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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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.