Credit rating agency liability in Europe: Rating the combination of EU and national law in rights of redress

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2 Influence of EU law on civil liability

2.1 INTRODUCTORY REMARKS

This study concentrates on a particular situation in which EU law influences (national) rules on civil liability: the civil liability of credit rating agencies under Article 35a CRA Regulation. The introduction of Article 35a CRA Regulation does not stand on its own, but is part of a broader tendency towards an increased influence of EU law on private law and, in particular, on the civil liability of individuals and other private parties.[1] Moreover, EU law contains an increasing amount of provisions included in regulations, which confer rights of redress upon private parties or provide private parties with rights of redress on the basis of national law.[2] This Chapter aims to map the ways in which EU law (regulations, directives and rulings of the CJEU) currently influences rules on civil liability and rights of redress,[3] with a particular focus on examples derived from EU financial law. It widens the scope of the research by providing the broader European legal context in which Article 35a CRA Regulation can be considered.[4] This broader European perspective helps to understand the status, main features and effects of Article 35a CRA Regulation.

The Chapter begins by outlining some basic concepts of EU law. To this end, section 2.2 pays attention to the legislative competences of the Union legislature. Section 2.3 subsequently explains the effects of EU law in national legal orders, concentrating on when individuals and other private parties can

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1 The terms 'individual' and 'private party' will be used interchangeably. This Chapter does not discuss the topic of Member State liability. This Chapter is based on research conducted with R. de Graaff, which resulted in the publications De Graaff & Verheij 2017 and De Graaff & Verheij 2019.

2 As demonstrated by the examples provided in this Chapter. *Also* Mañko 2015, p. 14.

3 This Chapter uses the terms 'civil liability' and 'rights of redress' as 'catch-all' terms. It investigates the influence of EU law on the civil liability of private parties vis-à-vis other private parties, which could take the form of a right of redress and, more concretely, a right to compensation or a right to damages. One could also say this Chapter investigates the influence of EU law on the remedy of compensation or damages. The terminology of rights, obligations, remedies, actions, claims and procedures is complicated, and sifting out the exact differences falls outside the scope of this dissertation. *For an analysis of the terminology and distinctions e.g.* De Graaff 2020 (forthcoming).

4 Prior to the publication of this dissertation, Vandendriessche 2015, no. 62-112 paid extensive attention to the influence of EU law on private enforcement in the context of financial law already.

directly rely on provisions of EU law before national courts. It discusses, in other words, the vertical and horizontal (in)direct effect of provisions of EU law. Section 2.4 shifts the attention towards the obligations resting upon Member States in the area of the enforcement of EU law and, in particular, towards the principles of equivalence and effectiveness. Finally, section 2.5 provides an overview of the influence of EU law on rules for civil liability and rights of redress with a particular, but not exhaustive, focus on the financial sector.[5] Article 35a CRA Regulation is one of the examples referred to in section 2.5. As the civil liability of credit rating agencies forms the main subject of this dissertation, section 2.5 involves a more extensive analysis of Article 35a CRA Regulation, in comparison to the other examples discussed.

2.2 Competence of the European Union

The division of competences between the EU and the Member States and the way in which the EU should exercise its competence are important building blocks to understand where the current landscape of European influence on (national) rules on civil liability finds its basis.

In general, the division of competences between the EU and the Member States is determined by the principle of conferral under Article 5 (2) of the Treaty on European Union (hereafter 'TEU'). The principle of conferral stipulates that the EU is only allowed to take action if the Member States 'conferred [competence] upon it in the Treaties to attain the objectives set out therein.' The Member States, hence, remain competent in areas in which they did not confer competence upon the EU. The EU's competence is not necessarily exclusive,[6] but can also be shared with the Member States.[7] If the EU is competent in a specific legal area, its powers are not unlimited.[8] Under Article 5 (1) TEU, the EU should exercise its competence in accordance with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within the exclusive competence of the EU (i.e. areas of shared competence), the EU shall act only if and insofar as certain goals cannot be sufficiently achieved by the Member States, but can be better achieved at the

5 In order to complete the overview, section 2.5 also includes some examples derived from other legal areas. This Chapter, however, does not aim to discuss the influence of EU law on civil liability in other areas, such as competition law, consumer law, intellectual property law and transport law. *For a broader overview of the influence of regulations on the Dutch law of obligations, see* De Graaff & Verheij 2017. *For the influence of EU law on (the system of) private law, see* Ackermann 2018. *For the influence of EU law on civil liability, see* Alpa 2019.

6 Pursuant to Art. 3 (1) TFEU, the EU has exclusive competence in the area of, for instance, the customs union and competition law needed for the functioning of the internal market.

7 Pursuant to Art. 4 (2) TFEU, the EU and the Member States share competence, for instance, in the areas of the internal market, economic, social and territorial cohesion and consumer protection. *See also on the principle of conferral* Craig & De Búrca 2015, p. 75.

8 *Cf.* Kuipers 2014, p. 159.

EU level (Art. 5 (3) TEU). Furthermore, the principle of proportionality entails that the content and form of European rules shall not exceed what is necessary to achieve the objectives of the Treaties (Art. 5 (4) TEU).[9]

Member States have conferred competence upon the EU in 'subject areas' rather than 'legal areas'. For instance, shared competence between the EU and the Member States exists in the area of the internal market and consumer protection (Art. 4 (2) (a) and (f) of the Treaty on the Functioning of the European Union (hereafter 'TFEU')). The Member States did not explicitly confer competence upon the EU in respect of private law under the TEU and TFEU.[10] Notwithstanding the absence of explicit competence in the area of private law, the influence of EU law in the area of 'private law' and the private enforcement of obligations stemming from EU law has increased. The Union legislature, however, is not very concerned with the question of whether a rule is of a public or private law nature. Rather, it adopts a 'functionalist approach' to European legislation, and organises rules per subject area.[11] To that end, the Union legislature often combines rules of multiple legal areas necessary to achieve particular objectives in legislative instruments. Consequently, rules of a private law nature can be found in broader European legal frameworks, which contain all types of different rules.[12] The CRA Regulation forms a good example of such a broad legal framework, as it provides for rules of a public and private law nature as part of the regulatory framework for credit rating agencies.

As described by Kuipers, European legislative action in the area of private law can be based on sector-specific competences, on Article 114 TFEU or on Article 352 TFEU.[13] For the purpose of this dissertation, the (shared) competence of the EU in the area of the internal market under Article 4 TFEU in

9 *Cf. also* Vandendriessche 2015, no. 75-76. The principle of proportionality applies irrespective of whether the competence of the Union legislature is exclusive or shared between the EU and Member States.

10 *See* Kuipers 2014, p. 159. *Also* Mañko 2015, p. 4.

11 Mañko 2015, pp. 3-4. *Cf. also e.g.* Leczykiewicz & Weatherill 2013, p. 2, who stated in respect of the character of EU law: '[i]t is not 'public law' in the orthodox sense(s) understood at national level, nor is it private law. It is both and it is neither. In fact, EU law operates without any such anchor, which makes it fluid and which makes it at the same time unstable'). *Cf. also e.g.* Busch 2015, pp. 216-217, who stated that EU law seems blindfolded for the difference between public and private law regarding the enforcement of standards set at the EU level.

12 Ackermann 2018, pp. 761-762 and De Graaff & Verheij 2017, p. 992. Exceptions are the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products and the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

13 Kuipers 2014, pp. 165-185. *Cf. also* Mañko 2015, pp. 4-5.

conjuction with Article 114 (1) TFEU is most relevant.[14] The Union legislature also based its competence for all versions of the CRA Regulation in general on Article 114 TFEU.[15] More in general, the Union legislature often bases its competence to take legislative action on Article 114 TFEU.[16] Article 114 TFEU allows the Union legislature to adopt 'the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' As the goal of the establishment and functioning of the internal market is formulated broadly and the CJEU has not developed a strict test in this regard,[17] the Union legislature can base its competence on Article 114 TFEU in a broad range of legal areas.[18] Based on Article 114 TFEU, parts of national private law can be harmonised if this is 'necessary for the functioning of the internal market'. Hence, harmonisation is allowed if differences between national legal systems would form an obstacle for the functioning of the internal market.[19]

Due to the functionalist approach of the Union legislature and the absence of a legal basis to codify private law in general, the influence of EU law on national private law often follows a 'piecemeal approach'.[20] Rules on civil liability often form part of broader packages of European rules regulating particular subject areas, forming little 'islands' of EU law.[21] This piecemeal approach of the Union legislature can be observed in relation to Article 35a CRA Regulation and in relation to the other examples discussed in section 2.5.

14 This dissertation will therefore not further discuss the sector specific competences (*in detail e.g.* Kuipers 2014, pp. 169-175 and Mañko 2015, pp. 5 ff.). Art. 352 constitutes a 'flexibility clause' (Kuipers 2014, p. 182 and Mañko 2015, pp. 5 and 12-13). If EU legislative action is required to achieve certain Treaty objectives while the Treaty did not confer competence upon the Union legislature, the Union legislature may nevertheless take the necessary legislative action to achieve the objectives. A special legislative proceeding applies: the Council must unanimously adopt a European Commission's proposal after having obtained consent of the European Parliament (Art. 352 (1) TFEU).

15 COM(2011) 747 final, p. 6.

16 *Cf. e.g.* Craig & De Búrca 2015, p. 93, Vandendriessche 2015, no. 74 and Kuipers 2014, p. 175.

17 *See* Kuipers 2014, p. 180.

18 Barents & Brinkhorst 2012, p. 606.

19 Kuipers 2014, p. 177 and Barents & Brinkhorst 2012, pp. 606-607. The broad wording of Art. 114 TFEU raised concerns. It was feared that the EU might base its competence on the sole fact that differences exist between legal systems of Member States, without considering whether such differences harm the functioning of the internal market. Craig & De Búrca 2015, pp. 93-94. *See also* Kuipers 2014, pp. 179-181.

20 *Term derived from* Kuipers 2014, p. 161. *For the same conclusion* Vandendriessche 2015, no. 80. *Cf. also* Ackermann 2018, p. 743: '*Der Orientierung an einem allgemeinen privatrechtlichen Systemvorbild kommt dabei kein großes Eigengewicht zu*' and pp. 761-762.

21 *In the context of regulations* De Graaff & Verheij 2017, p. 992. *In the context of directives* Kötz 1993, p. 97.

2.3 EFFECTS OF EU LAW IN NATIONAL LEGAL ORDERS

2.3.1 Direct effect

If the EU is competent in a particular subject area, it can exercise its competence through the adoption of regulations, directives, decisions and recommendations and opinions.[22] Each instrument influences national legal orders differently. For instance, whereas regulations and directives are binding upon Member States, recommendations and opinions do not have such binding force.[23] In order to explain the effects of provisions of the EU Treaties, regulations and directives in national legal orders, the concepts of direct and indirect effect of EU law are used often. If a provision of EU law has direct effect, this indicates that individuals and other private parties can directly rely on that provision before national courts.[24] If a provision of EU law lacks direct effect, it may still have 'indirect effect' (also known as the principle of harmonious interpretation).[25] Individuals and other private parties cannot rely directly on such a provision before national courts. Whereas the concept of direct effect is often associated with provisions included in the EU Treaties and regulations, the concept of indirect effect is often associated with provisions included in directives.

Legal doctrine has formulated a 'narrow' and a 'broad' definition of direct effect.[26] In its broad sense, direct effect is understood as 'the capacity of a provision of EU law to be invoked' by individuals and other private parties directly before national courts.[27] In its narrow sense, direct effect involves 'the capacity of a provision of EU law to confer rights on individuals which they may enforce before national courts'.[28] Provisions of EU law have direct effect in the broad sense if they are 'sufficiently clear, precise, and unconditional'.[29] For a provision to have direct effect in the narrow sense, it must also intend to confer rights on individuals. Whether a provision has direct effect depends on the concrete case in which a party invokes the provision. A party can only invoke a certain provision if that provision is relevant to the situation of that party.[30] For example, the person who invokes a right

22 Art. 288 TFEU. Craig & De Búrca 2015, p. 106.
23 Art. 288 TFEU.
24 Hartkamp 2014, p. 60.
25 Craig & De Búrca 2015, p. 184. *Cf.* Prechal 2005, p. 181. In detail, in the context of directives, section 2.3.3.
26 *E.g.* Craig & De Búrca 2015, pp. 186-187 and Hartkamp 2014, p. 60. *Cf.* Prechal 2000, p. 1050.
27 Craig & De Búrca 2015, p. 185. *See* Prechal 2005, p. 231 and Prechal 2000, p. 1050.
28 Craig & De Búrca 2015, p. 186.
29 Craig & De Búrca 2015, p. 192. *Also e.g.* McDonnell 2018, p. 430, Fairhurst 2016, p. 276 and Pescatore 2015, p. 151. The CJEU has used several different, yet similar, types of wordings to describe the conditions for direct effect, Pescatore 2015, p. 140.
30 *Cf.* Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 47, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

must be addressed by that right. Section 2.3.2.2 discusses the conditions for direct effect in detail.

The difference between the broad and the narrow definition of direct effect becomes visible in relation to provisions, which individuals and other private parties can rely upon in legal proceedings, but which do not confer directly effective rights upon those individuals and other private parties. As an example, Prechal refers to provisions that set a standard for the legality of national measures.[31] As a more specific example, Article 30 (1) Market Abuse Regulation provides that Member States must 'provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures' in relation to certain infringements of the Market Abuse Regulation. This provision imposes obligations upon Member States in respect of the enforcement of EU law, but does not confer directly effective rights upon individuals and other private parties. In this situation, application of the broad or the narrow definition of direct effect makes a difference: the former leads to the conclusion that Article 30 (1) Market Abuse Regulation has direct effect – as individuals and other private parties may rely on Article 30 (1) Market Abuse Regulation in legal proceedings for review of the legality of Member State's action in administrative proceedings,[32] whereas the latter leads to the opposite conclusion – as an individual cannot invoke Article 30 (1) Market Abuse Regulation as a right to an administrative action.

Within the concept of direct effect, one can further distinguish between vertical and horizontal direct effect of provisions of EU law. The terms 'vertical' and 'horizontal' indicate in which relationship private parties can directly invoke provisions of EU law. Private parties can invoke provisions with vertical direct effect directly against Member States and provisions with horizontal direct effect directly against other private parties. Hartkamp considers that a provision with horizontal direct effect 'directly influences the validity, substance or interpretation of legal relationships between individuals' and 'creates, modifies or extinguishes rights and obligations between the parties'.[33]

As stated at the beginning of this section, the concept of direct effect is often associated with provisions included in the EU Treaties and regulations, while the concept of indirect effect is often associated with provisions included in directives. Even though these associations are generally correct, one must keep in mind that provisions of regulations are not always capable of having direct effect and that provisions of directives can sometimes have vertical direct effect.[34] Whether a provision of EU law has direct or indirect effect ultimately depends on its content and wording and on whether the Union legislature

31 Prechal 2000, p. 1050.

32 *Also, on Art. 30 (1) Market Abuse Regulation,* section 2.3.2.3.

33 Hartkamp 2014, pp. 65-66.

34 For instance, individuals and other private parties can invoke provisions of directives directly against Member States in proceedings for Member State liability.

formulated the provision sufficiently clearly, precisely and unconditionally. As this Chapter concentrates on the influence of provisions of regulations and directives on civil liability and rights to damages, the following subsections look in more detail at the effects in national legal orders of provisions included in these legislative instruments.[35]

2.3.2 Regulations

2.3.2.1 Direct applicability does not entail direct effect

Regulations automatically take effect in national legal orders. They have general application, are binding in their entirety and are directly applicable in all Member States under Article 288 TFEU. The sole fact that a regulation is directly applicable, however, does not automatically entail the direct effect of all its provisions.[36] Each provision included in a regulation must have a sufficiently clear, precise and unconditional wording and, to be invoked by a specific party, must be relevant to the situation of that party.[37]

The CJEU acknowledged the (vertical) direct effect of regulations in the cases *Leonensio v Minstero dell' Agricoltura e Foreste*[38] and *Commission of the European Communities v Italian Republic* (the *Slaughtered Cow* case).[39] The CJEU held that provisions of regulations can have direct effect and are 'capable of creating individual rights which national courts must protect' because of their nature

35 This Chapter does not pay attention to the direct effect of provisions included in the EU Treaties. For the purpose of this dissertation, it suffices to remark that such provisions can have both direct vertical and horizontal direct effect. The concept of vertical direct effect originates from the ECJ's decision *Van Gend en Loos* (ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (*Van Gend en Loos*)). The ECJ introduced this concept in relation to negatively phrased obligations of Member States included in EU Treaty provisions. Subsequently, the concept of vertical direct effect was applied to EU Treaty provisions, which left discretion to the Member States and which imposed positive obligations upon Member States, *see, e.g.* ECJ 21 June 1974, C-2/74, ECLI:EU:C:1974:68 (*Reyners v Belgian State*) (*cf.* Chalmers, Davies & Monti 2014, p. 296 and Craig & De Búrca 2015, p. 190). Private parties can invoke EU Treaty provisions in vertical and horizontal relationships (Schütze 2018, pp. 86-88). *See, e.g.* ECJ 8 April 1976, C-43/75, ECLI:EU:C:1976:56 (*Defrenne v SABENA*), ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), ECJ 11 December 2007, C-438/05, ECLI:EU:C:2007:772 (*ITWF v Viking Line ABP*) and ECJ 18 December 2007, C-341/05, ECLI:EU:C:2007:809 (*Laval un Partneri*).

36 Schütze 2018, pp. 80 and 90-91, Woods, Watson & Costa 2017, p. 114 and p. 118 and Winter 1972, p. 435. *Cf.* McDonnell 2018, p. 428 and Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 46, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

37 Craig & De Búrca 2015, p. 198. *See also* Woods, Watson & Costa 2017, p. 118 and the Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 37, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

38 ECJ 17 May 1972, C-93/71, ECLI:EU:C:1972:39 (*Leonensio v Minstero dell' Agricoltura e Foreste*).

39 ECJ 7 February 1973, C-39/72, ECLI:EU:C:1973:13 (*Commission of the European Communities v Italian Republic*). *As referred to by* Craig & De Búrca 2015, pp. 198-199.

and purpose within the system of sources of EU law.[40] In general, Member States are not even allowed to implement regulations in their national legal orders if implementation would affect the regulation's direct effect.[41]

The distinction between vertical and horizontal direct effect is often less relevant in relation to regulations (as compared to directives). As regulations are directly applicable in national legal orders, individuals and other private parties can often invoke provisions, which are relevant to their situation, directly against parties to whom the provisions are addressed, whether the addressees are Member States, individuals or other private parties.[42]

2.3.2.2 'Sufficiently clear, precise and unconditional'

The direct effect of a provision of EU law (in the broad sense) depends on whether a provision's wording qualifies as being sufficiently clear, precise and unconditional. The CJEU elaborated upon these conditions in its case law.[43] A provision is sufficiently precise if it creates an obligation 'in unequivocal terms'.[44] A provision is unconditional if the obligation, and its effects, does not depend on additional measures taken either by the Union institutions or by Member States[45] and if it does not leave discretion to Member States.[46]

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40 ECJ 17 May 1972, C-93/71, ECLI:EU:C:1972:39 (*Leonensio v Minstero dell' Agricoltura e Foreste*), para 5. *Also* ECJ 10 October 1973, C-34/73, ECLI:EU:C:1973:101 (*Fratelli Variola Spa v Amministrazione delle finanze dello Stato*), para 8. *Also* Craig & De Búrca 2015, pp. 198-199.

41 ECJ 7 February 1973, C-39/72, ECLI:EU:C:1973:13 (*Commission of the European Communities v Italian Republic*), para 17. *Cf. also* ECJ 10 October 1973, 34/73, ECLI:EU:C:1973:101 (*Fratelli Variola Spa v Amministrazione delle finanze dello Stato*), para 11. Craig & De Búrca 2015, pp. 189-199.

42 Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, paras. 39, 45 and 47, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*). *See* Woods, Watson & Costa 2017, p. 118 and Fairhurst 2016, p. 279.

43 The conditions for direct effect apply to provisions included in the EU Treaties, regulations and directives. Therefore, this section combines decisions of the CJEU in relation to all EU legislative instruments. It was decided to discuss the conditions for direct effect in the context of regulations, because of this dissertation's focus on Art. 35a CRA *Regulation*.

44 *E.g.* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 45 and ECJ 17 September 1996, C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329 (*Cooperativa Agricola Zootecnica S. Antonio a.o. v Amministrazione delle Finanze dello Stato*), para 19. McDonnell 2018, p. 430.

45 *E.g.* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 45 and ECJ 17 September 1996, C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329 (*Cooperativa Agricola Zootecnica S. Antonio a.o. v Amministrazione delle Finanze dello Stato*), para 18. *See* the Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 37, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*). *E.g.* McDonnell 2018, p. 430, Fairhurst 2016, pp. 276-277 and Pescatore 2015, p. 151.

46 ECJ 12 December 1990, C-100/89 and C-101/89, ECLI:EU:C:1990:456 (*Kaefer and Procacci v French State*), para 26.

Legal scholars have stated that direct effect requires a provision to be 'self-executing'.[47] The Union legislature must have formulated a provision in such a manner that national courts do not need further European or national rules to be able to apply the provision to a case at hand.[48] 'Vague' terms do not necessarily preclude a provision from having direct effect, as long as national courts can apply the provision to the case at hand after interpretation.[49] Also, references to national legislation or national practice do not necessarily preclude the direct effect of a provision, as long as the reference does not affect the precise and unconditional nature of the right or obligation created by the provision.[50] However, it is problematic if a provision leaves actual discretion to Member States. Prechal considers that discretion involves a provision being able to be interpreted in several ways, while it is up to Member States to choose in which way they interpret the provision.[51] Such provisions can require, for instance, taking certain policy choices. Policy choices ought not to be taken by national courts, but by the Union legislature or national legislatures instead.[52] Therefore, national courts cannot apply such EU law provisions to concrete cases without further rules set by the Union legislature or by national legislatures. Such EU law provisions hence do not have direct effect.

2.3.2.3 Provisions requiring additional (national) measures

Considering the reference to the applicable national law under Article 35a (4) CRA Regulation, it is interesting to discuss in more detail what types of provisions included in regulations perhaps do not fulfil the conditions of being sufficiently clear, precise and unconditional. We do so by discussing several types of provisions included in regulations that require additional implementing measures taken by national legislatures and the effect of these measures on the clear, precise and unconditional character of these types of provisions. In terms of legislative techniques, such provisions exhibit features that traditionally are characteristic of directives (section 2.3.3) rather than regulations. Král categorised four types of national normative implementing measures, which can be required by regulations: concretising and/or complementing substantive measures; institutional and/or competence measures; procedural, controlling or penal measures; and adapting and/or derogating measures.[53] For the purposes of this dissertation, provisions included in regulations that require concretising and/or complementing substantive measures

47 McDonnell 2018, p. 431 and Craig & De Búrca 2015, p. 190.
48 *Cf.* McDonnell 2018, p. 431, Pescatore 2015, pp. 152-153 and Prechal 2005, p. 244.
49 Prechal 2005, p. 244.
50 CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), paras. 47-48.
51 Prechal 2005, p. 248, *based upon* Kapteyn & VerLoren van Themaat 1998, p. 532.
52 *Cf.* Prechal 2005, p. 250.
53 Král 2008, p. 245. Adam & Winter 1996 classified the types of provisions differently.

and procedural, controlling or penal measures are most relevant and will, therefore, be discussed in more detail.

(a) Concretising and complementing substantive measures

Provisions included in regulations can leave gaps, to such an extent that they are not sufficiently detailed or complete to qualify as 'self-executing'. Such provisions require Member States to take additional concretising and complementing substantive measures.[54] They do not have direct effect – at least not in the narrow sense, but can be used in proceedings on Member State liability for the non-transposition or non-conform transposition of EU law.

The case of *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna* (*Monte Arcosu*) involved examples of provisions that require additional national substantive measures to such an extent that the provisions did not create directly effective rights for a private party.[55] In this case, the CJEU had to decide whether Article 2 (5) of the Regulation on improving the efficiency of agricultural structure[56] (and the identical Art. 5 (5) Regulation No 2328/91[57]) had vertical direct effect.[58] Monte Arcosu, an Italian company that carried out farming activities, applied to Italian regional authorities for entry in the 'Register of Farmers Practising Farming as their Main Occupation'. The Italian regional authorities rejected the application because the Italian regional rules did not allow commercial companies like Monte Arcosu to enter the register.[59] The reason why Monte Arcosu could not enter the register was that at the time Monte Arcosu applied for registration, the Italian regional authorities had not yet established the criteria under which a commercial company could enter the register.[60] The Italian regional authorities had failed to establish a definition of the term 'farmer practicing farming as his main occupation', which they were obliged to do under Regulation No 797/85 and Regulation No 2328/91. Article 2 (5) of Regulation No 797/85 and Article 5 (5) Regulation No 2328/91 provided:

> 'Member States shall, for the purposes of this regulation, define what is meant by the expression farmer practising farming as his main occupation. This definition shall, in the case of a natural person, include at least the condition that the proportion of income derived from the agricultural holding must be 50% or more of the farmer's total income and that the working time devoted to work unconnected

54 Král 2008, p. 246.
55 *Example derived from* Král 2008, p. 246.
56 Council Regulation (EEC) No 797/85 of 12 March 1985 on improving the efficiency of agricultural structures.
57 Council Regulation (EEC) No 2328/91 of 15 July 1991 on improving the efficiency of agricultural structures.
58 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*).
59 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 12 and paras. 14-15.
60 Kronenberger 2001, p. 1546.

> with the holding must be less than half of the farmer's total working time. On the basis of the criteria referred to in the foregoing subparagraph, the Member States shall define what is meant by this same expression in the case of persons other than natural persons.'

Upon the rejection of its application to the register, Monte Arcosu started proceedings against the Italian regional authorities to enforce registration on the basis of these provisions of EU law,[61] thereby in essence claiming that the provisions had vertical direct effect. The CJEU came to the conclusion that Monte Arcosu could not base its claim on the relevant EU law provisions. The CJEU held that 'by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems'. Nevertheless, as stated by the CJEU, some provisions 'necessitate, for their implementation, the adoption of measures of application by the Member States'.[62] Subsequently, the CJEU qualified Article 2 (5) Regulation No 797/85 and Article 5 (5) Regulation No 2328/91 as provisions that require the adoption of national measures. The provisions left discretion to the Member States in respect of their exact implementation to such an extent that the CJEU concluded that 'it cannot be held that individuals may derive rights from those provisions in the absence of measures of application adopted by the Member States'.[63] Consequently, these provisions were not directly effective and Monte Arcosu was not able to base its claim on Article 2 (5) Regulation No 797/85 and Article 5 (5) Regulation No 2328/91.[64]

In *Monte Arcosu*, the magnitude of the margin of discretion left to the Member States was decisive for the CJEU's decision that the provisions lacked direct effect. As a result of the discretion, the provisions were not a source of sufficiently clear, precise and unconditional rights that could be invoked directly before national courts. It was, however, not decisive that national implementation measures were necessary in themselves.[65] One should also be aware of the importance of the context of the *Monte Arcosu* case.[66] Monte Arcose could not derive rights from the relevant provisions, but in another context a private party may be able to rely on the provisions.

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61 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 16.

62 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 26 (for both quotations). *Repeated in* CJEU 28 October 2010, C-367/09, ECLI:EU:C:2010:648 (*SGS Belgium and Others*), para 33.

63 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), paras. 27-28.

64 ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 29.

65 Kronenberger 2001, p. 1550. *As can also be derived from* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), paras. 47-48 (in the context of provisions included in directives). *Cf.* Adam & Winter 1996, p. 519.

66 *On the importance of the context of the case in general,* Prechal 2005, p. 250.

(b) Procedural, controlling or penal measures

Král also distinguished provisions included in regulations that require Member States to take procedural, controlling or penal implementing measures 'aimed primarily at securing full enforcement' of those regulations.[67] These provisions impose obligations upon Member States in the area of enforcement, but have such a broad wording that they do not create clear and precise rights for private parties or that they require additional measures taken by the Union legislature or by national legislatures.[68] They bear features of directives, in the sense that they require Member States to achieve a certain goal (e.g. enforcement of the regulation) and leave the manner in which this goal is achieved to the Member States.[69] An example can be found in Article 30 (1) Market Abuse Regulation:[70]

> 'Without prejudice to any criminal sanctions and without prejudice to the supervisory powers of competent authorities under Article 23, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative sanctions and other administrative measures in relation to at least the following infringements: […].'

The content and wording of this provision impose obligations upon Member States in respect of administrative sanctions and measures, but, at the same time, leave discretion to Member States. The provision addresses Member States, but does not create rights to a certain administrative sanction, which individuals and other private parties can directly invoke against other individuals and other private parties before national courts (direct effect in the narrow sense). Yet, again, the context of the concrete situation in which a party relies on a provision is of importance.[71] Individuals and other private parties may rely on Article 30 (1) Market Abuse Regulation, for instance, in legal proceedings for review of the legality of a Member State's action in administrative proceedings.

Provisions aimed at the full enforcement of the regulation codify (and specify) the division of competences between the EU and Member States in the area of enforcement of EU law. They leave the enforcement of EU law to

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67 Král 2008, p. 249.

68 *For examples of provisions that require additional measures,* CJEU 28 October 2010, C-367/09, ECLI:EU:C:2010:648 (*SGS Belgium and Others*), para 43.

69 This statement must be qualified, as the Union legislature can also introduce far more detailed directives over time. These directives in their turn bear features of regulations.

70 Král refers, amongst others, to Art. 9 Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (Codified version): 'The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.' *As derived from* Král 2008, p. 250. *For other examples,* Adam & Winter 1996, pp. 514-515.

71 *On the importance of the context of the case,* Prechal 2005, p. 250.

the national procedural autonomy of Member States (see also section 2.4.2), but do not provide Member States with unlimited discretion. In *Ebony Maritime v Loten Navigation*, the CJEU confirmed that even when a provision leaves the choice for certain manners of enforcement (in this case, the choice of penalties) to the discretion of Member States, Member States must ensure that infringements of EU law 'are penalized 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'.[72] One could also say that the discretion of Member States is restricted by the wording of the regulation itself and by the principles of equivalence and effectiveness (section 2.4.3).

This section discussed two types of provisions included in regulations that require additional implementing measures taken by national legislatures: concretising and complementing substantive measures and procedural, controlling or penal measures. The sole fact that a provision included in a regulation needs further implementation at the national level does not affect this. It is rather the amount of discretion left to Member States which causes provisions not to be self-executing and to lack a sufficiently clear, precise and unconditional nature to create directly effective rights for individuals and other private parties. Such provisions can have indirect effect (in the sense of the principle of harmonious interpretation, section 2.3.3) and can be used in proceedings for Member State liability for the non or non-conform transposition of EU law.[73] Furthermore, the context of the case is of crucial importance. A provision may not create directly effective rights (direct effect in the narrow sense), but can nevertheless be relied on by individuals and other private parties in a different factual context (direct effect in the broad sense).

2.3.3 Directives

In contrast to regulations, directives do not automatically take effect in national legal orders. Article 288 TFEU stipulates that directives are binding upon Member States as regards the result that they prescribe, but Member States may choose the form and methods in which they wish to achieve that result. The legislative instrument of a directive was, therefore, conceived to entail a lower level of harmonisation than the legislative instrument of a regulation. Directives could be said to 'not [be] directed to the world at large but at Member States'[74] and to confer the obligation upon Member States to ensure that national legal regimes accord with the results prescribed by directives.

72 ECJ 27 February 1997, C-177/95, ECLI:EU:C:1997:89 (*Ebony Maritime and Loten Navigation*), paras. 35 and 39. Král 2008, pp. 250-251.
73 Král 2008, p. 254.
74 Fairhurst 2016, p. 279.

To that end, Member States must implement EU law into their national legal regimes.

Due to the nature of directives and the obligation resting upon Member States to implement provisions included in directives into national legal regimes, individuals and private parties must generally rely on the national provisions in which EU law was implemented before national courts. Exceptionally, if a Member State failed to properly or timely implement a directive, provisions included in directives are capable of having vertical direct effect (see hereafter).[75] However, provisions included in directives do not have horizontal direct effect. As the CJEU decided in *Marshall v Southampton and South-West Hampshire Area Health Authority,* provisions included in directives cannot impose obligations upon individuals (namely upon Member States only), and can, therefore, not be directly relied upon against individuals.[76] In *Pfeiffer,* the CJEU confirmed that 'even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.'[77]

In order to ensure the effectiveness of provisions included in directives, national courts must interpret national law in conformity with EU law (the principle of harmonious or consistent interpretation).[78] Provisions included in directives, hence, at least have indirect effect. The principle of harmonious interpretation was developed by the CJEU and mitigated the differences in effects between directives and regulations.[79] In *Von Colson and Kamann v Land Nordrhein-Westfalen* and *Harz v Deutsche Tradax*, the CJEU held that, as directives impose an obligation upon all authorities of Member States to achieve the result prescribed by EU law, national courts 'are required to interpret their

75 *Cf.* Schütze 2018, p. 95.

76 ECJ 26 February 1986, C-152/84, ECLI:EU:C:1986:84 (*Marshall v Southampton and South-West Hampshire Area Health Authority*), para 48. *Also e.g.* ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing v Comercial Internacional de Alimentación*), para 6 and ECJ 14 July 1994, C-91/92, ECLI:EU:C:1994:292 (*Faccini Dori v Recreb*), para 20. *E.g.* Schütze 2018, pp. 98-99 and Prechal 2005, p. 255.

77 ECJ 5 October 2004, C-397/01, ECLI:EU:C:2004:584 (*Pfeiffer and Others*), para 109. The fact that provisions included in directives do not have horizontal direct effect is undermined by the fact that they can influence relationships between private parties through the concepts of indirect effect or harmonious interpretation, triangular direct effect and incidental direct effect. A discussion of the concepts of triangular direct effect and incidental direct effect falls outside the scope of this dissertation. *On these concepts e.g.* Schütze 2018, pp. 101-103, Craig & De Búrca 2015, pp. 216-220 and Chalmers, Davies & Monti 2014, pp. 313-316.

78 *E.g.* ECJ 5 October 2004, C-397/01, ECLI:EU:C:2004:584 (*Pfeiffer and Others*), paras. 114-115. *E.g.* Schütze 2018, pp. 103-106, Craig & De Búrca 2015, pp. 209-213 and Prechal 2005, pp. 180 ff.

79 *Cf.* Schütze 2018, p. 105.

national law in the light of the wording and the purpose of the directive'.[80] The obligation of harmonious interpretation has its limits. As the CJEU explained in *Dominguez*, the principle of harmonious interpretation is limited by the general principles of law and cannot lead to a *contra legem* interpretation of national law.[81]

If it is impossible for a national court to interpret national law in accordance with the directive, it should consider whether the provisions included in the directive are capable of having vertical direct effect so that they could be invoked directly against a Member State.[82] Whether provisions included in directives are capable of having direct effect depends on their wording and content, namely, again, on whether they are formulated sufficiently clear, precise and unconditional – the general test to determine whether provisions are capable of having direct effect.[83] As already stated in the context of regulations (section 2.3.2.2), the fact that directives provide discretion to Member States – as regards the form and method of implementation – does not in itself preclude their provisions from being capable of having (vertical) direct effect, as long as the content (minimum) of the right of the claimant 'can be determined with sufficient precision on the basis of the provisions of the directive alone'.[84] If a provision included in a directive is sufficiently clear, precise and unconditional, an individual can directly invoke it against a Member State who failed to implement a directive correctly or timely – if the individual started legal proceedings against the state. Alternatively, individuals and other private parties can use the provision in proceedings concerning Member State liability.[85]

80 ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Von Colson and Kamann v Land Nordrhein-Westfalen*), para 26 and ECJ 10 April 1984, C-79/83, ECLI:EU:C:1984:155 (*Harz v Deutsche Tradax*), para 26. *Repeated in e.g.* ECJ 13 November 1990, C-106/89, ECLI:EU:C:1990:395 (*Marleasing v Comercial Internacional de Alimentación*), para 7 and CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), para 24.

81 CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), para 25. *E.g.* Schütze 2018, p. 106 and Craig & De Búrca 2015, p. 213.

82 CJEU 24 January 2012, C-282/10, ECLI:EU:C:2012:33 (*Dominguez*), paras. 32-33.

83 *Cf.* ECJ 12 February 2009, C-138/07, ECLI:EU:C:2009:82 (*Belgische Staat v Cobelfret NV*), para 58.

84 ECJ 12 February 2009, C-138/07, ECLI:EU:C:2009:82 (*Belgische Staat v Cobelfret NV*), paras. 61-62. *Also e.g.* CJEU 17 July 2008, C-226/07, ECLI:EU:C:2008:429 (*Flughafen Köln v Bonn*), para 30 and ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 17. *See also* Woods, Watson & Costa 2017, pp. 119-120.

85 Craig & De Búrca 2015, p. 222. *E.g.* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*). *Also* Prechal 2005, pp. 259 and 271 ff.

2.4 Enforcement of EU law

2.4.1 Rights, remedies and procedures

The previous section discussed the effects of provisions included in regulations and directives in national legal orders and the extent to which individuals and other private parties can invoke provisions included in regulations and directives directly before national courts. One must however realise that the EU does not involve a complete legal order, and relies on national legal orders and national courts for the enforcement of EU law.

Van Gerven's distinction between 'rights', 'remedies' and 'procedures' helps to clarify the relationship between EU law and national law in relation to the enforcement of EU law. According to Van Gerven: 'The concept of right refers […] to a legal position which a person recognized as such by the law – thus a legal "subject" (hence the name "subjective" right) – may have and which in its normal state can be enforced by that person against (some or all) others before a court of law by means of one or more remedies, those are classes of action, intended to make good infringements of the rights concerned, in accordance with procedures governing the exercise of such classes of action and intended to make the remedy concerned operational.'[86] Hence, Van Gerven in principle separates the subjective right of a party from remedies and procedures available to enforce this subjective right, although he admits the lines between these three categories are sometimes difficult to draw.[87]

One can also apply this distinction to the context of credit rating agency liability. For example, issuers and investors have a 'right' to a credit rating which is not affected by a credit rating agency's failure to ensure a credit rating was based on 'a thorough analysis of all the information that is available to it' under the CRA Regulation.[88] This right mirrors the obligation of credit rating agencies to comply with the CRA Regulation. If a credit rating agency violates this 'right', issuers and investors are entitled to compensation: the right of redress under Article 35a CRA Regulation.[89] In order to effectuate this right, issuers and investors must resort to national 'procedures' before national courts.

Rights, remedies and procedures are not necessarily established entirely at the EU level or entirely at the national level. EU law does not involve a

86 Van Gerven 2000, p. 502 (references were removed).

87 Van Gerven 2000, p. 503. There is much more to say about the distinction between rights, remedies and procedures. Other authors have adopted different distinctions and have used different concepts. However, a more extensive discussion of these other approaches and the surrounding debates falls outside the scope of this research.

88 Under Art. 8 (2), I.42 Annex III and Art. 35a (1) CRA Regulation.

89 In addition to the remedy of compensation, Van Gerven refers to three other remedies: 'the general remedy of setting aside national measures' and 'the specific remedies of restitution (and specific performance) [and] interim relief […]' (Van Gerven 2000, p. 503).

complete legal order and often only establishes 'rights', which are to be enforced by means of national remedies and procedures.

2.4.2 National procedural autonomy

The starting point that EU law does not involve a complete legal order and may choose to only create certain 'rights' also explains the 'default' division of competences between the EU and its Member States regarding the enforcement of EU law: in the absence of EU law on the matter of enforcement, 'rights' created by EU law must be enforced by means of national remedies and procedures.[90] The enforcement of such EU rights then belongs to the 'national procedural autonomy' of Member States. The so-called 'principle of national procedural autonomy' entails that available remedies and procedural rules belong to the competence of Member States.[91] Provisions creating rights and obligations are established at the EU level, but have to be enforced by competent national public authorities, or before national courts through national legal proceedings. The CJEU developed this fundamental principle in *Rewe*, holding that 'in the absence of Community rules […], it is for the domestic legal system 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 Community law […]'.[92]

The national procedural autonomy of Member States is not without limitations. As described, the national procedural autonomy is only relevant where provisions of EU law on enforcement are absent or in as far as such provisions of EU law leave discretion to Member States. Furthermore, Article 19 (1) TEU and the principles of equivalence and effectiveness restrict the national procedural autonomy. Article 19 (1) TEU requires Member States to ensure the effective legal protection of the rights established by EU law: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' Furthermore, the principles of equivalence and effectiveness as developed by the CJEU should provide minimum thresholds with which Member States must comply.[93]

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90 Van Gerven 2000, p. 502. *Also* Craig & De Búrca 2015, pp. 226-227.
91 Wilman 2014, no. 25.
92 ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), para 5.
93 *Also* Vandendriessche 2015, no. 90-91.

2.4.3 Equivalence and effectiveness

The principles of equivalence and effectiveness (as developed by the CJEU) provide restrictions to the national procedural autonomy and minimum thresholds with which Member States must comply.[94] These principles can influence the existence and conditions of a remedy and national procedural rules. In *Wells,* the CJEU held that '[t]he detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)'.[95] Hence, the principle of equivalence entails that national remedies and procedural rules must be applied in the same way to infringements of national law and EU law 'where the purpose, cause of action and essential characteristics are similar'.[96] The principle of effectiveness, also described as 'practical possibility'[97] or *effet utile*, entails that national remedies and procedural rules shall not have the effect that it is virtually impossible or excessively difficult to exercise rights conferred by EU law.[98] Prechal and Wilman describe the principle of effectiveness as 'a principle of minimum protection', as this principle aims to ensure national courts guarantee a minimum standard of protection for private parties who enforce their EU rights.[99] For the purpose of this dissertation, the principle of equivalence has less relevance. Hereafter, the dissertation will mainly concentrate on the principle of effectiveness.

2.5 Influence of EU law on civil liability

2.5.1 Categorisation

The enforcement of EU law builds on the default position that, in the absence of EU law on this matter, 'rights' created by EU law must be enforced by means

94 *Also* Vandendriessche 2015, no. 90-91. In *Von Colson*, the ECJ referred to the benchmark of 'real and effective judicial protection' (ECJ 10 April 1984, C-14/83, ECLI:EU:C:1984:153 (*Von Colson and Kamann v Land Nordrhein-Westfalen*), paras. 22-23). *Also* Craig & De Búrca 2015, p. 230. This dissertation only pays attention to the principles of equivalence and, mostly, effectiveness.

95 ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*), para 67. Prior to *Wells*: ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), paras. 5-6.

96 Wilman 2014, no. 36.

97 By Craig & De Búrca 2015, p. 228.

98 ECJ 9 November 1983, C-199/82, ECLI:EU:C:1983:318 (*Amministrazione delle finanze dello Stato v San Giorgio*), para 14 and Wilman 2014, no. 37.

99 Wilman 2014, no. 37 and Prechal 2001, p. 40.

of national remedies and procedures.[100] Article 35a CRA Regulation differs from this default position, in the sense that the provision not only creates rights and obligations at the EU level, but also determines the remedy, namely compensation by means of a right of redress, at the EU level. The introduction of Article 35a CRA Regulation does not stand on its own. It forms part of a broader tendency towards an increased influence of EU law in the area of private law in general and on the civil liability of individuals and other private parties in particular. Moreover, EU regulations contain an increasing amount of provisions conferring rights to compensation or damages upon individuals or private parties, which can be directly invoked and enforced against other individuals or private parties before national courts.[101] This section maps the ways in which EU law[102] influences (national) rules on the civil liability of individuals and other private parties and rights of redress. In doing so, it aims to provide a broader perspective of the European legal context in which Article 35a CRA Regulation can be considered.

To analyse the current influence of EU law on civil liability, three situations are distinguished: (1) situations in which EU law leaves the enforcement of rights established at the EU level to Member States completely; (2) situations in which EU law imposes obligations upon Member States in respect of their rules on civil liability or requires the application of their national civil liability regimes; and (3) situations in which EU law creates directly effective rights to damages or compensation for individuals and private parties at the EU level for the violation of EU rights and obligations.[103]

This categorisation is based on the way in which and the extent to which EU law influences the existence and conditions of rights to compensation or damages. The first situation in fact involves the 'default' situation described in section 2.4.2: EU law creates rights and obligations only, while the enforcement is left to the national procedural autonomy of Member States. In both situation 2 and 3, EU legislation does contain provisions and imposes obligations in the field of civil liability. It is important to note that the distinction between these situations is drawn on the basis of whether eventual claims for compensation or damages must be filed in accordance with the applicable national law (situation 2) or can be based directly on a right of redress established at the EU level (situation 3). The second situation involves examples

100 *Cf.* Van Gerven 2000, p. 502.

101 *See on this development* Ackermann 2018 and De Graaff & Verheij 2017. *Cf. also* Alpa 2019.

102 Meaning provisions included in regulations and directives and general principles as effectiveness and equivalence.

103 A description of the ways in which EU law influences civil liability can be structured in other manners as well. *For a slightly different presentation of part of the examples described in this section, see* Vandendriessche 2015, no. 62 ff. *For part of the examples provided in section 2.5, see also* Moloney 2014, pp. 969-970. *See also* Alpa 2019 and Ackermann 2018. *For part of the examples analysed in the context of the civil liability of credit rating agencies, see* Wimmer 2017, pp. 119 ff.

of all sorts of different provisions included in regulations and directives. Notwithstanding the different legal instruments used, the effects of these provisions are similar in the sense that they entitle individuals and other private parties to bring claims for compensation or damages under the applicable national law in certain situations.

In advance, it must be noted that it is sometimes difficult to draw the line between situation 2 and 3 and that the effects of provisions falling in these categories can be similar. In fact, the examples discussed in situation 2 and 3 form part of a sliding scale. At the one end, there are provisions such as Article 11 (2) Prospectus Regulation (to be discussed in section 2.5.3.2), which impose obligations upon Member States in respect of civil liability. At the other end, there is Article 82 General Data Protection Regulation, which creates an autonomous and horizontal directly effective right to damages at the EU level (to be discussed in section 2.5.4.3). One can even wonder whether the Union legislature intentionally employed different wordings and templates, or whether the fragmentation simply stayed unnoticed because of the piecemeal approach adopted by the Union legislature in civil liability matters.[104]

The categorisation does not make a distinction on the basis of whether the influence of EU law stems from European legislative instruments or decisions of the CJEU.[105] Consequently, in each of the three situations described below, the influence of EU law on civil liability and rights to damages is determined by the content of the provision (if present), its (in)direct effect and the influence of the principles of equivalence and effectiveness on the national procedural autonomy of Member States. The examples used throughout this section have mainly been derived from EU financial law. However, to be able to complete[106] this overview of the types of influence, examples were sometimes derived from other legal areas as well. As the civil liability of credit rating agencies forms the main subject of this dissertation, this section involves a more extensive analysis of Article 35a CRA Regulation under subsection 2.5.4.2, as compared to the other examples discussed in section 2.5.

2.5.2 Situation 1: Absence of EU law provisions on civil liability

2.5.2.1 Setting the scene

The first situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations,

104 Section 2.2.

105 In contrast, Vandendriessche clearly distinguished between the influence of provisions of European legal instruments and of the CJEU (Vandendriessche 2015, no. 62 ff.).

106 Although this section does not intend to provide an exhaustive overview of all specific situations and examples in which EU (financial) law influences (national) rules on civil liability.

while leaving the enforcement of these rights and obligations (remedies and procedures) to the Member States. As described in section 2.4.2, in the absence of provisions of EU law addressing the matter of enforcement, the enforcement of EU law belongs to the national procedural autonomy of Member States. This section analyses to what extent the principle of effectiveness restricts the national procedural autonomy and requires Member States to entitle individuals and other private parties to a right to damages for infringements of rights and obligations established by EU law.

2.5.2.2 Regulations

Individuals and other private parties can invoke directly effective provisions established in regulations immediately before national courts. But, in the absence of specific provisions on the (private) enforcement of the rights created at the EU level, the question arises whether the principle of effectiveness requires Member States to allow individuals and private parties to start civil proceedings or to entitle individuals and other private parties to a right to damages under the applicable national law.

The CJEU decided on this matter in *Courage v Crehan* and *Muñoz v Frumar* in relation to Treaty provisions and provisions of regulations, respectively. In *Courage v Crehan* the question arose whether the claimant (Crehan) was entitled to claim damages from the defendant (Brewery Courage) under English law for the infringement of Article 85 (1) EC Treaty (currently Art. 101 (1) TFEU).[107] Brewery Courage and its tenant Crehan had entered into an agreement which was contrary to Article 85 (1) EC Treaty. As English law did not allow a party to an illegal agreement to claim damages from the other party, Crehan's claim for damages against Courage was barred.[108]

The CJEU held that Crehan should have been entitled to claim damages on the basis of Article 101 (1) TFEU as 'the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals' and that 'the practical effect of the prohibition laid down in 101(1) TFEU 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

107 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*). In 2014, a directive was adopted (Directive 2014/104/EU) laying down rules governing actions by private parties for damages under national law for infringements of competition law provisions of the Member States and of the European Union. *See also* section 2.5.3. Art. 101 (1) TFEU stipulates that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' 'shall be prohibited as incompatible with the internal market'.

108 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 11.

restrict or distort competition'.[109] An absolute bar to the claim for damages under English law was therefore not permissible.[110] But, as Article 85 EC Treaty did not provide relevant provisions on enforcement, English law had to 'lay down the detailed procedural rules governing actions for safeguarding rights which individuals can derive directly from Community law' in accordance with the principles of equivalence and effectiveness.[111] Also, Member States were allowed, although not in an absolute manner, to limit the right of damages of a claimant in specific situations.[112] The full effect of EU law hence required Member States to allow claims for damages for violations of Article 85 (1) EC Treaty, but left the detailed rules governing such actions to the Member States.

In *Muñoz v Frumar*, the question arose whether a private party was entitled to start civil proceedings under the applicable national law on the basis of the violation of a provision in a regulation committed by another private party.[113] The dispute centred around violations of quality standards under Regulations no. 1035/72 and no. 2200/96[114] by the English company Frumar in the sale of table grapes. The Spanish company Muñoz wished to bring civil proceedings against Frumar before the English courts in order to force Frumar to comply with the regulations. The English lower court concluded that Frumar violated the regulations, but dismissed Muñoz' claim because the rules on the quality standards of table grapes would not entitle private parties to claim enforcement on the basis of the violation of these Regulations.[115] The Court of Appeal asked the CJEU whether these Regulations created a legal duty 'which a national court should enforce in civil proceedings brought at the suit of a person who is a substantial grower within the Community of the fruit or vegetable concerned [Muñoz]?'[116] In essence, the Court of Appeal hence posed the question of whether Muñoz was entitled to claim enforcement through civil proceedings based on the violation of these EU regulations. The CJEU held that it lies in the nature of regulations 'to confer rights on indi-

109 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), paras. 25 and 26.

110 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 28.

111 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 29.

112 *Cf.* ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 31 in which the ECJ held that 'Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 Commission v Italy [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.'

113 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).

114 Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables.

115 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 22.

116 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 23.

viduals' which must be protected by the national courts.[117] The full effectiveness of the quality standards required Member States to make it possible for Muñoz 'to enforce that obligation by means of civil proceedings' against Frumar.[118] The CJEU hence decided that Muñoz was entitled to enforce EU law through civil proceedings.

A general application of *Courage v Crehan* and *Muñoz v Frumar* to provisions of regulations is debated amongst scholars. Leczykiewicz argued that *Courage v Crehan* does not entail 'a general regime of private party liability analogous to the principle of Member State liability'.[119] Leczykiewicz indicated that the actual introduction of a principle of private party liability would require a clarification of some core principles of EU law first, such as direct and horizontal effect and the concept of effective judicial protection.[120] Another argument to support a limited application of *Courage v Crehan*, was that the decision concerned EU competition law, which Leczykiewicz argued to be a very specific legal area that would not be representative of other areas of EU law.[121] However, the latter argument might have lost its relevance, as the reasoning of *Courage v Crehan* was applied in *Muñoz v Frumar* though that case did not involve competition law. Other scholars, however, did not agree with Leczykiewicz' restrictive approach. For instance, Sieburgh argued that *Courage v Crehan* showed that 'the liability is enshrined in Community law' as the decision referred to the full effectiveness and the practical effect of Article 101 (1) TFEU.[122] In addition, Wilman stated that '(t)he 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'.[123] Hence, scholars as Sieburgh and Wilman did assume that the decisions of *Courage v Crehan* and *Muñoz v Frumar* have a broad scope of application.

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117 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 27.

118 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 30. Unlike AG Geelhoed, the ECJ did not give a further explanation for the reason that the provisions have direct effect. Advocate General Geelhoed provided an overview of the standing of the law in respect of the direct effect of provisions of EU law. Subsequently, he concluded that it is 'beyond dispute' that Art. 3 (1) Regulation No 2200/96 has direct effect as it is 'unconditional and sufficiently precise and no national implementing measures are needed for it to be effective in regard to persons' (para 38). Also, in his opinion, it is clear that the system of quality standards 'serves to protect both dealers in fruit and vegetables and consumers' (para 30). In addition, Advocate General Geelhoed remarked that the ECJ has already expressly held that provisions of regulations on the common organisation of the market in fruit and vegetables have direct effect (para 38 and ECJ 13 December 1983, C-222/82, ECLI:EU:C:1983:370 (*Apple and Pear Development Council v K.J. Lewis Ltd and others*)).

119 Leczykiewicz 2009-2010, p. 259.

120 Leczykiewicz 2009-2010, p. 259.

121 Leczykiewicz 2009-2010, p. 260.

122 Sieburgh 2014, pp. 522 ff.

123 Wilman 2014, no. 64.

If the decisions in *Courage v Crehan* and *Muñoz v Frumar* have general application and thus apply in the context of EU financial law as well, they have the potential of requiring Member States to allow (at the least) civil proceedings on multiple occasions. The relevance of a general application is even larger when one takes into consideration that there is a tendency in EU law to turn directives into regulations.[124] If a provision is sufficiently clear, precise and unconditional and relevant to the situation of an individual litigant, private parties are entitled (at least) to start civil proceedings if required for the full effectiveness of EU law.[125]

An example of such a provision can be found in the Market Abuse Regulation.[126] The Market Abuse Regulation requires Member States to ensure that competent authorities can take appropriate administrative sanctions and other administrative measures against the persons responsible for certain infringements of the Market Abuse Regulation under Article 30 (1), but does not require Member States to apply their civil liability regimes to infringements of the regulation. Nevertheless, individuals and private parties may be entitled to civil proceedings under the applicable national law in order to enforce their rights under the Market Abuse Regulation on the basis of an analogue interpretation of *Muñoz v Frumar*.[127]

As the CJEU held in *Muñoz v Frumar*, it lies in the nature of regulations 'to confer rights on individuals' which must be protected by the national courts.[128] One could argue that the same applies to the Market Abuse Regulation: it lies in its nature to confer rights on individuals, which must be protected by the national courts. As argued by Tountopoulos, provisions of the Market Abuse Regulation can be sufficiently precise and unconditional and can confer rights upon private parties, so that they can be relied upon directly

124 *In the context of EU financial law e.g.* the Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC) and the Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC). The European Commission expressed this intention in a Communication – A Europe of Results – Applying Community Law /* COM/2007/0502 final */, p. 5 and fn. 12. *See also* M. Monti, 'A New Strategy for the Single Market –At the Service of Europe's Economy and Society' (Brussels, 2010) https://ec.europa.eu/docsroom/documents/15501/attachments/1/translations/en/renditions/pdf, last accessed at 31 August 2019.

125 Tountopoulos 2014, p. 325.

126 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. As argued by the contribution of Tountopoulos 2014.

127 As argued by Tountopoulos 2014. *See also* Busch 2016 *on the private law effects of the MAR.*

128 ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*), para 27.

before national courts by the private parties they aim to confer rights upon.[129] This may especially apply to investors, as the improvement of investor protection and confidence in the financial markets is one of the primary goals of the Market Abuse Regulation.[130] The prohibition for persons to engage, or attempt to engage, in market manipulation under Article 15 Market Abuse Regulation, for instance, can serve as an example of a directly effective provision that investors can directly invoke before the national courts.

The key question is whether the full effect of the rules established by the Market Abuse Regulation requires Member States to allow enforcement by individuals and private parties through civil proceedings.[131] As appears from *Muñoz v Frumar*, the fact that a national authority exists that exercises the public enforcement of the regulation does not necessarily ensure the 'full effectiveness' of EU law.[132] In addition, Tountopoulos argued that it is generally accepted that private enforcement contributes to the effectiveness of the rules on market abuse.[133] One can therefore argue that Member States must allow private parties, such as investors, to bring civil proceedings under the applicable national law against other private parties for violations of rules established by the Market Abuse Regulation.[134] If required by the full effect of EU law, Member States must allow a private party to bring proceedings for the enforcement of EU law or to bring a claim for damages. As appears from *Courage v Crehan*, the detailed rules on such actions are left to the Member States, subject to the principles of equivalence and effectiveness.[135]

2.5.2.3 Directives

In the absence of specific provisions on (private) enforcement established in a directive, matters relating to (private) enforcement for breaches of the national provisions in which the directive has been implemented are left to the Member States. Nevertheless, the question arises whether the principle of effectiveness requires Member States to allow individuals and private parties to start civil proceedings or to provide individuals and private parties with a right to damages under the applicable national law for violations of provi-

129 Tountopoulos 2014, pp. 312 and 317.
130 Art. 1 MAR.
131 Tountopoulos 2014, p. 323.
132 In *Muñoz v Frumar*, the ECJ did not pay attention to the fact that the English Horticultural Marketing Inspectorate was responsible for the public enforcement of Regulation No 2200/96. Advocate General Geelhoed stated that 'the regulation grants no monopoly in regard to enforcement' and that '[c]ommunity law does not operate on the notion that enforcement by means of private law is precluded where provisions is made *expressis verbis* solely for the enforcement under public law' (Opinion A-G L.A. Geelhoed, ECLI:EU:C:2001:697, para 55, with ECJ 17 September 2002, C-253/00, ECLI:EU:C:2002:497 (*Muñoz v Frumar*).
133 Tountopoulos 2014, pp. 323-328.
134 As done by Tountopoulos 2014, p. 328.
135 ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para 29.

sions of national law which implement directives. This question must essentially be answered in the same way as already done for regulations in section 2.5.2.2. Member States must therefore allow private enforcement if (1) a directive confers rights upon individuals for which Member States must ensure effective protection; and (2) if private enforcement is required for the full effectiveness of the directive. Yet, as decisions of the CJEU demonstrate, Member States are allowed more discretion in relation to the enforcement of directives, as compared to regulations.[136]

To start with, it must be determined whether a directive confers rights upon individuals for which Member States need to provide sufficient remedies in order to ensure the effective protection of those rights. In section 2.3.3, it was remarked that directives can impose directly binding obligations upon Member States only. However, as remarked by Prechal, '[t]his in no way precludes that directives may *formulate* obligations; it is, however, only upon transposition that the obligations become enforceable', so that directives can form an indirect source of rights and obligations for individuals.[137] The CJEU has not defined exactly when a directive confers rights upon individuals; however, some parameters can be derived from its case law.[138] According to Prechal, relevant parameters are the wording and aim of the provision, the parties to the relationship for which the rule is meant, the objectives of the provision (protecting private or public interests) and whether the directive explicitly requires effective judicial protection (although the absence of such a requirement is not conclusive).[139] In *Paul and Others*, for instance, the CJEU held that the mere fact that the recitals of a directive stipulate that one of its objectives is to protect depositors, does not necessarily entail that the directive seeks to confer rights upon depositors.[140] In academic literature, it is however doubted whether the CJEU would still come to the same conclusion today.[141]

If a specific provision confers rights upon individuals, it must be analysed whether the effective judicial protection of those rights and/or the principles of equivalence and effectiveness require Member States to allow private enforcement. Again, this all boils down to the influence of the principle of effectiveness. In theory, if the rights are fully secured without the availability of civil proceedings,[142] Member States are not required to allow civil proceed-

136 *See, for the relevance of the difference between regulations and directives,* Ackermann 2018, p. 776.
137 Prechal 2005, p. 96.
138 Prechal 2005, p. 111.
139 Prechal 2005, pp. 113, 115, 118 and 124, respectively.
140 ECJ 12 October 2004, C-222/02, ECLI:EU:C:2004:606 (*Paul and Others*), paras. 38 and 40.
141 Tegelaar 2016, pp. 708-711 and pp. 714-715, Van Praag 2014, pp. 217-218, Sahtie 2012, p. 277 and Athanassiou 2011, p. 21. *See also* CJEU 4 October 2018, C-571/16, ECLI:EU:C:2018:807 (*Kantarev*), para 101.
142 For instance through government funded relief funds, *see* Van de Bunt 2016 on government funded disaster relief funds, or through compensation schemes arranged for by financial supervisors, such as the Dutch Herstelkader rentederivaten.

ings.[143] In the context of the financial sector, the decisions *Genil 48 SL*[144] and *Alfred Hirmann v Immofinanz AG*[145] have demonstrated that the CJEU leaves the Member States a wide margin of discretion in this regard.

Genil 48 SL concerned the national contractual consequences of breaches of Article 19 (4) and (5) of the Markets in Financial Instruments Directive (hereafter 'MiFID'). Genil 48 SL and Comercial Hostelera de Grandes Vinos SL (hereafter: 'Genil 48 SL') had concluded swap agreements with Bankinter SA and Banco Bilbao Vizcaya Argentaria SA (hereafter: Bankinter SA), but the banks omitted to carry out the assessments required under Article 19 (4) and (5) MiFID.[146] Genil 48 SL argued that the swap agreements were void *ab initio* because of this failure.[147] The Court of First Instance (No 12, Madrid) referred to the CJEU for a preliminary ruling on the question of whether the failure to comply with Article 19 (4) and (5) MiFID would cause the contracts to be void *ab initio*.[148] The CJEU stated that MiFID does not state 'either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be.'[149] In the absence of EU law on contractual consequences, 'it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness'.[150] In this way, the CJEU left a large margin of discretion to the Member States to determine the contractual consequences of infringements of MiFID.

Subsequently, the CJEU delivered a similar judgment in *Alfred Hirmann v Immofinanz AG* concerning the interpretation of enforcement provisions of the Prospectus Directive, the Transparency Directive and the Market Abuse Directive. Hirmann purchased shares in Immofinanz, but subsequently accused Immofinanz of market manipulation and of having distributed an incomplete, false or misleading prospectus. Hirmann claimed the annulment of the purchase contract and damages. Immofinanz argued that Hirmann's claim violated overriding principles of national and EU law (the Second Council Directive

143 See Wallinga 2014, par. 5.
144 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*).
145 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG).*
146 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), paras. 13 and 16.
147 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 17.
148 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 22.
149 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 57.
150 CJEU 30 May 2013, C-604/11, ECLI:EU:C:2013:344 (*Genil 48 and Comercial Hostelera de Grandes Vinos*), para 57.

77/91/EEC[151]) with regard to the liability of limited liability companies.[152] The Handelsgericht Wien referred the case to the CJEU for a preliminary ruling on the question whether the Second Council Directive 77/91/EEC precluded national legislation – based on the enforcement provisions under the Prospectus Directive, the Transparency Directive and the Market Abuse Directive – (1) that allows liability from a public liability company to an investor; and (2) that, if the public company is liable, allows for the payment of a sum equivalent to the purchase price of the shares to the purchaser.[153] The CJEU held that in the absence of rules of EU law, Member States have 'a wide discretion in the choice of penalties' for violations of EU law as long as they 'act in accordance with European Union law'.[154] If an issuer is held liable, Member States may 'choose a civil measure to provide compensation'.[155] As long as they comply with the principles of equivalence and effectiveness, Member States may set the criteria for determining the extent of the damages.[156] In this specific situation, the CJEU concluded that the national civil liability regime constituted an appropriate remedy.[157] The CJEU did not impose an obligation upon Member States to apply their civil law systems to infringements of the directive. Yet, if a Member State chooses to apply its civil law system, it has to comply with the principles of equivalence and effectiveness.

In *Genil 48 SL* and *Alfred Hirmann v Immofinanz AG*, the CJEU affirmed that in the absence of EU law on the matter, Member States are free to decide on the type of private enforcement measure employed – as long as they comply with the principles of equivalence and effectiveness. If Member States choose to allow private law remedies, they have to comply with the principles of equivalence and effectiveness. The CJEU has shown a reluctant approach towards interference with the national procedural autonomy of the Member

151 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art. 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

152 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, paras. 16-20.

153 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 22.

154 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 41.

155 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 42.

156 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 40.

157 CJEU 19 December 2013, C-174/12, ECLI:EU:C:2013:856 (*Alfred Hirmann v Immofinanz AG)*, para 43.

States[158] and did not provide specific guidance on the circumstances in which the principle of effectiveness entails that private parties should be entitled to civil proceedings. If Member States can safeguard the indirect rights conferred upon individuals and private parties by other legal mechanisms, the full effect of EU law does not require them to allow for civil proceedings.[159]

Thus far, this section concentrated on the obligations imposed upon Member States to ensure a minimum level of protection in respect of the enforcement of EU law. Some EU legislative instruments, however, might also arrange for a maximum standard of protection. In the context of EU financial law, the conduct of business rules under MiFID II (the Markets in Financial Instruments Directive II)[160] provide an example of a situation in which EU law might not only require a minimum standard of protection, but also a maximum standard of protection. Conduct of business rules for investment firms have been established to protect clients of investment firms (investors) when investment firms provide services to them.[161] For instance, under Article 24 and 25 MiFID II, Member States must ensure investment firms conduct suitability or appropriateness tests if they provide clients with information or investment advice. These rules aim to protect private interests of investors and to regulate the relationship between an investment firm and its client. They can therefore qualify as an indirect source of rights for individuals or private parties.

MiFID II, however, does not impose specific obligations upon Member States in respect of civil liability. Under Article 69 (2) MiFID II, Member States must ensure 'mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014'.[162] In theory, Member States are not required to allow investors to start civil proceedings to claim damages if they

158 In particular, the exact meaning of *Genil 48 SL* is a topic of debate between scholars. Wallinga concentrated on the autonomy of the Member States (Wallinga 2015, p. 269 and Wallinga 2014, par. 6), while Busch, Della Negra and Grundmann concluded that the conduct of business rules of MiFID influence horizontal relationships (Busch 2015, p. 211, Della Negra 2014, p. 578 and Grundmann 2013, p. 287).

159 The approach is less strict as compared to regulations. *On the difference between regulations and directives,* Ackermann 2018, p. 776.

160 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. MiFID (I): Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. MiFID II replaced MiFID (I) as from 3 January 2018.

161 Recital 3, 4 and 7 MiFID II.

162 In addition to Art. 69 MiFID II, Art. 70 (1) MiFID II requires Member States to ensure that 'effective, proportionate and dissuasive' administrative measures or sanctions are available to the national competent authority against persons responsible for infringements of national provisions adopted in the implementation of MiFID II.

are able to fully realize the result prescribed by the Directive in accordance with the principles of equivalence and effectiveness. However, with regard to the conduct of business rules of investment firms, it seems difficult to imagine how Member States would not allow civil proceedings without breaching EU law[163] (possibly through a public fund or scheme arranging for investor compensation). Yet, in practice, Member States have often accepted that national provisions which have implemented the conduct of business rules of MiFID II can be enforced through civil proceedings.[164]

In academic literature, the question arose whether the conduct of business rules established by MiFID II can impose maximum standards in the area of civil liability.[165] The decision in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* involved the capability of national private law to gold-plate a provision of a directive with the character of maximum harmonisation. In this case, Van Leeuwen took out a life assurance policy with the Dutch insurance company Nationale-Nederlanden ('NN').[166] When the life assurance contract ended, a dispute arose between NN and Van Leeuwen on the costs and premiums deducted by NN and about whether the information provided by NN before the conclusion of the contract had been sufficient.[167] NN complied with the requirements referred to in Article 2 (2) (q) and (r) of the Dutch Regulation regarding the provision of information to policy-holders 1998 (the RIAV 1998) which implemented Article 31 of the Third Life Insurance Directive.[168] Still, the question arose whether the open norms and unwritten rules under Dutch law – in particular, the duty of care as a condition for non-contractual liability – could require NN to have provided additional information to Van Leeuwen. Article 31 (3) Third Life Insurance Directive provides that '[t]he Member State of the commitment may require assurance undertakings

163 *Cf.* Tison 2010, p. 2624.

164 *See in respect of German, Dutch, Belgian and French law* Vandendriessche 2015, no. 103 and Tison 2010, pp. 2630-2632. *See in respect of Dutch law* Busch 2015, p. 209.

165 *As addressed by e.g.* Busch 2012, Busch 2015, Busch & Arons 2015, Busch 2017, Janssen 2017a, Janssen 2017b, Tison 2010, Cherednychenko 2012, Wallinga & Cherednychenko 2016, Wallinga 2014, Wallinga & Pijls 2018 and Verbruggen 2018. This question is not relevant when EU law stipulates that the rights and obligations established at the EU level provide for minimum standards. Examples of such provisions can be found under Art. 11 (4) PRIIPs Regulation which states that it 'does not exclude further civil liability claims in accordance with national law' and Art. 35a (5) CRA Regulation which states that '[t]his Article does not exclude further civil liability claims in accordance with national law.' As the topic of maximum harmonisation therefore has no direct relevance in relation to credit rating agency liability, this topic is only mentioned briefly in this dissertation.

166 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 10.

167 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), paras. 13-14.

168 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC.

to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment'. In the words of AG Sharpston, '[t]he issue here is therefore whether that option could be exercised through the application of rules of law other than legislation',[169] and in this specific case whether additional information duties could be required through the open/general clauses of Dutch non-contractual liability law. The CJEU held that Member States have to ensure that additional information is required 'in accordance with the principle of legal certainty, [so that] it enables insurance companies to identify with sufficient foreseeability what additional information they must provide and which the policyholder may expect'.[170] Furthermore, the CJEU held that it is for the national courts to determine whether open clauses and unwritten rules comply with those requirements.[171] Hence, the CJEU accepted that open and general clauses under national law can require the provision of additional information under Article 31 (3) Third Life Insurance Directive.[172] Again, the CJEU showed reluctance to interfere with national civil liability law and allows Member States a wide margin of discretion to adopt additional requirements as long as EU law itself provides for such opportunities.

So, what general lessons can be derived from the decision in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* and how can these lessons be applied in the context of the conduct of business rules of MiFID II? It is generally accepted that the conduct of business rules of MiFID II involve maximum harmonisation,[173] but scholars are divided on the question of whether national courts are bound by these maximum standards when deciding on claims for damages brought in accordance with the applicable national law. Legal scholars as Busch and Janssen concluded that national courts may neither be less stringent nor more stringent than the standards set by MiFID II. They argued that, due to the lack of a distinction between private and public law at the EU level, maximum harmonisation applies to all national courts and

169 Opinion of A-G E.V.E. Sharpston, ECLI:EU:C:2014:1921, para 57 with CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*).

170 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 29.

171 CJEU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale-Nederlanden Levensverzekering Mij NV v Hubertus Wilhelmus van Leeuwen*), para 33.

172 Wallinga and Cherednychenko concluded that the CJEU did not fully realise that the District Court Rotterdam in fact asked whether national private law could adopt stricter rules than national public law in which EU law had been implemented (see Wallinga & Cherednychenko 2016, para 3). However, EU law is solely concerned with the effectiveness of EU law and is not concerned with the distinction between public law and private law. Therefore, from the perspective of the CJEU, it might not be considered remarkable that the CJEU has not approached the issue from a national – public and private law – perspective. *Cf.* Kalkman 2016, p. 187, responding to Wallinga & Cherednychenko 2016.

173 Tison 2010, pp. 2632-2633.

to both national public and private law.[174] Scholars such as Tison, Cherednychenko, Wallinga and Pijls, however, adopted a different approach in respect of the effects of the MiFID II rules on national private law.[175] Tison believes that care must be taken when translating the character of maximum harmonisation to the private law context, especially because the private law effects of MiFID II 'are only indirectly assumed on the basis of the objectives of the directive'.[176] As argued by Wallinga and Cherednychenko, it can be derived from *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen* that, rather than putting emphasis on MiFID II's character of maximum harmonisation, it is more useful to look at the margin of discretion that the wording of the relevant provisions leaves to the Member States.[177] For instance, Article 24 (1) MiFID II requires Member States to ensure that, when providing investment/ancillary services to clients, 'an investment firm act[s] honestly, fairly and professionally in accordance with the best interests of its clients and [complies], in particular, with the principles set out in this Article and in Article 25'.[178] In addition, Article 24 (12) allows Member States, in exceptional situations, to 'impose additional requirements on investment firms' that 'must be objectively justified and proportionate so as to address specific risks to investor protection or to market integrity which are of particular importance in the circumstances of the market structure of that Member State'.[179] Hence, one could say that Article 24 (1) itself forms an open clause allowing for flexibility if needed in particular circumstances and that Article 24 (12) forms an escape clause for Member States to adopt stricter requirements for investment firms. When these provisions are read in light of the CJEU's approach in *Nationale-Nederlanden Levensverzekering Mij NV v Van Leeuwen*, Member States can adopt stricter requirements through national open and general clauses and, in particular, through the duty of care under national non-contractual liability law.[180]

Overall, the influence of the principle of effectiveness on civil liability and the availability of rights to damages is less far-reaching and clear as compared to situations in which explicit provisions of EU law on these matters exist. The principle of effectiveness mainly requires Member States to provide individuals or private parties with the possibility to start 'civil proceedings'. The term 'civil

174 *E.g.* although with reservations in respect of the general clauses of MiFID II as discussed hereafter, Busch 2012, p. 395, Busch 2015, pp. 216-218, Busch & Arons 2015, paras. 5-6 and Busch 2017, p. 1014. *Also* Janssen 2017a, pp. 289-290 and Janssen 2017b, p. 1035.

175 Tison 2010, Cherednychenko 2012, Wallinga & Cherednychenko 2016, Wallinga 2014 and Wallinga & Pijls 2018. *Cf. also* Verbruggen 2018.

176 Tison 2010, p. 2633.

177 Wallinga & Cherednychenko 2016, para 5. *Cf. also e.g.* Busch 2017, p. 1015 and Busch 2015, pp. 217-218.

178 Busch 2015, pp. 217-218 and Tison 2010, p. 2633.

179 Wallinga & Cherednychenko 2016, para 5. *Also* Wallinga & Pijls 2018, p. 16.

180 As defended by Wallinga & Cherednychenko 2016, para 5. *Also* Wallinga & Pijls 2018, p. 16.

proceedings' does not only relate to civil liability or rights to compensation, but also includes other sanctions, such as the sanction to declare contracts null and void.

2.5.3 Situation 2: EU law provisions on (the application of) national civil liability regimes

2.5.3.1 Setting the scene

The second situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations, and also impose obligations upon Member States in respect of civil liability and the applicability of national civil liability regimes. EU law requires that Member States entitle private parties to rights to compensation or damages, but the actual enforcement of EU rights nevertheless continues to take place through national remedies and procedures.

The second situation involves examples of all sorts of different provisions included in regulations and directives. Notwithstanding the different legal instruments used, the effects of these provisions are similar in the sense that they entitle individuals and other private parties to claims for compensation or damages under the applicable national law in certain situations. Because of these similar effects, it was not considered useful to make a further distinction based on the legislative instrument in which the provision was included. The distinction made between section 2.5.3.2 ('EU law provisions (*de facto*) requiring application national civil liability regimes') and section 2.5.3.3 ('EU law provisions creating a right of redress under national law') is a matter of different wording and degree. Section 2.5.3.3 discusses examples of provisions that directly refer to a right to damages, while section 2.5.3.2 discusses examples of provisions that involve less direct wording and leave somewhat more discretion to Member States.

Outside the area of EU financial law, multiple examples of directives impose detailed obligations upon Member States in respect of the civil liability of individuals and other private parties and the remedy of compensation. Well-known examples are the Directive on competition law damages,[181] the Product Liability Directive,[182] the Directive on the enforcement of intellectual

181 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

182 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

property rights[183] and the Directive on environmental liability.[184] These examples are not discussed further in this dissertation, but serve as examples to show that the level of harmonisation entailed by provisions falling within this second category can be higher than the examples discussed hereafter in the context of EU financial law. For instance, the Directive on Competition Law Damages imposes detailed obligations upon Member States with regard to the compensation of parties duped by infringements of EU competition law. It codifies the rules established in *Courage v Crehan* by requiring Member States to ensure that natural and legal persons can obtain full compensation for loss caused by an infringement of competition law.[185] Furthermore, it codifies the principles of equivalence and effectiveness by stipulating that 'all national rules and procedures relating to the exercise of claims for damages' must comply with these principles[186] and imposes further obligations upon the Member States in respect of, for instance, the quantification of harm, causation and limitation periods.[187]

2.5.3.2 *EU law provisions (de facto) requiring application of national civil liability regimes*

Although EU financial law does not involve regulatory frameworks that impose such detailed obligations upon Member States on the remedy of compensation as done by the Directive on Competition Law Damages, one can find provisions that require or require *de facto* Member States to apply their national civil liability regimes to infringements of rights and obligations established at the EU level.

To start with, one can find examples of provisions under the Alternative Investment Fund Managers Directive (AIFMD[188]), the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS V[189]) and

183 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

184 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

185 Art. 3 (1) Directive on Competition Law Damages. *See* section 2.5.2.2 on ECJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*).

186 Art. 4 Directive on Competition Law Damages.

187 Art. 17 and Art. 10 Directive on Competition Law Damages, respectively.

188 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

189 Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.

the Payment Services Directive II (PSD II[190]), which stipulate when private parties are liable vis-à-vis other private parties and, thereby, impose obligations upon Member States in the area of civil liability.[191] The AIFMD and UCITS V contain rules on investment funds[192] and on their managers and depositaries. They do not impose a general obligation upon Member States to apply their national civil liability regimes to infringements of their national implementing provisions.[193] Instead, AIFMD and UCITS V have introduced specific provisions on the liability of depositaries of investment funds towards investment funds and investors. Under Article 21 (12) AIFMD and Article 24 (1) UCITS V, Member States must ensure that the depositary is liable to the UCITS or AIF and to the investors for loss caused by the depositary or a third party to whom the custody has been delegated:

> Article 21 (12) AIFMD – 'The depositary shall be liable to the AIF or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of paragraph 8 has been delegated.
>
> In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

190 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

191 *Cf. also for the same type of construction, included in a regulation* Art. 7 (4) of the Regulation (EU) 2017/1131 on Money Market Funds: 'The manager of an MMF shall be responsible for ensuring compliance with this Regulation and shall be liable for any loss or damage resulting from non-compliance with this Regulation' in conjunction with Art. 40 (1) of the Regulation (EU) 2017/1131 on Money Market Funds: 'Member States shall lay down the rules on penalties and other measures applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented'. Hence, the Regulation stipulates when a manager is liable, but leaves the enforcement of this obligation to the Member States. *Cf. also for the same type of construction, included in a regulation e.g.* Art. 7 (2) Regulation (EU) 2015/760 on European long-term investment funds (ELTIFs), which refers the liability of managers of ELTIFs back to the rules under AIFMD.

192 Investment funds gather assets from multiple investors and collectively invest these assets in the financial markets. *Cf. e.g.* Armour, Awrey, Davies et al. 2018, p. 250 and Moloney 2014, pp. 196-197.

193 Under Art. 48 (1) AIFMD and Art. 99 (1) UCITS V, Member States are required to ensure that the competent authorities can take appropriate administrative measures/sanctions against persons responsible for infringements of national provisions adopted in the implementation of AIFMD and UCITS V. *Cf. also on the liability rules in the context* Vandendriessche 2015, no. 64.

> The depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.'
> Article 24 (1) UCITS V – 'Member States shall ensure that the depositary is liable to the UCITS and to the unit-holders of the UCITS for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 22(5) has been delegated.
>
> In the case of a loss of a financial instrument held in custody, Member States shall ensure that the depositary returns a financial instrument of an identical type or the corresponding amount to the UCITS or the management company acting on behalf of the UCITS without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.
>
> Member States shall ensure that the depositary is also liable to the UCITS, and to the investors of the UCITS, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.'

Both Article 21 (12) AIFMD and Article 24 (1) UCITS hence impose an obligation upon Member States to ensure that depositaries are liable towards investment funds and investors in certain situations. Also, the preambles of both directives[194] explicitly state that a depositary will be liable towards investment funds and investors in certain situations. AIFMD and UCITS are both directives, so that Member States are free to decide which form and method they adopt to achieve the objectives set by the directives. In the absence of other arrangements for the compensation of investment funds investors, one could imagine that Member States must allow investment funds and investors to enforce the national provisions in which the directives have been implemented through civil proceedings and to bring claims for damages. Such an obligation may also be derived from Article 21 (15) AIFMD and Article 24 (5) UCITS V which suggest Member States must ensure that investors are able to bring proceedings against a depositary directly under the national regimes of civil liability:

> Article 21 (15) AIFMD – 'Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.'

> Article 24 (5) UCITS V – '*Unit-holders in the UCITS may invoke* the liability of the depositary directly or indirectly through the management company or the investment company provided that this does not lead to a duplication of redress or to unequal treatment of the unit-holders.'[195]

194 Recital 44 AIFMD and Recitals 26-28 UCITS V.
195 Emphasis added [DJV].

Another provision that imposes obligations upon Member States in respect of the application of national civil liability regimes can be found under Article 73 Payment Services Directive II (PSD II[196]). The Payment Services Directive requires Member States to ensure that payers will be compensated for unauthorised payment transactions under Article 73 (1):

> '(1) *Member States shall ensure that*, without prejudice to Article 71, in the case of an unauthorised payment transaction, *the payer's payment service provider refunds the payer the amount of the unauthorised payment transaction immediately*, and in any event no later than by the end of the following business day, after noting or being notified of the transaction, except where the payer's payment service provider has reasonable grounds for suspecting fraud and communicates those grounds to the relevant national authority in writing. Where applicable, the payer's payment service provider shall restore the debited payment account to the state in which it would have been had the unauthorised payment transaction not taken place. This shall also ensure that the credit value date for the payer's payment account shall be no later than the date the amount had been debited.'[197]

Furthermore, PSD II sets some additional rules in respect of civil liability. Under Article 74 (1) PSD II, a payment services provider is not liable if the payer incurred its loss because the payer acted fraudulently or failed to fulfil one or more of the obligations set out in Article 69 PSD II intentionally or with gross negligence. Recital 72 PSD II explicitly refers the term 'gross negligence' back to the applicable national law, and only stipulates that 'gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties.' Hence, PSD II leaves the actual enforcement of EU rights at the national level, but shapes the national enforcement by imposing obligations upon Member States in this respect.[198]

Whereas provisions under AIFMD, UCITS V and PSD II stipulate in which situations private parties are liable vis-à-vis other private parties and, thereby, impose obligations upon Member States in the area of civil liability, one can also find provisions included in directives *and* regulations, which more directly formulate the obligation resting upon Member States to apply their national civil liability regimes for certain infringements of EU law. The latter type of provision resembles what Král described as provisions requiring Member States

196 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

197 Emphasis added [DJV].

198 Although Member States must implement these provisions into national law, the incorporation in national systems of private law may still be difficult. In the context of PSD II and Dutch private law, Rank 2019, p. 111.

to take procedural, controlling or penal implementing measures 'aimed primarily at securing full enforcement' (section 2.3.2.3).[199]

Article 11 (2) Prospectus Regulation (applicable as from July 2019)[200] and Article 6 (2) Prospectus Directive serve as other examples of provisions that impose obligations upon Member States in respect of the enforcement of EU law only.[201] The Prospectus Directive and the Prospectus Regulation harmonise the requirements for the drawing up, approval and distribution of prospectuses that have to be published if securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State[202] in order to ensure investor protection and market efficiency.[203] Article 6 (2) Prospectus Directive and Article 11 (2) Prospectus Regulation require Member States to apply their national rules on civil liability to the persons responsible for the information given in a prospectus:

> Article 6 (2) Prospectus Directive – 'Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning to that effect.'

> Article 11 (2) Prospectus Regulation – 'Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus. However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary pursuant to Article 7 or the specific summary of an EU Growth prospectus pursuant to the second subparagraph of Article 15(1), including any translation thereof, unless:
> (a) it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus; or
> (b) it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in the securities.'

199 Král 2008, p. 249.
200 Art. 49 (2) Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
201 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC as amended.
202 Art. 1 (1) Prospectus Directive.
203 Recital 10 Prospectus Directive.

Even though the Union legislature changed the legislative instrument from a directive to a regulation, Article 6 (2) Prospectus Directive and Article 11 (2) Prospectus Regulation have the same effect: they require Member States to apply their regimes of civil liability to persons responsible for the information given in a prospectus, rather than create EU rights to damages that are directly enforceable by individuals and other private parties. Individuals and private parties must hence base claims for damages against the persons responsible on the applicable national law. They can invoke Article 11 (2) Prospectus Regulation and Article 6 (2) Prospectus Directive directly against Member States only (see section 2.3.2.3). Overall, EU law hence influences the applicability of national civil liability regimes in the context of prospectuses.

2.5.3.3 EU law provisions creating a right of redress under national law

Other provisions of EU law directly provide individuals and other private parties with a right of redress under the applicable national law. As compared to the examples listed in section 2.5.3.2, the examples provided in this section explicitly create a right to compensation or damages for individuals and other private parties under the applicable national law. Article 11 PRIIPs Regulation, and Article 31 and 55 of the Regulation on a pan-European Personal Pension Product (PEPP Regulation) are examples of provisions that explicitly provide individuals and other private parties with a right to damages under the applicable national law.[204]

The PRIIPs Regulation creates harmonised standards for key information documents relating to packaged retail and insurance-based investment products (PRIIPs).[205] It requires the manufacturers of PRIIPs to provide retail investors with key information documents on which they can base their investment decisions.[206] Article 11 PRIIPs Regulation arranges for the civil liability of PRIIP manufacturers for inaccurate key information documents:

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204 *On the similarities between Art. 11 PRIIPs Regulation and Art. 35a CRA Regulation*, Wimmer 2017, pp. 121-122.

205 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). The PRIIPs Regulation imposes the obligation upon manufacturers of PRIIPs to publish a key information document, providing retail investors with key information about these products in a clear and understandable way. Under Art. 4 (3) PRIIPs Regulation, the definition of PRIIPs involves investment products (packaged retail investment products) and insurance products (insurance-based investment products) for retail investors of which the amount payable to the investor depends on the performance of reference values, the performance of other assets not bought by the investor or market fluctuations. Examples of PRIIPs are structured finance products, derivatives, shares of a UCITS and unit-linked life insurance products. *On the civil liability of PRIIP manufacturers cf. also* Vandendriessche 2015, no. 67.

206 Art. 1 PRIIPs Regulation.

> '(1) The PRIIP manufacturer shall not incur civil liability solely on the basis of the key information document, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of legally binding pre- contractual and contractual documents or with the requirements laid down in Article 8.
> (2) A retail investor who demonstrates loss resulting from reliance on a key information document under the circumstances referred to in paragraph 1, when making an investment into the PRIIP for which that key information document was produced, may claim damages from the PRIIP manufacturer for that loss *in accordance with national law*.
> (3) Elements such as 'loss' or 'damages' as referred to in paragraph 2 of this Article which are not defined shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'[207]

The mixture of EU and national law was initially not intended by the European Commission. As pointed out by Vandendriessche, the European Commission's proposal did not include the reference to the applicable national law and wished to harmonise the rules on the civil liability of PRIIP manufacturers. Article 11 of the Proposal of the European Commission initially provided a directly effective right to damages at the EU level, without any reference to the applicable national law:

> 'Where an investment product manufacturer has produced a key information document which does not comply with the requirements of Articles 6, 7 and 8 on which a retail investor has relied when making an investment decision, such a retail investor may claim from the investment product manufacturer damages for any loss caused to that retail investor through the use of the key information document.'

Whereas the Union legislature amended this proposed provision, the Recitals of the PRIIPs Regulation did not change at this point. Recital 22 still expresses the intention to harmonise the rules on civil liability and states that 'rules regarding the civil liability of the PRIIP manufacturers should be harmonised.'[208] The course of the legal proceedings might explain this discrepancy, but the result is a bit of a peculiar mixture of EU and national law.

The PEPP Regulation sets a regulatory framework for voluntary, cross-border and long-term pension products.[209] The PEPP Regulation explicitly pays attention to its relationship with national law. It aims to harmonise the core features of pan-European Personal Pension Products (PEPPs), and expressly states that

207 Emphasis added [DJV].

208 Vandendriessche 2015, no. 67. This statement was not amended as compared to the initially proposed Recital 16 of the Proposal for a Regulation of the European Parliament and of the Council, COM(2012) 352 final.

209 *See* Recital 8 Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP).

it leaves other matters to national law.[210] Furthermore, it states explicitly that its provisions are without prejudice to national contract law.[211] At the same time, the PEPP Regulation involves multiple provisions on liability.[212] Under Article 31 (which is similar to Article 11 PRIIPs Regulation), a PEPP provider can be liable for inaccurate key information documents on PEPPs:

> '1. The PEPP provider shall not incur civil liability solely on the basis of the PEPP KID, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of legally binding pre-contractual and contractual documents or with the requirements laid down in Article 28.
> 2. A PEPP saver who demonstrates loss resulting from reliance on a PEPP KID under the circumstances referred to in paragraph 1, when concluding a PEPP contract for which that PEPP KID was produced, may claim damages from the PEPP provider for that loss *in accordance with national law*.
> 3. Elements such as 'loss' or 'damages' as referred to in paragraph 2 which are not defined shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'[213]

Furthermore, the PEPP Regulation creates another provision on civil liability under Article 55 in respect of the liability of PEPP providers for non-compliance with its obligations under the PEPP Regulation:

> '1. Any financial loss, including fees, charges and interest, incurred by the PEPP saver and resulting directly from the non-compliance of a PEPP provider involved in the switching process with its obligations under Article 53 shall be refunded by that PEPP provider without delay.
> 2. Liability under paragraph 1 shall not apply in cases of abnormal and unforeseeable circumstances beyond the control of the PEPP provider pleading for the application of those circumstances, the consequences of which would have been unavoidable despite all efforts to the contrary, or where a PEPP provider is bound by other legal obligations covered by Union or national legislative acts.
> 3. Liability under paragraph 1 shall be *established in accordance with the legal requirements applicable at national level*.'[214]

Article 11 PRIIPs Regulation, and Article 31 and Article 55 PEPP Regulation stipulate when a private party has a right to claim damages from a PRIIP manufacturer or a PEPP provider, but, at the same time, stipulate that private parties must claim damages in accordance with the applicable national law. The provisions entitle private parties to a right to damages under, for instance,

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210 *See* Recital 22 PEPP Regulation.
211 *See* Recital 23 PEPP Regulation.
212 The PEPP Regulation refers the liability of depositories of PEPPs back to the provisions under AIFMD under Article 48 (2) PEPP Regulation, discussed under section 2.5.3.2.
213 Emphasis added [DJV].
214 Emphasis added [DJV].

Article 6:162 of the Dutch Burgerlijk Wetboek. But for the reference to the applicable national law, these provisions of EU law could have served as rights to damages with horizontal direct effect. They stipulate sufficiently clear, precise and unconditional when individuals and other private parties have a right to damages.

The wording of the provisions entails that the right to damages must nevertheless be based on the applicable national law. Moreover, the wording causes the conditions for civil liability not to be harmonised.[215] The provisions do not have any intention to do so, except for determining when damages may be claimed as a matter of principle. In this respect, Article 11 (2) PRIIPs Regulation, Article 31 (2) PEPP Regulation and Article 55 (3) PEPP Regulation are ambivalent: they stipulate when an investor may claim damages, but the concrete action is referred to the applicable national law.[216] As a result, national law should foresee in a right to damages, with its origin in EU law, and individuals and other private parties must eventually base claims for damages on the applicable national law. If national law does not foresee in such a right to damages, the wording of the provisions might entail that private parties can only start proceedings for Member State liability and cannot base their claim for damages on EU law directly. However, one must realise that the wordings of Article 11 (2) PRIIPs Regulation, Article 31 (2) PEPP Regulation and Article 55 (3) PEPP Regulation are ambivalent and that the provisions rub up against rights to compensation or damages with horizontal direct effect.

2.5.4 Situation 3: EU law provisions creating directly effective rights to compensation or damages

2.5.4.1 Setting the scene

The third situation in which the influence of EU law is analysed concerns situations in which EU legislative instruments create rights and obligations, and attach directly effective remedies to the violation of those rights and obligations for individuals and other private parties. This category involves examples of EU legislation, which explicitly arranges for the remedy of compensation in the form of a right to damages or compensation at the EU

215 *Cf.* Heiss 2015, pp. 56-57.

216 In relation to Art. 11 PRIIPs Regulation, this ambivalence is explained by the legislative procedure. Initially, the European Commission had proposed an EU ground for non-contractual liability, however, the European Parliament added the reference to the applicable national law in a later stage. See Art. 11 and recital 16-17 of the Proposal for the PRIIPs Regulation (COM(2012) 352 final).

level.[217] The third situation hence forms the largest deviation of the 'default' division of competences described in section 2.4.2.

Outside the area of EU financial law, regulations in the field of transport law had already arranged for the compensation of passengers since 1991.[218] In EU financial law, Article 35a CRA Regulation was the first provision to create a directly effective right to damages that private parties could invoke directly against other private parties (section 2.5.4.2). In the General Data Protection Regulation (GDPR), the Union legislature went a step further in the influence of EU law on the private enforcement of EU rights (section 2.5.4.3). Whereas Article 35a CRA Regulation created a right of redress at the EU level that refers matters back to the interpretation and application under the applicable national law, Article 82 GDPR is an autonomous right to damages established at the EU level.

2.5.4.2 *A directly effective right to damages with reference to national law: Art. 35a CRA Regulation*

(a) Combination of EU and national law

Article 35a CRA Regulation took the European influence on civil liability a small step further in comparison to Article 11 PRIIPs Regulation, and Article 31 and 55 PEPP Regulation. The provision entitles private parties (issuers and investors) to a right of redress that can be enforced directly against other private parties (credit rating agencies), and does not stipulate that a claim for damages must subsequently be brought under or in accordance with the applicable national law. Instead, Article 35a CRA Regulation sets the conditions for civil liability at the EU level:

> Article 35a (1) CRA Regulation – 'Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement. […]'

At first glance, Article 35a (1) CRA Regulation appeared to be a breakthrough. It was the first provision to create an EU legislative basis for the civil liability

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217 This dissertation refers to both 'the right to damages' and 'the right to compensation', because the Union legislature uses both terms in European legislative instruments.

218 Art. 4 Council Regulation (EEC) No 295/91 establishing common rules for a denied-boarding compensation system in scheduled air transport (currently Art. 7 (1) Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91). *See for other examples e.g.* Art. 15 Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 and Art. 17 Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

of credit rating agencies for infringements of the CRA Regulation. Moreover, it was the first provision to incorporate a directly effective right to damages[219] in an EU regulation.

Notwithstanding its EU basis, the remedy created by Article 35a CRA Regulation greatly depends on the applicable national law and cannot be interpreted and applied autonomously. Article 35a (4) CRA Regulation combines EU and national law in the right to damages, by stipulating that:

> 'Terms such as "damage", "intention", "gross negligence", "reasonably relied", "due care", "impact", "reasonable" and "proportionate" which are referred to in this Article but are *not defined*, shall be interpreted and applied in accordance with the *applicable national law as determined by the relevant rules of private international law*. Matters concerning the civil liability of a credit rating agency which are not covered by this Regulation shall be governed by the applicable national law as determined by the relevant rules of private international law. […]'[220]

This combination of EU and national law resulted from the legislative proceedings. Similar to the proposed Article 11 PRIIPs Regulation, the European Commission did not include a reference to the applicable national law in the initial proposal for Article 35a CRA Regulation.[221] The reference created a remedy in which EU law and national law are combined, and, thereby, largely precludes an autonomous interpretation and application of the right to damages.[222]

The way in which Article 35a CRA Regulation combines EU and national law within the remedy of compensation is unique. Legal scholars came up

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219 This dissertation describes Art. 35a CRA Regulation as a 'right of redress', a 'right to damages' or a 'right to compensation'. However, one must realise that the wording of several language versions of Art. 35a CRA Regulation is not consistent in this regard. As discussed in section 5.3.1.4 as well, the English version of Art. 35a CRA Regulation (used in the main text) gives issuers and investors a right to claim 'damages'. Other versions investigated employ more generic terms to describe the remedy available, namely '*een belegger of uitgevende instelling [mag] een vordering wegens alle aan hem c.q. haar ten gevolg van die inbreuk toegebrachte schade tegen dat ratingbureau instellen*', '*un investisseur ou un émetteur peuvent demander réparation à cette agence de notation de crédit pour le préjudice qu'ils ont subi du fait de cette infraction*' and '*so kann ein Anleger oder Emittent von dieser Ratingagentur für den ihm aufgrund dieser Zuwiderhandlungen entstandenen Schaden Ersatz verlangen.*' The terms '*vordering wegens toegebrachte schade*' (Dutch version), '*réparation*' (French version) and '*Ersatz*' (German version) are generic terms for compensation and do not point towards damages in the form of a monetary award directly – although compensation in the form of a monetary sum will be awarded in practice. As the compensation awarded will often involve damages, this dissertation mostly simply describes Art. 35a CRA Regulation as a right to damages.

220 Emphasis added [DJV].

221 *In detail,* section 3.5.1.4.

222 *Cf.* Gass 2014, pp. 47-48 and 56. Gass described in more detail that Art. 35a CRA Regulation must be interpreted autonomously, except for the terms and subjects covered by Art. 35a (4) CRA Regulation. *Also e.g.* Deipenbrock 2018, p. 564.

with many metaphors to describe the current structure of Article 35a CRA Regulation. Lehmann described it as 'a colouring page that must be filled in by the Member States'.[223] Baumgartner used the term '*Janusköpfigkeit*' to describe the character of Article 35a CRA Regulation.[224] Deipenbrock called Article 35a a 'torso provision'.[225] One can also compare the structure with a mould into which one must 'pour' the applicable national law. The structure also brings to mind directives and harmonious interpretation, but in reverse: EU law must be interpreted in accordance with national law, instead of national law being interpreted in accordance with EU law. Lehmann described this construction as 'nationally autonomous interpretation'.[226]

(b) Direct effect of Article 35a

This dissertation assumes that Article 35a CRA Regulation created a right to damages with horizontal direct effect, so that issuers and investors can directly invoke Article 35a CRA Regulation against credit rating agencies before national courts. The direct effect of Article 35a CRA Regulation is, however, not self-evident, because the right to damages depends on the interpretation and application under the applicable national law. In this context, Lehmann questioned whether Article 35a CRA Regulation does not miss two essential characteristics of regulations, namely a binding nature and direct applicability.[227]

(i) – Doubts on direct effect

The legislative history of Article 35a CRA Regulation[228] and the broad reference to the applicable national law raise doubts as to whether the Union legislature initially intended to introduce a directly effective right of redress at the EU level. During the preparations of the third version of the CRA Regulation, the Impact Assessment investigated several options to ensure a right of redress for investors: (1) 'no policy change' (not taking action in the area of civil liability); (2) 'introduce civil liability of CRAs into EU legislation' (a remedy at the EU level); and (3) 'ensure civil liability of CRAs towards users of credit ratings before national courts' (a remedy at the national level).[229] The Impact Assessment expressed a preference as to the third option. It concluded that both the second and the third option would ensure the existence of a right

223 Lehmann 2016a, p. 76.

224 Baumgartner 2015, p. 507. The term '*Janusköpfigkeit*' refers to the 'ambivalent' or 'double-sided' nature of Art. 35a CRA Regulation.

225 Deipenbrock 2018, p. 561.

226 Lehmann 2016a, p. 75. On the similarities between directives and Art. 35a CRA Regulation, Dumont du Voitel 2018, pp. 154-155.

227 Lehmann 2016a, p. 77.

228 *In detail* section 3.5.1.

229 SEC(2011) 1354 final, pp. 45-48 and, *see also*, pp. 150 and 156. The Impact Assessment and the Proposal of the European Commission initially proposed to introduce a right of redress for investors only. During the legislative proceedings, the scope of the right of redress was expanded to also cover issuers.

of redress, but that the third option had the advantage that it respected the specific features of national civil liability regimes. Moreover, the Impact Assessment warned that, by regulating the civil liability of credit rating agencies at the EU level, the second option could increase the complexity of civil liability regimes of Member States. The third option was, eventually, preferred from the perspective of the principle of subsidiarity.[230]

The third option proposed to codify the principle of and some conditions for the civil liability of credit rating agencies at the EU level.[231] The Impact Assessment did not consider it to be legally necessary, practical and proportionate to propose an additional directive on civil liability in addition to the CRA Regulation,[232] so that the subject could be included in the CRA Regulation itself. The European Commission explained that:

> '[a]ccording to the settled case-law of the ECJ (Eridania, judgement of 27.9.1979 – case 230/78) the fact that a regulation is directly applicable does not prevent the provisions of that regulation from requiring Member States to take implementing measures. For instance, Art 36 of the first CRA Regulation (2009) required Member States to "...lay down the rules on penalties applicable to infringements of the provisions of this Regulation and ... to take all measures necessary to ensure that they are implemented."'[233]

The latter remark suggests that civil liability would be ensured before national courts by explicitly requiring Member States to adopt national implementing measures in this field. Therefore, one would have expected a provision without direct effect to be introduced in the CRA Regulation, namely a provision similar to what Král described as 'procedural, controlling or penal measures'[234] (see section 2.3.2.3).

Instead, the European Commission issued a proposal for the civil liability of credit rating agencies, which resembled policy option 2 rather than policy option 3 of the Impact Assessment. The proposal of Article 35a CRA Regulation provided for the conditions for civil liability, without any reference to the applicable national law. It was proposed that Article 35a (1) would read:

> 'Where a credit rating agency has committed intentionally or with gross negligence any of the infringements listed in Annex III having an impact on a credit rating on which an investor has relied when purchasing a rated instrument, such an investor may bring an action against that credit rating agency for any damage caused to that investor.'[235]

230 SEC(2011) 1354 final, pp. 46-47.
231 SEC(2011) 1354 final, p. 47.
232 SEC(2011) 1354 final, p. 64, fn. 136.
233 SEC(2011) 1354 final, p. 64, fn. 136.
234 Král 2008, pp. 249-251.
235 COM(2011) 747 final, p. 33.

The role of the applicable national law was only described in the proposed Recital 27: 'Regarding matters concerning the civil liability of a credit rating agency and which are not covered by this regulation, such matters should be governed by the applicable national law.'[236] The wording of this Recital suggested that only matters concerning credit rating agency liability that were not covered by the CRA Regulation were left to the applicable national law. Moreover, the Recitals did not explain that Article 35a CRA Regulation imposed any (explicit) obligation upon Member States to adopt national implementing measures to ensure the enforcement of Article 35a CRA Regulation. In this way, the proposal dedicated a much smaller role to the applicable national law in comparison to the preference expressed in the Impact Assessment. The current explicit reference to the applicable national law under Article 35a (4) CRA Regulation was proposed by the European Parliament's rapporteur and was eventually adopted by the European Parliament.[237]

(ii) – A right to damages with horizontal direct effect

Notwithstanding the initial intentions of the European Commission expressed in the Impact Assessment, this dissertation takes the position that Article 35a CRA Regulation resulted in a directly effective cause of action for private parties at the EU level, which must be complemented by the applicable national law.[238] The remedy under Article 35a (1) CRA Regulation forms a unique combination of EU and national law. The wording of the right of redress indicates that the right can be used directly by issuers and investors.

The reference to the applicable national law under Article 35a (4) CRA Regulation does not take away the horizontal direct effect of the right of redress under Article 35a (1) CRA Regulation. As discussed in sections 2.3.2.2 and 2.3.2.3, provisions included in regulations can have direct effect, even if they leave some discretion to Member States and require Member States to adopt additional national implementing measures. A provision does not have direct effect if it leaves too much discretion to Member States. For example, if the effects of a provision depend on actual policy choices that the Union legislature or national legislatures must make. In the context of Article 35a CRA Regulation, the policy choice in favour of the responsibility and civil liability of credit rating agencies vis-à-vis issuers and investors was made at the EU level by the Union legislature. Member States are left with discretion in concrete cases, but not in respect of the policy choice of the desirability of the civil liability of credit rating agencies in general.

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236 COM(2011) 747 final, p. 21.

237 *See* A7-0221/2012, pp. 32 and 68 and P7_TA-PROV(2013)0012, respectively.

238 Baumgartner stated that Art. 35a (4) CRA Regulation '*entfremdet*' the character of the CRA Regulation as a regulation and that Art. 35a (4) CRA Regulation introduced characteristics of a directive into the CRA Regulation. Nevertheless, he concluded Art. 35a CRA Regulation provides a basis for civil liability at the EU level (Baumgartner 2015, p. 506).

Guidance on the direct effect of EU law provisions, which contain terms that are referred back to the applicable national law, can be derived from the case *Francovich and Bonifaci v Italy*.[239] In this case, one of the questions that arose was whether former employees of two insolvent Italian companies could directly invoke provisions of Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer against Italy (vertical direct effect).[240] Under Article 3 (1) Directive 80/987/EEC, Member States needed to ensure that guarantee institutions guaranteed payment of outstanding claims of employees from insolvent employers. Italy failed to implement the Directive in time.[241] What makes this case interesting for the purposes of this dissertation[242] is that, similar to the structure of Article 35a CRA Regulation, Directive 80/987/EEC referred certain terms back to the applicable national law. Article 2 (2) Directive 80/987/EEC stipulated that '[t]his Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement"'.

As we have already seen, the sole fact that a provision requires national implementing measures or leaves some discretion to Member States does not necessarily preclude a provision from having direct effect.[243] In order to decide whether the provisions of Directive 80/987/EEC were sufficiently precise and unconditional, the CJEU considered: (1) the identity of the persons entitled to the right; (2) the content of the right; and (3) the identity of the person liable to provide the right.[244] In respect to 'the identity of the persons entitled to the right', we can conclude that the reference of the term 'employee' to the applicable national law under Article 2 (2) Directive 80/987/EEC did not preclude the direct effect of the provisions of Directive 80/987/EEC. In respect of the term 'employee', the CJEU held that '[a] national court need only verify

239 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*). *Example derived from* Prechal 2005, p. 249.

240 In full: Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 10 ff.

241 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 4.

242 One must realise, however, that the case of *Francovich and Bonifaci v Italy* concerned the vertical direct effect of provisions included in a directive, while this section concentrates on the horizontal direct effect of Art. 35a CRA Regulation.

243 *Cf.* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 11. *Cf. also* CJEU 1 July 2010, C-194/08, ECLI:EU:C:2010:386 (*Gassmayr*), para 44 and Adam & Winter 1996, p. 519.

244 *See* ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 12.

whether the person concerned is an employed person under national law […]'.[245] Therefore, the CJEU held that the Directive was sufficiently clear and unconditional 'to enable the national court to determine whether or not a person should be regarded as a person intended to benefit under the directive.'[246] Hence, one must distinguish between provisions that refer back to applicable national law in such way that a national court only needs to verify the meaning of terms and provisions that require national legislatures to introduce implementing measures to implement policy choices.[247]

If we consider again the reference to the applicable national law under Article 35a (4) CRA Regulation, one can argue that the reference does not preclude the direct effect of the right of redress under Article 35a (1) CRA Regulation. The identity of the persons entitled to the right (issuers and investors), the content of the right (a right to compensation), and the identity of the person liable to provide the right (credit rating agencies) can be established on the basis of the CRA Regulation. Furthermore, national courts must verify the requirements for civil liability under the applicable national law, but national legislatures are not required to make policy choices. The remedy under Article 35a (1) CRA Regulation forms a unique combination of EU and national law, but the policy choice in favour of credit rating agency liability was made at the EU level.[248]

In conclusion, even though one can doubt whether the Union legislature initially intended to create a directly effective right of redress at the EU level and even though the reference to the applicable law leaves discretion to Member States, this dissertation takes the position that the sufficiently clear, precise and unconditional wording of the main features of the right of redress under Article 35a (1) CRA Regulation tip the balance in favour of the horizontal direct effect of Article 35a (1) CRA Regulation.

(c) Further claims under the applicable national law

The previous section discussed how EU law and national law are combined in the right of redress under Article 35a (1) CRA Regulation. Article 35a (5) CRA Regulation explains the relationship between the right of redress under Article 35a (1) CRA Regulation and rights or redress under purely national regimes of civil liability. It allows Member States to impose stricter rules upon credit rating agencies as regards their civil liability, by stipulating that '[t]his

245 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 14.

246 ECJ 19 November 1991, C-6/90 and C-9/90, ECLI:EU:C:1991:428 (*Francovich and Bonifaci v Italy*), para 14.

247 *For such a situation*, ECJ 11 January 2001, C-403/98, ECLI:EU:C:2001:6 (*Monte Arcosu*), para 12 (section 2.3.2.3 (a)).

248 Even though it must be admitted that one can also argue that the reference under Art. 35a (4) CRA Regulation makes it difficult to establish a minimum level of protection so that the provision might be derived from its direct effect after all.

Article does not exclude further civil liability claims in accordance with national law'. Recital 35 CRA III Regulation adds that 'Member States should be able to maintain national civil liability regimes which are more favourable to investors or issuers or which are not based on an infringement of Regulation (EC) No 1060/2009.' In my opinion, this Recital entails that Member States are allowed to impose more favourable rules on civil liability in respect of infringements of Annex III and for other types of misconduct by credit rating agencies and for inaccurate credit ratings issued by credit rating agencies.[249] From that perspective, you could say that Article 35a CRA Regulation creates some sort of 'minimum' right of redress and, thus, does not constitute maximum harmonisation.[250] However, Recital 35 CRA III Regulation has been interpreted differently as well. Heuser concluded the opposite: '*Art. 35 a Abs. 5 Rating-VO erlaubt zwar weitere mitgliedstaatliche Haftungsansprüche, aber gilt dies nach Erwägungsgrund 35 nicht für solche zivilrechtliche Haftungsansprüche, die sich auf Verstöße gegen die Rating-VO stützen* […].'[251] Yet, in my opinion the use of the word 'or' in Recital 35 CRA III Regulation speaks against the conclusion of Heuser.[252] This dissertation therefore assumes that Article 35a (5) CRA Regulation allows Member States to adopt stricter rules on civil liability in respect of the infringements of Annex III CRA Regulation, and that Member States are allowed to interpret and apply the terms of Article 35a CRA Regulation more favourably for issuers and investors as well.[253]

(d) Comparison with other examples

One can question whether the actual effects of Article 35a CRA Regulation differ much from the effects of directives and 'limping' regulations involved with civil liability. Article 35a CRA Regulation's structure bars the harmonisation of the application of the conditions for civil liability in the context of credit rating agency liability. The explicit reference to the applicable national law leaves the CJEU with little room for manoeuvre to prescribe the interpretation and application of Article 35a CRA Regulation in an autonomous way.[254] The CJEU can still employ the principle of effectiveness to lay down minimum standards, but, as will be discussed in section 2.5.5, the current impression is that not much can be expected from this tool. At the same time, Article 35a

249 *Also* Schantz 2015, p. 357. *Cf. e.g.* Dumont du Voitel 2018, p. 339 and Maier 2017, p. 386.
250 *Also* Schantz 2015, p. 357.
251 Heuser 2018, p. 84. *Also* Heuser 2019, pp. 85-86.
252 Heuser explained the use of the term 'or' in the opposite way, Heuser 2019, p. 86.
253 This assumption explains the approach to Art. 35a CRA Regulation taken in this dissertation. On the basis of this assumption, for instance, section 5.6.2.3 (a) (ii) and 5.6.2.3 (b) (ii) conclude that Art. 35a CRA Regulation allows claims for compensation based on § 823 (2) BGB and section 5.3.1.3 (c) (ii) concludes Member States are allowed to adopt a flexible approach towards the requirement of reasonable reliance. *For the same reasoning in respect of § 823 (2) BGB*, Dumont du Voitel 2018, pp. 338-341.
254 Lehmann 2016a, p. 77.

CRA Regulation takes the influence of EU law on civil liability a step further as compared to the examples described in the previous sections. It provides a mould into which the national laws must be poured, and thereby leaves less discretion to the Member States. Also, it has the capacity of converging national regimes by setting the main conditions at the EU level.

2.5.4.3 Autonomous right to compensation: Article 82 GDPR

Subsequent to the introduction of Article 35a CRA Regulation, the Union legislature went one step further and created a right to damages at the EU level without a reference to the applicable national law under Article 82 (1) GDPR.[255] In the absence of such a reference to national law, this ground can be interpreted autonomously[256] and provides room to the CJEU to provide for autonomous interpretation of private law concepts. Article 82 (1) GDPR[257] currently provides for the most far-reaching directly effective right to damages ('compensation') under EU law:

> 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.'

The other sections of Article 82 GDPR complement this right to compensation with rules on when the controller or processor shall be exempt from liability

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255 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). *See for a similar right to compensation against Union institutions in relation to the processing of personal data,* Art. 65 Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC: 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the Union institution or body for the damage suffered, subject to the conditions provided for in the Treaties.'

256 *Cf. e.g.* Lenaerts & Guttiérrez-Fons 2014, p. 16. *See e.g.* ECJ 29 October 2009, C-174/08, ECLI:EU:C:2009:669 (*NCC Construction Danmark*), para 24, ECJ 17 July 2008, C-66/08, ECLI:EU:C:2008:437 (*Szymon Kozlowski*), para 42 and ECJ 18 October 2007, C-195/06, ECLI:EU:C:2007:613 (*Österreichischer Rundfunk (ORF)*), para 24, ECJ 14 December 2006, C-316/05, ECLI:EU:C:2006:789 (*Nokia*), para 21, ECJ 17 March 2005, C-170/03, ECLI:EU:C:2005:176 (*Feron*), para 26, ECJ 19 September 2000, C-287/98, ECLI:EU:C:2000:468 (*Linster*), para 43 and ECJ 18 January 1984, C-327/82, ECLI:EU:C:1984:11 (*Ekro*), para 11. For the examples, reference is made to Lenaerts & Guttiérrez-Fons 2014, p. 16. It is remarkable that a Dutch District Court continued to seek the connection with the Dutch law of damages to determine the type of recoverable loss, Rechtbank Overijssel 28 May 2019, ECLI:NL:RBOVE:2019:1827 (*X v College B&W Deventer*), para 5.

257 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

'if it proves that it is not in any way responsible for the event giving rise to the damage', the joint and several liability of controllers and processors and a right of redress between the controllers or processors. Also, Article 82 (6) in conjunction with Article 79 (2) GDPR provides a rule for determining jurisdiction of courts. Claimants shall bring proceedings against controllers and processors before the courts of the Member State where the controller or processor has an establishment – which corresponds with the general rule under Article 4 Brussels Ibis Regulation (see Chapter 4). Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers – which forms a severe deviation of the general rules under the Brussels Ibis Regulation (see Chapter 4).

As Article 82 GDPR does not refer to the applicable national law, an autonomous right to claim damages was created. Recital 146 GDPR even explicitly confirms that the 'concept of damage should be broadly interpreted in the light of the case law of the CJEU in a manner which fully reflects the objectives of this Regulation'. Article 82 GDPR hence paves the way for a uniform and autonomous interpretation of private law concepts. At the same time, the applicable national law does not entirely lose its relevance. The General Data Protection Regulation provides no rules on procedural aspects, such as the burden of proof and limitation periods. Moreover, Article 82 GDPR does not provide any guidance on whether such matters are to be governed by the applicable national law. Therefore, one can assume that in the absence of specific EU rules on these matters, procedures and other matters not addressed by the GDPR are left to the national procedural autonomy of the Member States.

Overall, the third situation hence forms the largest deviation of the 'default' division of competences described in section 2.4.2, and restricts the national procedural autonomy of the Member States in respect of the remedy available for violations of EU rights and obligations the most. Whereas Article 35a CRA Regulation combines EU and national law within the remedy (right to damages) created, Article 82 GDPR created an autonomous right to damages that paves the way for the uniform and autonomous interpretation of private law concepts at the EU level. The applicable national law, however, has not lost its relevance completely. As EU law does not involve a complete system of private law, matters not addressed by the GDPR continue to fall within the national procedural autonomy of the Member States.

2.5.5 Overarching influence of effectiveness

The previous sections analysed the influence of EU law on civil liability and the remedy of compensation in three situations. Although the influence of EU law on civil liability and the remedy of compensation in the area of EU financial

law increases, national law continues to play a large role in the remedies and procedures necessary to enforce rights and obligations established at the EU level. Article 82 GDPR currently forms the only European legislative basis for an autonomous EU right to damages.

In the situations in which national law continues to play a large role in the remedies and procedures necessary to enforce rights and obligations established at the EU level, Member States do not have *carte blanche* in respect of the remedies and procedures. Even where EU law explicitly leaves matters to the applicable national law, the national procedural autonomy of the Member States is restricted by the principles of equivalence and effectiveness. Hence, the influence of the principles of equivalence and effectiveness also extends to the national conditions for rights to damages and procedural aspects.[258] This applies in case the conditions were left to the Member States completely (e.g. Art. 11 (2) Prospectus Regulation) as well as in case the conditions have been set at the EU level with a reference back to the applicable national law (e.g. Art. 35a CRA Regulation[259]).

The principle of effectiveness requires Member States – national legislatures and courts – to ensure that national remedies and procedural rules do not have the effect that it is impossible in practice or excessively difficult to exercise rights conferred by EU law.[260] On the basis of the principle of effectiveness, the CJEU can strike out national conditions for civil liability if they render the enforcement of rights conferred by EU law virtually impossible or excessively difficult.[261] That said, the fact that Member States must comply with the principles of equivalence and effectiveness does not mean that Member States may not impose limitations on the right to damages. Member States are allowed to subject the remedies for violations of EU rights to certain conditions, such as the existence of causation, loss and relativity.[262] As stated by AG Kokott, 'it is perfectly legitimate, for the purposes of examining the existence of a causal link, to lay down criteria which ensure that cartel members are not subject to unlimited liability'.[263]

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258 In the view of Vandendriessche, Member States must ensure their general rules on liability provide for the full effect of EU law, so that it is not necessarily sufficient for Member States to only declare that their national rules on civil liability apply to certain infringements of EU law (*cf.* Vandendriessche 2015, no. 100). As described in section 2.4.3, the Member States must comply with the principles of equivalence and effectiveness. This dissertation mostly concentrates on the principle of effectiveness.

259 *See, for the same conclusion in respect of Art. 35a CRA Regulation,* Heuser 2019, p. 81.

260 ECJ 7 January 2004, C-201/02, ECLI:EU:C:2004:12 (*Wells*), para 67. Prior to *Wells*: ECJ 16 December 1976, C-33/76, ECLI:EU:C:1976:188 (*Rewe v Landwirtschaftskammer für das Saarland*), para 5.

261 This section only discusses a limited number of examples.

262 *Cf.* Opinion of A-G J. Kokott, ECLI:EU:C:2014:45, para 33 with CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*).

263 Opinion of A-G J. Kokott, ECLI:EU:C:2014:45, para 33 with CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*).

The conditions, however, must be compatible with the effectiveness of EU law. In the case law of the CJEU, multiple examples can be found of situations in which the CJEU limited the national autonomy of the Member States in respect of substantive conditions for right to damages based on the principle of effectiveness. Both *Kone and Others* and *Manfredi* concerned competition law, so that one must make some reservations as to whether they can be applied directly to other legal areas as well. In *Kone and Others*, the CJEU repeated that the national legal systems are allowed to lay down rules 'governing the application of the concept of the 'causal link'',[264] but the requirement of the causal link needs to comply with the principles of equivalence and effectiveness. National requirements are not permissible if they form an absolute bar that applies regardless of the particular circumstances of the case.[265] In *Kone and Others*, a general policy under Austrian law which stipulated that 'an undertaking not party to a cartel takes advantage of the effect of umbrella pricing, there is no adequate causal link between the cartel and the loss potentially suffered by a buyer, since it consists of an indirect loss: a side effect of an independent decision that a person not party to a cartel has taken on the basis of his own business considerations'[266] was precluded by the principle of effectiveness for forming an absolute bar on civil liability.[267] In *Manfredi*, the CJEU set a minimum level regarding the loss for which a victim of the violation of competition law rules could claim compensation. It held that 'it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest'.[268] In the field of transport law, in *Cuadrench Moré*, the CJEU repeated that Member States must respect the principles of equivalence and effectiveness in relation to matters not addressed in the CRA Regulation, such as the prescription of claims in this specific case. The CJEU held that 'the time-limits for bringing actions for compensation under Articles 5 and 7 of Regulation No 261/2004 are determined by the national law of each Member State,

264 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 32. *Cf. also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), paras. 43 and 49 in relation to an absolute bar on access to documents.

265 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33. *See also* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), paras. 43-44 and 49.

266 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 14.

267 CJEU 5 June 2014, C-557/12, ECLI:EU:C:2014:1317 (*Kone and Others*), para 33.

268 ECJ 13 July 2006, C-295/04, ECLI:EU:C:2006:461 (*Manfredi)*, para 100. *Cf.* Vandendriessche 2015, no. 94. *As repeated in* CJEU 6 June 2013, C-536/11, ECLI:EU:C:2013:366 (*Donau Chemie and Others*), para 24.

provided that those rules observe the principles of equivalence and effectiveness'.[269]

Furthermore, national courts can also apply requirements of rights to damages in accordance with the principle of effectiveness on their own accord. The most well-known example is the case *World Online*, decided by the Dutch Supreme Court. In *World Online*, the Dutch Supreme Court decided that, in light of the full effectiveness of EU law and in light of the objective of investor protection of the Prospectus Directive, it had to be assumed that there was a *condicio sine qua non* relationship (causal relationship) between the misleading information and the decision to invest.[270] The principle effectiveness caused the Dutch Supreme Court to relax the *condicio sine qua non* test under Dutch private law to the benefit of investors, because their legal protection would otherwise become 'illusory'.[271]

2.6 Concluding remarks

This Chapter aimed to map the ways in which EU law (regulations, directives and decisions of the CJEU) currently influences rules on civil liability and rights of redress, with a particular focus on examples derived from EU financial law. By providing the broader European legal context, it aimed to contribute to the understanding of the status, main features and effects of Article 35a CRA Regulation.

To analyse the influence of EU law on civil liability, section 2.5 distinguished three situations: (1) situations in which EU law leaves the enforcement of rights established at the EU level to Member States completely; (2) situations in which EU law imposes obligations upon Member States in respect of their rules on civil liability or requires the application of their national civil liability regimes; and (3) situations in which EU law creates directly effective rights to damages or compensation for individuals and other private parties at the EU level for the violation of EU rights and obligations. In each situation, the influence of EU law on civil liability is determined by the content of relevant provisions of EU law, their (in)direct effect and the influence of the principles of equivalence and effectiveness. The categorisation is based on the extent to which EU law influences the remedy of compensation, and, more in particular, the existence and conditions of rights to damages (or compensation). It must be emphasised once again that difference in result between situations 2 and 3 is a matter of degree; it is sometimes difficult to draw a line between situ-

269 CJEU 22 November 2012, C-139/11, ECLI:EU:C:2012:741 (*Cuadrench Moré*), para 26.

270 Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), paras. 4.11.1-4.11.2.

271 *Cf.* Hoge Raad 27 November 2009, ECLI:NL:HR:2009:BH2162, *NJ* 2014/201 annotated by C.E. du Perron (*VEB v World Online*), para 4.11.1.

ation 2 and 3 and the influence of the provisions falling in these categories can be similar.

As a first category, section 2.5 described the situation in which EU law leaves the enforcement of rights established at the EU level to Member States completely. The first situation in fact described the 'default' division of competences between the EU and its Member States in the area of EU law enforcement: EU law creates rights and obligations which are to be enforced at the Member State level, in the absence of EU law on this matter. The Union legislature thus left remedies and procedures for violations of EU law to the national procedural autonomy of Member States. The discretion of Member States, however, is not unlimited. For instance, the principle of effectiveness can restrict the national procedural autonomy by requiring Member States to entitle private parties to some sort of remedy. Compared to regulations, the CJEU is more reluctant in imposing obligations upon Member States in relation to directives. Overall, the principle of effectiveness can require the application of national civil liability regimes for violations of EU law, but it should be realised that Member States have a large discretion in ensuring the effective enforcement of EU law.

In both the second and third situation distinguished, provisions of EU law explicitly address the issue of civil liability and influence rules on civil liability to a larger extent. In the second situation, provisions of EU law impose obligations upon Member States in respect of civil liability or require Member States to apply their national civil liability regimes. The provisions gathered in this section entitle private parties to the enforcement of EU rights and obligations through national civil liability regimes and to the specific remedy of compensation or to damages in accordance with the applicable national law. Hence, private parties must still base any claims on national law – even though they are entitled to do so by EU law. Irrespective of whether such provisions are included in regulations or directives, the provisions of EU law do not harmonise the conditions for civil liability, but rather determine to which violations of EU law national liability regimes apply.[272]

The third category encompasses situations in which the Union legislature has created rights of redress for private parties that can be invoked against other private parties before national courts, i.e. rights to compensation or damages with horizontal direct effect. EU law, hence, does not only create rights and obligations, but also entitles private parties to directly effective remedies if those rights and obligations are violated. We have seen that currently, two examples of such horizontal direct effective rights of redress exist: Article 35a CRA Regulation, which refers the majority of its terms back to the interpretation and application under the applicable national law and Article 82 General Data Protection Regulation, which created an autonomous right to compensation at the EU level. The main difference between Article 35a CRA Regulation and

272 *Cf.* Vandendriessche 2015, no. 68.

Article 82 GDPR is that Article 82 GDPR paves the way for harmonised conditions for civil liability at the EU level.

The road map demonstrates that the introduction of the right of redress for issuers and investors under Article 35a CRA Regulation does not stand on its own. One can find a growing number of provisions of a private law nature in regulations and directives.[273] EU law leaves its traces on (national) civil liability rules mainly by setting common (mostly minimal) standards of conduct for private parties at the EU level and by requiring Member States to apply their national regimes for civil liability to violations of EU law.[274] However, the Union legislature has not developed a uniform approach to civil liability matters and regulates civil liability in a 'fragmented' way.[275] Provisions of EU law that explicitly arrange for civil liability and rights of redress do so in all sorts of wordings and are often included in a broader package of rules to achieve certain objectives set at the EU level (functionalistic approach).[276] From this perspective, Article 35a CRA Regulation is exemplary for the approach taken by the Union legislature in private law matters. The structure of Article 35a CRA Regulation is unique, and Article 35a CRA Regulation was included in a broader regulatory package for credit rating agencies. Furthermore, Article 35a CRA Regulation is exemplary for the approach to civil liability taken by the Union legislature in the area of EU financial law: the influence of EU law is increased, but national civil liability regimes continue to play a large role.[277] Issuers and investors can base a claim directly on Article 35a CRA Regulation, but Article 35a CRA Regulation is not an independent and autonomous EU legal basis for civil liability. Consequently, even though Article 35a CRA Regulation takes the European influence on civil liability one step further, it is doubtful whether Article 35a CRA Regulation has a very different effect in terms of the harmonisation of the conditions for civil liability, as compared to some examples of provisions of EU law that lack horizontal direct effect (as described in section 2.5.3.3).

273 *E.g.* Ackermann 2018 and, *focusing on regulations*, De Graaff & Verheij 2017.

274 *Cf.* Vandendriessche 2015, no. 71. Vandendriessche concluded that liability rules 'have been harmonized in a fragmented fashion and to a very limited degree only', but, at the same time, that 'some impact nevertheless has been felt' (Vandendriessche 2015, no. 72 and no. 71, respectively).

275 Vandendriessche 2015, no. 71. *Also e.g.* Ackermann 2018, pp. 743 and 761-762 and Kuipers 2014, p. 161.

276 *See* Ackermann 2018, 761-762 and De Graaff & Verheij 2017, p. 992.

277 *Cf. in general (i.e. not in the specific context of credit rating agencies)* Vandendriessche 2015, no. 71.