Commission had – not unlike the Competition Damages Directive – suggested the inclusion of a rather innovative rule of evidence designed to tackle a particular problem, namely the quantification of the recoverable 'unfair profits' made by an infringer.[100] Under this proposed rule the applicant would have to provide evidence only with regard to the amount of the gross income achieved by the defendant. The latter would then be allowed to submit evidence of its deductible expenses and profits attributable to other factors than the infringement. The EU legislature did not retain this aspect of the proposal however. As a consequence the IPR Enforcement Directive is largely silent on this subject-matter.[101]

On the other hand it should be acknowledged that the above rules are for the most part *not entirely exceptional*. The Competition Damages Directive's rule on the 'passing-on defence' resembles for instance the rule on the aforementioned 'development risk defence' set out in the Product Liability

96 Art. 13 Competition Damages Directive. See further para. 239 above.
97 Art. 14(1) Competition Damages Directive. See further para. 240 above.
98 Art. 14(2) Competition Damages Directive.
99 Art. 14(2) Competition Damages Directive.
100 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 38-39 (Art. 17(2)). See further para. 134 and 272 above.
101 Apart from a sporadic reference, such as in Art. 9(3) IPR Enforcement Directive 2004/48.

Directive. As far as issues of evidence are concerned, this seems primarily a matter of laying down the general rule that the party wishing to rely on an exonerating circumstance must prove the existence thereof. Many other expressions of this rule can be found elsewhere in EU law.[102] Neither are the abovementioned rebuttable presumptions unique. Similar rules of EU law already exist in other domains, especially in relation to the issue of fault.[103] A particular example can be found in the Gender Equality Directive, which requires the Member States to ensure, in accordance with their national judicial systems, that when an applicant establishes "*facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the [defendant] to prove that there has been no breach of the principle of equal treatment*".[104] It is arguably the Competition Damages Directive's rule on the effects of decisions by national competition authorities in private enforcement proceedings that is most remarkable, as no comparable provision of EU law appears to exist at present. That being so, it may not be coincidence that it is precisely this latter rule that proved to be one of the most controversial elements of this directive and that was in the end considerably watered down by the EU legislature.[105]

356. *In summary*, the EU legislation at issue only sporadically lays down rules of evidence. It mostly seems to be presumed that, in accordance with the applicable national law, it is in principle for the applicant to substantiate its claims and, where relevant, for the defendant to do the same where the latter raises specific issues in its defence, whereas it is for the national court to assess and weigh the evidence brought before it. It is true that both the Product Liability Directive and the Competition Regulation touch upon these matters to some extent. But these legal acts essentially do little more than confirming the aforementioned presumption rather than that they provide for a deviation thereof. More remarkable are the rules of evidence set out in the Competition Damages Directive, notably as regards the effects of infringement decisions by national competition authorities, its rebuttable

102 E.g. Art. 23(2) Data Protection Directive 95/46; Art. 5(3) Air Passengers' Rights Regulation 261/2004; Art. 37(1) of Annex I to Rail Passengers' Rights Regulation 1371/2007. See e.g. also Art. 6(9) Consumer Rights Directive 2011/83 and Art. 5(4) Air Passengers' Rights Regulation 261/2004, pursuant to which the burden of proof that certain (information) obligations have been complied with is on the parties to which this obligation applies.

103 E.g. Art. 6(1) and (2) Electronic Signatures Directive 1999/93; Art. 20(3) Public Limited Liabilities Companies Directive 2012/30. See further para. 263 above. Note that for competition cases the Commission had originally suggested to provide for a similar rebuttable presumption of fault, allowing the defendant to demonstrate an excusable error. See Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 6-7.

104 Art. 19 Gender Equality Directive 2006/54. See e.g. also Art. 8 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22 ('Racial Equality Directive'). See e.g. CoJ case C-127/92, *Enderby*, para. 13-19; CoJ case C-400/93, *Specialarbejderforbundet I Danmark*, para. 24.

105 See para. 243 above.

presumption of harm having been caused and its rules relating to the 'passing-on' of harm. Where rules of evidence are concerned this latter directive goes further than the other legislation at issue. With the exception of the rule on the effects of infringements decisions, comparable provisions can however be found elsewhere in EU law.

## 9.2. Forum, settlements, judicial review and general rules

This second section is concerned with the private enforcement-rules laid down in the EU legislation under consideration relating to five additional procedural issues, namely forum,[106] rules meant to facilitate out-of-court settlements, the standard of judicial review, own motion judicial review and what is referred to here as the relevant 'general rules'.

### *9.2.1. Forum*

357. It has been set out in part A of this study that the adjudication of claims brought by private parties for infringements of EU law by other private parties is primarily entrusted to the courts of the Member States.[107] The Court of Justice has consistently held that – in the absence of specific EU rules – it is in principle for each Member State to designate the courts having jurisdiction to rule on such claims and to establish the applicable detailed rules (principle of national procedural autonomy).[108] The EU law principle of effectiveness can come into play for example where a domestic system has been designed in such a manner that it might lead to procedural complications or other disadvantages making it impossible or excessively difficult for a private party to exercise its rights vested in EU law.[109] The fundamental right to effective judicial protection, set out in the Charter, further implies a general requirement for the national courts concerned to be independent and impartial.[110] Nonetheless the limits set by EU law in this regard are mostly rather broad.

When considering the EU legislation assessed in part B of this study, it appears that the situation is for the most part *not fundamentally different* where such legislation applies. Issues related to forum generally, and the designation of the body competent to decide on the case particularly, are mostly left to the Member States. Indeed, in relation to the Unfair Terms Directive the Court has held that this directive regulates neither which

106 As was noted in para. 22 above, in this study the term 'forum' is understood to refer to the body competent to rule on the private enforcement actions brought under the EU legislation at issue.

107 See subsection 1.1.1 above.

108 See in particular CoJ case 33/76, *Rewe*, para. 5. See further section 2.1 above.

109 E.g. CoJ case C-63/01, *Evans*, para. 44-58; CoJ case C-268/06, *Impact*, para. 51-53. See further para. 38 above.

110 Art. 47 Charter. See further para. 43 and 45 above.

court is to have territorial jurisdiction, nor the number of instances of jurisdiction.[111] Accordingly none of the directives in question requires for instance the designation of specialised courts or the creation of specialised chambers within the competent national courts. This is the case despite the fact that such an approach is not uncommon at Member State level, for example for public procurement disputes or in relation to competition law infringements.[112] Still, when overlooking that EU legislation, a distinction can be made in this connection between the following two groups of legal acts.

358. The *first group* of legal acts consists of the Product Liability Directive, the IPR Enforcement Directive and the Competition Damages Directive. The former does not touch upon the issue of which body is to rule on the product liability claims brought under this directive. This is by implication in principle entirely left to the Member States. The situation is largely similar where the IPR Enforcement Directive is concerned. This directive is marginally more detailed however, given that at vary instances it speaks of "*judicial authorities*".[113] It can be deduced that the competent bodies should at least be judicial in character, without this having been specified this any further however. Next the Competition Damages Directive is yet again somewhat more detailed, be it in an indirect manner. Under this latter directive the claims in question are to be brought before a "*national court*", i.e. a court or tribunal of a Member State within the meaning of Article 267 TFEU on the preliminary reference procedure.[114] This cross-reference implies that the case law of the Court of Justice regarding this Treaty article is, as it were, 'imported'. Consequently, while the body competent to rule on the damages claims brought under this directive need not necessarily be judicial in character, when determining whether it qualifies as such, account is taken among other things of whether the procedure before that body is *inter partes* and whether it is independent.[115]

Pursuant to all of the abovementioned directives belonging to this first group, even if this is not expressly required as a matter of EU law, the presumption is that the actions brought are to be decided on by the *civil* courts of the Member States. The Product Liability Directive and the Competition Damages Directive are both focused on ensuring compensation in damages. As the Commission noted in connection to the latter directive, "*[a]warding compensation is […] within the domain of national courts and of civil law and procedure*".[116] While the IPR Enforcement Directive also foresees other forms of relief, the cases brought under this directive also typically concern dis-

111 CoJ case C-413/12, *ACICL*, para. 28 and 30.
112 See para. 98 and 242 above respectively.
113 See Art. 6-13 and 15 IPR Enforcement Directive 2004/48.
114 Art. 4(9) Competition Damages Directive. See further para. 242 above.
115 See further para. 22 above.
116 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 2.

putes between two private parties regarding substantive law that is usually qualified as civil law.[117]

359. The *second group* of legal acts consists of the Procurement Remedies Directives and a number of consumer protection directives (other than the Product Liability Directive'), notably the Consumer Injunctions Directive, the Unfair Terms Directive and the Unfair Commercial Practices Directive. These directives differ from the abovementioned ones in that they leave the Member States an *express choice* when designating the competent forum. They offer the Member States essentially two options.[118]

The first possibility is to designate a body that is *judicial* in character. Whilst this is again not specified in the directives in question, actions under the abovementioned consumer protection directives are normally be brought before the *civil* courts.[119] In cases covered by the Procurement Remedies Directives it is not uncommon for Member States to attribute competence to the *administrative* courts or to 'split' the jurisdiction between these two types of courts.[120] Either way, where a Member State designates a judicial body, again no further specific EU law requirements apply.[121]

As an alternative the abovementioned directives also allow the Member States to designate a *non-judicial body*. The said consumer protection directives refer in this respect expressly to such a body being an 'administrative authority'. The Procurement Remedies Directives leave it open what sort of body this should be. This can thus be an administrative authority, but it could for example also be an arbitration board. This flexibility probably reflects the already existing wide variety in the bodies competent to resolve public procurement disputes at national level. Given that in public procurement cases the defendants are typically (semi-)public bodies and rapid review is a particular concern, in practice many Member States provide for a form of non-judicial review in first instance, mostly before an administrative authority of some sort.[122] The Unfair Terms Directive does not contain any further detailed rules that apply to these non-judicial bodies. But especially the Procurement Remedies Directives, as well as the Unfair Commer-

117 See further para. 142 above.

118 Art. 2(9) Procurement Remedies Directives 89/665 and 92/13; Art. 2(1) Consumer Injunctions Directive 2009/22; Art. 7(2) Unfair Terms Directive 93/13; Art. 11(1) Unfair Commercial Practices Directive 2005/29. See e.g. also Art. 5(1) Misleading Advertising Directive 2006/114.

119 See para. 158 and 160 above.

120 See para. 98 above. Such a 'split' is expressly allowed under Art. 2(2) Procurement Remedies Directives 89/665 and 92/13.

121 CoJ case C-413/12, *ACICL*, para. 28-30.

122 See para. 98 above.

cial Practices Directive, do go into further detail.[123] The rules set out in these latter directives differ to some extent between them, yet they have in common that they essentially require that, if not in first instance then at least on appeal, the claims brought are decided by a body that is independent and impartial. They also provide for procedural safeguards, such as the right of the parties to be heard and an obligation to provide reasons in writing for the board's decisions. Furthermore they require that the possibility of making a preliminary reference to the Court of Justice is ensured, if only on appeal.[124] That means that also in this case the relevant requirements set by the Court are 'imported' in an indirect manner.

360. The foregoing suggests that the need felt by the EU legislature to regulate forum-related matters varies, depending on the type of body designated by the Member States to rule on the private enforcement actions in question. Whenever a *judicial body* is designated, regardless of whether it is a civil or an administrative court, the EU legislature appears not to be particularly concerned about matters such as the conduct of the proceedings, the precise judicial architecture or safeguards in terms of independence and impartiality. Otherwise specific requirements would have been inserted on these points. In all of the abovementioned cases this was not even proposed however. Neither has it been an issue that otherwise came up, for instance in assessments by the Commission, academic studies or consultations of stakeholders. This seems to imply that the parties concerned mostly have considerable confidence that these matters can in principle safely be left to national law. By contrast there is not always such confidence when the Members States are given the possibility to designate a *non-judicial* body as the competent forum. In the latter case safeguards in terms of independence and impartiality and fairness of the proceedings are at times (although not always) prescribed with a considerable degree of detail as a matter of EU law, either expressly or indirectly via a reference to Article 267 TFEU.

361. *In summary*, the EU legislature tends to get involved only to a very limited extent with matters of forum generally and the designation of the body competent to rule on the actions in question specifically. These matters are mostly left to be regulated by the Member States. Some of the legal acts under consideration (Product Liability Directive, IPR Enforcement Directive, Competition Damages Directive) are based on a presumption that the

123 Art. 2(9) Procurement Remedies Directives 89/665 and 92/13; Art. 11(3) Unfair Commercial Practices Directive 2005/29. See further para. 98 and 160 above respectively. See e.g. also Art. 5(5) Misleading Advertising Directive 2006/114. As to Consumer Injunctions Directive 2009/22, in light of its recital 9, it arguably requires equivalent standards in cases where a Member States opts for designating a non-judicial body. See further para. 158 above.

124 Under the Unfair Commercial Practices Directive 2005/29 this is implicit in the requirement that appeal to a judicial authority must be possible. In Procurement Remedies Directives 89/665 and 92/13 this requirement is made explicit (see their Art. 2(9)).

Member States designate their civil courts. These acts are almost entirely silent in this respect. Other acts (Procurement Remedies Directives, Consumer Injunctions Directive, Unfair Terms Directive) leave the Member States an express choice between designating either a judicial or a non-judicial body, probably because here the situations in the various jurisdictions within the EU is more diverse. These judicial bodies can in practice be either an administrative or a civil court, whereas these non-judicial bodies are typically administrative authorities of some kind. What all of these acts have in common however is that they appear to reflect a considerable degree of confidence on the side of the EU legislature in the judicial authorities of the Member States, whereas that is much less so where non-judicial bodies are allowed to rule on the private enforcement actions in question. For in the latter case EU law does at times provide for a number of specific requirements relating to the designation and functioning of these non-judicial bodies.

### *9.2.2. Rules facilitating settlements*

362. Few would contest that reaching an amicable settlement between the parties to a dispute will in many cases be preferable to litigation. Not only may this help safe costs, time and energy on the side of the parties concerned, it is also attractive from the perspective of procedural economy.[125] For this reason many national legal systems have been structured in such a manner as to encourage out-of-court settlements being reached before a final judgment is rendered.[126] Several of the legal acts under consideration here also seek to do so, with a view to avoiding unnecessary litigation. This occurs essentially in two distinct manners.

363. A first such manner is to require the potential private party-applicant to first address the opposing party before initiating legal proceedings. While the IPR Enforcement Directive, the Product Liability Directive, the Unfair Terms Directive and the Competition Damages Directive do not contain any rules on *pre-trial contacts* of this kind, several of the other directives discussed in part B of this study do. The Consumer Injunctions Directive speaks of the possibility of 'prior consultation'. It provides in essence that Member States may require, before injunction proceedings can be brought, the potential applicant to try to achieve the cessation of the alleged infringement in consultation with the potential defendant (with the possible further involvement of a 'qualified entity' within the meaning of this directive).[127]

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125 Cf. e.g. European Parliament, Study on collective redress in antitrust, June 2012, p. 76.

126 See e.g. Van Rhee (2005), p. 187; European Parliament, Study on collective redress in antitrust, June 2012, p. 33. See e.g. also CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 64 (regarding the Italian legal system); Bowsher & Moser (2006), p. 196 (regarding the English legal system). See also UNIDROIT, Principles of Transnational Civil Procedure (Art. 23), available via http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

127 Art. 5 Consumer Injunctions Directive 2009/22. See further para. 158 above.

The Unfair Commercial Practices Directive simply speaks of the possibility to "*require prior recourse to other established means of dealing with complaints*", including those established under industry codes of conduct.[128] Finally, under the Procurement Remedies Directives a private party-applicant may be required to first notify the opposing party (i.e. the contracting authority concerned) of its intention to seek review.[129]

It is noticeable that these directives providing for this possibility of requiring pre-trial contacts are mostly the same directives that expressly allow for *administrative review* in one form or another, as was discussed in the previous subsection.[130] Conversely the directives that do not (expressly) contain rules on pre-trial review tend to presume that the cases brought on the basis thereof are to be adjudicated by the competent national *civil* courts.[131] This thus suggests a link between administrative review and requiring the establishment of pre-trial contacts, whereas in relation to proceedings before civil courts such a requirement appears not to be deemed appropriate.

364. In addition out-of-court settlements can also be encouraged by providing for mechanisms for *alternative dispute resolution*. This largely serves the same aims as the rules on pre-trial contacts referred to above, but here the presumption is that the parties concerned cannot resolve the dispute between them. The intervention of an outside entity, not being a court (or an administrative authority fulfilling a similar function), is thus required. On the whole the EU legislation at issue here touches upon this latter issue only very sparingly. Acts such as the IPR Enforcement Directive, the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive all do not contain rules related to alternative dispute resolution. As regards public procurement law, the situation is somewhat mixed. On the one hand in 2007 the 'conciliation procedure', for which one of the two Procurement Remedies Directives provided and which was meant to facilitate the out-of-court resolution of disputes, was abolished.[132] On the other hand, as has been discussed above, these directives' rules on forum have been drafted in such a manner that, subject to certain conditions, they allow for cases being decided by review bodies other than courts or administrative authorities, such as arbitration boards.[133]

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128 Art. 11(1) Unfair Commercial Practices Directive 2005/29. See further para. 160 above.

129 Art. 1(4) Procurement Remedies Directives 89/665 and 92/13. In addition, pursuant to Art. 1(5) of these directives the Member States may also require the private party concerned to first seek *review* with that contracting authority. This possibility of 'internal review' is related to the fact that in public procurement disputes the defendant tends to be a (semi-) public body. See further para. 98 above.

130 See para. 359 above.

131 See para. 358 above.

132 See para. 101 above.

133 See para. 98 and 359 above.

The interest at EU level for facilitating alternative dispute resolution seems to be increasing however. This is illustrated by two more recent developments. First, in 2013 the Consumer ADR Directive was adopted.[134] This directive seeks to ensure that EU-wide in all economic sectors alternative dispute resolution procedures are available for consumer disputes. These procedures are to be easily accessible and should offer adequate safeguards in terms of independence, impartiality and speed, among other things. Second, the Competition Damages Directive, adopted in 2014, contains rules on consensual dispute settlement (covering alternative dispute settlement as well as out-of-court settlements between the parties). That is to say, while these latter rules clearly aim to encourage these forms of dispute resolution, this directive does not require the establishment of such mechanisms as such. Rather it is concerned with the *effects* of such settlements (and the attempts to reach them) on the legal proceedings covered by the directive.[135]

365. By means of a first additional comment, the *optional nature* of the abovementioned provisions of EU law can be noted. This comes to light in two distinct manners for each of the two types of measures discussed above. Where pre-trial contacts are concerned, the said provisions essentially establish an option for the *Member States*. EU law does not require potential applicants to establish such contracts with a view to exploring the possibility of an amicable settlement. Rather this decision is left to each individual Member State, the EU legislation in question merely making it explicit that that such a requirement is not precluded as a matter of EU law.[136] But where a Member States has chosen to exercise this option, the private party concerned will normally be bound by it in accordance with the applicable rules of national law. Concerning alternative dispute resolution, the Consumer ADR Directive does not leave the Member States any choice, in that they are required to take certain measures to facilitate the out-of-court settlement of disputes.[137] However under this directive the use of these mechanisms is optional for the *private party* concerned. The mechanisms established under this directive are therefore to be used by consumers on a voluntary basis.[138]

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134 Consumer ADR Directive 2013/11. See further para. 194 above.

135 Art. 18 and 19 Competition Damages Directive. See further para. 245 above.

136 Note that this does not necessarily mean that, where this has *not* been made explicit in the EU legislation at issue, the Member States are *precluded* from imposing a requirement to establish pre-trial contacts between the parties on the basis of ('purely') national law. The main difference is that in the latter situation discussion could arise as to whether the requirement is compatible with the objectives of the EU legislation at issue and, where relevant, the principles of equivalence, effectiveness and effective judicial protection, discussed in sections 2.2 and 2.3 above.

137 Even if the Member States are left considerable discretion as regards the manner in which they give effect to their obligations under this directive. See e.g. Art. 5(3) and (4) Consumer ADR Directive 2013/11.

138 Art. 1 Consumer ADR Directive 2013/11.

That is also the most common situation where ('purely') national law provides for procedural rules of this kind.[139] The outcome of the alternative dispute resolution process is moreover not necessarily binding on the parties concerned.[140] Similarly, in connection with the Competition Damages Directive, the Commission expressly rejected the option of *obliging* a private party to make an attempt to settle the dispute in an alternative manner.[141] It follows that the EU law at issue can allow for a legal requirement to first address the *opposing* party, but it does not foresee an obligation to first submit the matter to a *third* party, i.e. an alternative dispute resolution body.[142]

366. A further additional comment is that the EU legislature appears to have been aware of some of the *possible disadvantages* associated with encouraging pre-trial contacts and alternative dispute resolution in the manners described above.[143] Most notably such efforts will inevitably lead to certain delays, which in turn could have further adverse consequences. Most of the abovementioned directives seek to address the risks in this regard, be it in different manners. The Consumer Injunctions Directive sets a maximum time period for the duration of the prior consultations between the parties. If no cessation of the infringement has been achieved within two weeks after the reception of the request for consultation, the private party concerned is free to bring an action without further delay. The Procurement Remedies Directives seek especially to prevent delays that might allow the disputed public contract to be concluded in the meantime or which may lead to the applicant being time-barred. The aforementioned obligation to notify therefore does not affect the standstill period during which the contracting authority may not conclude the contract, nor does it affect any other time limits for review.[144] The Competition Damages Directive similarly provides that limitation periods for initiating legal proceedings are to be suspended for the duration of the consensual dispute resolution process.[145] It also empowers the national court seised to suspend the legal proceedings where they already started, subject to a maximum of two years.[146]

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139 See para. 193 above.

140 See e.g. also points 25-26 Collective Redress Recommendation 2013/396. See further para. 190 above.

141 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 35.

142 This is also what would appear to follow from CoJ case C-410/01, *Fritsch*, para. 28-34; CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 52-60. See further para. 95 and 38 above respectively.

143 For a discussion of potential disadvantages of settlements and alternative dispute resolution more generally, see para. 444 below.

144 On the said limitation periods and this standstill period, see further subsection 3.3.2 above. Similarly these directives require that the aforementioned prior 'internal review' involves the immediate suspension of the possibility to conclude the contract.

145 Art. 17(1) Competition Damages Directive. See e.g. also point 27 Collective Redress Recommendation 2013/396 , discussed in para. 190 above.

146 Art. 17(2) and (3) Competition Damages Directive.

These rules all essentially give effects to the position that a private party affected by an alleged infringement should not be penalised for making use of mechanisms that aim to facilitate an amicable settlement of the dispute at hand.[147] However the EU legislature appears to have still a somewhat narrow perception of the said possible disadvantages. For one thing, especially for consumers it may not always be easy to proof that they contacted the opposing party before initiating legal proceedings and thus meet a requirement to this effect that may apply.[148] This concern remains unaddressed in the abovementioned directives. For another thing, the Court of Justice seems to take a broader view when assessing national rules providing for recourse to consensual dispute settlement procedures under the principles of effectiveness and effective judicial protection. In this context the Court has looked at whether any such arrangement leads to significant disadvantages for the applicant not only in terms of possible delays and the legal consequences that this may have, but also in light of other practical or legal factors that may be relevant, such as additional costs.[149]

367. *In summary*, the EU legislation under consideration sometimes expressly allows the Member States to impose a requirement on a private party that may wish to bring a private enforcement case to first establish 'pre-trial contacts' with the opposing party so as to explore the possibility of an amicable settlement (Procurement Remedies Directives, Consumer Injunctions Directive, Unfair Commercial Practices Directive). Although most directives at issue here do not address this point, there further appears to be an increasing interest at EU level in facilitating alternative dispute resolution. This is illustrated not only by the adoption in 2013 of the Consumer ADR Directive, but also by the inclusion of certain rules aimed at encouraging (but not requiring) consensual dispute settlement in the 2014 Competition Damages Directive. Still all of the above provisions are characterised by a degree of 'optionality', to be exercised either by the Member States (pre-trial contacts) or by the private parties concerned (alternative dispute resolution). Furthermore, while consensual dispute resolution can certainly have advantages for the parties concerned as well as for the courts, notably in terms of costs and speed, efforts to reach an out-of-court settlement can also have negative consequences, especially for potential applicants. The EU legislature has taken certain measures to address such concerns where possible delays and the legal consequences thereof are concerned (maximum period for consultations, standstill periods, suspension of limitation periods and legal proceedings). But no account is taken of other, more practical issues that can arise in this connection, such as difficulties in proving that pre-trial contacts actually took place or the additional costs associated with the efforts to reach an out-of-court settlement.

147 Cf. GC case T-407/07, *CMB Maschinenbau*, para. 103.

148 Loos (2011), pp. 493-494.

149 CoJ case C-63/01, *Evans*, para. 44-58; CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 52-66. See further para. 38 and 45 above respectively.

### *9.2.3. Standard of judicial review*

368. In a sense a discussion of the standard of judicial review to be applied by the national court in cases brought under the EU legislation assessed in part B of this study can be very short indeed, as *no requirements whatsoever* have been set out therein. None of the legal acts in question expressly addresses this issue with any degree of detail. At most some very general references can be found, for instance where the Competition Damages Directive refers to something having to be demonstrated "*credibly to the satisfaction of the court*".[150] Neither have any provisions of EU law on this subject-matter providing for a degree of detail been proposed or even seriously discussed in relation to this legislation. There is however some case law available from which certain indications might be deduced as to what is required from the national courts in this respect as a matter of EU law.

369. Most notably in *Hospital Ingenieure* the Court of Justice expanded on the standard of judicial review to be applied under the Procurement Remedies Directives.[151] In this case the defendant (a contracting authority) had decided to withdraw an invitation to tender after several private parties had already submitted a bid. One of these parties contested this decision, arguing that it was discriminatory. A question that emerged in the resulting litigation was whether the review exercised by the national court seised could be limited to whether or not the contested decision was arbitrary. The Court of Justice held that, in light of their objective, the scope of the judicial review exercised in cases brought under the Procurement Remedies Directives cannot be interpreted restrictively. Even where the contracting authority has a wide discretion, it must be possible to verify the compatibility of such a decision with the relevant substantive EU public procurement rules. According to the Court, in the absence of any indications to the contrary, the letter and the spirit of the Procurement Remedies Directives do therefore *not* permit the conclusion that the Member States can limit the review of the legality of a contested decision to whether or not it is arbitrary. Without using these words, the Court thus appeared to consider that the said directives preclude 'marginal' judicial review.

370. There is other case law that relates to situations where EU law is alleged to have been infringed, but where no specific secondary EU law of the type under consideration in this study applies. In these situations the standard of judicial review provided for under national law is to be assessed, where relevant, under the EU law principles of equivalence, effectiveness and effective judicial protection.[152] A prominent example of a case where the

150 Art. 14(2) Competition Damages Directive. See further para. 240 above.
151 CoJ C-92/00, *Hospital Ingenieure*, para. 57-64.
152 On these principles, see sections 2.2 (equivalence and effectiveness) and 2.3 (effective judicial protection) above.

Court of Justice made such an assessment is the 1999 *Upjohn* ruling.[153] This case concerned the judicial review of national decisions revoking marketing authorisation for certain medicinal products. The Court found in essence that a national rule providing that these decisions were not subject to 'full' judicial review, whereby the court seised substitutes its own assessment of the facts and of the scientific evidence for the contested assessment made by the competent national authorities, did *not* infringe the principle of effectiveness.

It is noticeable that in reaching this conclusion the Court drew a parallel with the review by the *EU courts* of decisions taken by the EU institutions and bodies involving complex assessments. In the latter context it has consistently been held that the judicial review exercised does not entail a 'full' review in the aforementioned sense, at least as regards matters in relation to which the EU institutions concerned have discretion. In those cases the EU courts typically restrict themselves to examining the accuracy of the findings of facts and law, as well as to verifying that the contested decision is not vitiated by a manifest error or a misuse of powers and that the bounds of discretion have not clearly been exceeded.[154] *Upjohn* thus seems to imply that the review exercised by the national courts seised in cases such as the ones at issue there need to be, as a matter of EU law, only modestly intrusive. Indeed, this ruling has been understood as the Court having declined an invitation to raise the standards of judicial review across the EU.[155]

371. It is not immediately evident how the two abovementioned rulings relate to each other and consequently which *broader conclusions* can be drawn from them. Whereas it appears to follow from *Hospital Ingenieure* that 'marginal' review is insufficient, *Upjohn* implies that 'full' judicial review is not required. The existence of discretion on the side of the body that had taken the contested decision might be a relevant factor, but this is unlikely to explain the difference in outcome in these two cases.[156] One view is therefore that what the Court of Justice required in *Hospital Ingenieure* was something more than a mere marginal (arbitrariness) review, but without neces-

153 CoJ case C-120/97, *Upjohn*, para. 30-37. See also para. 38 above.

154 See *ibid*., para. 34, for further references. As regards the standard of judicial review in relation to the principles of subsidiarity and proportionality and the fundamental rights guaranteed under the Charter, see subsection 10.1.2 below. Note that, as was touched upon in para. 45 above, a stricter test applies in legal proceedings involving the imposition of penalties for infringements of the EU competition rules.

155 Tridimas (2001), p. 82.

156 In *Hospital Ingenieure* the contested decision concerned a matter where pursuant to national law the contracting authority enjoyed a wide discretion, which the CoJ appeared to accept. This therefore does not seem to set this case apart from *Upjohn*. Moreover, according to the approach consistently followed by the EU courts in cases where the EU institutions themselves act as contracting authorities, these authorities enjoy a broad margin of assessment and the judicial review is consequently limited. See e.g. GC case T-407/07, *CMB Machinenbau*, para. 115-116; GC case T-461/08, *Europaïki Dynamiki*, para. 100 and 137.

sarily entailing full review of the sort at issue in *Upjohn*. Such a 'middle way' in terms of the intensity of the review exercised by the court may well be conceivable. This is largely speculative however, especially because any positive indication of what may be required under the Procurement Remedies Directives was entirely absent in *Hospital Ingenieure*. This also leaves open the question whether it any substantial difference whether or not secondary EU law of the type at issue here applies.

A possible alternative reading of these two rulings is that under the Procurement Remedies Directives a higher standard of judicial review is required than the one that would apply in 'ordinary' cases where no secondary EU law of this kind applies and which are therefore to be assessed under the aforementioned principles. If this latter reading is correct, then it would basically be the *mere existence* of such secondary EU law – and in particular the need to safeguard the objective that it seeks to achieve – that implies that such a higher standard is required. After all, as was noted above, the Procurement Remedies Directives do not contain any express provisions on this matter. This reading would then also seem to suggest that the Court of Justice may well come to conclusions similar to the one reached in *Hospital Ingenieure* when interpreting the other EU legislation under consideration in this study. For none of these acts expressly addresses the issue of the standard of judicial review to be applied either. Moreover, certain differences notwithstanding, the overall objectives of this legislation are to a high extent comparable.[157]

372. *In summary*, the standard of judicial review to be exercised by the national courts seised in cases brought under the EU legislation assessed in this study is not regulated in any detail in that legislation. The case law of the Court of Justice makes clear that this does not necessarily mean that EU law does not impose certain requirements in this respect however. Most notably the application of a test of whether or not the contested act by the defendant is arbitrary was found to be incompatible with (the objective of) the Procurement Remedies Directives. It may be that this implies that judicial review in cases covered by these directives – and arguably the other EU legislation at issue here – must be more stringent than in cases where no such specific secondary EU law applies and that are therefore to be assessed under the EU law principles of equivalence, effectiveness and effective judicial protection. However further clarification must be awaited before any firm conclusions can be drawn on this point.

157 See in particular para. 383 below. One such difference that may be relevant in this connection is that the review exercised under Procurement Remedies Directives 89/665 and 92/13 typically concerns acts by (semi-)public bodies and not acts of other private parties, which in turn can imply, depending on the domestic legal system, that the relevant cases are to be brought before administrative, rather than civil, courts. See also para. 98 above.

### *9.2.4. Own motion judicial review*

373. Apart from the question which *standard* of review a national court should apply in cases brought before it, discussed above, another question relates to whether, as a matter of EU law, that court may or must *raise of its own motion* (*ex officio*) – i.e. without one of the parties to the dispute having done so – certain points of EU law that may be relevant for deciding the case at hand. An in-depth assessment of this complex and, it appears, not yet fully settled matter falls outside the scope of this study.[158] Nonetheless this question has come up regularly in relation to the EU legislation discussed in part B. Indeed, the Court's most remarkable line of case law on this subject-matter has been issued precisely in relation to some of this legislation. A brief consideration is therefore in place.

374. In this regard it should be noted at the outset, in the first place, that under the domestic laws of most Member States their national courts generally have been assigned a *passive role* in proceedings between private parties.[159] Although there are certain differences between these laws, it is principally left to the parties to the proceedings to 'frame' the dispute and to submit the relevant legal arguments to support their respective claims. As the Court of Justice has noted, this reflects prevailing conceptions concerning the relations between the State and the individual, it safeguards the rights of defence and it ensures the proper conduct of proceedings.[160] This does not mean that this passive role is absolute however. Most notably in many jurisdictions the courts seised are required to raise of their own motion points of law that are considered to be of fundamental importance and therefore a matter of public policy (*d'ordre public*). That is also the situation before the EU courts, where proceedings are also *inter partes*. These latter courts are required to raise of their own motion certain matters of public policy, such as a failure to state reasons for a contested decision. But unless the parties to the proceedings raise these points, they do not verify for instance whether an action brought is time-barred or whether a contested decision is compatible with EU competition law.[161]

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158 For further references on this subject-matter specifically in relation to Unfair Terms Directive 93/13, see para. 167 above. More generally, see e.g. Ancery (2012); Snijders (2014).

159 For an overview, see Van Rhee (2005), pp. 189-193. See also Stuyck (2011), p. 513. Cf. UNIDROIT, Principles of Transnational Civil Procedure (Art. 10(1)), available via http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

160 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 21; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 35.

161 Cf. e.g. CoJ case 20/88, *Roguette frères*, para. 12; CoJ case C-386/10 P, *Chalkor*, para. 64-66; CoJ case C-510/11 P, *Kone*, para. 30-32; CoJ case C-224/12 P, *Netherlands v. Commission*, para. 97. See however also CoJ case C-530/12 P, *OHIM v. National Lottery Commission*, para. 44-45.

A second preliminary remark is that the secondary EU law discussed in this study does not expressly oblige these courts to deviate from the above-mentioned general rules established on the basis of the domestic laws of the Member States. The question whether such own motion judicial review is possible, precluded or obligatory as a matter of EU law is simply *not addressed* in any of the legal acts in question. It appears that the same applies, possibly certain limited exceptions aside,[162] for other acts of secondary EU law.

A last point concerns the *case law* of the Court of Justice, considered at a general level. It appears to follow from this case law that, as a general rule, EU law does not require national courts to abandon the predominantly passive role assigned to them on the basis of national law either.[163] However especially the EU law principle of equivalence can require a deviation from this general rule in certain cases.[164] It follows from this principle that, where a national court must raise certain rules of its own motion pursuant to national law, it must also raise comparable rules of EU law. Straightforward as this may sound, in the present context this principle has sometimes led to rather extensive interpretation. On occasion the Court has ruled that the particular role of the concept of public policy – which, as was noted above, in many national legal systems requires courts to abandon their passive role – can oblige these courts to intervene of their own motion where EU law is at stake. It reached this conclusion by stressing *inter alia* the fundamental nature and importance of the EU rules at issue.[165] Thus, by insisting on a broad interpretation of the (national law) concept of public policy, under the principle of equivalence an 'indirect' route to an obligation to raise certain points of EU law has been construed. This is necessarily limited however to situations where national law provides for an obligation to raise issues of public policy of their own motion in the first place.

375. Turning more in detail to the fields of law at issue in this study, even if the rules of secondary EU law do not provide any express obligations in this regard, an assessment of three key cases relating to the present subject-matter nonetheless exposes certain *differences*. First, there is the *GAT* case concerning EU public procurement law.[166] In this case the Court of Justice

162 Cf. Storskrubb (2008), p. 232, who argues that the role assigned to national courts under Small Claims Regulation 861/2007 in assisting applicants fundamentally changes their traditionally passive role. See also point 9 Collective Redress Recommendation 2013/396.

163 CoJ case 70/77, *Simmenthal*, para. 10; CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 16-22; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 28; CoJ case C-2/06, *Kempter*, para. 45.

164 On this principle, see further subsection 2.2.1 above.

165 E.g. CoJ case C-126/97, *Eco Swiss*, para. 36-39; CoJ case C-40/08, *Asturcom*, para. 49-55. Underlying this issue is the question how the CoJ approaches concept(s) of 'public policy' ('*d'ordre public*') and 'mandatory rules'. See further Prechal (1998), pp. 689-705; Snijders (2009), pp. 142-145; Schebesta (2010), pp. 864-877.

166 CoJ case C-315/01, *GAT*, para. 46-55. See further para. 88 above.

ruled in essence that it is for the domestic legal system of each Member State to determine whether, and in which circumstances, a national court seised in an action brought under the Procurement Remedies Directives may raise of its own motion an infringement of EU law. It was found that neither the objective of these directives, nor any of their specific provisions precludes a rule of national law pursuant to which the court seised is to raise such points of its own motion. The Court added however that under these directives an action for damages *cannot be dismissed* on the ground, raised *ex officio*, that the contract award procedure had been anyway been unlawful (and that therefore no damages were due, for lack of causality). For this would be incompatible with the directives' objectives of ensuring rapid and effective review for aggrieved private parties.

This ruling thus seems to contrast with the case law in the fields of EU consumer protection law (in particular the Unfair Terms Directive) and EU competition law (in particular Article 101 TFEU). As regards the former, in the *Océano Grupo* case law, discussed earlier, the Court held in essence that the national court seised is in principle *obliged* to raise of its own motion the unfairness of a term in a consumer contract, so as to ensure that consumers are given effective protection.[167] In this respect the Court pointed to the often weak position of consumers and the nature and importance of the public interest underlying consumer protection in the EU legal order. As regards the latter, even if no particular secondary EU law comparable to the abovementioned directives applied, in *Eco Swiss*, a case that has also already discussed earlier, the Court confirmed the existence of a similar obligation, at least in relation to proceedings for the annulment of an arbitration award.[168] In this context the fundamental importance attributed to the EU rules concerned was noted, which contributed to the conclusion that they constitute matters of public policy – at least for the purposes of the proceedings at issue in that case – which, as was explained above, a national court may have to raise of its own motion.[169]

376. The next question is then of course what *explains* the differences that emerge when comparing the above case law. It may be tempting to conclude that consumer protection law and competition law are to be considered of exceptional importance in the EU legal order, and that therefore these points of law must be raised by a national court of its own motion, whereas the same would not, or at least not necessarily or to the same extent, apply in

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167 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 22-29. See further para. 167-168 above.

168 CoJ case C-126/97, *Eco Swiss*, para. 36-41. See further para. 204 above.

169 It remains to be clarified whether this finding can simply be transposed to cases that do not concern proceedings for the annulment of an arbitration award, especially considering the different nature of the concept of public policy. See further para. 204 above. Note also that, as was indicated in para. 374 above, in legal proceedings before the EU courts possible infringements of EU competition law are not considered as a matter of public policy that must be raised of the court's own motion.

relation to other fields of law, such as public procurement law. However this view does not seem to provide a satisfactory explanation. To start with, even if the above case law makes it clear that the nature and importance of the EU rules at issue can certainly be a relevant factor, as it stands, it hardly allows for such an unambiguous conclusion.[170] At least for now many uncertainties remain, especially in terms of the precise legal basis for imposing such an obligation on national courts in the said cases. Moreover EU public procurement law is rooted in the EU Treaties' fundamental freedoms, notably those of establishment and to provide services.[171] This makes it unlikely that these rules should somehow be deemed 'less fundamental' than EU law on consumer protection and competition.

It is submitted that the different approaches and outcomes in the three abovementioned rulings are better explained in another manner. Three points should be noted in this connection. First, the questions referred differed. In *GAT* the Court of Justice was asked whether EU law *precluded* review of the national court's own motion. Even if the subsequent considerations by the Court were formulated in general terms, they should arguably still be understood in that light. That means that it is not excluded that, in other public procurement cases, the Court will rule that EU *requires* such own motion review, as it did in *Océano Grupo* and *Eco Swiss*. Second, in *GAT* the Court may have stressed that this question is to be settled primarily in accordance with national law, it nonetheless superimposed certain EU law requirements, derived from the need to safeguard the objective of the EU legislation in question. In that sense the difference between *GAT* on the one hand and *Océano Grupo* and *Eco Swiss* on the other hand seems more cosmetic than fundamental. Third, and probably most importantly, in each of the three abovementioned cases the relevant EU law requirements appeared to serve primarily the protection of the rights of the private parties initiating the legal proceedings. From this perspective the principal difference between these cases is that this very same consideration argued *in favour* of active judicial intervention as a matter of EU law in *Océano Grupo* and *Eco Swiss*, whereas in the specific factual circumstances of *GAT* it argued *against* it (given that in this latter case an *ex officio* finding of an *earlier* infringement could mean that the damages claim was to be dismissed).

The fact that the reasoning and the conclusions reached differed in the three abovementioned rulings should therefore not distract from the fundamental objective that the Court of Justice consistently seeks to achieve, namely the *effective protection of rights* that private parties derive from EU law in proceedings before their respective national courts. The Court has long insisted on this generally being one of the key tasks of the national

170 Cf. Opinion AG Poiares Maduro, joined cases C-222/05 to C-225/05, *Van der Weerd*, para. 27-29.

171 See para. 70 above.

courts in the EU legal order.[172] This consideration also underpins its position that, where national law provides for discretion for the court to raise points of its own motion, this should be understood as an obligation where points of EU law are concerned.[173] This reading is moreover consistent with other cases where similar issues emerged. Most notably in *Heemskerk* it was found that, at least where the principle of no *reformatio in pejus* is enshrined in national procedural law, a national court is not obliged to raise issues of EU law of its own motion where this would have the effect of leaving the private party-applicant worse off than if he had not done so.[174] The Court made it clear in this case that this applies even where this may lead to negative consequences for certain matters of general interest protected by EU law (in the case at hand: animal welfare and the EU's financial interests).

377. *In summary*, from a purely legislative perspective the question whether and if so, in which circumstances, a national court may or must raise certain points of EU law of its own motion (*ex officio*) is a rather straightforward one. For the EU legislation under consideration here leaves this topic entirely unaddressed. But the case law of the Court of Justice makes it clear that in reality the situation is considerably more complex. Whereas it has been held that the Procurement Remedies Directives can in some cases *preclude* such own motion review, in relation to the Unfair Terms Directive and Article 101 TFEU the Court has insisted that the national courts seised can *be obliged*, as a matter of EU law, to do precisely that. This case law tends to be casuistic and not always unambiguous. Several issues therefore still remain to be fully clarified. It would nonetheless appear that it is not primarily the nature or importance of the EU law at stake that underlies the imposition of certain EU law requirements in this respect. Rather, apart from applications of the principle of equivalence, the central unifying factor behind the Court's seemingly diverging case law appears to be its desire to ensure the effective protection of the rights of private parties derived from EU law in proceedings before the courts of the Member States.

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172 E.g. CoJ case 106/77, *Simmenthal*, para. 16; CoJ Opinion 1/09, *Patent Court Agreement*, para. 66 and 68. Note that here the emphasis tends to be on the rights of the private party-*applicant*. Where the *defendant* is also a private party, the latter's rights (which may or may not derive from EU law) typically receive less attention. See further para. 456 below.

173 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 13-14; CoJ case C-72/95, *Kraaijeveld*, para. 58; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 29-32; CoJ case C-40/08, *Asturcom*, para. 54.

174 CoJ case C-455/06, *Heemskerk*, para. 44-48. See further Geursen (2009), p. 131. See e.g. also CoJ case C-87/90, *Verholen*, para. 11-16; CoJ case C-18/13, *Maks Pen*, para. 33-39.

### 9.2.5. General rules

378. In part B of this study a number of 'general rules' were identified. This term refers to broadly formulated legislative provisions that deal not so much with certain specific issues, but rather apply generally to the matters covered by the legal act in question. Such general rules can be found primarily in the Procurement Remedies Directives and in the IPR Enforcement Directive. The former provide that it must be ensured that decisions can be reviewed "*effectively and, in particular, as rapidly as possible*".[175] In the IPR Enforcement Directive it is stated that the measures, procedures and remedies set out therein must be "*fair and equitable and [...] not be unnecessarily complicated and costly, or entail unreasonable time-limits or unwarranted delays*".[176] The latter directive also provides that those measures, procedures and remedies must be "*effective, proportionate and dissuasive*" and that they must be applied in such as manner so as to provide for safeguards against their abuse.[177]

379. One might be inclined to overlook these provisions, considering their broad and general wording and the more detailed rules set out in the remainder of the abovementioned directives. It appears however that they can – at least potentially – fulfil an *important function*, in particular where interpretation of these directives is required. In the case of the Procurement Remedies Directives this effect is somewhat blurred in light of the fact that the Court of Justice has at times identified the above general rule as these directives' objective.[178] Where it is seen as such, the importance that the Court attached to this rule is less remarkable. For the Court generally tends to give considerable weight to the objective that an EU legal act seeks to achieve when interpreting it.[179] For practical purposes it matters little however whether the requirement of effective and rapid review is seen as a 'general rule' or as the objective of the Procurement Remedies Directives. Either way it can play an important role. That was the case for instance in the Court's finding that these directives preclude a fault requirement in relation to actions for damages[180] and that they allow for limitation periods to be set

175 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13. See further para. 100 above.
176 Art. 3(1) IPR Enforcement Directive 2004/48. See further para. 144 above.
177 Art. 3(2) IPR Enforcement Directive 2004/48.
178 See para. 74 above.
179 It is e.g. settled case law that, when interpreting provisions of EU law or determining their scope, account is to be taken not only of their wording, but also of their context and objectives. See e.g. CoJ case C-323/03, *Commission v. Spain*, para. 23; CoJ case C-306/12, *Spedition Welter*, para. 17. Also, any discretion left to the Member States may not be used in such a manner as to compromise the objectives pursued by the act of EU law in question. See e.g. CoJ case C-145/10, *Painer*, para. 107.
180 CoJ case C-314/09, *Stadt Graz*, para. 43. See further para. 88 above.

with respect to the bringing of legal proceedings by private parties under these directives.[181]

The potential significance of the abovementioned general rules set out in the IPR Enforcement Directive may be even greater. A good example is the Court's ruling in *L'Oréal v. eBay*, discussed earlier.[182] Here it was held in essence that an injunction sought under this directive (requiring an online intermediary to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual property rights) would not be compatible with the abovementioned requirement that the remedies granted must be fair, proportionate and not excessively costly. Many other situations are conceivable where these general rules can fulfil a similar interpretative function, especially where the directive does not expressly regulate certain matters, such as limitation periods or the standard of judicial review to be exercised.[183] They can also serve as an important interpretative aid in relation to specific provisions of this directive, for example its rules on actions for damages or on the presentation and preservation of evidence and information.[184]

380. *In summary*, the general rules laid down in the Procurement Remedies Directives and the IPR Enforcement Directive may be broadly and somewhat vaguely worded, they can nonetheless – or perhaps precisely for that reason – play an important role in resolving questions of interpretation related to these directives, especially where they do not expressly regulate a particular issue or where their more detailed provisions leave scope for discussion.

181 E.g. CoJ case C-230/02, *Grossmann*, para. 37-38. See further para. 95 and 347 above.
182 CoJ case C-324/09, *L'Oréal v. eBay*, para. 139. See further para. 131 above.
183 See subsections 9.1.3 and 9.2.3 above respectively.
184 See subsections 7.1.1 and 8.2.2 above respectively.

# D. Broader aspects, perspectives and conclusions

# 10. The how, when and why of EU private enforcement legislation

One could say that the three foregoing chapters that together made up part C of this study were essentially concerned with the question of how the private enforcement of EU law is facilitated by the EU legislature in terms of remedies and procedural provisions. As part of the final part D, the present chapter 10 considers a number of broader aspects that emerge in this connection. The questions addressed here can be summarised as the 'how' (understood more broadly), 'when' and 'why' of EU legislation facilitating private enforcement of EU law. More specifically, it is first assessed what, from a *legal* perspective, the EU legislature's scope is to enact secondary law of the type at issue in this study. Attention then turns to the *political* and *policy* aspects and facilitating factors that can be of relevance in this respect. The questions addressed are thus essentially whether the EU has the legal empowerment, a sufficient policy reason as well as the necessary political will to enact legislative measures related to the private enforcement of EU law. Next the added-value of these legislative measures is considered, particularly as compared to legislative inaction at EU level. In the last subsection of this chapter the 'how' of the EU legislation at issue is re-assessed, this time particularly in terms of coherence and fragmentation. The following chapter 11 seeks to 'zoom out' even further and put in perspective the phenomenon of private enforcement generally and EU legislation on this subject-matter specifically. The final chapter 12 summarises this study's main findings and formulates conclusions.

## 10.1. The EU's legal scope to act

When considering the EU legislation at issue in this study more generally, an important question from a legal perspective is that of the EU legislature's scope to act under the EU Treaties. In this connection three specific issues are addressed in the below subsections. First, there is the question of the legal basis for the EU to act in this regard. Second, the legal constraints on the EU are assessed in as far as these constraints are associated with the principles of subsidiarity and proportionality and the fundamental rights guaranteed in the Charter. Finally, the significance of the principle of national procedural autonomy in the present context is (re-)considered.

### *10.1.1. Legal basis issues*

381. Of fundamental – and indeed constitutional[1] – importance in relation to the EU's scope to legislate on a particular subject-matter is the question whether and if so, to which extent the EU Treaties contain a sufficient *legal basis* for the intended act. That applies for the adoption of secondary EU law generally and it certainly also applies in the present context. The importance and sensitivity of this question in relation to private enforcement-related EU legislation is illustrated by the critical comments that have regularly been made in relation to possible legislative action on matters such as collective redress and the private enforcement of EU competition law.[2]

The requirement of a legal basis derives from the principle of *conferral*, pursuant to which the EU can act only within the competences conferred upon it by the Member States in the EU Treaties to attain the objectives set out therein.[3] Competences not conferred upon the EU remain with the Member States.[4] The EU Treaties list and categorise the areas of EU competence.[5] Many particular legal bases have been set out in accordance with this general distribution of competences. Each act of secondary EU law needs to be rooted in such a legal basis. In most cases the legal basis concerns a specific sector or subject-matter, such as the protection of personal data, the establishment of a common agricultural policy or the pursuit of certain environmental objectives.[6] Where a legal basis for a particular legal act is lacking or where it is exceeded, that act is open to being annulled by the Court of Justice.[7] It is settled case law that the choice of legal basis must be based on objective factors that are amendable to judicial review and that include in particular the aim and the content of the intended legislative measure in question.[8]

382. Two partial exceptions aside, the legal basis used for all legal acts assessed in part B of this study is *Article 114 TFEU*. The Procurement Remedies Directives, the IPR Enforcement Directive, the Consumer Injunctions Directive and the Unfair Terms Directive have all been adopted on the basis of this article.[9] The first partial exception is the Product Liability Directive,

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1 See e.g. GC joined cases T-458/10 to T-467/10 and T-471/10, *McBride*, para. 25.
2 See para. 189 and 219 above respectively.
3 Art. 4(1) TEU.
4 Art. 5(2) TEU.
5 Art. 2-5 TFEU.
6 See Art. 16(2), Art. 43(2) and Art. 192 TFEU respectively.
7 See Art. 263 TFEU as regards direct actions before the EU courts. Its second subparagraph specifies that one of the grounds for annulment is a lack of competence. An 'indirect' route for establishing the invalidity of secondary EU law is the preliminary reference procedure set out in Art. 267 TFEU. See further para. 3 above.
8 E.g. CoJ case C-155/91, *Commission v. Council*, para. 7; CoJ case C-440/05, *Commission v. Council*, para. 61; CoJ case C-301/06, *Ireland v. Parliament and Council*, para. 60.
9 See para. 73, 112, 153 and 162 above respectively.

which has been adopted under Article 115 TFEU. But this does not constitute a divergence that is of further relevance here, because the differences in terms of substance between Article 114 and 115 TFEU are limited and the use of this latter article is due to the fact that Article 114 TFEU did not yet exist at the time that the Product Liability Directive was proposed and adopted.[10] The subsequent amendment of this directive in 1999 was based on Article 114 TFEU.[11] The other partial exception is the Competition Damages Directive, as this directive rests on a dual legal basis, i.e. not on Article 114 alone, but also on Article 103 TFEU. The background of the addition of this latter article in this particular case has already been discussed earlier.[12]

Article 114 TFEU empowers the EU legislature to "*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*". This illustrates that, notwithstanding the fact that the EU is mostly empowered to enact secondary law in relation to specific sectors or subject-matters, the EU Treaties sometimes confer powers in a more broadly formulated manner. That does not imply however that the powers conferred on the EU under this article are unlimited. As is evident from its wording, this provision requires in particular a link with the EU's internal market. In its landmark *Tobacco Advertising* judgment (2000), the Court of Justice elaborated on this requirement.[13] This case concerned a challenge, brought by Germany, of the legality of a directive on tobacco advertising, which had been adopted on the basis of Article 114 TFEU.[14] The Court held that this article does *not* vest in the EU legislature a *general power* to regulate the internal market. A mere finding of certain disparities between the relevant laws of the Member States and of an abstract risk of obstacles to the exercise of the EU Treaties' fundamental freedoms or of distortions of competition liable to result therefrom does not suffice to justify its use. The Court underlined that instead EU legislation adopted on the basis of Article 114 TFEU must *genuinely have as its object* the improvement of the conditions for the establishment and functioning of the internal market. Any alleged distortion of competition that the legislation concerned seeks to eliminate most be appreciable. This does not necessarily exclude the use of this article to prevent the emergence of future obstacles, provided however that this emer-

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10 Article 114 TFEU was not inserted in the EU Treaties until 1987 (Single European Act). To the extent relevant in the present context, Art. 114 and 115 TFEU are worded mostly in a similar manner, a key difference being that the former article allows for the adoption of legislation by qualified majority voting instead of the unanimity required under the latter article.

11 See Product Liability Amending Directive 1999/34.

12 See para. 228 above. In relation to Art. 103 TFEU, see also para. 386 below.

13 CoJ case C-376/98, *Germany v. Parliament and Council (Tobacco advertising)*, para. 83-83 and 106.

14 Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ 1998, L 213/9.

gence is likely and that the EU legislative measures in question are designed to prevent these obstacles from emerging. In the case at hand the Court found that these conditions had not been met. It therefore annulled the directive. In subsequent case law the Court dealt with similar questions, essentially confirming and expanding on the line set out in *Tobacco Advertising*.[15]

383. In this light all legal acts considered in part B of this study rely in essence on two key considerations. In the first place, they all highlight – be it to a greater or lesser extent – the existence of certain *divergences* between the relevant laws of the Member States. It is then typically noted that this leads to a distortion of competition and a fragmentation of the internal market, which in turn is the justification for the EU to take legislative action with a view to reducing these divergences. While the Procurement Remedies Directive and the Product Liability Directive do not go into much detail on this point, this logic has for instance been set out quite extensively in the IPR Enforcement Directive. Its recitals speak of the existence of "*major disparities as regards the means of enforcing intellectual property rights*", which are said to be prejudicial to the functioning of the internal market and to make it impossible to ensure that these rights enjoy an equivalent level of protection throughout the EU.[16] The IPR Enforcement Directive therefore aims "*to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market*".[17] Likewise in the recitals of the Competition Damages Directive it is said that "*marked differences*" exist between the laws of the Member States, which lead to an "*uneven playing field*".[18] This directive seeks to "*reduce the differences*" between these laws and to "*prevent the emergence of wider differences*".[19] Considerations of this kind can also be found in the Unfair Terms Directive. After having observed that there are "*marked divergences*" between the relevant laws of the Member States, it is noted there that "*uniform rules of law in the matter of unfair terms*" should be adopted.[20]

A second key consideration is the justification of the harmonised rules in terms of *effectiveness*. For example, the IPR Enforcement Directive recalls the need for "*effective means of enforcing intellectual property rights*" and for ensuring that the substantive law on intellectual property is "*applied effectively*".[21] Along the same lines the Competition Damages Directive states that the said divergences "*affect the substantive effectiveness*" of the EU right to compensa-

15 E.g. CoJ case 491/01, *British American Tobacco*; CoJ case C-217/04, *UK v. Parliament and Council*; CoJ case C-380/03, *Germany v. Parliament and Council (Tobacco advertising II)*; CoJ case C-155/04, *Alliance for National Health*; CoJ case C-301/06, *Ireland v. Parliament and Council*; CoJ case C-58/08, *Vodafone*; CoJ case C-270/12, *UK v. Parliament and Council*.

16 Recital 7 and 8 IPR Enforcement Directive 2004/48. See further para. 112 above.

17 Recital 10 IPR Enforcement Directive 2004/48. See also para. 113 above.

18 Recital 7 Competition Damages Directive. See further para. 223 and 228 above.

19 Recital 9 Competition Damages Directive.

20 Recitals 3 and 10 Unfair Terms Directive 93/13. See further para. 163 above.

21 Recital 3 IPR Enforcement Directive 2004/48.

tion for infringements and leads to the "*uneven enforcement*" of this right.[22] As the Commission noted in its proposal, this directive "*seeks to ensure the effective enforcement of the EU competition rules*", against the background of the idea that such private enforcement contributes to ensuring compliance with these rules.[23] It similarly follows from the recitals of the Procurement Remedies Directives that these directives aim to ensure the "*effective application*" of the substantive rules at issue, whereby the importance of the availability of "*effective remedies*" at the national level is also stressed.[24] The purpose of the measures provided for in the Consumer Injunctions Directive is essentially to ensure that "*the effectiveness of national measures transposing the [substantive EU consumer protection directives concerned] […] is [not] thwarted*" in cross-border situations.[25] Such a focus on effectiveness may be somewhat less clearly articulated in the Product Liability Directive and the Unfair Terms Directive, probably because these directives contain substantive as well as remedial and procedural rules, but they nonetheless also make it clear that the overarching aim is to contribute to the effective protection of consumers.[26]

384. The fact that Article 114 TFEU is the legal basis for virtually all EU legislation considered in this study does not mean that its use has always been accepted in an unquestioned manner. In particular, the following two types of concerns occasionally emerged in this connection.

The first concern relates to the abovementioned requirement of a sufficient link with the *internal market*. Concerns of this type were raised in particular during the legislative process in relation to the Unfair Terms Directive and the Product Liability Directive[27] and occasionally also in the legal literature.[28] This has however on the whole not been a major topic of debate. In fact, considering the central importance of this internal market requirement under Article 114 TFEU, it can be seen as remarkable that this issue has been raised so sparingly in relation to the EU legislation at issue. Neither

22 Recitals 7 and 8 Competition Damages Directive.

23 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 2.

24 Recitals 1 and 4 Public Sector Remedies Directive 89/665 and recitals 1 and 3 Utilities Remedies Directive 92/13. See also recital 81 Concessions Awards Directive 2014/23, which explains that the scope of the Procurement Remedies Directives must be extended so as to cover also infringements of that directive by pointing to the need "*to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of this Directive*".

25 Recital 4 Consumer Injunctions Directive 2009/22.

26 Recital 13 Product Liability Directive 85/374; recital 10 Unfair Terms Directive 93/13.

27 As regards Unfair Terms Directive 93/13, see Council, doc. 4176/91, pp. 2-3; Council, doc. 4904/91, p. 2 and its annex. As regards Product Liability Directive 85/374, critical comments in this regard were initially voiced from the side of the European Parliament. See European Parliament, doc. 246/78, pp. 6-9. However this position was subsequently reversed; see European Parliament, doc. 71/79.

28 As regards Product Liability Directive 85/374, see e.g. Whittaker (2005), p. 439. Cf. Weatherill (2012), pp. 1306-1310 (in relation to a number of other (substantive) consumer protection directives).

have any legal challenges been brought before the EU courts for any alleged failure to meet this requirement. This can be explained by the fact that the link between the internal market and the *substantive* rules of EU law to which the said legislation relates is rather evident.[29] That being so, the adoption of additional EU rules relating to the *enforcement* of those substantive rules – by means of a "*logical extension*"[30] of, or a "*corollary*"[31] to, those substantive rules – may also generate comparatively little debate on this point.[32]

The second concern relates in essence to the question whether this article can be used as a basis for EU legislative measures that harmonise national law on *(civil) procedure*. The issue here is not so much whether the EU is competent at all, but rather whether Article 114 TFEU is the most appropriate legal basis for any such intended legislative intervention. Concerns of this type emerged in 2003 in relation to the proposal for the IPR Enforcement Directive. Several Member States raised the question whether, given that many of its provisions relate to matters of civil procedural law,[33] the draft directive should not (also) be based on Article 81 TFEU concerning judicial cooperation in civil matters.[34] The Commission had already answered this question in the negative.[35] The legal service of the Council subsequently agreed. In essence the latter pointed out that the draft directive did not seek to establish harmonised rules eliminating cross-border obstacles to the good functioning of civil proceedings in general.[36] It rather sought to harmonise remedies and procedures only in so far as necessary to achieve a particular sectoral aim, namely to ensure that intellectual property rights enjoy effective and equivalent protection throughout the EU.[37] This intervention proved sufficient to settle the matter within the Council. Comparable discussions, with comparable outcomes, took place in connection to the Consumer Injunction Directive[38] and the Competition Damages Directive.[39]

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29 See para. 70 (concerning substantive EU public procurement law), para. 108 (concerning substantive EU intellectual property law), para. 149-151 (concerning substantive EU consumer protection law) and para. 199-201 (concerning substantive EU competition law).

30 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 5.

31 Reinbothe (2010), p. 6.

32 Cf. e.g. also European Parliament, Resolution on consumer redress, OJ 1987, C 99/203, recital C: "*the substantive rights conferred by [EU] legislation on the consumer must be supplemented by appropriate procedural mechanisms to ensure their enforcement*".

33 Cf. para. 142 above.

34 See Council, doc. 6052/04, p. 7. The relevant provision of the EU Treaties at the time was Art. 65 EC. This provision is not exactly identical to its successor, Art. 81 TFEU, but these differences are only of limited relevance here. See also para. 432 below.

35 Given that it had based its proposal solely based on Art. 114 TFEU. See further Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, pp. 16-17.

36 Cf. recital 11 IPR Enforcement Directive 2004/48.

37 Council, doc. 6299/04, p. 2.

38 See Council, doc. 7562/98. In this case the UK made a statement on this matter, accepting the outcome that this directive was to be based on Art. 114 TFEU, while underlining that "*it does not accept [EU] competence in the field of civil judicial procedure*".

39 See Council, doc. 16176/13; Council, doc. 15983/13, p. 2. See further para. 219 and 228 above.

385. In and by itself, the modest degree of debate and the absence of legal challenges, referred to above, do not necessarily mean that the legality of the use of Article 114 TFEU for the present purposes is established beyond doubt. That is after all only for the Court of Justice to decide. The foregoing nonetheless seems to allow for the conclusion that the parties concerned *mostly agree* on the use that can be made of this article so as to adopt EU legislation facilitating the private enforcement of EU law. Although a case-by-case assessment in light of the aim and the content of each intended legislative measure always remains required, legal basis issues therefore certainly need not be an absolute bar for the EU to enact legislation on private enforcement-related matters.

386. That applies all the more so because, its frequent use in the present context notwithstanding, Article 114 TFEU is not necessarily the only possible legal basis for the adoption of EU legislation of the type at issue here. Depending on the case at hand, other articles of the EU Treaties may offer more specific (and therefore in principle preferable) *alternatives*. Article 103 TFEU provides an example thereof in as far as EU legislative measures giving effect to EU competition law are concerned. In fact, it is widely agreed that Article 103 TFEU is the most evident legal basis for the adoption of an act of secondary EU law that is specifically concerned with the private enforcement of EU competition law.[40] The Competition Damages Directive demonstrates that the Commission as well as the EU legislature essentially concur with this view, even though, as was noted earlier, in this particular case Article 103 has been used together with Article 114 TFEU, in light of the fact that the directive also relates to infringements of certain rules of national competition law.[41] The possible relevance of other articles than Article 114 TFEU is further illustrated by other acts of secondary EU law that address private enforcement-related matters. The Gender Equality Directive has for example been based on Article 157(3) TFEU concerning social policy, whereas the Environmental Impact Assessment Directive has been established under Article 192(1) TFEU concerning the environment.[42]

387. As a final point it is to be noted that in the EU legal system the choice of legal basis is not only decisive for the question whether the EU is competent to act. It also determines the applicable *legislative procedure* for the adoption of the proposed legal act in question. Of particular importance in this connection are the relative powers granted to the EU's two main institutions where the adoption of secondary EU law is concerned, i.e. the Council and

40 See para. 228 above.
41 See further para. 228 above.
42 Gender Equality Directive 2006/54; Environmental Impact Assessment Directive 2011/92.

the European Parliament.[43] Under the 'ordinary legislative procedure' these two institutions essentially decide jointly.[44] As its name indicates, this procedure is prescribed most commonly. But the EU Treaties can also require a 'special legislative procedure' to be followed.[45] That is for example the case under Article 103 TFEU. This article demands only the consultation of the European Parliament, thus leaving it to the Council to adopt the acts established on this basis. As such the choice of legal basis can be a cause of inter-institutional differences of opinion and potential conflicts at EU level, as the developments relating to the Competition Damages Directive illustrate.[46]

*10.1.2. Subsidiarity, proportionality and fundamental rights*

388. Apart from the principle of conferral that underlies the requirement of a sufficient legal basis, as was set out in the previous subsection, there are two other noteworthy principles that can constrain the EU's capacity to act, namely the principles of subsidiarity and proportionality. Article 5 TEU foresees what could be called a 'three-step-test' in relation to the existence and exercise of EU competences, addressing in essence first the question whether the EU Treaties *allow* the EU to act (conferral, discussed above), then the question whether the EU is *better placed* to act than the Member States individually (subsidiarity) and finally the question whether the intended EU measure is a *suitable means* in relation to the objective sought (proportionality).

389. More specifically, pursuant to the principle of *subsidiarity*, in areas which do not fall within its exclusive competence,[47] the EU can act "*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at [EU] level*".[48] Put simply, even where the EU has been conferred the necessary powers, the intended EU action must thus have added-value before these powers can be exercised. In legal terms the importance of this princi-

43 In addition the choice of legal basis can be of importance for the applicable *voting requirements* in the Council, including whether a quality majority or unanimity is required. It may be assumed that this latter issue played a role in the abovementioned discussions on whether IPR Enforcement Directive 2004/48 and Consumer Injunctions Directive 2009/22 should be based either on Art. 81 or 114 TFEU (although since the revision of this former article, i.e. *ex* Art. 65 EC, this distinction is no longer equally relevant in this regard).

44 See Art. 289(1) and 294 TFEU.

45 See Art. 289(2) TFEU.

46 See para. 219 and 228 above.

47 See Art. 3 TFEU, which contains a (relatively short) list of the areas where the EU has exclusive competence. It includes "*establishing of the competition rules necessary for the functioning of the internal market*" (point b).

48 Art. 5(3) TEU. See further Tridimas (2006), pp. 183-188; Craig & De Búrca (2011), pp. 94-100; Craig (2012b), p. 72.

ple is however rather limited. The EU courts tend not to employ a high standard of judicial review in this regard when deciding on the legality of acts of secondary EU law.[49] This means that the legal relevance of the principle of subsidiarity is mainly procedural. It implies among other things an obligation to consult widely,[50] to involve national parliaments[51] and to explain why it is considered to have been complied with.[52] This principle has therefore been called "*par excellence a political principle, which seeks to influence the legislative process ex ante [and which has had] virtually no impact as a ground for [judicial] review*".[53]

As regards the EU legislation and initiatives discussed in part B of this study, interested parties, including some Member States, have regularly invoked the principle of subsidiarity when objecting to certain (aspects of) suggested or proposed measures. This occurred for example in relation to the IPR Enforcement Directive, both in general and in relation to its rules on legal costs.[54] Subsidiarity-related concerns were also voiced in connection to possible EU legislative involvement with issues of collective redress and the initiative that led to the Competition Damages Directive.[55] It follows from the foregoing that concerns of this kind are probably best understood as expressions of political or policy-related concerns as to whether or not it is seen as appropriate or desirable for the EU to exercise its competences concerning the matters in question.[56] That is not to suggest that concerns of this type are not to be taken seriously. To the contrary, there is no question that the existence or absence of sufficient political will and support by stakeholders is a crucial requirement for the adoption of any legislation.[57] The point here is rather that this is not a matter of the legality of the exercise of the EU's competences in a strict sense.

390. In accordance with the principle of *proportionality* the content and form of EU action may further not exceed what is necessary to achieve the objectives of the EU Treaties.[58] This proportionality test, which also extends to the EU's law-making activities, thus essentially concerns the issue of *how* the EU makes use of its power to act, once it has been established that it is

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49 E.g. CoJ case C-84/94, *UK v. Council*, para. 55; CoJ case C-377/98, *Netherlands v. Parliament and Council*, para. 32-33; CoJ case C-491/01, *British American Tobacco*, para. 177-185; GC case T-526/10, *Inuit*, para. 80-85 (appeal pending; see CoJ case C-398/13 P, *Inuit*).

50 Cf. Art. 2 Protocol (No 2) to the EU Treaties on the application of the principles of subsidiarity and proportionality.

51 Cf. Protocol (No 1) to the EU Treaties on the role of national parliaments in the EU.

52 Cf. e.g. recital 31 IPR Enforcement Directive 2004/48.

53 Tridimas (2006), p. 183.

54 See para. 116 and 138 above respectively. On these rules on legal costs, see also subsection 8.2.5 above.

55 See para. 189 and 219 above respectively.

56 In a similar sense, see Komninos (2008), pp. 46-48.

57 See also subsection 10.2.1 below.

58 Art. 5(4) TEU. See further Tridimas (2006), pp. 177-180; Craig & De Búrca (2011), pp. 526-533.

both competent and best placed to do so. It appears that, although this principle has in other contexts regularly been invoked to contest the legality of secondary EU law, contrary to the two aforementioned principles of conferral and subsidiarity, proportionality does not emerge as an issue that tends to be frequently invoked in connection to the legislation at issue in this study.

Suffice to note therefore that, in areas that involve political, economic and social choices and where complex assessments are to be made, the Court of Justice allows the EU legislature a broad discretion, limiting its review to verifying the absence of any manifests errors, misuse of power or manifest excess of the bounds of that discretion.[59] The EU legislature must base its choices on objective criteria and, where relevant, examine whether the objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain undertakings.[60] Yet, as long as the measures adopted by the EU legislature are not manifestly inappropriate for achieving the objective pursued, the Court does not substitute its own assessment for that of the appropriateness or otherwise of these measures.[61] The standard of judicial review is thus limited, especially where divergent interests are to be reconciled and options are thus to be selected within the context of the policy choices which are the legislature's responsibility.[62]

391. A different kind of legal constraint for the EU legislature when enacting private enforcement-related legislation of the type at issue here concerns the need to respect *fundamental rights*.[63] Earlier in this study it has already been noted that the role and especially the visibility of fundamental rights in EU law has increased since the Charter became legally binding in 2009.[64] The obligation for the EU to respect the rights set out in the Charter implies that also the secondary law adopted by its legislature must be 'Charter-compliant'.[65]

At the same time the case law has made it clear the fundamental rights that are typically at issue here (such as, as the case may be, the protection of personal data, the freedom to conduct a business, the protection of intellectual property and the right to an effective remedy and a fair trial[66]) are not

59 E.g. CoJ case C-84/94, *UK v. Council*, para. 58; CoJ case C-491/01, *British American Tobacco*, para. 123; CoJ case C-344/04, *IATA*, para. 80; CoJ case C-58/08, *Vodafone*, para. 52. See also, more generally, e.g. CoJ case C-127/07, *Arcelor Atlantique*, para. 57-59; CoJ case C-601/11 P, *France v. Commission*, para. 142.

60 E.g. CoJ case C-58/08, *Vodafone*, para. 53.

61 E.g. CoJ case C-150/94, *UK v. Council*, para. 83.

62 E.g. *ibid*., para. 89.

63 As regards a number of more specific fundamental rights-related issues that can emerge in the present context, see also subsections 11.2.5 and 11.2.6 below.

64 See para. 43 above.

65 Cf. Art. 51(1) Charter.

66 See Art. 8, 16, 17(2) and 47 Charter respectively.

absolute.[67] In the words of the Court of Justice, they "*do not constitute unfettered prerogatives*".[68] In its Article 52(1) the Charter expressly allows for the limitation of the exercise of the rights laid down therein in the general interest or to protect the rights of others, provided that the limitation is laid down in law, the essence of the fundamental right concerned continues to be respected and the restriction is proportional to the objective pursued.

It remains to be fully clarified how 'strict' the Court of Justice's review is when verifying whether acts of secondary EU law are consistent with the Charter. On the one hand the Court has acknowledged in this context that the EU legislature can enjoy a wide margin of appreciation.[69] On the other hand the case law available to date suggests that this margin can actually be rather limited and that the judicial review exercised by the Court can consequently be rather strict. This will depend on factors such as the area concerned, the nature of the rights at issue and the seriousness of the interference with those rights.[70] That being so, although it remains difficult to determine this in the abstract and further clarification in the case law will need to be awaited, as it stands the overall impression is that acts of secondary EU law are generally more likely to be annulled for lack of respect for fundamental rights than for an insufficient legal basis or incompatibility with the principles of subsidiarity and proportionality.[71]

### *10.1.3. National procedural autonomy revisited*

392. A further question that can arise in relation to the foregoing is what role is left, if any, for the principle of national procedural autonomy. This principle has already been introduced in part A of this study.[72] The findings of part B of this study confirm, in a nutshell, that the Member States have *no proper 'autonomy'* as regards matters related to remedies and procedures applicable in proceedings before their national courts, in the sense that the EU would necessarily be barred from legislating on these matters. As this study illustrates, over the years a broad range of EU legislative measures relating to precisely these matters have been adopted at EU level. These

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67 E.g. CoJ case C-275/06, *Promusicae*, para. 61-69; CoJ joined cases C-92/09 and C-93/09, *Schecke*, para. 48; CoJ case C-283/11, *Sky Österreich*, para. 45 and 60; CoJ case C-399/11, *Melloni*, para. 49.

68 E.g. CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 63; CoJ case C-418/11, *Texdata*, para. 84.

69 CoJ joined cases C-402/05 P and C-415/05 P, *Kadi*, para. 360.

70 CoJ joined cases C-293/12 and C-594/12, *Digital Rights Ireland*, para. 47-48.

71 E.g. whereas annulments for lack of a sufficient legal basis or infringements of the principles of subsidiarity and proportionality generally remain (very) scarce, in the above-mentioned rulings in *Kadi*, *Schecke* and *Digital Rights Ireland* the CoJ annulled the acts in question for failure to respect the applicable fundamental rights (even if in the latter case it had ruled earlier that the legal basis chosen for the act in question was sufficient; see CoJ case C-301/06, *Ireland v. Parliament and Council*). Cf. Craig & De Búrca (2011), pp. 372-378.

72 See section 2.1 above.

measures touch upon matters as diverse as the requirements for liability in damages to be incurred, the availability of interim relief, rules on legal costs, the limitation periods that apply for the bringing of legal proceedings and the forum competent to hear the private enforcement actions brought under this legislation.[73] That the EU need not be barred from acting is also confirmed by the discussion in the two preceding subsections, where it was found that neither the requirement of a sufficient legal basis, nor the principles of subsidiary and proportionality nor the requirement to respect fundamental rights need to be insurmountable obstacles. In that sense the principle of national procedural autonomy has no further role to play. Nonetheless three further comments can be made against this background on this principle and its relevance in the present context.

393. In the first place, it may be helpful to distinguish between two types of EU activities in private enforcement-related matters, namely *law-making* and *judiciary* activities. To begin with the latter, where a preliminary question is referred to the Court of Justice concerning the rules that regulate the enforcement of EU law at national level, this institution must provide an answer on the basis of the law as it stands. Although this study might seem to suggest otherwise, the fact remains that in many instances no particular rule of secondary EU law applies that addresses the remedial and procedural matters that may arise in this respect. In those cases, by default as it were, national law takes central stage.[74] In that sense the Member States possess a degree of 'autonomy' concerning these matters, subject to the limits set by the EU law principles of equivalence and effectiveness.[75] It is in this context that the Court of Justice regularly refers to the principle of (national) procedural autonomy.

This should not be misunderstood to mean however that – where there is a sufficient legal basis and the principles of subsidiarity and proportionality are respected – the EU is barred from *legislating* on private enforcement-related matters. The 1976 *Rewe* judgment itself, which lay the legal foundations of the principle of national procedural autonomy, already made this clear. For there the Court noted that "*[w]here necessary, Articles [114 to 117 and 352 TFEU] enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the internal market*".[76] The Court has since made this (even) more explicit. In 1994 it was asked to rule on *inter alia* the distribution of competences between the EU and the Member States in relation to the conclusion of the TRIPS Agreement. This agreement touches upon many of the issues that are also addressed in the

73 See section 7.1 and subsections 8.2.1, 8.2.5, 9.1.3 and 9.2.1 above respectively.

74 Cf. Milutinovic (2010), p. 312. See also para. 27 above.

75 On these two principles, see section 2.2 above. The principle of effective judicial protection can also come into play in this context, as was discussed in section 2.3 above.

76 CoJ case 33/76, *Rewe*, para. 5. See further para. 26 above.

IPR Enforcement Directive.[77] In the context of these proceedings several Member States argued that, given that the TRIPS Agreement includes various measures relating to remedies and procedures applicable in proceedings before their respective national courts, this is a Member State competence. The Court rejected this argument however. It held that "*[i]f that argument is to be understood as meaning that all those measures are within some sort of domain reserved for the Member States, it cannot be accepted. The [EU] is certainly competent to harmonise national rules on those matters, in so far as, in the words of Article [115 TFEU], they 'directly affect the establishment or functioning of the internal market*".[78]

In other words, also with respect to possible legislative measures taken by the EU the principle of national procedural autonomy can perhaps be best understood as a default rule. The essence here is not so much one of the autonomy of the *Member States*. The key question is rather whether or not the *EU* is competent to act and if so, to which extent it has exercised these competences. This is not fundamentally different from any other intended or actual EU legislative activity, regardless of whether it concerns matters that are substantive or procedural in nature.[79] Where the EU legislature has not (or not yet) acted, it is for the Member States to take all necessary measures to enable the private parties concerned to effectively exercise their rights based on EU law.[80] It follows, as was the case with the principle of subsidiarity,[81] where opposition against possible EU legislative action on private enforcement-related matters is expressed in terms of national procedural autonomy, it is perhaps better understood as a policy or a political concern rather than a strictly legal one.

394. In the second place, even where EU legislation of the type at issue here has been adopted, in many respects 'purely' national rules (i.e. rules of national law other than those transposing a directive) on remedial and procedural matters continue to be of considerable importance. For this legislation often leaves considerable space for what could be called *'residual' autonomy* on the side of the Member States. That is to say, the scope of this EU legislation and the level of detail provided for on the matters covered may mean that the degree of EU involvement can be seen as remarkable and far-going when compared to most other fields of EU law. But the degree of EU involvement with the applicable remedial and procedural rules generally still remains rather modest when compared to the bodies of written and unwritten rules on these matters that apply at the domestic level. It is evi-

77 See para. 118 above.

78 CoJ Opinion 1/94, *WTO*, para. 104. Although reference is made here to Art. 115 TFEU, there can be no doubt that this observation also extends, in principle, to Art. 114 TFEU. On the relationship between these two articles, see also para. 382 above.

79 Cf. Art. 4(1) and 5(2) TEU; Art. 2(2) TFEU.

80 Cf. Art. 4(3) and 19(1) TEU.

81 See para. 389 above.

dent that this EU legislation by no means amounts to a complete and exhaustive procedural code. In that sense a significant scope for autonomous decision-making at national level typically remains, even where EU legislation facilitating the private enforcement of EU law has been adopted.

It is to be noted in this connection that all EU legal acts discussed in the foregoing are *directives*. That implies that the Member States are inherently left with some leeway. For in the EU legal order a directive is binding as to the result to be achieved, but it leaves the choice of form and methods to the Member States when transposing the EU rules concerned into national law.[82] It is true that this does not mean that directives cannot set out extensive, detailed and exhaustive rules and thus limit the Member States' scope for manoeuvre to a high extent. However this has on the whole not been the approach followed in the directives under consideration here. The Unfair Terms Directive states for instance that "*as they now stand, national laws allow only partial harmonisation to be envisaged*".[83] Similarly the Consumer Injunctions Directive declares, rather modestly, that "*some degree of approximation of national provisions*" is needed.[84] The IPR Enforcement Directive may further be comparatively ambitious in seeking to ensure a high, equivalent and homogeneous level of protection across the EU, but it also provides that the Member States remain free to establish national rules on the matters covered that are more favourable for rightholders.[85] The Commission has therefore described this directive as "*a minimum but standard toolbox*".[86] Similarly it has held that its initiative concerning the private enforcement of EU competition law aims to achieve "*effective minimum protection*".[87]

The Product Liability Directive may be somewhat of an outlier in this regard, given that the Court of Justice has held that it entails 'complete' (or 'maximum') harmonisation.[88] This implies that Member States cannot adopt diverging measures concerning issues falling within its scope. It that sense, this directive is more prescriptive and significantly limits the Member States' flexibility. It is questionable however whether this finding corresponds with the EU legislature's intention when adopting the directive.[89] More importantly, in this case this hardly means that the Member States no longer have any scope for manoeuvre. For one thing, the Product Liability

82 Art. 288, third subparagraph TFEU. According to the CoJ's case law, it follows from this provision that when the Member States transpose a directive they have the obligation to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of methods. See e.g. CoJ case C-389/08, *Base*, para. 24-25.

83 Recital 12 Unfair Terms Directive 93/13.

84 Recital 7 Consumer Injunctions Directive 2009/22.

85 Art. 2(1) IPR Enforcement Directive 2004/48.

86 Commission, Report on IPR Enforcement Directive 2004/48, COM(2010) 779, p. 5.

87 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 2.

88 E.g. CoJ case C-183/00, *González Sánchez*. See further para. 174 above.

89 Cf. Council, Resolution on amendment of the liability for defective products directive, OJ 2002, C 26/2. At the time of adoption of Product Liability Directive 84/374 the Council was the sole legislator.

Directive contains several optional provisions, for example on the availability of the 'development risk defence' and the possibility to 'cap' the amount of damages due.[90] By leaving it to the Member States to decide whether or not they wish to enact these provisions in their respective national laws, those laws will almost inevitably continue to differ; at best only the margins are narrowed. For another thing, the number of issues exhaustively regulated by this directive is rather limited. This means that on many other relevant private enforcement-related matters that could arise in this connection the Member States remain in principle at liberty to set their own rules.

Consequently, although the scope and intensity of the EU involvement thus differs per directive, the EU legislation at hand generally leaves the Member States a significant degree of flexibility. It does so in particular in three manners. A first such manner is *not to deal* with a given issue at all, or not in any detail. For example, contrary to the Commission's earlier intentions, apart from an occasional reference in its recitals, the Competition Damages Directive does not address issues of fault, collective redress, causality and legal costs.[91] And, despite earlier suggestions to be more specific, the Procurement Remedies Directive largely leave it open which heads of damages are to be compensated.[92] A second manner is to include an *express reference to national law*. One could think of the IPR Enforcement Directive's rules on legal standing. The reference to national law contained therein leaves many issues to be decided at the level of the Member States.[93] The Unfair Terms Directive similarly refers to national law in connection to the contractual remedy for which it provides.[94] A third manner is the inclusion of *optional* provisions. It has already been noted above that the Product Liability Directive does so on several occasions. The Consumer Injunctions Directive offers another example, as it allows the Member States to decide whether or not to impose a requirement of 'pre-trial' contacts between the parties.[95]

395. In the third place, as was explained above, the EU legislation at issue in this study may often leave the Member States considerable 'residual' autonomy. But as soon as the subject-matter in question is considered to fall within the scope of this legislation, it is no longer covered by the principle of national procedural autonomy. The aforementioned 'residual' autonomy thus only constitutes 'procedural autonomy' within the meaning of the

90 Art. 15(1)(b) and Art. 16 Product Liability Directive 85/374 respectively. See further para. 180 and 183 above respectively.

91 See para. 225 above.

92 See para. 84-85 above. See also subsection 7.1.5 above.

93 Art. 4 IPR Enforcement Directive 2004/48. See further para. 141 above. See also subsection 9.1.2 above.

94 Art. 6(1) Unfair Terms Directive 93/13. See para. 164-166 above. See also section 7.2 above.

95 Art. 5 Consumer Injunctions Directive 2009/22. See further para. 158 above. See also subsection 9.2.2 above.

Court's *Rewe* case law where the subject-matter at issue is not covered by the said legislation. In all other cases, to use the Court's words in *Rewe*, there is no longer an "*absence of [EU] rules on the subject*".[96] Accordingly in the latter cases the national laws concerned are not subject to the comparatively (although by no means always[97]) more 'lenient' test under the principles of *equivalence and effectiveness*, but rather to the principle of *primacy* of EU law.[98] Put differently, the EU legislation at issue here may be concerned with remedial and procedural matters, but it still concerns EU law. As such it is not to be treated any differently from EU law that addresses matters of substantive law.

It follows that the mere fact that this EU legislation exists can be of considerable importance, even if this legislation leaves the Member States a degree of flexibility in one of the abovementioned manners. In concrete terms this means in particular that the main test applied in cases falling within the scope of the EU legislation concerned is whether the exercise of the discretion that may be left to the Member States is such as to ensure the *effectiveness* and the *objectives* of this legislation (as opposed to the test under the '*Rewe*-principles' of equivalence and effectiveness). It is unfortunately not always clear whether or not a particular issue falls within the scope of EU legal acts such as the ones at issues in this study and which test is therefore to be applied. For instance, the Court has held that the Unfair Terms Directive regulates neither which court is to have territorial jurisdiction, nor the number of instances of jurisdiction.[99] Both issues were therefore considered to fall within the Member States' procedural autonomy and assessed under the EU law principles of equivalence and effectiveness.[100] Yet, while this same directive does not (expressly) regulate the question of own motion review either, in *Océano Grupo* this latter issue was assessed and decided in light of the objective of this directive and its particular provision at issue.[101] The Procurement Remedies Directives similarly do not expressly regulate in any way the standard of judicial review to be applied in cases brought under these directives. But in *Hospital Ingenieure* the Court nonetheless did not consider this issue to fall within the Member States' procedural autonomy.

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96 CoJ case 33/76, *Rewe*, para. 5. See further para. 26 above.

97 See section 2.2 above.

98 Cf. Jacobs & Deisenhofer (2003), pp. 216-217; Schebesta (2010), p. 856. See also Trstenjak & Beysen (2011), p. 103.

99 CoJ case C-413/12, *ACICL*, para. 28 and 30. See e.g. also CoJ case C-479/12, *Gautzsch*, para. 39-42. In this latter ruling it is noted that Community Designs Regulation 6/2002 contains express rules neither on the burden of proof, nor on the production of evidence. That first issue is then nonetheless considered to be regulated by EU law, so as to ensure that the objective of that regulation can be entailed, whereas the latter issue is left to be determined by national law, subject to the principles of equivalence and effectiveness.

100 On these principles, see sections 2.1 (national procedural autonomy) and 2.2 (equivalence and effectiveness) above.

101 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 26. Note however that in some subsequent cases this same question is assessed under the principles of equivalence and effectiveness. See further para. 167-168 above.

Instead it formulated an answer on the basis of the spirit and objective of these directives.[102]

It is further true that, in cases such as the ones mentioned above, it sometimes seems to matter little which test is applied. The Court has for example come to the conclusion that, either way, EU law requires in principle full compensation of any damage caused as a consequence of an infringement of EU law.[103] Yet in other cases the mere existence of a specific rule of EU law does appear to be of relevance. For instance, as was noted above, the Unfair Terms Directive expressly refers to national law where it stipulates that unfair terms in consumer contracts are not binding on the consumer. But, while acknowledging that the Member States consequently have a certain degree of autonomy in this respect, the Court has insisted all the same that any outcome must be such as to ensure the full effectiveness and achieve the objective of this rule of EU law.[104] Furthermore in the aforementioned cases *Océano Grupo* and *Hospital Ingenieure* the Court drew rather far-going conclusions. In the former case it held that under the Unfair Terms Directive own motion review is in principle required, whereas in the latter it found that the judicial review exercised under the Procurement Remedies Directives cannot be limited to the question whether or not the contested decision is arbitrary. This suggests that the mere existence of specific EU legislation of the type at issue here can imply that a higher threshold to be met by national law is set, even where that legislation does not touch upon that particular issue expressly.

### *10.1.4. Summary*

396. The 'three-step-test' established in Article 5 TEU regarding the existence and exercise of the EU's powers to act, which requires the conferral of competences and therefore a sufficient legal basis, as well as compliance with the principles of subsidiarity and proportionality, obviously constrains the EU legislature's capacity to enact secondary law facilitating the private enforcement of EU law of the type at issue here. Due account is also to be taken of the fundamental rights provided for in the Charter when establishing this secondary law. Having said that, there is no reason to be believe that, generally speaking, the need to respect these principles and these rights constitute an absolute bar for the EU legislature to act on private enforcement-related matters. More specifically, there appears to be broad agreement that Article 114 TFEU and, in certain cases, other specific articles such as Article 103 TFEU can in principle provide a sufficient legal basis.

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102 CoJ C-92/00, *Hospital Ingenieure*, para. 57-64. See further para. 369 above.

103 Cf. e.g. CoJ case C271/91, *Marshall*, para. 26 (relating to Gender Equality Directive 2006/54); CoJ case C-203/99, *Veedfald*, para. 25-28 (relating to Product Liability Directive 85/374); CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 92-97 (relating to EU competition law, without any further specific rules of EU law being applicable).

104 CoJ case C-618/10, *Banco Español de Crédito*, para. 62 and 72.

Indeed, this former article is the legal basis of most of the legal acts discussed in part B. The significance of the principles of subsidiarity and proportionality, for their part, is for the present purposes more political than legal. And whereas compliance with the Charter arguably ought to be a particular point of attention, it allows for the restriction of the exercise of the rights laid down therein. Furthermore the principle of national procedural autonomy does not imply that the EU legislature cannot act on remedial and procedural matters relating to legal proceedings before the national courts. At most it can have a 'residual' role to play in situations where a particular subject-matter falls outside the scope of EU legislation at issue.

## 10.2. Political aspects and policy-related factors

The EU having, within certain limits, the legal capacity to take legislative action on the issues under consideration here is one (important) thing, as was discussed above. Quite another thing however is the extent to which there is also the required *political will* and there are deemed to be sufficient reasons in terms of *policy* to propose and adopt such legislation. Although these matters largely fall outside the scope of a legal study such as the present one, they are nonetheless worth considering here. The relevant political aspects are therefore first briefly discussed below. Attention then turns to the three factors of a political and policy nature that can affect the chances of EU legislation facilitating the private enforcement of EU law being adopted.

### *10.2.1. Political aspects*

397. Part B of this study makes clear that the prospect of adopting EU legislation of the type at issue here can be *politically sensitive* and that the process of establishing this legislation can (therefore) be challenging and cumbersome. Many of the Commission suggestions and proposals proved to be controversial. It took for example almost two decades and several revisions of the Commission proposal to reach agreement on the Unfair Terms Directive.[105] Furthermore, not only did it take nine years of discussions by the EU legislature for it to adopt the Commission's proposal for the Product Liability Directive, it also required the insertion of various exceptions, limitations and optional provisions.[106] In the case of the Competition Damages Directive almost a decade filled with studies, official documents, discussions and consultations elapsed between the publication of the Commission's 2005 green paper and its adoption.[107] And even then it seems questionable whether this directive would have been proposed and adopted in the absence of additional rulings by the Court (notably *Pfleiderer*) and the

105 See para. 162 above.
106 See para. 174 above.
107 See in particular subsection 6.2.3 above.

exclusion of controversial issues, such as collective redress, fault requirements and legal costs.[108] The discussions related to a possible EU legislative initiative on collective redress provide yet another example of the controversies that can arise in this regard.[109] In the latter case these controversies were such that fears were expressed that the initiative had gone "*lost in consultation*".[110] In the end the Commission decided to limit itself, at least for the time being, to adopting a recommendation, rather than submitting a proposal for a legally binding act of secondary EU law.[111]

Arguably a further illustration of the sensitivity of EU legislative involvement with private enforcement-related matters are the efforts that the Commission typically makes to emphasise that national legal systems and traditions will continue to be respected as much as possible. In relation to the Procurement Remedies Directives the Commission held for instance that "*[c]onsiderable flexibility is left for the Member States to implement the directive's requirements in accordance with their particular approaches to administrative and judicial review*".[112] And in its proposal for the Consumer Injunctions Directive it highlighted that "*historical and legal traditions will be in no way compromised*" and that "*the proposed text in no way prejudices established remedies at national level*".[113] And when proposing the IPR Enforcement Directive the Commission declared that "*[a]ccount must be taken of the legal traditions and situation of each Member State*" and that the enforcement in question is to take place "*within the existing national frameworks*".[114]

These findings seem to fit into a more general trend. Other commentators have noted that EU legislative measures of the type at issue here tend to be inherently "*politically sensitive*"[115] and that their adoption can thus be "*an extremely challenging process*".[116] That is probably the case because national rules on remedies and (civil) procedure often reflect considerations that are fundamental to a Member State's political organisation, social and economic structure, constitutional and social identity and/or its arrangements for wealth distribution. This has therefore been described as "*a complex area of policy-driven rules, the application of which is irrevocably linked to legal cultures and judicial practices*".[117] In this light it has been submitted that EU legislative

108 See subsection 6.2.4 and para. 225 above.
109 See subsection 5.5.1 above.
110 Jeffries (2011), p. 1.
111 Collective Redress Recommendation 2013/396. See further para. 190-191 above.
112 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 15. See further para. 77 above
113 Commission, Proposal for Consumer Injunctions Directive 2009/22, COM(95) 712, p. 8. See further para. 153 above.
114 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 15. See further para. 115 above.
115 Jacobs & Deisenhofer (2003), p. 216. See e.g. also Adinolfi (2012), p. 286.
116 Tulibacka (2009), p. 1527.
117 *Ibid*., p. 1533. In a similar sense, see Dougan (2011), p. 410.

interference with remedies and procedures for the private enforcement of EU law is "*more taboo*" than with substantive law.[118]

398. That said, the above point should *not be overstated* either. For one thing, the mere fact that the EU legislation assessed in this study was in fact adopted demonstrates that one cannot speak of a taboo. For another thing, there can be no question that adopting secondary EU law on matters of substantive law can sometimes be highly controversial as well.[119] EU legislation of the type at issue in this study certainly does not have a monopoly on controversy. Besides, and most importantly for the present purposes, this study suggests that adopting this latter type of EU legislation is *not always* particularly sensitive or difficult. It rather appears that the degree of controversy that the various EU legal acts discussed in part B generate tends to vary considerably.

More specifically, it has been noted above that the Unfair Terms Directive, the Product Liability Directive, the Competition Damages Directive and a possible legislative initiative on collective redress all proved to be controversial.[120] However, although some discussions and controversies certainly emerged, particularly in the legal literature, the process leading to the adoption of the IPR Enforcement Directive has in contrast been on the whole relatively smooth and speedy.[121] Arguably the main bone of contention during the legislative process leading to the adoption of this latter directive, namely the possible inclusion of EU rules on criminal measures, was moreover of a public enforcement nature, rather than that it concerned a private enforcement-related matter.[122] In addition the IPR Enforcement Directive stands out for the rather rare example that it offers of a case where the EU legislature (and in particular the Member States represented in Council) enacted further-going harmonisation than the Commission had proposed. For the scope of this directive was extended so as to also cover infringements of intellectual property rights provided for by ('purely') national law and the general restriction to infringements committed for commercial pur-

118 Komninos (2008), p. 144 (n. 19) (although this author also acknowledges the gradual emergence at EU level of a "*positive integration drive*" in relation to rules on remedies and procedures; see pp. 142-144).

119 See e.g. the difficulties in establishing secondary EU law on patents, mentioned in para. 108 above. For another example, reference can be made to Services Directive 2006/123, which has been described as "*one of the most controversial and disputed pieces of European legislation in recent years*". See Flower (2007), p. 217.

120 Controversy is of course not easy to measure in a clear and objective manner. For the present purposes this is assessed based on the overall picture that emerges in light of especially the following elements: the duration of the legislative process and its preparatory stages; the discussions by the EU legislature; the degree to which the Commission proposal underwent substantial changes in the course of that process; and the extent, content and tone of the public and academic debate relating to the acts in question.

121 See para. 111 above.

122 See para. 147 above.

poses or causing significant harm that the Commission has proposed was deleted and instead limited to certain specific measures.[123]

Moreover neither was the Consumer Injunctions Directive overly controversial.[124] With respect to the Procurement Remedies Directives some controversy certainly arose,[125] but also in this case the single most hotly debated issue concerned essentially rather a matter of public than of private enforcement, namely the powers for the Commission to intervene directly at national level.[126] Neither did the legislative process leading to the revision of these directives in 2007 prove to be exceptionally problematic.[127] Finally, despite the aforementioned controversies that it generated, it should not be forgotten that the legislative process leading to the adoption of the Competition Damages Directive was actually rather smooth and speedy.[128] Once more the main bones of contention during this process were essentially public enforcement-related matters, namely the extent to which evidence included in the file of a public enforcement authority should be shielded from disclosure and the effects of infringement decisions by those authorities in private enforcement proceedings.[129]

399. The obvious next question is what *explains* these differences in terms of controversy between the various legal acts under consideration here. Subject to the proviso that there are clearly limits to the extent that the abovementioned directives and the fields of law at issue can be compared, the main point that emerges from the foregoing is that – contrary to what one might perhaps expect – the degree of controversy that a given private enforcement-related legislative proposal generates does *not* seem primarily related to the 'intrusiveness' (seen from the viewpoint of national law) of the measures it contains. On many accounts the IPR Enforcement Directive probably contains the most extensive EU legislative measures in this regard, yet this directive proved relatively uncontroversial during the law-making process. Something similar can be said of the Procurement Remedies Directives, which also touch upon a considerable number of remedial and procedural matters that had hitherto mostly been left to the Member States. Still these directives appeared not to be excessively controversial. That is all the more noticeable given that the Procurement Remedies Directives were among the first self-standing EU legal acts of this type.[130]

123 See para. 140 above. See also subsection 9.1.1 above.
124 See para. 153 above.
125 See para. 72 above.
126 See para. 104 above.
127 See para. 75 above.
128 See para. 225 above.
129 See para. 235 and 243 above respectively.
130 See subsection 1.1.3 above.

This is not to suggest of course that the content of a private enforcement-related act of secondary EU law is of no significance whatsoever in this respect. But what the foregoing does seem to indicate is that other factors can play a role that can be at least as important. These factors, it is submitted, often relate more to the *context* of the initiative at issue than to its *content*. Three of the political and policy-related factors that, the findings of part of this study suggest, can affect the chances of EU legislation facilitating the private enforcement of EU law being adopted are identified and discussed in the following three subsections.

### *10.2.2. Overall enforcement framework*

400. The first of these factors can be summarised as the 'overall enforcement framework'. This refers to the influence that considerations related to the *interaction* between the relevant public and private enforcement mechanisms can have on discussions concerning the EU legislation at issue. Whereas it has been seen earlier that in legal terms these mechanisms mostly operate independently of each other,[131] it appears that matters relating to public and private enforcement of EU law can nonetheless be linked in some respects. That can be explained as follows.

401. Consider first the fields where public enforcement generally plays a *limited role*, at least in as far as EU law is concerned. This is particularly the case in the fields of EU public procurement and intellectual property law.[132] In these two fields there is no obligation for the Member States to designate a public authority that is charged with enforcing the substantive rules in question and that is granted significant supervisory, investigatory and punitive powers for that purpose. Although the Commission has in the past sought to obtain certain powers for itself to address infringements of EU public procurement law, neither is it foreseen that this institution fulfils such a public enforcement role at EU level.[133] At the same time it is precisely in these two fields that relatively ambitious and detailed EU private enforcement-related measures have been enacted, i.e. the Procurement Remedies Directives and the IPR Enforcement Directive.

As a matter of EU law public enforcement has furthermore historically played only a rather modest role in relation to the enforcement of EU consumer protection law,[134] while also in this field has a considerable body of secondary EU law on private enforcement been adopted, as the Consumer Injunctions Directive, the Unfair Terms Directive and the Product Liability Directive illustrate. Conversely, more recently the EU has considerably strengthened the public enforcement framework in this field, for instance

131 See in particular subsection 2.4.3 above. See also subsection 9.2.4 above.
132 See subsections 3.4.2 and 4.4.2 above respectively.
133 See para. 111-112 above.
134 See subsection 5.5.3 above.

through the adoption of the CPC Regulation.[135] It has been observed that since the adoption of the CPC Regulation the public enforcement authorities of the Member States mostly prefer to cooperate between them, rather than to initiate legal proceedings under the Consumer Injunctions Directive as they can also be entitled to do.[136] It is noticeable that over roughly same period of time the Commission has consistently decided against (substantially) amending the said directives so as to improve the possibilities for private enforcement.[137] Neither were any significant new legislative initiatives on this point developed.[138]

402. All this contrasts markedly with the developments with respect to the enforcement of EU competition law, where public enforcement plays a *key role*.[139] Indeed, there is probably no other field of EU law where public enforcement mechanisms have been so well-established. There is certainly no other field where the Commission itself has such far-going powers to supervise and enforce compliance with the rules of EU law at issue *vis-à-vis* private parties. At the same time it has been seen that here it has been particularly difficult to enact private enforcement-related EU legislative measures. Although several factors play a role in this regard, there can be little doubt that concerns relating to the potential harmful effects of increased private enforcement on the existing public enforcement mechanisms featured prominently among them. Indeed, for some the very existence of a robust and effective public enforcement framework may perhaps not entirely eliminate, but nonetheless significantly qualify and reduce the need for EU legislative measures facilitating private enforcement in this field.[140] At the very least, the fact that such mechanisms exist may well limit the sense of urgency when considering the establishment of this kind of measures.

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135 CPC Regulation 2006/2004. See further para. 196 above.

136 See Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 7. On the empowerment of public authorities to act under Consumer Injunctions Directive 2009/22, see further para. 170 above.

137 See para. 159, 170 and 201 above.

138 As discussed in subsections 5.5.1 and 5.5.2 above, the EU has in recent years taken certain measures with respect to collective redress (notably Collective Redress Recommendation 2013/396) and alternative dispute resolution (notably Consumer ADR Directive 2013/11) respectively. This illustrates that public enforcement is not the EU's *sole* focus where infringements of EU consumer protection law are concerned. However it does not substantially affect the abovementioned observation that in recent years the EU legislature tends to place less emphasis on private enforcement in this field. As regards collective redress, the said recommendation is not specifically concerned with infringements of EU consumer protection law, but rather with infringements of EU law generally. Moreover it is not legally binding. No EU legislation on this subject-matter has been adopted or even proposed to date. Furthermore alternative dispute resolution is by definition an alternative to, and not a type of, private enforcement (as defined in para. 22 above).

139 See subsection 6.4.2 above.

140 Cf. e.g. Wils (2003a), p. 473; Eilmansberger (2007), p. 478; Hjelmeng (2013), p. 1033.

The fact that in 2014 the Competition Damages Directive was adopted does not imply that the abovementioned concerns no longer existed. Quite to the contrary, while it is evident that this directive contains a range of private enforcement-facilitating measures, as was explained earlier, there is a good case to be made that the fact that this directive was in the end proposed and adopted owes at least as much to a desire to protect public enforcement, particularly in light of the Court's Pfleiderer case law, as it was driven by the ambition to facilitate private enforcement.[141] As the Commission noted when submitting its proposal for this directive, "*the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement of the EU competition rules*".[142] The protection of public enforcement was therefore elevated to an objective of this directive in its own right, existing on a par with – and in some respects taking precedence over – the original (sole) objective of the Commission's initiative, namely to facilitate the bringing of actions for damages by private parties for competition law infringements whereby the interaction between both types of enforcement was merely one point of attention among many others.[143]

403. It thus appears that the existence or absence of well-established and robust public enforcement mechanisms can be an important factor when determining whether EU law measures relating to private enforcement are enacted in a given field and if so, what type of measures are provided for. This works in *two ways*. On the one hand the absence of such public enforcement mechanisms may reinforce the 'demand' for private enforcement and thus for secondary EU law of the type under consideration in this study. As such it can act as a facilitating factor. On the other hand, where public enforcement mechanisms of this kind are already 'on offer', there may not only be less 'demand' for private enforcement, but there can also be concerns about the possible negative consequences of the latter on the former. These two latter elements can act as a barrier to the adoption of the said legislation in terms of it coming into being as well as its objectives and content.

### *10.2.3. International dimension*

404. A second factor that can affect the chances of secondary EU law facilitating private enforcement being adopted is what is referred to here as the '*international dimension*'. At the heart of this argument lies the fact that both the Procurement Remedies Directives and the IPR Enforcement Directive, which, as was noted above, are noticeable for the degree of detail and 'intrusiveness' in respect of matters of remedies and procedures for private enforcement purposes, should be understood against the background of two

141 CoJ case C-360/09, *Pfleiderer*. See further subsection 6.2.4 above.

142 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 5.

143 See para. 223 and 226 above.

international agreements concerning these two fields of law. These are the GPA (Agreement on Government Procurement) and the TRIPS (Trade-Related aspects of Intellectual Property) Agreement, to which all Member States as well as the EU are a party.[144] These two agreements are moreover both exceptional, in that they make provision for the private enforcement of the substantive rules at issue.[145] The content of the said directives reflects to a high extent those of the international agreement to which they correspond, although the former are typically more detailed than the latter. This makes it tempting to conclude that the fact that the EU and the Member States were already bound by these international agreements is an important element explaining the adoption of these acts of secondary EU law.

Things are not as straightforward as that however. As regards the IPR Enforcement Directive there can be little doubt that the above logic has indeed been at work. As has been noted elsewhere, the TRIPS Agreement in effect "*paved the way*" for the EU harmonisation measures in question.[146] The Commission itself spoke of a "*TRIPS plus approach*".[147] But the same cannot be said of the Procurement Remedies Directives. These latter directives were adopted in 1989 and 1992. Although negotiations had started as early as 1986, the GPA was concluded only in 1994. Already the timing of events thus suggests that the influence of the latter on the former has probably been limited at best. This is confirmed by the legislative history of the Procurement Remedies Directives, which reveals no indications that the (ongoing negotiations on) the GPA had a substantial influence on the coming into being and the content of these directives. In fact, it is more likely that conversely the GPA was modelled in part upon the Procurement Remedies Directives.[148] For the EU can of course contribute to the 'production' of international law as much as it can be a 'consumer' thereof.

405. Yet that does not mean that the potential relevance of this 'international dimension' in the present context is therefore limited to only the IPR Enforcement Directive. There are also other instances where this has proven to be a relevant factor. Influences stemming from international law appear to have been largely absent in relation to the Consumer Injunctions Directive, the Unfair Terms Directive and the Competition Damages Directive. But the situation is different where the *Product Liability Directive* is concerned. In 1977 the Council of Europe established a Convention on product

144 Regarding these two agreements, see further para. 79 and 118 above respectively.

145 These agreements are however in principle not directly effective in the EU legal order. As regards the GPA, see Anderson & Arrowsmith (2011), p. 32. As regards the TRIPS Agreement, see CoJ case C-135/10, *SCF*, para. 46.

146 Reinbothe (2010), p. 5.

147 Commission, Press release on the proposal for IPR Enforcement Directive 2004/48, IP/03/144, p. 1.

148 Footer (1995), p. 88; Zhang (2011), p. 485.

liability in regard to personal injury and death.[149] The legislative history of this directive shows that this international agreement served as a valuable point of reference and offered some necessary common ground during the long and difficult negotiations at EU level.[150]

Similar influences can further be observed as regards *other acts* of secondary EU law than those discussed in part B of this study. A prominent example is the Environmental Impact Assessment Directive. This directive also contains a number of measures facilitating the private enforcement of the environmental rules in question, most notably with respect to the legal standing of the private parties concerned and legal costs.[151] The provisions in question were introduced in order to give effect to the United Nation's 'Århus Convention' on access to information, public participation in decision-making and access to justice in environmental matters.[152] Similarly, although it goes further in some respects, the Rail Passengers' Rights Regulation for instance expressly builds on the relevant international law instrument.[153]

### *10.2.4. Temporal aspect*

406. A third factor that can be of relevance in this regard concerns what could be called the '*temporal aspect*'. One could perhaps also speak of the 'political climate' (or, if you will, the *Zeitgeist*). Either way this refers to the evolution over time of the mainly political, but to some extent also legal, considerations that affect the scope for adopting EU legislation of the type at issue here. This aspect is inherently difficult to measure or pin down. There are nevertheless several indications that suggest that, put simply, it may well be that EU legislation that was adopted, say, two decades ago may not have been adopted today, or at least not in a similar form or under similar conditions.

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149 Council of Europe, Convention on product liability in regard to personal injury and death, 27 January 1977. See also Whittaker (2005), pp. 433-435; Micklitz, Reich & Rott (2009), p. 220.

150 See e.g. Council, doc. 5555/80, pp. 4-5, 9 and 11; Council, doc. 7772/80, pp. 8-11 and 13; Council, doc. 9976/80, pp. 10-11 and 13-17; Council, doc. 4161/81, p. 4; Council, doc. 7945/81, p. 6 and annex (p. 7). In a similar sense, see also Whittaker (2005), pp. 433-435; Micklitz, Reich & Rott (2009), p. 220.

151 Art. 11 Environmental Impact Assessment Directive 2011/92. See further para. 329 and 343 above respectively.

152 See Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ 2005, L 124/1. The abovementioned provision was inserted into (the predecessor of) Environmental Impact Assessment Directive 2011/92 by Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, OJ 2003, L 156/17. On this convention and its impact on EU law, see further Oliver (2013), p. 1423; Eliantonio (2014), p. 257.

153 Recital 6 Rail Passengers Rights' Regulation 1371/2007. See the Convention concerning international carriage by rail (COFIT), 9 May 1980, concluded in the framework of the Intergovernmental Organisation for International Carriage by Rail (OTIF).

407. The first of the three such indications that stand out in this regard can be derived from the *dates of adoption* of the legal acts assessed in part B of this study. The Product Liability Directive was adopted in 1985, the two Procurement Remedies Directives in 1989 and 1992, the Unfair Terms Directive in 1993, the Consumer Injunctions Directive in 1998 (codified in 2009), while the IPR Enforcement Directive dates from 2004. It follows that of these six legal acts, all are a decade old and most are considerably older. Only one of the legal acts under consideration in this study is more recent, namely the Competition Damages Directive, which was agreed (and is expected to be adopted) in 2014. Also several other, comparable EU legal acts are of a respectable age. The 2006 Gender Equality Directive is for example a recast of directives that originally date from 1976 and 1980.[154]

A second indication emerges when the developments related to the *Product Liability Directive* are assessed in further detail. Despite the controversy that it generated at the time, it was adopted (unanimously, as its legal basis then required[155]) in 1985. Over the years various shortcomings in the functioning of this directive have been identified.[156] Yet over the same period of time the Commission has consistently decided against proposing to amend this directive.[157] The references that it made in this connection to the abovementioned controversies and its stated fear to upset the existing 'delicate balance' between the various interests at stake seem to suggest that the Commission believes that it may not again be possible to reach an agreement. Indeed, if it were to propose an amendment it is not inconceivable that certain Member States would seek to use the opportunity to set a step back from a harmonisation perspective.[158] Whatever the merit of the Commission's argument that it has not sufficiently been demonstrated that the aforementioned shortcomings constitute a problem from an internal market perspective, it seems questionable whether this directive would have been proposed and adopted in the first place had a similar standard been applied at that time. Indeed, this Commission position has been described elsewhere as "*overly complacent*".[159] As a consequence this directive has remained

154 Gender Equality Directive 2006/54. See further para. 11 above.

155 See para. 382 above.

156 See para. 184 and 260 above.

157 Commission, Second report on Product Liability Directive 85/374, COM(2000) 893, p. 28; Commission, Third report on Product Liability Directive 85/374, COM(2006) 496, pp. 11-12; Commission, Fourth report on Product Liability Directive 85/374, COM(2011) 547, p. 4.

158 Cf. Council, Resolution on amendment of the liability for defective products directive, OJ 2002, C 26/2. Here it was in effect suggested to amend this directive, so as to allow for more scope for the application of national rules. Note that pursuant to Art. 17(2) TEU the Commission has the virtually exclusive right to propose secondary EU law, including amendments thereof, but that, once the Commission has made a proposal, the EU legislature is, within certain limits, at liberty to amend it.

159 Fairgrieve & Howells (2007), p. 978.

essentially unaltered for an unusually long period of time, namely almost three decades.[160]

Third, and more generally, account can be taken of the more recent *consultations and other public statements* regarding some of the directives and initiatives discussed in part B of this study. The responses generated suggest that various Member States may have become increasingly vocal in expressing hesitations as regards possible EU legislative intervention on the matters under consideration here.[161] As was noted above, the fact that such objections are often formulated in legal terms (e.g. alleged non-respect for the principles of subsidiarity or national procedural autonomy) and that as such these arguments seem not always entirely convincing should not distract from the apparent underlying political uneasiness with the initiatives in question.[162] More surprisingly perhaps, this development also seems to extend to the European Parliament. In the late 1970s and 1980s this institution called for a range of EU legislative measures harmonising national law on concerning consumers' access to court, including measures on collective redress.[163] In 2000 it still contemplated, in relation to the Product Liability Directive, addressing as a matter of EU law remedial and procedural issues such as burden of proof, limitation periods, non-material damage and quantification of damages.[164] All this contrasts with the seemingly more cautious positions that, at least in some cases, it has taken more recently. For instance, in 2008 it stated that "*safeguarding effective enforcement of rights originating from [EU] legislation is principally an obligation of the Member States*" and that "*the [EU] is not competent to prescribe rules for national procedural law*".[165] A year later it also took the view that rules on limitation periods and the allocation of legal costs should in principle be left to be set by the Member States.[166]

408. This is by no means to suggest that, politically speaking, there is no longer scope for the EU to adopt or amend secondary law on private enforcement. For one thing, this would risk overlooking that also in the past not all relevant Commission initiatives actually led to EU legislation of this kind being adopted. The Commission's draft directive on the liability of

160 A limited amendment, which led to agricultural products being brought within the scope of this directive, was enacted in 1990 as a consequence of exceptional circumstances, namely the so-called 'mad cow' crisis. See further para. 184 above.

161 See para. 189 and 219 above.

162 See para. 389 and 393 above.

163 See e.g. the 1977 report and resolution by the European Parliament, cited in Commission, Memorandum on consumer redress, COM(84) 629, p. 7; European Parliament, Resolution on consumer redress, OJ 1987, C 99/203.

164 European Parliament, Resolution on the Commission green paper on liability for defective products, A5-0061/2000.

165 European Parliament, Resolution on the EU consumer policy strategy 2007-2013, P6_TA(2008)0211, para. 34.

166 European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 19-20.

suppliers of services, proposed in 1990, encountered for example so much resistance that it was withdrawn a few years later.[167] Around the same time the Commission also unsuccessfully proposed EU rules establishing (no-fault) civil liability in relation to waste.[168] For another thing, it is evident that also in more recent times legislation of the type at issue here does get adopted. The 2007 amendment of the Procurement Remedies Directives offers a good example. This amendment involved the introduction of several new private enforcement-facilitating measures, most notably a new contractual remedy.[169] Another evident example is the 2014 Competition Damage Directive. Besides, as was noted in the introduction to this study, also several other private enforcement-related measures have been proposed and adopted at EU level in recent years.[170]

What the foregoing does appear to indicate is that, generally speaking, the *threshold* for the EU act may well have been *raised*. Although all this is to a considerable extent a matter of political appreciation, it also has a legal side to it. The 2000 *Tobacco Advertising* judgment, discussed above, on the use of Article 114 TFEU as a legal basis can be seen as a turning point in this regard.[171] This case did not concern private enforcement-related legislation as such. Nonetheless already the very fact that this challenge (and several other actions for annulment of EU legislation brought by Member States for alleged lack of a sufficient legal basis or infringements of the principle of subsidiarity in the same period[172]) was brought can be seen a symptom of the increasing uneasiness, referred to above. Moreover the resulting judgment underlines that, despite its rather broad wording, there are limits to the extent to which Article 114 TFEU can be relied upon. This latter point – the first such finding in relation to this article – is of evident importance also in the present context, considering that almost all of the legislation at issue here is based on this article.[173] Indeed, it appears that the EU legislature has taken good note of the message that the Court of Justice conveyed. Whereas justifications of this kind are only rather brief in the legal acts under consideration that *pre*-date this judgment (such as the Procurement Remedies Directives and the Product Liability Directive), legal acts that *post*-date it

167 Commission, Proposal for a services liability directive, COM(90) 482. See further subsection 5.2.3 above.

168 Commission, Proposal for a directive on civil liability for damage caused by waste, COM(89) 282; Commission, Proposal for a Council directive on the landfill of waste, COM(91) 102. This latter proposal was eventually adopted in 1999, but without the provision on liability referred to above. See Directive 1999/31/EC on the landfill of waste, OJ 1999, L 182/1.

169 See para. 75 and subsection 3.2.3 above.

170 See para. 13 above.

171 CoJ case C-376/98, *Germany v. Parliament and Council (Tobacco advertising)*. See further para. 382 above.

172 E.g. CoJ case C-84/94, *UK v. Council*; CoJ case C-377/98, *Netherlands v. Parliament and Council*; CoJ case C-217/04, *UK v. Parliament and Council*; CoJ case C-380/03, *Germany v. Parliament and Council (Tobacco advertising II)*.

173 See para. 382 above.

(such as the IPR Enforcement Directive and the Competition Damages Directive) extensively explains the required link between the harmonisation measures at hand and the internal market.[174]

409. At a more abstract level it appears that various phases can be discerned in the activities of the EU legislature relating to matters of remedies and procedures for the private enforcement of EU law in proceedings before the national courts.[175] There is a first phase, running roughly up until the late 1980s, that is characterised by *relative inactivity* on the side of the EU legislature. The second phase, which runs from the late 1980s roughly until the early 2000s, marks the period where the EU is *increasingly active* in this respect. And subsequently there is a third phase, extending to the present, where EU legislative action of the type at issue here is certainly not *per se* excluded, but where its *limits become more clearly visible*. The parallel with the evolution of the case law of the Court of Justice on this very same subject-matter is striking, be it that the phases in the activities of the EU legislature appear to trail those of its judiciary by a few years.[176] In both cases this evolution in EU activity can arguably be traced back to the same underlying broader developments. One can distinguish in particular: (i) an initial focus on the side of the EU on substantive matters and getting the European project 'up and running' and EU law accepted at national level; (ii) a period of relative 'euro-enthusiasm' particularly in the context of the 1992 internal market project, accompanied by increased concerns about the effective implementation, application and enforcement of EU law at national level;[177] (iii) a period characterised by a more balanced and selective approach, reflecting the increased maturity of EU law and the EU as a political system, but also increasing concerns and resistance in some corners related to a perception of 'Brussels' being overly intrusive.

### *10.2.5. Summary*

410. EU legislative involvement with matters related to the remedies and procedures for the enforcement of EU law before the courts of the Member States can be politically sensitive. Many of the acts of secondary EU law at issue here were only proposed and adopted after a rather long and challeng-

174 See para. 383 above.

175 See also the overview set out in subsection 1.1.3 above.

176 See para. 37 above. As was explained there, the relevant case law has evolved over time. Three phases are typically distinguished, namely a prudent initial phase (up to the early 1980s), a significantly bolder and more 'interventionist' period (mid 1980s-early 1990s) and a phase characterised by a more balanced and selective approach (mid 1990s onwards).

177 Cf. e.g. Council, Resolution on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market, OJ 1995, C 188/1: "*in the field of the internal market the [EU] has moved from an intensively legislative phase to a phase focusing on the effective operation of common rules*".

ing process of preparation and law-making. Yet that is not always the case. Although this undoubtedly plays a role, it appears that the degree of controversy that a given proposal for this legislation generates is not primarily related to the 'intrusiveness' (seen from the point of view of the Member States) of the measures concerned. In many cases the political and policy context seems at least as important as the content. Although no absolute rules can be formulated in this respect, three factors can be identified that may affect the chances of EU legislation of the type at issue here being established. The first factor is the 'overall enforcement framework' in the field of law at hand. It appears that the absence of robust and well-established public enforcement mechanisms can facilitate the adoption of private enforcement-related legislation. Conversely, the existence of such mechanisms need not constitute an absolute bar, but can be a complicating factor. Second, the 'international dimension' can be of relevance, in that the existence of binding international agreements can offer a helpful point of reference and some necessary common ground for the negotiations at EU level and thus make it easier for agreement to be reached on a given legislative proposal. Finally, even if this is particularly difficult to quantify, there are indications that, over the past decades, the threshold for the adoption of legislation of the type at issue here has been raised. This latter point may well reflect a broader trend.

## 10.3. The added-value of EU legislation on private enforcement

In the foregoing subsections it has been discussed which elements can drive, constrain and facilitate the adoption of the EU legislation under consideration. In order to complement the picture that thus emerges, a further relevant question is what, generally speaking, the 'added-value' is of adopting this legislation.[178] Two points stand out in this connection. The first concerns the added-value as compared to leaving the matters in question to the judiciary. The second relates to the relevance of other factors than remedial and procedural rules. These two points are subsequently discussed below.

### *10.3.1. Legislative vs. judicial action*

411. The first point that could be seen as questioning the added-value of EU legislative action on the matters and of the type under consideration here is essentially founded on the fact that, as construed by the Court of Justice, the principles of equivalence and (especially) of effectiveness and effective judicial protection, as well as considerations related to the effectiveness of EU law generally, can be *powerful forces* where the enforcement of this

178 As this section is meant to complement the foregoing, the focus is not on the circumstances that may justify taking legislative action at EU level in an individual case, but rather on its possible 'added-value' considered at a more abstract level.

law before the national courts is concerned. This has already been discussed in the foregoing.[179] The Court has for instance ruled that in proceedings before the national courts there can be an obligation to ensure that interim relief is available,[180] that actions for damages for infringements of EU law can be brought against both Member States and private parties,[181] that national rules of evidence are applied in a particular manner[182] and that unreasonable limitation periods set by national law are to be disapplied.[183] Taken together this constitutes a considerable body of 'judge-made law on remedies'.[184] It is moreover by no means excluded that (even) more far-going requirements can be deduced from the abovementioned principles. It has for example been argued that on this basis duties to facilitate collective redress actions, enable the ordering of the disclosure of evidence or depart from certain evidential presumptions under national law can be construed.[185]

This 'judge-made law' being already quite well-elaborated, and there arguably being scope for it being extended further, one might wonder to which extent there is still a need for 'legislature-made law' facilitating the private enforcement of EU law of the type under consideration here. Why not simply leave these matters to be dealt with by the courts of the Member States, which can refer preliminary questions to the Court of Justice where required? Such an approach may seem all the more attractive given that, as has already been seen, the EU legislation in question anyway regularly leaves the Member States a significant degree of flexibility[186] and that enacting it can be a politically sensitive and cumbersome affair.[187] Leaving the matters under consideration to be decided, as far as EU law is concerned, only on the basis of the aforementioned – broad – principles can also have the advantage of leaving the courts seised space for a case-by-case assessment.

412. It is interesting to see how on this point a *degree of ambiguity* appears to exist on the side of the EU institutions concerned, and especially the Commission. On the one hand, as has been seen in the foregoing, the latter tends to advocate the adoption of secondary EU law facilitating private enforce-

179 See sections 2.2, 2.3 and 2.5 above.
180 E.g. CoJ case C-213/89, *Factortame*, para. 21; CoJ case C-416/10, *Križan*, para. 107. See further para. 58 above.
181 E.g. CoJ joined cases C-6/90 and C-9/90, *Francovich*; CoJ case C-453/99, *Courage*. See further para. 59 and 60 above respectively.
182 E.g. CoJ case C-228/98, *Dounias*, para. 71; CoJ case C-526/04, *Laboratoires Boiron*, para. 55. See further para. 38 above.
183 E.g. CoJ case C349/07, *Sopropé*, para. 44. CoJ case C-69/10, *Samba Diouf*, para. 66-67. See further para. 38 and 45 above.
184 Micklitz (2012, p. 366.
185 Temple Lang (2008), pp. 101 and 107. These views are based on a combined reading of the principles of effectiveness and sincere cooperation.
186 See in particular para. 394 above.
187 See subsection 10.2.1 above.

ment. Its efforts in relation to consumer collective redress and in the field of competition law are but two recent examples thereof.[188] On the other hand the Commission has also frequently stressed the potency of the abovementioned principles that are at the basis of the said judge-made law. It has sometimes done so to such an extent that it actually seems to matter little whether or not any such secondary EU law applies. For instance, in the field of public procurement law the Commission deduced from the principle of effectiveness a rule on legal standing that it believes should apply in cases not covered by the Procurement Remedies Directives, which is in effect precisely the same as the one laid down in these directives.[189] And also for the Court of Justice it has sometimes seemed to make little difference in this respect whether these directives apply or whether the case is to be adjudicated under the principle of effective judicial protection.[190]

The Commission has further suggested that pursuant to the principle of effectiveness an applicant cannot be required to prove the exact amount of damage suffered in competition cases.[191] Yet it has nonetheless deemed it necessary to issue detailed (non-legally binding) guidance for the parties concerned and for the national courts as to how to quantify this damage and to include rules on this subject-matter in the Competition Damages Directive.[192] Other provisions of this directive, especially those on the concept of 'full compensation' and on legal standing, are expressly presented as mere 'reaffirmations' of EU law as it already stood before its adoption.[193] While these statements probably seek to facilitate the adoption of the directive by underlining that some of the rules provided for apply anyway, they also beg the question why, if that is indeed the case, it is necessary to include them. That applies not in the last place to the literal codification of the principles of equivalence and effectiveness that this directive also contains.[194]

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188 See subsections 5.5.1 and 6.2.2 above respectively.

189 See Commission, Interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006, C 179/2, para. 2.3.3. Cf. Dahlgaard Dingel (1999), p. 228. On these directives' rules on legal standing, see para. 98 above. See also subsection 9.1.2 above.

190 Cf. CoJ case C-129/04, *Espace Trianon*, para. 20 (regarding Procurement Remedies Directive 89/665 and 92/12); CoJ joined cases C-145/08 and C-149/08, *Club Hotel Loutraiki*, para. 65-80 (regarding the principle of effective judicial protection).

191 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 60.

192 Commission, Practical guide on quantifying harm in actions for damages based on breaches of Article 101 and 102 TFEU, SWD(2013) 205; Art. 17 Competition Damages Directive. See further para. 231-232 above.

193 Recital 12 Competition Damages Directive. See further para. 230 and 241 above respectively. See also Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 7.

194 Art. 3 Competition Damages Directive. Note that the Commission's proposal on this point contained slightly divergent wording with respect to the principle of effectiveness. See Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 31 (Art. 3).

413. It should not to be overlooked however that legislation and the legislature have several *inherent advantages* as compared to judge-made solutions and the courts respectively. The EU courts are neither formally charged, nor particularly well-placed to establish quasi-legislative measures.[195] Obviously the courts can only act in response to a case having been brought before them. That implies that case-law driven solutions are by definition reactive and often also time-consuming, as well as casuistic. In addition such jurisprudential solutions in principle entail 'negative integration'. That is to say, the Court of Justice is empowered to indicate how EU law should interpreted, thus stating expressly (in infringement proceedings) or by implication (in preliminary reference proceedings) which particular rules of national law are considered to be inconsistent with EU law and should thus be disapplied. But it has at best only limited scope to 'positively' indicate which rules or mechanisms should be applied instead.

The political difficulties that may arise in this regard notwithstanding, on most of these issues the EU legislature is in a considerably better position. The latter can be proactive, set out a more detailed and structured approach and positively require certain measures to be taken at national level. Matters of remedies and procedures also often concern points of a technical nature, which are generally probably better dealt with by the legislature. For the latter can benefit from the involvement of experts, consult stakeholders, issue studies and carry out impact assessments. Democratic legitimacy also mitigates in favour of having these matters primarily dealt with by the legislature.[196] Some also believe that, as compared to the 'judicial law-making' by the Court of Justice, involving the EU legislature might better 'protect' the interests of the Member States against too much EU 'intrusion' with their domestic legal systems.[197]

414. The adoption of secondary EU law can furthermore contribute to *legal certainty* and the *development of the law*. Increasing legal certainty can in itself be of considerable importance. Concerns about legal uncertainty in the absence of EU legislation featured for example prominently in relation to the Competition Damages Directive.[198] It can further be recalled that many have criticised the aforementioned 'judge-made law of remedies' for its unpredictability.[199] This unpredictability can evidently be reduced by enacting

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195 See further e.g. Snyder (1993), p. 50; Fernández Martín (1996), pp. 202-203 and 228; Jacobs & Deisenhofer (2003), p. 223; Nazzini (2012), p. 1001. See also para. 9 above.

196 Cf. Opinion AG Trstenjak case C-101/08, *Audiolux*, para. 108: "*Rule-making generally involves a choice between different political and social interests which are represented by the institutions and bodies participating in the rule-making procedure. In addition to the relevant democratic legitimation, those bodies possess the necessary expertise to fulfil the political responsibility conferred on them*".

197 Lindholm (2007), p. 273.

198 See e.g. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 14 and 17.

199 See para. 29 above.

secondary EU law. Besides, particularly through a dynamic interplay between the legislature and the judiciary, the law can further develop where secondary EU law applies. Regardless of whether it is fully 'autonomous' or concerns, in whole or in part, a codification of pre-existing case law, the adoption of secondary EU law typically leads to further interpretations thereof by the EU courts, as has been illustrated throughout this study. As a consequence the law evolves. This certainly occurs given the Court's tendency to sometimes interpret the EU legislation under consideration (and perhaps EU law generally) in a rather extensive manner. As was noted above, it has for instance derived certain requirements also in cases where they do not address a particular issue or where they expressly leave a margin of manoeuvre to the Member States.[200] It follows that even where these acts are comparatively modest in the degree of harmonisation that they establish, their mere existence can be a 'stepping stone' for the Court to address certain issues as a matter of EU law.

Somewhat paradoxically perhaps, this interplay can thus reduce to some extent the abovementioned advantages that adopting EU legislation can have in terms of providing legal certainty and 'protection' against EU 'intrusion'. While that is important to bear in mind, this seems neither entirely avoidable, nor peculiar to EU law however. In any case it would not seem to follow that it is therefore preferable not to adopt such secondary EU law in the first place. Such extensive interpretation by the Court of Justice may moreover often be as much due to the scope for interpretation that the legislation in question leaves, as it is due to any 'activism' on the side of the Court, which is in principle bound to rule on the cases brought before it.[201] In other words, leaving certain issues unaddressed, or regulating them only in vague or general terms in secondary EU law, may increase the scope for manoeuvre not only of the Member States, as was noted earlier,[202] but it also does so for the Court of Justice.

415. In sum, generally speaking, it cannot be maintained that EU legislative action of the sort at issue in this study does not provide any added-value as compared to leaving matters to the courts. The more important point that emerges on the basis of the foregoing is rather that there can be *alternatives to the 'legislative route'* that takes central stage in this study. The Commission and the EU legislature could thus decide (or in effect be forced to decide, e.g. in light of political objections to EU legislative action) to leave certain matters to be settled by the judiciary rather than to address them in EU legislation. Notwithstanding the aforementioned disadvantages of this judicial route, over time, effects that are at least to some extent similar to those of adopting secondary EU law may well emerge. The appeal of this

200 See para. 395 above.
201 See para. 9 above.
202 See in particular para. 394 above.

alternative route may increase in function of the (arguably increasing) difficulties encountered when seeking to enact such law.[203]

The potential importance of this 'judicial route' – and especially the preliminary reference procedure – is already evident from the fact that all the aforementioned landmark rulings with a particular importance from a private enforcement perspective (i.e. *Simmenthal*, *Factortame*, *Francovich*, *Courage* and *Muñoz*) concerned preliminary rulings relating to situations where no secondary EU law facilitating the private enforcement of EU law applied.[204] Another illustration is the fact that to date no secondary EU law has been adopted to facilitate the bringing of actions for damages by private parties for infringements of EU law under the principle of Member State liability.[205] In terms of nature, rationale and at least to some extent also content, this principle is closely related to the nascent principle of private party liability that is of particular relevance in the present context.[206] Despite this absence, a range of EU law requirements with a considerable level of detail have nonetheless been developed in the Court's case law.[207] Granted, this may not lead to a situation that leaves nothing to be desired. Many private parties indeed still encounter difficulties when trying to obtain compensation in damages from Member States.[208] But that is an unfair standard; neither does adopting secondary EU law tend to lead to optimal solutions in this respect.[209] The absence of specific EU legislation facilitating private enforcement actions brought under the principle of Member State liability thus illustrates that taking legislative action is not necessarily the only way forward where the private enforcement of EU law is concerned.

The Commission moreover has the possibility to try to fasten and 'steer' jurisprudential developments by initiating infringement proceedings in selected cases.[210] Rulings in cases concerning public enforcement-related matters, such as *Greek Maize*, demonstrate that this can be a manner to clari-

203 See subsections 10.2.1 and 10.2.4 above.

204 CoJ case 106/77, *Simmenthal*; CoJ case C-213/89, *Factortame*; CoJ joined cases C-6/90 and C-9/90, *Francovich*; CoJ case C-453/99, *Courage*; CoJ case C-253/00, *Muñoz*. See further sections 2.5.1 and 2.5.2 above.

205 On this principle, see para. 59 above. Note that Procurement Remedies Directive 89/665 and 92/13 could be seen as codifications of this principle, particularly in light of CoJ case C-568/08, *Combinatie Spijker*, para. 87, discussed in para. 88 above (at least where their provisions on actions for damages are concerned). However these directives pre-date the abovementioned *Francovich* ruling that articulated the principle of Member State liability. It can therefore be ruled out that, when adopting these directives, the EU legislature aimed to codify the case law on this principle.

206 See subsection 2.5.3 above.

207 See para. 59 above.

208 See e.g. Van Dam (2006), p. 40; Lock (2012), p. 1675.

209 See e.g. subsection 7.1.1 above concerning the difficulties that private parties that wish to bring actions for damages under the secondary EU law in question still tend to experience.

210 See subsection 2.4.1 above.

fy the obligations upon the Member States in this respect.[211] It is remarkable that in relation to the private enforcement-related matters at issue in this study infringement proceedings tend to play only a very limited role, if at all. Although in legal terms there are obvious limits to what can be achieved in this manner, this seems to be in large part the result of a policy choice. To give a concrete example, it would probably be difficult to establish through infringement proceedings that, as a matter of EU law, a finding of a competition law infringement by a national competition authority must necessarily have binding effect on a national court in a private enforcement case. For this to be achieved the adoption of secondary EU law seems required.[212] However, where the Commission finds that the laws of the certain Member States set the threshold for proving the extent of damages too high or provide for too limited disclosure possibilities, making it impossible or excessively difficult for a private party to obtain full compensation for an infringement of EU law, there is legally speaking nothing preventing it from initiating infringements proceedings against those Member States. This could be done either instead of, or in parallel with, proposing secondary EU law. The general absence of infringement proceedings for private enforcement-related matters suggests however that the Commission tends to prefer the 'legislative route'.

### *10.3.2. Added-value: other relevant factors*

416. The second set of considerations that could be seen as questioning the added-value of secondary EU law facilitating the private enforcement of EU law is more practical in nature. The central point here is that litigation patterns typically depend on a *broad range of factors*, only a limited number of which can conceivably be addressed through adopting legislation. As has been seen in the foregoing chapters, this legislation at issue is typically concerned with the applicable remedial and procedural rules in legal proceedings for (alleged) infringements of EU law. But there can be little doubt that, when a private party must decide whether or not to initiate or pursue such proceedings, many other factors can play a role that may be at least as important as the content of those rules. In other words, there can be 'unwritten obstacles' to the success of private enforcement claims.[213]

As far back as in 1984 the Commission noted for instance the relevance of "*psychological barriers*".[214] A more recent survey speaks in this connection of a "*significant emotional component*".[215] These findings typically relate to

211 CoJ case 68/88, *Commission v. Greece (Greek maize)*. See subsection 2.4.2 above.

212 Cf. Art. 9 Competition Damages Directive. See further para. 243 above.

213 Cf. Heinemann (2011), p. 219.

214 Commission, Memorandum on consumer redress, COM(84) 629 final, p. 6, where it is noted that consumers may be "*overawed or intimidated by the atmosphere of the courthouse or the courtroom, by the formality of the proceedings and of the legal language and even by the judges' and advocates' robes*".

215 Eurobarometer, Consumer redress in the EU, August 2009, pp. 7 and 42.

consumer disputes.[216] Presumably factors of this kind tend to play less of a role where the private parties concerned are undertakings, i.e. parties that act in a professional capacity. But also for the latter parties other factors than strictly legal considerations can be of relevance. They may for example fear harming the commercial relationship with the opposing party or certain forms of retaliation. Such concerns particularly play a role in public procurement cases, in light of some undertakings' dependence on public contracts and fears of being 'black-listed'.[217] Yet they can also be relevant in other fields, such as in competition cases.[218] Apart from that, both consumers and undertakings may simply prefer to spend their time, energy and resources on other things than litigation (opportunity costs; rational apathy).[219]

The *awareness* of the relevant rules of EU law and the rights that they may confer on private parties can be another important element, as has been frequently been noted in relation to various fields of law.[220] This does not necessarily only concern (potential) private party-applicants. The training, expertise and attitudes of legal representatives, judges and potential infringers, as well as the structure of the legal market, may all be relevant as well.[221]

It is moreover widely agreed that parties' willingness to litigate tends to be influenced by *social and cultural factors*.[222] The 'claim-consciousness' of private parties can thus differ significantly between Member States.[223] Some speak therefore of differences in "*procedural DNA*"[224] or the "*procedural culture*" that can differ.[225] Even within one and the same Member State litigation habits can vary across various fields of law.[226] Considerations of this

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216 See e.g. also Loos (2011), p. 491.

217 See para. 87 above.

218 See e.g. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, pp. 28-29. See also Basedow (2003), p. 37; Peysner (2006), p. 97; Eilmansberger (2007), p. 447; Milutinovic (2010), p. 125; Van den Bergh (2013), pp. 13-20.

219 See e.g. para. 87 and 188 above.

220 E.g. Commission, Green paper on public procurement in the EU, COM(96) 583, p. 17; Brown (1998), p. 93; Study Lovells (2003), p. x; Eurobarometer, Consumer redress in the EU, August 2009, pp. 9 and 39; Loos (2011), p. 490. See also CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 26, discussed in para. 167 above, where consumers' "*ignorance of the law*" was considered a relevant factor in concluding that in certain cases national courts must act of their own motion.

221 E.g. Jones (2003), p. 107; Kur (2004), pp. 825-826; Cafaggi & Micklitz (2009), pp. 426-427 and 426; Loos (2011), p. 490.

222 E.g. Van Gerven (2003b), pp. 74 and 213; Dougan (2002), p. 157; Wolf (2003), p. 422; Arrowsmith (2005), pp. 1436-1437; Drake (2006), p. 862; Howells (2008), pp. 121 and 133. See also Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 16.

223 Study Lovells (2003), pp. ix and 23.

224 Fairgrieve & Lichère (2011), p. 194.

225 Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 31.

226 E.g. where one study (Study Lovells (2003)) singles out the UK as a particularly 'claim-conscious' jurisdiction in relation to product liability, other reports (Wood Report (2004); Fairgrieve & Lichère (2011), p. 192) note that in the UK private parties are very hesitant in bringing claims for breaches of the public procurement rules.

kind may also effect the extent to which the competent courts are inclined to make use of the procedural possibilities provided for, for instance to estimate the harm caused by an infringement or to order the disclosure of evidence.[227]

417. Taken together the above factors can be seen as putting in doubt the added-value of the EU legislation at issue, given that this legislation generally does not – and often cannot – address them. Yet again matters are not black and white. In particular, most of the abovementioned observations do *not* constitute *absolute arguments* against the adoption of EU legislation facilitating private enforcement of the type assessed in this study. The fact that psychological and emotional factors, commercial and pragmatic considerations, as well as social and cultural attitudes play a role does not mean that therefore EU legislation has no role to play. Indeed, this could equally be seen precisely as a ground arguing in favour of enacting such legislation. For in this manner the factors that *are* capable of being influenced by legislation will be influenced to the extent possible. In addition most of the said factors are unlikely to be static. They can be expected to evolve over time, at least to some extent. There is no reason to presume that EU legislation could not play a role in that process. It would further appear that EU legislation of the type at issue here can in fact fulfil a particularly important function in *raising awareness*. Although it reportedly has not had a substantial effect in terms of increased litigation, the Product Liability Directive has for example been accredited with contributing towards "*an increased awareness of and emphasis on product safety*".[228] The introduction of the Procurement Remedies Directives has similarly been found to have contributed to improved awareness on the side of aggrieved tenderers of their rights conferred by EU public procurement law,[229] just as the IPR Enforcement Directive has been said to have 'sensitised' courts and legal practitioners.[230]

Especially this 'awareness-raising' potential of EU legislation has not been lost on the Commission. It has repeatedly invoked it as an important argument in favour of adopting EU legislative measures of the type at issue here, *inter alia* in relation to the revision of the Procurement Remedies Directives.[231] Another example is the Commission's statement concerning its proposal for the Competition Damages Directive that "*[r]aising awareness is necessary in order to ensure that victims of competition law infringements make use of their right to full compensation and, hence, contribute to achieving the purpose of*

227 Heinemann (2011), p. 219. As was noted in para. 231-233 above, national law does sometimes provide for possibilities of this sort, which tend however to be used only to a limited extent in practice.

228 Commission, First report on Product Liability Directive 85/374, COM(95) 617, p. 2. This conclusion is based on Study McKenna (1994).

229 Study Herbert Smith (1996), p. 21.

230 Geiger, Raynard & Rodà (2011), p. 546.

231 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 34.

*an effective private enforcement of competition law*".[232] Earlier the Commission had held that, through its initiative in this field, private parties would also be "*brought closer*" to the EU competition rules[233] and that codifying some of the relevant case law could lead to "*greater awareness*".[234] In fact, it may well be that even merely *discussing* possible legislative action can already have certain effects in practice. Over the past period damages litigation for infringements of competition law has on the whole gradually increased in the EU.[235] This has happened largely in parallel to the discussions on a possible EU legislative initiative in this field. In other words, this increase occurred *before* the Competition Damages Directive was adopted and transposed to national law. Although several factors are likely to have played a role in this connection,[236] it appears that the years of discussions, studies, official documents, academic publications and consultations on a possible legislative initiative in this field helped to 'sensitise' the private parties concerned, their legal representatives and the national courts alike.[237] It may furthermore well be that these discussions have also played a role in bringing about legislative change at the national level with respect to the private enforcement of competition law.[238] Also the national legislator may thus have been 'sensitised'. Moreover, whatever its precise cause, this increased degree of litigation can have self-reinforcing effects, especially where it leads to additional, well-published and broadly debated preliminary rulings by the Court of Justice.

418. Therefore again the main point is not that the abovementioned factors necessarily argue against the adoption of EU legislation facilitating the private enforcement of EU law. The foregoing has rather served to underline that the remedial and procedural matters addressed in this legislation should not be assessed in isolation. It is submitted that, when considering the question whether or not to adopt or amend such EU legislation, or when assessing the effects in practice of EU legislative action or inaction in this respect, account ought to be taken of the *broader context* in which this legisla-

232 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 26. See e.g. also Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 98.

233 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 4.

234 Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, p. 7.

235 See in particular para. 223-224 above.

236 The CoJ's *Courage* case law has e.g. undoubtedly been another relevant factor. See further para. 213-215 above.

237 See e.g. Kammin & Becker (2013), p. 61.

238 See e.g. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 17 (see also its pp. 74-75). Here it is noted that several Member States have adopted or amended their legislation, or are considering doing so, so as to facilitate the bringing of actions for damages for breaches of the competition rules.

tion operates or is to operate. This argues for instance against an approach whereby the need for EU legislative action is principally determined in light of the number of cases brought in a given field of law. Not only would few consider litigation to be an end in itself,[239] too many factors would also seem to be at work for this to be an adequate measure.

### *10.3.3. Summary*

419. The Court of Justice has, on the basis of primary EU law, over the years established a rather elaborate body of case law relating to the enforcement of EU law by private parties at national level. Litigation patterns moreover tend to be determined not only by the applicable remedial and procedural rules, but also by a range of other factors. The latter include, as the case may be, psychological and emotional factors, commercial and pragmatic considerations, social and cultural attitudes towards litigation, as well as awareness (or the absence thereof) of the relevant rules. Neither of these two observations implies that adopting EU legislation facilitating the private enforcement of EU law has no added-value. And yet these observations do provide useful reminders that the value of this legislation should not be overstated either. In particular, the existence of the said case law highlights that adopting legislation is not necessarily the only way forward. Preliminary references and targeted infringement proceedings might lead to outcomes that are at least in part comparable to those that result from the adoption of secondary EU law. The inherent limits and disadvantages of case law-driven solutions notwithstanding, this 'judicial route' may appear more attractive in function of the difficulties experienced in relation to the 'legislative route'. Quite apart from that, the relevance of the abovementioned other factors underlines that any such enforcement-related legislation should not be considered in isolation. Rather account should be taken of the broader environment in which this legislation operates or is to operate.

## 10.4. Coherence and fragmentation

This final section of chapter 10 takes as its point of departure that, in light of the relevant legal, political and policy considerations, the adoption of EU legislation facilitating the private enforcement of EU law is seen as both feasible and necessary. On that basis the question is essentially addressed *how* to legislate in such a case. It is first shown that the legislation analysed in the foregoing chapters can lead concerns in terms of coherence and fragmentation, when considered from the perspective of both EU law (first subsection) and national law (second subsection). The third subsection then considers to which extent there is scope for a more coherent approach at EU level.

239 Cf. Cafaggi & Micklitz (2009), p. 443.

### *10.4.1. Coherence and fragmentation at EU level*

420. Overlooking the foregoing it seems fair to say that the EU legislation considered in this study leaves much to be desired in terms of *internal coherence*. On the whole neither in this legislation itself, nor in the preparatory and explanatory documents relating thereto can indications be found that these legal acts are underpinned by an approach that seeks to address the remedial and procedural matters in question in a coherent and consistent manner. These acts and documents have instead been mostly tailored to the perceived needs and specifics of the sector at issue. Little account is taken of the state of play in other fields of EU law, let alone that much consideration seems to be given to the possible future development of EU law concerning private enforcement seen in its entirety.

For instance, hardly any attention appears to have been paid to ensuring a coherent and consistent approach regarding EU rules on actions for damages, even if this remedy takes an important place in most directives under consideration and similar concerns often arise in the different fields of law at issue.[240] There can of course be good reasons for addressing certain particular concerns in a particular manner. But it is difficult to see why one should not at least try to depart from a common position, for example on points such as the applicable causality requirements and the quantification and the qualification of the harm caused.[241] The relevant differences notwithstanding, it has similarly already been seen above that in respect of the contractual remedies there does appear to be scope for solutions ensuring a greater degree of internal coherence of the rules of EU law at issue.[242] It is also not immediately evident why, where provision is made in secondary law EU for recurring penalty payments or for publicity measures, the measures in question tend to be drafted every time in a different manner.[243] The rules on the *inter partes* disclosure of evidence set out in the Competition Damages Directive are in a sense a positive exception, as they are expressly inspired on the corresponding arrangement of the IPR Enforcement Directive.[244] This would however seem to make it all the more regrettable that these provisions have been drafted and structured in a slightly different manner.[245]

In this light it is unsurprising that many commentators have cast a harsh verdict on the EU's legislative involvement with the remedies and procedures applicable in proceedings before the national courts generally and with issues such as non-contractual liability (tort) and contract law specifi-

240 See section 7.1 above.
241 See subsections 7.1.3, 7.1.4 and 7.2.5 above respectively.
242 See subsection 8.1.1 above.
243 See subsections 8.2.3 and 8.2.4 above respectively.
244 See Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 14.
245 Cf. Art. 6 and 7(1) IPR Enforcement Directive 2004/18; Art. 5 Competition Damages Directive. See further subsection 8.2.2 above.

cally. The relevant bodies of EU law have been criticised for their "*piecemeal nature*",[246] their "*ad hoc*" character[247] and the "*compartmentalisation*".[248] EU law relating to non-contractual liability has been called a "*rather ramshackle creation*",[249] while in this connection it has also been held that it is "*hard to identify any consistency of approach at all*".[250] EU law on consumer contracts has similarly been described as "*wildly unsystematic*".[251] It has rightfully been observed that when addressing these matters the EU legislature seems mostly interested in solving certain particular problems, rather than in securing legal integrity or doctrinal coherence.[252]

421. An obvious but therefore no less relevant point to make in this connection is that each of the legal acts and initiatives assessed in part B of this study relates to *one particular sector* of economic activity regulated by EU law. The Procurement Remedies Directives are limited to the enforcement of the EU rules in the field of public procurement, the IPR Enforcement Directive is primarily linked to EU legislation in the field of intellectual property, etc. In fact, hardly ever is an *entire* sector or field of law covered.[253] The two aforementioned directives may be comparatively ambitious in as far as their scope is concerned, but they do not provide 'full' coverage of the substantive rules of EU law at issue even at sectoral level. The Procurement Remedies Directives do not apply to infringements of the Defence Procurement Directive for instance. The latter instead contains a set of private enforcement-related rules of its own.[254] This thus adds to the differentiation that already results from the fact that the EU legislature found it necessary to adopt not one but two Procurement Remedies Directives, which once again slightly differ between them. As to the IPR Enforcement Directive, the Commission decided to lay down a separate set of rules on civil redress in its proposal for a trade secrets directive, rather than to amend the IPR Enforcement Directive.[255] Besides already at present certain private enforcement-related provisions concerning intellectual property law infringements can be found in other legal acts than the IPR Enforcement Directive, for example in the Infosoc Directive.[256] The Competition Damages Directive's scope may

246 Van Gerven (1995), p. 525
247 Dougan (2004), p. 15
248 Milutinovic (2010), p. 341.
249 Kellner (2009), p. 151.
250 Oliphant (2008), p. 271 (regarding the qualification and quantification of damages).
251 Weatherill (2012), p. 1280.
252 Collins (2011), p. 453. See e.g. also Curtin (1993), p. 17.
253 As regards the scope of the EU legislation at issue more generally, see subsection 9.1.1 above.
254 Art. 55-64 Defence Procurement Directive 2009/81. See further para. 94 above.
255 Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 19-24 (Art. 5-14). See further para. 140 above. Unlike IPR Enforcement Directive 2004/48, this proposal includes e.g. rules on limitation periods, whereas it does not foresee rules on the disclosure of evidence.
256 Art. 8 Infosoc Directive 2001/29. See further para. 117 above.

be relatively broad in that it covers in principle all infringements of Articles 101 and 102 TFEU, yet its scope is narrow in the sense that, in terms of substantive remedies provided for, it concentrates on actions for damages.

It follows that none of these directives regulate private enforcement-related matters in an entire field of EU law in a more or less complete manner, let alone that they cover several or even all fields covered by substantive EU law. This is evidently a difference with many national legal systems. Particularly in Member States with a civil law (as opposed to common law) system, rules on remedies and procedures typically apply much more broadly, i.e. regardless of which types of substantive rules are infringed.[257]

422. The resulting 'compartmentalisation' is in part inherent in the manner in which *competences* have been vested in the EU. As was noted earlier, pursuant to the principle of conferral the EU cannot legislate as it sees fit.[258] The EU Treaties mostly confer powers on a sector-specific basis, notably with a view to addressing issues with a transnational dimension. Also Article 114 TFEU does not vest in the EU a general power to regulate the internal market.[259] That being so, it can hardly come as a surprise that secondary EU law is mostly sector-specific. That applies for the *substantive* rules in question and, by extension, also for the rules on remedies and procedures that seek to facilitate the *enforcement* of those substantive rules by private parties before the national courts. Admittedly this need not lead, in and of itself, to incoherence and inconsistencies in the wider body of EU law. The reality is however that this is typically the result of such a 'stand-alone' approach. That tends to be the case already where the private enforcement-related rules relate to the same sector, as is illustrated by the generally limited, but nonetheless noticeable differences between the Defence Procurement Directive and the Procurement Remedies Directives, or between the proposal for a trade secrets directives and the IPR Enforcement Directive. It certainly applies where entirely different sectors are concerned. Indeed, diversity of legal bases may result in equally fragmented mind-sets among administrators, decision-makers and stakeholders.[260]

One could well imagine establishing an underlying *programme or framework* of some sort, in light of which the EU's private enforcement-related legislation could then be drafted, regardless of the sector or subsector concerned.[261] It could set out certain guiding principles, standardised approaches, rules on uniform terminology, etc. Generally speaking, neither the need for tailor-made solutions in certain cases, nor constraints related to the legal basis of a particular proposed act need to stand in the way of

257 On the impact on national level, see further subsection 10.4.2 below.
258 See para. 381 above.
259 See para. 382 above. See also para. 430 below.
260 Dawson & Muir (2014), p. 222.
261 Cf. European Parliament, Council and Commission, Interinstitutional agreement on better law-making, OJ 2003, C 321/1.

such an approach. In that sense more can, and indeed should, be expected from the Commission and the EU legislature.[262] Yet there are also reasons for not being overly optimistic in this regard. The everyday reality of Brussels-based law-making is likely to continue to lead to situations where issues related to internal coherence and consistency play (at best) only a secondary role, whether or not a 'horizontal' programme or framework of some kind exists. When discussing a draft legal act that is only concerned with, say, private enforcement in the field of competition law, the parties involved (not only the EU institutions concerned, but also experts, academics, private sector stakeholders, etc.) may well have other concerns than ensuring consistency with the EU rules that already apply for instance in the field of intellectual property law. Account should further be taken of the political sensitivity of many of the matters under consideration.[263] Things tend to be complicated further by the need to reconcile different legal cultures, mentalities and linguistic issues in the process of EU law-making.[264] All this may well necessitate innovative rather than standardised solutions for a draft act to be adopted or even proposed. This almost inevitably comes at the expense of well-intended and in themselves laudable ambitions in terms of coherence and consistency.

423. Another – more fundamental – point to be made in this connection is that the current sector-specific approach also implies a *differentiation in enforcement possibilities* within the broader category of rights of private parties vested in EU law. While the EU legislation and initiatives at issue in this study typically seek to make it easier for these parties to enforce their rights based on substantive EU law on public procurement, intellectual property, consumer protection and competition law, in many other instances where EU law grants rights to private parties no comparable legislation exists. Here the issue of coherence thus does not relate so much to the differences between various legal acts at issue, but rather to the difference that exists between the fields of law where such acts have been adopted on the one hand and the fields where that is not the case on the other hand.

Not without reason has the appropriateness of the resulting sector-specific privileging of certain fields of EU law, and the rights derived therefrom, over others been questioned.[265] Such an approach can raise issues of fairness and equal treatment. To illustrate this point, it is evident that, further to the Court's ruling in *Courage*, the Commission and subsequently the EU legislature have sought to ensure, by proposing and adopting the Competition Damages Directive, that a private party affected by a competition law infringement can receive full compensation.[266] But it is considerably less evi-

262 Cf. Art. 7 TFEU. See also Van Gerven (2008a), p. 42.
263 See subsection 10.2.1 above.
264 Cf. Van Gerven (2008a), p. 43.
265 E.g. Wolf (2003), pp. 422-423; Van Dam (2006), p. 345; Reich (2007), p. 738.
266 CoJ case C-453/99, *Courage*. See in particular subsections 6.2.2, 6.2.3, and 6.3.1 above.

dent why no such 'legislative follow-up' has been given to the Court's finding in *Muñoz* that private parties should be able to bring civil proceedings to address infringements of certain agricultural rules.[267] Similarly the Procurement Remedies Directives seek to facilitate the private enforcement of the Substantive Public Directives, which give expression to the EU Treaties' 'fundamental freedoms' (namely the freedoms of establishment and to provide services).[268] Yet one could wonder why no such measures exist for example in respect of the rights that private parties can derive from the Services Directive, which was also adopted on the basis of these provisions.[269]

424. Once more the point here is not that there cannot be good grounds for differentiating between the enforcement possibilities that exist with respect to various substantive rules of EU law or in particular situations.[270] It may well be that one sector is considered to be of greater economic importance than another, that certain rules are singled out as a political priority, that the available enforcement difficulties encountered by private parties differ, etc. Likewise there can also be reasons for such differentiation between the various substantive rules that apply within a particular field of law.[271] The main point here is rather that the question whether or not there are such grounds does not seem to receive much attention, if at all, when EU legislation of the type at issue in this study is being prepared, discussed and adopted. In particular, it is often far from clear on the basis of *which criteria* these choices are made, or indeed whether the question on which basis certain particular domains are singled out has been asked at all. It may only be human that individual observers sometimes seem to assume rather easily that their own field of specialisation is exceptional and worthy of special treatment.[272] It is remarkable however how little attention is generally paid at institutional level to the question whether and why a particular field of EU law requires special legislative measures so as to facilitate private enforcement.

In relation to the Competition Damages Directive some attention has been given to this issue, presumably in response to earlier critical comments by stakeholders.[273] That is to say, in 2008 the Commission argued that the fact that similar private enforcement-related problems might exist in other fields is, in and by itself, not a reason for the EU not to act in this particular field. This seems a valid point to make. But it is submitted that it would have been considerably more convincing had the following statements about competition cases being "*unusually difficult*", given their "*particular*

267 CoJ case C-253/00, *Muñoz*. See further para. 61 above.
268 See para. 70 above.
269 Services Directive 2006/123.
270 Cf. also the discussion of certain 'sector-specific' measures on the closure of evidence in subsection 8.2.2 above.
271 Cf. e.g. Hüschelrath & Peyer (2013), p. 585.
272 E.g. Milutinovic (2010), pp. 330-331.
273 See para. 219 above. See e.g. also European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 3 and 5.

*complexity*" and the "*particularly high*" and "*unevenly distributed*" evidential burden been properly explained and substantiated.[274] At least some of these submissions may well be less self-evident than seems to be presumed. Competition cases can undoubtedly be complicated. But are they inherently more complex than other forms of commercial litigation, especially considering that in some ('follow-on') competition cases applicants can build on the findings of unusually powerful public enforcement authorities? It has already been seen in the foregoing that low levels of damages litigation and the problems typically cited in this connection (high costs, lengthy proceedings, difficulties in meeting the standard of proof, difficulties in quantifying the harm, etc.) are by no means unique to competition cases.[275] In 2013 the Commission also highlighted another element, namely that in the amount of uncompensated harm caused by competition law infringements would be "*particularly big*".[276] That might be true. But again this statement seems largely speculative. Not only is the estimate of the harm caused by the infringements at issue a very rough approximation,[277] there are also no indications whatsoever that a quantitative comparison has been made.

### *10.4.2. Coherence and fragmentation at national level*

425. Even if they take a somewhat different form, it is important to note that concerns related to coherence and fragmentation emerge not only at EU, but also at *national* level. A particular concern is that EU legislative measures of the type at issue in this study can lead to *fragmentation*, i.e. a lessening of the internal coherence, of the respective domestic legal systems of the Member States. Adopting specific remedial and procedural provisions for, say, the enforcement of right based on the EU public procurement rules can cause a degree of disruption of the national legal systems, in as much as these provisions of EU law do not cover rights based on 'purely' national procurement law (i.e. rules of national law other than those transposing a directive). As is perhaps to be expected, concerns along these lines have regularly been expressed especially by the Member States in relation to the EU legislation discussed above, either with respect to an intended EU legislative

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274 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 95-96.

275 See subsection 7.1.1 above.

276 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18 (n. 42).

277 Cf. *ibid*., p. 22, where it is observed that "*the absence of reliable empirical data makes precise quantification impossible*", but that "*there is general agreement that the infringements of competition law cause substantial harm*". The subsequent estimates give a somewhat more concrete indication, but the ranges remain very wide (between € 5,7 and € 23,3 billion a year EU wide) and the costs cited do not coincide with the size of the uncompensated harm as a consequence of the infringements that the proposal seek to address. A comparison with other fields of law is entirely absent.

initiative generally or a particular provision of a proposal.[278] Yet it is noticeable that, especially in more recent years, also the European Parliament has highlighted them.[279] This concern has also been widely acknowledged in the legal literature.[280]

This fragmenting effect at national level – the 'dark side of EU harmonisation', as it has been called[281] – may not be unique to EU legislation of the type at issue here. Yet this concern arguably features more prominently in the present context for two reasons. First, the matters concerned, i.e. remedies and procedures applicable in private enforcement proceedings, have traditionally been mostly left to be regulated by the domestic legal systems of the Member States.[282] This means that, as far as EU law is concerned, these legal systems have on the whole been able to retain a considerable degree of internal coherence, certainly as compared to many matters of substantive law. Second, at least in most Member States with a civil law tradition, the national bodies of law regulating these matters of remedies and procedures (e.g. regarding legal standing, damages claims or legal costs) have typically been designed to apply across the board, i.e. regardless of the nature or origin of the rule of substantive law at issue. The EU's sector-specific manner of legislating tends to necessitate a deviation from this point of departure. This effect is of aggravated by the fact that, as was pointed out in the previous subsection, the EU rules in question tend to differ between them.

426. This fragmenting effect can be looked upon in different manners. One view is to see it simply as an unfortunate but *necessary evil*, resulting from the supranational structure of the EU and the position of EU law in relation to national law.[283] There is certainly some truth in this. Generally speaking, the manner in which powers have been conferred to the EU makes it impossible to cover all situations, i.e. including situations without an internal market relevance or another cross-border dimension, in a single act of secondary EU law and thus to ensure coherence across the board.[284] It naturally follows

278 See e.g. para. 98 (concerning the possibility under Procurement Remedies Directives 89/665 and 92/13 to designate several, separate review bodies), para. 116 (concerning the legislative initiative leading to IPR Enforcement Directive 2004/48), para. 177 (concerning a provision on compensation of non-material damages under Product Liability Directive 85/374), para. 189 (concerning a possible legislative initiative on collective redress) and para. 219 (concerning the legislative initiative leading to the Competition Damages Directive) above.

279 E.g. European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 5; European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, para. 15.

280 E.g. Van Gerven (1995), p. 700; Cornish *et al*. (2003), p. 448; Dougan (2011), p. 416; Weatherill (2012), p. 1315.

281 Van Gerven (2003a), p. 401.

282 See section 2.1 above.

283 Komninos (2008), p. 181.

284 See also subsection 10.4.3 below.

that national rules tend to be harmonised on a selective basis, which necessarily implies that *other* national rules can remain unaffected. A degree of fragmentation at national level may therefore indeed be a necessary and often unavoidable evil.

However it is submitted that this is not – or, at least, this should not be – the last word to be said on the matter. In particular, it would be incorrect to perceive the abovementioned concerns about fragmentation at national level as being mainly a matter of national legislative design and elegance. For it can have significant *'real-world' consequences*. To start with, it is not to be forgotten that substantive EU law mostly applies in 'translated' form at national level, i.e. through – and therefore as an integral part of – the domestic legal systems of the Member States.[285] Furthermore the bodies of national rules that are affected by this EU legislation are often the result of centuries of legal evolution and, more importantly, may well reflect in principle legitimate political, social and cultural preferences.[286] In accordance with these preferences, most of these rules perform moreover a useful function.[287] Although this does not constitute an absolute bar to EU legislative action, all this is already reason not to set these rules aside too easily. Indeed, while it may be true that procedural idiosyncrasy, unlike national costume or regional cuisine, is not to be nurtured for its own sake,[288] neither is this merely a question of easily 'transferable technology'.[289] There is a balance to be struck.

That applies all the more so given that also in this context EU legislative interference tends to imply preferential treatment in terms of enforcement possibilities of certain fields of law and of certain rights over others.[290] The rights, the enforcement of which the EU legislation at issue seeks to facilitate, are after all mostly rights conferred by substantive EU law.[291] The result of EU legislative action facilitating private enforcement can therefore be more favourable treatment in terms of enforcement of certain rights vested in *EU* law, as compared to rights vested in 'purely' *national* law. There is however no reason to assume that the former, simply by virtue of being EU rights, are of greater importance than the latter.[292] It is not evident that a private party seeking to enforce a right vested in for instance EU consumer protection law ought to be treated more favourably than the party that seeks

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285 Cf. Prechal (2005), pp. 178-179.

286 Cf. Storme (1994), p. 38; Van Gerven (2008b), p. 409; Storskrubb (2008), p. 21; Dougan (2011), p. 410.

287 Cf. CoJ case C-413/12, *ACICL*, para. 38: "*[national] procedural rules relating to the structure of internal legal remedies and the number of instances of jurisdiction pursue a general interest in the sound administration of justice and foreseeability*". In a similar sense, see Dougan (2004), p. 28; Prechal (2005), p. 173.

288 Storskrubb (2008), p. 13 (citing English case law).

289 Harlow (2000), pp. 80-83.

290 See also para. 423 above.

291 See subsection 9.1.1 above.

292 Cf. Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 27.

to enforce such a right vested in 'purely' national consumer protection law. Also in this context issues of fairness and equal treatment can thus arise. Indeed, in its 2010 *DEB* ruling concerning national rules on legal aid the Court of Justice held that applicants relying on EU law should not be favoured over other applicants.[293]

427. A final point to note in this connection is the *'spill-over' effect* that EU legislation harmonising national law on remedies and procedures can have. This refers to the phenomenon that pursuant to the adoption of this legislation (or case law of the Court of Justice[294]) Member States regularly decide to apply more broadly the requirements set out in that legislation. For instance, the Procurement Remedies Directives only covers the substantive *EU* public procurement rules.[295] Nonetheless, when transposing these directives, many Member States decided to apply the same remedial and procedural rules to infringements of 'purely' national substantive public procurement rules.[296] Such a spill-over effect has also been observed to occur with respect to the Consumer Injunctions Directive[297] and the Product Liability Directive.[298] Of course, as a matter of EU law, these Member States are not *legally obliged* to take such steps. Strictly speaking this is no more than 'voluntary harmonisation'. But the fact that the Member States still regularly do so underlines the sincerity of the abovementioned concerns regarding the fragmentation of their respective national legal systems, as this is often the only manner to retain a degree of internal coherence and ensure equal treatment. Moreover this spill-over effect can also lead to question as regards the practical effects of the principle of conferral, which is of fundamental importance in the EU legal order.[299]

428. In many respects the conclusion to be drawn concerning matters of coherence and fragmentation considered from the perspective of national law is therefore comparable to the one set out in the previous subsection that concentrated on the EU perspective. That is to say, in legal terms none of the foregoing constitutes an absolute bar to the adoption of EU legislation facil-

293 CoJ case C-279/09, *DEB*, para. 56.

294 See Hartmann (2012), p. 620, where it is noted that several Member States 'implemented' the principle of Member State liability also for purely domestic situations pursuant to CoJ joined cases C-6/90 and C-9/90, *Francovich*. On this ruling and the said principle, see further para. 59 above.

295 See para. 94 above.

296 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 67.

297 Study University of Bielefeld (2008), p. 610.

298 Van Gerven, Lever & Larouche (2000), p. 648. For another example, outside the scope of part B, see the (proposed) application of the provisions of Mediation Directive 2008/52 not only in cross-border, but also in 'purely' national disputes under Netherlands and Italian law. See European Parliament Policy Department (2011), p. 67; Davies & Szyszczak (2011), p. 702.

299 See para. 381 above.

itating the private enforcement of EU law. There may moreover well be valid and convincing policy reasons for taking such legislative action at EU level. It is submitted however that, although this may be the outcome, concerns related to fragmentation at national level should not be simply shrug off a priori as an unfortunate but necessary evil. For the reasons set above the possible consequences for the national legal systems merit being given appropriate weight in the EU decision-making process. This is a matter of good law-making as well as respect for the principles of subsidiarity and proportionality.[300]

### *10.4.3. Towards a more coherent approach?*

429. In light of the foregoing, it is understandable that calls for a *more coherent EU legislative approach* have often been made.[301] It should be acknowledged that more recently there have been some (modest) signs of a 'de-compartmentalisation', or at least certain attempts thereto. As was noted above, despite the regrettable differences between both regimes, the Competition Damages Directive at least acknowledges the existence of, and seeks to build on, the arrangement in the IPR Enforcement Directive on the *inter partes* disclosure of evidence.[302] At an earlier stage, when this competition law initiative was still expected to include rules on collective redress, account was also taken of the approach involving 'qualified entities', as set out in the Consumer Injunctions Directive.[303] This collective redress aspect has since developed from a 'competition-only' into a broader initiative, covering also consumer protection law as well as other infringements of EU law.[304] The Commission explained this decision to opt for a broader approach with reference to the fact that competition law is not the only field where infringements may lead to 'scattered' damages, as well as the wish to avoid the unnecessary fragmentation of the civil laws of the Member States.[305]

And also elsewhere in EU law attention for ensuring a more coherent and consistent approach appears to be increasing. Ambitions in this regard were expressed for instance in relation to the EU rules on passengers'

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300 In a similar sense, see Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 27; De Búrca (1997), p. 45; Van Gerven (2008a), p. 43; Milutinovic (2010), p. 328.

301 E.g. Van Gerven (2004a), pp. 527-532; Koziol & Schutze (2008a), p. 608; Lukas (2008), p. 102; Storskrubb (2008), p. 305; Kellner (2009), p. 152; Zippro (2009a), p. 220; Tulibacka (2009), p. 1557.

302 See subsection 8.2.2 above.

303 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 19. See Art. 3 Consumer Injunctions Directive 2009/22, discussed in para. 154 above.

304 Collective Redress Recommendation 2013/396. See further subsection 5.5.1 above.

305 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 55.

rights, including the enforcement thereof.[306] A legislative proposal aimed at improving the consistency of existing EU legislation in the field of civil procedural law was announced in 2010.[307] In the field of contract law a number of further initiatives were also taken to this aim.[308] These include involving *academia* so as to establish a 'common frame of reference'.[309] In due time this academic work may contribute to the creation of more extensive and more coherent EU legislation on the aforementioned issues,[310] although for now that seems still a rather distant and uncertain prospect.[311] The said initiatives also include legislative proposals, most notably for a consumer rights directive and for a regulation on a European sales law.[312] Without going into detail here, it can however be noted that these proposals have been received rather critically.[313] Whereas the proposal for a regulation on a European sales law is currently still pending, the Consumer Rights Directive has been adopted in 2011.[314] In the course of the legislative process substantial amendments to the Commission's proposal were made, including a significant reduction of its scope. Many find the end result disappointing.[315] Indeed, the fate of this directive has led to the observation that "*there are limits to what is politically palatable in the name of 'coherence'*".[316]

It thus seems that a coherent approach is often more easily called for and dreamt up in the abstract than brought into EU legislative practice.[317]

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306 Commission, White paper on a roadmap on a single European transport area, COM(2011) 144, p. 23.

307 Commission, Communication on delivering an area of freedom, security and justice for Europe's, COM(2010) 171, p. 23. In Commission, Work programme 2012 (Annex), COM(2011) 777, p. 32, this initiative was announced for 2014, but it does no re-appear in subsequent work programmes.

308 See e.g. Commission, Green paper on policy options towards a European contract law for consumers and businesses, COM(2010) 348.

309 Von Bar & Clive (2010). For a discussion and further references, see e.g. Hondius (2011), p. 531. For other academic contributions, see e.g. Lando & Beale (2000); Lando *et al*. (2003); Hartkamp *et al*. (2011). More specifically on the topic of the law of non-contractual liability (tort), see also Van Gerven, Lever & Larouche (2000); Van Dam (2006); Koziol & Schulze (2008b). See also the work of the European Group on tort law, available via wwww.egtl.org.

310 Some of the academic work referred to above is at times referred to in opinions of certain AG's. See further Basedow (2010a), p. 465 (n. 103); Gutman (2011), p. 748.

311 Cf. Commission Decision 2010/233/EU setting up the expert group on a common frame of reference in the area of European contract law, OJ 2010, L 105/109; Study Expert group on European contract law (2011).

312 Commission, Proposal for Consumer Rights Directive 2011/83, COM(2008) 614; Commission, Proposal for a regulation on a common European sales law, COM(2011) 635.

313 On the proposed directive, see e.g. Micklitz & Reich (2009), p. 471; Ackermann (2010), p. 587; Hondius (2010), p. 103. In relation to the proposed regulation, see e.g. Lando (2011), p. 717; Samoy, Dang Vu & Jansen (2011), p 855; Heideman (2012), p. 119.

314 Consumer Rights Directive 2011/83.

315 E.g. Stuyck (2012), p. 69.

316 Weatherill (2012), pp. 1311.

317 See further e.g. Weitenberg (2008), p. 309; Basedow (2010a), p. 443.

430. A similar conclusion is likely to emerge when considerably *more ambitious legislative arrangements* are considered, which would cut across various sectors and regulate national remedial and procedural rules for the enforcement of EU law before national courts in a more coherent manner. Leaving political, policy and practical issues aside for a moment, as the law stands the main legal constraint seems, once more, the requirement of a sufficient legal basis.[318] It has for example been suggested that the EU might take legislative action to address differences between national laws on remedies and procedures in a more general manner under Article 114 TFEU. To this effect it has been submitted that "*the harmonisation of procedural rules [is] a sine qua non for market integration*" and that "*the Member States of the European Union, having created an internal market, are obliged to correct […] unwanted effects which stem from procedural differences*".[319] Others argue that "*[i]f a market is to flourish, disputes arising out of business conducted in the market must be resolved consistently with one another, and that requires more than uniform substantive law. Distortion is bound to occur if the mode of litigation, with all that that implies by way of procedural techniques and by way of their implications for costs, delays, appeals, enforcement of judgments and so on, varies substantially from one place to another*".[320]

Claims of this type may not be untrue. Yet it is another matter whether that suffices for the present purposes, particularly in light of their level of abstraction. It has already been noted above that the use of a legal basis can only be determined in light of the aim and the content of a concrete intended legislative measure and that Article 114 TFEU does not grant the EU a general power to regulate the internal market.[321] A real, appreciable effect of the identified disparities on the internal market is required. It seems questionable whether broad claims such as the ones set out above can be sufficiently substantiated so as to withstand scrutiny by the Court of Justice if and when challenged. In practice it would generally seem difficult to meet the required standard where the intended legislative measures relate to matters of remedies and procedures to be applied across the board. The Court of Justice has for instance held that the possibility that undertakings would hesitate to sell goods in another Member State because they are subject to different procedural rules "*is too uncertain and indirect for that national provision to be regarded*

318 Apart from the articles discussed above, Art. 352 TFEU could also be considered here. This article provides a legal basis where EU action is necessary to attain one of the objectives set out in the EU Treaties. However this provision has important limitations of its own. Most notably it is residual in nature, as it can only be applied "*if the [EU] Treaties have not provided the necessary powers*", and it requires that the Council acts unanimously in adopting the proposed legislative measure.

319 Storskrubb (2008), pp. 78-79. In a similar sense, see e.g. Van den Bossche (2003), pp. 52-54.

320 Jolowicz (1994), p. xiii. See also Storme (1994), pp. 43-53.

321 See para. 382 above.

*as liable to hinder trade between Member States*".[322] This case did not concern the use of Article 114 TFEU as a legal basis, but it would still seem to illustrate the mostly indirect or subsidiary effects that national rules on remedies and procedures have. Adopting private enforcement-related legislation based on this article seems difficult to conceive without making the argument that the intended EU legislative action is required in order to ensure the effectiveness of certain *specific* substantive rules of EU (or national) law.[323] Enforcement rules thus mostly 'follow' the substantial rules to which they relate.[324]

431. It is further important not to misunderstand the meaning of issues of *uniformity* that can arise in the present context. It is true that the Court of Justice has held the uniform application of EU law to be a fundamental requirement of the EU legal order.[325] However it has also ruled that the existence of certain differences between jurisdictions is inevitable where national law is relied upon for certain remedial and procedural matters (which continues to be the 'default' position under EU law[326]) or where the harmonisation at EU level in this respect is limited (which is mostly the case here[327]).[328] The fundamental requirement of uniform *application* therefore not necessarily involves (fully) uniform *enforcement* at national level.[329] In relation to (private) enforcement-related matters a certain degree of diversity can, and often must, be accepted. As Advocate General Reischl observed in 1980, the fact that "*the legal position of the individual may […] differ in the various Member States is simply a consequence of the implementation of [EU] law by the Member States, which is accepted by the [EU] legal system*".[330] There can be no doubt that EU law has since further evolved. But as a general rule it would seem to be no less true today.[331]

322 Cf. CoJ case C-412/97, *ED*, para. 11. See e.g. also CoJ case 811/79, *Ariete*, para. 16. See also Dougan (2004), pp. 23 and 100; Van Dam (2006), pp. 133-138; Study Cauffman, Faure & Hartlief (2009), p. 308.

323 Cf. Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 41. Here it is said that "*[e]ffective redress, fair competition and the proper functioning of the internal market would […] require comparable exposure to damages claims, which can be brought about only by similar procedural rules governing actions for damages*". This also seems a rather broad and abstract claim, even if here it evidently relates only to national rules relating to EU (and in some cases national) competition law.

324 Cf. CoJ case C-60/03, *Wolff and Müller*, para. 36-37.

325 E.g. CoJ joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, para. 26.

326 See section 2.2 above.

327 See subsection 10.1.3 vabove.

328 E.g. CoJ joined cases 205/82 to 215/82, *Deutsche Milchkontor*, par. 21; CoJ case C-570/08, *Simvoulio*, para. 37.

329 Cf. Micklitz (2012), p. 395.

330 Opinion AG Reischl case 61/79, *Denkavit*, p. 1233.

331 Cf. Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 45.

It has also been observed that the Court of Justice does not regard uniformity as an all-embracing principle which does not allow for any national differences. Advocate General Van Gerven (writing extra-judicially) noted that "*the requirement of universal application is fundamental, but does not override other principles, such as, in particular, the principle of the Member States' competence in 'procedural' matters*".[332] More specifically in relation to EU legislative measures, he added that: "*[w]ithin the EU, uniformity of laws, or even far-reaching harmonisation, must not be an objective in itself, as it is not of itself a higher good than diversity. The diversity between the legal families within the EU is so huge (not only with regard to content but also, and even more so, with regard to style and mentalities), and the task to achieve unity so daunting and time and resources-consuming, that unification and harmonisation should occur only when there is a good justification for it*".[333] It has also been noted in this respect that the degree of EU involvement with substantive law can vary significantly from one field to another. This, in turn, might well be seen as a reason for "*selectively matching the required level of remedial-procedural harmonisation to the actual degree of substantive approximation achieved within any given policy area*".[334]

A certain degree of increased uniformity may therefore well be the *consequence* of the adoption of EU legislation of the type assessed in this study, but it is not its (primary) *purpose*.[335] Some may see the resulting state of affairs as objectionable, whereas others may deem it entirely appropriate. The key point here is however that this is principally looked upon in a 'neutral' manner as a matter of EU law in the sense that, in and by itself, a quest for uniformity cannot be a basis for the EU to act in this regard. For that to be the case a sufficient legal basis in the EU Treaties is required. Indeed, whereas increased uniformity across the EU may be likely to be beneficial for the enforcement of rights vested in EU law by private parties, it cannot readily be assumed that, conversely, a degree of diversity in the applicable national rules as such leads to weak private enforcement.[336]

432. Finally, there is the question whether *Article 81 TFEU* concerning judicial cooperation in civil matters could lead to a different assessment. It has already been seen that questions relating to this article have occasionally been voiced in relation to the EU legislation at issue.[337] Moreover over the past decade or so, an increasing body of secondary EU law has been adopted on the basis of this article. This latter legislation is mostly of an 'international private law-type', but it also goes further by addressing various specific procedural issues.[338] Of particular relevance here is that Article

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332 Van Gerven (2000), p. 505. See also Dougan (2002), p. 162, where it is held that uniformity is neither a general principle nor a primary goal of the EU legal order.
333 Van Gerven (2008b), p. 409.
334 Dougan (2002), p. 162. See also Dougan (2004).
335 Cf. Prechal (2005), p. 178.
336 Cf. Milutinovic (2010), p. 97.
337 See para. 384 above.
338 See para. 14 above.

81 TFEU allows, among other things, for the adoption of EU legislative measures aimed at ensuring "*effective access to justice*" and at "*the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States*".[339] Both 'access to justice' and the 'proper functioning of civil proceedings' are – or at least can be – rather broad concepts. This suggests that a range of legislative private enforcement-related measures could conceivably be adopted under these banners.[340] This legal basis moreover inherently deals with procedural issues. It is therefore not 'subsidiary' in nature. Indeed, it can be said that, more generally, developments in relation to the EU's 'area of freedom, security and justice' mean that it "*reaches beyond economic integration and disconnects individually enforceable rights from the market logic*".[341] In short, Article 81 TFEU undeniable has potential as a possible legal basis for broader EU legislative measures on many of the issues under consideration here.[342]

Yet as it stands this provision contains also several important limitations. It includes an *internal market requirement* of its own, which is however formulated somewhat loosely as compared both to its formulation as it stood before the Treaty of Lisbon and to Article 114 TFEU.[343] More important therefore seems the requirement that the measures to be adopted on this basis must concern matters having *cross-border implications*.[344] This requirement relating to cross-border situations has been particularly contentious in the past years. The Commission has sought to interpret it in an extensive manner.[345] However especially the Council has consistently rejected any interpretation other than that this requirement excludes situations internal to a Member State from the scope of the intended EU legal act.[346] A further limitation is that the measures adopted under Article 81 TFEU must be lim-

339 Art. 81(2) TFEU, points (e) and (f) respectively. Note that the above reference to effective access to justice was only introduced recently, through the Treaty of Lisbon.

340 In a similar sense, see Lindholm (2011), p. 470. Legal Aid Directive 2003/8 has e.g. been adopted on the basis of (what is now) Article 81(2)(f) TFEU.

341 Micklitz (2012), p. 370 (in relation to the CoJ case law on citizenship).

342 Cf. Tulibacka (2009), p. 1561; Dougan (2011), pp. 436-437; Kuipers (2011), p. 545; Leskinen (2011), p. 114; Van Schagen (2012), p. 37.

343 Art. 81(2) TFEU. Here it is stated here that the measures in question shall be adopted "*particularly when necessary for the proper functioning of the internal market*". The use of the word "*particularly*" suggests that this is not necessarily the case. Before the entry into force of the Treaty of Lisbon, it read "*in so far as necessary*" for the proper functioning of the internal market. On this requirement and its relation to Art. 114 TFEU, see further Bariatti (2011), pp. 23-25; Stuyck (2011), pp. 527-528.

344 Art. 81(1) TFEU.

345 Most notably in its 2005 proposal for Small Claims Regulation 861/2007 the Commission argued that "*procedural law by its nature may have cross-border implications*" and that "*[a] measure which is necessary for the proper functioning of the internal market has necessarily cross-border implications*". On this reading the 'internal market requirement' and the 'cross-border requirement' would thus basically coincide. See Commission, Proposal for Small Claims Regulation 861/2007, COM(2005) 87, p. 6.

346 See further e.g. Storskrubb (2008), pp. 42, 173-174, 185, 206-207 and 220-221; Stuyck (2009), p. 67; Tulibacka (2009), pp. 1562-1563; Bariatti (2011), pp. 29-30.

ited to cooperation in *civil* matters. Rules regarding proceedings under administrative law – which can be of relevance for instance in relation to infringements of EU public procurement or consumer protection law[347] – are thus excluded. Where it refers to civil *procedure*, it also seems doubtful that in this context the term 'procedure' is to be interpreted in an equally broad manner as the term 'procedural' when used in relation to the principle of national procedural autonomy.[348] Finally, certain Member States '*opted out*' from this part of the EU Treaties, meaning that they are not (necessarily) bound by any of the measures adopted on this basis.[349]

All in all it thus appears that, despite its apparent potential and the scope for possible future developments in this domain, as it stands Article 81 TFEU does not allow either for an approach whereby all aforementioned concerns related to fragmentation and coherence emerging in a private enforcement context are a thing of the past.

### *10.4.4. Summary*

433. The EU legislation facilitating the private enforcement of EU law considered in this study leads to concerns of coherence and fragmentation of various kinds. Seen from the perspective of EU law, these concerns come in two forms. First, there is the issue of consistency between the various EU legal acts in terms of underlying principles, conceptual approach and drafting. Even if the EU's typical sector-based approach and the realities of day-to-day Brussels law-making may not make this easy, more can and should be expected in this regard from the Commission and the EU legislature. Second, there is the question why certain fields of law are singled out for special treatment in the form of the adoption of private enforcement-facilitating EU legislation, while others are not. It is suggested that, contrary to what is the case at present, the choices made in this respect should be made explicit and be properly explained. That applies all the more so because EU harmonisation measures of the type at issue here tend to lead to a loss of internal coherence for the domestic legal systems of the Member States. The affected national rules often not only reflect legitimate preferences and serve a valuable function, but are also meant to apply across the board, i.e. irrespective of the nature or origin of the provision of substantive law that the applicant invokes. While none of this needs to prevent the EU legislature from acting on private enforcement-related matters, it is submitted that these considerations nonetheless merit being given appropriate weight. At the same time, as the law stands, the manner in which powers have been conferred on the EU would appear to make the adoption of EU legislation that applies itself across the board to all sorts of infringements highly unlikely, if not impossible. Potential legal bases, such as Article 114 TFEU on the

347 See in particular subsection 9.2.1 above.
348 See para. 32 above.
349 Namely Denmark, Ireland and the UK. See Protocols No 21 and 22 to the EU Treaties.

internal market and Article 81 TFEU on judicial cooperation in civil matters, may have been drafted in a relatively broad terms, they nonetheless have certain important limits. In that sense a certain degree of incoherence and fragmentation seems unavoidable in connection to the establishment of EU legislation facilitating the private enforcement of EU law.

# 11. Two perspectives on private enforcement

In the introduction to this study it was explained that one of the objectives is to come to a profound understanding of EU legislation facilitating the private enforcement of EU law of the type under consideration here. To this end the present penultimate chapter seeks to 'take a step back' and assess the concept of private enforcement generally and EU legislation thereon specifically at a more fundamental level. It does so from two different angles. The first section below focuses on considerations related to effectiveness. While it has already been seen that ensuring effectiveness is an important 'driver' behind the EU legislation at issue, it is shown below that the concept of effectiveness in EU law is neither unambiguous nor unproblematic for the present purposes. The second section of this chapter subsequently asses this legislation from the perspective of the 'horizontalisation' of the enforcement of EU law. There it is explained what is meant by this term and what its implications are, particularly at the practical level and in as far as the various relevant fundamental rights protected in the EU legal order are concerned.

## 11.1. The effectiveness perspective

Considerations related to effectiveness lay in many ways at the heart of the issues discussed in the foregoing chapters. It is explained below that in this context a distinction can be made between two different 'expressions' of the principle of effectiveness as it exists in EU law. They often coincide and reinforce each other, but that is not always the case. It is further demonstrated that tensions, if not outright conflicts, can and do exist between these two forms of effectiveness where the private enforcement of EU law is concerned. On that basis, three additional remarks are made.

### *11.1.1. Two expressions of effectiveness*

434. In the foregoing many references have been made to considerations of *effectiveness*. Most notably considerations of this kind have been identified as central elements in justifying the EU legislation considered in part B of this study.[1] This is consistent with the crucial role that effectiveness-related

1 See in particular para. 383 above.

considerations tend to play in underpinning the key legal doctrines of EU law regarding the enforcement of EU law at national level. The clearest example may be the principle of effectiveness, as articulated in the *Rewe* case law, pursuant to which, as regards matters falling within their procedural autonomy, Member States may not make it impossible or excessively difficult for private parties to exercise their rights conferred by EU law.[2] Effectiveness is obviously also a consideration that is central to the principle of effective judicial protection, laid down in Article 47 Charter.[3] Considerations of effectiveness moreover underpin landmark rulings concerning matters of public and private enforcement before the courts of the Member States, such as *Greek Maize* (as regards penalties for infringements of EU law), *Simmenthal* (as regards the setting aside of national law that infringes EU law), *Francovich* (as regards the principle of Member State liability for infringements of EU law) and *Courage* and *Muñoz* (as regards the liability of private party for infringements of EU law).[4]

435. There can therefore be little doubt as to the crucial importance of considerations of effectiveness when discussing the topic of private enforcement of EU law. Yet it is all very well to speak of 'effectiveness' generally, but this is of limited importance if one does not answer the question effectiveness *of what* precisely.

The case law of the Court of Justice in this respect has been said to be "*strewn with intermittent and inconsistent references to 'effectiveness', 'effective protection' and 'effective judicial protection'*".[5] Others have criticized the Court for its "*almost chronic inability to adhere to any consistent legal terminology*" whether matters of effectiveness are concerned.[6] Largely as a consequence the concept of 'effectiveness' in EU law has been described as "*multifunctional and double-edged*" and "*a handy device for best result instrumentalism*",[7] as a "*moving target*"[8] and as "*a kind of jack-in-the-box instrument*".[9] This suggests that in this context the concept of 'effectiveness' can be as hard to capture as it can be of crucial importance. For the present purposes it is nonetheless necessary to make a *distinction* in relation to the broader concept of effec-

2 See subsection 2.2.2 above.
3 See section 2.3 above.
4 CoJ case 68/88, *Commission v. Greece (Greek maize)*; CoJ case 106/77, *Simmenthal*; CoJ joined cases C-6/90 and C-9/90, *Francovich*; CoJ case C-453/99, *Courage*; CoJ case C-253/00, *Muñoz*. See further subsections 2.4.2, 5.2.2 and 2.5.3 above.
5 Drake (2006), pp. 843-844.
6 Oliver (2011), p. 2038.
7 Ross (2006), pp. 480 and 486.
8 Lindholm (2007), p. 297.
9 Micklitz (2012), p. 398.

tiveness, as it manifests itself in EU law. That distinction boils down to the following.[10]

On the one hand there are the situations where the (subjective) *right of a private party*, conferred by EU law, is the main interest that is being protected. This notion of effectiveness underlies, inherently, the principle of effective judicial protection, laid down in Article 47 Charter. It also largely corresponds with the principle of effectiveness, as developed in the aforementioned *Rewe* case law.[11] On the other hand there are situations where the emphasis is on the protection of the interests associated with the effective application and enforcement of (objective) *EU law per se*. This expression of effectiveness was particularly clearly articulated in *Simmenthal*, where the Court of Justice insisted on the need to ensure that rules of EU law have "*full force and effect*".[12] In this ruling it emphasised the 'constitutional' character of these considerations by noting the importance of safeguarding the effectiveness of the obligations of the Member States under the EU Treaties, so as not to "*imperil the very foundations of the [EU]*".[13] Similarly in *Courage* it was made clear that considerations of this kind can also be essential in relation to specific policy objectives that the rules of EU law at issue seek to achieve, *in casu* the full effectiveness of the EU competition rules.[14]

436. Before discussing the significance of drawing the above distinction in the following, two preliminary remarks should be made. To begin with, making a distinction such as the one referred to above inevitably involves a degree of *simplification*. In practice things are not always as clear-cut. This is at least in part due to the manner in which the Court of Justice tends to employ the concept of effectiveness; as was noted above, many have found clarity and consistency to be lacking. To give a concrete example, under the '*Rewe*-principle' of effectiveness the protection of rights that private parties derive from EU law not always takes centre stage. This principle occasionally 'transforms' into a requirement not to make the application and enforce-

10 Comparable distinctions have been made elsewhere. See e.g. Snyder (1993), p. 46 (who speaks of a 'bottom up' perspective providing judicial protection for the individual and a 'top down' perspective performing an essentially political function of social control); Prechal (2005), p. 304 (referring to 'the need for effective judicial protection' and 'the desire to give full effect to EU rules'); Nebbia (2008), pp. 28-34 (distinguishing between 'effective judicial protection' and 'effective enforcement'); Dougan (2011), p. 427 and 431 (distinguishing between 'the principle of effectiveness in its narrow *Rewe/Comet* sense' and 'independent manifestations of some broader concept of effectiveness', complemented by the principle of effective judicial protection as a 'distinct EU rights in and of itself'); Bobek (2012), p. 316 (referring to the 'protection of an individual' as compared to the 'protection of all individuals within the EU').

11 On the relationship between these two principles, see further para. 44 above.

12 CoJ case 106/77, *Simmenthal*, para. 22.

13 *Ibid*., para. 17-20.

14 CoJ case C-453/99, *Courage*, para. 25.

ment of EU law *per se* impossible or excessively difficult.[15] And while in *Simmenthal* the emphasis was placed on the abovementioned 'constitutional' considerations related to the effectiveness of EU law *per se*, this line of argumentation was nonetheless blended in that case with a rights-based narrative. For in that case the Court also noted that national courts must "*protect rights which the latter confers on individuals*".[16] More generally it should not be forgotten that the distinction between the individual and the general interest that underlies the abovementioned distinction is not a matter of black and white, but rather one of degree. For every legal rule and its correct application in an individual case can be considered to be in the general interest.[17] Conversely objective law will generally serve to give effect to the subjective entitlements of the parties concerned.[18]

That leads to the second remark. The two forms of effectiveness identified above are generally understood in the case law of the Court of Justice as vectors pointing in the same direction. In other words, these two expressions of effectiveness and the interests that underlie them often *coincide*. The Court's ruling in *Francovich* offers perhaps the best illustration. In that case it was held that the "*full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened*" if private parties were unable to obtain compensation in cases of infringements of EU law attributable to Member States.[19] Both the effective protection of the (subjective) rights of private parties and the effectiveness of (objective) EU law *per se* were thus seen as arguing in favour of acknowledging the existence of a principle of Member State liability. A similar logic is apparent for instance in *Courage* concerning the liability of private parties for breaches of EU law.[20] As construed by the Court of Justice, these two expressions of effectiveness are generally used in a "*two-fold sense*".[21] Put differently, they are of a "*dual*

15 Cf. e.g. CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 17 and 19; CoJ case C-443/03, *Leffler*, para. 49-52 and 65. See also CoJ case C-226/99, *Siples*, para. 17-20. By contrast, e.g. in CoJ case C-536/11, *Donau Chemie*, para. 27, both issues were kept expressly separate. For a view insisting on keeping the test applied under the '*Rewe*-principle' of effectiveness restricted to the enforcement of rights, rather than the enforcement of EU law *per se*, see Opinion AG Bot case C-455/06, *Heemskerk*, para. 121-130. Note that some argue that the '*Rewe*-principle' of effectiveness is, or should be, primarily concerned with the enforcement of (objective) EU law *per se*. See Dougan (2011), p. 425; Prechal & Widdershoven (2011), p. 31; Parret (2012), p. 159. It is however submitted that, as the law stands, this view seems difficult to maintain in light of the CoJ's case law, discussed in subsection 2.2.2 above.

16 CoJ case 106/77, *Simmenthal*, para. 21. See further para. 57 above.

17 Prechal (2005), p. 119.

18 Cf. e.g. Opinion AG Tesauro joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 32, where it is observed that the central value articulated in the *Francovich* ruling on Member State liability is the effectiveness of EU law "*and hence*" complete judicial protection.

19 CoJ joined cases C-6/90 and C-9/90, *Francovich*, para. 33.

20 CoJ case C-453/99, *Courage*, para. 25. See further para. 60 above.

21 Steiner (1995), p. 57.

*nature*".[22] As construed by the Court, the underlying concerns are thus intimately linked and in effect mostly treated as two sides of the same coin.[23]

### *11.1.2. From dual nature to dual vigilance*

437. The two expressions of effectiveness identified above may not only *coincide*, but often actually *reinforce* each other. That is already evident from the relevant case law. Let us return for instance to the aforementioned *Courage* ruling. Here the Court found not only that the full effectiveness of the rule of EU competition law at issue would be put at risk if it were not open for a private party to claim damages for loss caused by the infringement of that rule. It also highlighted that the existence of such a right for private parties would "*strengthen the working*" of that rule and would "*discourage infringements*" thereof, thus making a "*significant contribution to the maintenance of effective competition*" in the EU.[24] As has been noted with reference to *Courage*, "*[w]hile pursuing his private interest, a plaintiff in such proceedings contributes at the same time to the protection of the public interest*".[25] Comparable considerations are apparent in *Muñoz*, which was concerned with the enforcement of EU rules that set quality standards and encouraged fair competition in the agricultural field. There the Court held that civil proceedings to enforce the rights that can be derived from those rules "*strengthens [their] practical working*" and, as a supplement to the existing public enforcement mechanisms, "*helps to discourage practices […] which distort competition*".[26]

These cases thus echo the 'dual vigilance'[27] logic that was already apparent in the Court's 1963 ruling in *Van Gend en Loos*. As was noted at the outset of this study, in this latter case the Court held that "*[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted […] to the diligence of the Commission and the Member States*".[28] The thought that the general and the individual interest can coincide and that moreover legal actions brought by private parties in their individual interest can also contribute to reaching certain policy objectives in the general interest – as a matter of the 'dual vigilance'[29] exercised by those parties as well as the competent public enforcement authorities – has thus been crucial in underpinning the principle of direct effect and the private enforcement model that emerged on its basis.[30]

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22 Prechal (1998), p. 706.
23 Prechal (2005), pp. 132 and 215.
24 CoJ case C-453/99, *Courage*, para. 25-27.
25 EFTA Court case E-14/11, *Schenker*, para. 132.
26 CoJ case C-253/00, *Muñoz*, para. 31. See further para. 61 above.
27 Cf. Weatherill (2000), p. 92; Tridimas (2006), p. 546.
28 CoJ case 26/62, *Van Gend en Loos*, p. 13. See para. 1 above
29 Weatherill (2000), p. 92; Tridimas (2006), p. 546
30 See subsection 1.1.1 above.

438. It has already been seen that considerations related to effectiveness generally constitute a key underlying objective of the EU legislation assessed in part B of this study.[31] When assessed more in detail, it appears that this typically constitutes a *mix of considerations* related to ensuring the effectiveness of EU law *per se* on the one hand and the effective protection of the rights of private parties on the other hand. Where the emphasis is placed precisely can vary somewhat per directive concerned, but a common theme is always the 'dual vigilance' philosophy referred to above.

Of the legal acts under consideration the Procurement Remedies Directives are probably most outspoken in their desire to strengthen the compliance with – and thus the effectiveness of – the relevant rules of substantive EU law. In its proposal for the first of these two directives the Commission stated that the underlying aim was "*to ensure that the rules of public contracts are correctly applied*".[32] This objective is also reflected in these directives' recitals.[33] It has subsequently been echoed in the Court's case law, where the objective of these directives has been held to be "*to guarantee the existence of effective remedies for infringements of [EU] law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the [Substantive Procurement Directives]*".[34] The Consumer Injunctions Directive is also rather explicit in this respect, in particular where it is stated in the recitals that its aims to address concerns that "*the effectiveness of national measures transposing the [substantive consumer protection directives concerned] […] may be thwarted*".[35] Indeed, it is noticeable that neither the Procurement Remedies Directives nor the Consumer Injunctions Directive even addresses the issue of 'rights' of private parties expressly. They refer instead to infringements of the relevant substantive law generally.[36] By contrast especially the IPR Enforcement Directive places more emphasis on the protection of the rights of the private parties concerned. It aims to ensure a high level of protection for holders of intellectual property rights.[37] Yet also this directive makes it clear that this objective should be understood in light of the necessity "*to ensure that the substantive law on intellectual property […] is applied effectively*".[38]

31 See in particular para. 383 above.
32 Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 10. See further para. 72 above.
33 See in particular recital 2 Procurement Remedies Directives 89/665 and 92/13.
34 CoJ case C-406/08, *Uniplex*, para. 26. See further para. 74 above.
35 Recital 4 Consumer Injunctions Directive 2009/22. See further para. 155 above.
36 See para. 338 above.
37 See in particular recital 10 IPR Enforcement Directive 2004/48. See also CoJ case C-406/09, *Realchemie*, para. 49. See further para. 113 above.
38 Recital 3 IPR Enforcement Directive 2004/48. See also para. 110 above.

The Competition Damages Directive further illustrates how, over time, the emphasis can sometimes shift somewhat from one expression of effectiveness to the other.[39] In relation to this initiative the emphasis was initially largely on the 'general interest' function (deterrence, punishment) of damages claims that is associated with ensuring the effectiveness of the relevant EU rules *per se*. It was only subsequently that the 'private interest' function (compensation for loss and damage suffered by private parties) associated with the effective enforcement of rights of private parties conferred by those EU rules was articulated more forcefully.[40] All the same there can be no doubt that it is essentially the thought that the *combining* of both functions and the mutually reinforcing effect that can then emerge that underpins this initiative. As the Commission noted in its proposal for this directive, "*if the likelihood increases that infringers of Articles 101 and 102 [TFEU] have to bear the costs of their infringement, this will not only shift the costs away from the victims of the illegal behaviour, but will also be an incentive for better compliance with the EU competition rules*".[41] Against that background the proposal "*seeks to ensure the effective enforcement of the EU competition rules by […] ensuring that victims of the EU competition rules can obtain full compensation for the harm they suffered*".[42]

439. Traces of the duality referred to above can also be detected in several *specific provisions* of the EU legislation at issue. It is evident that many of those provisions serve, first and foremost, to facilitate the enforcement of the rights of the private parties concerned. These parties are for example the prime beneficiaries of the EU rules at issue on obtaining compensation in damages or injunctive relief.[43] Yet the 'general interest function' of private enforcement actions also comes to light here. Take again the IPR Enforcement Directive. This directive stipulates that the remedies and procedures provided for therein must be "*effective, proportionate and dissuasive*".[44] This is a phrase that is normally used in relation to the penalties for which the Member States must make provision as a matter of public enforcement of EU law.[45] Especially dissuasiveness – to which also the Procurement Rem-

39 It appears that there has been a (somewhat) comparable 'shift' where Procurement Remedies Directives 89/665 and 92/13 are concerned, in the sense that in this connection the objective of effective judicial of the private parties concerned has recently been given increased attention. See in particular recital 81 Concessions Awards Directive 2014/23, where it is explained that the scope of the Procurement Remedies Directives must be extended so as to cover also infringements of that directive, with reference to the need "*to ensure adequate judicial protection of candidates and tenderers in the concession award procedures, as well as to make effective the enforcement of this Directive*". On this amendment, see further para. 76 above.

40 See in particular para. 217 above.

41 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 4.

42 *Ibid*., pp. 2-3. See also recitals 3 and 4 Competition Damages Directive.

43 See sections 7.1 and 7.2 above respectively.

44 Art. 3(2) IPR Enforcement Directive 2004/48. See further para. 144 above.

45 See subsection 2.4.2 above.

edies Directives refer[46] – is something that is generally of little direct interest for a private party seeking to enforce its rights. It rather points to a desire for prevention, so as to ensure that the infringement will not occur again.[47] As such it is closely related to the interests associated with the effective enforcement of EU law *per se*. Something similar can be said of the publicity measures provided for in the IPR Enforcement Directive and in certain consumer protection directives, including the Consumer Injunctions Directive, which serves the dual purpose of informing the public at large and deterring infringers.[48] Deterrence is also closely related to the interests associated with the effective enforcement of EU law *per se*.[49] Another illustration is the Commission's express ambition to ensure that the Procurement Remedies Directives' provisions on damages serve as a "*genuine incentive to compliance*".[50]

The Court of Justice has further noted for instance that the injunctions and the contractual remedy provided for in the Unfair Terms Directive also serve purposes of deterrence and dissuasion.[51] And also elsewhere in EU law the Court regularly emphasises the deterrent effect of the civil law remedies, notably those set out in the Gender Equality Directive.[52] Similarly in relation to the Consumer Injunctions Directive the Commission has referred to injunctions as a "*tool for policing market*" and as a "*governance tool [which] can be used as a deterrent*".[53] A further illustration is the regular use of the term '*penalty*' in connection to the remedies set out in the EU legislation at issue in this study. This term is normally associated with general interests related to punishment and deterrence, and thus ensuring the effectiveness of the EU law *per se*, rather than the enforcement of a right of a private party.[54] The Commission has called the contractual remedy set out in the Unfair Terms Directive a "*civil* penalty".[55] The Court of Justice has similarly referred

46 See Art. 2(1)(c) and (5) Utilities Remedies Directive 92/13. This provisions offers the possibility, as an alternative for the setting aside of a decision taken in breach of the applicable procurement rules, to pay a particular sum set at a level high enough to 'dissuade' the contracting authority from committing or persisting in an infringement. See further para. 82 above.

47 Cf. Prechal (1997), p. 10.

48 Art. 15 IPR Enforcement Directive 2004/48; Art. 2(1)(b) Consumer Injunctions Directive 2009/22. See also Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(4) Misleading Advertising Directive 2006/114. See further subsection 8.2.4 above.

49 Cf. Hodges (2011), p. 438.

50 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 12-13.

51 As regards the said injunctions, see CoJ case C-372/99, *Commission v. Italy*, para. 15; CoJ case C-472/10, *Invitel*, para. 37; CoJ case C-470/12, *Pohotovost*, para. 44. As regards the said contractual remedy, see CoJ case C-618/10, *Banco Español de Crédito*, para. 69.

52 Art. 18 Gender Equality Directive 2006/54. See e.g. CoJ case 14/83, *Von Colson*, para. 23; CoJ case C-177/88, *Dekker*, para. 23-26; CoJ case C-54/07, *Feryn*, para. 38-39. See e.g. CoJ case C-174/12, *Hirmann*, para. 43.

53 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 7.

54 Cf. the third of the three 'Engel-criteria', referred to in para. 471 below. Cf. e.g. Opinion AG Sharpston case C-174/12, *Hirmann*, para. 47.

55 Commission, Report on Unfair Terms Directive 93/13, COM(2000) 248, p. 19.

to the remedies set out in the Procurement Remedies Directives as penalties.[56] More specifically in relation to the contractual remedy of ineffectiveness set out in these latter directives provision is made for 'alternative penalties'.[57] This term not only suggests a penalising element where this provision itself is concerned, the word 'alternative' also implies that the EU legislature saw this contractual remedy itself as a sort of penalty. Tellingly, in its proposal the Commission spoke in this connection of "*sanctions intended not to leave unpunished the conclusion of a contract*".[58] The term 'penalties' is also used in relation to provisions on civil liability in some other provisions of secondary EU law.[59]

440. The quest for effectiveness that underpins not only the relevant case law, but also the EU legislation at issue thus generally encompasses a desire to ensure the effective protection of rights of private parties vested in EU law and the effectiveness of EU law *per se*. The underlying idea is that these two expressions of effectiveness may not only coincide, but will normally also reinforce each other. Accordingly ensuring that a private party can effectively enforce its rights vested in EU law before a national court contributes not only to safeguarding the effective judicial protection of the private party concerned, but it also serves to ensure that EU law is effectively applied and enforced at national level. This insight in effect appears to constitute the *very essence* of the concept of private enforcement as it exists in the EU legal order.[60]

Although this study has not sought to quantify this, there seems generally little reason to doubt that the overall effect on both the individual interest of the private parties concerned and the general interest is often positive. In itself, the idea of private parties pursuing their own interests and, in so doing, also furthering the general interest is obviously attractive. It is moreover by no means unique to the present context. Adam Smith observed in 1776 that "*every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the pub-*

56 CoJ case C-315/01, *GAT*, para. 55.

57 Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13. See further para. 92 above.

58 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 18 (Art. 2f(4)).

59 See e.g. Art. 39 Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ 2005, L 309/15.

60 There is also a semantic side to this discussion. It has been argued that the term 'private enforcement' is semantically biased towards the idea of ensuring compliance with EU law *per se*, while terms such as 'claims for damages' or 'effective protection' connote more strongly with the idea of compensating a victim of a wrong and safeguarding his subjective rights. See Nebbia (2008), p. 24. See also Ottervanger (2014), pp. 18-19. Whereas this latter statement is undoubtedly correct, it is submitted that, in EU law generally, there is however not necessarily such a bias where the term 'private enforcement' is concerned. For this term leaves open the key question, namely *what* is being 'privately enforced': EU law *per se* or the rights that private parties derive therefrom?

*lic interest, nor knows how much he is promoting it. […] [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it*".[61] The adoption of EU legislation facilitating the private enforcement of EU law should perhaps be seen an instance where this famous 'invisible hand' becomes visible to some extent and is given a bit of guidance.

### *11.1.3. Tensions and potential conflicts*

441. On the basis of the foregoing one might be tempted to conclude that the individual and the general interests at stake when enforcing EU law before the national courts make a 'perfect match'. But situations can and do arise where the said interests underlying these two expressions of effectiveness *collide* rather than *collude*, or where there is at least a certain tension between them. Given the centrality of both expressions of effectiveness in private enforcement-related matters, this can lead to pressing questions of various sorts. That is illustrated by the following four examples.

442. First, such tensions and potential conflicts can emerge in relation to the question of how to deal with *leniency applicants* in relation to the private enforcement of EU competition law. The difficulties that can arise in this connection have already been discussed rather extensively in the foregoing, particularly where the possible disclosure of leniency applications and other relevant evidence in the file of a competition authority is concerned.[62] Suffice to note therefore that, seen from the perspective of an injured private party wishing to claim compensation, the disclosure of such documents could be highly beneficial, whereas too permissive disclosure rules are widely seen as putting at risk the effectiveness of the leniency programmes as a public enforcement instrument. As the Commission observed, "*the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement of the EU competition rules*".[63] After considerable debate, the EU legislature eventually cut the knot by opting for absolute protection from disclosure for certain documents (the 'black list'), temporal protection until the public enforcement proceedings are terminated for a larger category of documents (the 'grey list') and in principle disclosability for all other documents in a competition authority's file.[64] As was explained above, while there would appear to be good grounds to argue that in this man-

61 Adam Smith, cited in Cambell & Skinner (1976), p. 456.
62 See in particular subsections 6.2.4 and 6.3.3 above.
63 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 5.
64 Art. 5 and 6 Competition Damages Directive. See further para. 234-235 above.

ner a reasonable and tenable balance has been struck between the inherently conflicting interests at stake, some scope for discussion remains.[65]

A related issue arising is whether successful leniency applicants should be granted a 'rebate' on any damage claim brought against them. This was one of the options outlined in the Commission's 2005 green paper on actions for damages for competition law infringements.[66] This would clearly make the leniency programmes more attractive. But this would also be evidently at odds with the ambition to ensure full compensation for private parties that suffered harm as a consequence of such infringements. This option was therefore not retained in the subsequent white paper, which instead focused on a less far-going option, namely limiting the civil liability of successful leniency applicants to claims brought by their direct and indirect purchasers.[67] This means that, in cartel cases, the undertakings in question would not be jointly and severally liable for the entire damage caused. On the one hand such a rule makes it more difficult, but certainly not impossible for an injured party to obtain full compensation. On the other hand, in the absence of such a rule, these undertakings would be the most likely of all co-infringing undertakings to be addressed by a damages claim for the entire damage, which was seen as a threat to the attractiveness of the leniency programmes and a form of "*undue exposure to damages claims*".[68] For that reason this suggestion made its way into the Commission's proposal and subsequently also the Competition Damages Directive itself.[69] Illustrative of the effort to strike a balance between the various interests at stake is the addition of a rule pursuant to which the above limitation of joint and several liability does not apply where full compensation cannot be obtained from the co-infringing undertakings that did not obtain leniency.

443. Second, the distinction between the two expressions of effectiveness referred to above can have a bearing on discussions on how to assess the issue of *punitive damages*, i.e. damages awards that go beyond mere compensation of the harm suffered with a view to punishing and deterring infringers. Seen from an individual rights perspective there appears to be no justification for making provision for this type of damages. Full compensation of the loss or damage caused by the infringement is the general rule; no less,

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65 See para. 236 above.

66 Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 10. For a discussion of those options, see Milutinovic (2010), pp. 274-278.

67 Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, p. 10. See further Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 81-89.

68 See Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 16; recital 28 Competition Damages Directive.

69 Art. 11(3) Competition Damages Directive. See further para. 238 above.

but also not more.[70] But these aims of punishment and deterrence associated with punitive damages fit in well with a perspective whereby the main concern is the effectiveness of EU law *per se*. Which of these two perspectives is applied determines to a large extent the views on the appropriateness or desirability of punitive damages as a matter of EU law. Where the view is taken that compensation is not a sanction[71] and that deterrence and punishment is a task better left to public enforcement,[72] it logically follows that there is no place for punitive damages. However on the alternative view, whereby the effectiveness of EU law *per se* takes centre stage, there is a 'deficit' if damages are regarded as purely compensatory[73] and the idea of limiting damages to compensation of the harm suffered can be dismissed as "*formal(istic)*" and something that is to be abolished.[74] The tension between these two fundamentally differing views lies at the heart of the discussions referred to above on whether or not punitive damages are an appropriate private enforcement instrument to be provided for in secondary EU law.[75]

444. Third, take the topic of *out-of-court settlements*, reached either after a form of alternative dispute resolution or simply through negotiations between the parties concerned. At first sight it might appear that reaching such a settlement – as opposed to litigating a case until a final judgment is rendered – is both attractive for the private parties concerned and in the general interest. Both interests are after all generally served where disputes are terminated faster and with lower legal and administrative costs, as will typically be the case where disputes are settled. Several directives considered in part B therefore contain provisions that aim to facilitate pre-trial contacts between the parties to the dispute and to otherwise encourage out-of-court settlements between them.[76] It has already been noted however that these kinds of provisions can also have disadvantages, especially for the (potential) applicants.[77] One could think of delays and the associated risk of limitation periods expiring. In these cases the general interest may thus argue in favour of encouraging settlements, while the individual interests of the private parties concerned can point in a different direction. The latter interests can be safeguarded to some extent by taking specific legislative measures, such as the suspension of limitation periods for the duration of the settlement attempt. But this is unlikely to address all possible disadvantages, for instance in terms of additional costs and complexities or other negative consequences of the said delays.

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70 See subsection 7.1.5 above.
71 Van Gerven (2000), p. 530.
72 Wils (2009), p. 22.
73 Komninos (2008), p. 211.
74 Milutinovic (2010), p. 221.
75 See subsection 7.1.6 above.
76 See subsection 9.2.2 above.
77 See para. 366 above.

Where out-of-court settlements as such are concerned (as opposed to the rules encouraging them, referred to above), the situation can moreover be largely reverse. That is to say, then settling the dispute may be advantageous for the private parties concerned, while from the perspective of the effectiveness of EU law *per se* there may also be some notable disadvantages.[78] Settlements tend after all to be primarily based on considerations of convenience and not, or at least not necessarily, on considerations of legality or effectiveness of the law.[79] The private parties concerned typically simply seek to obtain the best possible deal. This means that there can be a real risk that they will settle a dispute in a manner that is not compatible with, for example, the applicable EU rules on public procurement or competition.[80] The foregoing evidently applies when the settlement is negotiated directly between the parties concerned, but it can also apply when it comes about after alternative dispute resolution. It is notable in this connection that 'alternative dispute resolvers' are not necessarily obliged to apply the law when solving the dispute at hand.[81] And when they do, it is not evident that they are always best placed to do so. For even where the amounts at issue may be small, the legal questions raised can be complex, while the option of referring preliminary questions to the Court of Justice to obtain guidance and ensure the uniform interpretation of EU law is in principle not available in those cases.[82] Settlements are further rarely published. They therefore do not contribute to the clarification and development of the law in the same manner as court judgments do.[83] Neither are they likely to have a (general) deterrent effect on infringers in such a case.

445. Finally, addressing the issue of *collective redress* can also involve tensions and trade-offs between the two aforementioned expressions of effectiveness and the interests that underlie them.[84] Take the Commission's Collective Redress Recommendation, adopted in 2013.[85] The stated main aim of this initiative is ensuring private parties' access to court and the effective

78 For a more detailed assessment from an economic perspective and for further references, see Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 138-150.

79 Cf. Jacobs & Deisenhofer (2003), p. 196 (see also p. 221).

80 See para. 102 and 248 above respectively. See also Hondius (2009), p. 242. Cf. also point 28 Collective Redress Recommendation 2013/396, discussed in para. 190 above, which calls for verification by a court of the legality of the binding outcome of a collective settlement.

81 Wagner (2014), p. 177 (concerning Consumer ADR Directive 2013/11, discussed in para. 194 above).

82 *Ibid*., pp. 178-179. See further para. 22 above.

83 Cf. Jacobs & Deisenhofer (2003), p. 196. See also para. 414 above.

84 Various proposals have been made in the legal literature with a view to finding the correct balance in this connection. See e.g. Cafaggi & Micklitz (2009), p. 444 (opt-in for private applicants and opt-out for public applicants); Micklitz, Reich & Rott (2009), p. 361 (opt-in for small claims, opt-out for bigger ones).

85 Collective Redress Recommendation 2013/396. See further section 5.5.1 above.

enforcement of their rights vested in EU law.[86] This thus suggests an approach concentrating on the enforcement of the right of the private parties concerned. However at the same time many of the arguments that have been put forward in this connection to justify the possible introduction of special rules on collective redress are of a 'general interest nature'. They relate for instance to contributing to the overall level of enforcement, the aggregate loss that 'scattered' damages can cause to society, procedural efficiency and the risk of abuse.[87] Indeed, the Commission's remark in 2011 that "*careful consideration must be given as to whether and in which area an EU initiative would bring added value for improving the enforcement of EU law*" suggests that it found ensuring the effectiveness of EU law *per se* at least equally important as the protection of rights of private parties.[88]

Once more the aforementioned distinction can have important consequences. Arguably only where 'scattered' damages are at stake (i.e. a situation where many parties each individually suffered relatively low amounts of damage resulting from the same or similar unlawful behaviour) can an enforcement of rights rationale convincingly be invoked for justifying the introduction of special rules on collective redress. In other cases of mass damages, i.e. where the damage suffered does result from the same or similar unlawful behaviour but where the damage of each individual party concerned is nonetheless significant, these parties normally have, each individually, a sufficient incentive to take legal action. The Commission's Collective Redress Recommendation is however not limited to such cases of 'scattered' damages.[89] In the said other cases rules on collective redress are first and foremost about ensuring efficient administration of justice.[90] This can of course also be a perfectly legitimate reason to enact legislation. However then it seems confusing or even misleading to justify suggestions to this effect in terms of access to justice and the enforcement of rights. This is of particular importance, given that identifying the objective at stake can be

86 See e.g. recital 10 and point 1 Collective Redress Recommendation 2013/396. See e.g. also Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 7; Commission, Communication towards a European horizontal framework for collective redress, COM(2013) 401, p. 2.

87 See e.g. Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, pp. 3 and 9; Commission, Communication towards a European horizontal framework for collective redress, COM(2013) 401, pp. 7 and 9.

88 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 5.

89 See the definition of 'mass harm situation' in point 3 Collective Redress Recommendation 2013/396. The Commission specifically referred to 'scattered low-value damage' in its earlier work on collective redress in a competition law context. However also in that case the argumentation brought forward seemed to blur points related to individual rights (access to court, right to compensation) and the effective enforcement of EU law *per se* (procedural economy, undesirability of illegal gains remaining in the hands of the infringer). See Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 15-16.

90 Cf. Stadler (2009), p. 307; Cupa (2012), p. 511.

crucial when assessing whether the EU has the required legal basis to act and if so, whether the principles of subsidiarity and proportionality are complied with.[91]

The same tension can come to light in relation to a specific collective redress-related issue, namely whether an 'opt-in' or 'opt-out' approach is preferable.[92] It is common ground that most private parties do not make the effort to opt-in to a collective redress scheme even where it is available.[93] Seen from a perspective that is primarily concerned with the enforcement of rights, this need not be overly problematic.[94] After all the principle of party autonomy implies that parties can also decide *not* to initiate legal proceedings, for example because they consider that the amounts at stake are not worth even the modest effort of opting-in. In such cases these parties' 'rational apathy' can seem very rational indeed.[95] As the Court of Justice held in another context, the effective protection of rights vested in EU law may find its limits in the "*total inertia*" of the private party concerned.[96] But legislative intervention may then still be required to safeguard the effectiveness of EU law *per se*. Scattered or not, collectively the negative effects of the infringements can still be very significant. Seen from this latter perspective the limited appeal of opt-in collective redress schemes may therefore well be seen as problematic and thus a reason to introduce opt-out mechanisms.[97] On that view an express opt-in requirement would "*hamper the effectiveness*

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91 Cf. e.g. points e) and f) of Art. 81(2) TFEU, discussed in para. 432 above. On issues of legal basis and the principles of subsidiarity and proportionality, see subsections 10.1.1 and 10.1.2 above respectively. E.g. where the effective enforcement of EU law *per se* is identified as the main objective at stake, then one might argue in favour of establishing or reinforcing *public* enforcement mechanisms. In a sense, public enforcement is after all the ultimate form of collective redress. Public enforcement might then well be seen as preferable to, and more proportionate than, meddling with the basic principles of the legal systems of the Member States (with respect to legal standing, the role of the courts, party autonomy, etc.) to facilitate collective redress in an attempt to achieve a result that seems inherently difficult to reach via civil law means. Cf. e.g. Frese (2011), p. 410.

92 In short, an 'opt-in' system implies that any party allegedly having suffered damage must explicitly indicate that it wishes to participate in the collective redress procedure, whereas under an 'opt-out' system consent is assumed and the party concerned has instead the opportunity to expressly indicate that it does not want to participate.

93 Study Civic Consulting (2008a), p. 9; Nazzini (2009), pp. 426-427; Miller (2009), p. 280; Tzakas (2011), p. 1136-1137; Buccirossi & Carpagnano (2013), p. 5; Van den Bergh (2013), p. 23; Jones (2014), p. 301.

94 In particular not where legal aid, specific small claim procedures and/or alternative dispute resolution mechanisms are available where necessary. It is submitted that the questions addressed above should be seen in the context on other measures of this kind that may serve to address similar shortcomings.

95 Cf. Eurobarometer, Consumer redress in the EU, August 2009, p. 12, where it is found that the majority of consumers prefer their small claims to be fully handled by a consumer organisation or a public enforcement authority. Collective alternative dispute resolution emerges as the second-best option. Only where higher value claims are at stake do consumers generally favour collective redress proper.

96 CoJ case C-40/08, *Asturcom*, para. 47.

97 Nazzini (2009), pp. 426-428; Andreangeli (2012), p. 529.

*and deterrent effect*"[98] of the collective redress scheme and has been said to be "*excessive and formalistic*".[99] And also the loss of influence of the individual parties concerned on the course of the litigation or the undermining of these parties' right to be heard under an opt-out collective redress scheme will then not be seen as much of a concern.[100] Yet what is excess and formalism to some, are to others constitutionally protected fundamental rights and reasons to reject opt-out schemes.[101] The latter occurred in Germany and Sweden.[102]

### *11.1.4. Three final remarks*

446. By means of a first final remark it is probably no exaggeration to say that in many respects the above discussions go to the *very heart of EU law*. Few will dispute that the finding in *Van Gend en Loos* in 1963 that EU law can confer rights directly upon private parties, enforceable before their national courts, laid the basis for "*one of the great achievements of EU law*".[103] In the words of Advocate General Jacobs (writing extra-judicially), this "*has clearly proved fundamental in creating the EU legal order and, indeed, in transforming the [EU Treaties] from a classical instrument of international law into (or towards) the constitution of a quasi-federal organism*".[104] Since then both the EU judiciary and the EU legislature have been rather "*generous*" in conferring rights to private parties.[105] Indeed, it has been held that the "*language of rights permeated every aspect of EU law*".[106]

This does not mean however that an 'individual rights perspective' necessarily prevails. The above remark by Advocate General Jacobs was followed by the observation that "*the Court's approach, historically at any rate, has not been to promote the rights of individuals for their own sake or as a matter of ideology; its approach has essentially been pragmatic and the recognition of individual rights has almost been instrumental, being seen as necessary to ensure the effectiveness of the legal order*".[107] In a similar vein, it has been held elsewhere that "*the case law suggests that the principle of full effectiveness of [EU] law is a*

98 Cf. Tzakas (2011), p. 1136.
99 *Ibid.*, p. 1137. See also Tzakas (2014), p. 236.
100 Stadler (2009), pp. 315 and 317.
101 See e.g. European Parliament, Study on collective redress in antitrust, June 2012, p. 65, where it is argued that a ('pure') opt-out system is incompatible with the fundamental right to a fair trial guaranteed under Art. 6 ECHR and Art. 47 Charter, discussed in section 2.3 above.
102 Stadler (2009), p. 317.
103 Reich (2010), p. 118. For a critique (but not a denial of the importance of this finding), see e.g. Lindholm (2007), p. 256.
104 Jacobs (2004b), p. 307. This statement was made in relation to direct effect, of which the conferment of rights upon private parties is a consequence (see p. 306). In a similar sense, see e.g. Weatherill (2000), p. 99-101; Drake (2005), p. 329.
105 Eilmansberger (2004), p. 1205.
106 Wakefield (2009), p. 410.
107 Jacobs (2004), p. 308.

*leading theme in the conferral on individuals of a right to damages for breach of [EU] law*".[108] Although there is certainly no consensus on this point,[109] many understand the Court's 'language of rights' primarily in such an 'instrumentalist' manner, meaning that the rights of private parties vested in EU law are, at least in part, instruments to help achieving the underlying objective of ensuring the effectiveness of EU law *per se*.[110] Put differently, in this latter view the 'ethos of individual rights' in EU law is little more than an "*inevitable by-product*" of the underlying quest to ensure the application and enforcement of EU law at the national level.[111] It then follows that, on this view, the private parties in question could and should be seen, first and foremost, as 'private policemen', 'private attorneys general' or 'law enforcers acting in the public interest'.[112] Contrary to what the Court's 'language of rights' might suggest at first sight, this reading would thus imply that the latter considerations take precedence in case of a conflict.

447. The second remark concerns the question what the *position of the Court of Justice* would be if and when it must choose between the rights of private parties vested in EU law and the effectiveness of this law *per se*. This has been described earlier as "*the real hard case*", whereby it is "*not easy to predict what the choice of the Court will be*".[113] Indeed, the existence of the diverging views outlined above can be seen as testimony to the ambiguity of the case law available to date and moreover the aforementioned tendency of the Court of Justice to underline the symmetry and the synergy between both interests at stake rather than to make an explicit choice between them. It consequently remains disputed whether, put simply, EU law serves individual rights, or these rights serve EU law.[114] While acknowledging the resulting uncertainty and the fact that this question is particularly hard to answer in the abstract, it is submitted here that a purely 'instrumentalist' view, whereby the interests associated with the enforcement of EU law *per se* would eventually take precedence where a choice is unavoidable, is unlikely to be upheld.

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108 Nazzini (2009), p. 405. See also Nazzini (2011), p. 131.

109 While recognising the importance that the CoJ often attaches to safeguarding the effectiveness of EU law *per se*, some consider that at least in certain cases "*the response of the Court suggests rather unambiguously that priority should be given to effective judicial protection*". See Nebbia (2008), p. 33. In a similar sense, see also e.g. Leczykiewicz (2010a), p. 282; Dougan (2011), pp. 425 and 431. For yet another approach, see e.g. Becker (2007), pp. 1051-1056.

110 E.g. Prechal (2005), p. 111: "*it is more often the case that full application of [EU] law provisions as such is what matters, as opposed to the protection of any specific rights*". In a similar sense, see e.g. Caranta 1995), p. 725; Kilpatrick (2000), p. 2; Geursen (2009), p. 136; Dougan (2011), p. 425; Micklitz (2011), p. 563.

111 Dougan (2004), p. 76.

112 See Drake (2006), p. 843; Kilpatrick (2000), p. 2; Gyselen (2001), p. 144 respectively.

113 Prechal (1997), p. 13.

114 Cf. Milutinovic (2010), p. 89.

This follows, in the first place, from a further assessment of the origin and purpose of the Court's frequent insistence on safeguarding the effectiveness of EU law *per se*. Court of Justice Judge Pescatore noted in this respect (writing extra-judicially) that "*[e]ffectiveness is the very soul of legal rules*". He explained this as follows: "*the purpose of any legal rule [...] is to achieve some practical aim and it would be running counter to its essential purpose if one handled it in such a way as to render it practically meaningless*".[115] This highlights that any such reference to effectiveness is, at least in its origin, an application of an *interpretative technique*.[116] This implies that the effectiveness of EU law is not an end in itself; the end in question depends on the content of the rule of EU law at issue. It is rather a means to an end, namely ensuring that that rule is meaningful in practice.[117] Against this background, it should come as no surprise that Advocate General Jacobs found on another occasion that "*the proper application of the law does not necessarily mean that there cannot be any limits on its application [but that] the interest in full application may need to be balanced against other considerations, such as legal certainty, sound administration of justice and the orderly and proper conduct of proceedings*".[118] As Judge Pescatore reminded us, the rule at issue should *not be meaningless* – but this is not quite the same as saying that it can never yield, to some extent, to another interest that is considered to be of fundamental importance.[119] Particularly if we add to this the abovementioned consistent emphasis placed by the Court of Justice on the conferral and effective protection of rights of private parties vested in EU law, including the rise to prominence of the principle of effective judicial protection,[120] the conclusion seems justified that a purely 'instrumentalist' interpretation is not (or, perhaps, no longer[121]) likely to be upheld.[122] In other words, as the law stands

115 Pescatore (1983), p. 177.

116 Tridimas (2006), p. 419. In a similar sense, see Jacobs (2004), p. 315; Prechal (2005), p. 219; Ross (2006), p. 497.

117 Van den Bogaert (2002), p. 136. See also Leczykiewicz (2010a), p. 274; Temple Lang (2008), p. 95. For a good example of the application of this interpretative technique, see CoJ case C-105/03, *Pupino*, para. 38 and 42.

118 Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 31. See also Jacobs (1997), pp. 26-27.

119 Cf. e.g. Opinion AG Léger case C-66/95, *Sutton*, para. 71: "*Thus, national rules clearly may not be applied in such a way as to wholly negate the exercise of a right based on [EU] law*".

120 On this principle, see further section 2.3 above. Broadly speaking, this rise went hand-in-hand with the expansion of EU competences beyond purely economic issues covering also matters such as social policy and consumer protection, as well as the creation of the concept of EU citizenship, which the CoJ has referred to as "*destined to be the fundamental status of nationals of the Member States*". See CoJ case C-184/99, *Grzelczyk*, para 31. Cf. Dougan (2004), pp. 75-82.

121 Note that the above citation by AG Jacobs referring to the CoJ's 'instrumentalist' approach was accompanied by the words "*historically at any rate*".

122 As a subsidiary point, it can also be noted that EU law allows for other means to protect the EU's interest, most notably through infringement proceedings *ex* Art. 258 TFEU (and, in competition cases, also public enforcement exercised by the Commission). See Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 26.

at present there seems to be no reason to presume *a priori* that the effectiveness of EU law *per se* must and will always prevail over the rights of private parties, should a conflict emerge.

It appears that, rather than establishing a clear hierarchy, the Court of Justice may well insist on *balancing* these two fundamental interests on a case-by-case basis. This was after all the essence of its approach in the aforementioned *Pfleiderer* case law.[123] There the Court had an opportunity to prioritise the interest related to the effective public enforcement of EU competition law (no access to leniency documents) over the interest related to the right to obtain full compensation of the private parties concerned (full and unconditional access to these documents), or *vice versa*. However it did not do so. It instead insisted on a case-by-case balancing of the interests at stake, without establishing a clear hierarchy between them. This case law moreover does not stand on its own. The Court seems inclined to follow a comparable approach, emphasising the need to find a balanced solution, also in other cases where it is confronted with (potentially) conflicting principles and interests of a fundamental nature. One example is the *Van Schijndel* case law, where the Court allowed in essence for a balancing of the interests of EU law and the protection of rights vested therein on the one hand and the basic principles of the legal systems of the Member States on the other hand.[124] The Court typically also insists on a balancing approach in cases where various fundamental rights of private parties are in conflict with each other, as was the case in *Promusicae*.[125] And it again did so in *Smidberger*, where the EU law provisions on the free movement of goods conflicted with the freedoms of expression and of assembly of certain private parties.[126] A further illustration is the *Atlanta* case law on the possibilities for national courts to grant interim relief with respect to the application of secondary EU law whose validity is in doubt.[127] In this context the Court of Justice has made the balancing between the interests of the EU related to ensuring the full effect of EU law on the one hand and the interests of the private parties at issue on the other hand an important condition.

It is of course true that the situations and the interests at stake in each of the abovementioned cases all differ to a greater or lesser extent. Still it is suggested that the positions are sufficiently comparable so as to be able to consider that also in the present context, as a general rule, the interests involved are essentially 'too fundamental' to be forced in a hierarchical relationship.[128] If this view is correct, this approach should arguably be seen as

123 CoJ case C-360/09, *Pfleiderer*. See further para. 221 above.

124 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 19. See further para. 39 above.

125 CoJ case C-275/06, *Promusicae*, para. 68. See further para. 124 above. See e.g. also CoJ case C-461/10, *Bonnier*, para. 56-60; CoJ case C-283/11, *Sky Österreich*, para. 59-60.

126 CoJ case C-112/00, *Smidberger*, para. 81. See e.g. also CoJ case C-438/05, *Viking Line*, para. 79.

127 CoJ case C-465/93, *Atlanta*, para. 42-44 and 50. See further para. 58 above.

128 Cf. Reich (2010), pp. 140-141.

a consequence of the increased maturity of EU law over time.[129] Now that EU law is established more firmly than in the early decades of the process of European integration, there may be less of a need to 'instrumentalise' concepts such as rights of private parties to ensure its effectiveness. It can then also more easily 'afford' giving way to other legitimate interests where appropriate, such as these very same rights.[130]

448. The third and last remark relates to the implications of the foregoing specifically for the *EU legislature*. The institutions involved in the EU's law-making process do not necessarily need to follow the same approach as the Court of Justice with respect to the issues discussed above. Indeed, the balancing and prioritising of the various interests at stake in a particular situation is the very essence of law-making (which in itself may be an additional argument why the Court could be expected to take a nuanced approach). Generally speaking, there is no rule of law that precludes the EU legislature from letting prevail what it sees as the general interest over the interests of certain private parties when regulating a particular situation, or *vice versa*. Of course in so doing the EU legislature must respect certain boundaries. These come in the form of procedure (e.g. consulting widely, stating reasons)[131] as well as substance (e.g. proportionality, fundamental rights).[132] Procedural requirements by definition do not amount to an absolute bar however. Moreover, where issues of substance are concerned, the EU legislature tends to enjoy broad discretion when making political, economic and social choices and complex assessments.[133] Subject to certain conditions, this may also involve restricting the exercise of fundamental rights of certain private parties.[134] The EU legislature therefore generally has not unrestricted, but nonetheless considerable freedom to legislate in a manner that it deems appropriate on the abovementioned matters involving tensions and conflicts between the two expressions of effectiveness that are of particular importance here. In other words, this is to a considerable extent a matter of policy choices.

Crucially the discussion in the foregoing subsections has highlighted the importance, when making these policy choices, of clearly identifying the objectives that the EU legislative initiative in question seeks to achieve and the effect that this has on establishing the approach to be followed. In particular, it has been illustrated how one's views on the objective that is primarily to be achieved determines to a high extent the answer to questions such as: whether and if so, to what extent and in what manner, leniency

129 For a detailed overview and discussion of the relevant developments over time, see Eilmansberger (2004), pp. 1201-1231. Cf. Tridimas (2001), p. 77.
130 Cf. Prechal (1998), p. 686; Bengoetxea (2008), p. 22.
131 See e.g. Art. 11(3) and 296 TFEU.
132 See subsection 9.2.2 above.
133 Cf. para. 389-390 above.
134 See para. 391 above.

applicants are to be shielded from private enforcement litigation; punitive damages are desirable or objectionable as a private enforcement instrument; out-of-court settlements between the private parties to an EU law-related dispute are to be encouraged or a reason for concern; and whether and if so, in which form collective redress mechanisms are to be provided for. These are issues that are of obvious importance when discussing EU legislation facilitating the private enforcement of EU law.

### *11.1.5. Summary*

449. Considerations of effectiveness are at the heart of most of the EU legislation relating to private enforcement analysed in this study. A distinction can be made between two expressions of the broader concept of effectiveness as it exists in EU law, namely one centred on the effective protection of the (subjective) rights of private parties and another one that focuses on the effective enforcement of (objective) EU law *per se*. Generally speaking, these two expressions tend not only to coincide, but also to reinforce each other. The resulting 'dual vigilance' logic lies at the heart of the concept of private enforcement. Yet in certain situations there can be tension, if not an outright conflict, between these two expressions and the interests that underlie them. These situations include discussions on the relationship between private enforcement and leniency programmes, punitive damages, out-of-court settlements and collective redress. The resulting question whether the interest associated with a private party enforcing its individual right or the interest associated with the effective enforcement of EU law *per se* should prevail is as fundamental as the said interests themselves. It appears that the Court of Justice, if and when confronted with this question, may well insist on the balancing of these interests, rather than establishing a clear hierarchy between them. Within certain boundaries (procedural requirements, proportionality, fundamental rights), the EU legislature is free to make its own policy choices in this respect. This can generally entail letting one interest prevail over the other. Yet it can still be of considerable importance in a law-making context to clearly identify which interest is being prioritised. For while these interests may often coincide, the choices made, the arguments underpinning them and the scope for the EU to act may well differ significantly depending on whether one seeks primarily to facilitate the enforcement of the rights of private parties vested in EU law or rather the enforcement of EU law *per se*.

## 11.2. The horizontalisation perspective

At the outset of this study it was recalled how the Court of Justice has made it clear that the EU legal order is essentially triangular in nature, meaning that EU law is not exclusively a matter between the Member States and the EU institutions, but that it can grant private parties a legal position of their

own right and that, driven by considerations of effectiveness, this has led to the creation and elaboration of a private enforcement model.[135] In this section the emphasis is on another aspect of this model. It builds on the point that over the years it has become clear that private parties can invoke their rights vested in EU law not only in 'vertical' legal relationships, i.e. *vis-à-vis* the Member States and the EU institutions, but also in 'horizontal' legal relationships, i.e. *vis-à-vis* other private parties. The present section thus looks at private enforcement from a 'horizontalisation' perspective. Below the main aspects of this development are first sketched in relation to EU law generally and the private enforcement of this law specifically. Attention then turns to the most important implications in terms of enforcement, costs, fears of a 'litigation culture' and situations where diffuse interests are at stake. Then the three main categories of hybrid enforcement are outlined, followed by an assessment of the fundamental rights-related implications.

### *11.2.1. The horizontalisation of EU law and its enforcement*

450. A first issue to be elaborated on when discussing the 'horizontalisation' of EU law is whether the provisions of EU law in question are capable of having *horizontal direct effect*, i.e. whether they can be relied upon directly in legal proceedings between two private parties. As was noted earlier, in this respect a distinction must be made between various instruments of EU law.[136] On the one hand provisions of the EU Treaties, regulations and decisions that are sufficiently clear and unconditional can be directly effective in horizontal legal relationships, whereas on the other hand the Court of Justice has consistently refused to construe *directives* as being capable of having such effect. In the case of directives, transposition by the Member States into national law is required before the rules in question can have direct legal effects between private parties. This latter limitation is obviously an important one in the present context. For one thing, the substantive EU law to which the legal acts discussed in part B of this study relate have often been laid down in directives. That is the case for substantive EU public procurement law, EU consumer protection law and in part also substantive EU intellectual property law.[137] By contrast another part of substantive EU intellectual property law has partially been laid down in regulations, whereas substantive EU competition law is founded in the EU Treaties, i.e. Articles 101 and 102 TFEU.[138] For another thing, all private enforcement facilitating legal acts at issue in this study are themselves directives. Transposition into

135 See subsection 1.1.1 above.
136 See para. 5 above.
137 See para. 69 (concerning public procurement law), 108 (concerning intellectual property law) and 151 (concerning consumer protection law) above.
138 See para. 108 (concerning intellectual property law) and 200-201 (concerning competition law) above.

national law by the Member States is thus required for them to have effect in disputes between two private parties.

At the same time the practical implications of this lack of horizontal direct effect of directives should probably not be overstated either. Although there is certainly scope for improvement, especially in terms of the speed with which transposition takes place, in the majority of cases Member States do transpose directives in a timely and adequate manner.[139] The private parties concerned can therefore normally invoke their rights vested in EU law also *vis-à-vis* other private parties, on the basis of the national laws transposing the directives in question. Moreover, even where transposition is late or inadequate, pursuant to the EU law principle of consistent interpretation national law must be interpreted in so far as possible in light of the wording and the purpose of the directives at issue.[140] In this manner a directive can thus still have important 'indirect' effects also in legal relationships between private parties.[141] Finally, in certain cases directives give expression to a general principle of EU law. Where national law is incompatible with that principle, it may still need to be disapplied also in disputes between two private parties.[142] Some understand this to boil down to all but the same thing as granting horizontal direct effect to directives.[143]

451. A second important issue is whether the provisions of EU law in question actually *confer rights* on which a private party can rely *vis-à-vis* another private party. As was explained earlier, the issues of direct effect and conferral of rights may often coincide, but they are not identical.[144] Whether a provision confers right on a given private party depends on its content. When the content of an EU law provision is such as to confer rights, and how that is to be determined, is regrettably not always entirely clear.[145] This does not appear to be overly problematic for the present purposes however. As has also already been seen, the substantive EU law the private enforcement of which the legal acts under consideration seek to facilitate generally confer rights on which private parties can rely, also against other private parties.[146]

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139 Cf. Commission, 30$_{th}$ Annual report on applying EU law (2012), COM(2013) 726, pp. 2-4.

140 See para. 5 above.

141 In addition a private party that suffers damage as a consequence of a lack of timely and adequate transposition of a directive can seek to obtain compensation from the Member State in question under the principle of Member State liability, discussed in para. 59 above.

142 See e.g. CoJ case C-555/07, *Kücükdeveci*, para. 50-51. For a case where the CoJ expressly refused to apply similar reasoning, see CoJ case C-176/12, *Association de médiation sociale*, para. 41-47.

143 E.g. Thüsing & Horler (2010), p. 1161. For a more nuanced analysis, see Peers (2010), p. 849. On the possible horizontal direct effects of general principles of EU law more generally, see further e.g. Groussot & Lindgard (2008), p. 173; De Mol (2010), p. 293; Hartkamp (2010), p. 250; Azoulai (2012), p. 215.

144 See para. 31 above.

145 See para. 21 above.

146 See in particular para. 338 above.

Indeed, if that were otherwise, there would be little point in adopting these acts in the first place. And also more generally EU law, as construed by the Court of Justice, tends to be rather 'generous' in conferring rights on private parties.[147]

This 'generosity' at times also extends to the related issue of the identification of the *addressee* of a particular provision of EU law. This determines who is bound by the obligation in question and consequently against whom the rights that private parties may be able to derive from that provision can be invoked. The most notable example is probably Article 157 TFEU relating to gender equality, in relation to which the Court of Justice has held that "*the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down*".[148] It added that the provision concerned applies not only to the action of public authorities, but also to agreements between private parties.[149] Although the case law is still evolving, the EU Treaties' provisions on the fundamental freedoms[150] are subject to a certain degree of 'horizontalisation' as well. It has become clear that, even if they are formally addressed only to the Member States, in certain situations private parties can rely on the rights that they derive from these provisions against parties that may be functionally rather closely related to the State, but that are nevertheless not themselves public authorities.[151]

452. Although there are various conditions and limitations, it has thus gradually become clear that private parties can in many instances invoke rights vested in EU law *vis-à-vis* other private parties. One can therefore speak of a perhaps not universal and unrestricted, but nonetheless clearly apparent development towards the '*horizontalisation*' of substantive EU law. In many ways the development of the concept of private enforcement of that law, both in the enforcement-related case law discussed in part A of this study and in the EU legislation on private enforcement discussed in part B, is an *expression and extension* of this development. Where substantive law is increasingly 'horizontalised', attention logically also turns to the remedies and procedures that seek to make the enforcement of the rights in question a realistic possibility. This is well illustrated by the aforementioned provision on gender equality, which was first substantially 'horizontalised', what in turn led to EU involvement – by its judiciary as well as by its legislature

147 See para. 338 and 446 above.
148 CoJ case 43/75, *Defrenne*, para. 31.
149 *Ibid*., para. 39.
150 Art. 34, 45, 49 and 56 TFEU.
151 See e.g. CoJ case C-438/05, *Viking Line*, para. 33; CoJ case C-171/11, *Fra.bo*. See further Van den Bogaert (2002), p. 123; Krenn (2012), p. 177; Van Harten & Nauta (2013), p. 677; Verbruggen (2014), p. 201. As follows from this case law and as is discussed in these contributions, as it stands, not all freedoms are treated in the same manner however.

– with the rules of national law relating to the enforcement of this provision.[152]

Accordingly it has been observed that a ruling such as *Muñoz* – where the Court of Justice held that national law cannot preclude the private parties concerned from relying, in a horizontal relationship, on the rules laid down in two EU regulations on common quality standards for certain agricultural products[153] – "*transposes the principle of horizontal direct effect to the procedural and remedial plain*".[154] Put differently, this case clarifies the practical consequences of that principle.[155] Similar observations have been made in a competition law context in relation to the Court's rulings in *BRT* and *Courage*.[156] The (nascent) principle of private party liability articulated in those cases can thus be seen as the corollary of the principle of direct effect and the granting of rights by EU law directly to private parties, which underlines once more that the legal order established under the EU Treaties is in many respects truly triangular in nature.[157]

Some caution is admittedly in place when drawing conclusions on the basis of the above case law. In *Muñoz* the rights in question derived from regulations. Similarly in *Courage*, where the same principle of private party liability for infringements of EU law was articulated, they derived from the EU Treaties, i.e. Article 101 TFEU. It therefore does not necessarily follow that this principle can also be applied to *directives*, which, as was recalled above, have no horizontal direct effect.[158] There seems no reason however to presume that in principle the same logic could not be applied to provisions of national law transposing a directive.[159] That is certainly the presumption underlying the EU legislation at issue in this study. After all, as was also noted above, in many instances this legislation seeks to facilitate the enforcement of rights vested in EU law taking the form directives. It may therefore be presumed that the said principle can apply in all situations where provisions of EU law that confer rights on private parties are allegedly infringed.[160]

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152 Resulting in what is now Gender Equality Directive 2006/54. See e.g. CoJ case 43/75, *Defrenne*, para. 40; CoJ case 14/83, *Van Colson*, para. 23-28.

153 CoJ case C-253/00, *Muñoz*. See further para. 61 above.

154 Tridimas (2006), p. 546.

155 Biondi (2003), p. 1243.

156 CoJ case 127/73, *BRT*; CoJ case C-453/99, *Courage*. See further para. 199 (concerning *BRT*) and para. 60 and 213 (concerning *Courage)* above. See Milutinovic (2014), p. 346.

157 Cf. Kelliher (2008), p. 7.

158 Tridimas (2006), p. 546.

159 Cf. Prechal (1997), p. 5; Betlem (2003), pp. 215-216.

160 In a similar sense, see e.g. Dougan (2004), p. 386; Drake (2006), pp. 858 and 861; Van Dam (2006), p. 345; Komninos (2008), pp. 176-179; Milutinovic (2010), p. 76. Cf. Ward (1998), p. 70. See also Opinion AG Geelhoed case C-253/00, *Muñoz*, para. 2-3. Tridimas (2006), p. 547, appears however to take the view that the scope of application of this principle is limited to the internal market.

453. More specifically, there can be little doubt that also the *secondary EU law* considered in part B of this study focuses primarily on the 'horizontalised' private enforcement of EU law. The legal acts assessed generally set out rules on remedies and procedures which can be relied upon by a private party in cases of alleged infringements of EU substantive law by another private party. In a typical case the infringements to be addressed in acts such as the IPR Enforcement Directive, the Consumer Injunctions Directive the Product Liability Directive and the Competition Damages Directive are committed by private parties.

There is one notable exception however. The Procurement Remedies Directives are typically concerned with private enforcement actions to be brought against (quasi-)public bodies and not against other private parties.[161] This exception serves to underline that the EU legislation facilitating private enforcement at issue may have *mostly* been designed to apply to disputes between two private parties, it does not *necessarily* remain limited to such situations. Put differently, this legislation can give effect not only to the principle of *private* party liability for infringements of EU law, but also that of *public* party (i.e. Member State) liability for such infringements.[162] It may in effect well be the other way round. *Van Gend en Loos*, where the Court of Justice laid the foundations for the private enforcement model, concerned a case brought by a private party against a public body.[163] Since then the Court's enforcement-related case law has evolved by first articulating the principle of Member State liability and only subsequently that of private party liability. Likewise, where secondary EU law on this subject-matter is concerned, it would seem that in some respects the Procurement Remedies Directives 'led the way' and subsequently 'spilled-over' from the vertical to the horizontal domain.

This distinction between vertical and horizontal situations is furthermore far from absolute. Private undertakings can in certain situations be bound by rules of substantive EU public procurement law as well, which implies that the Procurement Remedies Directives can also apply to disputes between two private parties.[164] Indeed, in some legal systems procurement law is in any case treated as a matter of civil law, given that the bodies in question act in a private rather than a public capacity in as far as they procure goods or services on the market.[165] Conversely it is not excluded that legal proceedings are brought under the IPR Enforcement Directive against a public body. After all public bodies can at times also infringe intellectual property rights. The same applies for the Competition Damages Directive, considering that public bodies can sometimes also be subject to (and there-

161 See in particular para. 69 above.
162 See also section 2.5 above.
163 CoJ case 26/62, *Van Gend en Loos*, p. 1. See further para. 1 above. The public body in question was the Netherlands Inland Revenue Administration.
164 See para. 78 above.
165 See para. 78 above.

fore be infringers of) the substantive EU competition rules to which this directive relates.[166] Indeed, these latter two directives could theoretically even apply to disputes between two public bodies, given that the latter can also be applicants in the cases covered by them.[167]

454. Especially the IPR Enforcement Directive takes this 'horizontalisation' again one step further in some respects. Under this directive certain *third parties* (i.e. private parties who are not themselves accused of having infringed any intellectual property right) can be required to disclose information on the origin and distribution network used for an alleged infringement of the relevant rules of EU law.[168] Covered by this provision are most notably intermediaries whose services were used by the alleged infringer. In addition this directive allows for injunctions being imposed on these third party-intermediaries.[169] In practice these obligations tend to play a particularly important role in the online sphere, for instance with respect to internet service providers. Bringing these third parties within the directive's scope has been justified essentially on the basis of their central role as 'gatekeepers' and the relevant information and means to act that they often possess. This is also one of the directive's most controversial aspects however. This has been called the 'privatisation' of enforcement, forcing these third parties to act as a sort of 'internet police'.[170]

The Court of Justice has highlighted certain limitations that are to be respected in connection to the abovementioned provisions of the IPR Enforcement Directive. These limitations relate in particular to the fundamental rights that may be at stake. Depending on the case at hand it concerns not the only fundamental rights of the persons that make use of the services provided by these intermediaries, such the right to protection of personal data and the freedom to receive and impart information, but also the freedom to conduct a business of the intermediaries themselves.[171] It is noticeable however that the Court has so far not expressed any principled objections against the involvement of these third parties as such. Quite to the contrary, it has interpreted the provision of the IPR Enforcement Directive on these injunctions extensively, by allowing this remedy to relate not only to past, but also to possible future infringements.[172] In relation to certain (on-line) copyrights infringements it has expressly held that "*intermediaries are, in many cases, best placed to bring such infringing activities to an end*".[173]

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166 See para. 199 above.
167 Cf. e.g. recital 12 Competition Damages Directive.
168 Art. 8 IPR Enforcement Directive 2004/48. See further para. 122 above.
169 Art. 9(1)(a) and 11 IPR Enforcement Directive 2004/48. See also Art. 8(3) Infosoc Directive 2001/29. See further para. 126 and 130 above.
170 See para. 124 above.
171 E.g. CoJ case C-70/10, *Scarlet Extended*, para. 46-52.
172 E.g. CoJ case C-324/09, *L'Oréal v. eBay*, para. 128-134. See further para. 131 above.
173 CoJ case C-314/12, *UPC Telekabel Wien*, para. 27 (relating to the injunctions referred to in Art. 8 Infosoc Directive 2001/29).

It is true that the abovementioned remedies that are available with respect to third parties under the IPR Enforcement Directive are rather limited in several respects. In terms of personal scope they remain limited to certain categories of third parties. In terms of substance they only concern the disclosure of information and the issuing of injunctions. The information to be disclosed is moreover specified in a rather narrow manner. The very existence of these provisions nonetheless illustrates how far the 'horizontalisation' of the enforcement of EU law can extend. And it is not inconceivable that this approach will be taken a step further in due time. Although there appear to be at present no specific plans to this effect, one could think of making other remedies, such as actions for damages, available also with respect to certain third parties implicated in infringements of EU law.[174] Apart from that this tendency to involve third parties in private enforcement proceedings already appears to be spreading to other sectors. Most notably also the Competition Damages Directive foresees the possibility of third parties being ordered to disclose evidence that may be of relevance in private enforcement proceedings.[175] Unlike under the IPR Enforcement Directive, this regime covers in principle all third parties that may have relevant evidence that lies within their control. Neither the evidence in question nor the third parties concerned are circumscribed in any detail, meaning that these parties are in fact treated hardly any differently than defendants.[176]

### *11.2.2. Private enforcement implications*

455. What does the foregoing mean in practical terms? When considering the implications of this 'horizontalisation' in terms of private enforcement, it is once more important to distinguish between the two different expressions of effectiveness identified in the foregoing.[177] In the first place, seen from an *individual rights perspective*, the implications seem quite straightforward. Generally speaking, the more the enforcement of EU law is 'horizontalised', the better the possibilities for private parties to enforce the rights that they derive from that law. 'Horizontalised' EU law may occasionally offer these parties an entirely new legal venue, as was the case for the private parties affected by the (alleged) infringement of the EU competition and agricultural rules at issue in *Courage* and *Muñoz* respectively.[178] More

174 Cf. Commission, Responses to the public consultation on the civil enforcement of intellectual property rights, July 2013, p. 17.

175 Art. 5 Competition Damages Directive. See further para. 234 above.

176 Only in the context of the proportionality assessment referred to in Art. 5(3) Competition Damages Directive is (limited) attention paid to the specific attention paid to the interests of third parties. There it is stipulated that the factors relating the scope and costs of the requested disclosure, as well as the protection of confidential information, apply "*especially for any third parties concerned*".

177 See in particular subsection 11.1.1 above.

178 CoJ case C-453/99, *Courage*; CoJ case C-253/00, *Muñoz*. See further para. 60-61 above.

often the improvement of the enforcement possibilities of the private parties concerned are however more gradual, for instance by clarifying specific matters such as the terms under which they are to be given access to evidence or can claim damages.[179]

The requirements in this respect that flow from secondary EU law can be rather modest in terms of the level of detail that they provide or the standard that they establish,[180] but it can nonetheless safely be assumed that no single Member State already complied with all remedial and procedural requirements discussed in the foregoing chapters before they were imposed on them by the EU legal acts under consideration. In most cases the Member States have thus been obliged to amend their respective national laws, at least to some extent. Overall the position of private parties wishing to bring a private enforcement claim has improved as a consequence. From this perspective the practical implications resulting from the EU legislative action at issue are thus generally to be assessed positively.

456. But there is also another side to this coin. The case law and the legislative measures discussed above typically enlighten the burden on the (potential) *applicant* in private enforcement proceedings. It is primarily this private party that benefits from the availability under EU law of remedies, such as actions for damages, contractual remedies, interim relief, the disclosure of evidence and recurring penalty payments.[181] The EU law provisions on procedural issues such as legal standing, forum, limitation periods and judicial review have mostly also been established with the interests of the applicants in mind.[182] Although, legally speaking, these provisions can affect all parties to the dispute, in practice they primarily benefit the applicants.[183] This raises the question of the position of the (potential) *defendant* in the disputes covered by the EU legislation at issue.

On the one hand it cannot be said that improving the legal position of the applicant in a horizontal context *necessarily* means that the defendant's position deteriorates in a manner that is to be deemed unfair or legally problematic. It is hard to see which legitimate reasons a defendant could invoke for arguing that he is unduly affected by EU legislative measures that seek for instance to safeguard and improve an applicant's access to court so as to

179 See subsections 8.2.2 and section 7.1.1 above respectively.

180 See in particular para. 394 above.

181 See sections 7.1 and 7.3 and subsections 8.2.1 and 8.2.3 above respectively.

182 See subsections 8.2.2, 8.2.3, 8.2.5 and 8.2.7 above respectively.

183 One of the few examples of a procedural provision that mitigates mostly in favour of the *defendant* is the rule on (very) short limitation periods for bringing actions under the Procurement Remedies Directives 89/665 and 92/13. It is noticeable that this rule has thus been laid down in the only acts under consideration that are not primarily concerned with enforcement in horizontal legal relationships, but where the typical defendant is a (semi-)public body. By contrast, e.g. under Art. 10 Competition Damages Directive, which regulates disputes between private parties, the rules on limitation periods mainly seeks to safeguard the interests of the applicants. See further section 9.1.3 above.

allow this party to obtain a fair, timely and legally enforceable ruling on the lawfulness of certain behaviour on the side of the defendant. Indeed, that can also be in the interest of the latter. In that sense there is no 'one-to-one' relationship between an improvement of the position of the applicant and a deterioration of that of the defendant. On the other hand it is striking however that in the present context at best very limited attention tends to be paid to the position of the latter. That applies all the more so because, at the stage when the relevant measures are applied for, it often still remains to be determined whether an infringement of EU law has actually been committed. In other words, at that stage one can often only speak of an *alleged* infringement of EU law. In a *vertical* context such a generally rather one-sided focus on improving the position of the applicant might normally not be much of a concern. In that case it may even be said to be perverse to pay too much attention to the position of the defendant, i.e. the State or one of its entities, as the latter is generally not considered to be in need of any special protection.[184] But this is considerably less evident in *horizontal* legal relationships, which disputes between two private parties that are as a general rule presumed to be equals.[185] Even when leaving the possible fundamental rights-related implications aside for now (which are discussed separately below[186]), the question can arise why certain measures are not made available to the defendant as well.

Take the IPR Enforcement Directive. Its provisions facilitate the enforcement of the various rights enjoyed by private parties that in relation to their intellectual property, whereas a party that wishes to *challenge* the existence or validity of such an intellectual property right cannot benefit from those provisions.[187] Furthermore, although both parties to the dispute may be able to rely on this directive's provision on the disclosure of evidence, the wording of its provisions on the *preservation* of evidence and on *obtaining information* from certain third parties seems to suggest that these measures are only available to the private party-applicant.[188] Yet also a private party-defendant may wish to make use of those measures so as to demonstrate that no intellectual property right has been infringed or that it was not involved in any such infringement. Turning to the Competition Damages Directive, this legal act regulates the effects of decisions by national competition authorities (and of the courts reviewing those decisions) in private enforcement proceedings only where it concerns findings of an *infringement*.[189] Although under EU law these authorities cannot establish that *no* infringement occurred, they may still find that there are no grounds for action on their

184 Cf. Himsworth (1997), p. 310; Dougan (2004), pp. 13-14.
185 Cf. Jacobs & Deisenhofer (2003), p. 205.
186 See in particular para. 468 below.
187 CoJ case C-180/11, *Bericap*, para. 77. See also CoJ case C-435/12, *ACI Adam*, para. 62.
188 Art. 6-8 IPR Enforcement Directive 2004/48. See further subsection 6.2.1 above.
189 Art. 9 Competition Damages Directive. See further para. 243 above.

part.[190] Or a review court might annul a decision by these authorities finding an infringement. A defendant in a private enforcement case may well wish to rely on decisions of this type. But this directive leaves their legal effects entirely unaddressed. Comparable questions can arise in relation to certain rules on the allocation of legal costs, particularly if they were to amount to one-way fee shifting.[191]

457. In the second place, an assessment of the implications is altogether rather different if we consider them from the perspective of ensuring the *effectiveness of EU law per se*.[192] Then the main consequence in practical terms of private parties being facilitated in bringing their actions for infringements of EU law before national courts is that this helps drawing *private resources* into the overall 'enforcement mix'.[193] Private parties that consider that they have a reasonable prospect of obtaining for instance an injunction or a damages award for infringements of EU law before their national courts can be expected to more closely monitor the behaviour of their (commercial) counterparts and initiate legal proceedings where they deem this necessary. This in turn should act as an incentive for the parties that are subject to these rules to improve compliance and avoid infringements. It has already been seen that this 'dual vigilance' logic was an important consideration when adopting the legislation assessed in part B.[194] The resulting beneficial effect in terms of overall compliance and enforcement can be particularly important, given that the resources available for public enforcement (where such mechanisms exist in the first place) are often limited, certainly in times of budgetary constraints.[195] But it would be wrong to see this as only a matter of financial means. In many cases private parties also possess considerable *expertise* and *inside-knowledge* of the practical workings of a given sector, which is certainly not always the case for public enforcement authorities. The latter may moreover not wish to pursue certain infringements, in light of their policy of prioritisation or under political influence. Constraints of this kind will normally not apply to private parties affected by infringements of EU law.

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190 Art. 5 Competition Regulation 1/2003. See e.g. CoJ case C-375/09, *Tele 2 Polska*, para. 19-30.

191 See subsection 8.2.5 above.

192 See further Benedict (1995), p. 250; Jacobs & Deisenhofer (2003), p. 191; Jones (2004), p. 21; Hodges (2006), p. 1395; Eilmansberger (2007), p. 443; Wils (2009), p. 6; Milutinovic (2010), pp. 17 and 352; Peyer (2011), p. 635; Canenbley & Steinvorth (2011), p. 321; Lock (2012), p. 1675; Whish & Bailey (2012), p. 295; Möschel (2013), pp. 4-6; Van den Bergh (2013), pp. 13-20.

193 Jones (2004), p. 21.

194 See in particular para. 383 and 438 above.

195 Cf. Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 11. See e.g. also Heads of the European competition authorities, Resolution on competition authorities in the EU: the continued need for effective institutions, 16 November 2010.

458. Seen from this latter perspective, a private enforcement model also has certain *important limitations* however. First and foremost, the (potential) private party-applicants inevitably act primarily in accordance with what they see as their *own interest*. These private parties decide for themselves if, when and how they wish to initiate legal proceedings. As the Court of Justice put it, "*in a civil suit, it is for the parties to take the initiative*", which "*reflects fundamental conceptions prevailing in most Member States as to the relations between the State and the individual*".[196] Indeed, notwithstanding certain differences and exceptions, national law on civil procedure has traditionally been based on the concept of party autonomy, which is reflected *inter alia* in the principle of judicial passivity.[197] This also implies that no party can be forced to initiate litigation when it does not want to do so.[198] Private parties will typically base their decisions in this regard on a cost/benefit analysis that takes account only of their own individual interests. No account is normally taken of broader considerations in the general interest, such as the overall benefits in terms of effective enforcement of the law or the optimal level of enforcement. In a competition case private enforcement can consequently easily lead to a focus on protecting the competitor, rather than competition as such.[199] This distinction is perhaps less clearly visible, but nonetheless not fundamentally different in the other fields of law under consideration.

The *investigative and evidence-gathering powers* of private parties are normally also rather limited.[200] As discussed above, especially the IPR Enforcement Directive and the Competition Damages Directive seek to address this issue by setting out specific disclosure regimes.[201] Yet there are still clear limits to the extent to which private parties are, and can be, granted such powers. That is the case essentially for the simple reason that they are private parties, which implies that granting them too far-going powers inevitably raises concerns in terms of risk of abuse, fairness and equality of arms.[202] These powers are therefore subject to a whole set of safeguards, including judicial oversight.[203] This latter safeguard implies that the powers in question are in fact attributed mainly to the national courts, rather than to the private parties concerned. In any case these powers tend to be more modest

196 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 21. See e.g. also Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 31.

197 Ebers (2010), p. 826. See also Opinion AG Jacobs joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 33-37.

198 Cf. Jacobs & Deisenhofer (2003), p. 191.

199 Cf. Hjelmeng (2013), pp. 1024 and 1032.

200 Cf. e.g. Whish (1994), p. 4; Wils (2003a), p. 480; Jones (2004), p. 17; Frese (2011), p. 410; Canenbley & Steinvorth (2011), p. 321.

201 See in particular subsection 8.2.2 above. Another example is the *ex parte* search order procedure, provided for in Art. 7 IPR Enforcement Directive 2004/48. See further para. 121 and 456 above and para. 471 below.

202 See para. 458 above and para. 468 below.

203 See para. 316 above.

than the powers attributed to the competent public enforcement authorities, even if the powers of the latter can differ significantly across the various field of law at issue.[204]

The above can obviously limit the effectiveness and deterrent effect of possible private enforcement actions – and therefore the effectiveness of a model that relies on 'regulation through litigation' as such.[205]

### *11.2.3. Costs, litigation culture and diffuse interests*

459. It was noted above that one of the attractions of facilitating private enforcement can be its role in increasing overall levels of enforcement, in light of the often limited resources of the relevant public enforcement authorities. It would be a mistake however to think that private enforcement actions of the type at issue do not also entail certain *costs*.[206]

The most visible costs relate directly to the litigation resulting from the legal claims the enforcement of which the legislation assessed in this study seeks to facilitate. This involves expenditure on the side of the national courts before which the proceedings are brought, as well as legal costs for the parties to the dispute.[207] But there can also be other costs that are sometimes less immediately apparent, such as costs related to 'over-deterrence'. Facilitating private enforcement actions may lead to a risk that potential defendants adapt their behaviour not so much because there is a clear cut case of them infringing EU law, but rather simply out of fear of being sued. A private party could for example decide not to bring an innovative product on the market for that reason. There can thus be a 'chilling effect'. A related matter is the possibility of strategic litigation and the harassment of innocent parties, known as 'nuisance cases'. For even when a legal action is unlikely to be successful, the mere fact that it is brought can be problematic for the defendant, for example due to the legal costs and other resources that the latter must spend on its defence or the reputational damage that may result from the mere fact that a case has been brought against it.

All this may lead to costs not only for the (potential) defendants in a private enforcement action, but also for society as a whole.[208] These negative effects are to some extent an inevitable by-product of any legal system that aims to offer effective judicial protection to private parties and to punish

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204 An obvious example of public enforcement authorities possessing far-going powers in this respect are competition authorities (see subsection 6.4.2 above). The powers of the competent authorities in fields such as public procurement law and consumer protection law are, certainly in as far as EU law is concerned, significantly more limited, but also in these cases they go beyond the investigative and evidence-gathering powers of private parties (see subsections 3.4.2 and 5.5.3 above respectively).

205 Cf. Hodges (2006), p. 1394.

206 See further e.g. Wils (2003a), pp. 479 and 484; Kur (2004), p. 829; Hodges (2006), p. 1395; Eilmansberger (2007), p. 459; Milutinovic (2010), pp. 16-17; Peyer (2011), pp. 635-641.

207 As regards the latter, see also subsection 8.2.5 above.

208 Cf. European Parliament, Study on collective redress in antitrust, June 2012, p. 41.

and deter infringers. But that should not distract from the fact that the more these latter objectives are pursued through particular legislative measures such as the ones at issue in this study, the bigger these risks generally become.

460. That brings us to the fears of a creating or encouraging what is often called a '*litigation culture*'. Concerns of this type have been expressed regularly in connection to private enforcement-related EU legislation, whether in the form of fears of 'cowboy tenderers' bringing 'nuisance cases' under the Procurement Remedies Directives,[209] a perceived risk of the Product Liability Directive leading to excessive litigation[210] or more general concerns about creating or encouraging such a culture through an EU initiative on collective redress or the private enforcement of EU competition law.[211] Reference is often made in this connection to the situation in the United States.[212]

The term 'litigation culture' refers, broadly speaking, to a situation where litigation between private parties takes place to a degree that is considered to be undesirable, harmful or even abusive.[213] Understood in this manner there are obviously few people who will argue in favour of creating or encouraging such a culture. This presumes that a clear dividing line can be drawn between an 'excessive' and a 'healthy' degree of litigation. Making such a distinction may be far from easy in practice however. Views on where this line is to be drawn tend to depend not only on whether or not the party concerned is likely to an applicant or a defendant in private enforcement proceedings, it also typically involves a value judgment of sorts. It may well vary for instance on whether the enforcement of EU law *per se* or safeguarding the rights of private parties is seen as the principal objective. In any case it is not difficult to spot the inherent tension between the ambition to see more private enforcement claims being brought and the desire to avoid a litigation culture. Indeed, the EU might not be able to have the cake and eat it too.[214]

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209 See para. 72 and 75 above.

210 See para. 174 and 179 above.

211 See para. 189 and 219 above respectively. See e.g. also Hodges (2006), p. 1398.

212 Cf. e.g. Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 9; European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, p. 2; Commission, Communication towards a European horizontal framework for collective redress, COM(2013) 401, p. 3.

213 Commission, Communication towards a European horizontal framework for collective redress, COM(2013) 401, p. 7: "*Litigation can be considered abusive when it is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them*". See also e.g. Garben (2013), pp. 42-43.

214 Cf. Keyte (2014), p. 203.

Having said that, there are good reasons to believe that, as matters stand at present, there is generally little risk of establishing such a litigation culture. To begin with, the impact of the relevant EU legislation in practice should probably generally not be overstated.[215] And even apart from that it is broadly agreed that the – presumed[216] – private enforcement-related excesses in the United States can mainly be explained by the availability of what the Commission has called a "*toxic cocktail*"[217] of rules on issues such as class action, punitive (treble) damages, intrusive pre-trial discovery and legal costs (contingency fees).[218] On none of these issues there are currently similar rules in place in the EU legal system, let alone that such rules would apply in combination.[219] It can further be noted that the said fears tend to arise especially in connection to the facilitation of actions for damages under EU law. However, despite the more recent increase observed in several fields, precisely these types of private enforcement actions remain for now typically rather scarce in practice, even where EU legislative action has been taken.[220] The Commission thus may well be correct in its assessment that, at present, undercompensation is generally more of a concern in the EU than possible overcompensation.[221]

Besides, if required, the EU legislature has several instruments at its disposal to help avoid creating situations that are deemed harmful and undesirable.[222] The Product Liability Directive offers one example in this regard, where it sets a financial threshold of € 500 for damages awards.[223] This threshold has been expressly designed to "*avoid litigation in an excessive number of cases*".[224] Even if this could conceivably be seen as objectionable especially from the perspective of a private party's right to full compensation, the Court of Justice has so far not expressed any principled objections in this

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215 See subsection 10.4.2 above.

216 Whether or not this perception actually rests on a realistic understanding of the US system is another matter. Micklitz (2011), p. 114, notes in relation collective redress that observations made in this regard tend to be based on the unquestioned assumption that the situations in the EU and the US are comparable and on rather superficial knowledge of the situation in the US. In a similar sense, see e.g. also Lande (2010), p. 11; Gavil (2014), p. 12.

217 Commission, Questions and answers regarding the green paper on consumer collective redress, MEMO/08/741, p. 4.

218 E.g. Commission, Green paper on consumer collective redress, COM(2008) 794, pp. 12-14; European Parliament, Study on collective redress in antitrust, June 2012, p. 11; recital 15 Collective Redress Recommendation 2013/396. See e.g. also Hodges (2011), pp. 438-439; Van den Bergh (2013), p. 13.

219 See subsections 5.5.1, 7.1.6, 8.2.2 and 8.2.5 above respectively.

220 See in particular para. 259 above.

221 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18.

222 More generally, in a different context the CoJ has made it clear that EU law cannot be relied upon for abusive or fraudulent ends. See e.g. CoJ case C-153/13, *SICES*, para. 29-34; CoJ joined cases C-58/13 and C-59/13, *Torresi*, para. 42-46.

223 Art. 9 Product Liability Directive 85/375. See further para. 179 above.

224 Recital 9 Product Liability Directive 85/374.

regard.[225] Another possible instrument is the regulation of legal costs, and in particular rules on their allocation between the parties to the dispute. Especially the 'loser pays' principle can and does act as a threshold against unmeritorious claims and excessive litigation.[226] A further example can be found in the IPR Enforcement Directive, which requires in general terms that safeguards against abuse are provided for.[227] The proposed trade secrets directive takes this one step further by providing for a rule to address "*intimidating or harassing*" litigation.[228] More limited but not dissimilarly, the Commission had proposed providing for penalties for cases of abuse relating to the rules on the disclosure of evidence laid down in the Competition Damages Directive, a suggestion that was however not retained by the EU legislature.[229]

461. Finally, it has been seen in the foregoing that the concept of a 'right' is an indispensable element for a private enforcement model to function, as it essentially links the relevant objective law to the subjective entitlement of a given private party.[230] However the interests that substantive EU law seeks to protect can sometimes be '*diffuse*' in nature and therefore hard to capture in terms of individual rights that private parties can derive from EU law.[231] One could think of EU environmental law, where legal protection "*generally serves not only the individual interest of claimants, but also, or even exclusively, the public*".[232] In those cases it may not always be evident that a private party-applicant has the required standing to initiate legal proceedings when it believes that an infringement occurred.[233] In other words, the issue here is not so much that the private parties concerned might be discouraged from bringing a legal action in light of potential drawbacks such as costs or other risks involved, but rather that there might be no such parties that are in a position to bring an action in the first place.[234] Where they cannot, the private parties' vigilance will be of no relevance in terms of private enforcement.

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225 CoJ case C-52/00, *Commission v. France*, para. 29-32; CoJ case C-154/00, *Commission v. Greece*, para. 29-32.

226 See para. 329 above.

227 Art. 3(2) IPR Enforcement Directive 2004/48. See further para. 144 above. See also subsection 9.2.5 above.

228 Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 19-20 (Art. 6(2)).

229 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 35 (Art. 8(1)(d)).

230 See in particular para. 338 and 451 above.

231 Even if there are certain similarities, this situation where the interests at stake are 'diffuse' is to be distinguished from the situation where substantive EU law grants 'individualisable' rights to private parties, but where these parties may not be inclined to enforce them for other reasons, such as the low monetary value of the issue at stake. The latter situation is discussed in the context of collective redress. See further subsection 5.5.1 above.

232 Opinion AG Kokott case C-260/11, *Edwards*, para. 40.

233 On legal standing, see also subsection 9.1.2 above.

234 Cf. Eliantonio (2014), pp. 259-260.

This particularity can be addressed, at least to some extent, by granting legal standing to certain third parties, such as non-governmental organisations that invoke the public rather than a strictly individual interest. As the Court of Justice noted in an environmental case, this can be seen as appropriate precisely because the rules of substantive EU law in question mostly address the public interest and not merely the protection of the interests of individual private parties as such.[235] Yet even where those organisations are entitled to initiate legal proceedings, and valuable as such actions may be, this still means that the group of potential applicants is significantly reduced as compared to a situation where in principle *any* interested private party affected by an infringement of EU law can bring a case. Indeed, it is debatable whether such 'general interest litigation' amounts to private enforcement at all.[236] It is at least not private enforcement in a 'pure' sense, given that the category of potential applicants is, by definition, limited to parties that seek to defend the public (or at least not only a strictly individual) interest. Certain private enforcement remedies, such as actions for damages, moreover seem less suitable in these cases. For where 'diffuse' interests are at stake, the damage caused by an infringement may not be 'individualisable' either.

A private enforcement model therefore generally does not seem particularly well suited for these situations.[237] Indeed, the EU legislature appears to be of the view that persons invoking a general or public interest (as taxpayers) can be prevented from relying on the remedies and procedural provisions set out in the Procurement Remedies Directives.[238] In such cases public enforcement may well be a more appropriate and effective means of enforcement. It is probably no coincidence that the Environmental Liability Directive does not provide for 'classical' liability in damages,[239] nor that it was precisely in this field that criminal sanctions were (controversially) introduced as a matter of EU law.[240] This points seems to be further underscored by the fact that alleged violations of EU environmental law top the list of fields about which private parties complain to the Commission, with

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235 CoJ case C-115/09, *Bund für Umwelt und Naturschutz Deutschland*, para. 46.

236 See para. 22 above for the definition of the term 'private enforcement' for the purposes of this study. The above arguably constitutes a form of 'hybrid' enforcement, as discussed in subsection 11.2.4 below. The legal systems of several Member States provide for certain forms of 'public interest litigation', whereby legal actions are brought by entities seeking to protect fragmented, diffuse or collective interests. See further e.g. Jacobs & Deisenhofer (2003), p. 192; Wilsher (2006), p. 34; Eliantonio (2014), pp. 260-261.

237 See further Weatherill (2000), p. 87; Micklitz (2011), p. 568.

238 Note that Cf. recital 122 New Public Sector Directive 2014/24; recital 128 New Utilities Procurement Directive 2014/25.

239 Environmental Liability Directive 2004/35. See also Art. 11 Environmental Impact Assessment Directive 2011/92, pursuant to which private parties are to be given access to review procedures for challenging the legality of decisions, acts or omissions subject to public participation under that directive. However this latter directive does not, in principle, confer a right to compensation in damages. See CoJ case C-420/11, *Leth*, para. 46-47.

240 See CoJ case C-176/03, *Commission v. Council*.

a view to the latter exercising its public enforcement powers under the EU Treaties.[241]

### *11.2.4. Hybrid enforcement*

462. The relationship between public and private enforcement has already been touched upon several times in the foregoing. There it has been made clear not only that both forms of enforcement can be complementary, but also that the existence of public enforcement mechanisms can influence the establishment of the private enforcement-related EU legislation assessed in this study.[242] At the same time public and private enforcement are largely unconnected in legal-procedural terms.[243] Certain *'hybrid' forms of enforcement*, which mix elements of both enforcement mechanisms, have nonetheless emerged in the EU legislation at hand, in Commission proposals and in the legal literature related thereto.[244] The following three main categories can be distinguished in this respect.

463. The first category concerns the granting of certain *quasi-public powers to private parties*. An example is the *ex parte* search order procedure found in the IPR Enforcement Directive.[245] Under this (optional) provision certain investigatory powers – notably to enter premises for the description or physical seizure of infringing goods, materials used for their production or documents relating thereto – can be granted to a private party, which this party can exercise in relation to another private party that allegedly infringed its intellectual property rights. It has been pointed out in the legal literature that this entails a remarkable measure of 'privatisation'.[246] Indeed, many Member States consider that this measure is more common in the context of criminal proceedings than for civil ones and therefore did not make use of this option offered under the directive.[247]

Another example is Article 27(4) ACTA. It will be recalled that ACTA is the international treaty that aimed to step up the fight against infringements of intellectual property rights worldwide, which the EU signed but eventu-

241 See Commission, 30$_{th}$ Annual report on applying EU law (2012), COM(2013) 726, p. 6. Cf. Rawlings (2000), p. 278. On these infringement proceedings, see further subsection 2.4.1 above.

242 See in particular subsection 10.2.2 above.

243 See also subsection 2.4.3 above.

244 The term 'hybrid enforcement' is used (only in relation to the 'qualified entity' approach, discussed below) by Culpa (2012), p. 528, with reference to Basedow (2010b), p. 16. See also Collins (2011), p. 460; Hodges (2011), p. 440.

245 Art. 7 IPR Enforcement Directive 2004/48. See further para. 121 above. See also para. 471 below.

246 Cornish, Llewelyn & Aplin (2010), pp. 89-90 (regarding the English law equivalent of this procedure).

247 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 9.

ally did not ratify.[248] The said provision essentially foresees the possibility of a court ordering an internet service provider to disclose, to the *rightholders*, information to identify the alleged infringer that uses the provider's services. This would arguably have entailed a further step in the abovementioned process of 'horizontalisation'. For, even if the Member States are in not necessarily *precluded* from providing for a possibility of disclosing this information in the context of legal proceedings between private parties under national law,[249] EU law itself currently foresees such disclosure only to *public authorities*.[250]

464. The second category of hybrid enforcement relates to the involvement of (quasi-)*public authorities in civil proceedings*. This involvement can for instance take the form of the Commission being involved in proceedings before national courts. Proposals to this effect were made at the time of the adoption of the two Procurement Remedies Directives in 1989 and 1992. There the Commission – unsuccessfully – suggested it being granted the power to intervene directly by submitting *amicus curiae* observations in national legal proceedings or by suspending on-going contract award procedures.[251] Years later a somewhat comparable arrangement did find its way into the Competition Regulation however. It entitles both the Commission and national competition authorities to submit, either upon request or on their own initiative, *amicus curiae* observations in legal proceedings before national courts. The Commission may do so whenever it considers that the coherent application of EU competition law so requires.[252]

Over and above this possibility, more recently the Competition Damages Directive set a few further steps in this direction. Under this directive the Commission or national competition authorities can intervene in pending private enforcement proceedings by submitting observations on the proportionality of a disclosure request concerning evidence included in the authority's file and by providing assistance on the determination of the quantum of damages.[253] It is noticeable that neither of these two provisions was included in the Commission's proposal. Interesting and comparatively innovative as these provisions may be, it remains for now to be seen what their effect will be in practice. This will largely depend on the authorities concerned, as in both cases they are *entitled*, but not *obliged* to do so (in the

248 See para. 118 above.
249 See CoJ case C-275/06, *Promusicae*, para. 58-69. See further para. 124 above.
250 Art. 15(2) E-Commerce Directive 2000/31.
251 See para. 104 above.
252 Art. 15 Competition Regulation 1/2003. See further para. 203 above.
253 Art. 6(11) and 17(3) Competition Damages Directive. See further para. 235 and 231 above respectively. Reference can further be made to the provisions on the effects of decisions by national competition authorities (and the courts reviewing these decisions) in private enforcement proceedings. See Art. 9 Competition Damages Directive, discussed in para. 243 above.

latter case subject to a request of the court seised).[254] More radical suggestions made in the legal literature were not taken over in this directive, such as to provide for the possibility of national competition authorities (or other public bodies) themselves bringing actions for damages before a national court in the general interest, so as to obtain compensation for the harm suffered by all consumers or by society as a whole.[255]

A somewhat distinct form of hybrid enforcement that also falls in this second category is litigation brought by 'qualified entities' under the Consumer Injunctions Directive.[256] This directive foresees certain private parties, notably consumer associations, being allowed to initiate legal proceedings with a view to bringing an infringement of EU consumer protection law to an end.[257] Strictly speaking, these parties do not exercise public powers.[258] Yet they still can be said to act in a quasi-public – or at least not in a fully 'private' – capacity. After all these qualified entities take legal action not in their own interest, but in the interest of all consumers collectively.[259] They moreover do so pursuant to some form of *ex ante* designation or approval by the Member State concerned, while in some jurisdictions these associations are also (co-)financed by public means.[260] After having initially contemplated following a similar approach with respect to collective redress for competition law infringements,[261] this has since become an important element of the Commission's more widely applicable Collective Redress Recommendation.[262]

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254 Where assistance on the quantification of the harm is concerned, the European Parliament had (unsuccessfully) argued for such an obligation. See European Parliament, Report on the proposal for the Competition Damages Directive, A7-0089/2014, p. 29 (Art. 16).

255 E.g. Milutinovic (2010), p. 135; Tzakas (2011), p. 1150. The suggestions described here are to be distinguished from the situation where a public authority claims compensation for injury that it suffered *itself* as a consequence of an infringement of EU law. In this latter case, the authority acts in a private capacity and will thus essentially be in the same position as any private party. Cf. e.g. CoJ case C-199/11, *Otis*. The actions referred to above would be similar to *parents patriae* actions now in several national jurisdictions, such as in France. See Komninos (2008), p. xv.

256 Art. 3 Consumer Injunctions Directive 2009/22. See further para. 154 above.

257 Another possibility under this directive is that certain public authorities (e.g. an ombudsman or a consumer protection authority) initiate the legal proceedings referred to here. In those cases this 'hybrid' approach falls in the first category, discussed above.

258 Cf. CoJ 1 case C-167/00, *Henkel*, para. 30.

259 See also para. 461 above with respect to actions by third parties where 'diffuse' interests are at stake.

260 See e.g. Rott (2001), pp. 418 (regarding Germany) and 430 (regarding England). In Italy provision is made for consumer associations being (co-)financed by the proceeds of fines imposed by the national competition authority. See Komninos (2008), p. 237.

261 See para. 218 and 220 above.

262 Points 4 and 6 Collective Redress Recommendation 2013/396. See further para. 190 above.

465. The third and last category of hybrid enforcement is essentially the mirror image of the previous one. Instead of introducing a quasi-public or public element in civil litigation, it concerns the introduction of a *'private' element in public enforcement* proceedings. Most notably in its 2006 proposal on criminal measures for infringements of intellectual property rights, which did not get adopted for reasons largely unrelated to this particular aspect of the proposal, the Commission suggested allowing rightholders to form 'joint investigation teams' with the competent national public enforcement authorities.[263] The involvement of the latter prevents this from being a proper 'privatisation' of typically public prerogatives. All the same, granting private parties such a formal and active role in criminal investigations would still have been a remarkable development. Elsewhere in EU law the term 'joint investigation teams' refers only to the cooperation between various *public* authorities.[264] This proposal would also have implied a significant step beyond the already existing cooperation arrangements between the private and public parties concerned as regards intellectual property-related customs matters, where private parties can (only) *request* the competent public authorities to take action.[265]

Other suggestions, made in the legal literature (typically relating to competition law infringements), seek to integrate damages claims in public enforcement proceedings.[266] This could involve private parties intervening in these proceedings, whereby they would be allowed to bring actions for damages in their own name. This connects with the possibility under the national laws of some Member States that allow private parties to benefit from the efforts made by the competent public enforcement authorities, for instance in criminal proceedings.[267] Alternatively it has been suggested that (part of) the proceeds of the fines imposed by the public authorities could be used to compensate the private parties that suffered harm as a consequence of the established infringement or that the granting of leniency would be made subject to compensation having been paid. Once more the 2014 Competition Damages Directive sets a step in this direction, as it provides that competition authorities may consider any compensation payments made as part of consensual settlements as a mitigating factor when setting the fines for the infringements at issue.[268] But again this step is a rather modest one, in that this concerns merely a (seemingly already existing) *possibility* and not

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263 Commission, Proposal for a directive on criminal measures for the enforcement of intellectual property rights, COM(2006) 168, p. 11 (Art. 7). See further para. 147 above.

264 See Framework Decision 2002/465/JHA on joint investigation teams, OJ 2002, L 162/1. See also Art. 88(2)(b) TFEU.

265 See in particular Customs Enforcement Regulation 608/2013, discussed in para. 117 above.

266 E.g. Van Gerven (2003b), p. 77; Wolf (2003), p. 423; Canenbley & Steinvorth (2011), pp. 324-326; Heinemann (2011), p. 225. These suggestions sometimes draw on the possibilities that exist in some national jurisdictions (e.g. in Germany) to integrate damages claims in criminal proceedings.

267 See e.g. Hodges (2013), p. 80.

268 Art. 18(4) Competition Damages Directive. See para. 245 above.

an *obligation* on those authorities. Also this provision did not feature in this Commission's proposal for this directive.

466. The above legislative provisions, proposals and academic suggestions have in common that they seek, in one way or another, to *bridge the divide* between public and private enforcement. They illustrate that hybrid solutions of various kinds are conceivable – and have to some extent also actually been enacted in EU law – to address specific enforcement-related concerns touched upon in the foregoing. On an optimistic reading, this indicates that (also) in procedural terms the division between these two forms of enforcement need not be absolute. With some creativity, optimal use can be made of the relative advantages that the public and private parties involved may offer in terms of enforcement of EU law and the rights that can be derived from that law. Through hybrid enforcement mechanisms of the type discussed above it may thus be possible to optimise the aforementioned 'enforcement mix'.

A less optimistic reading is also possible however. To begin with, it is clear that comparatively few of the hybrid enforcement arrangements outlined in the foregoing paragraphs are current law or even stand a reasonable chance of becoming law. And where this is otherwise, the provisions in question tend to be formulated in a rather non-committal manner. Particularly the measures of the first category referred to above (i.e. granting quasi-public powers to private parties) seem to generate resistance, as the controversy related to ACTA illustrates.[269] Moreover some of those suggestions can be understood not so much as creative solutions, but rather as testimony to the inherent limitations of a private enforcement model. For instance, if in respect of actions for damages the intervention by a public enforcement authority is structurally required for such actions to be dealt with successfully by national courts, this would seem to highlight the difficulties associated with these actions as much as it highlights their potential for private enforcement purposes.[270] Involving public enforcement authorities in private enforcement proceedings or conversely involving private parties in public enforcement proceedings may anyway not be a feasible option in many other fields than competition law, for the simple reason that no comparable public enforcement mechanisms exist. It further appears that also an approach relying on qualified entities has its shortcomings, for instance in terms of incentives and capacity to act, funding, possible principal/agent problems and the distribution of damages awards.[271] The more such short-

269 See para. 118 above. See also subsections 9.2.5 and 9.2.6 below for an assessment of this type of measures from a fundamental rights perspective.

270 On these difficulties, see also subsection 7.1.1 above.

271 See para. 159 above. See e.g. also Hodges (2006), p. 1388 and 1391; Leskinen (2011), p. 90; European Parliament, Study on collective redress in antitrust, June 2012, p. 40; Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 6. Cf. CoJ case C-413/12, *ACICL*, para. 37.

comings are addressed through increased public involvement with these entities (in terms of funding, oversight, etc.), the more the question can arise what the added-value is as compared to ('traditional') public enforcement.

In addition, seen from the perspective of the public enforcement authorities concerned, one of the key features of a private enforcement model is that it can *complement* public enforcement, and as such enlighten the burden on, and to some extent perhaps even replace, the competent public enforcement authorities in a given field. Blurring both forms of enforcement may well be seen as being at odds with that philosophy. To give a concrete example, there may well be better ways to contribute to the effective enforcement of the law than using the public enforcement authorities' scarce resources to quantify the harm suffered by a private party or to otherwise be involved in private enforcement litigation.[272] Indeed, the Commission stated in relation to its aforementioned possibility to make *amicus curiae* interventions in national legal proceedings that it has "*no intention to serve the private interests of the parties involved in the case pending before the national court*".[273] In other words, even if it had the necessary resources,[274] this public authority does not wish to "*transform into an investigator for the benefit of national litigation at the request of national courts*".[275] Accordingly the Commission had thus far used this possibility rather sparingly, seemingly to the disappointment of certain stakeholders.[276] This hesitance probably lies behind the fact that it was not the Commission that proposed the abovementioned provisions on possible interventions by competition authorities in private enforcement proceedings, just as it is reflected in the care that has been taken to emphasize in those provisions that the authorities concerned cannot be obliged to provide assistance. Indeed, even the mere possibility of having to disclose evidence in their files was seen as too much of a burden on these authorities, which can therefore be required only as a last resort.[277]

It therefore appears that, while there is evidently nothing against seeking to optimise the interaction between public and private enforcement also in procedural terms and some creativity and innovation may well be called for, there are principal as well as practical limits to what can be sensibly achieved by blurring the distinction between the two.

### *11.2.5. Fundamental rights (1): horizontal effects and 'civil' rights*

467. The 'horizontalisation' of the enforcement of EU law also raises issues with a fundamental rights dimension. As a first and general issue, there is the question whether the rights set out in the Charter can have horizontal

272 Cf. Study CEPS, Erasmus University Rotterdam & LUISS (2007), pp. 200-201.
273 Commission, Cooperation notice, OJ 2004, C 101/54, para. 19.
274 Which the Commission considers it has not, as reported in Hodges (2013), p. 73.
275 Statement by Commission officials, reported in Komninos (2003), p. xxx.
276 Commission, Report on Competition Regulation 1/2003, COM(2009) 206, pp. 8-9.
277 Art. 6(10) Competition Damages Directive. See further para. 235 above.

*direct* effect, i.e. be invoked directly in legal relationships between private parties. On this issue the case law is still evolving.[278] Some caution is therefore required. That said, the Charter is expressly addressed only to the institutions and other bodies of the EU, as well as to the Member States when they are implementing EU law.[279] It is moreover stipulated that the Charter does not extend the field of application of EU law, nor establish new powers or tasks for the EU.[280] Many commentators take the view that to consider that the provisions of the Charter are directly effective in horizontal relationships would in effect bypass these important delimitations and that therefore such effect should be considered excluded.[281]

Yet the foregoing does not mean, in any case, that the Charter is not of relevance in the horizontal legal relationships under consideration here. For one thing, where there is some form of involvement by public or quasi-public bodies, this can still be reason to apply the Charter directly to the case at hand. There may thus be some margin of interpretation when determining what constitutes precisely a 'horizontal' relationship.[282] For another thing, and more importantly for the present purposes, it is clear that the fundamental rights set out in the Charter can have *indirect* effects in such relationships.[283] In this regard the Court of Justice has held that "*the Member States must not only interpret their national law in a manner consistent with [EU] law, but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the [EU] legal order or with the other general principles of [EU] law*".[284] It has further ruled that "*under a general principle of interpretation, a [EU] measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter*".[285] Thus, as a particular form of the general EU law principle of

278 See e.g. CoJ case C-176/12, *Association de médiation sociale*, para. 40-48.

279 Art. 51(1) Charter. On the meaning of this term 'implementing' EU law, see para. 43 above.

280 Art. 51(2) Charter.

281 See e.g. Opinion AG Trstenjak case C-282/10, *Dominguez*, para. 80-83, and the references made there. See also Craig (2010), pp. 206-207; Leczykiewicz (2010b), p. 332; Ladenburger (2012), p. 35. Inclined to the same view, but somewhat more hesitant are Rosas & Armanti (2010), pp. 160-162. As regards the formal addressees of provisions of EU law, see however also CoJ case 43/75, *Defrenne*, para. 31, discussed in para. 451 above. Furthermore an open question remains to what extent the fundamental rights, in their capacity as general principles of EU law (see para. 42 above), could in some cases be applied in horizontal situations. On the horizontal direct effect of those principles, see para. 450 above. On these issues, also Nauta (2012), p. 19; Leczykiewicz (2013), p. 479.

282 For a range of such conceivable situations, see Rosas & Armanti (2010), pp. 160-162; Ladenburger (2012), pp. 35-37. See also Craig (2010), pp. 207-208.

283 Cf. Craig (2010), pp. 209-210; Ladenburger (2012), p. 16.

284 CoJ joined cases C-411/10 and C-493/10, *N.S.*, para. 77-78. See e.g. also CoJ case C-275/06, *Promusicae*, para. 68; CoJ case C-277/11, *M.M.*, para. 93; CoJ joined cases C-356/11 and C-357/11, *Maahanmuuttovirasto*, para. 78.

285 CoJ case C-579/12 RX-II, *Strack*, para. 40. See e.g. also CoJ case C-400/10 PPU, *McB.*, para. 52 and 60; CoJ case C-426/11, *Alemo-Herron*, para. 30.

consistent interpretation,[286] where relevant, provisions of both secondary EU law and national law implementing that law may need to be interpreted in a 'Charter-consistent' manner. Accordingly the case law of the Court of Justice offers several examples of instances where such provisions were interpreted in light of the principle of effective judicial protection, set out in Article 47 Charter.[287] Considering the importance of this principle in the present context, there may well be considerable scope to interpret the EU legislation at issue here in light of especially (but certainly not exclusively) this Charter provision.[288] It would appear however that also in this case the principle of consistent interpretation is limited, in that it cannot lead to an interpretation *contra legem*.[289]

468. In litigation between two private parties involving matters of EU law the Charter can also be of importance in other, more specific manners. Seen from the perspective of the State, the primary objective of the relevant (typically civil law) proceedings is to settle the dispute at hand in a fair manner, whereby the State and particularly the national courts normally remain neutral and passive.[290] Accordingly in terms of fundamental rights the focus is on ensuring that everyone can have a fair and public hearing within a reasonable time by an independent and impartial court, as is guaranteed under Article 47 Charter.[291] This involves among other things respect for the principle of *equality of arms*, which requires a fair balance between the parties, and the right to *adversarial proceedings*, which requires that all parties have knowledge of and can comment on all evidence adduced and observations filed.[292] This in turn brings us back to a point made earlier, namely that the EU legislation at issue tends to focus rather unilaterally on improving the position of the applicant, while little attention appears generally to be paid to that of the defendant.[293]

This can be illustrated with reference to the IPR Enforcement Directive's regime on the disclosure of certain information held by third parties.[294] Judging by its wording, it appears that only applicants – and not also defendants – are able to rely on the provision in question. If that reading is correct,

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286 See para. 5 above.

287 E.g. CoJ case C-459/99, *MRAX*, para. 101-102; CoJ case C-50/00 P, *UPA*, para. 42; CoJ case C-506/04, *Wilson*, para. 45; CoJ case C-268/06, *Impact*, para. 54; CoJ case C-240/09, *Lesoochranárske zoskupenie*, para. 51; CoJ case C-300/11, *ZZ*, para. 50-51.

288 See e.g. para. 343 above on the interpretation of some of the provisions on legal standing laid down in this legislation.

289 See e.g. CoJ case C-583/11 P, *Inuit*, para. 97.

290 Cf. e.g. Cadiet (2005), pp. 57-58. On the passive role of courts in civil proceedings and the own motion application of EU law, see also subsection 9.2.4 above.

291 On Art. 47 Charter generally, see para. 43 above. As was noted there, different from Art. 6(1) ECHR, Art. 47 Charter applies to proceedings that are civil as well as administrative in nature.

292 See para. 47 above. Cf. Hodges (2006), pp. 1400-1401.

293 See para. 456 above.

294 Art. 8 IPR Enforcement Directive 2004/48. See further para. 122 and 456 above.

it would contrast markedly with the Competition Damages Directive's disclosure regime, which is expressly also available to defendants.[295] As the Commission noted in this latter context, in private enforcement proceedings the defendant may also need to have access to evidence in so far as the burden of proof falls on him.[296] The Competition Damages Directive explains the choice to make the disclosure measures available also to defendants in terms of equality of arms.[297] Furthermore the possibility under the IPR Enforcement Directive to order measures to *preserve* evidence may not only lead to questions from the perspective of equality of arms, but also from that of the right to adversarial proceedings.[298] For not only does this possibility appear to be available to the applicant only, these measures can also be ordered without the defendant having been heard. Again this stands in clear contrast with the more recent Competition Damages Directive, which expressly requires the party concerned to be heard before it can be ordered to disclose evidence under this directive.[299] It has further already been seen that these measures can also affect *third parties*, which can lead to additional fundamental rights-related questions, for instance as regards the protection of privacy and personal data, the freedom of expression and information, as well as the freedom to conduct a business.[300]

469. Does this mean that the aforementioned fundamental rights are, or will be, *infringed* in the cases referred to above, particularly where the said provisions of the IPR Enforcement Directive are concerned? It is submitted that, generally speaking, this is probably *not* the case. It has already been noted earlier that the fundamental rights of the type at issue here are not unfettered prerogatives.[301] The Court of Justice has repeatedly held that they may need to be balanced against the other fundamental rights that can be at issue in particular case.[302] The Charter expressly allows the restriction of the exercise of these rights in the general interest and to protect the rights of other parties.[303] In this connection it must be acknowledged that the EU legislation under consideration, including the IPR Enforcement Directive, provides for several limitations and safeguards. This latter directive stipulates for example that any measure granted must be fair, equitable and pro-

295 Art. 5 Competition Damages Directive. See further para. 234 above.
296 Cf. Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 13.
297 Recital 14 Competition Damages Directive.
298 Art. 7 IPR Enforcement Directive 2004/48. See further para. 121 above.
299 Art. 5(7) Competition Damages Directive. See further para. 256 above.
300 Art. 7, 8, 11, and 16 Charter respectively. See in particular para. 124 and 131 above.
301 E.g. CoJ case C-418/11, *Texdata*, para. 84. See further para. 391 above.
302 E.g. CoJ case C-275/06, *Promusicae*, para. 68. See further para. 124 above. See e.g. also CoJ case C-461/10, *Bonnier*, para. 56-60; CoJ case C-283/11, *Sky Österreich*, para. 59-60. In addition to the abovementioned fundamental rights, in specific cases other fundamental rights can also be of relevance, such as those relating to the protection of intellectual property (Art. 17(2) Charter) and consumer protection (Art. 38 Charter).
303 Art. 52(1) Charter. See also para. 391 above.

portionate.[304] It also contains more specific requirements concerning the conditions applicable to the disclosure of evidence and other relevant information,[305] as well as the specific substantive and procedural safeguards attached to the abovementioned possibility of granting preservation measures without hearing the opposing party.[306] Added to the fact that, first, these provisions of EU law are to be interpreted in a 'Charter-consistent' manner where necessary, second, further safeguards may apply as a matter of national law and, third, the fairness of the proceedings as a whole is what matters in this regard, there appears to be generally little reason to believe that the aforementioned EU legislative measures as such necessarily involve the infringement of the said fundamental rights. Although some scope for debate remains, there appear to be good grounds for coming to a similar conclusion with respect to the absolute bar to the disclosure (and use) of certain pieces of evidence that the Competition Damages Directive establishes.[307]

Yet it is evident that in this respect a certain *tension* can nonetheless exist. Ensuring the fundamental right to a fair trial generally and to equality of arms and adversarial proceedings specifically may well need to be a point of special attention in relation to the type of private enforcement-facilitating measures referred to above. That applies to the EU legislature at the stage of the adoption of such measures, as well as to the national legislatures when transposing them into national law and the national courts when they are being called upon to apply and interpret these measures in individual cases.[308] Particularly if the remedial and procedural rights of private party-applicants in horizontal legal contexts were to be further reinforced, there might well be a point where the above assessment leads to a different conclusion. In other words, the balance to be struck can be a delicate one and a degree of caution on this point is therefore called for.

### *11.2.6. Fundamental rights (2): 'criminal' rights*

470. Fundamental rights can also come into play in another manner in the present context. Put crudely, fundamental rights are rights of defence enjoyed by private parties in respect of public authorities.[309] These rights are of particular relevance in the context of *criminal proceedings*. In those cases the private parties concerned may benefit for instance from the presumption of innocence, the privilege against self-incrimination (*nemo tenetur*), the principle of legality and the principle that one cannot be punished twice for

304 Art. 3(1) and (2) IPR Enforcement Directive 2004/48. See further para. 144 above. See also subsection 9.2.5 above.
305 Art. 7 and 8 IPR Enforcement Directive 2004/48. See in particular para. 316 above.
306 Art. 7(1) IPR Enforcement Directive 2004/48. See further para. 121 above.
307 Art. 6(6) and 7(1) Competition Damages Directive. See further 236 above.
308 Cf. e.g. CoJ case 125/79, *Denilauler*, para. 13 and 15; CoJ case C-450/06, *Varec*, para. 44-55.
309 Opinion AG Trstenjak case C-101/08, *Audiolux*, para. 77.

the same offence (*ne bis in idem*).[310] These rights function, as it were, as a counterbalance to the powers vested in the competent public enforcement authorities to detect, punish and deter infringements in the general interest.[311] Whether or not proceedings are criminal in nature is for the present purposes to be determined on the substance. Decisive are the three so-called 'Engel-criteria', namely: (i) the classification of the measure under national law; (ii) the nature of the offence; and (iii) the nature and severity of the possible penalty.[312]

The foregoing implies that the abovementioned fundamental rights can *inter alia* be invoked in proceedings for the imposition of fines under competition law also where those proceedings are nominally a matter of *administrative* law, as is typically the case in the EU.[313] In contrast these rights do not apply in legal relationships between private parties in proceedings that are truly *civil* in nature, which is also determined on the substance.[314] That means that these rights may generally be of no importance in the context of 'horizontalised' enforcement, i.e. in disputes between two private parties. But this distinction between typical criminal (i.e. vertical) and typical civil (i.e. horizontal) cases sometimes becomes blurred as a consequence of the legislative measures discussed in this study. That means in turn that it is not excluded that the abovementioned 'criminal' fundamental rights might also come into play in the present context of 'horizontalised' enforcement. This can be illustrated through the following three examples.

471. First, consider once again the *ex parte search order procedure*, set out in the IPR Enforcement Directive.[315] This (optional) provision creates the possibility of a private party whose intellectual property rights have allegedly

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310 Art. 48-50 Charter. More specifically, under the Charter the 'triggers' for the application of the above rights are the existence of a 'charge' (Art. 48), 'criminal offences and penalties' (Art. 49) and 'criminal proceedings' (Art. 50). Under Art. 6(2) and (3) ECHR the existence of a 'criminal charge' is the (corresponding) central element. Other examples are full jurisdiction of the competent courts, the proportionality of sanctions and retro-application of the more lenient penalty. See e.g. CoJ case C-386/10 P, *Chalkor*, para. 53-67; CoJ case C-17/10, *Toshiba*, para. 64. See further Zippro (2009b), pp. 450-459.

311 Concerning the Commission's powers in relation to infringements of EU competition law, see e.g. CoJ joined cases 100/80 to 103/80, *Musique Diffusion Française*, para. 105-106; GC case T-13/03, *Nintendo*, para. 73; CoJ case C-429/07, *Inspecteur van de Belastingdienst v. X*, para. 36-37.

312 See e.g. ECtHR case 5100/71, *Engel v. Netherlands*, para. 82; ECtHR case 73053/01, *Jussila v. Finland*, para. 30-31. These criteria have since been applied by the EU courts. See e.g. CoJ case C-489/10, *Bonda*, para. 37; CoJ case C-617/10, Åklagaren, para. 35.

313 E.g. CoJ case C-301/04 P, *SGL Carbon*, para. 42; CoJ case C-352/09 P, *ThyssenKrupp*, para. 80; CoJ case C-17/10, *Toshiba*, para. 94. On the public enforcement of EU competition law, see further subsection 6.4.2 above.

314 E.g. ECtHR case 6232/73, *Köning v. Germany*, para. 88-90; ECtHR case 21522/93, *Georgiadis v. Greece*, para. 34. On the non-applicability, as a general rule, of the privilege against self-incrimination in civil proceedings concerning EU competition law, see also CoJ case C-60/92, *Otto v. Postbank*, para. 11-17.

315 Art. 7 IPR Enforcement Directive 2004/28. See further para. 121 and 463 above.

been infringed entering certain premises for the description or physical seizure of infringing goods, materials used for their production or documents relating thereto. With respect to the similar procedure foreseen under English law, on which this directive's regime was inspired, the national courts initially took the view that the privilege against self-incrimination could be invoked. This view was only reversed after it had been ensured that any statement obtained from the defendant in this manner cannot be used in criminal proceedings.[316] Furthermore it is true that, as part of this procedure, a court must first decide whether or not to grant this order. This thus ensures a degree of objective control and constitutes an important safeguard. Nonetheless, as has been pointed out in the legal literature, the fact remains that, where the execution of this order is concerned, it allows a particular private party that can arguably least be expected to preserve a measure of objectivity and sense of proportion acting in a manner that may amount to a direct infraction of personal liberties of the private party that is subject to the search.[317]

This is by no means merely an academic discussion. In 1989 the Court of Human Rights highlighted certain concerns with respect to the said procedure, as provided for under English law.[318] In the case at hand no breach of the right to a private and family life was found,[319] it being noted that the order in question was a necessary step in the effective pursuit by private parties of their intellectual property rights and that the scope of that order was limited so as to keep its impact within reasonable bounds.[320] Yet the Court of Human Rights also held that such an order is "*capable of producing damaging and irreversible damage*" for the private party-defendant and that it is "*essential that this measure should be accompanied by adequate and effective safeguards against arbitrary interference and abuse*".[321] Along similar lines many Member States associate this *ex parte* search order more with criminal proceedings than with civil ones and therefore chose not to transpose it to national law.[322] Comparable concerns come to light in the more recent Patent Court Agreement, which contains a procedure that is largely similar to the one of the IPR Enforcement Directive.[323] There is however an important

316 Cornish, Llewelyn & Aplin (2010), pp. 92-93.

317 *Ibid*., pp. 89-90 (regarding the English law equivalent of this procedure).

318 On the ECtHR, see also para. 42 above.

319 Art. 8 ECHR. Cf. Art. 7 Charter.

320 ECtHR case 10461/83, *Chappell v. UK*, para. 59-60. These limitations related to the duration of order, the times at which and the number of persons by whom the applicant's search could be effected, and the purposes for which any materials seised could be used. Reference is further made to the undertakings given by the applicants or their solicitors and the remedies available to the defendant. See also para. 61 of this judgment on the role of the solicitor under English law as an officer to the court.

321 *Ibid*., para. 57.

322 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 9.

323 On this agreement and its relationship to IPR Enforcement Directive 2004/48, see further para. 108 above.

difference. Pursuant to this agreement the order to inspect certain premises can only be executed by a person appointed by the court, whereas the applicant is in fact expressly barred from being present during the search.[324]

All this shows that, while a procedure of this kind is not *per se* problematic from a fundamental rights perspective, it can certainly lead to some concerns in this respect, sometimes requiring certain particular safeguards to address them.

472. Second, comparable questions can emerge in connection to the aforementioned measures on the *disclosure of evidence*.[325] In a competition law context the Commission has held that the privilege against self-incrimination cannot be invoked to prevent the disclosure of unfavourable evidence in private enforcement proceedings.[326] Advocate General Jääskinen similarly held in his opinion in *Donau Chemie* that this privilege "*does not apply in private law contexts*".[327] While as a general rule these statements are undoubtedly correct, in light of the foregoing they may nonetheless require a degree of nuance.[328] This is again illustrated by the more cautious line in this respect that was taken by the drafters of the Patent Court Agreement. This agreement provides expressly that a court order to disclose evidence may not result in an obligation of self-incrimination.[329] A similar concern is echoed in the IPR Enforcement Directive's provision on the 'right of information', pursuant to which infringers and third parties can be required to disclose certain information. There it is said that this right is without prejudice to other statutory provisions that "*afford an opportunity for refusing to provide information which would force the person [concerned] to admit to his/her own participation or that of his/her close relatives in an infringement*".[330]

473. A third and final example concerns the possibility of awarding *punitive damages*, which EU law does not foresee at present, but which has repeatedly been debated.[331] By definition punitive damages seek to penalise. Pursuant to the aforementioned 'Engel-criteria' the existence of a punitive element is an important aspect in determining whether, in substance, the proceedings are criminal in nature and hence whether the aforementioned fundamental rights can be relied upon.[332] Accordingly it is at least

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324 Cf. e.g. Art. 60(3) and (4) Patent Court Agreement. The applicant can only be represented by an independent legal practitioner.

325 See subsection 8.2.2 above.

326 Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, p. 37.

327 Opinion AG Jääskinen case C-536/11, *Donau Chemie*, para. 56.

328 Note that, unlike its AG, the CoJ left this issue untouched in its ruling in *Donau Chemie*. See CoJ case C-536/11, *Donau Chemi*e, discussed in para. 222 above.

329 Art. 59(1) Patent Court Agreement. On this agreement, see further para. 108 above.

330 Art. 8(3)(d) IPR Enforcement Directive 2004/48. See further para. 122 above.

331 See in particular subsection 7.1.5 above. On punitive damages, see also para. 443 above.

332 See para. 470 above.

conceivable that in civil proceedings involving punitive damages the defendant must be deemed to be entitled to invoke the privilege against self-incrimination or the principle of *ne bis in idem*.[333] Opinions differ especially on the possible application of this latter principle in such cases.[334] Also this is by no means merely an academic discussion. Whether or not this principle of *ne bis in idem* applies can be of considerable practical importance, given the possible concurrent imposition of fines and award of punitive damages for the same anti-competitive behaviour.[335] As was the case with *ex parte* search orders mentioned earlier this question has already been subject to debates and litigation especially in England,[336] whereas for now it largely remains an open question how the Court of Justice would address it.[337]

474. In light of the foregoing the conclusion here is not unlike the one drawn in the previous subsection on 'civil' fundamental rights. That is to say, there seems no reason to believe that the EU legislative measures discussed here are such that the fundamental rights at issue have been or will be infringed. With the possible exception of punitive damages, for which EU law however makes at present no provision, these measures are unlikely to insert a 'criminal' element in 'horizontalised' enforcement proceedings to such an extent that, as a counterbalance, fundamental rights such as the presumption of innocence, the privilege against self-incrimination and the *ne bis in idem* principle ought to be available to a defendant. Yet it would seem that this nonetheless remains an *important point of attention* when discussing EU legislation facilitating the private enforcement of EU law. Generally speaking, the more a 'dual vigilance' logic translates into particular powers or prerogatives being granted to a private party-applicant, the less 'civil' in substance the proceedings are and the more likely it becomes that these 'criminal' fundamental rights can be relied upon. Put differently, one cannot equip a private party with the powers to act as a 'private policeman' or 'private attorney general' without equipping the party that may be subject to

333 Cf. Zippro (2009b), p. 450. Specifically in relation to penalties and the privilege against self-incrimination, see CoJ case C-60/92, *Otto v. Postbank*, para. 16.

334 Cf. e.g. Milutinovic (2010), p. 131 (who argues that punitive damages do not breach the said principle); Wils (2009), p. 22 (who argues essentially the contrary).

335 Note that, even where it can be assumed that this principle applies, its application may not always be straightforward. In particular, only in retrospect can it be said with certainty that both types of punishment were imposed in a concrete case. At the time of a punitive damages award, public enforcement proceedings may still be pending or not even been initiated, or *vice versa*. Cf. Zippro (2009b), pp. 457-458.

336 For a discussion, see e.g. Frese (2011), pp. 425-426.

337 It may however be possible to derive some indications from GC case T-59/02, *Archer Daniels Midlands*, para. 349-351 (where it was held that there is no need to take account of punitive damages paid in non-Member State jurisdiction when setting fines in competition cases) and CoJ case C-301/04 P, *SGL Carbon*, para. 32-34 (where it was found that the *ne bis in idem* principle is not applicable in relation to competition fines imposed by a non-Member State).

the exercise of these powers with the fundamental right safeguards that would have been available to the latter had he been prosecuted by a 'real' policeman or attorney general.

### *11.2.7. Summary*

475. Over the past decades it has become clear that substantive EU law can play an important role in legal relationships between private parties. This 'horizontalisation' of EU law also extends to the enforcement of that law. Much of the EU legislation at issue in this study reflects and reinforces this development. In practical terms this generally means that it becomes easier for private party-applicants to enforce their rights vested in EU law *vis-à-vis* other private parties. Limited attention tends to be paid however to the private parties that are defendants in these private enforcement proceedings. This development also contributes to the effective enforcement of EU law *per se*, particularly by drawing private resources into the 'enforcement mix', thus complementing public enforcement. Yet the private parties concerned mostly take legal action only if and to the extent that they consider this to be in their own individual interest. Private enforcement is moreover not cost-free. It might involve less expenditure on public enforcement, but it entails costs directly related to the resulting litigation (expenditure on courts, legal costs for the parties) as well as possibly also costs associated with 'over-facilitation' (over-deterrence, chilling effects, nuisance cases). At the same time, while regularly raised in this connection, the risk of creating a 'litigation culture' seems generally limited.

Three main forms of hybrid enforcement, whereby elements of public and private enforcement are combined in the same legal proceedings, are conceivable, namely: (i) granting certain typically 'public' powers to private parties (e.g. to obtain evidence); (ii) involving public or quasi-public authorities in civil proceedings (e.g. to advise the court or to bring actions in the general interest); and (iii) introducing a 'private' element in public proceedings (e.g. so as to rule on damages claims). These measures, which have so far only to a limited extent been enacted in EU law, generally seek to optimise the abovementioned 'enforcement mix'. While this can be helpful, all in all, there nonetheless seems a lot to be said for keeping both forms of enforcement mostly separate in procedural terms. That applies all the more so if account is taken of the fundamental rights issues that can arise in a 'horizontalised' enforcement context. For the more the distinction between public and private enforcement is blurred, particularly by granting private parties additional powers so as to reinforce the dual vigilance logic underlying the EU legislation at issue, the bigger the risk that typical 'civil' rights, such as the equality of arms, will be infringed and the greater the probability that typical 'criminal' rights, such as the privilege against self-incrimination and the *ne bis in idem* principle, will need to be made available to the opposing private party.

# 12. Summary and conclusions

This final chapter summarises this study's main findings, brings together the most important general lines running through the foregoing and draws conclusions. It concentrates on the two aspects of the main research question identified in chapter 1, namely what EU legislation facilitating the private enforcement of EU law entails, particularly in terms of remedies and procedural provisions and how it should be understood more generally, notably as regards its typical characteristics, its underlying objectives as well as the advantages and drawbacks of and the limits to the choices made by the EU legislature in this connection. To that end, this chapter consists of three parts. In the first section below a number of general remarks are made with respect to the EU's legislative activities relating to private enforcement. The second section then focuses on the remedies and procedural provisions provided for private enforcement purposes as a matter of EU law. The last section outlines the main findings with respect to the nature, limits and effects of private enforcement generally and EU legislative action in this regard in particular. It also includes a discussion of what an EU policy on this subject-matter could look like.

## 12.1. Private enforcement between interference and autonomy

A central theme in this section is the tension that can exist between, put simply, EU 'interference' and the Member States' 'autonomy' in relation to the (possible) adoption of EU legislation facilitating the private enforcement of EU law. This is of course a common theme in almost all instances where secondary EU law is being established. However it is arguably of particular importance in the present context, especially given that the remedial and procedural issues under consideration have traditionally largely been left to be regulated by the Member States. In the first subsection below the relative value of the said 'autonomy' as well as the possibility for the EU to act on these matters are highlighted. The second subsection then explains, conversely, that there are nonetheless limits to the EU's scope to act, while the Member States tend to retain considerable 'residual' autonomy in private enforcement-related matters. The further consequences of this tension are also discussed.

### *12.1.1. The scope for enacting EU legislation on private enforcement*

476. In the foregoing chapters it has been seen how, over the past decades, the EU legislature has enacted a *range of legislative measures* that facilitate the private enforcement of EU law, i.e. the bringing of legal actions by private parties before the courts of the Member States with a view to enforcing their rights derived from the rules of substantive EU law at issue. These measures can touch upon issues of civil as well as administrative law, substance as well as procedure, and remedies as well as procedures. This study has concentrated on seven acts of secondary EU law that provide, to varying degrees and in different manners, for measures of this kind, i.e.: the two Procurement Remedies Directives, dating from 1989 and 1992 and revised in 2007;[1] the 2004 IPR Enforcement Directive;[2] the Consumer Injunctions Directive, which was adopted in 1998 and codified in 2009;[3] the 1993 Unfair Terms Directive;[4] the Product Liability Directive, which dates from 1985;[5] and the Competition Damages Directive that was agreed (and is expected to be adopted) in 2014.[6] Several other private enforcement-related provisions and developments have also been assessed, most notably the provision of primary EU law on anti-competitive agreements being automatically void[7] and the Commission's 2013 Collective Redress Recommendation.[8]

477. It is evident that EU legislative measures of this kind affect national rules on remedies and procedures applicable in private enforcement proceedings. As the Court of Justice has consistently held ever since its 1976 judgment in *Rewe*, pursuant to the principle of *national procedural autonomy* it is as a general rule for the Member States to set these rules.[9] They have considerable discretion in this regard, although they remain bound to respect EU law, in particular the principles of equivalence and effectiveness.[10] The very existence of the abovementioned EU legislation already indicates however that this principle should not be misunderstood as constituting an absolute bar for the EU to act on these matters. As the Court already held in *Rewe*, this principle only applies in the absence of EU rules. As it later clarified, rules on remedies and procedures applicable in private enforcement proceedings are not "*within some sort of domain reserved for the*

1 Procurement Remedies Directives 89/665 and 92/13, discussed in sections 3.2 and 3.3 above.
2 IPR Enforcement Directive 2004/48, discussed in sections 4.2 and 4.3 above.
3 Consumer Injunctions Directive 2009/22, discussed in section 5.2 above.
4 Unfair Terms Directive 93/13, discussed in section 5.3 above.
5 Product Liability Directive 85/374, discussed in section 5.4 above.
6 Competition Damages Directive, discussed in section 6.3 above.
7 Art. 101(2) TFEU, discussed in subsection 6.1.3 above.
8 Collective Redress Recommendation 2013/396, discussed in subsection 5.5.1 above.
9 CoJ case 33/76, *Rewe*, para. 5. See further section 2.1 above.
10 On these two principles, see further section 2.2 above.

*Member States*".[11] Quite to the contrary, it was held that the EU is "*certainly competent to harmonise national rules on those matters*" in so far as the EU Treaties provide for a sufficient legal basis.[12] It follows that in fact the key question is not one of autonomy of the *Member States*. This is approaching the matter from the wrong angle. As is generally the case where possible acts of secondary EU law are concerned, the key issue is rather whether or not the *EU* is competent to act. Where the EU legislature has not (yet) acted, it is for the Member States to take all necessary measures to enable the private parties concerned to effectively exercise their rights based on EU law.[13]

In the present context the significance of the principle of national procedural autonomy is therefore threefold. First, it highlights the importance of the question whether and if so, to which extent the EU is *competent to act* on private enforcement-related matters. Second, where EU legislation of the type at issue in this study has been adopted, this principle can continue to be of relevance for issues falling *outside the scope* of that legislation. In those cases there is after all still an absence of EU rules. Third, it can also serve a function that is not strictly legal. In particular, this principle can function as a means to *signal political unease or opposition*, rather than a proper legal concern, in relation to an intended private enforcement-related EU legislative initiative. As such it serves as a reminder that it is one thing for the EU to be competent to act on certain private enforcement-related matters, but that it can be quite another thing to determine whether it is also seen as appropriate or desirable for the EU to actually exercise those competences. Indeed, as is further discussed below, EU legislative involvement with the matters at issue here can be a sensitive affair.

478. Legally speaking, the key question is therefore, first and foremost, that of the *EU's competence* to adopt secondary law facilitating the private enforcement of EU law. In this respect it is to be noted that Article 114 TFEU on harmonisation for the establishment and the functioning of the EU's internal market constitutes the legal basis for virtually all abovementioned EU legal acts.[14] There has been comparatively little debate on this point at the time of adoption of these acts. Neither have there to date been any legal challenges. Although this might certainly be taken as an indication to that effect, in and by itself, this does not allow for the conclusion that the EU is competent to enact legislation of this type on the basis of this article. An express ruling by the Court of Justice would be required for drawing any definitive conclusions. Moreover, where possible future EU legislative measures of this type are concerned, it will always need to be assessed whether the legal basis that this article offers suffices in light of the aim and the content of the particular measure in question. In specific cases there may fur-

11 CoJ Opinion 1/94, *WTO*, para. 104.
12 *Ibid*.
13 Cf. Art. 4(3) and 19(1) TEU.
14 See subsection 10.1.1 above.

thermore also be other, more specific legal bases available. Article 103 TFEU is one example thereof in as far as EU legislative measure that give effect to substantive EU competition law are concerned. Indeed, this article would seem the most logical legal basis for secondary EU law on the private enforcement of EU competition law, even if, perhaps somewhat less self-evidently, the Competition Damages Directive has been adopted on a dual legal basis, i.e. Articles 103 as well as 114 TFEU.[15] Consequently, the above qualifications notwithstanding, it appears that Article 114 TFEU is not only a commonly used legal basis for EU legislation facilitating the private enforcement of EU law, but also that, to the extent that this can be said in the abstract, there also seems little reason to doubt that it can legitimately be used for those purposes.

### *12.1.2. The limits to the EU's scope to act and its consequences*

479. The foregoing evidently does not mean that there are no *limits* to the EU's scope to act in relation to private enforcement. In particular, Article 114 TFEU does not empower the EU to generally regulate the internal market. This implies that the EU can act on this basis only if and to the extent that that is demonstrably required for internal market purposes, in accordance with the conditions set out in this article. Generally speaking, these conditions can be expected to be met where the EU legislative measures in question are necessary to ensure the effective enforcement of certain internal market-related rules of substantive EU law. Indeed, that is precisely what the abovementioned EU legislation essentially seeks to achieve; each of those directives is primarily concerned with harmonising the provisions of national law so as to facilitate the enforcement of the rights that private parties derive from the rules of substantive EU law in question, i.e. on public procurement, intellectual property, consumer protection and competition law, which are all closely connected to the EU's internal market, with a view to improving overall levels of compliance and enforcement of those rules.[16]

Yet these limits inherent in Article 114 TFEU complicate, and may in practice even preclude, the possibility of adopting EU legislation that is of *broader application*, i.e. covering the enforcement of all substantive rules of EU law or even all legal proceedings before the national courts generally. That applies all the more so when account is taken of the additional constraints on the EU's legislative activities resulting from the principles of subsidiarity and proportionality.[17] It would seem that, as the law stands, neither does any other Treaty provision constitute a sufficient legal basis for the adoption of EU legislation of the type referred to above that can apply across the board. Article 81 TFEU on judicial cooperation in civil matters undeniably appears to have some potential to serve as such, as it empowers the EU

15 See subsection 6.3.1 above.
16 See subsections 10.1.1 and 11.1.2 above.
17 Art. 5(3) and (4) TEU. See further subsection 10.1.2 above.

to take measures to ensure 'effective access to justice' and to eliminate 'obstacles to the proper functioning of civil proceedings'.[18] Yet this provision has certain important limits of its own. Most notably, not only does it also require a link with the internal market (although arguably a looser one than under Article 114 TFEU), any EU action on this basis is also to remain limited to "*civil matters having cross-border implications*".

For the foreseeable future the issues under consideration in this study are therefore likely to continue to be regulated on a *sector-specific* basis. On the one hand this should not prevent, it is submitted, the Commission and the EU legislature from improving the internal coherence and consistency of the legislation that they propose and adopt to this effect respectively. This study has shown that more can, and indeed should, be expected in this regard.[19] On the other hand this implies that a degree of fragmentation of the legal systems of the Member States may prove unavoidable.[20] For where the EU legislative interference relates only to certain situations but not to others (e.g. addressing infringements of the EU rules on public procurement, but not those of 'purely' national rules in this domain or of substantive rules in other fields), the effects in the domestic legal sphere are necessarily uneven. At the same time that does not mean that this possible 'fragmenting' effect should not be given serious consideration when adopting EU legislation of the type at issue in this study. That is the case not only because many of the affected national rules tend to fulfil a useful and legitimate function, but also because those rules tend to apply across the board, i.e. regardless of the sector or the origin of the rights concerned. Careful consideration and a degree of constraint on the side of the EU legislature would therefore seem to be in place.

480. The EU legislature may thus have considerable scope to adopt legislation of the type under consideration and it may already have exercised these competences on several occasions, but this should not distract from the fact that many remedial and national rules applicable in private enforcement proceedings are still determined by 'purely' national law (i.e. national law other than that transposing a directive). This is a point that risks being overlooked in a study such as this one, which concentrates on EU legislative action in this domain. In other words, the seven abovementioned legal acts may imply increased EU involvement with private enforcement proceedings, a point that is further underlined by the fact that comparable acts apply in certain other fields of EU law.[21] However, for the time being as well as for the foreseeable future, this development remains not only *gradual and*

18 See subsection 10.4.3 above.
19 See subsection 10.4.1 above.
20 See subsections 10.4.2 and 10.4.3 above.
21 E.g. Gender Equality Directive 2006/54.

*far from linear*,[22] but in many respects also *incomplete*. This results in particular from the following four considerations.

In the first place, many other sectors governed by substantive EU law than the ones assessed in this study remain mostly or entirely unaffected by EU legislation of the type at issue here. In the second place, even if this legislation touches upon a considerable number of important remedial and procedural matters, it certainly does not regulate all matters that can be of relevance in private enforcement proceedings. There are many other important issues that often remain unaddressed, such as the applicable rules of evidence, including on the burden of proof, and the standard of judicial review to be exercised by the national courts.[23] In third place, the EU involvement also tends to be uneven in the sense that, taken together, said acts may address many private enforcement-related issues, but not all acts touch upon all matters discussed here. In fact, far from it. Just to give one example, while only the IPR Enforcement Directive deals with the allocation of legal costs between the parties,[24] this is also one of the few acts under consideration that does not contain rules on limitation periods.[25] Finally, the level of detail provided for in the provisions of this EU legislation is often rather limited. With respect to damages claims the Procurement Remedies Directives stipulate for instance little more than that it must be possible to award damages to injured private parties.[26] The Unfair Terms Directive similarly only provides for the bear minimum where it lays down a contractual remedy, while expressly referring to national law in this connection.[27]

Consequently, without putting into question the (potential) importance of any of these legal acts and the provisions laid down therein individually, let alone the abovementioned development more generally, it remains important to see these measures in their proper perspective. The EU's involvement may be considered remarkable especially as compared to the general rule that remedial and procedural matters relating to legal proceedings for the private enforcement of EU law at national level are in principle left to be regulated by the Member States. But as it stands there is no question of something resembling an EU code of civil (or administrative) proceedings being established. In other words, there is still a considerable degree of 'residual' autonomy to be exercised by the Member States in this regard.

22 See subsection 10.2.4 above.
23 See subsection 9.1.4 and 9.2.3 above respectively.
24 Art. 14 IPR Enforcement Directive 2004/48. See further subsection 8.2.5 above.
25 See subsection 9.1.3 above.
26 Art. 2(1)(c) Public Sector Remedies Directive 89/665; Art. 2(1)(d) Utilities Remedies Directive 92/13. See further subsection 3.2.2 above.
27 Art. 6(1) Product Liability Directivce 93/13. See further subsection 5.3.1 above.

481. That leads to a last general remark, which relates to the degree of *controversy* generated by EU legislative action related to private enforcement. This study indicates that on the one hand, contrary to what is sometimes presumed, there is no reason to believe that such EU involvement is generally and necessarily controversial.[28] The relatively smooth adoption of the IPR Enforcement Directive, which contains some of the most far-going private enforcement-related measures available to date, is a case in point. Here a number of *contextual* factors (upcoming EU enlargement, absence of adequate public enforcement, existence of the TRIPS Agreement) appear to have carried at least as much weight during the law-making process as the *content* of the proposal as such.[29] On the other hand this study has also found that EU involvement with private enforcement-related issues can indeed be a sensitive matter. As is discussed in further detail in the following two sections, that is the case most notably where national rules on non-contractual liability (tort), contract law, penalty payments, legal costs and legal standing are affected. The fact that, as was noted above, not few of the provisions of EU law under consideration are broadly – not to say vaguely or ambiguously – worded is at least in part a result of this sensitivity. Leaving a degree of flexibility or ambiguity allows political compromises to be made. This can at times be the only manner in which agreement can be reached at EU level on a legislative proposal.

All the same this given can have important *consequences* also beyond the sphere of political compromises made in the context of the decision-making process. These consequences need not be negative. In particular, it tends to leave the Member States a margin of manoeuvre when transposing the provisions at issue into national law, as is required considering that all of the abovementioned acts are directives. This facilitates the embedment of those provisions in the domestic legal systems in which they are to function. This therefore limits the aforementioned 'fragmenting' effect. That sometimes occurs to the point that no transposition at all is needed, because a national legal system is already compliant.[30] And even broadly or ambiguously worded provisions can have an important impact in practice. Among other things they can help to make all parties concerned (private parties affected by infringements, possible infringers, legal practitioners, judges) aware of the rights and enforcement possibilities that may exist as a matter of EU law. Largely independent of their content the EU rules at issue tend to fulfil an important 'awareness-raising' function.[31] Awareness is obviously a necessary precondition for the rights derived from EU law to be of relevance in practice.

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28 See subsection 10.2.1 above.

29 See subsections 10.2.2 and 10.2.3 above.

30 E.g. with respect to Art. 14 IPR Enforcement Directive 2004/48 on legal costs. See further subsection 4.2.5 above. As regards the Member States' scope not to transpose directives when they deem their domestic legal system to be already compliant, see e.g. CoJ case C-151/12, *Commission v. Spain*, para. 26-28.

31 See further subsection 10.4.2 above.

Having said that, enacting broadly worded provisions of EU law and leaving flexibility to the Member States in this respect can also come at a '*price*'. For the private parties concerned it can result in legal uncertainty and a degree of unequal treatment. Seen from the perspective of the EU, the main disadvantage is the continuing differences between the laws of the Member States and the related risk of the objectives of the harmonisation aimed for not being achieved. But also for the Member States there can be such a price. In particular, there can be a certain loss of control and risk of unanticipated consequences when this EU legislation is applied and interpreted after its adoption. Over time this uncertainty and ambiguity is likely to lead to preliminary questions being referred to the Court of Justice. The wording of the rules of EU law in question providing only limited guidance, the Court (which is in principle bound to answer such questions) tends to attach particular weight to the objectives of the legislation at issue. This can in turn sometimes lead to expansive and unexpected interpretations. One example is the *Océano Grupo* case law, pursuant to which the national courts seised under the Unfair Terms Directive must in principle raise the unfairness of a terms in a 'standard' consumer contract, and consequently the related contractual remedy, of their own motion.[32] Another example is the finding that the Procurement Remedies Directives preclude judicial review exercised by the national courts being limited to a test of arbitrariness.[33] The present EU legislation can thus play an important role as a 'stepping stone' for Court rulings, even – or perhaps: particularly – in connection to matters that are not expressly or extensively addressed in this legislation.

## 12.2. Remedies and procedures for private enforcement purposes

This second section looks more in detail at what the EU legislation at issue might entail in terms of the instruments that it offers to private parties for pursuing private enforcement actions. To this end the three 'main' (substantive) private enforcement remedies laid down in this legislation – i.e. actions for damages, actions for injunctions and contractual remedies – are first subsequently discussed. Attention then turns to the 'other' remedies, which are not necessarily any less important. However these latter remedies are generally less widely provided for, they tend to be concerned with certain more specific issues and they are mostly not 'self-standing' but instead dependent on a 'main' claim of some sort being brought as well. Attention is also briefly paid to the remedies that remain unregulated in the EU legislation at issue. At the end of this section the findings with respect to the most important provisions of a procedural nature that are set out in that legislation are outlined.

32 CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 22-29. See further subsections 5.3.2 and 9.2.4 above.

33 CoJ C-92/00, *Hospital Ingenieure*, para. 57-64. See further subsection 9.2.3 above.

### *12.2.1. Actions for damages*

482. For some the term 'private enforcement' typically connotes private parties bringing *actions for damages* before the courts of the Member States for infringements of EU law. Where competition law infringements are concerned this seems to hold true for the Commission, given that it decided to concentrate the Competition Damages Directive exclusively on this substantive remedy.[34] While acknowledging that other remedies can be of relevance too, in its slipstream most attention in academic publications on private enforcement tends to go this remedy, certainly in a competition law context. It further appears to hold true in a sense for the Court of Justice. While this latter institution is evidently constrained by the cases brought before it, it is nonetheless noticeable that for instance both in its competition law-related case law (*Courage*, *Manfredi*, *Pfleiderer*[35]) and in its case law concerning infringements of EU law committed by the Member States (*Francovich*, *Brasserie du Pêcheur*[36]) the emphasis tends to be on compensation in damages. To a considerable extent the same applies for the EU legislature, given that, besides their central place in the Competition Damages Directive, actions for damages are also especially an important remedy under the Procurement Remedies Directives, the IPR Enforcement Directive and the Product Liability Directive.

Generally speaking, the above directives aim to ensure that private parties that suffered loss or damage as a consequence of an infringement of EU law can obtain compensation, which in turn is expected to contribute to strengthening compliance with the substantive rules at issue. At the more detailed level there are several thorny issues however. *Causality* generally leads to few structural difficulties.[37] In contrast *fault* is certainly one of them.[38] The approaches found in the abovementioned legislation in this regard range from the 'strict' (no-fault) liability provided for in the Product Liability Directive[39] to the IPR Enforcement Directive that requires that the infringer acted "*knowingly or with reasonable grounds to know*".[40] Matters are complicated further when account is taken of the case law of the Court of Justice on matters of fault. Most notably the Court has interpreted the Procurement Remedies Directives' silence in this regard as implying that no fault requirement can be applied.[41] It is cannot be excluded that the Court would come to a similar conclusion with respect to the Competition Dam-

34 See subsection 6.3.2 above.
35 CoJ case C-453/99, *Courage*; CoJ joined cases C-295/04 to C-298/04, *Manfredi*; CoJ case C-360/09, *Pfleiderer*. See further subsections 2.5.2, 6.1.3 and 6.3.1 above.
36 CoJ joined cases C-6/90 and C-9/90, *Francovich*; CoJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur*. See further subsection 2.5.1 above.
37 See subsection 7.1.3 above.
38 See subsection 7.1.2 above.
39 Art. 4 Product Liability Directive 85/374. See further subsection 5.4.1 above.
40 Art. 13(1) IPR Enforcement Directive 2004/48. See further subsection 4.2.4 above.
41 CoJ case C-314/09, *Stadt Graz*, para. 30-45.

ages Directive. After all, despite earlier suggestions to this effect,[42] this directive does not expressly address the issue of fault. That will however largely depend on the importance that the Court attaches to the relevant statements in the directive's recitals.[43] More generally, while the reasons for these differing approaches are not always clear and while a no-fault approach can have considerable disruptive effects at national level, it also appears that in practice the approach chosen as a matter of EU law has at most only a limited effect on the degree of successful damages litigation.

*Quantifying* the harm suffered tends to be an important practical bottleneck for successfully bringing damages claims.[44] The Commission therefore proposed EU rules on this subject-matter on several occasions. The EU legislature mostly rejected these proposals however. Yet the more recent adoption of the Competition Damages Directive, which contains several limited but nonetheless noteworthy provisions on quantification, illustrates that this is not always the case. It appears that especially rules that are not overly rigid but instead allow the court seised a degree of flexibility, for instance to estimate the extent of the harm caused, can be both acceptable to the EU legislature and helpful in practice. It has on the whole proven less difficult to adopt common rules on the *qualification* of damages, i.e. specifying the heads of damages to be compensated. Here the EU's involvement is typically more substantial than where matters of quantification are concerned.[45] Certainly when read together with the relevant case law (referred to below), these rules indicate that a general rule of EU law is emerging according to which – subject to possible deviations or precisions in the legislation at hand – any harm caused by infringements of EU law must be compensated in full. That means that costs and lost profits, as well as interest and non-material damage, must normally be compensable. While extensively debated, the award of punitive damages is currently not foreseen as a matter of EU law however.[46] Neither are they at present considered to be precluded as a matter of EU, although more recently there appears to be a growing trend towards their prohibition.

483. When considered more generally one of the main findings of this study is that harmonising national laws relating to actions for damages for private enforcement purposes is often a problematic affair, with in many cases *disappointing results in practice*.[47] To begin with, agreeing at EU level on the rules to be provided for is often difficult. EU interference with issues of non-contractual liability (tort) remains a sensitive matter. This can translate

42 See in particular Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 6-7.
43 Recital 11 Competition Damages Directive.
44 See subsection 7.1.4 above.
45 See subsection 7.1.5 above.
46 See subsection 7.1.6 above.
47 See in particular subsection 7.1.1 above.

into the relevant provisions of EU law being worded in a broad and minimalistic manner (e.g. the Procurement Remedies Directives' damages regime generally[48]), the Member States being left several options (e.g. the IPR Enforcement Directive's rules on setting damages[49]), the inclusion of express references to national law (e.g. the Product Liability's provision on non-material damage[50]) or EU law simply not addressing certain issues (e.g. the issue of fault under the Competition Damages Directive). The 'net harmonising effect' of these provisions is therefore often rather limited indeed. Furthermore in all fields of law at issue here where legislative measures of this kind have been taken, private parties often continue to be hesitant to initiate damages claims. This is in part due to (anticipated) difficulties associated with these claims, such as lengthy proceedings, high legal costs and problems in demonstrating and quantifying the harm suffered. But even apart from that it appears that these parties might prefer spending their resources on more forward-looking activities, rather than seeking to obtain *ex post* compensation. Other considerations can also play a role in specific cases, such as the fear of 'biting the hand that feeds you' in procurement cases, the difficulty of identifying infringers in intellectual property cases or the 'rational apathy' where the harm suffered is modest for individual consumers.

All this thus puts in perspective the well-known finding that, especially in light of the low number of successful claims, there is "*astonishing diversity and total underdevelopment*" as regards actions for damages for infringements of EU competition law.[51] To the extent that the number of cases successfully brought is to be considered an appropriate indicator in the first place (which seems debatable, considering that many disputes appear to be settled and that litigation would not appear to be an end in itself), the Commission had already concluded three decades earlier that "*[s]cant use has yet been made of the possibility of actions for damages for breaches of the [EU] competition rules*".[52] More importantly, the situation appears to be largely similar in many other fields of EU law. For instance, although the degree of litigation seems to have increased somewhat since then, after the Procurement Remedies Directives' regime had been in force for several years it was reported that "*no more than a handful*" of damages cases had been brought EU-wide.[53] Likewise, roughly a decade after its adoption, a study found that "*almost no cases have been reported*" under the Product Liability Directive.[54] And in 2010 the Commission observed in relation to the IPR Enforcement Directive that in intellectual property cases damages awards "*are not requested […] as a matter*

48 Art. 2(1)(c) Public Sector Remedies Directive 89/665; Art. 2(1)(d) Utilities Remedies Directive 92/13. See further subsection 3.2.2 above.
49 Art. 13(1) IPR Enforcement Directive 2004/48. See further subsection 4.2.4 above.
50 Art. 9 Product Liability Directive 85/374. See further subsection 5.4.1 above.
51 Study Ashurst (2004), p. 1.
52 Commission, Thirteenth report on competition policy, 1984, p. 136.
53 Study Herbert Smith (1996), p. 18.
54 Study McKenna (1994), p. 45.

*of course*".[55] This limited degree of damages litigation for (alleged) infringements of EU law in these other fields is all the more remarkable, given that there the EU legislature enacted specific measures meant to facilitate the bringing of this kind of private enforcement actions years, if not decades, ago.

484. There are reasons to doubt whether the Commission and the EU legislature are willing and able to *alter this situation* by substantially 'beefing up' EU law on this point. These doubts seem to result as least as much from political constraints as from strictly legal considerations. The Product Liability Directive has for example been left substantially unaltered for almost three decades, despite there being broad agreement that this directive has done relatively little to alleviate the burden on private parties wishing to obtain compensation in damages.[56] The Commission similarly seems hesitant to propose amending the IPR Enforcement Directive's damages regime.[57] But probably the best illustration is the 2007 revision of the Procurement Remedies Directives.[58] In that context the problems encountered by private parties having suffered harm as a consequence of infringements of EU public procurement law were expressly acknowledged. However the Commission – and with it the EU legislature – saw this as a reason to introduce another remedy (namely a contractual remedy, discussed below) rather than to attempt to improve and further elaborate these directives' rules on damages claims. This evidently contrasts with the extensive efforts that especially the Commission made over the past decade to come to EU legislation that gives effect to the right to compensation in damages for competition law infringements, which eventually led to the adoption of the Competition Damages Directive.[59] And on many points (also) this latter directive is only limitedly prescriptive. Moreover the fact that it was eventually proposed and adopted is arguably more due to a desire to protect the existing public enforcement mechanism (particularly 'leniency' programmes) than to a broadly shared ambition to facilitate the private enforcement of EU competition law.[60]

It may therefore well be that some of the most noticeable legal developments with respect to actions for damages in a private enforcement context are still to come from Luxembourg rather than from Brussels. For instance, as was noted above, the Court of Justice has held that the absence of an express fault requirement in the Procurement Remedies Directives implies that the application of such a requirement under national law is precluded.[61]

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55 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 21.

56 See subsection 5.4.2 above.

57 See subsection 4.1.2 above.

58 See subsection 3.1.3 above.

59 See subsection 6.2.3 above.

60 CoJ case C-360/09, *Pfleiderer*. See subsection 6.3.4 above.

61 CoJ case C-314/09, *Stadt Graz*, para. 30-45. See further subsections 3.2.2 and 7.1.2 above.

As a consequence liability under these directives is probably more 'strict' even than under the no-fault Product Liability Directive. For the latter contains a range of exonerating circumstances and other moderating provisions on which a defendant can seek to rely, which are evidently entirely absent in the former.[62] There is also case law suggesting that, unless expressly provided otherwise, non-material damage is also to be compensated, and indeed that the harm caused must be compensated in full, including costs, lost profits and interests.[63] In this connection the scope for dynamic interplay between the EU's judiciary and its legislature is not to be overlooked. As was noted earlier, almost irrespective of their content the above directives can fulfil a function in terms of 'awareness-raising' and as a 'stepping stone'. Put crudely, for it to be able to issue rulings the Court of Justice needs cases to be brought before it and EU law to interpret. On both accounts these directives can play an important role, notwithstanding their often modestly prescriptive rules on actions for damages (perhaps to the contrary). And the Court's rulings can in turn also lead to further legislative developments. That is illustrated by the Competition Damages Directive, which in many respects codifies and builds on the earlier *Courage* case law.[64]

### *12.2.2. Actions for injunctions*

485. The story of the second main remedy discussed above, i.e. *actions for injunctions*, is altogether rather different. This remedy is a common one especially in the field of EU consumer protection law. Not only the Consumer Injunctions Directive, but also several other directives, including the Unfair Terms Directive, contain provisions in this regard.[65] This remedy further plays an important role under the IPR Enforcement Directive[66] and, be it perhaps to a lesser extent, the Procurement Remedies Directives.[67] In EU legislative terms this remedy is therefore by and large as widely provided for as actions for damages. Together with actions for damages it is also one of the two key remedies addressed in the Commission's Collective Redress Recommendation.[68]

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62 E.g. Art. 7 and 16(1) Product Liability Directive 85/374. See further subsection 5.4.2 above.

63 E.g. CoJ case C271/91, *Marshall*, para. 26; CoJ case C-203/99, *Veedfald*, para. 25-28; CoJ case C-168/00, *Leitner*, para. 21-23; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 92-97. See further subsection 7.1.4 above.

64 CoJ case C-453/99, *Courage*. See further subsections 2.5.2 and 6.1.3 above.

65 Art. 2(1)(a) Consumer Injunctions Directive 2009/22; Art. 7(1) Unfair Terms Directive 93/13. See further subsections 5.2.1 and 5.2.2 above respectively.

66 Art. 9(1) and 11 IPR Enforcement Directive 2004/48. See further subsections 4.2.2 and 4.2.3 above respectively.

67 Art. 2(1)(b) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.1 above.

68 See in particular section IV Collective Redress Recommendation 2013/396. See further subsection 5.5.1 above.

And yet injunctive relief arguably still remains an undervalued possible course of action in the present context. This remedy tends to receive only limited attention both in the private enforcement-related legal literature and in the case law of the Court of Justice. More than a decade after *Courage* it still remains to be clarified if the reasoning set out in that case can also be extended to other remedies than actions for damages, particularly with respect to actions for injunctions.[69] As compared to the academic and institutional attention and follow-up given to *Courage*, the Court's ruling in *Muñoz* – based on similar reasoning but relating to the civil law consequences of EU law infringements generally – almost went unnoticed.[70] This remedy is also notably absent from the Competition Damages Directive. The reasons for the exclusion of this remedy from this latter directive are far from evident and have regrettably not been properly explained to date.

486. This study suggests that injunctive relief can in fact be an *important remedy* in private enforcement proceedings, including in competition cases. In particular, it appears that, although this will obviously depend on the circumstances of the case at hand, private parties confronted with EU law infringements are often most interested in a 'quick fix', i.e. (relatively) uncomplicated, speedy and not overly costly proceedings that serve to determine whether or not the relevant rules of substantive EU law have been infringed and that oblige the defendant to stop acting in that manner in case of an affirmative answer. To a considerable extent, actions for injunctions can satisfy this need.

With respect to the EU legislation under consideration, two factors stand out in this regard, namely the (likely) absence, as a matter of EU law, of a requirement to demonstrate, in order for injunctive relief to be granted, first, that the defendant was *at fault* when committing the infringement and, second, that the infringement caused (sufficiently quantified) *harm* to the applicant.[71] As a consequence, even if there can be significant differences between the legal systems of the Member States, the proceedings concerned are typically less complex, faster and less costly, at least as compared to actions for damages. That applies all the more so because, as is further discussed below, unlike actions for damages, injunctions can often be granted as interim relief. Indeed, the abovementioned directives regularly expressly require certain forms of injunctive relief to be made available by means of interim measures.[72] The provisions of EU law in question often also leave a degree of flexibility to the Member States and by extension the national courts seised.

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69 Cf. Opinion AG Jacobs joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOB Bundesverband*, par. 105.

70 CoJ case C-253/00, *Muñoz*. See subsection 2.5.2 above. For a broader assessment of *Courage* and *Muñoz*, see subsection 2.5.3 above.

71 See subsection 7.2.2 above.

72 E.g. Art. 9(1)(a) IPR Enforcement Directive 2004/48; Art. 2(1)(a) Consumer Injunctions Directive 2009/22.

That can allow the latter to issue orders tailored to the specifics of the case at hand.

Taken together the above probably goes a long way in explaining the relative success in practice of injunctive relief as a private enforcement remedy, despite this remedy often receiving only a limited degree of broader attention.[73] It is mostly positively assessed in consumer cases for instance. And in relation to infringements of intellectual property law stakeholders have even identified this as the "*main enforcement remedy*".[74] There further appears to be considerable 'demand' for providing for the possibility of granting injunctive relief in competition cases.[75] The forward-looking (relatively) 'quick fix' that injunctive relief can offer may thus for many private parties be more attractive than the inherently backward-looking remedy of compensation for past harm.[76] It is submitted that this remedy therefore deserves being taken seriously and to be made available and facilitated more broadly where relevant, as a possible manner for private parties to address infringements of EU law before their national courts.

487. The foregoing does not mean however that EU law on injunctive relief as it stands does not leave room for improvement. Two points are to be noted in particular. In the first place, the provisions in question are arguably *too unclear and too lenient* in some respects. Most notably the EU legal acts under consideration do not stipulate expressly that no requirements of fault or harm can apply for injunctive relief to be granted.[77] This means that there remains scope for debate – and for deviating approaches at national level – on these two important points. The possibility offered by both the Procurement Remedies Directives and the IPR Enforcement Directive to allow in certain cases a defendant to 'buy off' an injunction that might otherwise have been granted can also be seen as an example of too far-going flexibility.[78] These provisions essentially allow injunctive relief to be 'transformed' into compensatory relief, thus denying the applicant the possibility to obtain the former where required.

In the second place, it appears that this remedy generally functions in an unsatisfactory manner where *cross-border infringements* are at stake.[79] The Consumer Injunctions Directive, which specifically seeks to address these

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73 See subsection 7.2.2 above.

74 Commission, Staff working document accompanying the report on IPR Enforcement Directive 2004/48, SEC(2010) 1589, p. 14 (regarding preliminary injunctions).

75 See subsection 7.2.3 above.

76 Cf. CoJ case C-169/14, *Sánchez Morcillo*, para. 43, where it is held that, in certain cases, the purely compensatory nature of a damages award might mean that the protection conferred on the private party concerned is incomplete and insufficient.

77 For two exceptions, see Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(3) Misleading Advertising Directive 2006/114.

78 Art. 12 IPR Enforcement Directive 2004/48; Art. 2(1)(c) and 2(5) Utilities Remedies Directive 92/13.

79 See subsection 7.2.3 above.

kinds of infringements, is a case in point. It has largely failed to do so, considering that the system it established to this effect has been used only very sporadically. Similar shortcomings have been observed in connection to the IPR Enforcement Directive. These difficulties are probably not peculiar to this specific remedy however. It would appear that they mainly come to light here mainly because injunctive relief is otherwise relatively frequently applied for and granted. The Commission may therefore well be correct in treating this concern as an expression of more general difficulties connected to cross-border litigation relating to infringements of EU law. Nonetheless it remains to be seen whether the improvements that may result from measures of broader application, such as the Brussels I and the Rome II Regulations,[80] will lead to significant improvements in this respect. Additional measures might be called for.

### *12.2.3. Contractual remedies*

488. *Contractual remedies*, i.e. actions intended to make good infringements of EU law by seeking to nullify or to otherwise make ineffective contractual arrangements entered into in relation to those infringements, can be found in three fields of EU law selected for the purposes of this study. Article 101(2) TFEU stipulates that contracts that are contrary to the prohibition of anti-competitive behaviour, notably cartels, are 'automatically void'.[81] Pursuant to the Unfair Terms Directive consumers are 'not bound' by unfair terms in standard consumer contracts.[82] The Procurement Remedies Directives stipulate that contracts concluded pursuant to certain infringements of the EU public procurement rules are to be considered 'ineffective'.[83]

489. This remedy can play an important role where the EU law infringements to be addressed have a contractual dimension of some sort.[84] The precise nature of this dimension can differ. In competition cases the conclusion of the *contract as such* essentially constitutes the infringement of EU law. By contrast in public procurement cases the conclusion of the contract is 'merely' a *consequence* of an infringement committed at an earlier stage, namely during the preceding contract award procedure. And under the Unfair Terms Directive it is the inclusion of a *particular term* that can have implications for the contract in question. Despite these differences, this remedy thus seeks to prevent private parties from being confronted with a *fait accompli* when they try to address an infringement of EU law in the form of a concluded contract. In the absence of this remedy being expressly provided

80 Brussels I Regulation 44/2001; Rome II Regulation 864/2007.
81 See subsection 6.1.3 above.
82 Art. 6(1) Unfair Terms Directive 93/13. See further subsection 5.3.1 above.
83 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.3 above.
84 See subsection 8.1.1 above.

for as a matter of EU law, primary EU law may – arguably – still require the contract to be terminated in certain cases.[85] Considerably uncertainty exists in this regard however. It would moreover seem that in those cases the outcome is likely to depend to a high extent on the circumstances of the case at hand and the applicable provisions of national law.

It follows from the foregoing that this remedy is more selective in nature than the other two 'main' (substantive) remedies discussed earlier. After all by no means *all* infringements of EU law typically have a contractual dimension of the type referred to here. The IPR Enforcement Directive does not provide for this remedy for instance. Neither does EU law expressly provide for a contractual remedy in relation to abuses of a dominant position within the meaning of Article 102 TFEU. This selectiveness is further illustrated by the fact that the contractual remedy set out in the Procurement Remedies Directives is available only with respect to what are considered to be the most serious infringements of substantive EU public procurement law. The possible contractual consequences of other infringements remain unaddressed in these directives. This appears to imply that, as a matter of EU law, in the latter case the contracts in question can remain effective.

490. The fact that each of the three abovementioned provisions uses a different term ('automatically void', 'not bound', 'ineffective') further suggests a *lack of coherence* at EU level where this remedy is provided for. That applies all the more so because other consumer protection directives than the Unfair Terms Directive use yet again different terms.[86] This is not merely a matter of terminology. There are notable differences as regards the *legal effects* that result from this remedy being awarded. The Court of Justice has for instance long held that the effects under Article 101(2) TFEU are absolute (i.e. *vis-à-vis* all contracting parties as well as third parties) and that they apply *ex tunc* (i.e. retroactively).[87] By contrast the wording of the Unfair Terms Directive makes it clear that here the effects are relative (i.e. they only affect certain parties),[88] while the Procurement Remedies Directives expressly allow for this remedy having only *ex nunc* effects (i.e. only for future purposes).[89] The effects of this remedy being invoked on the remaining, 'non-infringing' provisions of the contracts in question can vary too. Competition law is largely 'neutral' on this point, as it leaves questions of severability in principle to

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85 See subsection 8.1.3 above.

86 E.g. Art. 3(2), (5) and (6) Consumer Sales Directive 1999/44 speaks of contracts being '*rescinded*'. Elsewhere, reference is made to the possibility of '*withdrawal*' from a contract, whereby this term is moreover used in different legal acts with two apparently distinct meanings (cf. e.g. Art. 4(5) and (6) Package Travel Directive 90/314 and Art. 9 Consumer Rights Directive 2011/83).

87 E.g. CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 57.

88 Art. 6(1) Unfair Terms Directive 93/13 provides that the unfair contract term shall not be binding "*on the consumer*".

89 Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13. Although in that case provision must be made for the 'alternative penalties' set out in Art. 2e of these directives.

national law.[90] The Unfair Term Directive's approach can be described as one of 'restraint', in that it seeks to leave the other provisions of the contract unaffected as much as possible.[91] Although this remains to be clarified, under the Procurement Remedies Directives there would generally seem to be little scope for severance, this thus being more of an 'all-or-nothing' issue. For in procurement cases the entire contract will normally result from the earlier infringement of EU law during the contract award procedure.

These differences are to some extent understandable, given that the objectives of the above three contractual remedies, and the contexts in which they operate, differ. A one-size-fits-all approach on the matters discussed above is therefore not always in place. Absolute effects seem for example entirely appropriate for breaches of the relevant competition rules. But that is certainly not the case for breaches of the rules on unfair terms in consumer contracts, as the latter are meant only to protect the interests of the consumer concerned. The distinct approaches as regards the 'non-infringing' provisions seem understandable as well, in light of the different nature of the contractual dimension at issue, as explained above. But this explains by no means all these differences. On many other points the manner in which this remedy has been elaborated appears to be driven primarily by other considerations. Even allowing for the required relative effect, the Unfair Terms Directive could set out the effects more specifically as a matter of EU law. From a legal perspective it is also far from evident why, while Article 101(2) TFEU stipulates that anti-competitive contracts are 'automatically void', in the Procurement Remedies Directives the legally much less distinct term 'ineffectiveness' is used. Under these latter directives the contract in question must moreover first be 'considered' ineffective, implying that here there are no 'automatic' effects.[92]

491. That leads to the last point to be made in this connection. If, as was noted above, EU legislative interference with matters of non-contractual liability (tort) tends to be *sensitive*, this surely also holds true, and perhaps even more so, where contract law is concerned. Contract law has traditionally been left to be regulated by the Member States. Even the Court of Justice can seem hesitant to venture too deeply into this domain.[93] This tension between the EU wishing to take certain legislative measures to facilitate private enforcement and the Member States wishing to avoid too much EU involvement goes a long way in explaining why this remedy has been regulated in such a rather incoherent and unspecific manner, as was already touched upon above. Indeed, the legislative history of the Unfair Terms Directive and the Procurement Remedies Directives show that the legally rather indistinct terms 'not bound' and 'ineffective' were introduced at the

90 E.g. CoJ case 56/65, *Société Technique Minière*, p. 250.
91 E.g. CoJ case C-453/10, *Pereni□ová*, para. 31-35.
92 Cf. recital 13 Procurement Remedies Amending Directive 2007/66.
93 Cf. e.g. CoJ case C-159/00, *Sapod*, para. 52.

behest of the EU legislature. The Commission had proposed using more specific wording (namely 'void' and 'invalid' respectively). Different from what the Commission had proposed these two directives now also expressly refer to national law for the precise legal consequences of this remedy.[94] The complex system of possible 'alternative penalties' and judicial discretion for which the Procurement Remedies Directives provide in this regard is also testimony to the compromises that sometimes need to be struck when enacting secondary EU law of the type at issue here.[95]

It is therefore unsurprising that the laws of the Member States provide for a range of legal concepts when transposing the terms 'not bound' and 'ineffectiveness', such as non-existence, revocability, voidability and unenforceability. As was noted earlier, this flexibility can help to ensure an optimal 'fit' with the domestic legal systems in which these provisions of EU law are to be embedded. However, when taken too far, as is arguably the case here, it can also put at risk the very harmonised and effective enforcement possibilities that the EU legislative measures in question seek to achieve. This very same tension is also reflected in the case law of the Court of Justice. For example, while acknowledging that under the Unfair Terms Directive the Member States have "*a certain degree of autonomy*" to define the applicable legal arrangements, it has also insisted on ensuring the full effectiveness of the objectives of this provision of EU law.[96] Although more factors are likely to play a role in this respect, this ambiguity may well be an important element in explaining why these contractual remedies are not always assessed positively in practice.

### *12.2.4. Interim relief, disclosure measures and penalty payments*

492. Turning to the other remedies found in the EU legislation assessed in this study, a first remedy is *interim relief*.[97] As the Court of Justice has held, this remedy serves in essence "*to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under [EU] law*".[98] Without interim relief being available, pending a definitive ruling in the dispute at hand, the situation 'on the ground' may well evolve in such a manner that this latter ruling becomes devoid of practical effects. One could think of a public contract that is awarded and executed while the contract award decision is still being contested in court. As the Court of Justice observed, in these cases the granting of interim measures can prevent a *lacuna* in the legal protection of the private parties concerned from occurring.[99] Although there can be sig-

94 Art. 6(1) Unfair Terms Directive 93/13; Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13.

95 Art. 2d(3) and Art. 2e Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.3 above.

96 CoJ case C-618/10, *Banco Español de Crédito*, para. 62 and 72.

97 See subsection 8.2.1 above.

98 CoJ case C-416/10, *Križan*, para. 107.

99 CoJ Order case C-278/13 P(R), *Pilkington*, para. 36.

nificant differences between the laws of the Member States, proceedings for interim measures are therefore typically (relatively) uncomplicated and speedy. The resulting measures however only apply provisionally; as the Court has also held, they do not finally determine the legal situation in the dispute at hand.[100] The latter can only be done through legal proceedings on the merits of the case.

Therefore the availability of this remedy under the EU legislation at issue in this study principally depends on whether the typical disputes in question are deemed to *require judicial intervention on short notice*. At one end of the spectre are the Procurement Remedies Directives, where interim measures take an important place.[101] As the above example relating to the award and execution of a public contract illustrates, disputes arising in that context often need to be addressed quickly.[102] At the other end of the spectre are the Product Liability Directive and the Competition Damages Directive. These latter two directives do not provide for this remedy at all, because in terms of substantive remedies they are exclusively concerned with actions for damages and those actions are generally not seen as urgent.[103] Somewhere in between these two extremes lies the IPR Enforcement Directive, which requires interim relief to be made available for two specific purposes, namely to prevent imminent infringements from occurring and to preserve relevant evidence.[104] The consumer protection directives at issue here, in turn, take a somewhat different route. They tend to leave it principally to the Member States to ensure speedy legal proceedings, whether or not they are interlocutory in nature.[105]

The above directives mostly establish a link between the possibility of granting interim relief and injunctive relief of some sort. Generally speaking, interim measures lend themselves well to bringing an (alleged) infringement to a (provisional) halt and/or to prevent damage from occurring. It is noticeable however that the EU legislation under consideration here generally only provides for limited details on the functioning of these proceedings. Only the Procurement Remedies Directives are to some extent an exception, as they go some way in specifying what these interim measures are to entail. These directives refer to the suspension of the contract award procedure

100 CoJ case C-568/08, *Combinatie Spijker*, para. 61.

101 Art. 2(1)(a) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.2.1 above.

102 Cf. Art. 1(1) Procurement Remedies Directives 89/665 and 92/13, according to which one of the key objectives of these directives is to ensure that decisions taken in relation to contract award procedures can be reviewed "*as rapidly as possible*".

103 Cf. e.g. CoJ joined cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen*, para. 29; CoJ Order case C-278/13 P(R), *Pilkington*, para. 50.

104 Art. 7(1) and Art. 9(1)(a) IPR Enforcement Directive 2004/48. See further subsections 4.2.1 and 4.2.2 above.

105 Art. 2(1)(a) Consumer Injunctions Directive 2009/22. See further subsection 5.2.1 above. See e.g. also Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(3) Misleading Advertising Directive 2006/114.

or of the implementation of a decision taken by the contracting authority concerned. They are also alone in expressly allowing for the balancing of the various interests at stake by the competent national court (even if such an exercise often takes place in this connection more generally).[106] The Court of Justice has further held that the Procurement Remedies Directives preclude making the filing of an application for interim measures dependent on a requirement that proceedings on the merits must first have been brought, even where the latter is mere a formality.[107] As regards this latter point, the situation seems largely similar under the IPR Enforcement Directive. There it is stated that the said provisional measures to preserve evidence are to be made available even before the commencement of proceedings on the merits of the case.[108]

493. Another relevant remedy is concerned with measures on the *disclosure of evidence* and other relevant information.[109] Over and above the 'general' EU law requirements that can be derived from the principles of equivalence and effectiveness,[110] there are two EU legal acts that provide for this remedy, namely the IPR Enforcement Directive and the Competition Damages Directive.[111] Both regimes essentially aim to ensure that in the private enforcement proceedings concerned applicants, and where relevant also defendants, can obtain access to evidence that is in the possession or that lies within the control of either the opposing party in the dispute at hand or a third party. They also seek to ensure that this evidence is being preserved, either by means of a court order to this effect (IPR Enforcement Directive) or by means of sanctions in case of relevant evidence being destroyed (Competition Damages Directive). The disclosure possibilities offered under the IPR Enforcement Directive are assessed mostly favourably. Many also agree that measures were called for in relation to competition law infringements. According to the Commission the national laws pre-dating the Competition Damages Directive not only varied considerably, but could also mean that there is "*no effective access to effective evidence*".[112]

This study has nonetheless shown that the following two issues of broader relevance tend to arise in this connection. In the first place, this is an example of a situation where in relation to the EU's legislative intervention several questions of *coherence and fragmentation* come to light. Even if the Competition Damages Directive has been inspired on the IPR Enforcement

106 Art. 2(5) Public Sector Remedies Directive 89/665; Art. 2(4) Utilities Remedies Directive 92/13.

107 CoJ case C-214/00, *Commission v. Spain*, para. 99-100.

108 Art. 7(1) IPR Enforcement Directive 2004/48.

109 See subsection 8.2.2 above.

110 E.g. CoJ case C-526/04, *Laboratoires Boiron*, para. 55. See further section 2.2 above.

111 Art. 6-8 IPR Enforcement Directive 2004/48; Art. 5-7 Competition Damages Directive. See further subsections 4.2.1 and 6.3.3 above respectively.

112 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 19 (regarding competition cases).

Directive, there are certain differences between both disclosure regimes. Some of these differences are understandable, such as the special rules on the disclosure of evidence included in the files of public enforcement authorities that the former directive provides for. These rules are to a high extent specific to the manner in which competition law is being enforced in the EU, namely through strong public enforcement and with heavy reliance on 'leniency' programmes. Other differences between these two regimes are more difficult to understand and are to be regretted however. This includes the manner in which the requests for disclosure must be specified and the formulation of the standard to be met before disclosure can be ordered. A further – and more fundamental – question is why these two fields of law have been singled out for EU legislative action, while no such action has been taken in other fields. This decision implies that the enforcement possibilities of the private parties concerned by (alleged) infringements of EU intellectual property and competition law are increased, while those of private parties affected by infringements of other rules of EU law, or of 'purely' national law, remain unaltered. This also implies that there is a fragmenting effect on the national legal systems concerned, as the latter tend to address matters of disclosure across the board (i.e. regardless of the field of law at issue). It would seem that, on balance, there are grounds for arguing that the concealed and professional manner in which intellectual property and competition law infringements tend to be committed sets these two fields of law apart, at least when compared to typical infringements of public procurement and consumer protection law. Whether or not these differences are such that the aforementioned consequences are to be taken for granted remains however a matter for (political) debate.[113]

The second issue is the risk of *conflicting interests and abuse*. Fears of this kind have been expressed in relation to the disclosure regimes foreseen in both the IPR Enforcement Directive and the Competition Damages Directive, for instance concerning the possible high costs of complying with these disclosure orders, the possibility of confidential information or personal data being disclosed and abuse through overly broad 'fishing expeditions'. A balance is therefore to be struck between the legitimate interests of the applicants, the defendants and the third parties that may be involved. At a more abstract level, this also concerns a balancing between the interests served by private enforcement of EU law generally and the risk associated with a 'litigation culture'. Against this background several safeguards have been provided for in the two abovementioned directives. They include: the requirement of a court order, thus ensuring judicial oversight; the obligation to first present reasonably available evidence supporting the claims in question ('fact pleading'); a requirement to delineate the disclosure orders in a

113 Doubts on these points were expressed e.g. in the context of the consultations relating to the Competition Damages Directive, discussed in subsection 6.2.3 above. On issues of coherence and fragmentation at national level more generally, see also subsection 10.4.2 above.

specific, narrow and proportionate manner, especially under the Competition Damages Directive; and rules on the protection of confidential information. That being so, it would appear that these directives strike a reasonable balance, although the effects in practice may depend in part on the precise manner in which the above rules are transposed and applied at national level. Especially the possible involvement of third parties seems to require particular attention in this regard.

494. The Consumer Injunctions Directive describes a *recurring penalty payment* as "*an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or the administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions*".[114] It follows that this remedy serves to ensure that, once a national court has issued a ruling in a private enforcement case, the defendant takes the necessary measures to comply with that ruling.[115] It does so by imposing a financial penalty, often on a recurring basis, for instance per day that the non-compliance persists after a certain date. The aim is thus, in the words of the Court of Justice, to place the defendant under "*economic pressure which induces it to put an end to the breach established*".[116] No payment will be due if timely compliance is ensured. This remedy can thus be especially useful in situations where there is reason to doubt the defendants' commitment to comply with a court's ruling in private enforcement proceedings.

Apart from the Consumer Injunctions Directive, of the legal acts under consideration only the IPR Enforcement Directive also provides for this remedy however.[117] That leads to the question what explains its rather limited availability for private enforcement purposes. Two points stand out in this regard. In the first place, the two abovementioned directives make this remedy available specifically in relation to the *injunctive relief* that may be granted under the legislation at hand. Much like interim measures, this remedy is thus not available in relation to actions for damages. This explains why it has not been laid down in acts such as the Product Liability Directive and the Competition Damages Directive, which concentrate exclusively on compensation in damages. In the second place, it appears that this is another subject-matter where EU legislative intervention tends to be seen as particularly sensitive. This is likely to be connected to the differences between the national laws in this respect. While some national legal systems are entirely unfamiliar with this remedy, where they do, differences exist as to whether

114 Art. 2(1)(c) Consumer Injunctions Directive 2009/22. See further subsection 5.2.1 above.
115 See subsection 8.2.3 above.
116 CoJ case C-177/04, *Commission v. France*, para. 91 (concerning Article 260(2) TFEU).
117 Art. 9(1)(a) and Art. 11 IPR Enforcement Directive 2004/48. See further subsections 4.2.2 and 4.2.3 above.

any such penalty payments are due to the State or rather to the private party-applicant concerned. Therefore, at the insistence of the Member States represented in Council, the abovementioned reference to this remedy in the Consumer Injunctions Directive is preceded by the phrase "*in so far as the legal system of the Member State concerned so permits*". The IPR Enforcement Directive similarly contains phrases qualifying the Member States' obligations in this respect, i.e. "*where appropriate*" and "*where provided for under national law*".[118] Both directives further leave it open who is the beneficiary of the payment. The fact that the Procurement Remedies Directives do not provide for this remedy, but instead – more generally – require Member States to ensure that decisions are effectively enforced should probably also be seen in light of this sensitivity.[119] It also indicates that there are also other manners to seek to ensure compliance with judgments issued in private enforcement proceedings.

### *12.2.5. Publicity measures, legal costs and 'unregulated' remedies*

495. Another remedy that is provided for in only some of the acts of secondary EU law under consideration in this study is the possibility for the court seised to order *publicity measures*. The IPR Enforcement Directive speaks of "*appropriate measures for the dissemination of information concerning the decision, including displaying the decision and publishing it in full or in part*".[120] This directive adds that, on an optional basis, Member States may also make provision for the ordering of "*additional publicity measures which are appropriate to the particular circumstances, including prominent advertising*". These measures are to be imposed at the request of the applicant and implemented at the expense of the infringer. The Consumer Injunction Directive and certain other consumer protection directives contain a largely similar remedy, which is to be ordered "*where appropriate*".[121]

This remedy serves a dual purpose, namely deterring infringers and contributing to the awareness of the public at large.[122] It can therefore be expected to be normally most effective where the general public is directly affected by the infringements of EU law at issue and where the infringing party is sensitive to the reputational damage that may result from the publication. This explains its inclusion in the abovementioned directives, just as it probably explains its absence in acts such as the Procurement Remedies Directives. It might also mean that, although it has not been included in the

118 This latter phrase has been included in Art. 11 IPR Enforcement Directive 2004/48 (on 'permanent' injunctions), but not in its Art. 9(1)(a) (on interlocutory injunctions).

119 Art. 2(8) Procurement Remedies Directives 89/665 and 92/13. See further subsection 3.3.3 above.

120 Art. 15 IPR Enforcement Directive 2004/48. See further subsection 4.2.5 above.

121 Art. 2(1)(b) Consumer Injunctions Directive 2009/22. See further subsection 5.2.1 above. See e.g. also Art. 11(2) Unfair Commercial Practices Directive 2005/29; Art. 5(4) Misleading Advertising Directive 2006/114.

122 Recital 12 IPR Enforcement Directive 2004/48.

Competition Damages Directive, at least in certain competition cases this remedy might well be of relevance. Having said that, where EU law makes this remedy available it mostly appears to play only a modest role in practice. The often rather non-committal manner in which it has been set out may be part of the explanation for this. However a more important consideration appears to be that this remedy anyway tends to generate only limited interest on the side of the private parties that are being confronted with an infringement of EU law. Given its dual purpose (i.e. deterring and raising awareness), it is arguably more suitable as a public enforcement instrument.[123]

496. Although both are evidently concerned with different subject-matters, there is a remarkable degree of similarity between the EU law measures on the disclosure of evidence discussed above and those on *legal costs*.[124] And both issues are of considerable practical importance to private parties that may wish to initiate private enforcement proceedings, especially (but not exclusively) actions for damages. Both issues were singled out for EU legislative action in particular in relation to infringements of EU intellectual property and competition law. But in the end no binding measures were provided in the Competition Damages Directive.[125] Of the EU legislation under consideration only the IPR Enforcement Directive contains therefore measures on legal costs. This latter directive provides that "*reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this*".[126] That implies that the infringer must generally bear all the financial consequences of its conduct.[127] Exceptional as it may be,[128] this provision has been drafted in a very broad manner, to the extent that most Member States did not even consider it necessary to amend their pre-existing rules to comply with it. Although it cannot be excluded that the Court of Justice will develop more ambitious requirements on the basis of this provision, it is

123 Cf. e.g. Art. 30 Competition Regulation 1/2003.

124 See subsection 8.2.5 above.

125 For earlier discussions on this subject-matter, see in particular Commission, Green paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, p. 9; Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 9-10; Commission, Staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, pp. 74-75.

126 Art. 14 IPR Enforcement Directive 2004/48. See further subsection 4.2.5 above. See also the 'general rules' set out in Art. 3(1) IPR Enforcement Directive 2004/48, discussed in subsection 4.3.2 above, pursuant to which the measures, procedures and remedies for the enforcement of the intellectual rights covered by this directive may not be "*unnecessarily complicated or costly*".

127 CoJ case C-406/09, *Realchemie*, para. 49.

128 For another (scarce) example of EU involvement in this domain, see Art. 11(4) Environmental Impact Assessment Directive 2011/92. Cf. CoJ case C-260/11, *Edwards*, para. 40-48; CoJ case C-427/07, *Commission v. Ireland*, para. 92-94; CoJ case C-530/11, *Commission v. UK*, para. 33-72.

therefore unsurprising that its introduction so far seems to have done little to alleviate stakeholders' concerns related to the legal costs involved in bringing private enforcement actions for infringements of EU intellectual property law. Comparably, also the Commission's (non-legally binding) Collective Redress Recommendation leaves the Member States a large margin of manoeuvre when setting rules on legal costs.[129]

The result is therefore somewhat of a *paradox*. On the one hand the importance of legal costs for the private enforcement of EU law is generally not in doubt. On the other hand as it stands this subject-matter is hardly addressed in a meaningful manner in EU law. This state of affairs can probably be explained in particular by two considerations. First, many consider that EU 'interference' in this domain is undesirable. There appears to be a general preference for leaving this subject-matter to be regulated by the Member States, as a matter of subsidiarity and so as to avoid fragmentation at national level. Second, as was the case in relation to the aforementioned disclosure measures, the fear of creating or encouraging a 'litigation culture' is frequently voiced in this connection. That applies especially where a possible rule of EU law would entail a deviation from the generally accepted 'loser pays' principle. In this light it is probably no coincidence that the abovementioned rule of the IPR Enforcement Directive, which is broadly consistent with this principle, did get adopted, whereas the Commission's earlier suggestion to include a rule on legal costs in the Competition Damages Directive, which could have implied a deviation from this principle, received considerable criticism and was eventually dropped.

This would seem to make it unlikely that the EU will take private enforcement-related legislative measures on legal costs in the foreseeable future. That applies all the more so because not only the Member States represented in Council tend to be of the above view, as is perhaps to be expected, but also its co-legislator, i.e. the European Parliament. The watering down of the IPR Enforcement Directive's rule on legal costs largely occurred at the insistence of the two EU co-legislators. And in 2012 the European Parliament declared that "*Member States are to determine their own rules on the allocation of [legal] costs*", while also insisting that "*there can be no action without financial risk*".[130] Still it is uncertain whether this means that this matter is therefore to be considered 'settled' at EU level. Not only do rules on legal costs remain of considerable practical importance in this context, there can also be a tension between the two abovementioned considerations. For now it remains an open question what carries more weight for the EU legislature, its opposition against EU legislative involvement with rules of legal costs

129 Points 13 and 30 Collective Redress Recommendation 2013/396. See further subsection 5.5.1 above.

130 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, para. 20. See also European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 20.

(which implies that no EU legislative measures are to be taken) or its desire to ensure that the applicable rules are such as to avoid creating or encouraging a litigation culture (which could imply that certain measures are to be taken, e.g. prohibiting contingency fees as a matter of EU law).

497. Finally, it is not to be forgotten that the overview of the remedies discussed above is certainly not exhaustive. Although this can vary significantly, the national laws of the Member States regularly provide for *other remedies*, which remain unregulated as a matter of secondary EU law, but which can nonetheless also be of importance for the purposes of the private enforcement of EU law.[131] One could think in particular of actions for declaratory relief, actions based on unjust enrichment and actions for restitution. Especially this latter remedy can be relevant here, not in the last place because on this point there is already a well-established body of case law concerning 'vertical' situations, pursuant to which private parties can claim the repayment of charges levied contrary to EU law by the Member States' authorities.[132] In its 'pure' form restitution can involve an action for the repayment of sums paid from one private party to another as a consequence of an infringement of EU law. As such an action for restitution could serve as a 'follow-up' to a successful contractual remedy. Actions for 'restitutionary damages' can also be used to reclaim the gains made by the infringer, rather than – as is the case with the 'classical' actions for damages discussed above – for compensating the harm caused by the infringement. The above remedies could therefore conceivable play a role in the EU's broader approach on private enforcement.

Noting the existence and the private enforcement potential of these 'unregulated' remedies is not only of relevance with a view to possible future legislative action at EU level in this regard. These remedies can also be of relevance in other ways. In particular, it may not always be easy to clearly distinguish those remedies from the ones that are at present already regulated by the EU legislation assessed in this study. That is illustrated by the fact that under the IPR Enforcement Directive's regime on actions for damages account can be taken of the 'unfair profits' made by the infringer. This appears to point to a restitution-related element, even though the directive's overall emphasis remains on the compensatory function of damages awards.[133] Likewise views can differ as to whether and if so, in which cases actions for restitution brought under national law qualify as 'actions for damages' within the meaning of the Competition Damages Directive. This is of practical relevance, as it determines whether or not this directive's rules on matters such as the non-disclosure of certain evidence apply to the legal

131 See subsection 8.2.6 above.

132 E.g. CoJ case 199/82, *San Giorgio*, para. 12; CoJ case C-147/01, *Weber's Wine World*, para. 93.

133 Art. 13(1)(a) and (2) IPR Enforcement Directive 2004/48. See also its recital 26.

proceedings in question.[134] Finally, the concept of unjust enrichment can lead to particular complexities of its own, mainly because it can be a double-edged sword. That is to say, it may serve as a ground for reclaiming payments made to a party that infringed EU law, but it can also be an argument for rejecting such claims for restitution where it would lead to the overcompensation of the private party-applicant.

### *12.2.6. Legal standing, limitation periods and rules of evidence*

498. One of the most important procedural issues touched upon in the foregoing is that of *legal standing* (*locus standi*), i.e. the rules that determine which parties are entitled to initiate private enforcement proceedings.[135] In many respects the EU's involvement with this issue echoes the more general tendencies touched upon earlier. On the one hand for private enforcement to be a realistic option for private parties affected by infringement of certain rules of substantive EU law it is evidently of crucial importance to ensure that these parties are not precluded from bringing a case. All EU legal acts under consideration in this study therefore contain rules on legal standing. The IPR Enforcement Directive specifies for example which four categories of parties should in principle be allowed to bring a case.[136] It is even one of the main aims of the Consumer Injunctions Directive to specify which entities are entitled to act upon (alleged) infringements of the relevant EU consumer protection rules.[137] One might thus be inclined to conclude that EU law typically regulates this subject-matter to a high extent.

On the other hand the provisions of EU law in question have often been drafted in such a manner that the Member States did not need to take any action to comply with them. Indeed, in relation to the Procurement Remedies Directives' rule on legal standing the EU legislature expressly stated that it wished not to "*jeopardise*" the logic of the existing legal systems of the Member States.[138] Mostly at the insistence of the Member States, almost all provisions in question contain express references to national law. These references are sometimes limited to the applicable detailed rules, as is the case under the Procurement Remedies Directives. But in other instances they appear to relate to the more fundamental question which parties are entitled to initiate private enforcement proceedings in the first place. For example, three of the four categories of potential applicants specified in the IPR Enforcement Directive only have legal standing "*in so far as permitted by and in accordance with the rules of the applicable law*". The degree of harmonisation provided for is thus often more limited than what might appear at first

134 See in particular Art. 2, 4(4) and 6 Competition Damages Directive.
135 See subsection 9.1.2 above.
136 Art. 4 IPR Enforcement Directive 2004/48. See further subsection 4.3.1 above.
137 Art. 4 Consumer Injunctions Directive 2009/22. See further subsection 5.2.2 above.
138 Council, doc. 7834/89 ADD 1, p. 7.

sight. The relevant provisions of EU law tend to confirm the pre-existing rules of national law as much as they may lead to these rules being altered.

It would seem therefore that this is another situation where the dynamic interplay between the EU legislature and the EU judiciary might be of particular importance. For the Court of Justice may well derive from the above provisions more ambitious requirements as a matter of EU law. With respect to the Procurement Remedies Directives the Court has already signalled that, while the inclusion of an express reference to national law may allow the Member States a certain margin of manoeuvre, the exercise thereof should not come at the expense of the effectiveness of these directives.[139] Conversely, the Competition Damages Directive, where an express reference to national law is notably absent in relation to the issue of legal standing, is an example of a case where the EU legislature codified and built on earlier case law.[140] More generally, even if much remains to be clarified, when seen in light of the Court's other case law on legal standing-related issues[141] as well as the need for an interpretation that is consistent with the fundamental right to an effective remedy guaranteed under the Charter,[142] the Court may well be inclined to interpret the above provisions rather extensively, without however creating an *actio popularis*.

499. Another procedural issue of particular importance in a private enforcement context is that of *limitation periods*, which determine before which date an aggrieved private party must initiate legal proceedings to address an infringement of EU law should it wish to do so.[143] Rules of this kind serve to ensure legal certainty, particularly for possible defendants and affected third parties, while at the same time their length and application in specific cases should not be such as to deprive the private parties concerned from a reasonable opportunity to bring a private enforcement action. Especially the Procurement Remedies Directives, the Product Liability Directive and the Competition Damages Directive contain relatively detailed rules in this regard.[144] When considered together, it appears that the EU legislature tends not to rely on a 'one-size-fits-all' approach where limitation periods are concerned. Instead the balance between the various interests at stake is

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139 CoJ case C-410/01, *Fritsch*, para. 28-34.

140 See in particular Art. 1(1) and 2(1) and recital 12 Competition Damages Directive. Cf. CoJ case C-453/99, *Courage*, para. 24; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 59 and 61. See further subsection 6.3.5 above.

141 See e.g. CoJ case C-253/00, *Muñoz*, para. 32; CoJ case C-174/02, *Streekgewest Westelijk Noord-Brabant*, para. 18-20; CoJ case C-132/05, *Commission v. Germany (Parmesan cheese)*, para. 68-71; CoJ case C-240/09, *Lesoochranárske zoskupenie*, para. 51.

142 Art. 47 Charter. See further section 2.3 and subsection 11.2.5 above.

143 See subsection 9.1.3 above.

144 Art. 2c and Art. 2f(1) and (2) Procurement Remedies Directives 89/665 and 92/13; Art. 10 and 11 Product Liability Directive 85/374; Art. 10 Competition Damages Directive. IPR Enforcement Directive 2004/48 addresses this issue only in very general manner (see its Art. 3(1)). See further subsections 3.3.2, 5.4.2, 6.3.5 and 4.3.2 above respectively.

often struck in a slightly different manner, in light of the specific objectives that the directives in question seek to achieve and the particularities of the field of law at issue.

The rules on limitation periods set out in the three abovementioned directives accordingly each have certain specific characteristics. First, although this depends on the form of relief sought, the Procurement Remedies Directives provide for limitation periods that are generally very short (as little as 10 days). This is consistent with these directives' aim to ensure that the judicial review is not only effective, but also, and in particular, rapid. Second, the time periods set out in the Product Liability Directive primarily serve as a sort of temporal 'counterbalance' against the 'strict' liability provided for in this directive. This directive therefore not only provides for a relatively short limitation period, but it also lays down an additional period after which all relevant rights are extinguished in any case. Third, the Competition Damages Directive's rules on limitation periods stand out for being particularly 'claimant-friendly'. These rules seek to ensure that any limitation period has a considerable length (five years), while allowing – different from the Product Liability Directive for instance – the Member States to set longer periods. These rules also determine, in manner that is rather 'generous' to (potential) applicants, the moment at which the limitation period begins to run and that these periods are to be suspended until after the completion of any relevant public enforcement investigations and proceedings.

500. Turning to *rules of evidence*, the main conclusion to be drawn here is that the EU legislation assessed in this study only sporadically specifies which party has the burden of proof in private enforcement proceedings and how the available evidence is to be assessed.[145] For the most part it seems to be simply presumed that, in accordance with the relevant national law, it is for the applicant to substantiate its claims and for the national court seised to assess the evidence brought before it. It is true that the Product Liability Directive specifies what applicants and defendants must demonstrate for liability to be incurred and for the latter to be able to rely on the defences set out in this directive (e.g. the 'development risk defence').[146] However the point here seems more one of making clear that the said liability is 'strict' and that the said defences are available, rather than one of addressing the burden of proof proper. The same essentially applies with respect to the Competition Regulation, which stipulates that it is for the applicant to prove that an infringement occurred, while the defendant must prove that the conditions of Article 101(3) TFEU have been met if it wishes to rely on this provision by means of a defence.[147]

145 See subsection 9.1.4 above.

146 Art. 4 and 7 Product Liability Directive 85/374. See subsections 5.4.1 and 5.4.2 above respectively.

147 Art. 2 Competition Regulation 1/2003. See further subsection 6.1.3 above.

Even if the Commission eventually did not pursue its earlier suggestion to provide for a rebuttable presumption of fault in competition cases,[148] the Competition Damages Directive is still comparatively ambitious where rules of evidence are concerned. Most notably it regulates the effects (as either irrefutable or *prima facie* evidence) in private enforcement proceedings of infringement decisions taken by public enforcement authorities, it includes particular rules of evidence regarding cases where the harm may have been 'passed-on' and it provides for a rebuttable presumption that certain infringements caused harm.[149] While these rules go further than the ones set out in the other EU legislation at here, elsewhere in EU law comparable rules of evidence can be found, particularly rebuttable presumptions and reversals of the burden of proof.[150] Seen in this broader perspective, the said rules on the effects of infringement decisions appear to be the most innovative (and perhaps therefore also the most controversial).

### *12.2.7. Forum, rules facilitating settlements and judicial review*

501. This study indicates that, at least as far as the EU legislation assessed is concerned, detailed EU rules on *forum* are rather unusual.[151] In fact, hardly any such rules are provided for regarding situations where the private enforcement claims in question are presumed to be brought before a *civil* court, as is the case under the Product Liability Directive, the IPR Enforcement Directive and the Competition Damages Directive (although the reference in this latter directive to Article 267 TFEU on the preliminary reference procedure implies that indirectly certain requirements apply[152]). The situation is more heterogeneous however under the Procurement Remedies Directives and consumer protection directives such as the Consumer Injunctions Directive and the Unfair Terms Directive.[153] Probably in light of the differences existing at national level, these latter directives leave the Member States the choice whether to designate a judicial or a non-judicial body to rule on the claims brought on the basis of these acts. These *judicial* bodies can be either civil or administrative courts. In those cases again no further requirements have been specified. But this can be different where these bod-

148 See in particular Commission, White paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, pp. 6-7.

149 Art. 9, 12-15 and 16 Competition Damages Directive respectively. See further subsection 6.3.5, 6.3.4 and 6.3.2 above respectively.

150 See e.g. Art. 6(1) and (2) Electronic Signatures Directive 1999/93; Art. 8 Racial Equality Directive 2000/43; Art. 5(3) and (4) Air Passengers' Rights Regulation 261/2004; Art. 19 Gender Equality Directive 2006/54; Art. 6(9) Consumer Rights Directive 2011/83; Art. 20(3) Public Limited Liabilities Companies Directive 2012/30.

151 See subsection 9.2.1 above.

152 Art. 4(9) Competition Damages Directive. See further subsection 6.3.5 above.

153 Art. 2(9) Procurement Remedies Directives 89/665 and 92/13; Art. 2(1) Consumer Injunctions Directive 2009/22; Art. 7(2) Unfair Terms Directive 93/13. See further subsections 3.3.3, 5.2.2 and 5.3.2 respectively.

ies are *non-judicial* in character (e.g. an administrative appeal board or an ombudsman). As especially the Procurement Remedies Directives illustrate, then additional and rather detailed requirements can apply, which essentially aim to ensure that the review exercised is independent and impartial.[154] These requirements include rules on the composition of the review bodies concerned, the parties' right to be heard, decisions being reasoned and in writing, as well as the possibility of making preliminary references.

It thus appears that, where rules of forum are concerned, a considerable degree of 'residual' procedural autonomy often remains for the Member States. As the Court of Justice has consistently held ever since *Rewe*, in the absence of specific EU rules, it is in principle for each Member State to designate the courts having jurisdiction to rule on private enforcement actions and to specify the detailed rules that apply in this respect.[155] The findings of this study suggest that secondary EU law on private enforcement mostly leaves this general rule unaffected, particularly where the Member States designate bodies that are judicial in character. Put simply, the EU legislature appears to trust that the – civil or administrative – courts of the Member States will do their work in an independent, impartial and fair manner. It tends to be less inclined to do so however where the task of ruling on the private enforcement actions in question is attributed to administrative authorities or other non-judicial bodies.

502. The EU legislation under consideration aims to encourage the *out-of-court settlement* of disputes involving alleged infringements of EU law essentially in two distinct manners.[156] As a first possible manner, rules on '*pre-trial contacts*' do so by obliging potential applicants to first contact the alleged infringers before initiating legal proceedings. Rules of this kind are typically found in the acts that expressly allow for review by administrative courts, notably the Consumer Injunctions Directive and the Procurement Remedies Directives.[157] A second possible manner is the provision of rules on *alternative dispute resolution*, which in contrast presume that the parties concerned are unable to resolve the dispute between them and therefore foresee the involvement of (non-judicial) outside entities of some sort. Leaving aside the Procurement Remedies Directives' aforementioned broadly formulated rules on forum (which could entail arbitration) and the 'conciliation mechanism' for which one of these directives provided until the 2007 revision of these directives,[158] it has been seen that the EU legislation at issue

154 See e.g. also Art. 11(1) Unfair Commercial Practices Directive 2005/29; Art. 5(1) Misleading Advertising Directive 2006/114.

155 CoJ case 33/76, *Rewe*, para. 5.

156 See subsection 9.2.2 above.

157 Art. 1(4) and (5) Procurement Remedies Directives 89/665 and 92/13; Art. 5 Consumer Injunctions Directive 2009/22. See further subsections 3.3.3 and 5.2.2 above respectively. See e.g. also Art. 11(1) Unfair Commercial Practices Directive 2005/29.

158 Art. 9-11 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment. See further subsection 3.4.1 above.

does not set out rules on alternative dispute resolution as such. The focus is squarely on facilitating judicial redress. Yet the Competition Damages Directive nonetheless includes certain rules that expressly seek to encourage attempts at settling disputes out-of-court, especially by specifying the effects thereof on legal proceedings brought under this directive (suspension of limitation periods and possibly also of legal proceedings; reduction of claims for compensation and contribution).[159] This illustrates that the EU legislature does not see judicial redress and alternative dispute resolution as being entirely unrelated. It also illustrates, more generally, that interest at EU level in alternative dispute resolution appears to be increasing, as also the adoption in 2013 of the Consumer ADR Directive illustrates.[160]

Two additional points merit being noticed here. In the first place, the abovementioned provisions of EU law are characterised by their *optional nature*. The said rules on pre-trial contacts can be binding on the parties concerned, but under the directives concerned they are mere options available to the Member States. The reverse is true for the abovementioned rules on alternative dispute resolution. These latter rules are binding on the Member States, but they are optional for the parties concerned, in the sense that neither the Competition Damages Directive nor the Consumer ADR Directive obliges private party-applicants to have recourse to alternative dispute resolution mechanisms. In the second place, there is generally little doubt that out-of-court settlements can have certain advantages, notably in terms of lower costs and the informality and speed of the proceedings. This is thus potentially an interesting manner to resolve disputes involving infringements of EU law. Yet there can also be certain *disadvantages*, especially for (potential) applicants. In as far as possible delays and the associated risks during attempts to reach a settlement are concerned, such as the expiry of limitation periods, the above directives mostly address these disadvantages. However the EU legislature seems to take a narrower view than the EU judiciary on this point, given that the latter also tends to take account of possible additional costs and practical complications for the private parties concerned.[161] Another, more general potential disadvantage that tends to receive only limited attention is how to safeguard the general interest associated with issues such as the legality of any settlement reached between the parties and the lack of transparency of settlements.[162]

503. As a last point, two procedural issues that both relate to the *judicial review* to be exercised by national courts seised in private enforcement proceedings are to be considered, i.e. the standard of judicial review and the question whether those courts are required to raise certain points of EU law

159 Art. 18-19 Competition Damages Directive. See further subsection 6.3.5 above.
160 Consumer ADR Directive 2013/11. See further subsection 5.5.2 above.
161 CoJ case C-63/01, *Evans*, para. 44-58; CoJ joined cases C-317/08 to C-320/08, *Alassini*, para. 52-66.
162 See subsection 11.1.3 above.

of their own motion (*ex officio*). Both issues have in common that none of the legal acts assessed in this study addresses them expressly. Yet in both instances certain requirements have been developed in the case law. In particular, as regards the *standard* of judicial review, the Court has held that it is not compatible with the objective of the Procurement Remedies Directives if the test to be applied is whether or not the defendant acted in an arbitrary manner.[163] For now it remains to be clarified however what standard is then required under these directives and whether this ruling can be applied more broadly. There is other case law suggesting that EU law generally (especially the principle of effectiveness) does not require 'full' judicial review, i.e. the empowerment of the court to substitute its own assessment for that of the defendant.[164] Consequently the required standard arguably lies somewhere in between a test of arbitrariness and full review. Yet it cannot be excluded that a higher standard applies in cases brought under secondary EU law of the type at issue in this study, as compared to cases where no such legislation applies and that therefore fall squarely within the procedural autonomy of the Member States.

At least as many questions can arise with respect to EU law requirements regarding the possible *own motion review* by a national court in private enforcement litigation.[165] Such an obligation implies a deviation from the predominantly passive role of those courts, particularly in legal proceedings between private parties, under the domestic laws of the Member States, which the Court of Justice has accepted as a general rule.[166] In a remarkable line of case law the Court has however also clarified that under the Unfair Terms Directive an *obligation* of own motion review exists in principle, in light of the often weak position of consumers and the nature and importance of the public interest underlying consumer protection in the EU legal order.[167] The Court has further held that in competition cases a similar obligation can exist, at least where the possible annulment of arbitration awards is concerned, whereby the importance of the EU rules in question has again been highlighted, without however making it clear precisely in which situations and on which grounds such an obligation exists in this field of law.[168] By contrast in relation to the Procurement Remedies Directives the Court has left this question primarily to be determined by national law, while not-

163 CoJ C-92/00, *Hospital Ingenieure*, para. 57-64. See subsection 9.2.3 above.

164 CoJ case C-120/97, *Upjohn*, para. 30-37.

165 See subsection 9.2.4 above.

166 E.g. CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 21; CoJ joined cases C-222/05 and C-225/05, *Van der Weerd*, para. 28.

167 See in particular CoJ joined cases C-240/98 and C-244/98, *Océano Grupo*, para. 22-29. See further subsection 5.3.2 above.

168 See CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 13-14 and 22; CoJ case C-126/97, *Eco Swiss*, para. 36-41; CoJ joined cases C-295/04 to C-298/04, *Manfredi*, para. 31; CoJ case C-8/08, *T-Mobile Netherlands*, para. 49. See further subsection 6.1.1 above.

ing at the same time that these directives can *preclude* own motion review.[169] The overall picture that thus emerges is therefore far from clear. Further clarification remains to be awaited. Nonetheless it would appear that the nature or importance of the rules of substantive EU law at stake in the abovementioned cases is not the decisive element in explaining these differing outcomes. The crucial issue seems rather a desire on the side of the Court to ensure the effective protection of the rights that the private parties concerned derive from EU law. While in some cases this consideration can argue in favour of own motion review, in other instances it can argue against it.

## 12.3. Public and private perspectives on private enforcement

In many respects a central theme running through the two preceding sections has been, as was noted earlier, the tension between EU 'interference' and the Member States' 'autonomy' where the possible adoption of EU legislation facilitating the private enforcement of EU law is concerned. This last section has a somewhat different central theme, namely the distinction and interaction between 'public' and 'private' in private enforcement-related matters. A question that is of particular importance in this connection is whether and if so, to which extent private enforcement can and should be understood as an enforcement instrument in the general interest. The answer to this question also has a bearing on the assessment of the inherent limitations and points of attention that arise in connection with the EU's private enforcement model and, by extension, the EU legislation assessed in this study. Finally, the question arises as to the need for, and the content of, a more elaborated EU policy regarding its law-making related to private enforcement. Building on the findings set out in the preceding chapters, these issues are subsequently discussed in the three subsections below.

### *12.3.1. Private enforcement as a complementary enforcement instrument*

504. This study has shown that the relationship between public and private enforcement is both an important and a complex issue. Just as the enforcement of the rights that private parties derive from EU law normally takes place before the national courts, public enforcement also mostly takes place *at national level*.[170] The Commission itself is only exceptionally empowered to address (alleged) infringements of rules of substantive EU law by private parties, notably in the field of EU competition law.[171] Consequently, where the compliance with EU law by private parties is concerned, the responsibility for ensuring public enforcement normally lies with the Member States. EU law typically requires the Member States to provide, as a min-

169 CoJ case C-315/01, *GAT*, para. 46-55. See further subsection 3.2.2 above.
170 See in particular subsections 1.1.1 and 2.4.2 above.
171 See subsections 2.4.2 and 6.4.2 above.

imum, for effective, proportionate and dissuasive penalties for such infringements of EU law. They can also be required to designate public enforcement authorities that exercise certain powers to investigate, terminate and/or punish infringements. The extent of these requirements and these powers tends to differ significantly between the various fields of EU law however.

505. When considering these public enforcement-related obligations under EU law and the EU legislation facilitating the private enforcement of EU law discussed in the foregoing in their totality the starting point is that these are to a high extent two *largely unrelated matters*. These two sets of obligations exist for the most part independently from each other. For instance, a Member State will generally not be deemed to have fulfilled its duties under EU law to ensure public enforcement of the substantive rules in question merely because it has permitted or facilitated private enforcement.[172] Similarly, whereas for an assessment under the principle of effective judicial protection regard can be had to the entirety of the remedies available to the private party concerned in a given legal system, the availability or absence of certain public enforcement mechanisms does not appear to be a relevant factor in this respect however.[173] And while private parties can seek to 'trigger' public enforcement proceedings by filing complaints, that does not mean that they become a party to the legal proceedings to which their complaint may (or may not) lead.[174]

It is true that especially in the field of EU competition law there is a degree of interaction. The Competition Regulation foresees the possibility of *amicus curiae* interventions by the competent public enforcement authorities, including the Commission, in private enforcement proceedings.[175] The Competition Damages Directive further provides for the possibility of such interventions specifically in relation to requests for the disclosure of evidence included in the their files and the quantification of damages.[176] This directive also regulates the effects of findings of infringements in public enforcement proceedings, the suspension of limitation periods until after the termination of public enforcement proceedings as well as the possibility for the public enforcement authorities concerned, when determining the appropriate penalty for an infringement, to take account of compensation paid to injured private parties pursuant to an out-of-court settlement.[177] But these are on the whole rather limited exceptions. That is already illustrated by the optional nature of most of the abovementioned rules set out in the

172 See subsection 2.4.3 above.
173 See further subsection 2.3.1 above.
174 See subsection 2.4.1 and 6.4.2 above.
175 Art. 15 Competition Regulation 1/2003. See further subsection 6.1.3 above.
176 Art. 6(11) and 16(3) Competition Damages Directive. See further subsections 6.3.3 and 6.3.2 above respectively.
177 Art. 9, 10(5) and 18(4) Competition Damages Directive. See further subsection 6.3.5 above.

Competition Damages Directive. It is further illustrated by the fact that no comparable rules exist (and to some extent cannot even exist, in the absence of any significant public enforcement obligations under EU law) in other fields of EU law. It is noticeable that both in the field of EU competition law and in the other fields of law under consideration several suggestions and proposals to connect both enforcement mechanisms more closely were not taken over by the EU legislature.[178] In procedural terms public and private enforcement therefore remain for the most part two separate worlds.

506. Having said that, in several other respects public and private enforcement ought not to be considered entirely in isolation from each other. When assessed at a more general level, the most evident link between the two is that both forms of enforcement can help increase overall levels of enforcement of, and eventually compliance with, EU law. Private enforcement is frequently seen as a means to *complement* (or supplement) public enforcement. In its proposal for the Competition Damages Directive the Commission stated for example that "*[t]he overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement*".[179] Here both forms of enforcement were thus seen as "*complementary tools serving the objective of an effective enforcement of the EU competition rules*".[180] The Collective Redress Recommendation similarly declares that "*[i]t is a core task of public enforcement to prevent and punish the violations of rights granted under [EU] law. The possibility for private persons to pursue claims based on violations of such rights supplements public enforcement*".[181] The European Parliament is essentially of the same view. It has for example held that "*bringing private actions for damages should complement and support, but not replace, the enforcement of competition law by the competition authorities*".[182]

Broadly speaking, this view rests on the idea that private enforcement can help to draw important resources into the overall 'enforcement mix'. That can be all the more important given that the resources of the competent public enforcement authorities tend to be limited. This is not only a matter of the human and financial resources. Private parties can also have specific expertise and inside knowledge of the practical workings of a particular sector, which might make it easier for them to detect and pursue infringements of EU law that it is for public enforcement authorities. This insight is moreover by no means a recent one. The possible beneficial effects in terms of increasing the overall enforcement capacity that might result from the "*vigi-*

178 See subsection 11.2.4 above.

179 Commission, Proposal for Competition Damages Directive, COM(2013) 404, p. 3.

180 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 12.

181 Recital 2 Collective Redress Recommendation 2013/396.

182 European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, recital H. See e.g. also European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, recital I.

*lance of individuals*" played an important role already in the Court of Justice's 1963 landmark judgment in *Van Gend en Loos*, which articulated the principle of direct effect that is a necessary prerequisite for a private enforcement model to function.[183] Similarly, as the Commission already observed three decades ago, damages awards to injured private parties "*would render [EU] law more effective*" and might therefore have to be facilitated.[184] More recently the same thought has been echoed in rulings such as *Courage* and *Muñoz*, where the Court stressed the beneficial effects of private parties being able to address other private parties' (alleged) infringements of EU law in terms of strengthening the working of the substantive rules of EU law in question and discouraging infringements of those rules.[185]

507. Although the degree to which this has been articulated differs somewhat per legal act at issue, there can be no doubt that the EU legislation under consideration in this study *builds on this insight*. The Procurement Remedies Directives for instance ultimately aim "*to ensure that the rules of public contracts are correctly applied*".[186] The Consumer Injunctions Directive similarly seeks to prevent the effectiveness of substantive EU consumer protection law from being "*thwarted*".[187] Although this 'general interest function' of private enforcement litigation is less clearly expressed in the IPR Enforcement Directive, this directive too should be understood against the background of a desire "*to ensure that the substantive law on intellectual property […] is applied effectively*".[188] Likewise by increasing the likelihood that infringers of the EU competition rules have to bear the costs of their infringement, the Competition Damages Directive aims *inter alia* to act as "*an incentive for better compliance*".[189] Also the private enforcement-facilitating measures introduced by this latter directive should thus be seen in light of the desire to further the full effectiveness and practical effects of the substantive EU competition law at issue.[190]

This 'general interest function' of private enforcement is also echoed in several of the individual remedial and procedural provisions that have been included in the EU legislation at issue. One example is the reference in the IPR Enforcement Directive to the measures, procedures and remedies set out therein being "*effective, proportionate and dissuasive*".[191] As was noted

183 CoJ case 26/62, *Van Gend en Loos*. See further subsection 1.1.1 above.
184 Commission, Thirteenth report on competition policy, 1984, p. 136.
185 CoJ case C-453/99, *Courage*, para. 25-27; CoJ case C-253/00, *Muñoz*, para. 31. See further subsections 2.5.2 and 2.5.3 above.
186 Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 10. Cf. recital 2 Procurement Remedies Directives 89/665 and 92/13. See e.g. also CoJ case C-406/08, *Uniplex*, para. 26.
187 Recital 4 Consumer Injunctions Directive 2009/22.
188 Recital 3 IPR Enforcement Directive 2004/48.
189 Commission, Proposal for the Competition Damages Directive, COM(2013) 404, p. 4.
190 Recital 3 Competition Damages Directive.
191 Art. 3(2) IPR Enforcement Directive 2004/48.

above, this is what EU law normally requires with respect to the penalties to be provided for by national law as a matter of public enforcement. The Court of Justice has further clarified that the provisions on injunctions and the contractual remedy provided for in the Unfair Terms Directive serve a purpose in terms of deterrence and dissuasion.[192] Along similar lines the Commission has noted that the injunctive relief available under the Consumer Injunctions Directive can be a "*successful tool for policing markets*" and a "*governance tool [which] can be used as a deterrent*".[193] Other illustrations are the Procurement Remedies Directives' provisions on 'alternative penalties'[194] and the publicity measures for which the IPR Enforcement and the Consumer Injunctions Directive provide, which serve both as a 'supplementary deterrent' and to inform the public at large.[195]

508. The underlying idea is thus essentially to *co-opt and 'instrumentalise'* interested private parties so as to encourage them to play their role as "*the 'real guardians' of the legal integrity of [EU] law*".[196] On this view private enforcement involves private parties as "*law enforcers acting in the public interest, rather than as holders of subjective rights*", as a Commission official argued in 2001 in a competition law context.[197] Others speak of these parties functioning as 'private policemen'[198] or 'private attorneys general'.[199] Although this study has not sought to quantify this effect, there seems little reason to doubt that the vigilance of interested private parties can make an important contribution to improving overall levels of enforcement of and compliance with the rules of EU law. In all likelihood that applies even more so where legislation of the type at issue in this study is in place. Nonetheless this study also indicates that the above view on private enforcement is *incomplete*, in light of the following considerations.

509. To begin with, considering private enforcement primarily as a complement to public enforcement seems to presuppose that public enforcement mechanisms are in place. In some fields this certainly is the case. Especially in relation to EU competition law infringements robust and well-entrenched public enforcement mechanisms exist both at EU and at national level.[200]

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192 Cf. CoJ case C-372/99, *Commission v. Italy*, para. 15; CoJ case C-618/10, *Banco Español de Crédito*, para. 69.

193 Commission, Second report on Consumer Injunctions Directive 2009/22, COM(2012) 635, p. 7.

194 Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13.

195 Art. 15 IPR Enforcement Directive 2004/48; Art. 2(1)(b) Consumer Injunctions Directive 2009/22. See further subsection 8.2.4 above.

196 Weiler (1991), pp. 2413-2414.

197 Gyselen (2001), pp. 144-145 (this author was at the time head of unit in the Commission's Directorate General for Competition; this paper was however written at a personal title).

198 E.g. Drake (2006), p. 843.

199 E.g. Kilpatrick (2000), p. 2.

200 See subsection 6.4.2 above.

But in many other fields of law public enforcement plays at best only a limited role as a matter of EU law. These latter fields include EU public procurement and intellectual property law.[201] It is noticeable that precisely in these two fields some of the most elaborated EU legal acts facilitating private enforcement have been enacted, i.e. the Procurement Remedies Directives and the IPR Enforcement Directive respectively. Initially the same held true where the EU's law-making activities in the field of consumer protection law are concerned. The EU's involvement with public enforcement in this field has historically been limited,[202] while several private enforcement-related acts were adopted (Consumer Injunctions Directive, Unfair Terms Directive, Product Liability Directive). More recently attention has focused on strengthening public enforcement, which appears to have come at the expense of the EU's long-standing ambition to facilitate private enforcement.

All this suggests that seeing the relationship between public and private enforcement merely in complementary terms risks overlooking that – as matter of policy rather than in strictly legal terms – there can be what rather appears to be a *substitution* effect.[203] That is to say, at least some private enforcement-related EU legislation appears to have been established at EU level not so much to as complement, but rather as a substitute for weak or even almost entirely absent public enforcement mechanisms under EU law. Put differently, the absence of robust and well-entrenched public enforcement mechanisms as a matter of EU law in a given field may well be an important factor in determining the 'demand' for private enforcement-related EU legislation of the type at issue in this study. The considerable difficulties encountered in establishing a directive on the private enforcement of EU competition law seem to confirm this. Many of the concerns expressed in connection to this initiative relate to the negative effects that it might have on the public enforcement already 'supplied' in this field. The existence of the latter can thus not only lessen 'demand', but it might in effect also act as a barrier for the adoption of private enforcement-related measures. It is noticeable in this regard that this competition law initiative has transformed over time from one that wholeheartedly sought to encourage private enforcement in this domain, to one that is as much driven by a desire to shield the existing public enforcement structures from the (potential) negative effects of increased private enforcement.[204]

510. A second and more fundamental point is that seeing private enforcement principally as a complement to public enforcement and considering private parties essentially as law enforcers in the general interest places the emphasis squarely on ensuring the effectiveness of EU law *per se*. This large-

201 See subsections 3.4.2 and 6.4.2 above respectively.
202 See subsection 5.5.3 above.
203 See subsection 10.2.2 above.
204 See subsection 6.3.1 above.

ly neglects that ensuring the effective *enforcement of the rights* that private parties may derive from this law can be an objective in its own right. There is no reason to presume that this latter objective is of secondary importance in the EU legal order.[205] As Advocate General Jääskinen observed, applicants in private enforcement proceedings are essentially simply seeking legal protection in relation to a private law claim rather than that they are enforcing a public policy.[206] It can be noted in this connection that, although the Court may at times have seemed ambiguous on this point, it has held that the purpose of the EU law principle of Member State liability is not punishment or deterrence, but rather ensuring that the parties having suffered damage are compensated.[207] The situation is unlikely to be fundamentally different where the principle of private party liability, which underlies the concept of private enforcement, is concerned, in light of the parallelism between that these two principles.[208] An overly one-sided emphasis on the 'general interest function' of damages claims (and by extension private enforcement actions generally) would moreover seem to sit uncomfortably with the predominant views that the rules of national law of this kind aim to punish and deter at most as a secondary objective, if at all.[209]

If anything, this argues for *not distinguishing too rigidly* between the objectives of ensuring the effectiveness of EU law *per se* and the effective enforcement of the rights that private parties derive from that law. They are intertwined. This distinction also matters little in practice where the two underlying interests (i.e. the general interest and the individual interests of the private parties concerned) coincide, as is often the case. A private party that is affected by an infringement of, say, the EU public procurement rules may find it entirely in its own individual interest to initiate legal proceedings so as to have a discriminatory provision struck out from the tender documents, a contract award procedure annulled or damages awarded. At the same time the bringing of private enforcement actions of this kind – or the mere fact that there is a realistic *risk* of such actions being brought – can be an incentive for the parties that are subject to these rules to ensure compliance, which is evidently in the general interest. Indeed, the thought that both objectives can be reached at the same time, and that there can moreover be mutual beneficial effects, lies at the very heart of the private enforcement model generally and the EU legislation assessed in this study specifically. Concentrating only on the 'general interest function' risks overlooking the duality that is central to the concept of private enforcement as it exists in the EU legal order.

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205 See subsection 11.1.4 above.
206 Opinion AG Jääskinen case C-536/11, *Donau Chemie*, para. 48.
207 CoJ case C-470/03, *AGM-COS.MET*, para. 88.
208 See in particular subsections 2.5.2 and 2.5.3 above.
209 See subsection 7.1.6 above.

The rationale underpinning the said legislation may thus be a desire to improve the effectiveness of the (objective) EU law at issue, as was noted above, but at the same time the legal acts in question also aim to help the private parties concerned to enforce their (subjective) rights derived from that law.[210] Those parties are obviously the prime beneficiaries for instance of the "*high, equivalent and homogeneous level of protection*" that the IPR Enforcement Directive aims to establish.[211] The Unfair Terms Directive seeks among other things "*to safeguard the citizen in his role as consumer*",[212] just as the Product Liability Directive makes it clear that "*injured person[s] should be able to claim full compensation*".[213] The Competition Damages Directive likewise also aims to ensure that the "*Union right to compensation*" can be exercised effectively, in accordance with the principle of effective judicial protection.[214] While again this study did not seek to quantify this effect, it can safely be assumed that these parties' possibilities to enforce their rights derived from EU law have generally improved as a consequence of the introduction of the specific EU rules on remedies and procedures discussed in the foregoing.

511. Lastly, besides for a proper understanding of the concept of private enforcement as such, the above distinction between ensuring the effectiveness of EU law *per se* and ensuring the effective enforcement of the rights that private parties derive from this law can also be of importance in the present context for other reasons. In particular, the two interests involved may at times *collide rather than collude*, or at least there can be a certain tension between them. This can for instance occur in relation to issues such as whether and to which extent infringers that applied for 'leniency' for competition law infringements should be protected from being held liable in private enforcement cases, whether punitive damages are required or to be rejected at EU level, whether out-of-court settlements should be encouraged or treated with some caution and whether collective redress mechanisms ought to be provided for as a matter of EU law and if so, in which cases and in what form.[215] As the Commission once put it, there can be an "*[inevitable] trade-off between justice […] and efficiency*".[216]

It is submitted that, generally speaking, in situations of this kind the Court of Justice is likely to insist on both interests being *balanced* rather than placing them in a hierarchical relationship.[217] It would appear that both are in principle equally fundamental in the EU's legal order. In and by itself that

210 See subsection 11.2.2 above.
211 Recital 10 IPR Enforcement Directive 2004/48.
212 Recital 6 Unfair Terms Directive 93/13.
213 Recital 5 Product Liability Directive 85/374.
214 Recitals 3 and 4 Competition Damages Directive. See also its Art. 1(1).
215 See subsection 11.1.3 above.
216 Commission, Staff working paper accompanying the green paper on damages actions for breach of EC antitrust rules, SEC(2005) 1732, pp. 49-50.
217 See subsection 11.1.4 above.

does not necessarily mean that the EU legislature is barred from prioritising one interest over the other when it acts in this respect. If and when it does so, it must however respect certain boundaries, notably in terms of procedural requirements, proportionality and fundamental rights.[218] The aforementioned distinction is important for the present purposes, given that the assessment of an (intended) EU legislative measure on private enforcement, for instance on any of the abovementioned issues (protection of leniency applicants, punitive damages, settlements, collective redress), often largely depends on which of the two objectives in question is identified as the principal one that the legislature wishes to achieve. For this may well have a bearing on the need for and the design of those measures. It can also be of relevance when determining whether and if so, to which extent the EU's intended action meets the 'three-step-test' under the principles of conferral (i.e. a sufficient legal basis), subsidiarity and proportionality.

### *12.3.2. Four inherent limitations and points of attention*

512. Turning more in particular to the inherent limitations and points of particular attention connected to private enforcement generally and EU legislation thereon specifically, a first remark relates to the conceived role of private parties as 'law enforcers in the general interest', mentioned above. Implicit in the foregoing is that these parties can generally only be expected to act as such only up to a certain point, i.e. the point at which the general interest and the individual interests of the private parties concerned no longer coincide. In many instances this point might never be reached, in light of the parallelism that often exists between both interests. But even apart from the abovementioned situations where these two interests may fundamentally be at odds with each other, many *other factors* can also lead a private party to conclude that its interests are not served by initiating or continuing to pursue legal proceedings for an (alleged) infringement of EU law before a national court. An evident and particularly important factor is the costs involved, seen in light of the possible gains of a private enforcement action.[219] Yet several other factors can also affect the cost/benefit analysis that an affected private party will typically make. They include, as the case may be, a fear of harming an existing business relationship or of retaliatory measures, a possible preference to invest in more forward-looking matters rather than in litigation, limited awareness of the law, emotional or psychological considerations (stress, distraction, uncertainty) and culturally determined views on litigation.[220]

None of this should be taken to mean that a private enforcement model cannot properly function or that the EU legislative measures discussed in this study are necessarily ineffective. In many respects these measures can

218 *Ibid*.
219 See subsection 11.2.2 above.
220 See subsection 10.3.2 above.

be understood as attempts to prevent the said point from being reached. The easier it is for a private party for instance to have access to relevant evidence, to quantify the harm suffered or to have its legal costs reimbursed, the more likely it is that this party will deem it in its interest to bring an infringement of EU law to the attention of a national court. Even if these measures can thus certainly make a significant difference in practice, the fact remains that several of the abovementioned factors can be difficult or even impossible to influence through the adoption of legislation. Moreover the private parties involved are autonomous when taking their decisions in this respect. As the Court of Justice has observed, "*in a civil suit, it is for the parties to take the initiative*".[221] It held to reflect "*fundamental conceptions prevailing in most Member States as to the relations between the State and the individual*".[222] That implies that the EU legislature may encourage, lure or facilitate private parties into bringing and continuing to pursue a private enforcement action, but that the latter can in the end not be guided, instructed or forced to do so. This evidently limits the extent to which private enforcement can be used as an instrument for the enforcement of EU law in the general interest.

513. Second, *not all fields of EU law* may be equally well suited for private enforcement, in light of practical as well as legal considerations. To start with the former, and building on the previous point, in certain fields it can be particularly difficult to provide incentives for the private parties concerned to initiate private enforcement proceedings. A good example is EU consumer protection law. Here the private parties concerned, i.e. consumers, by definition do not act in a professional capacity.[223] That means that their resources and expertise might be relatively limited. Some of the other aforementioned factors may also carry particular weight for these parties, such as a lack of awareness of the law and emotional and psychological considerations. Besides, and at least as importantly, the harm caused by infringements of EU consumer protection law may well be comparably modest when considered at the level of the individual consumer ('scattered damage'). This can thus tilt the said cost/benefit analysis in favour of not taking legal action when an infringement occurs. Distinct yet related issues can arise for legal reasons. It has already been seen how a private enforcement model essentially seeks to build on the parallelism between the general interest and the individual interests of the parties concerned. The concept of a 'right' constitutes a crucial link between the two. A private party will normally only be able to bring a private enforcement case where the rule of EU

221 CoJ joined cases C-430/93 and C-431/93, *Van Schijndel*, para. 21. See e.g. also Opinion AG Geelhoed joined cases C-295/04 to C-298/04, *Manfredi*, para. 31.

222 *Ibid*., para. 21.

223 For in EU consumer protection law the term 'consumer' is normally defined as a natural person acting for purposes falling outside his trade, business, craft or profession. See subsection 5.1.2 above.

law at issue is capable of conferring rights.[224] If not, there may simply be nothing to privately enforce. It follows that, in situations where the interests at stake are 'diffuse' in nature, i.e. hard or even impossible to capture in terms of individual rights, there may be limited or no scope for private enforcement. This can be the case for instance with respect to (certain) infringements of EU environmental law.[225]

It is true that certain particular approaches could help to address the above difficulties. One could think of facilitating collective redress, notably in situations where EU law does confer rights on private parties but where the damage caused by the infringements at issue is 'scattered'. The Collective Redress Recommendation suggests that in those cases legal proceedings could be brought either by 'representative entities' or by certain public authorities.[226] This approach is thus comparable to the one found in the Consumer Injunctions Directive, which relies on 'qualified entities' or public authorities for initiating legal proceedings in the collective interest of consumers.[227] Similarly, where 'diffuse' interests are at stake, relatively generous rules on legal standing could allow certain non-governmental organisations or other third parties to act upon infringements. It appears that such approaches tend to enjoy increasing interest at EU level.[228] But relying on third parties can lead to certain complications of its own, for example as regards their funding, case-selection, oversight and the distribution of possible damages awards. Indeed, views can differ as to whether this actually constitutes private enforcement properly speaking. After all these parties may generally act through civil law means, but they essentially act in the public – or at least not in a strictly individual – interest. The more these parties are made subject to specific rules and public oversight to address the said possible complications, the less this constitutes private enforcement in a 'pure' sense and the more it becomes a sort of 'public enforcement by private means'.

514. Third, private enforcement might in some cases lead to less expenditure on public enforcement, but it is certainly *not cost-free*.[229] There evidently are direct costs in the form of expenditure by the national courts seised as well as the legal and other costs incurred by the parties to the dispute. In addition there may also be less visible and more indirect costs, such as

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224 Cf. recitals 6 and 7 Collective Redress Recommendation 2013/396, where the question whether or not EU law grants rights to private parties is put at the forefront when indicating in which fields private enforcement could take place.

225 See subsection 11.2.3 above.

226 Points 5-7 Collective Redress Recommendation 2013/396.

227 Art. 1(1) and 3 Consumer Injunctions Directive 2009/22.

228 See e.g. Commission, Proposal for a regulation on the protection of individuals with regards to the processing of personal data and on the free movement of such data, COM(2012) 11, p. 90 (Art. 76(1) and (2)); Art. 11(3) Posting of Workers Enforcement Directive 2014/67.

229 See subsection 11.2.3 above.

opportunity costs and costs related to possible 'over-deterrence' and 'chilling effects' on parties that may decide not to engage in certain not evidently illegal activity out of fear of being sued nonetheless.

A related, more general concern is that of creating or encouraging a '*litigation culture*'. This term refers to a situation where private enforcement litigation takes place to an extent that is deemed to be undesirable, harmful or even abusive. Even apart from the possible direct and indirect financial costs of such 'excessive' litigation, it may also imply costs in societal terms more broadly. Over the decades especially this latter concern has regularly been voiced in relation to EU legislative measures of the type at issue in this study, particularly from the side of the parties that might be defendants in private enforcement cases and the European Parliament.[230] There can evidently be a degree of tension between the ambition to facilitate a 'healthy' degree of private enforcement and the fear that this may lead to 'excessive' litigation, even if it were possible to capture both forms of litigation in neat categories of this kind. This tension may to some extent be unavoidable. It results in particular from the aforementioned autonomy of the private parties concerned and the related limited scope for the EU legislature to guide or control these parties' actions in this respect.

That said, this study suggests that there generally seems little reason for concerns of this kind. Both as it now stands and in the foreseeable future EU law is far off from providing for the "*toxic cocktail*"[231] of private enforcement-related measures (punitive damages, intrusive pre-trial discovery, class action, contingency fees) that are deemed to have led to excesses in this regard in the United States. Practical experience with acts such as the Procurement Remedies Directives, the IPR Enforcement Directive and the Product Liability Directive show that – certainly where damages claims are concerned – the degree of private enforcement litigation in the EU can by no means be called excessive.[232] The Commission therefore seems largely correct in its assessment that in the EU undercompensation is at present probably more of a concern than possible overcompensation.[233] And where this is nonetheless deemed a realistic concern, the EU legislature has certain measures at its disposal to address it. Examples of measures of this kind assessed in the foregoing include the threshold amounts set out in the Product Liability Directive,[234] the inclusion of rules on the allocation of legal

230 E.g. European Parliament, Resolution on the white paper on damages actions for breach of the EC antitrust rules, P6_TA(2009)0187, para. 9; European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, para. 2. See also subsections 5.1.5 and 6.2.2 above.

231 Commission, Questions and answers regarding the green paper on consumer collective redress, MEMO/08/741, p. 4.

232 See subsection 7.1.1 above.

233 Commission, Impact assessment report on damages actions for breach of the EU antitrust rules, SWD(2013) 203, p. 18.

234 Art. 9 Product Liability Directive 85/374.

costs based on the 'loser pays' principle,[235] the Competition Damages Directive's rule prohibiting overcompensation[236] or the IPR Enforcement Directive's general requirement of safeguards against abuse.[237]

515. Finally, private enforcement typically – although by no means necessarily, as especially the Procurement Remedies Directives illustrate – takes place 'horizontally', i.e. in legal relationships between private parties. This is thus a difference as compared to public enforcement, which normally works 'vertically', i.e. in legal relationships between the State and a given private party. As such the increased and increasing possibilities for the private enforcement of EU law created by the EU legislature in the legislation at issue both exemplify and extend a gradual trend towards the '*horizontalisation*' of EU law.[238] This can be seen as transposing and giving further effect to the principle of horizontal direct effect in the procedural and remedial sphere. In the words of the Commission, this is thus a "*logical extension*" of the EU's involvement with the substantive law that applies in these horizontal legal relationships.[239]

This given can in turn have several important implications in the present context. For one thing, the point of departure in civil litigation is the equality of the parties to the dispute. As a matter of fundamental rights (more specifically the right to a fair trial), in private enforcement proceedings brought under the EU legislation at issue here the principles of *equality of arms* and *adversarial proceedings* must be respected.[240] This means for instance that a private party can only be allowed to carry out searches at the premises of an alleged infringer, as the IPR Enforcement Directive permits, where adequate safeguards have been provided for.[241] For another thing, the more private enforcement is made akin to public enforcement by granting the private party-applicants concerned powers to investigate or to penalise (alleged) infringements of EU law, the more likely it is that the parties that are subject to these powers may be able to rely on fundamental rights that apply in *criminal proceedings*, such as the privilege against self-incrimination and the *ne bis in idem* principle.[242] Given that the question whether or not proceedings are 'criminal' in nature is determined on the substance, the fact that private enforcement proceedings are often qualified

235 See subsection 8.2.5 above.
236 See in particular Art. 2(3) Competition Damages Directive.
237 Art. 3(2) IPR Enforcement Directive 2004/48. See also Commission, Proposal for a trade secrets directive, COM(2013) 813, pp. 19-20 (Art. 6(2)).
238 See subsection 11.2.1 above.
239 Commission, Proposal for IPR Enforcement Directive 2004/48, COM(2003) 46, p. 5. Cf. e.g. also European Parliament, Resolution on consumer redress, OJ 1987, C 99/203, recital C: "*the substantive rights conferred by [EU] legislation on the consumer must be supplemented by appropriate procedural mechanisms to ensure their enforcement*".
240 Art. 47 Charter. See section 2.3 and subsection 11.2.5 above.
241 Art. 7 IPR Enforcement Directive 2004/28.
242 Art. 48-50 Charter. See section 2.3 and subsection 11.2.6 above.

as 'civil' under national law does not, in and by itself, mean that these latter rights cannot be invoked. Therefore also these latter fundamental rights can conceivably come into play here, for instance in relation to the aforementioned *ex parte* search orders, measures on the disclosure of evidence[243] or possible punitive damages.[244]

Generally speaking, there currently seems little reason to believe that the EU legislation assessed in this study is such as to raise serious concerns in terms of fundamental rights. Adequate safeguards tend to be provided for to ensure respect for the right to a fair trial that applies in civil proceedings, while the nature and effects of the measures under consideration do not appear to justify the conclusion that the proceedings in which they are applied must be qualified as criminal. Still the foregoing implies that there are limits to the extent to which the EU legislature can seek to facilitate private enforcement proceedings, in particular where this consists of granting private party-applicants certain special powers to fulfil their role as 'law enforcers in the general interest'. Too strong and too one-sided a focus on improving the position of the applicant might well lead to concerns as regard the position of the defendant in these 'horizontal' situations. This arguably applies even more so where the private enforcement proceedings also involve certain third parties. It is noticeable that little, if any, attention tends to be paid to questions of this kind when EU legislation of the type at issue in this study is enacted.

### *12.3.3. Towards an EU policy on private enforcement?*

516. That brings us to the last subsection of this study. It departs from the observation that at present *no EU policy on private enforcement* to speak of exists. Overlooking the foregoing, it appears that only very few general lines can be discerned where the EU's law-making activities in question are concerned. It is evident that in some instances the EU legislature has deemed it necessary to take measures to facilitate private enforcement. It also seems to be accepted that on the one hand these measures can entail the introduction of a range of remedial or procedural provisions, while on the other hand the legal systems of the Member States should not be affected more than necessary and that even then the Member States should often be left considerable flexibility. Although this is not always clearly articulated and there can be considerable variations, there further appears to be an inclination to see private enforcement principally as an instrument to contribute to the effectiveness of EU law *per se*, more so than as a manner to ensure effective judicial protection for the private parties concerned. One of the better articulated points on which common ground appears to exist is the view that, when enacting these legislative measures, anything that might lead to the excesses that are perceived to exist in the United States is to be rejected. To the extent

243 See subsection 8.2.2 above.
244 See subsection 7.1.5 above.

that the EU has a policy on private enforcement, it can thus be described as a non-policy, in that it seems to be characterised mainly by agreement on what it should *not* entail.

517. It is submitted that there are *good reasons for establishing* such a policy that is worthy of the name. Issues of enforcement and compliance have long been, and continue to be, a matter of particular concern in the EU's legal order. The assessment that "*it is not enough to pass laws and simply to hope that they will be applied evenly in all Member States*" seems as valid today as it was over two decades ago.[245] Indeed, a recent study found that "*it would be a mistake to hold that the enforcement issue is 'solved', far from it*".[246] This state of affairs evidently concerns not only the effectiveness of EU law *per se*, but also the rights of the private parties concerned. The European Parliament has noted in this connection that "*citizens and companies must not only enjoy rights, but must also be able to enforce those rights effectively and efficiently*".[247] In the words of the Commission, "*rights which cannot be enforced are worthless*".[248] Thus, in an EU that is founded on the rule of law[249] and that moreover aspires to have a positive impact on the lives of the citizens of its Member States, not in the last place through its extensive 'language of rights', ensuring that the rules of substantive EU law are capable of actually having an effect in practice must be a matter of priority. Facilitating private enforcement may be only one of a range of measures that can conceivably be taken to this effect. Yet it is undoubtedly an important on, especially because it can be a manner to empower the private parties concerned as well as to help ensure the effectiveness of EU law generally. It is hard to see how this can be realised in a credible and effective manner without elaborating a specific EU policy on private enforcement.

That applies all the more so given that effectiveness is not the only concern in this respect. Improving *coherence and consistency* in relation to the EU's legislative measures on private enforcement is another one. The more frequently and extensively the EU acts on private enforcement-related matters, the more this emerges as a particular concern. It has already been seen earlier that as it stands the EU legislation at issue leaves much to be desired in this respect. For legal as well as political reasons the EU may not have a free hand in designing and implementing an all-encompassing policy on the enforcement by private parties of their rights derived from EU law before the courts of the Member States. Yet enacting an over-arching policy regard-

245 Sutherland Report (1992), p. 5.

246 Study Pelkmans & Correia de Brito (2012), p. iv. See e.g. also UK Single Market Report (2013), p. 43, where it is concluded that "*much of the evidence to this report suggests that there is a significant problem with enforcement across the Single Market*".

247 European Parliament, Resolution on towards a coherent European approach to collective redress, P7_TA(2012)0021, recital A.

248 Commission, Public consultation towards a coherent approach to collective redress, SEC(2011) 173, p. 2.

249 Art. 2 TEU.

ing the situations where it does act is arguably the best manner to address and reconcile the complex and sometimes contradictory issues that can arise in this connection. For this is not only a matter of ensuring a coherent and consistent approach at EU level, it also relates to fundamental questions of differentiation in terms of enforcement possibilities for private parties and therefore to questions of fairness and equal treatment. Questions of this kind inevitably arise where private enforcement-related action is taken in some sectors covered by substantive EU law, but not in others. They extend to the situation at national level, notably in relation to differences that may exist between national jurisdictions in the absence of EU legislative action in this regard as well as in relation to fragmentation within national legal systems where action of this type is taken.

To be clear, this is not a plea for necessarily establishing *uniform* rules on private enforcement, which apply without distinction in all sectors covered by EU law. As the law stands this would not do justice, it is submitted, to the abovementioned complexities and the specificities of the EU legal order more generally. Even apart from the apparent absence of political will and the legal basis issues that might arise in this connection, full uniformity in terms of private enforcement-related measures – across the various fields of EU law or across or within the various jurisdictions in the EU – is not required as a matter of EU law.[250] A 'one-size-fits-all' policy would moreover not seem to be in place, given that specific enforcement challenges may well call for specific solutions. For instance, as was explained above, only where infringements have a 'contractual dimension' can it be helpful to provide for contractual remedies. Likewise certain private enforcement-related measures, such as facilitating the bringing of actions for damages, may not be suitable in all areas. One could think of situations where damages tend to be 'scattered' or where there are other reasons for presuming that the private parties concerned will remain hesitant to initiate legal proceedings. Even apart from that it can be questioned whether such uniformity would be in place in light of the variations in the degree of EU involvement with substantive law.

Therefore the point here is rather that, even without aiming for full uniformity, a clear and coherent over-arching EU policy on private enforcement could make a valuable contribution on many points that can arise in this connection. In light of the foregoing it is suggested that such a policy should address in particular the following four key issues.

518. To begin with, an EU policy on private enforcement should address the question of the *scope of the EU legislative action* in this regard, i.e. clarify in which fields private enforcement-facilitating measures are to be enacted or, at a more detailed level, specify precisely which substantive rules of EU law are to be complemented by specific remedial and procedural rules as a mat-

250 See subsection 10.4.3 above.

ter of secondary EU law. If we depart from the presumption that – for legal, political or policy reasons – there is no scope or justification for enacting such rules across the board, i.e. in *all* sectors covered by substantive EU law, then criteria need to be established for determining which fields and which substantive rules are to be singled out. Careful consideration and explanations on this point appear to be in place, not only in light of the inevitable fragmenting effects at national level but also because, as was observed earlier, this choice implies giving preferential status to certain private parties that derive rights from EU law while denying it to other private parties whose rights happen to derive from other, non-selected provisions of substantive EU law or from 'purely' national law.

An appropriate starting point for this exercise would seem to be an assessment of whether in a given field particular enforcement-related problems exist. The next question could then be whether these problems are such that the EU can and should enact legislative measures, in light of considerations that include the scale of the problems identified, their possible effects on the internal market or other EU policies as well as possible alternatives. In case of a confirmative answer, it remains to be determined whether facilitating private enforcement is a suitable means to address the said problems. The granting of rights to private parties under the substantive rules of EU law at issue seems a necessary prerequisite, as was explained above. Yet also beyond that it should be assessed whether it is seen as desirable and moreover realistic to expect the typical private parties concerned to bring legal proceedings upon being confronted with an infringement of EU law – if necessary with some encouragement in the form of certain facilitating measures, but without fundamentally altering the basic characteristics of the means through which this is to take place and without unduly affecting the rights of those that may be at the 'receiving end' of those proceedings.

519. A second point is that any such policy relating to the EU's legislative activities should clearly establish *which objective* (or objectives) the EU wishes to achieve by facilitating private enforcement. This may sound self-evident, but, as been extensively discussed in the foregoing, there still appears to be considerable ambiguity in this regard. This concerns especially the question whether private enforcement is primarily seen as an instrument for strengthening overall levels of enforcement of and compliance with EU law *per se*, or rather as a manner to help the private parties concerned to enforce the rights that they derive from that law for its own sake. This is evidently not to say that both objectives cannot be pursued at the same time. Quite to the contrary, it has been discussed almost equally extensively above that the insight that in most cases this may well be possible – and that there may in fact well be mutually reinforcing effects in this regard – lies at the very heart of the concept of private enforcement. The point is rather that the parallelism that often (although by no means always) exists between the general and the individual interest is no justification for, rather lazily or confusingly, mixing and blurring both rationales and the arguments related thereto when

addressing the matters at issue in this study. Clearly and correctly identifying the objective(s) pursued by each EU legislative initiative related to private enforcement is not only important for its own sake, it also determines to a high extent which measures are to be enacted precisely, and which not, as was indicated below. In addition it can be of importance for correctly identifying the required legal basis for the intended EU legal act in question and for an assessment under the principles of subsidiarity and proportionality. Providing for analytical clarity on this point is therefore also a prerequisite for establishing the correct balance between EU 'interference' and Member States' 'autonomy'.

520. As a third point, in function of the objective(s) pursued, a clear line ought to be formulated as regards the *means employed*, i.e. the remedies and procedural provisions for private enforcement purposes set out in the acts of secondary EU law at issue. This is not merely a matter of 'technicalities', such as the manner in which the relevant provisions of EU law are drafted, although that certainly is an important aspect as well. It also extends to more fundamental matters, notably the basic principles and assumptions underlying those provisions. This concerns questions such as whether the damages awards are deemed to serve only compensatory purposes or also (partially) a punitive and deterrent function; whether and if so, to which extent the finding of an infringement of EU law should be reason to terminate or otherwise affect contracts concluded between private parties; when a private party is sufficiently 'concerned' for him to be entitled to initiate private enforcement proceedings under the EU legislation at issue; how active a role the national court seised is expected to play in private enforcement proceedings; and where and how the dividing line is to be drawn between a 'healthy' and an 'excessive' degree of private enforcement litigation. Another aspect is outlining the criteria on the basis of which it is decided which remedies are to be provided for in which situations. As has been set out above, at present it seems far from clear, for example, why the EU's legislative action is sometimes limited to facilitating actions for damages or why in some acts rules on the disclosure of evidence or on legal costs are included, while in others they are not. Some differentiation may well be in place, but that does not mean that the available options and the resulting choices made in this regard should not first be properly assessed and explained; quite to the contrary. In other words, this is a matter of deciding as well as explaining which 'tool' from the private enforcement 'toolbox' is to be used in which situations.

521. Finally, even apart from questions as to the main objective(s) and the means employed, it is suggested that the EU's policy on private enforcement should address these matters from an *overall enforcement perspective*. This involves in particular elaborating on the relationship and interaction between public and private enforcement. One aspect is the need to address, in a balanced manner, the aforementioned tensions that can exist between

both forms of enforcement in specific cases. More generally, the possible existence of, suitability and scope for public enforcement in a given situation can be a relevant factor in determining in which cases the EU is to enact which types of private enforcement-related measures, and *vice versa*. For, as has been set out above, the relationship between the two can be as much one of substitution as one of complementarity, particularly where private enforcement is seen as an enforcement instrument in the general interest. There may thus be less reason for encouraging private enforcement in areas where strong public enforcement mechanisms exist, just as, conversely, public enforcement efforts could conceivably be concentrated on infringements that are not or insufficiently addressed through private enforcement alone. There may further be nothing against trying to coordinate and optimise the relationship between both forms of enforcement in procedural terms where possible, for instance by allowing *amicus interventions* by public authorities in private enforcement proceedings or by encouraging the resolution of disputes between the private parties concerned in the context of public enforcement proceedings.

At the same time it is equally important to acknowledge that there are clear limits to the extent to which the distinction between both forms of enforcement can and should be blurred, both in terms of objectives and the means employed to achieve those objectives. For all the possible parallelism in the interests at stake and the mutual reinforcing effects that might exist in this regard, public and private enforcement mostly have different objects, aims and effects. Put differently, the vigilance of private parties might "*amount to an effective supervision*" in addition to the relevant public enforcement structures, as the Court of Justice held over half a century ago in *Van Gend en Loos*.[251] But, as the Court made clear already in that very same judgment, this only applies with respect to the private parties "*concerned*" and moreover the vigilance of these parties serves only "*to protect their rights*".[252] Indeed, around the same time the Court observed that legal actions brought by private parties under EU law are "*intended to protect individual rights in a specific case*", whilst an action in infringement proceedings – and by extension public enforcement more generally – "*has as its object the general and uniform observance of [EU] law*".[253] Therefore, while private parties can undoubtedly make a valuable contribution to achieving this latter objective, the fact remains that their vigilance concerns, first and foremost, their own individual interests.

251 CoJ case 26/62, *Van Gend en Loos*, p. 13.
252 *Ibid*.
253 CoJ case 28/67, *Firma Molkerei*, p. 153.

# Summary (abstract) & Samenvatting

## Summary (abstract)

*The vigilance of individuals: how, when and why the EU legislates to facilitate the private enforcement of EU law before national courts*

This PhD thesis is concerned with EU legislation facilitating the private enforcement of EU law, i.e. the enforcement of that law by private parties in legal proceedings before the courts of the Member States. The relevant EU-level legislative developments in four fields of law are assessed in detail, namely those relating to EU public procurement law (in particular Procurement Remedies Directives 89/665 and 92/13), EU intellectual property law (in particular IPR Enforcement Directive 2004/48), EU consumer protection law (in particular Consumer Injunctions Directive 2009/22, Unfair Terms Directive 93/13 and Product Liability Directive 85/374) and EU competition law (in particular Article 101(2) TFEU and the recent Competition Damages Directive). These EU legal acts and related developments are analysed first separately and subsequently in a comparative and contextual manner. Specific attention is paid in this connection to the remedies and procedural provisions for private enforcement purposes that are to be made available to aggrieved private parties under the said legislation. In addition the concept of private enforcement generally and EU legislation on this subject-matter specifically are considered in a broader perspective. On this basis conclusions are drawn as to how, when and why the EU legislates to facilitate the private enforcement of EU law.

## Samenvatting

*De waakzaamheid der belanghebbenden: het hoe, wanneer en waarom van EU wetgeving ter facilitering van de private handhaving van EU recht voor nationale gerechten*

Dit proefschrift spitst zich toe op EU wetgeving die de private handhaving van Europees recht faciliteert, dat wil zeggen de handhaving van dit recht door private partijen in procedures voor de gerechten van de lidstaten. De relevante ontwikkelingen op wetgevingsgebied op EU niveau in vier rechtsgebieden worden nader onderzocht, te weten Europees aanbestedingsrecht (met name Rechtsbeschermingsrichtlijnen 89/665 en 92/13), Europees recht

op het gebied van intellectueel eigendom (met name Handhavingsrichtlijn 2004/48), Europees consumentenbeschermingsrecht (met name Richtlijn Staking Inbreuken Consumentenbelangen 2009/22, Richtlijn Oneerlijke Bedingen 93/13 en Productaansprakelijkheidsrichtlijn 93/13) en Europees mededingingsrecht (met name artikel 101, lid 2 VWEU en de recent aangenomen Richtlijn Schadevorderingen Mededingingsrecht). Deze wetgeving en verwante ontwikkelingen worden eerst afzonderlijk geanalyseerd, waarna zij in hun onderlinge samenhang en context worden beschouwd. In dit verband wordt bijzondere aandacht besteed aan de rechtsmiddelen en de procedurele bepalingen ten behoeve van private handhaving die op grond van deze wetgeving beschikbaar dienen te zijn aan private partijen die worden geconfronteerd met inbreuken. Daarnaast wordt het fenomeen private handhaving in het algemeen en EU wetgeving dienaangaande in het bijzonder in een breder perspectief bezien. Op basis daarvan worden conclusies getrokken ten aanzien van de vragen hoe, wanneer en waarom de EU wetgevend optreedt teneinde de private handhaving van Europees recht te faciliteren.

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CoJ 4 July 2000, case C-352/98 P, *Bergaderm*, ECLI:EU:C:2000:361
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CoJ 15 July 2002, case C-459/99, *MRAX*, ECLI:EU:C:2002:461
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CoJ 17 September 2002, case C-253/00, *Muñoz*, ECLI:EU:C:2002:497
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CoJ 21 November 2002, case C-473/00, *Cofidis*, ECLI:EU:C:2002:705
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CoJ 19 June 2003, case C-410/01, *Fritsch*, ECLI:EU:C:2003:362
CoJ 19 June 2003, case C-315/01, *GAT*, ECLI:EU:C:2003:360
CoJ 11 September 2003, case C-13/01, *Safalero*, ECLI:EU:C:2003:447
CoJ 30 September 2003, case C-224/01, *Köbler*, ECLI:EU:C:2003:513
CoJ 2 October 2003, case C-147/01, *Weber's Wine World*, ECLI:EU:C:2003:533
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CoJ 4 December 2003, case C-63/01, *Evans*, ECLI:EU:C:2003:650
CoJ 9 December 2003, case C-129/00, *Commission v. Italy*, ECLI:EU:C:2003:656
CoJ 7 January 2004, case C-201/02, *Wells*, ECLI:EU:C:2004:12
CoJ 13 January 2004, case C-453/00, *Kühne & Heitz*, ECLI:EU:C:2004:17
CoJ 12 February 2004, case C-230/02, *Grossmann*, ECLI:EU:C:2004:93
CoJ 18 March 2004, case C-314/01, *ARGE*, ECLI:EU:C:2004:159
CoJ 17 June 2004, case C-30/02, *Recheio*, ECLI:EU:C:2004:373
CoJ 24 June 2004, case C-212/02, *Commission v. Austria*, ECLI:EU:C:2004:386
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CoJ 8 November 2005, case C-443/03, *Leffler*, ECLI:EU:C:2005:665
CoJ 10 January 2006, case C-344/04, *IATA*, ECLI:EU:C:2006:10
CoJ 10 January 2006, case C-402/03, *Skov*, ECLI:EU:C:2006:6
CoJ 9 February 2006, case C-127/04, *O'Byrne*, ECLI:EU:C:2006:93
CoJ 23 February 2006, case C-201/04, *Molenbergnatie*, ECLI:EU:C:2006:136
CoJ 9 March 2006, case C-323/03, *Commission v. Spain*, ECLI:EU:C:2006:159
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CoJ 16 March 2006, case C-234/04, *Kapferer*, ECLI:EU:C:2000:178
CoJ 2 May 2006, case C-217/04, *UK v. Parliament and Council*, ECLI:EU:C:2006:279
CoJ 4 May 2006, case C-508/03, *Commission v. UK*, ECLI:EU:C:2006:287
CoJ 29 June 2006, case C-301/04 P, *SGL Carbon*, ECLI:EU:C:2006:432
CoJ 13 July 2006, case C-4/03, *GAT v. LUK*, ECLI:EU:C:2006:457
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CoJ 13 July 2006, case C-539/03, *Roche Nederland*, ECLI:EU:C:2006:458
CoJ 7 September 2006, case C-526/04, *Laboratoires Boiron*, ECLI:EU:C:2006:528
CoJ 19 September 2006, joined cases C-392/04 and C-422/04, *i-21 Germany*, ECLI:EU:C:2006:586
CoJ 19 September 2006, case C-506/04, *Wilson*, ECLI:EU:C:2006:587
CoJ 26 October 2006, case C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675
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CoJ 18 January 2007, case C-421/05, *City Motors*, ECLI:EU:C:2007:38
CoJ 25 January 2007, case C-407/04 P, *Dalmine*, ECLI:EU:C:2007:53
CoJ 15 February 2007, case C-239/05, *BVBA Management*, ECLI:EU:C:2007:99
CoJ 15 February 2007, case C-292/05, *Lecouritou*, ECLI:EU:C:2007:102
CoJ 13 March 2007, case C-432/05, *Unibet*, ECLI:EU:C:2007:163
CoJ 15 March 2007, case C-95/04 P, *British Airways*, ECLI:EU:C:2007:166
CoJ 20 March 2007, case C-24/95, *Alcan*, ECLI:EU:C:2007:163
CoJ 17 April 2007, case C-470/03, *AGM-COS.MET*, ECLI:EU:C:2007:213
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CoJ 4 October 2007, case C-429/05, *Rampion*, ECLI:EU:C:2007:575
CoJ 11 October 2007, case C-241/06, *Lämmerzahl*, ECLI:EU:C:2007:597
CoJ 23 October 2007, case C-440/05, *Commission v. Council*, ECLI:EU:C:2007:625
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# Abbreviations

| | |
|---|---|
| ACTA: | Anti-Counterfeiting Trade Agreement |
| BIE: | Berichten Intellectuele Eigendom |
| BR: | Tijdschrift voor Bouwrecht |
| CMLRev: | Common Market Law Review |
| CLJ: | Consumer Law Journal |
| CoJ: | Court of Justice |
| CompLRev | Competition Law Review |
| CST: | Civil Service Tribunal |
| CWILJ: | California Western International Law Journal |
| EAR: | European Antitrust Review |
| EBLR: | European Business Law Review |
| EC: | European Community |
| ECJ: | European Competition Journal |
| ECLR: | European Competition Law Review |
| ECSC: | European Coal and Steel Community |
| ECtHR | European Court of Human Rights |
| EEC: | European Economic Community |
| EFAR: | European Foreign Affairs Review |
| EFTA: | European Free Trade Area |
| EIPR: | European Intellectual Property Review |
| ELJ: | European Law Journal |
| ELRev: | European Law Review |
| ERPL: | European Review of Private Law |
| ErLRev: | Erasmus Law Review |
| EStAL: | European State Aid Law Quaterly |
| EU: | European Union |
| EuConst: | European Constitutional Law Review |
| FILJ: | Fordham International Law Journal |
| GC: | General Court |
| GCLR: | Global Competition Litigation Review |
| GP: | Gazette du Palais |
| GPA: | Agreement on Government Procurement |
| GPRI: | Geneva Papers on Risk and Insurance |
| IBA: | International Bar Association |
| ICLQ: | International and Comparative Law Quaterly |
| IIC: | International Review of Intellectual Property and Copyright Law |
| ILP: | International Legal Practioner |
| JCLE: | Journal of Competition Law and Economics |
| JCMS: | Journal of Common Market Studies |
| JCP: | Journal of Consumer Policy |
| JDE: | Journal de Droit Européen |
| JECLP: | Journal of European Competition Law and Practice |
| JEPP: | Journal of European Public Policy |
| JESP: | Journal of European Social Policy |
| JIPITEC: | Journal of Intellectual Property, Information Technology and E-Commerce |
| JIPLP: | Journal of Intellectual Property Law and Practice |

| | |
|---|---|
| LIEI | Legal Issues of Economic Integration |
| LPIB: | Law and Policy in International Business |
| MJECL: | Maastricht Journal of European and Comparative Law |
| MLR: | Modern Law Review |
| NiPR: | Nederlands Internationaal Privaatrecht |
| NTER: | Nederlands Tijdschrift voor Europees Recht |
| PLC: | Practical Law Company |
| PPLR: | Public Procurement Law Review |
| RabelsZ: | Rabels Zeitschrift für ausländisches und internationales Privatrecht |
| REAL: | Review of European Administrative Law |
| REDC: | Revue Européenne de Droit de la Consommation |
| RDC: | Revue des Droits de la Concurrence |
| RIDC: | Revue Internationale de Droit Comparé |
| TA: | Tijdschrift Aanbestedingsrecht |
| TFEU: | Treaty on the Functioning of the European Union |
| TEU: | Treaty on European Union |
| TRIPS: | Trade-Related aspects of Intellectual Property Rights |
| WComp: | World Competition |
| WIPO: | World Intellectual Property Organisation |
| WTO: | Word Trade Organisation |
| YLJ: | Yale Law Journal |

# Index

# Curriculum vitae

Folkert Wilman was born on 2 November 1978 in Damwoude in Friesland in the Netherlands. He completed his International and European Law studies at the University of Groningen, the Netherlands, which included a six month stay at the University of Granada in Spain. After his graduation he did several internships, including at the Embassy of the Netherlands in Managua, Nicaragua, and the European Commission in Brussels. He subsequently completed a Masters in European Political and Administration Studies at the College of Europe, Belgium. Between 2004 and 2009 Folkert Wilman worked for the Dutch law firm Houthoff Buruma, initially in Rotterdam and later in Brussels. During that period he qualified as an attorney-at-law at the Netherlands' bar. In 2009 he joined the European Commission as a member of its Legal Service.

Folkert Wilman werd op 2 november 1978 geboren in Damwoude, Friesland. Hij studeerde Internationaal en Europees Recht aan de Rijksuniversiteit Groningen. In dat kader studeerde hij ook een half jaar aan de Universiteit van Granada in Spanje. Na het voltooien van deze studie deed hij diverse stages, onder meer bij de Nederlandse ambassade in Managua, Nicaragua, en de Europese Commissie in Brussel. Vervolgens behaalde hij een Masters diploma in Europese politicologie en bestuurskunde aan het Europa College in Brugge, België. Van 2004 tot 2009 werkte Folkert Wilman voor het Nederlandse advocatenkantoor Houthoff Buruma, aanvankelijk in Rotterdam en vervolgens in Brussel. In deze periode voltooide hij zijn beroepsopleiding en trad hij als advocaat toe tot de Nederlandse balie. Sinds 2009 is hij werkzaam bij de Europese Commissie als lid van de Juridische Dienst van deze instelling.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2013 and 2014:

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