

Effective judicial protection and State liability in EU law.
Implications for the Macedonian Judiciary

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the Macedonian judiciary**

**Effectieve rechtsbescherming en staatsaansprakelijkheid in het EU-recht.
Implicaties voor het Macedonische rechtssysteem
(met een samenvatting in het Nederlands)**

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CHAPTER 1

Introduction

1. Background, central questions and structure

National courts have been entrusted with an obligation to protect the EU rights of individuals within the framework of domestic procedures and remedies in each Member State. Their mandate to perform this task was initially established in the seminal judgment *Van Gend & Loos*¹, delivered by the Court of Justice of the European Union (CJEU), and the legal basis for their action was further elaborated by the CJEU in its *Rewe/Comet* case law.²

Article 10 TEC (now Article 4 (3) TEU), the principle of loyalty or sincere cooperation, generates a responsibility for national courts to ensure the legal protection of individuals. Moreover, Article 19 (1) TEU, prescribes that:

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

In order to broaden legal protection beyond directly effective EU law provisions, the CJEU stated in the *Francovich* case³ that national courts were equally obliged to ensure the protection of rights which EU rules confer on individuals vis-a-vis Member States, sanctioned by the obligation to provide for

¹ Case C-26/62 *Van Gend en Loos* [1963]:EU:1963:1.

² Case C-33/76 *Rewe* [1976] ECLI:EU:C:1976:188; Case C-45/76 *Comet* [1976] ECLI:EU:C:1976:191.

³ Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

compensatory measures. In fact, the CJEU held that according to the principle of cooperation in good faith, Member States were required to nullify the unlawful consequences of a breach of Community law.⁴

Thus, in the *Wells* case, the CJEU stated that it was up to the national court to determine whether it was possible under domestic law for a consent already granted (contrary to EU law) to be revoked or suspended or alternatively, whether it was possible for the individual who was a victim of the failure of the Member State to apply EU law, to claim compensation for damage. In any event, the intention of the CJEU was that there had to be a remedy for a Member State's infringement of EU law. In this particular case, the breach consisted of not carrying out an environmental impact assessment before consent for mining operations was granted.

The application of national procedures and remedies by the courts of the Member States stems from the lack of a common procedural system established at EU level for the protection of substantive EU rights. Only in certain specific sectors has the EU legislator succeeded in achieving a certain level of harmonisation of procedural and remedial rules for the protection of EU substantive rights. The most prominent examples can be found in the area of customs⁵ and public procurement⁶. Apart from this, exist certain rules that touch upon national procedures and remedies in, for instance, the field of consumer protection⁷, equal treatment⁸, implementation of the Aarhus Convention on access to justice in

⁴ See Case C-201/02 *Wells* [2004] ECLI: EU:C:2004:12, para 64.

⁵ Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L269/1.

⁶ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public work contracts [1989] OJ L395/1; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ L166/1, now Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/1.

⁷ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/1; 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 [1985] OJ L210/1, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC [1999] OJ L141/1; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/1; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/1.

environmental matters⁹, environmental liability with regard to the prevention and remedying of environmental damage¹⁰ and the enforcement of intellectual property rights¹¹.

There are also some Directives in which codification is made of the administrative rules, for instance, the Directive on Integrated Pollution Prevention and Control¹² and the Telecommunications Directive¹³. Also, worth mentioning is Regulation 1/2003 in the field of competition law¹⁴ and Directive 2014/104 on actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union¹⁵.

The ‘decentralised’ enforcement of EU law has triggered a complex interplay between the CJEU and the national courts.

⁸ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1997] OJ L14/1 which provides for detailed rules concerning the reversal of the burden of proof in gender discrimination cases; now Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/1.

⁹ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

¹⁰ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environment liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

¹¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

¹² Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [2008] OJ L24/8.

¹³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications and networks and services [2002] OJ L108/33 (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC, and 2002/20/EC [2009] OJ L337/37.

¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2002] OJ L1/1.

¹⁵ Directive 2014/104/EU of the European Parliament and of the Council of 16 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 [2014] OJ L349/1.

These national rules and remedies have to protect EU individual rights, inevitably implying not only a different level of protection of these rights in each Member State but also an impairment of the principle of uniform application of EU law and the executive force of EU legal rules.

In order to mitigate the deficiencies of the CJEU's established approach towards this issue, reflected in its "no new remedies" statement¹⁶ which implied that EU law does not require national legal systems to invent new remedies in order to safeguard individual EU rights, the CJEU was simply compelled to intervene in the initially recognised 'procedural autonomy' of the Member States and encroach upon it by imposing on Member States the obligation to observe the requirements of minimum effectiveness and equivalence when adjudicating in cases which involve an EU law component. Other approaches by the CJEU were also applied, including the application of the principle of effective judicial protection and effectiveness of EU law and, most recently, a strong reliance on the Charter of Fundamental Rights of the European Union (CFR), in particular its Article 47.

This thesis will firstly analyse how EU law and, in particular the case law of the CJEU, limits the competence of Member States to both set and apply their domestic rules on procedures and remedies. The analysis is necessary to understand the process leading to EU law's defined regime of State liability in the seminal *Francovich* judgement. This '*Francovich* liability' is the second main subject of this thesis, with a focus on how this regime of State liability would be applied in the Republic of Macedonia if Macedonia becomes a Member State of the EU. An important stimulus for me to undertake this study and address these broad questions has been my teaching of EU law to Macedonian judges. From the perspective of my country the evolution and influence of EU law and case law on national procedures and remedies is something almost revolutionary.

The thesis has a double objective:

The first is to make a critical analysis of the case law and legal literature on procedural and remedial autonomy. In particular:

- what this autonomy entails and whether it really exists as a legal principle, also in light of the different views in the literature;
- whether the classical division of the development of the CJEU case law in this area in three phases corresponds with reality and if not, whether another way of structuring this case law would be more appropriate;

¹⁶ Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH* [1981] ECLI:EU:C:1981:163, para 6.

- what is the relationship between the principles of effectiveness and effective judicial protection on one hand and the principle of national procedural autonomy, limited by the principles of equivalence and minimum effectiveness, on the other hand.

The second main objective is an analysis of a particular doctrine by way of case study, the so-called ‘Francovich liability’. Francovich state liability concerns a doctrine which has been quite well developed and elaborated in EU law. Thus, zooming in on this doctrine enables an analysis of how the more general issues of this thesis – how the principles of autonomy relate to principles of effectiveness and effective judicial protection – play out in practice and what their consequences will be for the Republic of Northern Macedonia after its projected accession to the EU.

Thus, the chapter on Macedonia will zoom in on the ‘reception’ of EU judicial protection law into the Macedonian legal order. This chapter will in particular consider which reception issues will arise for the adoption of the Francovich-doctrine, but will do so in the broader context of Macedonian law. This includes issues such as the status and application of international law in the Macedonian legal order (including how courts consider law of non-domestic origin). The research will thus offer concrete answers on how Francovich liability may be adopted in Macedonian law, but will also provide more general insights on what issues and obstacles may arise more generally with the reception of EU judicial protection law.

Different approaches to national procedural autonomy exist in CJEU case law. For the purpose of this book, I will argue that the CJEU has applied four approaches which demonstrate its encroachment on the national procedural and remedial autonomy of Member States to different degrees. At this juncture, it is necessary to underline that the notion of ‘approaches’ rather than ‘phases’ will be utilised, since, as will be demonstrated, these approaches sometimes overlap and cannot be strictly placed in a certain period of time. An attempt to structure the CJEU’s case law in chronological periods was made most recently by Dougan, who claims that the “three periods” in fact constitute a “core narrative”.¹⁷ Nevertheless, this author himself admits that there are other narrative strands in the national remedies stories, such as the fundamental right to access to judicial process and the enhanced activity of the EU legislator.¹⁸ Apart from this, a deficiency in the usage of ‘phases’ could be discerned in his article, in which he announces that in the first period (until the mid-1980s), there were judgments delivered by the CJEU which, based

¹⁷ M. Dougan, ‘The vicissitudes of life at the coalface: Remedies and Procedures for enforcing Union Law before National Courts’ in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (2nd edition, Oxford: Oxford University Press 2011).

¹⁸ See Dougan 2011 (n 17).

on their content and message clearly belong in the second approach. Examples of the latter include *Simmenthal* and *Pigs and Bacon*.¹⁹

As a matter of fact, many authors, while considering the interference of the CJEU in the national procedural autonomy of the Member States, claim that there were three phases. The first phase was marked by the requirements of minimum effectiveness and equivalence, the second was characterised by judicial activism to promote the principles of effectiveness of EU law and effective judicial protection while the third demonstrates the necessity of ‘balancing’ between the principle of effective judicial protection and effectiveness of EU law on the one hand and general principles of law which justify the application of restrictive national procedural rule on the other hand.²⁰

In my view, there are four approaches by the CJEU which have different impacts through its case law on the national procedural autonomy of Member States. All of these approaches demonstrate the CJEU’s will to intervene in national procedural regimes of the Member States in order to achieve a greater level of uniformity and effectiveness of EU law throughout the EU, but also a uniform minimum protection of EU rights which individuals derive from EU law.

It will be argued that this ‘restructuring’ also makes clear that the balancing approach, which was considered as the third phase, is in fact a way of dealing with certain questions which was present in the Court’s case law from the outset already.

The *Rewe/ Comet* approach, which is our first approach of the CJEU’s case law assumed the existence of national remedies which effectively protected EU individual rights and thus implied deference to the national procedural and/or remedial autonomy of the Member States. Initially, the CJEU did not create

¹⁹ In these cases the CJEU demonstrates a strong judicial activity rather than the approach of “judicial restraint”, even though they were adopted before the mid-1980s. See Dougan 2011 (n 17) 413.

²⁰ See in this sense: T. Heukels and J. Tib, ‘Towards Homogeneity in the Field of legal Remedies: Convergence and Divergence’ in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law* (Oxford: Hart Publishing 2002) 113-118; C.W.A. Timmermans, ‘Application of Community Law by National Courts: (Limits to) Direct Effect and Supremacy’ in R. H. M. Jansen, D. A. C. Koster and R. F. B. van Zutphen (eds), *European Ambitions of the National Judiciary* (The Hague: Kluwer 1997), 37; M. Claes, L. H. Katelijne, *The National Courts’ Mandate in the European Constitution* (Oxford: Hart, 2006) 135-147. M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart Publishing, 2004) 29; A. Biondi, ‘The European Court of Justice and Certain National Procedural Limitations: Not Such a Tough Relationship’, (1999) 36(6) *Common Market Law Review*, 1271–1287 and M. Hoskins, ‘Tilting the Balance: Supremacy and National Procedural Rules’, (1996) 21(5) *European Law Review*.

new remedies, nor did it affect the substance of the existing national remedies. This will be the topic of the second Chapter.

However, the CJEU proceeded with a much higher degree of intervention in the national procedural and remedial rules using the express requirements of effective judicial protection of EU individual rights and effectiveness of EU law. This, our second approach, affected the principle of national procedural and remedial autonomy and was marked by cases like *Simmenthal*²¹, *Factortame*²², *Francovich*²³ and *Unibet*²⁴. This approach triggered many controversies related to the division of the competences between the CJEU and the national courts of the Member States, as well as other shortcomings of this method, as will be elaborated in Chapter 3.

In the same Chapter I will next turn to the third approach of the CJEU's intervention in the national procedural autonomy of the Member States which has been labelled a 'balancing approach' and shall be scrutinised through the analysis of the *Van Schijndel/ Peterbroeck* case law and the more recent *Alassini* case²⁵.

The application of the Charter on Fundamental Rights of the European Union to EU law cases marks the fourth approach of the CJEU jurisprudence. The key cases here are *DEB*²⁶, *Peftiev*²⁷ and many others that will also be explored in Chapter 3.

What follows first is a brief discussion of the approaches since they are one of the main topics of this book. It is important to note that these approaches are not necessarily consecutive, but partly overlap.

During the *first approach*, the CJEU laid down that, if harmonised procedural rules at the EU level do not exist for the protection of EU substantive rights, these rights will be enforced through the procedural rules existent in the national legal system for the exercise of similar domestic substantive rights, provided that the national procedural rule does not make the exercise of EU rights virtually impossible or excessively

²¹ Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49.

²² Case C-213/89 *Factortame* [1990] ECLI:EU:C:1990:257.

²³ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

²⁴ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163.

²⁵ Joined Cases C-317/08 to C-320/08 *Alassini and others* [2010] ECLI:EU:C:2010:146.

²⁶ Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811.

²⁷ Case C-314/13 *Peftiev* [2014] ECLI:EU:C:2014:1645.

difficult. This implies that the national procedural rules apply, as long as they satisfy the principles of equivalence and minimum effectiveness.²⁸

In this approach, the CJEU also stated, in the *Butter-buying cruises* case,²⁹ that:

“Although the EEC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the CJEU, it was not intended to create new remedies in the national courts to ensure the observance of EU law other than those already laid down by national law.”

In the *second approach* of the CJEU’s case law (illustrated by *Simmenthal*³⁰, *Factortame*³¹, *Francovich*³² and *Unibet*³³), two specific elements surfaced: setting aside unfavourable national procedural rules and awarding specific redress (as a matter of EU law). What is particularly important in this approach is that the national procedural rules which hindered the awarding of a concrete remedy were not assessed in the light of the double requirement of minimum effectiveness/ equivalence. In other words, the focus was not on whether they make the enforcement of substantive EU rights virtually impossible or excessively difficult, but rather only whether the principles of effectiveness of EU law and the principle of effective judicial protection were met. If their application by the national court undermined the principles of effectiveness and effective judicial protection, national procedural rules had to be set aside and the specific remedy was awarded to the plaintiff, without any ‘balancing exercise’ that is characteristic of all the other approaches.

National procedural rules, such as the obligation for an assessment of constitutionality by the Constitutional Court in Italy (*Simmenthal*) and the prohibition of the awarding of interim relief against the Crown (*Factortame*), not only touch upon the very essence of the individual EU right, but also undermine the effectiveness of EU law, specifically Article 267 TFEU (ex Art. 234 EC) in *Simmenthal*, and

²⁸ As Prechal argues, this principle is not the same as the principle of effectiveness, since the principle of minimum effectiveness is in fact, a principle of minimum protection, laying down the lower limit. See S. Prechal, ‘Judge-made harmonisation of national procedural rules: a bridging perspective’ in J. Wouters and J. Stuyck (eds) *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune (Essays in Honour of Walter van Gerven)* (Antwerp/Groningen/Oxford: Intersentia 2001) 39.

²⁹ Case C-158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen* [1981] ECLI:EU:C:1981:163, para 6.

³⁰ Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49.

³¹ Case C-213/89 *Factortame* [1990] ECLI:EU:C:1990:257.

³² Joined Case C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

³³ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163.

effectiveness of the interim protection as a necessary component of the principle of effective judicial protection in *Factortame*.³⁴

In the *third approach* (demonstrated in *Van Schijndel*³⁵ and *Peterbroeck*³⁶) the CJEU, either directly or through instructions to the national courts, laid down that, while assessing the national procedural rule which prevents the exercise of an individual EU right, a new balanced approach should be applied.³⁷ Judgments like *Van Schijndel*, *Peterbroeck* and *Alassini* were delivered under this approach, the essence of which consists of weighing the importance of the effectiveness of the EU law right and the principle of effective judicial protection against the principle served by the national procedural provision, namely a general law principle which restricts the enforcement of the individual EU right.

The *fourth approach* of the CJEU' is devoted to the application of the CFR to EU law issues. In the previous approach the definition of the principle of effective judicial protection was provided in the *Johnston case*³⁸, namely that "effective judicial protection is a general principle of EU law, which finds its basis in Articles 6 and 13 of the ECHR and the constitutional traditions of the Member States". In the fourth approach, however, the CJEU emphasised that the principle of effective judicial protection is enshrined in Article 47 CFR and there is no need to refer to Articles 6 and 13 ECHR. Nevertheless, as demonstrated by the case law, it is undisputed that in almost all the cases resolved under this approach,

³⁴ R.C. Smith, 'Remedies for breaches of EU law in National Courts: Legal variation and Selection', in Craig et al 2008 (n 17), 300. Prechal has suggested that the CJEU in *Simmenthal* may have considered there to be no general principle capable of justifying the Italian rule – in the way in which, for example, the principle of legal certainty could be used to support the restrictive limitation period at issue in *Rewe-Zentral Finanz eG*. See S. Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement in National Courts* (Oxford: Oxford University Press 1995) 156-158.

³⁵ Case C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441, para 19.

³⁶ Case C-312/93 *Peterbroeck, Van Campenhout & Cie* [1995] ECLI:EU:C:1995:437, para 14.

³⁷ The expression "balanced approach or balancing of rights" was also used by Hofstotter, see B. Hofstotter, *Non-compliance of national Courts Remedies in European EU law and Beyond* (The Hague: T.M.C Asser Press 2005); see Smith 1999 (n 34) 291; Prechal, 1995 (n 34), 134; see Craig et al 2008 (n 17) whereas certain scholars marked this phase of the CJEU's case law as a phase of 'purposive approach', see Hoskins 1996 (n 20). S. Prechal denotes this balancing exercise as a "procedural rule of reason", see S. Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel', (1998) 35(3) *Common Market Law Review*, 681-706; whereas T. Tridimas refers to this phase as a phase of "selective deference to the national rules of procedure and remedy", see T. Tridimas, 'Enforcing Community Rights in National Courts: Some Recent Developments' in C. Kilpatrick, T. Novitz and P. Skidmore (eds), *The Future of Remedies in Europe*, (Oxford: Hart Publishing 2000).

³⁸ Case C- 222/84 *Johnston* [1986] ECLI:EU:C:1986:206, para 18.

the CJEU took the case law of the ECtHR as guidance or justification for its own rulings. In this approach there is also a rule of balancing effective judicial protection against another important interest or another fundamental right, usually as provided for in Article 52 (1) CFR.

In recent years more frequently a reference is made to Article 47 CFR. However, at the same time, the principle of effective judicial protection as defined and comprehended before and after its enshrinement in Article 47 CFR are very often employed jointly or interchangeably.

Still, it is worth mentioning that certain differences do exist regarding their scope, limitations and basis. For the purpose of this book it is however not necessary to go into detail of this new and rapidly developing case law.

However, by way of example, I mention three cases which illustrate that the CJEU now predominantly uses Article 47 CFR.

Thus, in the *DEB* case³⁹, despite the fact that the case was argued along the principle of effectiveness, (the referring court asked whether that principle precluded a national rule under which the pursuit of a claim before the courts was subject to making an advance payment in respect of costs for legal persons), the CJEU found that the question referred should be recast so that it relates to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the CFR.

In the *Samba Diouf* case⁴⁰, the CJEU stated that:

“That principle [of effective judicial protection] is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union.”

In the case of *Otis*⁴¹, the CJEU held that:

“Art 47 CFR secures in EU law the protection afforded by Art 6 (1) ECHR and thus it is necessary to refer only to Art 47 CFR.”

Following the consideration of the different approaches of the CJEU towards the national procedural autonomy of the Member States and the effect that each of these approaches has had on the application of national procedural provisions, I will turn in the fourth Chapter to the second main topic of this thesis: the principle of State liability in EU law and the compensation for damage which Member States award to

³⁹ Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811, para 33.

⁴⁰ Case C-69/10, *Samba Diouf* [2011] ECLI:EU:C:2011:524, para 49.

⁴¹ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 47.

individuals who are harmed by a breach of EU law on the part of a Member State. This principle was chosen mainly because it belongs to the group of the so-called ‘Euro remedies’ for which uniform conditions were created by the CJEU, although compensation for damage suffered by individuals due to an infringement of EU law by the State is awarded according to national procedural rules. My intention is to narrow down, in this way, the exploration of the main topic, i.e. the effect of the principles of effectiveness and effective judicial protection on the principle of national procedural autonomy of Member States.

Consequently, in a very concrete manner the reader will become acquainted with the mode in which the CJEU created the so-called ‘constitutive conditions’ or better ‘uniform EU law conditions’, indispensable for the right to compensation to arise. More importantly, it will be demonstrated that the courts of the Member States have had to follow a new and unknown route - and be very creative - in order to satisfy the EU law requirement that this remedy is provided to any individual who has sustained damage.

Regarding the application of the procedural rules which might hinder the effective application of a substantive EU right, but which might also be justified with some other important interest, a continuation of what was set as a bundle of procedural rules in the second and third chapter will be displayed. Again, through the examination of the case law of the CJEU towards “the principles” under consideration, one will be able to discover the path that the CJEU follows. The issue is whether this is a predictable route or whether it is even more confusing for the national courts when they apply the national rules to award compensation for damage.

The fifth Chapter will be partly dedicated to the application of EU law in the pre-accession phase of the Republic of Macedonia to the EU and partly to the manner in which the national courts will eventually apply the relevant national rules by observing the EU law principles, following the accession. In this chapter, the greatest room for discussion will be given to the award of compensation for damage sustained as a result of breaches of EU law obligations by the Republic of Macedonia.

The Republic of Macedonia was chosen since it is the country of origin of the author.

Thus, the topic under assessment in the previous chapters will be narrowed down even further, to the manner in which compensation for damage will be awarded to individuals in a State which is in fact only a candidate country for full membership of the European Union.

To provide a clear context of the predictions related to the application of the national rules on State liability by the national courts in Macedonia, an overview of the status of international law will be provided, as well as insight into the way national courts award damages to individuals in cases of State

infringement of constitutional and international law. This is necessary for the sake of predicting the most appropriate action for claiming compensation for damage in a situation in which the legislator breaches EU law after accession. The same exercise will be carried out for other organs of the State, such as its administrative and judicial organs, as well as other bodies with public authority.

The sixth and final Chapter will summarise all the findings in the Chapters that precede it. Furthermore, it will show the constitutional and normative hurdles which Macedonian judges may encounter, by drawing comparisons with the manner in which the judges of other post-communist countries have adjudicated when dealing with EU law. These CEE countries or the so-called ‘newcomers’ were taken as a source of inspiration due to the common communist past they share with the Republic of Macedonia, which immensely affected the legal setting as well as the way judges think when resolving cases. The approaches that the legislators from the new Member States have applied in order to integrate EU law, as well as the approach of the other State bodies including, most importantly, the stances of the national courts, might indicate the direction which the Macedonian judges should or should not follow.

2. Concepts of rights, remedies and procedures

Different concepts of rights, remedies and procedures in the legal systems of the Member States have triggered problems in the application of the EU law principles of effectiveness, effective judicial protection and the uniform application of EU law, as well as in the assessment of the CJEU’s intervention in the autonomy or competence in procedural matters of each Member State.

It is necessary to define a number of central notions, namely ‘rights’, ‘remedies’ and ‘procedures’, as these may differ depending on the context in which they are used (EU law or the legal system of different Member States), as well as the notion of procedural and/ or remedial autonomy itself.⁴²

The first issue that will be considered is the notion of a right.

⁴² Difficulties in differentiating between substance and procedure, rights, remedies and procedures are admitted and illustrated also by W. van Gerven, ‘Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?’, (1995) 32(3) *Common Market Law Review*, 679–702; M. Ruffert, ‘Rights and Remedies in European Community Law: A Comparative View’, (1997) 34(2) *Common Market Law Review*, 307-336; W. van Gerven, ‘Of rights, remedies, procedures’, (2000) 37(3) *Common Market Law Review*; C. Harlow, ‘A Common European Law of Remedies?’ in C. Kilpatrick, T. Novitz, P. Skidmore, *The Future of Remedies in Europe*, (Oxford: Hart Publishing 2000) 73; Prechal 2001 (n 28); T. Eilmansberger, ‘The relationship between rights and remedies in EC law: in search of the missing link’, (2004) 41(5) *Common Market Law Review*.

The manner in which the notion of ‘right’ is used affects national procedural rules and the EU principles that these rules are required to uphold.

The possibility for individuals to invoke directly effective provisions enshrined in EU law or “the possibility of individuals to invoke EU rights”, as stated in the *Van Gend & Loos* case⁴³, denotes a simple entitlement of an individual to rely on a precise, sufficiently clear and unconditional provision of EU law, in order to have a national rule which is incompatible with that EU law provision disapplied. It is accepted that this ability provided to individuals by the CJEU was created in order for individuals to ensure the effective enforcement of EU law by the Member States. Often, this is a situation where an individual is obliged to do something according to the national law (which is unfavorable to him) and, in order to prevent that application, he argues the incompatibility of those national provisions with ‘directly effective’ EU law provisions, which take precedence over the national provisions.

This is called *objective direct effect* or direct effect in a broad sense of the EU law provisions, as opposed to *subjective direct effect* or direct effect in a narrow sense, whereby individuals can obtain certain substantive EU rights through the application of EU law provisions instead of the national rules, where this seems possible.⁴⁴

In order to secure the effectiveness of EU law, the CJEU created the possibility for individuals to call on directly effective provisions of EU law before national courts. Direct effect of the EU law provisions could be comprehended in a broad sense, as a pure *entitlement right* or a possibility for an individual to invoke the EU law provisions. If the provision is sufficiently clear, precise and unconditional, an

⁴³ Case C- 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1.

⁴⁴ The distinction between “objective” and “subjective” direct effect was made in particular by the German legal doctrine, in order for an individual in Germany to be able to rely on EU provisions without there being a certain, specific, “subjective” right that needs to be protected. In the German legal system, an individual can initiate proceedings in court if he can prove that the legislator’s intent was to protect the specific right that was infringed. This logic is entirely opposite to the requirements of EU law that an individual needs to meet in order to invoke EU provisions. In EU law, for the provision to be invoked, it suffices that the provision is precise and unconditional, without necessarily conferring substantive rights. Rather, a right is created from the direct effect of directives. A German citizen relying on an EU law provision before the national courts and unable to prove the existence of a specific “subjective” right, would be barred in his action or would lack *locus standi* to initiate proceedings. For a more thorough explanation about the differences between objective and subjective direct effect, see Ruffert 1997 (n 42); W. van Gerven 1995 (n 42); Eilmansberger 2004 (n 42), 1199–1246.

individual is entitled to rely on that provision before the national courts. With regard to directives, their direct effect in general was recognised by the CJEU in the *Van Duyn* case⁴⁵.

The *Becker case*⁴⁶ illustrates both the broad definition of direct effect (the *invokability* right) and the narrow definition, (the conferral of substantive EU rights by the provision).

In cases in which the *invokability* right is applied, national courts are required to set aside conflicting national provisions, since EU law has precedence over the national law of the Member States.⁴⁷ This is called the *exclusion effect of EU law provisions* which corresponds to the notion of objective direct effect.

In certain cases, EU law provisions can be directly applied, and this is called the *substitution effect of the EU law provisions* which corresponds to the subjective direct effect.

Note, however, that horizontal direct effect of directives is forbidden, i.e. individuals are not allowed to rely on directly effective provisions of directives in order to impose obligations on other individuals.⁴⁸ Only the State is permitted to impose obligations. Nevertheless, the invention of the concepts of incidental horizontal effect⁴⁹ and indirect effect of directives⁵⁰ put other individuals at a disadvantage when the opposing party is allowed to rely on the directive.

⁴⁵ Case C-41/74 *Van Duyn* [1974] ECLI:EU:C:1974:133, para 12.

⁴⁶ Case C-8/81 *Becker* [1982] ECLI:EU:C:1982:7, para 25 “Thus, whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.”

⁴⁷ Case C-6/64 *E.N.E.L* [1964] ECLI:EU:C:1964:66, paras 13, 15-16; Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:48, para 17.

⁴⁸ Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335, para 48; Case C-91/92 *Faccini Dori* [1994] ECLI:EU:C:1994:292, para 25.

⁴⁹ Case C-194/94 *CIA Security* [1996] ECLI:EU:C:1996:172, para 55; Case C-443/98 *Unilever Italia* [2000] ECLI:EU:C:2000:496, paras 45-52; Case C-253/00 *Muñoz* [2002] ECLI:EU:C:2002:487, paras 30-32; Case C-453/99 *Courage and Crehan* [2001] ECLI:EU:C:2001:465, para 36.

⁵⁰ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153, para 26; Case C-40/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores*, [2000] ECLI:EU:C:2001:19, para 30; Case C-456/98 *Centrosteeel* [2000] ECLI:EU:C:2000:402, para 16.

Apart from the obligation to set aside conflicting national provisions, national courts are obliged to interpret national law in light of the EU law⁵¹ in order, not only to provide the plaintiffs with effective remedy for their infringed EU law right, but also to ensure the effectiveness of EU law as such. Thus, the primary techniques of ensuring the effectiveness of EU law and effective judicial protection of EU rights are the direct effect of EU provisions and consistent interpretation of national law, which operate at the level of conduct, whereas, State liability operates at a secondary level, i.e. the level of sanctions.⁵²

This implies that before resorting to liability of the State as a technique, the individual is required to attempt to safeguard his rights through consistent interpretation and direct effect. If “direct effect of provisions” is conceived in the narrow sense of *subjective direct effect*⁵³ (whereby individuals are entitled to specific substantive rights under the EU law), then these rights have to be protected by the national courts to be effectively enjoyed by the individuals.

However, the case law on protection is not limited to substantive EU rights, but extends to entitlement or *invokability* rights.

Unlike *invokability* rights which do not necessarily confer substantive rights on individuals,⁵⁴ substantive rights exist which are not enforceable or judicially protected, either because of the prohibitions of horizontal direct effect⁵⁵ or because the provisions are not directly effective in order to be relied upon.⁵⁶

In cases in which individuals were deprived of asserting/ enforcing substantive rights due to the breach of a directly effective provision by the national legislation, national courts are under an obligation to provide an “effective remedy” for the breach of these rights from the panoply of remedies available under the national law. This means for instance, that an infringed right to the free movement of goods would

⁵¹ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153, para 30.

⁵² See S. Prechal “*Directives in EC Law*” (Oxford: Oxford University Press, 2005) , 311.

⁵³ This terminology is derived from the German legal doctrine in an attempt to better comprehend the concept of direct effect in an EU law sense – see Ruffert 1997 (n. 42), 307-336.

⁵⁴ This was demonstrated in cases like Case C-380/87 *Enichem Base* [1989] ECLI:EU:C:1989:318; Case C-222/02 *Peter Paul and others* [2004] ECLI:EU:C:2004:606, paras 40-41; Case C-226/97 *Lemmens* [1998] ECLI:EU:C:1998:296, para 37.

⁵⁵ Case C-91/92 *Faccini Dori* [1994] ECLI:EU:C:1994:292, para 25.

⁵⁶ Joined Case C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 26.

normally be remedied by the restitution of illegally levied charges⁵⁷ and an infringement of the right to gender equality could be remedied through reinstatement to the post or compensation for damage suffered. These are so-called procedural rights, which ensue from the breach of individual substantive rights and form an inseparable part thereof.

According to Prechal⁵⁸ and most of the authors, the notion of direct effect (although often used interchangeably with the term ‘right’) is a broader concept, which implies that a provision which satisfies the conditions for direct effect (being sufficiently clear, precise and unconditional) does not necessarily confer substantive individual rights. The explanation is that certain provisions could be directly effective for purposes other than those for which the individual invokes it.

The notion of a ‘right’ at the EU level is contrasted with that at the national level. In the legal systems of the Member States the notion may be differently interpreted, which could result in unequal protection of the same EU rights in different Member States. For example, the Nitrate Directive (91/676), which obliges Member States to establish and implement an action programme to reduce and prevent pollution, was interpreted differently by the Hague Appeal Court and by the French Administrative court. According to the Dutch court, the provisions were not intended to confer rights on individuals, meaning that individuals were unable to claim damages from the State for the cost of purifying ground and surface water, or the cost of alternative drinking water. In contrast, the French *Tribunal Administratif* in Rennes upheld a decision delivered by the *Tribunal d’instance* at Guincamp which had ordered the Société Suez Lyonnaise des Eaux to pay compensation to 176 subscribers to its drinking water distribution network on account of the excessive nitrate content of the water it distributed.⁵⁹

Moreover, the problem increases with the fact that the CJEU does not have a clear definition of what constitutes a right.

Also the notion of remedy is a confusing concept.

⁵⁷ The kind of remedy does in fact depend on the nature of the infringement. For instance, if there were a breach of the free movement of goods by not allowing importation, it makes no sense to have a remedy of restitution, but rather a remedy of compensation for damage.

⁵⁸ See Prechal 2005 (n 52), 97-111.

⁵⁹ See more about these cases in J.H. Jans, ‘State liability: In search of a Dividing Line between National and European law’ in D. Obradovic and N. Lavranos (eds), *Interface between EU Law and National Law: Proceedings of the Annual Colloquium of the G.K. Van Hogendorp Centre for European Constitutional Studies* (Groningen: Europa Law Publishing 2007) 289.

It may be viewed in a narrow sense (as ‘redress or relief’) or in a broader sense (as a means to obtain redress as in French ‘*voies de recours*’). The choice influences the issue of whether the ‘Euro remedies’, created by the CJEU and made obligatory in each of the Member States’ legal systems, are in fact entirely new remedies in the legal systems of the Member States or simply an extension of the existent ones.⁶⁰

For instance, in common law countries, restitution, compensation and interim measures are considered as remedies, whereas in continental legal systems (like France and Germany) compensation for damage and restitution are part of substantive laws and thus, the right to restitution or to compensation is placed under the procedural laws.⁶¹ In the continental legal systems this right to restitution can be enforced through the legal means (remedies in a broad sense) provided by the procedural laws. However, in common law countries in which the accent is put on remedies, restitution is a remedy.

Regarding the concept of procedure, it is understood to comprise: rules related to the access to court, such as the ability to initiate judicial proceedings (*locus standi*); rules on types of time limits for bringing actions at law; rules related to an *ex officio* application of law; rules for the application of *res judicata* and rules related to awarding specific forms of relief or redress, such as restitution or compensation for damage (the type, amount and other issues).

Restrictions imposed on the national courts when applying any of these rules will be considered as mild undermining of the procedural autonomy of the Member States. On the other hand, certain scholars⁶² have adopted broad definitions of remedies, which encompass access to court for the safeguard of EU rights, their temporary protection during the procedure as well as redress of rights.

In this sense, all modifications or non-application on the part of the national courts of the national rules relating to access to court, interim protection and redress will be considered as affecting the national remedial autonomy of the Member States.

The acceptance and application of a specific definition of ‘remedy’ and ‘procedure’ are indispensable for the purpose of this thesis, where one of the main issues is the assessment of how deeply the CJEU’s case law undermines procedural and/ or remedial autonomy of the Member States.

⁶⁰ Prechal 2005 (n 52), 170.

⁶¹ Ruffert 1997 (n 42), 332.

⁶² Kilpatrick et al 2000 (n 37), 4. According to Kilpatrick, remedies and procedures have not been clearly distinguished *inter se*.

For the purpose of this thesis I will employ the notion of ‘remedy’ in a narrow sense, which will entail the requirement by the CJEU that specific redress or relief is available as a matter of EU law. The consequence of this requirement is that the remedial autonomy is a part of the broader notion of procedural autonomy.

3. Research method

This book presents legal research of a qualitative nature.

The cases which have been analysed have been selected on their content: whether they deal explicitly with the principles of equivalence and effectiveness, with effective judicial protection and/or with State liability. This, however, does not exclude that incidentally, when appropriate, references will be made to other cases as well.

The impact of the afore-mentioned principles on the national autonomy of the Member States will be appraised through the lens of the CJEU case law. National procedural rules which can hinder the effective enforcement of substantive EU rights are the rules of different Member States, depending on the importance of the issue in the case. By doing this research, I have become acquainted with a number of national restrictions and principles and concluded that most of these justifications of the restrictive national rules, were common to, if not all, at least most of the Member States and in the end, common to the European Union. That is why I call this book an interplay of principles, as one can prevail over the other in any given situation.

Of course, the real concretisation of the application of EU law is presented in the fifth Chapter with regard to the award of compensation for damage in the Republic of Macedonia, as it will eventually occur following Macedonia’s accession to the European Union. For that purpose, as well as the case law of the CJEU, I will explore the approaches of the highest courts of the CEE countries in the pre-accession phase in order to gauge where Macedonian judges might stand in this respect. The national rules on awarding compensation for damage arising from Macedonia’s breach of constitutional and international law are thoroughly analysed for the sake of comparison with both the ‘constitutive’ EU law conditions posed by the CJEU and the principles which restrict their application.

The main focus in the selection of Macedonian cases to be discussed was on the cases which deal with the breach of the ECHR by the Macedonian legislator, the cases in which the Macedonian administrative organs breach the national law and the cases in which an attempt was made to prove or it was proven that the Macedonian judges breached the national law. This analysis was made in order to be able to identify

and review national actions against the State to view whether these can be considered as “appropriate” for EU law purposes.

The examination of constitutional and other legal solutions of EU law hurdles by the CEE countries is done in order to proceed in the conclusions with a demonstration of similarities of the legal systems of the CEE on one hand and the legal system of Macedonia on the other hand. This is performed both normatively and from the aspect of changes in the mindset of judges. Apart from the national legislation, the most important judgments delivered by the Constitutional Court of Macedonia and the ordinary courts will be scrutinised.

The comparison with the CEE countries is basically based on secondary resources i.e existing literature. The limitation to secondary sources is justified by the very fact that the problem of 'mindset of judges' is not a central issue of my research but it is an element that should be mentioned when the question about 'how are Macedonian judges going to cope with their EU law state liability obligation' is discussed.

The cut-off date for the case law is in principle December 2017, with some incidental exceptions for a number of more recent cases.

CHAPTER 2

The case law of the Court of Justice of the European Union and national procedural and remedial rules

The principle of national procedural autonomy

1. The principle of national procedural and remedial autonomy

1.1 Formulation and limits of the principle

The procedural autonomy of Member States comprises the rules relating to the access to court (*locus standi* and the time limits for the initiation of proceedings), rules applied during the procedure (*ex officio* raising issues, evidential rules and burden of proof, observance of the principle of *res judicata*) as well as the rules pertaining to the type, height and content of the relief. The latter rules form part of the remedial autonomy⁶³ of the Member State as a constitutive part of its procedural autonomy.⁶⁴ According to Prechal and Cath, the use of the notion ‘autonomy’ could be problematic, not only because of the source of that autonomy (is it an expression of national sovereignty or does it result directly from the decentralised nature of the enforcement and application of EU law, in which Member States retain power only as long as the Union legislation governing procedural rules have not been developed?)⁶⁵, but also because, it

⁶³ The terms ‘enforcement autonomy’ or ‘remedial autonomy’ are sometimes used as a species of ‘procedural autonomy’. See S. Prechal and K. Cath, ‘The European acquis of civil procedure: constitutional aspects’, (2014) 19 *Uniform Law Review*, 3. It is also argued that it is a species of ‘institutional autonomy’, J.H. Jans, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015) 44.

⁶⁴ According to Prechal, Widdershoven and Jans, “Procedural autonomy refers to the powers of Member States to determine which kind of procedures apply and how they are organized.” See Jans et al 2015 (n 63), 44.

⁶⁵ These “sources” in my thesis will define the division between ‘absolute’ and ‘relative’ autonomy, whereas, for certain authors who incline towards only one approach, national procedural autonomy does not exist at all. See C.

comprises, apart from the application of procedural rules in a strict sense, rules and principles which are of a substantive nature and additionally, it relates to remedies that should be available with respect to sanctions.⁶⁶

The principle of national procedural autonomy of the Member States was first articulated by the CJEU in the *Rewe* case.⁶⁷

In this case, the preliminary question referred to the CJEU by the Bundesverwaltungsgericht was whether the claim brought by the appellants, who had asked for a refund of illegally levied charges, was admissible in spite of the fact that, according to the relevant German rules, the time limit for initiation of this kind of proceedings had expired.

The CJEU ruled that:

“In the absence of EU rules on this subject, 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 EU law, it being understood that such conditions could not be less favourable than those relating to similar action of a domestic nature.

“Where necessary, Articles 100 to 102 and 235 of the EEC Treaty (now Articles 115 to 117 and 352 TFEU) enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.

In the absence of such measures of harmonization the right conferred by EU law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

M. Kakouris, ‘Do the Member States Possess Judicial Procedural “Autonomy”?’ (1997) 34(6) *Common Market Law Review*, 1389-1412. Also, M. Bobek, ‘Why there is no principle of ‘Procedural Autonomy’ of the Member States’ in B. de Witte and H. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia 2011).

⁶⁶ See Prechal et al 2014 (n 63), 3.

⁶⁷ A-G Opinion Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral* [1976] ECLI:EU:C:1976:167, para 5.

This is not the case where reasonable periods of limitation of action are fixed.”

These paragraphs, setting out an obligation to exercise EU rights before the national courts in accordance with the conditions laid down by national rules, provided that the conditions do not make impossible in practice the exercise of those rights, are considered to be of pivotal relevance in the establishment of the principle which is commonly referred to as a principle of national procedural autonomy of the Member States.⁶⁸

It implies that, in the absence of harmonising EU measures, Member States have the discretion to choose the competent courts, procedures and remedies for the purpose of safeguarding EU rights which individuals derive from EU law, provided that the requirements of *equivalence* and *minimum effectiveness* are observed.⁶⁹

The principle of *equivalence* implies that the rules which the national courts apply to the EU law cases must not be less favourable than those applied to similar domestic cases.⁷⁰

The principle of *minimum effectiveness* indicates that national procedural rules applied to EU law cases must not be such as to make the exercise of EU rights impossible in practice.⁷¹

⁶⁸ See Hoskins 1996 (n 20) who defines the relationship between EU law and national procedural rules as a “principle of procedural autonomy”. There are arguments put forward by different authors, who propose different terminological reference to this principle, for instance “procedural competence”, see Van Gerven 2000 (n 42), 502; Jans et al 2015 (n 63), as already mentioned, use the term “enforcement autonomy” as a species of procedural autonomy as well as the notion of “remedial autonomy”. See Jans et al 2015 (n 63), 47. It was in Case C-300/04 *Eman and Sevinger* [2006] ECLI:EU:C:2006:545, para 71, that the CJEU transparently used the term “remedies” when referring to the Member States’ discretion to determine the rules allowing legal redress for a person.

⁶⁹ In the legal literature these principles are also called principles of “non-discrimination” and “practical impossibility” respectively. The issue of whether it is pertinent to consider “practical impossibility” and “effectiveness” as synonyms will be addressed in a separate section.

⁷⁰ Case C-33/76 *Rewe -Zentralfinanz, eG and Rewe-Zentral AG* [1976] ECLI:EU:C:1976:188, third sub para of para 5; Case C-45/76 *Comet* [1976] ECLI:EU:C:1976:191, para 13; Case C-811/79 *Ariete* [1980] ECLI:EU:C:1980:195, para 12; Case C-826/79 *MIRECO* [1980] ECLI:EU:C:1980:198, para 13; Case C-338/91 *Steenhorst-Neerings* [1993] ECLI:EU:C:1993:857, para 15; Case C-410/92 *Johnson* [1994] ECLI:EU:C:1994:401, para 21; Case C-180/95 *Draemphael* [1997] ECLI:EU:C:1997:208, para 29.

⁷¹ CJEU also uses the expression “excessively difficult” see Case C-327/00 *Santex* [2003] ECLI:EU:C:2003:109, para 56, alternatively to “virtually impossible”, see Case C-199/82 *San Giorgios.p.a.*, [1983] ECLI:EU:C:1983:318,

I would like to distinguish this latter principle from the principle of effectiveness which will be treated separately in Chapter 3, and which refers to the requirement of the availability of an effective remedy in the national legal system and/ or the effective enforcement of EU law as such, and which has a much more far-reaching impact on national law. Therefore, I will refer to the principle laid down in *Rewe* as a principle of minimum effectiveness or minimum effective protection so it is not confused with the principle of effectiveness discussed in Chapter 3.⁷²

1.2 EU competence to harmonise procedural law

The EU does not have general competence to harmonise the procedural law of the Member States on the basis of the Treaties.⁷³ According to Article 5 TEU, the principle of conferred powers implies that the EU may only act within the limits of the powers conferred upon it by the Treaty. In this same provision, the principles of subsidiarity and proportionality are explained. The latter principles are further regulated in a special Protocol on the application of these principles.⁷⁴

Thus, the EU legislator may act to harmonise procedural law at EU level only in specific fields where this is necessary to achieve the substantive objectives of these fields (Art. 5 (3) TEU).⁷⁵

Articles 114-117 TFEU (ex. Art 94-97 TEC) provide for a more general legal basis to approximate the laws: the Council is competent to adopt measures for the approximation of 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. Thus, procedural harmonisation measures may be adopted by the Council if it is probable that the functioning of the internal market might be distorted. On this legal basis,

para 14, which, according to Prechal differs in degree from the term “impossible in practice”, see Prechal 1995 (n 34), 137-138.

⁷² Certain scholars accept this terminology: see Prechal 2001 (n 28), 1; Van Gerven (2000) (n 42), 529, F.G. Jacobs, ‘Enforcing EU rights and obligations in national courts: striking the balance’ in J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law*, (West Sussex: Wiley, 1997) 27. However, certain authors consider the use of the term “effectiveness” as more accurate, since, according to them, the standard of “ minimum effective protection” is in fact fairly high, see Tridimas 2000 (n 37), 41.

⁷³ However, certain authors, such as Kakouris, maintain the opposite. See Kakouris 1997 (n 65), 1389-1412.

⁷⁴ See Protocol on the application of the principles of subsidiarity and proportionality.

⁷⁵ Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

as well as on the basis of Article 352 TFEU (ex. Art. 308 TEC), the ‘flexibility clause’, most of the acts which are considered as ‘harmonised procedural law’ within the EU have been enacted.⁷⁶

The viewpoint that the EU has restricted national courses of action and changed the division of competences is maintained by different authors.⁷⁷

Curtin and Mortelmans⁷⁸ have rightly observed that the CJEU’s case law (*Rewe/ Comet* case law) spurred the Council to insert remedial provisions in directives and regulations in various fields, founding this competence on Articles 100-102 and 235 of the EEC Treaty (now Articles 115 and 117 TFEU and Article 352 TFEU).

Regarding the division of competences for the harmonisation of procedural law between the EU and the Member States, the CJEU uses the following expressions “in the absence of EU rules in the matter”⁷⁹, “in the absence of relevant EU provisions”⁸⁰, “in so far as no provisions of EU law are relevant”⁸¹.

These expressions by the CJEU were interpreted by some judges, such as Kakouris (writing extra-judicially), to mean that the Member States have in fact very limited latitude (or no latitude at all) to apply their national rules, in other words, that their discretion exists only up to the moment that the EU initiates its ‘harmonising’ process in the particular field. The fact remains that there are areas the EU can simply not legislate in or touch upon (these are called supporting competences), while in the areas in which the EU and Member States have shared competences, the Council is allowed to legislate under specific circumstances (Art. 115 TFEU).

⁷⁶ On harmonised procedural acts, see extensively Heukels et al 2002 (n 20), 123-127.

⁷⁷ See M. Eliantonio, *Europeanization of Administrative Justice? The Influence of the ECJ’s Case Law in Italy, Germany and England*, (Groningen: Europa Law Publishing 2009) 3; Hofstötter 2005 (n 37), 23; Heukels et al 2002 (n 20), 112; Van Gerven 2000 (n 42), 502.

⁷⁸ D. Curtin. and K. Mortelmans, ‘Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script’ in G. Schermers, H. Gerhard, C. Deirdre M. Curtin and T. Heukels, *Institutional Dynamics of European Integration Essays in honour of Henry G. Schermers*. (Dordrecht: Nijhoff 1994) 434.

⁷⁹ Case 33/76, *Rewe* [1976] ECLI:EU:C:1976:188, para 5, Case 45/76, *Comet* [1976] ECLI:EU:C:1976:191, para 13.

⁸⁰ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, paras 83 and 90.

⁸¹ Joined cases 66/79, 127/79 and 128/79 *Salumi*, [1980] ECLI:EU:C:1980:101, para 18; Case 265/78, *Ferwerda*, [1980] ECLI:EU:C:1980:66, para 10.

Nevertheless, in my view, this formulation by the CJEU should be understood to mean that as long as the EU has not yet harmonised procedural law, procedural rules of the Member States apply, subject to the tests of minimum effectiveness and equivalence. The EU has restricted competence to harmonise, as stated above, and it will not ‘harmonise’ EU procedural law through its secondary legislation as long as the procedural law of the Member State is effective for the attainment of substantive policy objectives.

Complete harmonisation of national procedural law by the EU, in the sense of the establishment and application of an identical set of procedural and remedial rules in all the Member States, has not only been impossible,⁸² but also undesirable.⁸³ Therefore, one of the main concerns of the EU appears to be, not the uniform application of EU law (an ideal situation according to van Gerven)⁸⁴, but rather, the attainment of a certain uniform level of protection of these rights in all the Member States. According to van Gerven the requirement of a minimum level of protection through the *Rewe/ Comet* test set by the CJEU should however develop into an adequate level of protection of EU rights.⁸⁵ Delicostopoulous also argues against complete harmonisation of procedural law: “Procedural harmonisation is both unwelcome and unnecessary for the realisation of a single market and/ or for the protection of EC rights; moreover it is re-regulatory and illusory”.⁸⁶ Claes and Catelijne consider that “in many areas of law, Community law and national law are so intertwined, that a separate set of Community procedures and remedies may complicate matters, rather than making them easier”.⁸⁷ On the other hand, according to Dougan, the legislative harmonisation of national remedies and procedural rules represents the ultimate and indeed preferred solution to the problems of effectiveness and uniformity posed by decentralised enforcement.⁸⁸

There have been attempts to harmonise the laws of procedure of the Member States at different periods of time. In 1994, a group of experts under the presidency of Marcel Storme drew up a working paper entitled *Approximation of Judiciary law in the European Union*, which required that serious attention be given to

⁸² Van Gerven 2000 (n 42).

⁸³ See Prechal 2001 (n 28).

⁸⁴ See Van Gerven 2000 (n 42).

⁸⁵ See Van Gerven 2000 (n 42); Jacobs 1997 (n 72). Dougan also finds that the legislative harmonisation of national remedies and procedural rules represents the ultimate and preferred solution to the problems of effectiveness and uniformity posed by decentralised enforcement. See Dougan 2011 (n 17) 435.

⁸⁶ See J.S. Delicostopoulous, ‘Towards European Procedural Primacy in National Legal Systems’ (2004) 9(5) *European Law Journal*, 603.

⁸⁷ See Claes et al 2006 (n 20), 144.

⁸⁸ See Dougan 2011 (n 17), 435.

the problems that could come about from a lack of procedural harmonisation.⁸⁹ There is also a research network on EU Administrative law, ReNEUAL, which is engaged in research designed to produce best practice guidelines on EU procedural law, which may lead to a more formal law.⁹⁰ Certain scholars, like Craig, strongly contend in favour of the enactment of a Law of Administrative Procedure that would be based on Article 298 TFEU or potentially on Article 352 TFEU. According to him, this law would enhance the clarity of, and facilitate access to the law, increase the coherence of principles and procedures and set up default procedures to fill gaps in existing laws.⁹¹

Not only in substantive law, but also in the field of procedural law, any potential harmonisation should function within the context of ‘autonomy’ of the Member States. The development and drafting of European Rules of Civil Procedure cannot disregard the constitutional dimension of the EU for a number of reasons, the most important one being the constitutional feature of the EU as a decentralised model for the application of EU law. This is the stance of Prechal and Cath, with which I fully agree.⁹²

In my view, the problem with complete harmonisation of EU procedural law lies within the issue that a same individual right (for instance the right to restitution of illegally levied charges) will have to be exercised according to different procedural norms (provisions contained in different codes of the Member States), depending on whether that right occurs as a remedy for the infringement of an *EU* individual right or for a purely *national* individual right.

In fact, once EU law has been transposed, the EU individual right also becomes a domestic right with an EU law origin, and in a case where it needs to be safeguarded, the national courts will need to ascertain whether the infringed right flows from an EU act which has been transposed into the national law or whether its source is a pure national law. If a special procedural code of the EU is adopted, two different proceedings will have to be established: one for the protection of purely national individual rights and one for the ‘European’ individual rights, i.e. national individual rights with an EU law origin.

1.3 Constraints on national procedural autonomy

⁸⁹ See more on the Storme Report in Himsworth, ‘Things fall apart: The harmonization of Community Judicial Procedural Protection revisited’ (1997) 22 *European Law Review*, 9-10.

⁹⁰ <http://www.reneual.eu>. See also about this research network in P. Craig, ‘A General Law on Administrative Procedure, Legislative Competence and Judicial Competence’, (2013) 19(3), *European Public Law*, 504. Also, in Jans et al 2015 (n 63), 496.

⁹¹ See Craig, 2013 (n 90), 520.

⁹² See Prechal et al 2014 (n 63), 1-20.

As held by the CJEU, there are constraints and limits on the national procedural autonomy of Member States. In areas which are not harmonised by the Union legislator, Member States have to observe the principles of minimum effectiveness and equivalence.

According to Prechal and Cath, the exercise of autonomy of Member States is subject to a number of limitations, in particular, not only the principles of equivalence and effectiveness, but also fundamental rights and general principles of law.⁹³ Safjan and Düsterhaus also find that, when there is an EU right, the rules for its enforcement must comply with Article 47 CFR and the principles of equivalence and effectiveness.⁹⁴ Interestingly, and as Wallerman herself admits, it is less commonly acknowledged that the principle of sincere cooperation, laid down in Article 4 (3) TFEU, also functions as a limit on procedural autonomy, of course, in addition to other constraints such as minimum effectiveness, equivalence and effective judicial protection.⁹⁵

I agree with the above authors' views on the type of limitations on national procedural autonomy, but, since the principle of effective judicial protection and other principles will be the subject of the next Chapter, in this Chapter I will analyse only the principles of minimum effectiveness and equivalence. I will, first, discuss these principles in general and then turn to some specific examples of how these principles influence national procedural law.

Before concluding, the final section of this Chapter will present an overview of doctrinal debates on the existence and nature of procedural autonomy.

1.4 The principle of equivalence

As stated, the principle of equivalence requires that EU actions are not treated less favourably than the national claims of the same nature.⁹⁶ This principle is actually a manifestation of the general principle of equal treatment.⁹⁷

⁹³ See Prechal 2014 (n 63), 3.

⁹⁴ See M. Safjan and D. Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', (2014) 33(1) Yearbook of European Law, 10. This is the 'upgraded formula', the '*Rewe 47 test*'.

⁹⁵ See A. Wallerman, 'Towards an EU Law doctrine on the exercise of discretion in national courts? The Member States' self-imposed limits on national procedural autonomy', 53(2) (2016) Common Market Law Review, 342.

⁹⁶ The CJEU specified in *Pasquini* that the principle of equivalence 'must be applied not only with regard to provisions of national law on limitation of actions and recovery of sums paid though not due, but also to all

Questions which immediately arise concern the notions of ‘similar domestic action’ or rather *comparability* between the two actions and the existence of ‘less favourable treatment’ to the detriment of a protected subject.⁹⁸

Certain instructions concerning how to appraise the comparability of actions, as well as the meaning of “unfavourable conditions”, were provided by the CJEU in the following cases.

In *Palmisani*⁹⁹, Ms. Palmisani brought an action for reparation of loss and damage sustained as a result of the belated transposition of an EU Directive into the Italian legal system, after the expiry of the limitation period of one year provided in the Legislative Decree for initiation of this kind of proceedings. According to the provisions of the Italian Civil Code, an action for reparation of non-contractual damage was subject to a prescription period of five years. In these circumstances the question was referred to the CJEU for determining whether the time limit specifically introduced for claiming compensation for damage suffered as a result of the belated transposition of the Directive was in line with the principle of equivalence. The time limit for instituting an action for obtaining social security payments under the statutory system arising out of the full implementation of the Directive was one year.

The CJEU pointed out that, in order to establish the comparability of the two systems in question, the national court should take into account the purpose and cause, as well as the *essential characteristics* of the domestic system.¹⁰⁰ In the *Palmisani* case, the CJEU admitted its lack of information about the possibility of an individual to institute this kind of proceedings against a public body in the national legal system and consequently it left the task of examination to the national court. Considering that the

procedural rules governing the treatment of comparable situations, whether administrative or judicial.’ See Case C-34/02 *Pasquini* [2003] ECLI:EU:C:2003:366, para 62.

⁹⁷ See Case C-34/02 *Pasquini* [2003] ECLI:EU:C:2003:366. See also Case C-300/04 *Eman and Sevinger* [2006] ECLI:EU:C:2006:545, para 57 where the CJEU holds that “...it must be observed that the principle of equal treatment or non-discrimination, which is one of the general principles of Community law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.”

⁹⁸ According to Dougan, apart from ‘comparability’ between the two actions and ‘existence of less favourable treatment to the detriment of a protected subject’ there is another main limb, namely ‘determining whether the less favourable treatment might nevertheless be objectively justified’. These are the three main limbs of *any* anti-discrimination analysis, involving the principle of equivalence, which, according to him is essentially a manifestation of the general principle of equal treatment. See Dougan (n 17), 422.

⁹⁹ Case C-261/95, *Rosalba Palmisani* [1997] ECLI:EU:C:1997:351.

¹⁰⁰ *Ibid*, para 38.

requirement of minimum effectiveness was satisfied, the CJEU assessed the limitation period as acceptable, provided that the principle of equivalence was also complied with.

This approach was subsequently confirmed in a number of more recent cases where the CJEU clearly stated that “similar actions are to be determined based on their purpose, their cause of action and their essential characteristics”.¹⁰¹

Determining a ‘similar domestic’ action for the purposes of assessing whether the principle of equivalence was complied with by the national procedural provisions led to difficulties in *Benallal*¹⁰². In this case the CJEU left the problem to be resolved by the national courts. It consisted of the fact that under Belgian law, a plea on points of law cannot be raised for the first time before the *Conseil d’Etat* unless that plea was a matter of public policy. Mr. Benallal claimed that his right of defence, specifically his right to be heard, guaranteed under EU law, was violated and he raised that plea before the *Conseil d’Etat*. The question arose whether this type of plea on points of law, was admissible under Belgian law. The CJEU held that it would be admissible, if, under national law, the right of defence was considered as public policy, a question that was left to be determined by the national court. This ensued from the fact that in Belgium, an appeal on a point of law can be raised only if it is a public policy argument. Consequently, in order for the issue to be resolved, a national court was required to assess whether the right of defence were to be treated as belonging to the area of public policy, in which case it would be acceptable.

Further, it is important to note that the principle of equivalence requires that actions stemming from an infringement of national law and *similar* actions stemming from an infringement of EU law be treated equally, and not that there be equal treatment of national procedural rules applicable to proceedings of a different nature or applicable to proceedings falling within two different branches of law.¹⁰³ Another potential problem of comparability occurred in *Danqua*¹⁰⁴. In this case Ms. Danqua, a Ghanian citizen, applied for subsidiary protection status in Ireland, following a rejection by the competent authority to obtain refugee status. According to national law, she should have lodged her application for subsidiary

¹⁰¹ Citation from Case C-200/14 *Câmpean* [2016] ECLI:EU:C:2016:494, para 45. See however also C-63/08 *Pontin* [2009], ECLI:EU:C:2009:666, para 45 and 46; Case C-591/10 *Littlewoods Retail* [2012] ECLI:EU:C:2012:478, para 31.

¹⁰² Case C-161/15, *Bensada Benallal* [2016] ECLI:EU:C:2016:175.

¹⁰³ See Case C-200/14 *Câmpean* [2016] ECLI:EU:C:2016:494, para 55. See also Case C-61/14 *Orizzonte Salute* [2015] ECLI:EU:C:2015:655, para 67 and case C-69/14 *Târsia* [2015] ECLI:EU:C:2015:662, para 34.

¹⁰⁴ Case C-429/15 *Danqua* [2016] ECLI:EU:C:2016:789.

protection within a time limit of 15 working days following the rejection for asylum. She claimed that the principle of equivalence was breached, since there were no comparable rules regarding the request for asylum. The CJEU stated that invoking the principle of equivalence in this situation, in which there were two types of application (one for refugee status and one for subsidiary protection) was irrelevant, since the case concerned two types of applications, both based on EU law.¹⁰⁵

Finally, the CJEU held, in *Paquay*, that "... in choosing the appropriate solution for guaranteeing that the objective of Directive 76/207 is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (Case C-68/88 *Commission v. Greece* [1989] ECLI:EU:C:1989:339, para 24, and Case C-180/95 *Draemphael* [1997] ECLI:EU:C:1997:208, para 29). That reasoning applies *mutatis mutandis* to infringements of Community law of a similar nature and importance."¹⁰⁶

The existence of 'less favourable treatment' was an issue, for instance, in the case of *Weber's Wine World*¹⁰⁷, where the infringement of the principle of equivalence was established because national law imposed less advantageous procedural conditions for the refund of EU law claims, allowing the repayment of charges levied contrary to the Constitution to be more easily obtained than those levied contrary to EU law, when the latter was determined with a CJEU judgment.¹⁰⁸

Also, in the case of *Transportes Urbanos*¹⁰⁹, two actions were brought against the State: one following a declaration for unconstitutionality of a national law by the Constitutional Court of Spain, the other, initiated on grounds of incompatibility of a national law with EU law, declared as such by a judgment by the CJEU. After determining the similarities/ comparability between these two actions, the CJEU held that the principle of equivalence had been breached. This was due to a national provision which required the injured applicant to exhaust all the remedies (such as rectification/ annulment of the administrative decision which was based on the contested law), before claiming compensation from the State for the breach of EU law, whereas, this same condition was not required when the applicant was claiming

¹⁰⁵ Ibid, para 35.

¹⁰⁶ Case C-460/06 *Paquay* [2007] ECLI:EU:C:2007:601, para 52.

¹⁰⁷ Case C-147/01 *Weber's Wine World* [2003] ECLI:EU:C:2003:533, paras 104-108.

¹⁰⁸ See also for disadvantaged treatment cases: Case C-43/95, *Data Delecta Forsberg*, [1995] ECLI:EU:C:1996:357, also Case C-323/95, *Hayes* [1997] ECLI:EU:C:1997:169.

¹⁰⁹ Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39, paras 44-48.

compensation based on the unconstitutionality of a national law. What sufficed in the latter case was only a declaration for unconstitutionality delivered by the Spanish Constitutional Court.

In *Pontin*¹¹⁰, building upon the earlier judgement in *Levez*¹¹¹, the CJEU indicated how to assess the question of whether there is less favourable treatment: the national court must objectively verify, in the abstract, whether the rules at issue are similar, while taking into account the role played by those rules in the procedure as a whole, the conduct of that procedure and any special features of those rules. In this case, there was solely one action for the protection of the rights of pregnant workers, which was actually an action for nullity and reinstatement and whose time limit for initiation of the proceedings was 15 days. This was compared to the action for compensation for damage which was available to other workers (pregnant workers being prevented from introducing this action) where the time limit for bringing an action for damage was 30 days. In this case, the more convenient action (in terms of the time limit) was not provided to pregnant workers and consequently it was found that the principle of equivalence was breached.

In *Levez*, the issues were rather complicated.¹¹² In this case, Ms. Levez had suffered discrimination on grounds of sex in relation to payment. She brought an action for the recovery of arrears of remuneration reckoned from the date on which she commenced working for Jennings as her employer. By virtue of a rule of national law, the claimant's entitlement to arrears of remuneration for the breach of the principle of equal treatment was limited to a period of two years prior to the date on which the proceedings were instituted. The application of the national provision prevented her from recovering arrears for the period she had put forward. Once the infringement of the principle of minimum effectiveness was found to exist, the CJEU proceeded to examine the principle of equivalence with respect to the *alternative remedy* to which Ms. Levez was entitled before the County Court, namely an action for compensation for the damage suffered because her employer's deceit prevented her from bringing a claim under the Act. By referring to its established case law concerning the appraisal of the principle of equivalence¹¹³ and parameters taken into account while carrying out the exercise in these cases,¹¹⁴ the CJEU recalled the

¹¹⁰ Case C- 63/08 *Pontin* [2009] ECLI:EU:C:2009:666, para 45.

¹¹¹ Case C-326/96 *B.S. Levez* [1998] ECLI:EU:C:1998:577.

¹¹² *Ibid.*

¹¹³ Case C-231/96 *Edis* [1998] ECLI:EU:C:1998:401; Case C-261/95 *Rosalba Palmisani* [1997] ECLI:EU:C:1997:351.

¹¹⁴ 'The purpose and cause of the actions' and 'the purpose and essential characteristics of similar domestic actions' respectively.

conditions previously established in *Van Schijndel*¹¹⁵ in order to determine whether the conditions governing an EU law action were less favourable than those related to similar domestic actions. It stated in paragraph 44 of the *Levez* judgment that:

“Whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.”¹¹⁶

In the subsequent paragraphs of the judgment, the CJEU left it to the national courts to choose which of the following domestic actions proposed had to be taken as a “similar” one and in light of that action, to determine whether the conditions were less favourable. However, with respect to the assessment of the second requirement (comparability of conditions), the CJEU also provided certain guidelines, such as the appropriateness of considering whether the claimant of a similar domestic action could bring the claim before the Industrial Tribunal, which would be simpler and less costly and thus would lead to a breach of the equivalence principle and consequently a disapplication of the national time limit.¹¹⁷

Although the *Draemphael* case¹¹⁸ is usually used for the clarification of the principle of effective judicial protection, it is also instructive on the manner in which the CJEU approaches the requirement of equivalence.

In this case, the CJEU also adduced that a specific ceiling on the compensation for damage not exceeding three months’ earnings was not provided for in the other provisions of domestic civil and labour law, thus implying a violation of the requirement of equivalence in the treatment of similar national and EU law actions.¹¹⁹

¹¹⁵ Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441, para 19.

¹¹⁶ Case C -326/96, *B.S. Levez* [1998] ECLI:EU:C:1998:577, para 44.

¹¹⁷ See also the Opinion of A.G. Leger in Case C-326/96 *Levez* [1998] ECLI:EU:C:1998:220, para 26-78, where the expressions of ‘similar domestic actions’, ‘more favourable’ character of a similar domestic action as well as notions like ‘transversal’ and ‘vertical’ comparison are beautifully explained.

¹¹⁸ Case C-180/95 *Draehmpaehl* [1997] ECLI:EU:C:1997:208.

¹¹⁹ *Ibid*, para 28 and 29.

*Edis*¹²⁰ illustrates the CJEU viewpoint that Member States are not obliged to extend their most favourable procedural rules to EU law actions, as long as the less favourable conditions apply equally to the same type of national actions.

This case concerned an action brought by Edis against the Italian Ministry of Finance regarding a recovery of tax levied contrary to EU law. The national procedural provision for initiation of that kind of proceedings provided a time limit of three years which had expired, thus inducing Edis to claim that the principle of equivalence had been breached. Indeed, under the national law for the recovery of sums paid but not due between private persons, the time limit for instituting proceedings was ten years. However, the CJEU held that the national court was allowed to dismiss the action in issue, provided that the less favourable time limit of three years applied equally to national actions for repayment of *that type of* charges. In this case, the CJEU put the accent on the nature of the charges, which had to be the same in order for the time limits related to these proceedings to be comparable. Although more favourable rules were provided under the national law for the recovery of illegally levied charges between private persons, it was not required that they also apply to actions against the Ministry, since the charges were not the same.

The *IN.CO.GE* case¹²¹ is an interesting one as it raises the issue of the (non) existence of national tax, due to its incompatibility with EU law. In *IN.CO.GE*, the applicant, IN.CO.GE, initiated proceedings against the Ministry of Finance in Italy for the repayment of taxes that were levied illegally, i.e. contrary to an EU directive. The Ministry of Finance claimed that the applicant's entitlement to repayment was barred by the lapse of a three year time limit prescribed by national law for the initiation of this type of taxes. The national court asked the CJEU whether the tax was non-existent (because it was contrary to EU law) and consequently there was no relationship of a fiscal nature between the Ministry and IN.CO.GE. If the latter were true, the relationship would have been classified as one of a civil nature and would have fallen under the ordinary time limit of ten years in which case, the application would not have been time-barred.

There have also been specific problems in cases where a Member State introduced special legislation after the CJEU found that there was a breach of EU law.¹²² One of these was *Deville*.¹²³ After the CJEU had

¹²⁰ Case C-231/96 *Edilizia Industriale Siderurgica Srl (Edis)* [1998] ECLI:EU:C:1998:401, para 2.

¹²¹ Case C-10/97 to C-22/97 *IN.CO.GE. '90 and others* [1998] ECLI:EU:C:1998:498, para 27.

¹²² See Case C-309/85 *Barra* [1988] ECLI:EU:C:1988:42 discussed below under section 1.5 of this chapter.

¹²³ Case C-240/87 *Deville* [1988] ECLI:EU:C:1988:349. Since *Deville* the CJEU has made it plain in a whole series of cases that special (less favourable) rules introduced by Member States for certain European Union law claims

declared a (French) special motor vehicle tax contrary to Article 110 TFEU, the French legislature adopted certain measures in order to comply with the judgment. The provisions provided, inter alia, that individuals could obtain a refund of the tax unduly paid, but at the same time they also shortened the time limit within which the claims could be brought and thus reduced the possibility of recovering the taxes. In other words the claim, which was based on a Union law provision, was treated in a less favourable way than domestic claims of a similar nature.

The recent case of *Câmpean*¹²⁴, concerned a new national legislation that was adopted following a CJEU judgment that found that the taxes on pollution emissions were unlawful. This legislation was made specifically for the execution of judicial decisions concerning repayments of taxes levied contrary to EU law. The CJEU found that this type of legislation, which was aimed solely at EU law claims, was contrary to the principle of sincere cooperation.¹²⁵ *Câmpean* also raised the issue of whether the principle of equivalence was infringed. The CJEU left this issue to be resolved by the referring Romanian court and provided that court with instructions on the manner in which the fulfilment of this requirement should be assessed.¹²⁶

To sum up: after the establishment of a ‘similar domestic action’ it is necessary that there is ‘less favourable treatment of the subject’ in order to hold that the principle of equivalence has been breached.

The first problem which remains, however, is the fact that it is indeed difficult to assess what a ‘similar domestic action’ is. Next, even if a ‘similar action’ is found, it is cumbersome to determine which conditions are more favourable for the national claims or which conditions are less advantageous for the EU law claims. In this respect, one must delve into the examination of various issues, such as the different

cannot be upheld. See e.g. the more recent Case C-62/00 *Marks & Spencer* [2002] ECLI:EU:C:2002:435; Case C-147/01 *Weber's Wine World* [2003] ECLI:EU:C:2003:533.

¹²⁴ Case C-200/14 *Câmpean* [2016] ECLI:EU:C:2016:494.

¹²⁵ Ibid, para 40 and paras 43-44. Prior to this judgment, the CJEU confirmed that Member States may not adopt provisions that make the repayment of a tax held to be contrary to EU law by a CJEU judgment subject to conditions relating specifically to that tax which are less favourable than those which would otherwise be applied to that repayment of the tax. See Case C-147/01 *Weber's Wine World* [2003] ECLI:EU:C:2003:533, para 87. See also recent case C-288/14 *Ciup* [2016] ECLI:EU:C:2016:495, para 31. According to Wallerman the principle of sincere cooperation laid down in Article 4(3) TEU, also functions as a limit on procedural autonomy. See Wallerman 2016 (n 95), 342.

¹²⁶ See Case C-200/14 *Câmpean* [2016] ECLI:EU:C:2016:494, para 33. Other examples of cases in which the CJEU gives instructions are Case C-326/96 *Levez* [1998] ECLI:EU:C:1998:577; Case C-591/10 *Littlewoods Retail and Others* [2012] ECLI:EU:C:2012:478.

instances before which the claims can be brought, the complexity of the procedure or the stricter time limits within which the action must be brought, as well as to consider the issue of which action is less costly for the party.

1.5 The principle of minimum effectiveness

In the *Rewe* case¹²⁷, referred to above, the CJEU stated the following:

“In the absence of such measures of harmonization the right conferred by EU law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.”

It is accepted that as long as the national procedural rules do not make the exercise of the EU right virtually impossible or excessively difficult (one of the *Rewe* requirements), the principle of minimum effectiveness will be considered to be satisfied.

In *San Giorgio*¹²⁸, San Giorgio, an Italian firm who paid charges contrary to EU law, was faced with a national provision according to which the illegally levied charges could be reimbursed only if the plaintiff proved to the authorities that he had not passed these charges on the final consumers. It was only then that the reimbursement of illegally levied charges would have been in line with the principle of prohibition of unjust enrichment.

The CJEU accepted that this latter principle of law should be respected, but did not agree on the point of national law which required that the only acceptable proof that the importer (the plaintiff) had not passed on the charges to the final consumers was a documentary proof. According to the CJEU, this national requirement made virtually impossible the repayment of charges levied contrary to EU law, and this was especially true when the burden of proof was placed upon the plaintiff seeking the reimbursement of the charges in order to safeguard his substantive EU right.

In certain cases, the time limits for initiating proceedings for exercising EU rights to which the claimants were entitled under national law appeared to be incompatible with the requirement of the effective enforcement of these rights, due to the restrictions imposed by the national procedural provisions relating to their judicial protection before the national courts. Limitation periods for bringing an action against the

¹²⁷ Case C-33/76 *Rewe* [1976] ECLI:EU:C:1976:188, para 5.

¹²⁸ Case C-199/82 *San Giorgio.p.a.*, [1983] ECLI:EU:C:1983:318, para 14.

national authorities were found to be reasonable per se, but *specific circumstances of the case*, rendered their exercise virtually impossible or excessively difficult. Emblematic of this situation are the *Emmott*¹²⁹ and *Santex*¹³⁰ cases.

In the *Emmott* case, the specific circumstances were that Ms. Emmott was *misled* with respect to the proper time for the initiation of proceedings, whereas in the *Santex* case, the specific circumstances were the *creation of uncertainty* in the interpretation that was given to the relevant clause, which was removed only by adopting the exclusion decision which was contested. This delayed the initiation of proceedings. The final result in these cases was a restriction on the claimants to assert their rights before the national courts, depriving them of asserting their EU rights at all.

In *Emmott*, the behaviour of the social security authorities affected Ms. Emmott's right to rely on Directive 79/7 before the national court against the defaulting Member States, whereas in *Santex*, the tenderer was deprived, due to the unacceptable conduct of the contracting party in creating uncertainty as to the exact meaning of the relevant clause, of an opportunity to plead before a court the incompatibility of that interpretation with EU law.

Similarly, in *Levez*¹³¹ *deceit by the employer* regarding the amount of salary paid to a male predecessor of Ms. Levez caused her delay in bringing proceedings related to discrimination on grounds of sex in relation to pay and consequently deprived her of the full exercise of an EU right to which she was entitled on the basis of the Directive.¹³²

In *Magorrian*¹³³, a national procedural rule limited the plaintiff's right to be admitted to the occupational pension scheme to two years prior to the commencement of proceedings. This fundamentally violated Ms Magorrian's right to equal treatment with her male colleagues. In this case, it was found that she had been indirectly discriminated against on grounds of sex, following which she brought proceedings before the national court, relying on Article 119 EC in support of her claim for additional benefits on the basis of her length of service, calculated from 8 April 1976, the date of delivery of the CJEU's judgment in the *Defrenne* case.

¹²⁹ Case C-208/90 *Emmott* [1991] ECLI:EU:C:1991:333, para 20.

¹³⁰ Case C-327/00 *Santex* [2003] ECLI:EU:C:2003:109, para 57.

¹³¹ Case C-326/96, *B.S.Levez* [1998] ECLI:EU:C:1998:577.

¹³² *Ibid.* More thorough discussion of this case was provided in section 1.4 of this chapter.

¹³³ Case C-246/96 *Magorrian and Cunningham* [1997] ECLI:EU:C:1997:605.

Considering that Ms. Magorrian initiated the action to join an occupation pension scheme in 1992, she was restricted to obtain additional benefits, counting only from 1990 instead of 1976, the date on which the direct effect of Article 119 EC was established by the CJEU.

Although her right to retroactively join the occupational scheme did not restrict her right to access to court, the entire record of service completed by those concerned before the two years preceding the date of initiation of proceedings could not be taken into consideration.

The CJEU's reasoning in *Magorrian*, was reiterated in *Preston*¹³⁴, where the plaintiff questioned the compatibility of a national law according to which, in employment cases in which there was 'no umbrella contract', a period of six months for bringing proceedings on the grounds of equality started from the end of each contract of employment and not from the end of the employment. This placed the claimant in a position in which he/ she was deprived of the recognition of periods for pension entitlement purposes if he/ she failed to bring proceedings within that time limit. The CJEU ruled, by making a comparison with the *Magorrian* case (in which the objective of the proceedings was a right to the recognition of retroactive membership of a pension scheme with a view to receiving additional benefits), that in the *Preston* case, the aim of the proceedings was to obtain a basic pension. In light of those circumstances, the CJEU found that the national procedural rule ran counter to EU law.

Nevertheless, in other cases relating to an elapsed time limit for the initiation of proceedings for enforcing EU rights, the CJEU found that the national time limit was reasonable and thus compatible with the requirement of minimum effectiveness.¹³⁵

Another strand of cases in which a restriction on the judicial protection of EU rights made their exercise impossible in practice concerns circumstances under which, following a specific CJEU judgment on the interpretation of certain EU law provisions, a national legislator inserted national *procedural provisions specifically intended to reduce or deprive the right to a certain category of citizens who were basing their claims on EU law*.

This is illustrated in *Barra*¹³⁶. Following a CJEU judgment in *Gravier*, where it was held that a registration fee as a condition of access to vocational training imposed on the nationals of other Member States and not on Belgian nationals was contrary to Article 7 TEC, a Belgian legislator in the Barra case

¹³⁴ Case C-78/98 *Preston* [2000] ECLI:EU:C:2000:247.

¹³⁵ Case C-30/02 *Recheio - Cash & Carry* [2004] ECLI:EU:C:2004:373 and recently Case C-327/15 *TDC* [2016] ECLI:EU:C:2016:974.

¹³⁶ Case C-309/85 *Barra* [1988] ECLI:EU:C:1988:42, para 19.

adopted a Law on education which provided that a refund of illegally levied charges would be made only to those students – nationals of other Member States who had brought proceedings for reimbursement of this charge before the delivery of the *Gravier* judgment. According to the CJEU, this national provision actually deprived all the individuals who did not satisfy that condition, of the right to obtain repayment of unduly paid charges and consequently rendered the exercise of rights conferred by Article 7 TEC impossible in practice. The barrier to obtaining a specific remedy (restitution of illegally levied charges) made the exercise of the right to equal treatment impossible in practice.

The *Marks & Spencer* case¹³⁷, is almost identical to the previous case in terms of a retroactive introduction of new time limits for instituting an action for the refund of illegally levied charges (from six to three years), following a CJEU judgment. It was restated that shortening the limitation period for claims for the repayment of taxes was incompatible with the principle of minimum effectiveness if it rendered, wholly or in part, impossible in practice the exercise of EU rights.¹³⁸ In this case, it was also pointed out that the principle of legitimate expectation as an EU law principle was breached, since the legislative amendments retroactively deprived a taxable person of a right enjoyed prior to that amendment.

In *Test Claimants*¹³⁹, the CJEU reiterated that national legislation curtailing, retroactively and without any transitional arrangements, the period within which repayment could be sought of sums collected in breach of EU law, is incompatible with the principle of minimum effectiveness.

In *Câmpean*¹⁴⁰ the CJEU also suggested to the referring court that the principle of minimum effectiveness was infringed since the repayment of illegally levied EU taxes over five years made the execution of decisions contingent on the availability of funds received in respect of another tax, without the individual having the right to compel public authorities to fulfil their obligations if the applicant had not been able to do that voluntarily.

Regarding the application of the principle of minimum effectiveness in the *Rewe/ Comet* approach, it is noteworthy that the CJEU accepted that this principle was satisfied, even in cases in which, strictly

¹³⁷ Case C-62/00 *Marks & Spencer plc* [2002] ECLI:EU:C:2002:435.

¹³⁸ It is relevant to note that shortening limitation periods was not as such incompatible with the principle of effectiveness, as demonstrated by cases C-228/96 *Aprile* [1998] ECLI:EU:C:1998:544; and Case C-343/96 *Dilexport* [1999] ECLI:EU:C:1999:59.

¹³⁹ Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation* [2013] ECLI:EU:C:2013:834, para 38.

¹⁴⁰ Case C-200/14 *Câmpean* [2016] ECLI:EU:C:2016:494.

speaking, the national procedural rule made the exercise of an EU right impossible in practice, if the restriction was justified with certain general principles of law.

In the *Rewe* case, the Court found that the national time limit was acceptable, despite the fact that it made the exercise of the EU right impossible in practice, since the national time limit was reasonable and its existence was necessary for the application of the fundamental principle of legal certainty which protected both the tax payer and the administration concerned.¹⁴¹

However, as was discussed here above, in certain situations, the reasonable time limits which are acceptable in EU law could not be relied upon, if their breach had been a consequence of a certain conduct on the part of the Member State bodies or the actual defendant.

In general terms, it is worth underlining that certain general principles of law such as legal certainty, good administration of justice or prohibition of unjust enrichment can prevail over the safeguard of certain individual EU rights and consequently justify the national procedural rule which breaches the principle of minimum effectiveness. In these cases, the unfavourable procedural rule is applied despite its restrictiveness of the exercise of the EU right.

For the sake of illustration, the principle of *the prohibition of unjust enrichment* was most frequently invoked in cases concerning the repayment of charges, when the crucial issue was whether the passing on of illegally levied taxes to the final consumers had taken place. Thus, in *Hans Just*¹⁴², in which the plaintiff initiated proceedings for a refund of illegally levied charges, the CJEU allowed the national courts to take into consideration the fact that the principle of unjust enrichment would have been violated if the State had refunded these charges to the plaintiff, if the burden of charges had been passed on to traders or to consumers. Similarly, in *San Giorgio* as stated above, the CJEU accepted this principle as justification for the restrictive character of the national rule, in so far as it did not make the exercise of the right virtually impossible in practice.

Despite the CJEU's expressed deference to the principle of prohibition of unjust enrichment, it proved in several cases that the national rule precluding the repayment of illegally levied charges to traders, on the sole ground that the charges were passed on to third parties, without establishing what the concrete degree of unjust enrichment that repayment of the charge would entail for the trader, was considered by the CJEU as infringing the principle of minimum effectiveness. This was enunciated in *Weber's Wine*

¹⁴¹ See also in this regard Case C-94/100 *Roquette Frères SA* [2002] ECLI:EU:C:2011:674; Case C-228/96 *Aprile* [1998] ECLI:EU:C:1988:544; Case C-343/96 *Dilexport* [1999] ECLI:EU:C:1999:59.

¹⁴² Case C-68/79 *Hans Just* [1980] ECLI:EU:C:1980:57, para 4.

*World*¹⁴³ and reiterated in *Lady & Kid*¹⁴⁴. The CJEU went even further in this latter case, by stating that the refusal to reimburse illegally levied charges would be justified only if it were certain that the charges had been passed on to consumers directly and not if these charges had been set off in another way.

In *Ferwerda*¹⁴⁵, the CJEU explicitly held that EU law did not preclude the invoking of the national principle of legal certainty in the defendant's defence, even if this meant that EU law would be infringed. Consequently, the national authorities could not recover the sums granted in breach of EU law to traders for export purposes, due to the national principle of legal certainty. However, more recently the CJEU proved less lenient with arguments relating to the national principle of legal certainty.¹⁴⁶

In conclusion, there are a number of problems with the application of the principle of minimum effectiveness.

First, the difference between the expressions 'virtually impossible' and 'excessively difficult' is difficult to define and in my view not necessary, apart from the slightly different level of intensity. I do not think that it has an important impact on the application of the principle.

One might conclude that what truly matters for the principle of minimum effectiveness to be observed is difficult to establish.

For instance, what is to be considered as a 'reasonable time limit' for the initiation of proceedings, to satisfy the principle of minimum effectiveness? Some guidance in cases that will be analysed below could serve to answer this question, although in the end, it remains within the scope of discretion.¹⁴⁷

How can a national court decide whether the restrictive national procedural provision is justified by a certain general principle of law, i.e. when does that general principle prevail over the principle of effectiveness, and vice versa? The interrelation and interweaving of principles, as will be clearly demonstrated in paragraph 1.6 is a constant and never ending game, the result of which can never be predicted with certainty.

¹⁴³ Case C-147/01 *Weber's Wine World* [2003] ECLI:EU:C:2003:533, para 118.

¹⁴⁴ Case C-398/09 *Lady & Kid and others* [2011] ECLI:EU:C:2011:540.

¹⁴⁵ Case C-265/78 *H. Ferwerda BV* [1980] ECLI:EU:C:198066, para 21.

¹⁴⁶ Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECLI:EU:C:2008:165.

¹⁴⁷ See section 2, para 2.3.

Despite this, one can conclude that in most of the cases, the national procedural rule passed the requirement of minimum effectiveness and could be applied in the case at hand, thus implying that the application of the *Rewe* principles does not make a severe enough impact on the principle of national procedural autonomy to undermine it.

1.6 The interrelationship between the requirements of equivalence and effectiveness

The relationship between the principles of minimum effectiveness and equivalence, according to the *Rewe/ Comet* case law and the doctrine¹⁴⁸, is cumulative rather than alternative.

Certain authors claim that, due to the difficulties that the principle of equivalence entails, this principle was very rarely tackled and there is in fact a free standing test of ‘effectiveness’ only.¹⁴⁹

In my view, the cumulative relationship between these two principles should be questioned.¹⁵⁰

In cases in which the principle of equivalence is satisfied in a sense that restrictive national rules apply to both national and EU claims, it is still considered that the *Rewe* test has not been passed if the rule in question renders virtually impossible or excessively difficult the exercise of the EU right. In this respect, I would underline cases like *Rewe* and *San Giorgio*¹⁵¹. Similarly, in *Fuß*¹⁵², the CJEU held that the principle of equivalence was satisfied since the requirement of a prior application to the employer, made in good faith, appeared to apply to all actions brought by civil servants against their employer seeking reparation for loss or damage suffered, whether resulting from an infringement of national law or EU law,¹⁵³ but that the rule requiring the injured person to first seek recourse systematically to all the legal remedies available to them, even if that would give rise to excessive difficulties or could not be reasonably required of them, ran counter to the principle of effectiveness.¹⁵⁴

¹⁴⁸ Heukels et al 2002 (n 20), 115.

¹⁴⁹ In this regard, see Bobek 2011 (n 65).

¹⁵⁰ In a same line as Bobek, according to whom “the relationship between the two requirements is no conjunction, but (inclusive) disjunction. The national rule may be found incompatible in cases when it is either not equivalent or it is not efficient or it is not equivalent as well as not efficient.”

¹⁵¹ Case C-199/82 *San Giorgios.p.a.*, [1983] ECLI:EU:C:1983:318.

¹⁵² Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717.

¹⁵³ *Ibid*, para 73.

¹⁵⁴ *Ibid*, paras 77, 78.

On the other hand, in *Edis*¹⁵⁵, despite the fact that the national time limit was such as to render the EU rule impossible (ineffective), (i.e. it breached the principle of minimum effectiveness), the CJEU still found that the national rule could be applied since it was equally applied to national and EU claims. Therefore, in this case, the principle of equivalence was given precedence and cumulativity was not required.

Certain scholars believe that the appraisal and fulfilment of the principle of minimum effectiveness implies that the principle of equivalence does not matter¹⁵⁶, but this is contradicted by cases like *Levez*, *Stadt Wiener* and *Preston*.

*Levez*¹⁵⁷ is an important case in terms of the principles of effectiveness and equivalence. Substantially, in this case it was established that, despite the breach of the principle of minimum effectiveness which in itself (according to certain authors) would exclude the next logical step: appraisal of the principle of equivalence, the availability of another remedy for safeguarding the EU right would not infringe the principle of minimum effectiveness, as long as that remedy satisfies the principle of equivalence also. This task of appraisal was left to the national courts.

In essence, this case demonstrates that the breach of the principle of minimum effectiveness can be remedied, provided that another remedy is available to the plaintiff and this remedy also satisfies the requirement of equivalence.

In this respect, it is worth considering *Stadt Wiener Neustadt*¹⁵⁸, which concerned Directive 85/337 on the assessment of the effects of certain public and private projects and the possibility for a project to be exempted from the scope of the Directive with a specific act of national legislation under certain conditions. In this case, the CJEU stated that the principle of equivalence was satisfied, since EU law does not lay down any rules on the time limits for bringing proceedings against the consents issued in breach of the obligation required by the Directive, thus the time limit of three years set by the national law was acceptable.¹⁵⁹ However, held the CJEU, a national provision under which projects for which consent can no longer be subject to challenge before the courts, because of the expiry of the time limit laid down in national law, is not compatible with that Directive. The CJEU reiterated that the Member State is required to make good any harm caused by a failure to carry out an environmental impact assessment and that if a national law prevents any action to remedy this failure, before the time limit for bringing proceedings

¹⁵⁵ Case C-231/96 *Edis* [1998] ECLI:EU:C:1998:401.

¹⁵⁶ See Bobek 2011 (n 65).

¹⁵⁷ Case C-326/96 *Levez* [1998] ECLI:EU:C:1998:577.

¹⁵⁸ Case C-348/15 *Stadt Wiener Neustadt* [2016] ECLI:EU:C:2016:882.

¹⁵⁹ *Ibid*, para 42.

placed on the action for a remedy has expired, it would be incompatible with EU law for that reason as well.¹⁶⁰ In this case, the principle of equivalence was not breached, but the time limit for bringing actions which prevented the infringement of an EU obligation from being remedied, made the national provision incompatible with EU law.

In *Preston*, the CJEU found that that the principle of minimum effectiveness had been violated but this did not prevent it from then providing instructions to the national courts for appraising the compliance with the principle of equivalence. Although the minimum effectiveness requirement was not passed, the CJEU encouraged the national courts to appraise whether the principle of equivalence had been met. However, it is not clear from the instructions provided by the CJEU with regard to the appraisal of the principle of equivalence, what the consequences on the national rule would be if the national court found that the principle of equivalence was upheld.

Similarly, in *Palmisani*¹⁶¹, the CJEU concluded that the national rule could be applied since the principle of minimum effectiveness was satisfied, provided however that the principle of equivalence was also satisfied, an assignment that was conferred to the national courts.

In certain cases, like *Barra, Deville and Marks & Spencer*, mentioned above, both the principles of minimum effectiveness and equivalence were infringed by the introduction of a national law specifically created to make virtually impossible or excessively difficult the exercise of EU rights, specifically by excluding from its scope of application all national claims of that kind. A newly inserted time limit, in response to a CJEU judgment, reduced the possibility to initiate proceedings, which amounted to less favourable conditions for national citizens. Moreover, the national rules created in this manner made the enforcement of EU rights virtually impossible or excessively difficult. Thus, it was through direct discrimination against the EU law claims, which resulted in a manifest breach of the principle of equivalence, that the principle of effectiveness was also violated.

In *Impact*¹⁶² the question arose as to whether an EU law action, initiated before the ordinary courts to safeguard rights that flowed directly from a directive that was belatedly transposed into national law, was less advantageous than an action based on the protection of rights stemming from the national act transposing the directive which was to be brought before a specialised court, i.e. the Labour Court. The CJEU replied that the principle of effectiveness required that a specialised court which was called upon to

¹⁶⁰ Case C-348/15 *Stadt Wiener Neustadt* [2016] ECLI:EU:C:2016:882, para 48.

¹⁶¹ Case C-261/95 *Rosalba Palmisani* [1997] ECLI:EU:C:1997:351.

¹⁶² Case C -268/06 *Impact* [2006] ECLI:EU:C:2008:223, para 51.

hear and determine a claim based on the infringement of the national legislation transposing the Directive, must also have jurisdiction to hear and determine the applicant's claims arising directly from the directive, if the obligation for the applicant to bring a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by EU law.

In this case, the appraisal of the effectiveness test was directly related to the issue of satisfying the principle of effective judicial protection for the plaintiff. This followed from paragraphs 47 and 48 of the judgment, in which the CJEU expressed its stance that a failure to comply with the requirements of equivalence and effectiveness, which embody a general obligation on the Member States to ensure the judicial protection of individual rights under EU law, was liable to undermine the principle of effective judicial protection.

In certain cases, the principle of effectiveness was breached but the CJEU does not refer to the principle of equivalence at all or it leaves the issue to be resolved by the national court.¹⁶³

From the discussion taken as a whole about the principles of minimum effectiveness and equivalence, one can conclude that in most of the case law, the national procedural rule passed the requirements of minimum effectiveness and equivalence and could be applied, implying that the application of the 'Rewe principles' do not have a severe enough impact on the principle of national procedural autonomy to undermine it. This inference will be demonstrated in the paragraph below where certain specific national procedural and remedial rules will be analysed through the lens of the CJEU.

Also worth accentuating is that the 'balancing exercise' between the limitations of minimum effectiveness and equivalence on one hand and other principles of national law like legal certainty, legitimate expectations, prohibition of unjust enrichment, quicker settlement of disputes, rights of defence, etc, which justify national rules, on the other hand, started to manifest itself even in this first approach of the CJEU.¹⁶⁴

2. The principle of procedural autonomy: some specific applications in CJEU case law

2.1 Designation of courts

¹⁶³ Case C-536/11 *Donau Chemie and others* [2013] ECLI:EU:C:2013:366, para 39. See also Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation* [2013] ECLI:EU:C:2013:834, para 38; Case C-565/11 *Irimie* [2013] ECLI:EU:C:2013:250, para 26-27.

¹⁶⁴ The 'balancing approach' will be discussed in section 5 of Chapter 3.

Because the full effectiveness of EU law can be achieved only if individuals can assert their rights before the national courts, Member States are under an obligation to designate the competent court or tribunal to which individuals may apply in order to protect the rights that they derive from EU law.¹⁶⁵

According to the principle of national procedural autonomy, the matter of which court is competent to adjudicate on an EU law dispute is left to the discretion of the Member States. In any event, that court must have jurisdiction, must provide ‘direct and immediate protection’¹⁶⁶, and ‘effectively protect the rights in each case’.¹⁶⁷

2.2 *Locus standi* rules

When EU law confers rights on individuals, these are entitled to remedy the breach of these rights before the national courts. The first prerequisite for this is to have access to court.

Legal standing is the ability of an individual to initiate an action before a court, but the issue of who possesses this legal standing is differently resolved in different Member States.

In France, for instance, it suffices for the person to have ‘sufficient interest’ in a decision (“*doit justifier d’un intérêt suffisant lui donnant qualité pour agir*”)¹⁶⁸, whereas in Germany and Austria, an individual should prove that the provision(s) he invokes is/ are “intended to protect his individual interests”.¹⁶⁹ In the Netherlands, for access to court in cases of appeal against administrative decisions the individual has standing if he/ she has an interest that would be directly affected by the decision.¹⁷⁰

In any event, once EU law confers substantive rights on an individual, that individual has access to court according to national standing rules, provided that these rules do not render the exercise of rights impossible in practice, nor undermine the right to effective judicial protection.¹⁷¹

¹⁶⁵ K. Lenaerts, I. Maselis and K. Gutman. ‘National Procedural Autonomy, Equivalence and Effectiveness’ in K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford: Oxford University Press 2014) 108.

¹⁶⁶ Case C-13/68 *Salgoil* [1968] ECLI:EU:C:1968:54, para 462.

¹⁶⁷ Case C-179/84 *Bozzetti* [1985] ECLI:EU:C:1985:306, para 17.

¹⁶⁸ See Jans et al 2015 (n 63), 374.

¹⁶⁹ See Jans et al 2015 (n 63), 375.

¹⁷⁰ See Jans et al 2015 (n 63), 375. This was clearly demonstrated in the *Verholen* case that will be discussed below in this paragraph.

¹⁷¹ See Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and others* [1991] ECLI:EU:C:1991:314, para 24.

The ambit of an EU law provision in terms of its application to individuals (i.e. persons who have a legal interest to rely on it in order to obtain an individual EU right), is sometimes explicitly established in the EU acts themselves,¹⁷² and sometimes – most frequently – the persons who should have *locus standi* under the EU act, is determined through the interpretation of the *objective* and the *text* of that EU act.¹⁷³ As Ortlep and Widdershoven claim,¹⁷⁴ the individuals upon whom EU rights are conferred depends on the scope of the legislation, both in terms of the persons it protects and the protection extended. This must be determined on the basis of the *substance* of the legislation, in light of its object.

Thus, in *Verholen*¹⁷⁵, the plaintiff's spouse was harmed through the infringement of the Social Security Directive (Directive 79/7 or Equal treatment in statutory schemes of social security)¹⁷⁶, but her husband was the plaintiff before the national court as he was the only who could bring action for the couple in order to receive the benefit for the couple. His wife was discriminated against under that Directive, but she could not be a party to the proceedings and, as a result, her spouse also bore the consequences of that discrimination. The CJEU found that persons other than those falling within the personal scope of the Directive may also have a direct interest in ensuring the observance of the principle of non-discrimination.¹⁷⁷

In paragraph 24 of the ruling, the CJEU held that:

¹⁷² In certain Directives, there are provisions to indicate who is the beneficiary of the Directive or who falls under the scope of the Directive, for instance: “all persons who consider themselves wronged by sex discrimination” (Art 6 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40) or “any natural or legal persons must obtain information” (Art 3 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information repealing Council Directive 90/313/EEC [2003] OJ L41/26).

¹⁷³ Concerning the issue of *locus standi* see: P. Oliver; *Le droit communautaire et les voies de recours nationales* (Cahier du droit européen, 1992), 360; Prechal 1995 (n 34), 148; Jans et al 2015 (n 63), 374-383; Ruffert 1997 (n 42), 307-336; Eilmansberger 2004 (n 42), 1199–246; Van Gerven 1995 (n 42), 679–702.

¹⁷⁴ See Jans et al 2015 (n 63), 376.

¹⁷⁵ Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and others* [1991] ECLI:EU:C:1991:314.

¹⁷⁶ Council Directive 79/7/ EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24.

¹⁷⁷ Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and others* [1991] ECLI:EU:C:1991:314, paras 23-24 (with a case note by S. Prechal (1993) S.E.W.163-9).

“while it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection and the application of national legislation *cannot render virtually impossible the exercise of the rights conferred by Community law.*”

2.3 Time limits

In this paragraph I will refer to the nature of time limits, their justifications, the question of which time limits can be accepted as reasonable and, inevitably, the *Emmott* case with its relevance and limitations.

One can differentiate between a time limit for initiating proceedings and a time limit related to the retroactive effect of claims. In the cases that follow, it will be demonstrated that the differing nature of the aims which these national rules serve, is crucial to the CJEU’s adjudicating on their compatibility with EU law.

In the *Rewe case*¹⁷⁸, the CJEU confirmed that the time limit was reasonable¹⁷⁹ and justified this with the fundamental principle of legal certainty. Even though the time limit made the exercise of EU rights ‘virtually impossible’ or ‘excessively difficult’, the CJEU allowed that time limit, since it was justified by the principle of legal certainty.

Also, in the more recent *Iaia case*¹⁸⁰, the CJEU found that the elapse of the time limit for initiating proceedings was justified by the principle of legal certainty (on account of the infringement of the effectiveness of an EU rule).

*Steenhorst-Neerings*¹⁸¹ concerned a national provision which restricted the retroactive effect of claims for incapacity for work to one year before the claim was submitted. Ms. Steenhorst argued that Directive 79/7/EEC, concerning the prohibition of discrimination on grounds of sex in matters of social security, on which she had relied, was not transposed into the national law at the time she submitted her claim for these benefits. More precisely, she relied on Art. 4 (1) of the Directive, that lays down the right for a married women to claim benefits for incapacity for work under the same conditions as men.

¹⁷⁸ Recently confirmed in Joined Cases C-452/09 and C-452/09 *Iaia and others* [2011] ECLI:EU:C:2011:323, para 17.

¹⁷⁹ In this case the time limit was one month.

¹⁸⁰ Joined Cases C-452/09 and C-452/09 *Iaia and others* [2011] ECLI:EU:C:2011:323.

¹⁸¹ Case C-338/91 *Steenhorst-Neerings* [1993] ECLI:EU:C:1993:857.

The preliminary question referred to the CJEU concerned the compatibility of the national provision with Art. 4(1) of the Directive, with effect from 23 December 1984, if the Member State had not yet transposed that provision into national law.

Ms. Steenhorst-Neerings and the Commission's arguments were based on the CJEU's ruling in *Emmott*¹⁸², in which it was established that the time limits for proceedings brought by individuals seeking to avail themselves of their rights were applicable only when the Member State had properly transposed the directive at issue.

The CJEU made a distinction between the aims of the national rules in these two cases and explained it in paragraph 21 of *Steenhorst-Neerings*:

“It should be noted first that, unlike the rule of domestic law fixing time-limits for bringing actions, the rule described in the question referred for a preliminary ruling in this case does not affect the right of individuals to rely on Directive 79/7 in proceedings before the national courts against a defaulting Member State. It merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits.”

In paragraph 23 of the judgment, the CJEU referred to the aim of the rule restricting the retroactive effect of claims for benefits: “On the other hand, the aim of the rule restricting the retroactive effect of claims for benefits for incapacity for work is quite different from that of a rule imposing mandatory time-limits for bringing proceedings. As the Government of the Netherlands and the defendant in the main proceedings explained in their written observations, the first type of rule, of which examples can be found in other social security laws in the Netherlands, serves to ensure *sound administration*, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility and so that the degree of incapacity, which may well vary over time, may be fixed. It also reflects the need to *preserve financial balance* in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year.”

Thus, in *Steenhorst-Neerings*, the CJEU made a comparison with *Emmott*¹⁸³, in which the CJEU held that the time limit for initiating action for safeguarding rights which ensue from the Directive cannot begin to run until the proper transposition of the Directive into the national legal system of the Member State. In this specific case, the time limit of five years for the initiation of proceedings for Ms. Emmott had elapsed and it was calculated not from the period from which the Directive was supposed to be transposed in the

¹⁸² Case C-208/90 *Emmott* [1991] ECLI:EU:C:1991:333.

¹⁸³ *Ibid.*

national system (in 1984), but from a later date, which, consequently prevented her from claiming her rights.

The ‘estoppel principle’ was cited in *Emmott*.¹⁸⁴ According to this principle, Member States cannot rely on their own wrongdoing, i.e. they cannot prevent individuals from relying on a directive which has not yet been transposed into national law by invoking the elapsed time-limit for the initiation of proceedings. This principle was narrowed down in cases like *Fantask*¹⁸⁵ and *Johnson*¹⁸⁶. This situation leaves one to infer that the *Emmott* ruling remained an isolated case in that regard. In *Fantask*, the time limit to claim illegally levied charges had expired and the claimant asked the national court to disregard the national time limit by relying on the CJEU’s ruling in *Emmott*. The CJEU refused to do so, providing the following reasoning in paragraph 52:

“The reply to the seventh question must therefore be that EU law, as it now stands, does not prevent a Member State which has not properly transposed the Directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on EU law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by EU law.”

Thus, the *Fantask* case definitely established that the principle according to which the Member States can prevent a plaintiff from relying on a directive which was not properly transposed into the national law when the time limit for instituting the proceedings had elapsed, was not applicable in post-*Emmott* cases.¹⁸⁷

The ruling in *Emmott* was circumscribed to the *specific circumstances* of the case¹⁸⁸ which consisted of misleading conduct on the part of the authorities and depriving Emmott of any opportunity to enforce his rights before the national courts.

¹⁸⁴ It was also articulated in Case C-148/78 *Tullio Ratti* [1979] ECLI:EU:C:1979:110, para 23.

¹⁸⁵ Case C-188/95 *Fantask and others* [1997] ECLI:EU:C:1997:580.

¹⁸⁶ Case C-410/92 *Johnson* [1994] ECLI:EU:C:1994:401.

¹⁸⁷ This was also confirmed in *Spac* case, Case C-260/96, *Ministero delle Finanze / Spac* [1998] ECLI:EU:C:1998:402.

¹⁸⁸ Also more recently Case C-327/15 *TDC* [2016] ECLI:EU:C:2016:974, para 106 where the CJEU held that, “*in the absence of any particular circumstances* having been brought to the attention to the Court..., the principles of good faith, equivalence and effectiveness were not precluding the legislation such as that in the main proceedings,

Similarly, in *Santex*¹⁸⁹, due to the creation of uncertainty by the competent authority as to the correct interpretation of the decision, the period of 60 days (which was reasonable in principle) breached the principle of minimum effectiveness.

In *Edis*¹⁹⁰, the national time limit for instituting proceedings for the reimbursement of illegally levied charges was three months from the date of payment and this was accepted by the CJEU as reasonable. However, in the *Danqua* case, mentioned above, the time limit of 15 working days following a rejection by the competent authority to obtain asylum, was considered by the CJEU to be especially short. In this case, while making reference to *Pontin*¹⁹¹, the CJEU indicated very clearly which factors have to be taken into account when assessing whether a time limit is reasonable or not. These are: the significance of the decisions to be taken for the parties concerned, the complexities of the procedures and of the legislation to be applied, the number of people who may be affected and any other public or private interests which must be taken into consideration.¹⁹² Moreover, the short time limit was not justified by elements such as insurance of proper conduct of the procedure for examining an application for asylum status.¹⁹³

An interesting situation can be found in *Danske Slagterier*¹⁹⁴, where the CJEU initially reiterated its stance in the *Aprile* and *Marks and Spencer* cases, that a national limitation period of three years appeared to be reasonable and in line with the principle of legal certainty, but seemed to hesitate about whether the principle of minimum effectiveness was still not breached as a result of the fact that the limitation period was not fixed in advance.¹⁹⁵ Still, in the afore-mentioned *Test Claimants* case, the CJEU held that the principle of minimum effectiveness was breached when the new legislation was without any transitional

which made the submission of application for compensation for the loss..., subject to a time limit of three months running from the expiry of the period within which that operator is required to send an annual report to the competent national authority, provided that that time limit is no less favourable than that provided for in national law for an analogous application and that it is not such as to render impossible in practice or excessively difficult the exercise of rights conferred on undertakings by the Universal Service Directive, which is for the referring court to ascertain.”

¹⁸⁹ Case C-327/00 *Santex* [2003] ECLI:EU:C:2003:109, para 61; See also Case C-326/96 *Levez* [1998] ECLI:EU:C:1998:577.

¹⁹⁰ Case C-231/96 *Edis* [1998] ECLI:EU:C:1998:401 and Case C-261/95, *Rosalba Palmisani* [1997] ECLI:EU:C:1997:351.

¹⁹¹ Case C-63/08 *Pontin* [2009] ECLI:EU:C:2009:666, para 48.

¹⁹² Case C-429/15 *Danqua* [2016] ECLI:EU:C:2016:789, para 44-48.

¹⁹³ *Ibid*, para 46.

¹⁹⁴ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178.

¹⁹⁵ *Ibid*, para 32-33.

arrangements and had the effect of depriving individuals of their right to repayment or allowing them too short a period for asserting that right.¹⁹⁶

As stated, the *Iaia* case, where the principle of legal certainty was underscored, reaffirmed the CJEU's finding that the time limit for instituting proceedings does not start from the proper transposition of a Directive (as was held in *Emmott*) nor from the time the CJEU found that there was a breach of EU law (as was held in *Recheio*).

In *Uniplex*¹⁹⁷, the CJEU stated that the “the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement”.

Regarding the application of the national time limits (both time limits for instituting proceedings and time limits for the retroactive claiming of benefits) by the national courts, one can conclude that, save in isolated cases, the CJEU has expressed a deference to these national procedural rules and found national time limits to be reasonable and in accordance with the principle of minimum effectiveness. In this type of national rule, the justification of the national time limits with principles like legal certainty, sound administration, perseverance of financial balance, certainty and predictability, strikingly comes to the fore.

2.4 Reopening final decisions that are incompatible with EU law

Although not always strictly speaking a matter of equivalence and minimum effectiveness, national procedural autonomy can also be limited by EU law as far as *res judicata* is concerned.

The principle of *res judicata* is an expression of the principle of legal certainty and implies that, once a court decision has become final by the exhaustion of all the available remedies or after the expiry of the time limits provided for initiating remedies, it can no longer be called in question. Respecting the principle of *res judicata* allows stability of law and the sound administration of justice. For this reason,

¹⁹⁶ Case C-362/12 *Test Claimants in the Franked Investment Income Group Litigation* [2013] ECLI:EU:C:2013:834, para 38.

¹⁹⁷ Case C-406/08 *Uniplex* [2010] ECLI:EU:C:2010:45, para 35.

this principle is entrenched in EU law and even in the national cases in which the final decision was contrary to EU law, the CJEU gave precedence to this principle.¹⁹⁸

In *Köbler*¹⁹⁹, the reparation of the damage incurred by a wrongful judicial decision did not consist of the court's judgment being overturned. The case concerned a Member State that was liable for infringement of EU law and consequently was obliged to make good the damage sustained by a party, due to the national decision delivered by the last instance court which had adjudicated in breach of EU law. Thus, the party whose EU rights were impaired by the delivery of the national decision was allowed to claim damages on those grounds, but this did not entail a declaration of invalidity of the status of *res judicata* of the judicial decision.²⁰⁰

Also, in *Impresa Pizzarotti*²⁰¹, where, according to the national law, the operative part of one of its judgments could have been supplemented by implementation decisions (something that was called 'progressively formed *res judicata*'), the CJEU gave the referring court discretion to make use of the national procedure by observing the principles of equivalence and effectiveness.²⁰²

In *Tarsia*,²⁰³ the CJEU stated that the principles of equivalence and effectiveness did not preclude a national provision according to which a final judgment delivered in a *civil* procedure and contrary to EU law could not be revised, whereas, a national judgment covered by *res judicata*, delivered in an *administrative* procedure and also contrary to EU law, could be revised.

Nevertheless, on certain occasions, the CJEU found that the principle of *res judicata* should be disregarded if the principles of equivalence and/ or minimum effectiveness were breached. For instance, in *Fallimento Olimpiclub*²⁰⁴, it found that a national decision covered by *res judicata* created extensive obstacles to the effective application of the Community rules on VAT and could not be reasonably justified with the principle of legal certainty.

¹⁹⁸ See, for instance Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513, Case C-234/04 *Kapferer* [2006] ECLI:EU:C:2006:178, para 21. Case C-2/06 *Kempter* [2008] ECLI:EU:C:2008:78; Case C-126/97 *Eco Swiss China* [1999] ECLI:EU:C:1999:269.

¹⁹⁹ Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513.

²⁰⁰ See paragraph 39 of the ruling. This case will be discussed in more detail in Chapter 4 section 4 on State liability

²⁰¹ Case C-213/13 *Impresa Pizzarotti*, [2014] ECLI:EU:C:2014:2067.

²⁰² *Ibid*, para 54.

²⁰³ Case C-69/14 *Târșia*, [2015] ECLI:EU:C:2015:662, para 41.

²⁰⁴ Case C-2/08 *Fallimento Olimpiclub* [2009] ECLI:EU:C:2009:506, para 31.

In *Finanmadrid*²⁰⁵, the Spanish rules at issue in the main proceedings ran counter to the principle of minimum effectiveness, in so far as the court's ruling on the enforcement of an order for payment was prevented from assessing its own motion on whether the terms of a contract were unfair. On other occasions, when the national law provided for exceptions to *res judicata* for national claims, the same should have been applied for EU law claims, in order for both conditions to be satisfied.²⁰⁶

In two cases related to State aid, the principle of effectiveness of EU law prevailed over the principle of *res judicata*. In the first one, *Lucchini*²⁰⁷, EU law precluded the application of a provision of national law which sought to lay down the principle of *res judicata*. According to the CJEU, this was a highly specific situation in which the matters at issue were principles governing the division of power between the Member States and the EU. In the second case, *Klausner*²⁰⁸, the CJEU held that the principle of control of State aid could not be justified either by the principle of *res judicata* or by the principle of legal certainty.

Regarding the reopening of final administrative decisions delivered contrary to EU law, it was stated in *Kuhne & Heitz*²⁰⁹ that the principle of equivalence has to be emphasised. It concerned a situation in which the Dutch customs bodies had imposed custom duties on Kuhne & Heitz for a certain period of time. Following a reclassification of the goods, it was found that these were levied contrary to EU law and consequently Kuhne & Heitz requested a reimbursement from the Customs office. Their application for refund was dismissed both by the administrative body and by the national court. However, in 1994, the CJEU delivered a judgment on the interpretation of the customs tariff which was favourable to the plaintiff, who, on those grounds (infringement of EU law) applied once again for the reimbursement of charges that were previously taken by the Customs bodies.

The national court referred to the CJEU regarding the obligation on the part of the administrative body, on the basis of Article 10 EC, to review final the administrative decision, in circumstances in which:

- under the national law, it had the power to reopen that decision;
- the administrative decision in question had become final as a result of a judgment of a national court ruling at final instance;

²⁰⁵ Case C-49/14 *Finanmadrid EFC* [2015] ECLI:EU:C:2016:98, para 54.

²⁰⁶ See Case C-213/13 *Impresa Pizzarotti* [2014] ECLI:EU:C:2014:20167, para 62. Also, Case C-234/04, *Kapferer Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECLI:EU:C:2006:178.

²⁰⁷ Case C-119/05 *Lucchini* [2007] ECLI:EU:C:2007:434.

²⁰⁸ Case C-505/14 *Klausner Holz Niedersachsen* [2015] ECLI:EU:C:2015:742, para 45.

²⁰⁹ C-453/00 *Kühne & Heitz* [2004] ECLI:EU:C:2003:350.

- that judgment was, in light of a decision given by the court subsequent to it, based on a misinterpretation of EU law which had been adopted without a question being referred to the CJEU for a preliminary ruling under the third paragraph of Article 234 EC; and
- the person concerned had complained to the administrative body immediately after becoming aware of that decision of the court.

While the national court referred to the possibility of ‘creating an administrative chaos’ if the final decisions were to be amended following subsequent case law (paragraph 24), it also pointed out that under Dutch law, it was possible for subsequent case law in certain circumstances to have effect in cases in which the legal remedies have been exhausted.

In this case, the CJEU stated that the principle of loyal cooperation stemming from Article 10 EC (now Article 4(3) TEU), obliged national administrative bodies to review final administrative decisions taken in breach of EU law, only when they disposed of the power to do so under national law.²¹⁰

The CJEU reiterated that *legal certainty* was one of the general principles of Community law and that finality of administrative decisions contributed to safeguarding this principle. Therefore, Community law did not require, in principle, that administrative bodies were placed under an obligation to reopen an administrative decision which had become final in that way.

In *Byankov*²¹¹, the administrative organ was obliged to review the final administrative act which entailed a prohibition of the exercise of the EU right to free movement. In this case, the infringement of the EU right was not justifiable with a reason such as legal certainty, and consequently a breach of the principle of minimum effectiveness and Article 4(3) TEU was found.²¹² The CJEU held that a restriction on the right for EU citizens to move freely (Art 21 (1) TFEU) was only allowed under the circumstances provided for in Art 27 of Directive 2004/38, namely a serious and genuine threat of endangering public policy, public security or public health. Moreover, the CJEU emphasized that the decision prohibiting Mr Byankov to leave the country had been adopted for an unlimited period and produced effects for eternity. In these circumstances, legal certainty could not justify the non-revocation of the decision.

²¹⁰ This judgment could also be considered in the context of the CJEU’s concern about the fact that the last instance court did not make a preliminary reference to it under Art. 267 TFEU, the consequence of which was a misinterpretation of the EU law by the last instance national court.

²¹¹ Case C- 249/11 *Byankov* [2012] ECLI:EU:C:2012:608.

²¹² *Ibid*, para 81.

Consequently, it found that the national legislation allowing the impediment of this right when the person owed a debt, was considered to be an economic objective and thus did not fall within the ambit of the derogations prescribed under the Directive.

Despite the fact that Bulgarian rules banned the reopening of the final administrative act, national administrative authorities were obliged to reopen the procedure following amended factual and legal circumstances. Still, it needs to be underlined that the EU law does not, in principle require that an administrative body be forced to reopen an administrative decision which has become final.²¹³ Nevertheless, the CJEU has held that particular circumstances may require a national administrative body to review an administrative decision that has become final, in order to strike a balance between the requirement for legal certainty and the requirement for legality under EU law.²¹⁴

2.5 Evidential rules and burden of proof

In line with the principle of national autonomy, in the absence of relevant rules of EU law, the rules of evidence are governed by the national law, provided that they satisfy the principles of minimum effectiveness and equivalence.

The cases that will be considered below demonstrate that on certain occasions the *Rewe* principles were respected, whereas on others, the burden of proof ran counter to these principles. This is mainly in cases where importers, who were required to pay certain taxes contrary to EU law, claimed reimbursement from the State. The problem arises when these charges are passed on to third parties (final consumers) and a possible refund to the importers of the illegally levied charges can result in their unjust enrichment.²¹⁵ In order for this principle of prohibition of unjust enrichment to be observed, the individuals who claim the refund must prove that the charges were not passed on to third parties. However, this type of requirement might sometimes turn out to be contrary to the principle of minimum effectiveness.

²¹³ See Case C-2/06 *Kempter* [2008] ECLI:EU:C:2008:78, para 37.

²¹⁴ Case C- 249/11 *Byankov* [2012] ECLI:EU:C:2012:608, para 77.

²¹⁵ The prohibition of unjust enrichment by paying the money back to individuals who later passed these charges or levies to third parties, was enunciated in Case C-68/79 *Hans Just I/ S v. Danish Ministry for Fiscal Affairs* [1980] ECLI:EU:C:1980:57 and Case C- 2/94 *Denkavit Internationaal and others* [1996] ECLI:EU:C:1996:229.

Thus, it was stated in *San Giorgio*²¹⁶, that if the only proof that the charges were not passed on to third parties was a documentary proof, it was considered as a breach of the principle of practical exercise of a right. In *Weber's Wine World*²¹⁷, it was held that the sole presumption that the charges were passed on to third parties was treated as contrary to the principle of minimum effectiveness. In *Lady & Kid*²¹⁸, the CJEU stated that the refusal to reimburse illegally levied charges would be justified only where it was certain that the charges had been passed on to consumers directly and not in case where these charges were set off in another way.

In *Donau Chemie*²¹⁹ the principle of effectiveness was applied in relation to a national procedural rule which made the access for third parties to documents available in cartel proceedings subject to the consent of the all parties in the cartel proceedings. In that case Donau Chemie and others had been fined for the establishment of a cartel in the market for the wholesale distribution of printing chemicals. When a third party requested access to the documents of the cartel proceedings on the basis that they claimed to have suffered damages because of the cartel, the national court refused to provide this third party with the documents, on the grounds that not all parties in the cartel proceedings had consented to granting access to the documents. Under national law this rule applied even if the third party demonstrated a legitimate interest in accessing the documents.

The referring court doubted whether this national rule complied with EU law, and decided to refer questions to the CJEU. The CJEU held that the principle of effectiveness precluded a national procedural rule which did not offer the domestic court any opportunity to weigh the interests in favour of and against the disclosure of the documents from the cartel proceedings. With respect to the interests that needed to be included in undertaking this balancing exercise, the CJEU indicated that the right to compensation of the parties suffering damage was an example of an interest militating in favour of disclosure, whilst the right to the protection of professional secrecy or business secrecy was an interest weighing against disclosure.

In the field of (non) discrimination between men and women, there are a couple of cases in which the burden of proof of the discrimination had to fall on the employer in order for the principle of minimum effectiveness to be observed. Nevertheless, one must observe that the burden of proof is also immanent in

²¹⁶ Case C-199/82 *San Giorgio* [1983] ECLI:EU:C:1983:318, para 14. The same was reiterated in Case C-343/96 *Dilexport* [1999] ECLI:EU:C:1999:59, para 48.

²¹⁷ Case C-147/01 *Weber's Wine World*, [2003] ECLI:EU:C:2003:533, para 113.

²¹⁸ Case C-398/09 *Lady & Kid and others* [2011] ECLI:EU:C:2011:540, para 26.

²¹⁹ Case C-536/11 *Donau Chemie and others* [2013] ECLI:EU:C:2013:366.

the discrimination tests. This happened in *Danfoss*²²⁰, where the burden of proof that the plaintiff was not discriminated against in the matter of wages, fell to the employer. Similarly, in *Enderby*²²¹ the burden of proof that the plaintiff was not discriminated against had to shift and thus, fell to the employer.²²²

2.6 Rules on interest

In *Metallgesellschaft*²²³, the CJEU held that it is for the national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated. In the case of *Metallgesellschaft*, the interest covering the loss represented the ‘reimbursement’ of what was erroneously paid. What is important is that the compensation for loss cannot leave out factors such as effluxion of time which may in fact reduce its value.²²⁴ The CJEU stated that the interest constituted an essential component of compensation and consequently it could not be compared to payment of interest in arrears of benefits, something that was claimed in the *Sutton* case.²²⁵ Regarding the issue of whether the principal sum must bear ‘simple interest’, ‘compound interest’ or another type of interest, the CJEU left this problem to the court to solve by observing the principles of effectiveness and equivalence.²²⁶

Still, the CJEU rules in *Irimie*²²⁷ that a national rule limiting the interest to that accrued from the day following the date of the claim for repayment of the tax unduly levied breached the principle of effectiveness.

One can conclude that in the area of interest on compensation, the Member States enjoy a wide leeway as to the type and calculation of the interest, but, in principle, interest must be provided for.

2.7 Application *ex officio*

²²⁰ Case C-109/88 *Danfoss* [1989] ECLI:EU:C:1989:383.

²²¹ Case C-127/92 *Enderby* [1993] ECLI:EU:C:1993:859.

²²² See also Case C-180/95 *Draehmpaehl* [1997] ECLI:EU:C:1997:208, in which the CJEU held that it is for the employer to adduce proof that the applicant would not have obtained the vacant position even if there had been no discrimination.

²²³ Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECLI:EU:C:2001:134, para 86.

²²⁴ Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335, para 31; Case C-63/01 *Evans* [2003] ECLI:EU:C:2003:650, para 68.

²²⁵ Case C-66/95 *Sutton* [1997] ECLI:EU:C:1997:207, paras 23 and 25.

²²⁶ Case C-591/10 *Littlewoods Retail and others* [2012] ECLI:EU:C:2012:478, para 34.

²²⁷ Case C-565/11 *Irimie* [2013] ECLI:EU:C:2013:250, paras 26-29.

The EU law and in particular the principles of equivalence and effectiveness have also impact on application of EU law by national judges on their own motion but for reason of a very close link of this topic with the issue of the ‘balancing approach’ I am going to discuss the *ex officio* application in section 5 of Chapter 3.

3. The principle of procedural autonomy: doctrinal debates

The question of the existence of ‘national procedural autonomy’ of Member States has been thoroughly treated by many scholars, leading to the a broad spectrum of standpoints, ranging from the acceptance and recognition of national procedural autonomy of the Member States in the field of protection of EU rights before the different organs of the Member States to even a denial of its very existence. Somewhere in between are the majority of the scholars, who regard this principle as still existent albeit restricted to some extent.

To better understand these opposing stances, one can distinguish between *absolute* national procedural autonomy and *relative* national procedural autonomy. The former notion relates to an absolute discretion for the Member States’ national courts to consider individual EU rights. The latter is understood as autonomy as it is conceived by the CJEU and expressed through its *Rewe/ Comet* case law, implying necessary observance of the principles of equivalence and minimum effectiveness on the part of the national courts before which EU rights are vindicated.

It is exactly the level and intensity of the CJEU’s intervention in national procedural and remedial rules applied by the national courts which determines differing scholars’ views as to the extent of national procedural autonomy for Member States.

Thus, Claes considers that national procedural autonomy is the leading principle, while the requirements of equivalence and minimum effectiveness are merely ‘corrections’ to this autonomy when its application by national courts prevents the individuals’ rights from being effectively safeguarded.²²⁸

Similarly, Manin regards this autonomy as simply ‘framed’ for the purpose of the effectiveness of EC law.²²⁹

Heukels and Tib conclude that the *Rewe/ Comet* requirements applied by the Court, introduce a kind of minimum harmonisation of national procedural laws (negative convergence) “without interfering

²²⁸ Claes et al (n 20), 133.

²²⁹ P. Manin, *L’Union Européenne: institutions, ordre juridique, contentieux* (Paris: Pedone 2005) 510.

unnecessarily with national procedural autonomy”,²³⁰ whereas Eliantonio, considers the Court’s interventions into national remedies as the ‘shaping’ of national remedial law for the sake of ensuring the adequate protection of rights stemming from EU law.²³¹

The “*Rewe* case with its requirements, *did not modify the classical national playground*” in the words of Curtin and Mortelmans, but it simply made national law applicable to EU law cases.²³² These authors place this case law in the *second phase* of the CJEU’s case law, which takes care of Member States’ procedural autonomy.²³³ At this point, I would like to underline that Curtin and Mortelmans use terms like phases and periods, which is clearly different from my use of ‘approaches’, which are unrelated to time, but are rather a manifestation of different interactions between the legal principles.

Prechal admits that the Court “curtailed” national discretion by insisting on the observance of the two minimum requirements which national procedural law has to satisfy, without going as far as to call into question the existence of the principle of national procedural autonomy. On the contrary, this author is inclined towards the stance that national procedural autonomy is the main rule, and the principle of effectiveness is not an overriding principle.²³⁴

According to Lenaerts, Maselis and Gutman, “since the Union does not have procedural law or law governing sanctions of its own, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights.”²³⁵

²³⁰ Heukels et al 2002 (n 20).

²³¹ Eliantonio 2009 (n 77), 5.

²³² Curtin et al 1994 (n 78).

²³³ Ibid, 432 According to Curtin and Mortelmans, the first phase of the case law is related to the economic goals of the Community (*Van Gend en Loos*), the second phase is concerned with remedies (*Rewe*, *Greek fraud* case) and the third phase is illustrative of the CJEU’s intention to find solutions for the lack of “effet utile de l’effet direct” (*Heylens*, *Emmott*, *Costanzo*, *Francovich*, *Foto – Frost* cases).

²³⁴ Prechal 1995 (n 34), 173. According to Prechal and Widdershoven, “national procedural autonomy – and for that matter national remedial autonomy – is still the leading principle that governs the application of Union law in national courts.” See S. Prechal and R. Widdershoven, ‘Effectiveness and Effective Judicial Protection: a Poorly Articulated Relationship’, in: T. Baumé (eds), *Today’s Multi-layered Legal Order: Current Issues and Perspectives* (Zutphen: Paris Legal Publishers 2011) 1.

²³⁵ Lenaerts et al 2014 (n 165), 108.

Wallerman claims that “as long as the minimum requirements are complied with, Member States remain free to legislate as they wish”.²³⁶

Dougan claims that (in the early period; until the mid-1980s), the domestic standard of judicial protection remained the rule, and that Community interference proved to be an ill-defined and rarely practised exception, despite the creation of new tools for scrutinising national remedies and procedural rules in *Rewe/ Comet*.²³⁷

On the other hand, as stated above, there are scholars who deny the existence of the principle of national procedural autonomy. Hofstötter argues that the CJEU has encroached on the concept of national procedural autonomy in many ways, thus taking away much of its substance.²³⁸ In the same line of reasoning, this author supports the propositions put forward by Barav, who considers the CJEU’s insistence on enforcing EU law through national rules of procedure as “disingenuous”.²³⁹

Bobek claims that there is no such thing as ‘procedural autonomy’ of Member States, taking as its starting point the definition of autonomy as the “ability to act and make decisions without being controlled by anyone else”.²⁴⁰ According to him, the usage of the term ‘autonomy’ in the EU law field should imply an absence of any EU law constraints as well as completely free actions by the Member States, uncontrolled by the CJEU. He considers that there are no such areas where the Member States are truly free to employ their national mechanisms (procedures and legal remedies) for the protection of EU rights, since, even in the areas where the European legislature is not competent to ‘harmonise’, the CJEU imposes its dual requirement of equivalence/ minimum effectiveness on the national courts, thus infringing their autonomous actions.

According to these authors, procedural autonomy is seen as an absolute and entirely free disposal of national courts with regard to national actions and remedies for the sake of the protection of EU rights. CJEU interventions through its case law, in terms of providing instructions to national courts which require more or less strict application on the part of the CJEU of the twin principles of minimum

²³⁶ Wallerman 2016 (n 95), 342.

²³⁷ See Dougan 2011 (n 17), 412.

²³⁸ Hofstötter 2005 (n 37), 22.

²³⁹ A. Barav, ‘Omnipotent Courts’ in Curtin et al 1994 (n 78), who refers to the principle as ‘defunct’ and Keville (C. Keville, “The principle of effectiveness and the development of a system of remedies at European Community law” in M.C. Lucey and C.Keville (eds), *Irish Perspectives on EU law* (Dublin, Round Hall 2003).

²⁴⁰ Bobek 2011 (n 65), 12.

effectiveness and equivalence, as well as the principle of effective judicial protection, amount to the non-existence of any national procedural autonomy of the Member States.

Kakouris' view that there is no national procedural autonomy of the Member States²⁴¹ flows from his argument that the EU has a general competence to harmonise procedural law, and in this regard, Member States' competence to apply their procedural law is temporary and dependent on the will of the EU legislator.

One can infer that the terms 'existence', 'eclipse', 'curtailing' or 'non-existence' of national procedural autonomy depend on the definition of the very principle. Thus, if one regards procedural autonomy in its absolute sense: completely unfettered discretion of the Member States in safeguarding EU rights, this principle would be considered as non-existent, since it is clear that both the Council (through the legislation of 'harmonised' procedural law) and the CJEU (through the imposition of the *Rewe* requirements) do affect the national procedural and remedial law of the Member States.

If, on the other hand, the principle of national procedural autonomy is considered in a relative sense, confined by the double requirements of equivalence and minimum effectiveness enunciated in the *Rewe/Comet* judgments, and thus corresponds to the CJEU's view on national procedural autonomy, one can infer that this principle does exist.

It is an undeniable fact that the CJEU intervened through its judge-made rules of equivalence and minimum effectiveness in order to moderate inequalities in the protection of EU rights generated by the usage of procedures and remedies which differ from one Member State to another, leading to disparity in the level of protection of those rights.

It is a separate issue to ascertain whether the CJEU possessed a proper legal basis to broaden the application of these principles to the extent of creating completely new remedies at EU level which had to be applied in the national context,²⁴² and whether it did not exceed the ambit of its competences to interpret solely EU law and not the national law of the Member States, which it did through an assessment of the 'specific circumstances' of the cases that were pending to be adjudicated by the national courts and were referred to the CJEU.²⁴³

²⁴¹ Kakouris 1997 (n 65).

²⁴² This will be a subject of the following Chapter.

²⁴³ The problem of 'predictability' as to the technique the CJEU uses in the balancing exercise of the principle of effectiveness of EU law with the 'rule of reason' put forward by the national legal systems, will be addressed in the third chapter.

In my opinion, the principle of procedural autonomy of the Member States is to be interpreted as a discretion of the Member States to choose the *manner in which EU rights are protected*, thus comprising the designation of competent courts, the selection of actions at law, procedural rules and remedies in general, while, at the same time being obliged to observe the requirements created and developed by the CJEU.

Considered in this light of *relativity*, when embracing ‘corrections’ by the CJEU, Member States are still free to a great extent to apply domestic procedural and remedial rules in order to ensure the protection of EU rights which individuals assert before the national courts, a finding that I have attempted to demonstrate through my analysis of the CJEU’s case law treating different types of procedural rules.

As to the advantages and disadvantages of the observance of the principle of procedural autonomy (on the part of the CJEU), these shall be considered in the spirit of the separation of the notions of *absolute* national procedural autonomy and *relative* national procedural autonomy as set out above.

Both benefits and deficiencies of this principle concern not only the position and actions of the CJEU and national courts, but also (and arguably, mostly), EU citizens, since it is intimately linked to the level of protection of their EU rights.

Advantages of the application of the principle of procedural autonomy, understood in an *absolute* sense, are in fact mostly beneficial to the national courts, for example, because they are already familiar with national procedures and remedies, leading to an the expeditious enforcement of EU rights.²⁴⁴

Equally, citizens, seeking enforcement of their EU rights are also expected to be acquainted with procedural and remedial rules within their domestic legal order to avoid any legal uncertainty. In these circumstances, there is no ‘risk of reverse discrimination’ which is typical in a constellation in which national courts are obliged to use double standards for the protection of the same type of rights, depending on the origin of these rights.

However, dependence on the solutions laid down by the national legal systems of the Member States for the enforcement of EU rights engenders different levels of protection of rights with the same content. Due to the differing procedural and remedial rules provided for in the legal orders of the Member States, as well as the diverging competences of the national courts entitled to protect EU rights, individuals who rely on the same EU law provisions will be unequally protected in different Member States, which severely impedes the principle of uniform application of EU law and its *effet utile*.

²⁴⁴ The same arguments are put forward by Smith 1999 (n 34), 291; Prechal 1995 (n 34), 134.

From the perspective of *relative* procedural autonomy, according to Lenaerts, it was exactly through these two constraints that the CJEU defined the duty of national courts, placed upon them by Article 4 (3) TFEU (ex Article 10 TEC), to ensure the ‘full effectiveness’ of EU law, as well as the entitlement of individuals to claim, before these courts, the full enforcement and protection of the rights which they derive from EU law.²⁴⁵ Compared to its later approach in which the CJEU vehemently insisted on the application of the principle of effective judicial protection and effectiveness of EU law, to be discussed in Chapter 3, which in turn entailed a rise of doubts as to whether national procedural autonomy of the Member States existed at all, this state of CJEU’s action vis-à-vis national procedural law could be qualified as acceptable and desirable.²⁴⁶

National courts were placed under the obligation to assess whether a certain national procedural rule made excessively difficult or virtually impossible the enforcement of an asserted EU right, as well as to appraise it in light of the protection of ‘similar’ substantive domestic rights. If that national procedural rule was applied in the same manner both to national and EU law actions and it did not prevent the ‘effective enforcement’ of the right with EU origin, it was deemed suitable from the EU law perspective. However, the principle of ‘minimum effectiveness’ did not always result in the disapplication of the national procedural rule at issue. On many occasions, even though the principle of minimum effectiveness was affected and the EU right could not be enforced before the national courts, (leaving individuals without their vindicated right due to the restrictive national provision), the CJEU considered that the minimum effectiveness test was passed, because the provision at issue was justified by certain higher principles of law which were considered to override the principle of effectiveness.²⁴⁷

²⁴⁵ K. Lenaerts, ‘The rule of law and the coherence of the judicial system of the European Union’, (2007) 44(6) *Common Market Law Review*, 1645.

²⁴⁶ Thus, Heukels et al 2002 (n 20), 114 find that the CJEU’s requirements introduce a kind of minimum harmonisation of national procedural laws (negative convergence), “without interfering unnecessarily with national procedural autonomy”, as already mentioned above; M. Eliantonio, ‘The future of national procedural law in Europe: Harmonisation vs. Judge-Made Standards in the field of Administrative Justice’, (2008) Maastricht Faculty of Law Working Paper similarly refers to CJEU setting of reference points and minimum standards, 2.

²⁴⁷ This relation between the principle of effectiveness and national justifications (‘rule of reason’) will be treated in the third chapter, “balancing” between two competing, yet legitimate aims – EU and national ones (although most of the national principles are also EU law general principles). Despite the fact that, in the *Rewe/ Comet* phase the CJEU did not explicitly perform its ‘weighing’ task as it did in *Van Schijndel/ Peterbroeck* case law, it was nonetheless inclined towards the observance of the national principles which prevailed over the effective protection of the individual EU right.

In the case law of *Rewe*, *Hans Just* and *Ferwerda*, despite the infringement of the ‘practical impossibility’ requirement, national justifications expressed in certain general principles of law were taken into consideration by the CJEU and eventually prevailed over the requirement of minimum effectiveness in the exercise of the EU individual rights.

The insertion by the CJEU of the *Rewe/ Comet* requirements contributed to a higher level of uniform and effective application of EU law compared to the previous stage of absolute non-intervention by the CJEU. Still, the principle of uniform application of EU law and more importantly, uniform protection of EU rights, remained endangered by the persistent accentuation of the application of national procedural rules.

In this approach, the CJEU’s interference in national procedural law is still such as to take into account national sensitivities of the Member States, such as legitimate aims expressed in the general principles of law which serve to justify restrictive national procedural rules, as well as the cultural choices between objectives of a different nature, and to leave room for the exercise of their legal sovereignty.

Apart from this, certain disadvantages can be discerned with regard to this line of CJEU rulings.²⁴⁸

Real *effet utile de l’effet direct* was still lacking and the problem of uniformity in the enforcement of EU law and protection of EU rights still persisted, although it was mitigated.

The principles of equivalence and minimum effectiveness, which were to be applied by the national courts in order to appraise whether a certain national procedural or remedial rule had passed the test remained vague, with great uncertainty surrounding the ambit and content, and were difficult to apply.

Potential problems relate to the *different general principles of law* which justify restrictive national rules. Although, in general terms, the CJEU accepts the invocation and application of general principles of law which can prevail over the principle of the effective enforcement of an EU right, it is not always very clear whether prevalence will be given to the minimum effectiveness of the EU right or to the restrictive national rules backed by a general principle of law. In this regard, the previous scenario, in which a

²⁴⁸ In Dougan’s view, there are several sound reasons for critique of the principle of national procedural autonomy, framed by the *Rewe* requirements. According to this author, legal certainty can be impaired, especially because of the unpredictable application of the principle of effectiveness. Another reason is the ‘reverse discrimination’ of citizens, which in fact implies a dual system of protection within each Member State and contradicts the basic values such as equality between citizens. Another thing is a common reproach of the CJEU that what it did was blatant judicial law making and finally, there are accusations that the CJEU uses double standards in the treatment of Member States and Community institutions as regards the level of judicial protection offered to individuals. See Dougan 2011 (n 17), 415-416.

national court of one Member State accepts the ‘deceitful behaviour of the authorities’ while in another it does not, might be repeated in this context of general principles. Understandably, this could bring about different levels of protection of the same EU rights in different Member States.

With regard to the application of the principle of equivalence, it remained unclear to the national courts how they were to determine which action from the national law was to be considered as ‘similar’ for the purpose of assessing this requirement. The CJEU provided certain parameters with regard to this question, leaving the final decision to the national courts.

Even if in two different Member States, the national courts find the same domestic proceedings as similar to proceedings with EU law origin, the result may be different. In one Member State the national court might find that the principle of equivalence is infringed and thus the restrictive national provision cannot be applied (thus safeguarding the EU right), while in the other Member State, the reverse may be found and the restrictive national provision can be applied.

If we consider that the principle of national procedural autonomy implies an application of the national procedural rule as long as it does not make virtually impossible the exercise of an EU right, this can bring up more questions. Firstly, which situations make the exercise of the right virtually impossible? Secondly, if some factors justify the application of the national rules at issue, such as legal certainty²⁴⁹ or the proper conduct of the procedure²⁵⁰, against which criteria should the national court assess which of the two opposing objectives should prevail? Should it be the minimum effective protection of the EU right, or another general principle of law, which justifies a restricting national procedural rule?

Problems with predictability of this approach grow with the fact that sometimes this exercise is performed by the national courts, and sometimes by the CJEU itself.

4. Conclusion

Under the *Rewe* line of case law, national procedural autonomy is limited by the principles of equivalence and minimum effectiveness.

To claim that the principle of equivalence has been breached, it must be shown that there has been less favourable treatment of the subject than in the case of a ‘similar domestic action’. The first problem rests, however, in the fact that it is indeed difficult to assess what a ‘similar domestic action’ is. Next, even if a ‘similar action’ is found, it is cumbersome to determine which conditions are more favourable for the

²⁴⁹ Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG* [1976] ECLI:EU:C:1976:188.

²⁵⁰ Case C-429/15 *Danqua* [2016] ECLI:EU:C:2016:789.

national claims and which are less advantageous for the EU law claims. In this respect, one must examine various issues such as the different instances before which the claims can be brought, the complexity of the procedure or stricter time limits within which the action must be brought, as well as the cost of each action for the party.

Next, one can infer from the overview of the case law in which the principles of minimum effectiveness and equivalence have affected the application of different national procedural rules, that the influence/interference was made only in cases in which certain specific circumstances occurred. These circumstances include cases where a complete denial of access to justice was risked or when obtaining an effective remedy was hindered. In some cases the principle of equivalence produced important effects (for example in *Weber's Wine World*, *Transportes Urbanos* and *Draemphael*, while in other cases minimum effectiveness was influential. Thus in the *Magorrian* case, the entire record of service completed by those concerned (including Ms. Magorrian) before the two years preceding the date of initiation of proceedings was taken into consideration thanks to the principle; in *Preston*, the claimant was put in a position in which she was deprived of the recognition of periods of service for pension entitlement purposes; while in *Impact* for instance, the principle of effectiveness required that a specialised court, which had been called upon to hear and determine a claim based on the infringement of the national legislation transposing the Directive, must also have jurisdiction to hear and determine an applicant's claims arising directly from the Directive, if the obligation for the applicant to bring a separate claim based directly on the Directive before an ordinary court should involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by EU law.

In the some of the cases where the principle of effectiveness made a great difference, it was due to unacceptable behaviour by the party (most frequently State authorities) which made the exercise of the right at issue virtually impossible, for instance deceit, deliberate delay in providing the plaintiff with necessary and correct information, and the intentional insertion of certain provisions specifically introduced for the purpose of escaping EU law obligations. The CJEU proved to be intolerant towards States or other actors which attempted to benefit from their own wrongdoing, at the cost of depriving the citizens of the assertion of their EU rights (*Emmott*, *Santex*, *Levez*).

In some situations, the denial of the possibility to exercise the EU right was complete (*Emmott*, *Preston*), and in others, the Member States specifically introduced national procedural rules (in response to a CJEU ruling) which made the exercise of EU rights impossible in practice (*Barra*, *Deville*, *Marks and Spencer/Câmpean*).

Finally, concerning the doctrinal debate of whether national autonomy exists: in my view, the principle of national procedural autonomy in its absolute sense, implying a lack of any respect of common harmonised standards, is not desirable, not only for the reasons that were advanced above, but also because it is well established that every principle has its restrictions.

CHAPTER 3

The principles of effective judicial protection and effectiveness of EU law

1. The principle of effective judicial protection: from *Johnston* to the application of Article 47 of the Charter of Fundamental Rights of the European Union

In old case law, the principle of effective judicial protection would seem to be founded on certain substantive EU law provisions, as illustrated through cases like *Salgoil*²⁵¹ and *Bozzetti*²⁵².

In *Salgoil*, the CJEU stated that the provisions of Articles 31 and 32 TEEC (now Articles 37 and 38 TFEU) required the authorities, and in particular the relevant courts of the Member States, to protect the interests of persons subject to their jurisdiction by ensuring them “direct and immediate protection of their interests”.

Member State responsibility to ensure that individual rights derived from EU law are effectively protected in each case was reiterated by the CJEU in *Bozzetti*²⁵³.

In particular, Article 4(3) TEU (ex Art. 10 TEC) obliged national courts to interpret domestic law in light of EU law, in order for the sanctions imposed on those infringing EU law to be effective.²⁵⁴ Moreover, the remedies available to those whose substantive EU rights had been impaired had to be effective. In the majority of these cases, this provision was applied in conjunction with another provision of EU law, most

²⁵¹ Case C-13/68 *SpA Salgoil* [1968] ECLI:EU:C:1968:54, para 462.

²⁵² Case C-179/84 *Bozzetti* [1985] ECLI:EU:C:1985:306.

²⁵³ *Ibid*, para 17.

²⁵⁴ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153.

frequently found in EU directives.²⁵⁵ The right to a remedy against a breach of an EU right was considered to be essential in securing individuals effective protection of that right.²⁵⁶

Thus, in *Johnston*²⁵⁷, the concrete foundation of the principle of effective judicial protection was found in Article 6 of the Directive in question²⁵⁸, which gave the litigant the right to pursue his claims by judicial process, combined with Article 4(3) TEU (ex Art. 10 TEC). However, the CJEU added that:

“The requirement of judicial control stipulated by [Article 6 of the Directive] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the [ECHR].”

In *Unectef*²⁵⁹, the CJEU repeated that:

“Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection of his rights. As the Court held in its judgment of 15 May 1986 in case *Johnston/ Chief Constable of the Royal Ulster Constabulary*, that requirement reflects a general principle of EU law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.²⁶⁰

The basis of the requirement of effective judicial protection was again found in the constitutional traditions of the Member States and derived also from Articles 6 and 13 of the ECHR.

²⁵⁵ See Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206, para 53. Caranta claims that it was, by exploiting the rather vague terms of Article 10 of the EC Treaty (now Article 4(3) TEU), that the CJEU included effective judicial protection of EU law rights among the general principles of law concerning fundamental rights, see R. Caranta, ‘Judicial protection against Member States: a new *jus commune* takes shape’, (1995) 32 Common Market Law Review, 704.

²⁵⁶ Case C-222/86 *UNECTEF* [1987] ECLI:EU:C:1987:442, para 14.

²⁵⁷ Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206. This case will be further elaborated in section 3.1 of this chapter.

²⁵⁸ Directive 76/207/EEC [1976] on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion and working conditions, 40.

²⁵⁹ Case C-222/86 *UNECTEF* [1987] ECLI:EU:C:1987:442.

²⁶⁰ *Ibid*, para 14.

In this case, a national football trainer, Mr. Heylens, held a Belgian diploma and wanted to work as a trainer in France. However, when he asked for recognition of his diploma, a competent member of the government rejected him by referring to an adverse opinion of the special committee, which itself contained no statement of reasons, thus making it almost impossible for Mr. Heylens to bring a meaningful case.

The CJEU held that the existence of a remedy of a judicial nature and judicial control of compliance with the Treaty freedoms were of utmost importance for the safeguard of Treaty rights. Judicial control implied that the court to which the case was referred should have required the competent authority to notify its reasons for rejection in a decision, so that the harmed individual was in a position to defend his rights under the best possible conditions. *Unectef* was a particularly important case because, unlike in *Johnston*, there was no ‘stepping stone’ in a directive to be used to apply the requirement of effective judicial protection.

Although not closely linked to the foundation of the principle of effective judicial protection, *Unibet*²⁶¹ bears considerable weight when examining the essence of the principle and one of its components, ‘an effective remedy’. This is owed to the CJEU finding that the principle of effective judicial protection does not require a self-standing action in the panoply of national remedies which would serve as a special remedy in order to question the compatibility of a disputed national law with EU law.

The principle of effective judicial protection of EU rights is closely linked to the principle of effectiveness of EU law, when the latter is understood in light of the protection of individual interests of EU citizens, specifically, the protection of their substantive individual EU rights.

The concern for the effective exercise of EU rights brings about an interest in the manner of their judicial protection, since the right to a specific kind of redress or remedy is a consequence of and an adjunct to the rights conferred on individuals by EU law.²⁶²

Effectiveness of EU law, in the sense of the full enforcement of EU rights, necessarily requires effective judicial protection of those rights before the national courts of the Member States. Considering the CJEU’s approach, i.e. considerable deference of the principle of national procedural autonomy of the Member States, EU individual rights were safeguarded under the rules and procedures of the national legal system of each Member State. Requirements of *equivalence* and *minimum effectiveness* laid down in

²⁶¹ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163.

²⁶² Case C-199/82 *San Giorgio* [1983] ECLI:EU:C:1983:318, para 12.

the *Rewe/ Comet* principle proved to be insufficient in terms of acquiring a real and effective enforcement of EU law.

As mentioned above, the CJEU founded the principle partly on the ECHR and the national constitutional traditions.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 laid down the foundations of the requirements of fair trial and effective remedy. Article 6 of the ECHR provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Moreover, Article 13 of the Convention establishes that:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Similarly, the content of the principle of effective judicial protection as conceived in the EU legal order consists of two dimensions, procedural and substantive, more precisely the right to access to court and the right to an effective remedy of a judicial nature.

With regard to the content of this principle, various authors advance more or less the same idea. Curtin and Motelmans consider that the protection of individual EU rights, which has to be effective and appropriate and which stems from Article 4(3) TEU (ex. Art. 10 TEC), embraces not only procedural guarantees such as access to court, but also substantive guarantees, like the availability of effective remedies for wrongs.²⁶³ Prechal and Widdershoven claim that the requirement of effective judicial protection has implications for the actual access to court, which must be impartial and independent, and also for the remedies that must be made available.²⁶⁴ Claes similarly places the right to an effective remedy and the right to judicial review as two different aspects of this principle.²⁶⁵

²⁶³ See Curtin et al 1994 (n 78), 447.

²⁶⁴ See Prechal 2011 (n 234), 40, 42. A similar definition of the principle of effective judicial protection is provided by Prechal. According to her, the principle implies that individuals should be able to enforce all rights conferred on

The principle of effective judicial protection can be regarded as a more robust manifestation of the principle of minimum effectiveness, but it is also a self-standing general principle which has constitutional status. Another characteristic is that it develops into a positive standard, as its focus is that individuals should be able to enforce all rights conferred on them by Union law. Similarly, for Krommendijk, the principle of effective judicial protection has developed within the context of fundamental rights and embodies the idea of *Rechtstaat*; it largely serves to protect individuals and is also applicable where (secondary) EU law contains procedural rules.²⁶⁶ According to Safjan and Düsterhaus, effective judicial protection serves the effectiveness of EU law and when EU rules need to be enforced, they must comply with Article 47 CFR and the requirements of effectiveness and equivalence, something they call an “upgraded formula of the ‘*Rewe 47 test*’”.²⁶⁷

The principle of effective judicial protection has a strong influence on the competences of national courts. It is for this reason that Barav defines this principle as comprising an availability of remedy and power of national courts²⁶⁸, similarly to Claes, who considers this principle as a general principle of EU law, creating new causes of action and remedies in national courts.²⁶⁹

Defined in this manner, the application of the principle of effective judicial protection implies that Member States must observe the right to access to court for individuals asserting their EU rights as well as their right to an effective remedy for an infringement of these rights. Considering that every single Member State has different solutions in their specific procedural provisions related to the access to court, such as rules on *locus standi* and limitation periods for initiating proceedings, the national procedural and remedial law of the Member States has been subject to a certain undermining. This was done for the purpose of responding to the requirement of effective judicial protection created by the CJEU.

them by EU law and that the observance of the applicable provisions of EU law should be effectively scrutinised by the competent court. See. Jans et al 2015 (n 63), 53.

²⁶⁵ See Claes et al 2006 (n 20), 136-137.

²⁶⁶ See J. Krommendijk, ‘Is there light on the horizon? The distinction between ‘*Rewe effectiveness*’ and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*’, (2016) 53 Common Market Law Review 1405-1407.

²⁶⁷ Safjan et al 2014 (n 94), 10.

²⁶⁸ See Barav 1994 (n 239), 299.

²⁶⁹ See Claes et al 2006 (n 20), 136.

The requirement of effective judicial protection has affected not only the application of national procedural provisions in the initial phase and throughout judicial proceedings, but also the substance and type of remedies, as well as the competence of national courts.²⁷⁰

This principle was later codified in a binding legal instrument of the EU, namely the Charter of fundamental rights of the European Union (CFR), and enshrined in Article 47 of this Charter, under the title:

“Right to an effective remedy and to a fair trial”, according to which:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the *right to an effective remedy before a tribunal* in compliance with the conditions laid down in this Article.

Everyone is entitled to a *fair and public hearing within a reasonable time by an independent and impartial tribunal* previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Another reinforcement of this principle of EU law was made with its enshrinement in Article 19 TEU, which lays down that:

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”²⁷¹

The constitutional traditions of the Member States and Articles 6 and 13 of the ECHR were considered to be the legal basis for the principle of effective judicial protection as a general principle of EU law in numerous cases.²⁷² The principle itself is now also given expression in Article 47 of the CFR.²⁷³

²⁷⁰ Various cases of the CJEU which are illustrative of this point shall be discussed further on in this chapter.

²⁷¹ I will come back to this provision in Section 3.2, subsection 1, of the present Chapter.

²⁷² See Case C-50/00 P, *Union de Pequeños Agricultores* [2002] ECLI:EU:C:2002:462, para 39; Case C-1/99 *Kofisa Italia* [2001] ECLI:EU:C:2001:10, para 46.

²⁷³ Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811, paras 30-31, Case C-457/09 *Chartry* [2011] ECLI:EU:C:2011:101, para 25, Case C-69/10, *Samba Diouf*, [2011] ECLI:EU:C:2011:524, para 49, Case C-12/08 *Mono Car Styling* [2009] ECLI:EU:C:2009:466, para 47, Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 46-47.

Cases like *DEB*²⁷⁴ and *Otis*²⁷⁵ that will be examined later in this Chapter, will help to demonstrate that when the CFR acquired a legally binding status, its Article 47 became a separate and self-sufficient expression of this principle.

However, it will be demonstrated that even when there is a possibility that the principle of effective judicial protection enshrined in Article 47 CFR is endangered by the application of the national procedural rules, there is no obligation for the national courts to set aside the restrictive national rules, provided that the requirements under Article 52(1) of the CFR are fulfilled.

2. The principle of effectiveness of EU law: background, foundation and content

The principle of effectiveness in EU law²⁷⁶, comprising *effet utile*, may be considered as a self-standing principle which is however closely related to the principle of effective judicial protection of EU rights.

According to Snyder, ‘effectiveness’ is taken to mean the fact that law matters: it has an effect on political, economic and social life outside the law. Of course, this definition is broader than the legal doctrine of ‘effectiveness’, either procedural or substantive, and it includes implementation, enforcement, impact and compliance.²⁷⁷

Thus, Lenaerts, Maselis and Gutman appealingly explain that the principle of effectiveness has several expressions, the first being in the principle of effective judicial protection, the second found in the principle of full effectiveness of Union law in relation to upholding the principle of primacy of Union law vis-à-vis national (procedural) law, and the third reflected in the interplay between national law on

²⁷⁴ Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811.

²⁷⁵ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684.

²⁷⁶ The principle of effectiveness has been recognised as a general principle of Community law by the Court of Justice. See T. Tridimas, *The General Principles of EU law* (Oxford: Oxford University Press 2006) 418. See Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 95 and the Opinion of A-G Léger in Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193, paras 174-176. In other cases, the CJEU has referred to the “effectiveness of Community law” rather than the principle of effectiveness. See cases *Simmenthal*, *Factortame*, *Köbler*.

²⁷⁷ F. Snyder, ‘The effectiveness of European Community law: Institutions, Processes, Tools and Techniques’ (1993) 56(1) *Modern Law Review*, 19. According to Snyder, a typical example for procedural effectiveness is Case C-33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG* [1976] ECLI:EU:C:1976:188, whereas for substantive effectiveness is illustrated in cases like: Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153 and Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206.

procedure and sanctions and the Union's framing principles of equivalence and effectiveness.²⁷⁸ In this authors' view, these expressions of the principle of effectiveness underpin the system of judicial protection in the European Union as a whole.

Dougan questions whose interests the principle of effectiveness actually articulates and protects. According to standard formulation it seems that the principle of effectiveness is equated with the interests of individual citizens. However, he admits many commentators' stance that the concept of effectiveness refers primarily to the enforcement of Union law *per se*, protecting individual rights (if at all) only incidentally or instrumentally.²⁷⁹

The CJEU, through its case law, has made efforts to achieve its enforcement by devising the doctrines of supremacy of EU law²⁸⁰ and direct effect of EU law provisions. Thus, it was stated in *Costa v. ENEL*²⁸¹ that:

“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”

In *Simmenthal*²⁸², the CJEU stated that “directly applicable rules of EU law must be fully and uniformly applied in all the Member States”. In *Francovich*²⁸³ the Court dwelled on the national courts' task to ensure that the EU rules *take full effect*. In the same case²⁸⁴ the CJEU stated that:

“The full effectiveness of the EU rules would be impaired [...] if individuals were unable to obtain redress when their rights are infringed.”

In this context, it is related to the protection of individual rights, i.e. granting a specific remedy to the individuals with the effectiveness of the EU rules.

²⁷⁸ Lenaerts et al 2014 (n 165), 110.

²⁷⁹ See Dougan 2011 (n 17), 425.

²⁸⁰ In this direction Bruno de Witte puts forward the argument that “the only decisive argument for supremacy is the *effet utile* argument”. See B. de Witte, ‘Direct effect, supremacy and the nature of the legal order’ in Craig et al 2008 (n 17), 183.

²⁸¹ See Case C-6/64 *Costa / E.N.E.L.* [1964] ECLI:EU:C:1964:66, para 17.

²⁸² See Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49, para 14.

²⁸³ See Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 32.

²⁸⁴ *Ibid*, para 33.

For instance, Lord Bingham CJ referred to the “cardinal principle of [Union] law that national laws should provide ‘effective and adequate redress for violations’ of that law”.²⁸⁵

Nevertheless, it should be noted that some scholars are uncertain as to whether there is a separate principle of effectiveness alongside the principles of supremacy and direct effect or the ‘effectiveness’ is only a stretching of the principle of ‘structural’ or ‘procedural’ supremacy, which led to the creation of new remedies, as in *Factortame* and *Brasserie du Pecheurs*.²⁸⁶

Other scholars, without mentioning the principle of supremacy, deem that the broader concept of effectiveness is in fact manifested through ‘autonomous Union action’ in the form of specific forms of remedy, such as the right to interim relief, the right to recovery of unlawfully levied charges and the right to reparation against Member States.²⁸⁷ In this line of argument, Dougan considers that their particular judicial basis makes the autonomous Union actions not only quantitatively but also qualitatively different from the principle of effectiveness in its narrow *Rewe/ Comet* sense; they represent, he states, an independent manifestation of some broader concept of effectiveness which justifies its own specific Union interventions in the system of decentralised enforcement.²⁸⁸

Consequently, the principle of effectiveness of EU law implies a uniform application of its rules in all the Member States through the uniform protection of EU individual rights, but also for the sake of attaining a general interest of the EU which does not necessarily involve protection of individual rights.

The latter objective of the principle of effectiveness can also be achieved through the imposition of sanctions both on individuals and on States.²⁸⁹

Sometimes, these two separate aims of the principle seem to be intertwined.

Effective judicial protection of EU rights is necessary for the effective exercise of substantive EU rights, which results in satisfaction for the individual who achieved his aim and took advantage of the benefits conferred upon him by EU law. Additionally, it also contributes to the fulfilment of certain EU law

²⁸⁵ See Lenaerts et al 2014 (n 165), 109.

²⁸⁶ According to De Witte, ‘structural supremacy’ is in fact a ‘disapplication’ of rules on procedures and remedies. See De Witte 2008 (n 280), 191-192.

²⁸⁷ See Dougan 2011 (n 17), 426-427.

²⁸⁸ As stated in the Introduction of this book, Prechal also argues, that the *Rewe/ Comet* principle is not the same as the principle of effectiveness, since the principle of minimum effectiveness is in fact, a principle of minimum protection, laying down the lower limit. See Prechal 2001 (n 28) 39.

²⁸⁹ See Dougan 2011 (n 17), 136; Prechal 1995 (n 34), 144.

objectives, like the proper and effective enforcement of competition rules, environmental rules and ultimately, of the very objectives of the primary and secondary EU law sources.

A link between the substantive and procedural law can be illustrated in the cases described below.

The effectiveness of EU competition rules could have been infringed if the national procedural rules had been applied in their entirety in *Courage, Manfredi* and *Munoz*.

The *Courage* case²⁹⁰ concerned a claim for compensation for damage sustained as a result of the illegal behaviour of the other party to a contract concluded contrary to EU competition rules. The issue pertained to the compatibility of a national procedural rule, which prevented the damaged party from claiming compensation for loss suffered on the sole basis that the plaintiff was himself party to the illegal contract, with EU competition rules enshrined in Article 85 EC.

Initially, the CJEU referred to the fundamental character of the provision enshrined in Article 85 EC for the accomplishment of the mission conferred on the EU and then proceeded with the obligation imposed on the national courts to ensure full effect of the EU provisions and protect the rights which they confer on individuals. Moreover, in paragraph 26 of the judgment, it stated that:

“The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”

This case is another proof of the CJEU’s reasoning that the existence of a relief for an individual is directly related to the effectiveness of Treaty articles, i.e. of substantive EU law as such, although the damage that Mr. Crehan claimed stemmed from the breach of the other’s party’s obligation²⁹¹ according to a contract which was concluded by both of them and ran counter to the EU Treaty.

The effect of this judgment appears to be the creation of a right to claim damages for the party that would be prevented from initiating such an action with respect to a contract that infringes national competition rules. As regards the national courts, they were under an EU duty to disregard national procedural rule considered restrictive for EU law effectiveness, although they retained discretion as to the exact scope of the damage claimed.

²⁹⁰ Case C-453/99 *Courage* [2001] ECLI:EU:C:2001:465.

²⁹¹ The other party of this anti-competitive agreement is *Courage Ltd*.

In *Munoz*²⁹², a question arose as to whether Munoz, one of the top producers of “superior seedless” grapes in Spain, who was importing into the United Kingdom, could bring an action before the English courts to block Frumar, who was importing grapes under the denomination “White seedless”. According to Munoz’s allegations, “White seedless” fell within the “Superior seedless” sort and was thus undermining Munoz’s right arising from Regulation 2200/96. The preliminary question was the issue of whether the Regulation conferred on the plaintiff (Munoz) a *right to action*, which the national courts were obliged to protect.

It is noteworthy that in paragraph 29 of the judgment, the CJEU referred to the objective of the Regulation which in fact, consisted of the elimination from the market of products with insufficient quality, orientation of the production in such a way as to satisfy the needs of the consumers and facilitate commercial relations on the basis of loyal competition. Not allowing a right to civil procedure against individuals who violated these objectives would amount to the impossibility of the plaintiff to exercise his substantive rights under the Regulation, thus undermining the objective of the EU law enshrined in this act.

While in *Courage*, the substantive right of the plaintiff was a right to loyal competition, which could be remedied by ‘setting aside’ the national restrictive provision and conferring the right to action for damages against the disloyal competitor, in the *Munoz* case, the substantive right was a right to loyal competition, which could be remedied by granting him right to bring action against Frumar.

In both these cases, the content of the specific substantive right could have been indirectly inferred from the objectives of the Treaty and Regulation respectively.

The application of national procedural rules would have undermined the effective exercise of rights conferred by EU law, but they were also liable to prevent the effective implementation of the EU provisions.

In fact one could infer that, unlike the CJEU’s conclusion in the *Butter-buying cruises* case, in these two cases new remedies, in their broad sense as legal means, were created for the sake of ensuring the effectiveness of EU law.

When an individual brings an action in order to obtain a reimbursement of charges levied to him contrary to EU law, this contributes to the effective exercise of his substantive right to export his goods to other Member States without being subject to charges having an equivalent effect to customs duty. But it also

²⁹² Case C-253/00 *Antonio Munoz v CIA and Superior Fruticcola SA* [2002] ECLI:EU:C:2002:497.

effectively enforces the objective of the EU Treaty of prohibition of charges having an equivalent effect to customs duty between Member States. However, as will be demonstrated, full enforcement of EU law can be attained by means of actions against Member States by the EU institutions, due to the Member States' failure to prevent its citizens from falling foul of the observance of EU law rules. In these situations, Member States are obliged to impose sanctions on irresponsible and 'guilty' citizens.

This brings us to the issue of sanctions on EU citizens as a component of the principle of effectiveness.

Thus, in some cases the emphasis is on the protection of individual rights and consequently it is considered to be sufficient once these are effectively protected. On the other hand, failure of the national legal order to protect these EU rights effectively impairs the effectiveness of EU law. It is in this sense that one is to interpret the CJEU's statement in the *Factortame* and *Francovich* cases. Although the CJEU begins in these cases with phrases like: "the full effectiveness of EU will be impaired, if...", it proceeds by emphasising the relevance of effective protection of the right at issue through the necessary granting of a specific remedy, so that the full effectiveness of EU law remains operative. The absence of a remedy is likely to undermine the safeguard of EU rights and thus entail a distortion of the principle of effectiveness of EU law.

The relation between the effectiveness of EU law and the principle of effective judicial protection is clear: the existence of an effective remedy for the protection of EU individual rights contributes to the full and effective enforcement of EU law. However, effectiveness of EU law also comprises the *sanctions* imposed on individuals for the purpose of safeguarding the general interest and in that sense it is broader than the principle of effective judicial protection.²⁹³

As far as sanctions are concerned, the link between effectiveness and effective judicial protection is not that obvious. Effectiveness of EU law may consist only of the effective enforcement of EU law as such or more specifically its general interests and policies. A clear link with effective judicial protection will only exist if the sanction directly contributes to the protection of another individual, as was for instance the case in *Von Colson*.²⁹⁴

Non-compliance with the EU law requirements on the part of State bodies or individuals creates an obligation for the Member States to impose sanctions upon those who infringed EU law provisions. In these situations, by relying on Article 4(3) TFEU (ex. Art. 10 TEC), the CJEU in fact established a

²⁹³ See Prechal 1995 (n 34), 144; Dougan 2004 (n 20), 38

²⁹⁴ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153 that will be discussed further on in this Chapter.

Member State's obligation to penalise infringements of EU law under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature, which, make the penalty *effective, proportionate and dissuasive*.

Thus, in *Greek maize*²⁹⁵, the Republic of Greece failed to fulfil its obligations under Article 10 EC, by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it. The appropriate sanctions in this case were criminal proceedings against the perpetrators, which Greece did not impose and thus it failed to fulfil its obligations under Article 10 EC.

Similarly, in *Nunes*²⁹⁶, in which Ms. Nunes committed a criminal offence (fraud, by misusing the financial aid received by the European Social Fund), the question arose as to whether Ms. Nunes should be penalised under national law with a criminal sanction against fraud, in spite of the fact that EU legislation did not classify the improper use of ESF assistance as a criminal offence. The CJEU restated that:

“While the choice of penalties remains within their discretion, the Member States must ensure in particular 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*.

In this case, the criminal offence (fraud) was penalised with a criminal sanction under the national law and thus Ms. Nunes had to be penalised in this manner in order for the State to fulfil its obligations under the Treaty.

In its case law, the CJEU placed the accent on the requirement that national sanctions must be in line with EU law and that the Member States are free to choose among available national sanctions, however respecting the EU law and its general principles.

For instance, in *Urban*²⁹⁷, the CJEU found that the requirement of proportionality laid down in the regulation at issue was breached by the imposition of national sanctions, since these penalties exceeded the limits of what was necessary in order to attain the objectives legitimately pursued.²⁹⁸ In *Chmielewski*²⁹⁹, the CJEU, while underlining that the requirement of Regulation No. 1889/2005 was

²⁹⁵ Case C-68/88 *Commission v. Greece* [1989] ECLI:EU:C:1989:339.

²⁹⁶ Case C-186/98 *Nunes and de Matos* [1999] ECLI:EU:C:1999:376.

²⁹⁷ Case C-210/10 *Urban* [2012], ECLI:EU:C:2012:64, paras 23 and 44.

²⁹⁸ *Ibid*, paras 53, 54.

²⁹⁹ Case C-255/14 *Chmielewski* [2015] ECLI:EU:C:2015:475, paras 20 and 29.

related to the effective, proportionate and dissuasive character of the national penalties, also held that the act at hand required that the breach of the obligation should be penalised in a simple, effective and efficient way. In the end, the CJEU found that the national penalties were disproportionate and should have been disapproved. Still, in *Reindl*³⁰⁰, related to requirements of food law, the CJEU's finding resulted in the approval of the application of national penalties.

To sum up: in the area of penalties imposed by Member States' authorities on individuals who breach EU law rules, there are instances in which the impact of the principle of effectiveness precludes the application of national rules, although it does not seem to be such as to entirely disregard national procedural autonomy.

Given the broad scope of application of the principle of effectiveness of EU law, it often occurs that different objectives to which it aspires serve as a tool to attain the other objective. Thus, by effectively protecting the rights of individuals, national courts can also play a role in the effective enforcement of the general interest of the EU.

On the other hand it must be noted that the principles of effective judicial protection can mitigate full effectiveness in the sense that individuals must have the opportunity to go to a court of law in order to challenge sanctions.

A striking example, in this respect, is *Berlioz*³⁰¹, a case about administrative efficiency of cooperation in the field of taxation under Directive 2011/16/EU³⁰², which is an instrument that assists the Member States in combating tax evasion.

In Luxembourg, pecuniary sanctions can be imposed if a person refuses to submit information that is requested in the context of an exchange of information with the tax administration of another Member State. There was little doubt that a mechanism for imposing sanctions enhances the effectiveness of the system for the exchange of information established by Directive 2011/16/EU. However, under Luxembourg law, a person could only challenge the sanction as such, not the legality of the decision by which the person was requested to provide the information concerned. The CJEU essentially disagreed with this. It recalled that, according to the second paragraph of Article 47 CFR, everyone is entitled to a hearing by an independent and impartial tribunal. That right implies that a decision of an administrative

³⁰⁰ Case C-443/13 *Reindl* [2014] ECLI:EU:C:2014:2370.

³⁰¹ Case C-682/15 *Berlioz* [2017] ECLI:EU:C:2017:373.

³⁰² Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EC [2011] OJ L64/1.

authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent judicial control. Accordingly, a national court hearing an action against the pecuniary sanction imposed on a person for failure to comply with an information order must be able to examine the legality of that information order as well.

3. Impact of the principle of effective judicial protection and Article 47 CFR on national procedural and remedial autonomy in the pre-Charter period

The principle of effective judicial protection as defined before the adoption of the Charter of Fundamental Rights of the European Union (CFR) as well as its formulation under Article 47 of the CFR had a considerable effect on the national procedural and remedial autonomy of Member States, the extent of which will be analysed in the following paragraphs.

The degree to which national procedural and remedial rules were affected by this principle will be assessed mainly through the analysis of CJEU case law. These cases will be divided according to the period in which the judgments were delivered: before the impact of the binding force of the CFR and in the post-CFR era, i.e. after the Charter became binding. Although it might seem difficult to draw a strict line between these periods, I will attempt to structure this paragraph in that way with a view to better understanding the impact of the principle of effective judicial protection on the national procedural rules of the Member States.

3.1 Impact of the principle of effective judicial protection prior to its formulation in Article 47 CFR.

Like the principles of equivalence and minimum effectiveness, the principle of effective judicial protection may apply to various procedural and remedial rules.

The principle of effective judicial protection was raised in cases related to *locus standi*.³⁰³

*Safalero*³⁰⁴ raised the issue of the legal standing of Safalero, a seller of radio controls which were sold to Vitale and seized from the latter by the Italian authorities on the grounds that these items were not marked in accordance with Italian legislation. That national requirement (labelling with a trade mark) was contrary to EU law.

³⁰³ Case C-13/01 *Safalero Srl* [2003] ECLI:EU:C:2003:447.

³⁰⁴ *Ibid.*

Safalero appealed both the decision by which he was fined because of the marketing of his products without respecting the Italian rules, and the decision which was referred to Vitale regarding the seizure of goods.

According to the CJEU, the right to effective judicial protection of Safalero was not undermined by the very fact that he had no standing in a court proceedings against a decision referred to Vitale (which obliged Vitale to return the goods sold by Safalero), since Safalero himself had an opportunity to obtain a court decision establishing the incompatibility of the contested provision with EU law.³⁰⁵ In this case, the national rules on *locus standi* were in line with the principle of effective judicial protection and the satisfaction of the latter principle did not require any extension of the standing rules as prescribed by the Italian legislation.

In certain cases, almost anyone can have *locus standi (actio popularis)*; in other cases, the group of members who are bestowed with rights is broader than might be expected solely on the basis of the purpose of the legislation.³⁰⁶

A special category of cases are those related to environmental law, since there are directives which affect a wide range of individuals who may rely on EU acts before the courts.³⁰⁷ The core of the environmental directives is that their objectives relate to the protection of human health, which raises the question of whose health is not potentially jeopardised by exceeding an air quality limit.³⁰⁸

Still, as stated before, in certain Member States, such as Germany and Austria, a crucial criterion for *locus standi* is the *Schutznorm* doctrine which is a possibility to delimit a specifically protected group of persons that can be distinguished from the general public. As legal environmental provisions, whose aim is to protect public health, are of *public interest*, there have been recurrent cases concerning standing in environmental law in particular from these Member States.³⁰⁹

A particular group of case law on standing concerns the Directive 2003/35/EC³¹⁰, which implemented the Aarhus Convention at EU level and which affected the manner in which national rules on *locus standi*

³⁰⁵ Ibid, para 55.

³⁰⁶ Case C-174/02 *Steeggewest Westelijk Noord-Brabant* [2005] ECLI:EU:C:2005:10.

³⁰⁷ For instance , directives on air quality.

³⁰⁸ See Case C-361/88 *Commission v Germany (TA Luft)* [1991] ECLI:EU:C:1991:224.

³⁰⁹ See Jans et al 2015 (n 63), 379.

³¹⁰ Directive 2003/35/EC [2003].

operate especially with regard to NGOs. This Directive contains detailed rules about standing, which are clearly an expression of the principle of effective judicial protection.

From the relevant cases associated with this issue I mention two. The first one, *Djurgården*, concerned Swedish national rules on *locus standi* according to which the right to judicial remedy, or more precisely, the right of appeal, was only available to NGOs with at least 2000 members. According to EU law, these national rules were to be disapplied, otherwise only two NGOs would have enjoyed the right to appeal.³¹¹

The second case is *Trianel*³¹² in which the German rules did not allow an NGO to rely on the breach of EU environmental law rules solely on the grounds that those rules protect the public interest.

In the same area of environmental protection another case is worth mentioning in the context of the present Section, namely the case known as *Slovak Brown Beer*.³¹³ In this case an issue arose of whether an environmental protection organisation such as the Slovak *zoskupenie* could challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law. The CJEU held that, despite the fact that Article 9(3) of the Aarhus Convention being approved at EU level through Decision 2005/370/EC does not have direct effect in EU law, there was an obligation for the referring court to interpret the procedural rules relating to the conditions to be met in such a way as to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law, so that the *zoskupenie* was able to challenge the above mentioned decision.³¹⁴

The principle of effective judicial protection also touches upon the issue of evidence, as initially observed in the pivotal *Johnston* case.³¹⁵ In this case the problem was the following:

Pursuant to the Sex Discrimination Order, discrimination on grounds of sex was allowed in certain cases in which the safeguarding of national security and protection of public safety and public order were at stake. The provision of this national law, which gave rise to a dispute, stipulated that a certificate signed by the State Secretary was conclusive evidence that the discrimination which took place was for these

³¹¹ See Case C-263/08 *Djurgården – Lilla Värtans Miljöskyddsoforening* [2009] ECLI:EU:C:2009:631.

³¹² Case C-115/09 *Trianel* [2011] ECLI:EU:C:2011:289.

³¹³ Case C-240/09 *Lesoochránárske zoskupenie* [2011] ECLI:EU:C:2011:125.

³¹⁴ *Ibid*, para 52. For a follow up, see case C-243/15 *Lesoochránárske zoskupenie VLK* [2016] ECLI:EU:C:2016:838.

³¹⁵ Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206.

purposes. Ms. Johnston, who had worked as a member of the Royal Ulster Constabulary for six years, did not obtain the renewal of her contract with the Chief Constable, who, in judicial proceedings initiated by the plaintiff pleading discrimination, relied on this provision and adduced the evidence – a certificate signed by the State Secretary. Ms. Johnston then invoked Directive 76/207, more precisely Article 6, by virtue of which she arguably had a right to judicial process.

In the preliminary ruling the CJEU, after having explained that the principle of effective judicial protection is a general principle of law which underlies the constitutional traditions common to the Member States and which is laid down Articles 6 and 13 of the ECHR, the Court held:

‘By virtue of Article 6 of Directive no. 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.’³¹⁶

Seen against this background, the national evidential rule could not be applied, since the decision by the Chief Constable of the Royal Ulster Constabulary became judicially unreviewable and, consequently, deprived Ms Johnston of any remedy.

The Steffensen case³¹⁷ demonstrated the influence of ECtHR case law on the CJEU. In this case, the plaintiff, being deprived of the exercise of his EU right to a second opinion on the results of the analysis of foodstuff, was questioning the admissibility of the result of an analysis made only by the State Authority as the only evidence about the quality of the foodstuff. The plaintiff raised the issue of evidence with respect to his right to a fair hearing and the principle of equality of arms arising from that right. The CJEU explicitly took into account the Strasbourg ECtHR’s jurisprudence in this regard, according to which:

“Where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Art. 6(1) of the ECHR.”³¹⁸

³¹⁶ Case C-222/84 *Johnston* [1986] ECLI:EU:C:1986:206, para 19.

³¹⁷ See Case C-276/01 *Steffensen* [2001] ECLI:EU:C:2003:228.

³¹⁸ *Ibid*, para 77.

The CJEU left it to the national court to consider whether the evidence adduced by the competent authority entails a risk of an infringement of the adversarial principle and should be excluded in order to avoid measures incompatible with the right to a fair hearing.

The conclusion would be that the CJEU did not explicitly pronounce whether in this case the national rule infringed the principle of effective judicial protection.

In *Upjohn*³¹⁹ concerning the intensity of the judicial review of administrative decisions, the plaintiff demanded thorough judicial review of an administrative decision adopted by the Licensing Authority established by the Medicines Act, by virtue of which the medicine produced by Upjohn had to be withdrawn from the market. For the review, the applicant was in fact referring to factual elements and means for scientific proof underpinning this decision. In fact, Upjohn had requested a complete new review that would substitute the professional analysis made by the competent authority. The CJEU replied that EU law and the requirement of judicial control did not oblige the national courts to conduct this kind of scientific analysis. In *Upjohn*, the Court did not approach the question of intensity of review from the perspective of effective judicial protection. It pointed out that it is for the Member States to decide on the standard of review and that only the principles of equivalence and effectiveness have to be satisfied. More recently, the same approach was followed in the *East Sussex*-case.³²⁰

However, in *Samba Diouf*³²¹ the Court did link the intensity of review to the principle of effective judicial protection. According to the judgement in this case the national court must be competent to conduct a ‘thorough review’, concerning both the rule on facts and the law. In this case the CJEU prescribed a strict judicial test of the reasons for an asylum decision:

“The right to an effective remedy is a fundamental principle of EU law. In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.”³²²

³¹⁹ Case C-120/97 *Upjohn* [1999] ECLI:EU:C:1999:14.

³²⁰ Case C-71/14 *East Sussex County Council* [2015] ECLI:EU:C:2015:656.

³²¹ Case C-69/10, *Samba Diouf*, [2011] ECLI:EU:C:2011:524.

³²² *Ibid.*, para 61

More recently, in the case of *Sahar Fahimian*³²³, the Court pointed out that when Member States authorities have to assess, under Directive 2004/14, whether a third country national applying for a visa for the purpose of study, represents ‘a threat to public security’, they enjoy ‘a wide discretion’, because such an assessment involves ‘complex evaluations’ based on many relevant factors. The judicial review of the substantive assessment of the facts should be limited ‘to the absence of manifest error’. However, the reviewing court must ‘ascertain in particular whether the contested decision is based on a sufficiently solid factual basis’. In addition, ‘judicial review must also relate to compliance with procedural guarantees, which is of fundamental importance’, and which include ‘the obligation for those authorities to examine carefully and impartially all the relevant elements of the situation in question [...], and also the obligation to give a statement of reasons for their decision that is sufficient to enable the national court to ascertain [...] whether the factual and legal elements on which the exercise of the power of assessment depends were present.’ In other words, the process review is rather strict.

The principle of effective judicial protection also made an impact on the remedial autonomy of the Member States through the imposition of sanctions/ compensation.

The CJEU interprets real and effective judicial protection to mean that ‘effective sanctions’ should be imposed on the wrongdoers although it leaves the choice of the sanction imposed to the national court. However, the CJEU clearly states that the award of compensation must be adequate in relation to the damage sustained.

In *Von Colson*³²⁴, the CJEU required the national court to interpret and apply the national implementing legislation in such a way that the compensation be adequate. A real and effective judicial protection of the individual suffering discrimination implied that the purely nominal compensation provided for under the national law had to be disregarded.

Thus, it was in *Von Colson* that the CJEU set out for the first time that, although the provision of a directive did not impose specific sanctions that should be inserted into the national law *these sanctions must be sufficiently effective* so that the directive’s objective is achieved.³²⁵

³²³ Case C-544/15 *Fahimian* [2017] ECLI:EU:C:2017:255, paras 29, 41, 46, 50.

³²⁴ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153.

³²⁵ This stance was inferred from the interpretation of Art. 6 of Directive 76/207/EEC [1976] on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, which provided for the possibility for those whose right to equal treatment had

In paragraph 18 of the judgment, the CJEU enumerates what these sanctions might be, which can be taken as interference in the type of sanction applied by the national law. However, it proceeded to claim that the Directive left Member States free to choose between the different solutions suitable for achieving its objective.

According to the CJEU in this case, the sanctions imposed had to be such as to guarantee *real and effective judicial protection and also have a deterrent effect on the employer*. In the CJEU's view, once the *compensation for damage* was chosen as a sanction for achieving equal treatment between men and women, it needed to be *adequate to the damage sustained by the victim of discrimination*.³²⁶

*Marshall*³²⁷ equally indicated the influence of the principle of effective judicial protection on the substance of the national remedy. By requiring the national court to disregard a national provision prescribing an upper limit for the compensation for damage inflicted on a victim of discrimination on grounds of sex and to also award an interest *additionally* (due to effluxion of time, which was not prescribed under national law), the CJEU sought a *full* compensation for the loss suffered. In this case, not only was the national court made to perform a negative obligation by disregarding the national limit to compensation, but it also was instructed to act positively in the sense of *awarding interest not prescribed under national law*.

3.2 Impact of the principle of effective judicial protection as defined in Article 47 CFR

The principle of effective judicial protection as enshrined in Article 47 CFR comprises rights of defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented and the right to legal aid.³²⁸ Therefore, the cases which will be analysed in terms of their impact on national rules shall be divided into two groups: a group of sub-rights which are contained in the right to an effective remedy and a group of sub-rights related to the right to a fair hearing, the right to be advised, defended and represented and the right to legal aid. Most of the sub-rights belonging to the right of effective judicial protection are also contained in the right of defence enshrined in Article 48 of the Charter.

been violated to “pursue their claims by judicial process”. About the connection between the sanctions as part of the enforcement of EU law and judicial protection, see Jans et al 2015 (n 63), 50.

³²⁶ Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153, para 28; Case C-180/95 *Draehmpaehl* [1997] ECLI:EU:C:1997:208, para 39, Case C-177/88 *Dekker* [1990] ECLI:EU:C:1990:383, para 23.

³²⁷ Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335.

³²⁸ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 48.

These groups overlap to a large extent since it very often happens that one sub-right, such as the right to be heard, belongs both to the right to an effective remedy and the right to a fair hearing as well as to the right of defence.³²⁹ Still, a certain structure had to be made.

Before starting the discussion of the various cases, let me make an observation on the requirement that the European legal system of protection of EU rights and the access to both national and EU courts taken as a whole must be effective.

In an attempt to demonstrate this requirement, I will start with the *UPA* case³³⁰. Here, the CJEU clearly stated that, if the conditions set out in Article 230(4) TEC (now Art. 263(4) TFEU) are not fulfilled by the plaintiffs, the CJEU will not make exceptions, even if this means the individuals might be deprived of the effective judicial protection of their rights. Still, the CJEU emphasised that the European legal system has created many indirect instruments to control the validity of European acts, especially through the tools provided in Articles 241 TEC and Article 177 TEC (now Article 267 TFEU). The point is, explained the CJEU, that natural and legal persons can indirectly plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty (now Article 277 TFEU) or before the national courts, asking them to make a reference to the CJEU for a preliminary ruling on validity, since they have no jurisdiction themselves to declare those measures invalid.³³¹

“Thus, it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection”, held the CJEU.³³²

However, the CJEU stated in *Inuit*³³³ that *some* remedy must be made available. It stated that:

“Neither the TFEU nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of European Union law other than those already laid down by national law,” but this would be otherwise “if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully.”

So briefly: there must always be *a possibility* to address a court of law, either national or European.

³²⁹ About the rights of defence, see extensively Jans et al 2015 (n 63), 237-245.

³³⁰ Case C-50/00 P, *Union de Pequeños Agricultores* [2002] ECLI:EU:C:2002:462.

³³¹ *Ibid*, para 40.

³³² *Ibid*, para 41.

³³³ Case C-583/11 P *Inuit* [2013] ECLI:EU:C:2013:625, paras 103-104.

The conclusion of these cases would be that the CJEU searches for *alternative remedies* within the national or European legal system in order to satisfy the principle of effective judicial protection. As long as there are alternative remedies and tools for safeguarding EU rights effectively, this principle will be satisfied.

3.3 Right of access to an impartial and independent tribunal

As stated above, one of the components of this principle is access to court. Although, it was prior to the adoption of the CFR and the establishment of Article 47 CFR, the *Wilson* case³³⁴ is illustrative of the requirement of actual access to the courts, which must be independent and impartial. *Wilson* is an important precedent to a more recent case of the ‘*Associação Sindical dos Juizes Portugueses*’ (hereafter Portuguese Judges).

According to *Wilson* case, the body called upon to hear appeals against decisions refusing registration, must be a court or tribunal as defined by Community law. The criteria for a court or tribunal were clearly laid down in *Dorsch Consult* case.³³⁵ According to the CJEU in *Wilson*, the concept of independence of court comprises two aspects: an external one and an internal one, which requires objectivity and the absence of any interest in the outcome of the proceedings.³³⁶

In the *D. and A.* case³³⁷, two Nigerian refugees lodged an appeal before the Refugee Appeals Tribunal following the rejection of their application for asylum by the Minister in Ireland. They pleaded inter alia that the Refugee Appeals Tribunal was not a court or tribunal within the meaning of Article 267 TFEU, while the directive at issue, Directive 2005/85, stated in recital 27 that “the decisions taken in relation to an application for asylum and the withdrawal of refugee status must be subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU”. Regarding this plea, the CJEU comprehensively explained the criteria according to which a certain body is to be considered a court or tribunal within the meaning of Article 267 TFEU. It referred to its well-established case law in, inter alia, *RTL Belgium*³³⁸ and held that:

³³⁴ Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587.

³³⁵ Case C-54/96 *Dorsch Consult Ingenieurgesellschaft / Bundesbaugesellschaft Berlin* [1997] ECLI:EU:C:1997:413, para 3.

³³⁶ Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587, paras 47-52.

³³⁷ Case C-175/11 *D. and A.* [2013] ECLI:EU:C:2013:45.

³³⁸ Case C-245/01 *RTL Television GmbH* [2003] ECLI:EU:C:2003:580.

“The Court takes into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.”³³⁹

According to the CJEU, all the criteria were fulfilled and finally it found that the Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status did not preclude the national rule, according to which the applicant could lodge an appeal to the Refugee Appeals Tribunal and even lodge an appeal against its decision before the High Court and Supreme Court.

Significant is the case of *EL Hassani*³⁴⁰, in which the issue arose of whether a non-EU national had the right to access to court (in order to get visa and be able to visit his Polish wife and son). When he was appealing the decision delivered by a consul outside Poland, he faced the problem that, according to Polish law, the appeal was inadmissible as the administrative courts did not have jurisdiction in these matters. The CJEU recalled that the procedural rules as those at issue are a matter for the legal order of each Member State and that they have to comply with the principles of equivalence and effectiveness. However it also continued to consider, in particular, that under Article 47 of the CFR, a decision of an administrative authority that does not itself satisfy the conditions of independence and impartiality must be subject to subsequent control by a judicial body that must have jurisdiction to consider all the relevant issues. According to the CJEU, Article 32(3) of the Visa Code, read in the light of Article 47 of the CFR, requires Member States to provide for a judicial appeal against decisions refusing visas, with, at a certain stage of the proceedings, the guarantee a judicial appeal.

In *Otis*³⁴¹, the European Commission brought an action for damages on behalf of the EU before the Belgian court following a breach of competition rules and the establishment of a cartel by Otis and other companies for elevators. The defendants in the case challenged the right of the EU Commission to be a party to the proceedings because it was a party in an action concerning its own decision, on the grounds of which the fine was imposed on the defendants, hence the principle *nemo iudex in sua causa* would be infringed.

With regard to access to a tribunal, the CJEU held that the ‘tribunal’, for the purposes of Article 47 CFR, must have the power to consider all the questions of fact and law that are relevant to the case before it.³⁴²

³³⁹ Case C-175/11 *D. and A.* [2013] ECLI:EU:C:2013:45, para 83.

³⁴⁰ Case C-403/16 *Soufiane el Hasani* [2017] ECLI:EU:C:2017:960, para 42.

³⁴¹ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684.

³⁴² *Ibid*, para 49.

Despite the fact that the national courts may not take decisions running counter to a Commission decision relating to proceedings under Article 101 TFEU, that rule does not mean that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in Article 47 CFR.³⁴³

The *Portugueses judges* case³⁴⁴ is an extremely significant case related to the principle of effective judicial protection, the rule of law and judicial independence. As certain authors claim, it is arguably the most important judgment since *Les Verts* as regards principle of the rule of law in the EU legal system.³⁴⁵

In this case the Trade Union of Portuguese Judges ('the ASJP') acting on behalf of members of Court of Auditors, brought an action before the Supreme Court of Portugal seeking annulment of measures which were imposed by the Portuguese legislator and which were aimed at temporary salary- reduction and were based on mandatory requirements for reducing the Portuguese State`s excessive budget deficit during the year 2011.

The plaintiffs claimed that by imposing these measures, the principle of judicial independence enshrined in Article 19 (1) TEU and Article 47 CFR was breached.

The CJEU after referring to Article 2 TEU in which, along other values, the rule of law is listed,³⁴⁶ pointed out that Article 19 TEU, which imposes the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals,³⁴⁷ gives concrete expression to Article 2 TEU. According to the CJEU, the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.³⁴⁸ As to the concept of independence of the judiciary, which is inherent in the task of adjudication³⁴⁹, the Court held that:

“The concept of independence presupposes, in particular that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus

³⁴³ Ibid, paras 54-55.

³⁴⁴ Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117.

³⁴⁵ See L. Pech and S. Platon ““*Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juizes Portugueses*”
<http://eulawanalysis.blogspot.lu/2018/03/rule-of-law-backsliding-in-eu-court-of.html>

³⁴⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117, paras 30-31.

³⁴⁷ Ibid, paras 32-33.

³⁴⁸ Ibid, para 36.

³⁴⁹ Ibid, para 42.

protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.”³⁵⁰

The protection against removal from office of the members of the body concerned and the receipt of a level of remuneration commensurate with the importance of the functions the persons carry out constitute guarantees essential to judicial independence.³⁵¹

However, the CJEU found that the salary reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Court of Auditors.³⁵² This finding was inferred from the fact that these measures were not specifically targeted at the judiciary or specific courts, that they were not justified by overriding reasons of public interest and they were general in nature.

According to Pech and Platon³⁵³, noteworthy is that the CJEU focused exclusively on Article 19(1) TEU, which means that this Article may be ‘triggered’ in a much broader set of national situations than Article 47 CFR and in areas where there is very little or no EU *acquis*. Article 19 (1) is now a relevant standard for reviewing national measures irrespective of whether the situation is connected or not with EU law.

Bonelli and Claes provide a compelling argument regarding the necessity for differentiating between the relevance of Article 19 (1) TEU and Article 47 CFR. These authors argue that the intention of the CJEU was to come to rescue to a rule of law crisis in the Polish judiciary, through a creative interpretation of the austerity measures imposed on the Portuguese judges.

In their view, the CJEU invented a new sphere of EU law by stating that the material scope of Article 19 TEU is broader than that of Article 51(1) Charter. In this sense, there are "fields covered by EU law", which are not at the same time covered by the notion "the Member States implementing EU law".³⁵⁴

The essence is that it is not necessary to prove that a situation of ‘implementing EU law’ exist, but merely that the Portuguese court at issue is a court or tribunal that is part of the judicial system of the EU ‘in the fields covered by EU law’ under Article 19(1)TEU.

³⁵⁰ Ibid, para 44.

³⁵¹ Ibid, para 45.

³⁵² Ibid, paras 51-52.

³⁵³ See L. Pech and S. Platon, *‘Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in Associação Sindical dos Juizes Portugueses’* <http://eulawanalysis.blogspot.lu/2018/03/rule-of-law-backsliding-in-eu-court-of.html>

³⁵⁴ See M.Bonelli and M.Claes, *‘Judicial serendipity:how Portuguese judges came to the rescue of the Polish judiciary’* European Constitutional Law Review 2018 Vol.14 n 3 p.630.

Due to the function of national courts to be part of the national judiciary having competence to potentially decide on the interpretation or application of Union law, this new sphere of EU law, namely 'the fields covered by Union law' is created as a functional, rather than a traditional substantive one.

By entrusting the function of judicial review not only to the Court of Justice, but also to national courts and tribunals, Article 19 TEU makes all courts and tribunals which may potentially be called to interpret or apply EU law, part of the European judiciary. In this way, Member States are obliged to provide effective judicial protection of individuals in the fields covered by EU law (Article 19 TEU). Thus, individuals may rely upon Article 19 TEU in order to set aside national measures that threaten the independence of national judiciary.

The independence of the judiciary is an obligation deriving from Article 19 TEU. The support for this, the ECJ found in the case law related to Article 267 TFEU, Article 47 Charter and the principle of mutual trust.³⁵⁵ Apart from being given substance to the principle of effective judicial protection through entrusting the key function of judicial review to the national courts or tribunals, the ECJ did that also through its linking with the 'Member States' common constitutional traditions, Articles 6 and 13 of the ECHR, and Article 47 of the Charter.³⁵⁶

The legislative amendments to the Law on Ordinary Courts of 12 July 2017 and the Law on the Supreme Court of 8 December 2017 in Poland made the Commission decide to initiate the procedure under Article 7 (1) TEU, issuing a Reasoned proposal and to start two infringement actions against Poland (Case C-192/18 and Case C-619/18). Similarly, a number of preliminary cases have been referred to the CJEU on the issue of independence of the Polish judiciary after the recent legislative reforms.

With the ruling in the case of the Portuguese judges, the CJEU demonstrated that it was willing to assess national measures that allegedly undermine the independence of the national judiciary on the basis of Article 19 TEU, irrespective of whether the Charter applies. The impact of EU judicial protection law on Member States' legal orders through this specific application of the principle of judicial independence has thus gained a new and important dimension.

3.4 Rights of the defence

³⁵⁵ See M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' *European Constitutional Law Review* 2018 Vol. 14 n 3 pp 633-634.

³⁵⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117, para 35.

It is interesting to note that the rights of the defence form part of the right to effective judicial protection contained in Article 47 CFR, but they also contain sub-rights which overlap with the sub-rights of effective judicial protection. Rights of defence contain the following rights: the right to be heard, the right to be informed, the right to sufficient time to prepare a defence, the right not to incriminate oneself, legal privilege and the right to legal assistance.³⁵⁷ It is worth mentioning that the question of whether there is an infringement of the rights of the defence and the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question.³⁵⁸

In *Texdata*³⁵⁹, penalties for not disclosing the balance sheet within the prescribed period were imposed on a subsidiary company which was located in another Member State, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation. The company alleged that Article 47 CFR was infringed because of a too short period to submit an effective objection as well as the absence of prior notice and lack of any opportunity to make known the company's views³⁶⁰. In response, the CJEU held that the imposition of the penalty on the company did not impair the substance of its fundamental rights, since the submission of a reasoned objection against the decision imposing the penalty immediately rendered that decision inoperable and triggered an ordinary procedure under which there was a right *to be heard*.³⁶¹ The CJEU came to the conclusion that the system of penalties at issue in the main proceedings was consistent with the principles of effective judicial protection and respect for the rights of the defence.³⁶²

*ZZ*³⁶³ was about an Algerian citizen who was refused entry into Great Britain, a decision delivered by the SIAC (Special Immigration Appeals Commission), on the grounds that there was a serious and real danger of the residence of that person on UK territory, since he was allegedly related to terrorist activities. This was stated in the 'open judgment' (the closed' judgment was provided only to the Secretary of State and *ZZ*'s special advocates).

³⁵⁷ See Jans et al 2015 (n 63), 237-245.

³⁵⁸ See Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi* [2013] ECLI:EU:C:2013:518, para 102.

³⁵⁹ Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588.

³⁶⁰ Note that the too short period to submit an effective objection is similar to the sub-right to have sufficient time to prepare a defence.

³⁶¹ Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588, para 85.

³⁶² *Ibid*, para 88.

³⁶³ Case C-300/11 *ZZ* [2013] ECLI:EU:C:2013:363.

Then, ZZ set out that his right to family life was hampered and that in any case he was supposed to be informed of the grounds of refusal.

The CJEU reiterated the right to review in light of the *Byankov* case³⁶⁴, the right to ascertain the reasons for which the decision was taken either by reading the decision itself or requesting and obtaining notification of those reasons, as in *Gaydarov*³⁶⁵. Moreover:

“The right to an effective legal remedy would be infringed if a judicial decision was founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views.”³⁶⁶ However, the Court continued looking into how far reasons of State Security, which is one of the objectives protected under Article 51(2) CFR could nevertheless limit the access to the documents at issue.

*Sacko*³⁶⁷ demonstrates that the right to be heard is sufficiently observed if it was exercised in the first instance asylum procedure and if there is a transcript of the hearing. In addition, it is also respected if the Appellate Court can order a hearing, i.e. examination *ex nunc* of both facts and points of law,³⁶⁸ in a way that is required by the Directive at issue.

3.5 Principle of equality of arms

The principle of equality of arms, which is a corollary of the very concept of a fair hearing, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.³⁶⁹

The aim of this principle is to ensure a fair balance between the parties to the proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings.³⁷⁰

³⁶⁴ Ibid, para 47.

³⁶⁵ Ibid, para 53.

³⁶⁶ Ibid, para 56.

³⁶⁷ Case C-348/16 *Sacko* [2017] ECLI:EU:C:2017:591.

³⁶⁸ Ibid, para 49.

³⁶⁹ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 71.

³⁷⁰ Ibid, para 72; Case C-543/14 *Ordre des barreaux francophones et germanophone and others* [2016] ECLI:EU:C:2016:605, para 41; Case C-169/14 *Sánchez Morcillo* [2014] ECLI:EU:C:2014:2099, para 49.

In *Otis*, the defendants argued that the balance between the parties was jeopardised because the Commission conducted an investigation into the infringement of Article 101 TFEU with the aim of subsequently claiming compensation for the loss sustained. The CJEU replied that the EU contains a sufficient numbers of safeguards to ensure that the principle of equality of arms is observed in such an action.³⁷¹

In *Sánchez Morcillo*³⁷², following enforcement proceedings brought by Banco Bilbao (of the notarial act signed with Banco Bilbao for a loan) against the applicants in the main proceedings, Sanchez Morcillo and Abril Garcia, the applicants in the main proceedings, lodged an objection to the proceedings, which was rejected by the court hearing the case at the first instance. Then, they appealed this decision before the Provincial Court, Castellon.

This court made a reference to the CJEU and explained that under Spanish civil procedure, if a decision upheld the defendant's objection (in this case, the applicants objected to the 'unfair terms' of the agreement), the creditor had a right to appeal before a court, while, if the decision dismissed the objection brought by the defendant, the debtor did not have a right to appeal against the judgment at first instance, ordering the enforcement procedure to be carried out.

This case concerned, in the first place, the interpretation of Directive 93/13. However, as to the broader issue of principle of equality of arms, the CJEU underlined that that principle was an element of the principle of effective judicial protection guaranteed in Art. 47 CFR³⁷³ and also a corollary to the very concept of fair hearing.³⁷⁴ Since this principle was infringed, the national legislation was precluded from application.³⁷⁵

3.6 Right to be advised, defended and represented and right to legal aid

The *Peftiev* case³⁷⁶ relates to the right to be defended and represented.

By Regulation No. 765/2006, the EU imposed restrictive measures on the Belarus authorities due to a breach of democratic values and international electoral standards. However, according to Art. 3(1) of the

³⁷¹ Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 75.

³⁷² Case C-169/14 *Sánchez Morcillo* [2014] ECLI:EU:C:2014:2099.

³⁷³ *Ibid*, para 48.

³⁷⁴ *Ibid*, para 49.

³⁷⁵ More recently in Case C-205/15 *Toma* [2016] ECLI:EU:C:2016:499, however, the difference in treatment of the parties involved did not breach the principle of equality of arms, paras 47-50.

³⁷⁶ Case C-314/13 *Peftiev* [2014] ECLI:EU:C:2014:1645.

Regulation, the competent authorities had discretion to authorise a release of certain frozen funds of economic resources, when this was necessary, including where the resources were intended for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services.

Certain persons subject to the restrictive measures challenged those measures before the EU courts and for those reasons they contacted a Lithuanian law firm which lodged an action for annulment before the General Court.

When this firm sent invoices for the legal services provided to the respondents, the latter couldn't transfer the sum of money requested to the law firm's bank account since their resources were frozen.

The Ministry of foreign affairs and finances of Lithuania refused to make the derogation provided for in the Regulation, on the grounds that the resources were illegal.

In the end, the Supreme Court of Lithuania referred to the CJEU as it doubted whether the refusal by the competent authorities to make the derogation and unfreeze the funds for the purposes of providing legal aid to the law firm was in compliance with Art. 47 CFR.

The CJEU found that according to Art. 47 CFR (everyone has a right to be advised, defended and represented), under para 3, legal aid is to be made available to those who lack resources in so far as the aid is necessary to ensure effective access to justice.

The criterion that the resources must be necessary to pay for reasonable professional fees associated with legal aid had to be applied by the competent authorities. Besides, the CJEU stated that it was irrelevant whether these resources were acquired illegally or not.

Article 3(1) (b) of the Regulation had to be read jointly with the second paragraph of Art. 47 CFR.

In *DEB*³⁷⁷, the main question was whether the right to legal aid for legal entities, which was limited by certain conditions under German law and was thus obstructing the initiation of proceedings for compensation for damage suffered by DEB (as an outcome of the non-implementation of the EU Directive by the Federal Republic of Germany), rendered virtually impossible the right to access to court. The CJEU found that the right of a legal person to effective access to justice actually concerned the principle of effective judicial protection as a general principle of EU law, founding its legal basis on Art. 6 and 13 of the ECHR and Art. 47 CFR. Considering this, the CJEU established that the question referred

³⁷⁷ Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811.

had to be recast so that it related to the interpretation of the principle of effective judicial protection as enshrined in Art. 47 CFR.³⁷⁸

It proceeded by analysing the notion of legal aid within the context of EU law, namely the Charter, and concluded that legal aid did not constitute a social assistance as was the case in German law and could therefore also be granted to legal persons. This finding was also underpinned by a reference to ECtHR case law on whether the provision of legal aid was necessary for a fair hearing. According to the Strasbourg Court, this has to be determined on the basis of the particular facts and circumstances of each case and would depend also on the importance of what was at stake for the applicant, as well as the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively.³⁷⁹

In the end, the CJEU found that Art. 47 CFR was to be interpreted such that it was not impossible for legal entities to be granted legal aid. Nevertheless, it left to the national courts to ascertain whether the conditions for granting legal aid under German law constituted a limitation on the right of access to court, which undermined the very core of that right.³⁸⁰

3.7 Cases which demonstrate in which circumstances the act must be appealable

In *Zakaria*³⁸¹ the question that was referred to the CJEU by the Senate of the Supreme Court of Latvia, consisted of the interpretation of Art. 13(3) of the Regulation No. 562/ 2006 (Schengen Borders Code), which allowed an *appeal* against a decision of refusal of entry into a Schengen zone by the national authorities.

Mr. Zakaria, who had permanent Swedish residency, faced certain inconveniences at the airport in Riga, where, according to his allegations, he was provoked and offended, which, in turn violated his human dignity. Apart from this, he missed his flight to Copenhagen. Nevertheless, he was eventually allowed entry.

Mr. Zakaria lodged a complaint with the Head of the State border control, who upheld the decision of the border authorities (to enter the country) but dismissed Mr. Zakaria's application claiming compensation for material and non-material damage.

³⁷⁸ Ibid, para 33.

³⁷⁹ Ibid, para 46.

³⁸⁰ Ibid, para 60.

³⁸¹ Case C-23/12 *Zakaria* [2013] ECLI:EU:C:2013:24.

The administrative courts also dismissed his application for compensation for damage.

Finally, Mr. Zakaria requested that the Senate of the Supreme Court condemn the factual act of the border officials at the time of the adoption of the decision, but unrelated to its adoption. Mr. Zakaria was not seeking a review of the decision authorising him to enter Latvia.

The CJEU interpreted the above-stated provision in the Regulation in light of Art. 47 CFR and the right to appeal and found that that Art. 13(3) of the Regulation obliged Member States to establish a means of obtaining redress only against decisions to refuse entry (para 35) and not against infringements alleged to have been committed during the adoption of a decision authorising entry.

In this case, the relevant Article from the Regulation was interpreted jointly with Art. 47 CFR (right to appeal) in a manner which did not impose any new obligation on the national authorities. In this sense it respected the national procedural autonomy. However, the CJEU emphasised that an appropriate redress action should be in place if the authorities find a breach of another provision from the Regulation (in this case the right to human dignity).

In *Borelli* case³⁸², the CJEU stated that:

“The requirement for judicial review of any decision of a national authority constitutes a general principle of EU law [...].

In *Liivimaa*,³⁸³ Estonia and Latvia jointly prepared an operational programme on the basis of EU Regulations, with the objective of promoting European territorial cooperation. In the context of that operational programme, a Monitoring Committee was set up, which adopted a programme manual. When the applicant Liivimaa submitted an application for financing a project, it was rejected by a simple letter. The applicant then instituted proceedings before the Estonian courts challenging the letter with which it was refused aid and contended that the provision stipulating that the act by the Monitoring Committee *was not appealable* was contrary to Art. 47 CFR, the *right to an effective remedy*.³⁸⁴

³⁸² Case C-97/91 *Oleificio Borelli / Commission* [1992] ECLI:EU:C:1992:491, para 14.

³⁸³ Case C-562/12 *Liivimaa Lihaveis* [2014] ECLI:EU:C:2014:2229.

³⁸⁴ *Ibid*, para 71, in which the CJEU stated that that the lack of any remedy against such a decision deprives the applicant of their right to effective remedy under Art 47 CFR.

Also *Berlioz*³⁸⁵, discussed earlier, is an example of the obligation to make certain acts reviewable, in that case the order to give information.

4. The principle of effective judicial protection and effectiveness of EU law: creation of new remedies?

4.1 The jurisprudential developments

In the *Unibet* case³⁸⁶ the question arose whether EU law requires a self-standing action in order for an individual to challenge the compatibility of national law with EU law. The CJEU confirmed that, as long as the issue of compatibility can be raised in other alternative procedures, there is no obligation for a free-standing action specifically dedicated to EU law.

The CJEU held, however, that:

“It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under European Union law.”³⁸⁷

In *Unibet*, the term remedy corresponds to the broad understanding of this notion, i.e. to the ‘*voie de recours*’³⁸⁸

Over the years, there has been quite some debate as to whether EU law requires the creation of new remedies in the strict sense of the term.

Apart from the so-called general remedy of setting aside conflicting national provisions, the existence of which has been contested,³⁸⁹ it would seem that three separate remedies have been created at EU level as a matter of EU law. They are: the interim injunction, compensation for damage against the State and restitution of illegally levied charges.

As it was expounded in the Introduction of this book, the notion of remedy can be conceived in a narrow sense, as a specific redress or relief and in a broad sense as legal means to obtain certain redress.

³⁸⁵ Case C-682/15 *Berlioz* [2017] ECLI:EU:C:2017:373. This case was discussed in section 2 of this chapter.

³⁸⁶ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163, para 40.

³⁸⁷ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163, para 41.

³⁸⁸ See French version of paragraph 41 of the judgment.

³⁸⁹ Van Gerven finds that ‘setting aside’ is a general remedy in EC law, Van Gerven 2000 (n 42), 503, whereas Prechal concludes that it is a consequence of the supremacy of EU law, see Prechal 1995 (n 34), 166.

It was underlined that for the sake of this thesis, that the notion of remedy will be treated in its narrow sense, i.e. as the redress or relief a party may seek, thus also including compensation for damage and interim relief.

The principle of effective judicial protection of EU rights was elucidated through the *Simmenthal*³⁹⁰, *Factortame*³⁹¹ and *Francovich*³⁹² case law, as was the principle of effectiveness of EU law as such, although in these cases, the CJEU only referred to “effectiveness of Community law” rather than the principle of effectiveness.

The analysis of these cases will involve questions as to the legal basis of the remedies, the CJEU’s rationale behind their creation and their effects on the national remedial autonomy of Member States. Undoubtedly, these cases which strengthened the principles of effective judicial protection and effectiveness of EU law and also contributed to the increased level of uniformity in the standard of protection of EU rights and EU law, thus presenting a stepping stone towards *ius commune* at the level of remedies, are characteristic of the second approach of the CJEU’s intervention in the legal orders of the Member States.

Both *Simmenthal* and *Factortame*, where national courts were obliged to disregard all the national procedural provisions, whether legislative or administrative rules or judicial practice, which could impair the *effectiveness* of EU law, marked the beginning of a new approach to assessing national procedural provisions which moved away from the previous *Rewe/ Comet* approach, where, as explained, the CJEU was exercising a discreet balancing of legal interests.

The CJEU conferred powers on the national courts to do everything necessary to safeguard the effective enforcement of EU rights and EU law as such when adjudicating an EU law dispute. This primarily took the form of a negative obligation to set aside national legislative provisions which might prevent, even temporarily, EU rules from having full force and effect, be they of the highest rank in the national legal hierarchy.

In fact, those national procedural rules, which were basically of a constitutional character, and which constituted an obstacle to the exercise of the full force and effect of EU rules, had to be set aside by the

³⁹⁰ Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49.

³⁹¹ Case C-213/89 *Factortame Ltd and others* [1990] ECLI:EU:C:1990:257.

³⁹² Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

national court. This obligation of the national courts to set aside national procedural rules which hindered the effectiveness of the EU substantive rights was labelled ‘structural supremacy’.³⁹³

The CJEU obliged national courts to “ensure full effect of Community provisions”.³⁹⁴ In *Simmenthal*, an Italian constitutional rule had to be set aside, while in *Factortame*, the CJEU proceeded even further and imposed on the national court a two-fold obligation consisting of the disapplication of the old common law rule which prohibited the awarding of an interim measure against the Crown and the awarding of interim relief against the contested national provisions.

In *Simmenthal*³⁹⁵, the national provision at issue prevented the enforcement of a substantive EU law provision. The plaintiff in this case asked the national court to order the repayment of taxes levied contrary to EU law, and this raised doubts about the discretion of the court to do that, since there was a national constitutional provision which required the courts to refer each case to the Italian Constitutional Court whose task was to adjudicate on the constitutionality of the substantive rule. The *Preto* referred the question to the CJEU about the compatibility of this national constitutional provision with the EU law requirement of effectiveness. As set out above, the CJEU ruled that the immediate protection of the substantive EU right required this national provision to be disapplied by the national court and derived this court’s obligation from the direct effect of EU law, which required the full force of EU law in a uniform manner in all the Member States,³⁹⁶ an obligation for the national courts to protect rights,³⁹⁷ the precedence of EC law,³⁹⁸ and the effectiveness or economy of Article 234 EC.³⁹⁹ In the subsequent paragraphs of the judgment,⁴⁰⁰ it explained that “setting aside” the national procedural provision was a “logical consequence” of the preceding arguments.

The national procedural provision indeed prevented the immediate enforcement of the substantive EU law provision. However, also in the previous *Rewe/ Comet* phase, the effective exercise of substantive EU rights was prevented by a national procedural rule and in most of the cases, as was demonstrated, despite

³⁹³ The expression is from Bruno de Witte in ‘The evolution of EU law’. See also Claes et al 2006 (n 20), 133 and Prechal 1998 (n 37), 685.

³⁹⁴ Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49, para 24.

³⁹⁵ *Simmenthal* is considered to be a culmination of the doctrines of direct effect and supremacy. It is also seen as a notoriously complex judgment; firm in terms of result, but less clear in argumentation. See Prechal 1998 (n 37), 684.

³⁹⁶ Case C-106/77 *Simmenthal* [1978] ECLI:EU:C:1978:49, para 14.

³⁹⁷ *Ibid*, para 16.

³⁹⁸ *Ibid*, para 17.

³⁹⁹ *Ibid*, para 19.

⁴⁰⁰ *Ibid*, paras 21-24.

the prima facie impairment of the minimum effectiveness principle, national procedural rule applied according to the established principle of national procedural autonomy, as it was justified by considerations of legal certainty.

What was so special in the *Simmenthal* case that made the principle of effectiveness prevail over national law? One explanation was that in this case, no national principle that would justify the restrictive national provisions was put forward, as was the case in the previous strand of cases.⁴⁰¹

Besides, it was also argued that the national rules in the *Rewe/ Comet* approach were of a ‘procedural’ nature and as such were appraised in the *Rewe* manner, whereas the issues in *Simmenthal* and *Factortame* were of constitutional importance for the EU legal system as such, since the provisions in these cases prevented the national court from referring to the CJEU, thus giving the CJEU the final word on the constitutionality of certain national substantive provisions.⁴⁰²

However, the distinction between substantive and procedural provisions of EU law as the criterion for applying either the intrusive *Simmenthal* test or the minimalist *Rewe* requirement turned out to be confusing.⁴⁰³ The deficiencies of the dichotomy between substantive and procedural rules are very well elucidated by Himsworth.⁴⁰⁴

The *Simmenthal* logic is that, once a substantive EU law provision is impaired by the application of a national procedural rule, the latter should immediately be set aside for the sake of the effectiveness of the EU law. This stance is not entirely correct, since the essence of ‘supremacy’ lies in the conflict between two substantive provisions of national and EU law, in which case, the national provision should be set aside.

National procedural provisions are not supposed to be disapplied immediately by the national court on the basis of direct effect and supremacy of EU law, but rather they should be appraised in light of the *Rewe*

⁴⁰¹ For instance, Prechal suggests that, in the *Simmenthal* case, the CJEU may have considered there to be no general principle capable of justifying the Italian rule. See Smith 1999 (n 34), 299.

⁴⁰² See Prechal 1995 (n 34), 141-142.

⁴⁰³ For the separation between substantive and procedural conditions and the confusion they bring about see Smith 1999 (n 34) ; Van Gerven 1995 (n 42); Prechal et al 2011 (n 234), 283-295. According to Prechal, “procedural, remedial etc provisions may also be ‘substantive’ in the sense that Community legislation provides for them. In this case, a conflict between such a Community procedural provision and national law will be resolved in accordance with the principle of supremacy.” See Prechal 1998 (n 37), 685.

⁴⁰⁴ Himsworth 1997 (n 89), 12.

test, by taking into consideration some other important principles of law which justify the restrictive national procedural rule. The principles of supremacy and direct effect, as well as the requirement of effectiveness of EU law and effective judicial protection are not sound arguments for the immediate and undisputed setting aside of national procedural rules which restrict the effective enforcement of an EU right.

All these *Simmenthal* characteristics have been reiterated in more recent cases of the CJEU.⁴⁰⁵

In *Factortame*⁴⁰⁶, the Spanish fishermen asked for an interim measure to be awarded by the national court in England until the decision on compatibility of the contested national act with EU law was delivered. However, the plaintiff's request was blocked by an old common law rule that an interim measure could not be granted against the Crown. Despite the lack of power of the national courts to grant this relief under national law, the House of Lords referred a preliminary question to the CJEU as to whether the courts had this power under EU law. This was rephrased by the CJEU to whether that national rule preventing the court from granting interim relief had to be set aside.

By relying on the principle of precedence of EU law and direct effect of its provisions and consequently on the principle of 'structural supremacy', endorsed by the national court's obligation stemming from ex. Art. 10 TEC (now Art. 4(3) TEU) to ensure legal protection to persons which flows from the direct effect of EC law provisions, the CJEU obliged the national court *a quo* to disapply that national rule which prevented it from granting interim relief. Apart from its emphasis that the effectiveness of EU law would be impaired if the national court was unable to grant interim relief, it also stated that the interim relief was aimed at ensuring the full effectiveness of the rights claimed under EU law.⁴⁰⁷

Thus, the outcome of this case was not only an obligation on the national court to set aside a national procedural rule, but also an obligation to provide a *specific type of remedy*. The issue of whether the interim relief in this case was the creation of a new remedy in the English legal system or simply an extension of an already existing remedy was approached differently in the legal literature.

Barav⁴⁰⁸ argues that the CJEU erroneously adjudicated on the exercise of the general powers of the English courts to grant interim relief, while in fact these powers were non-existent under the national law.

⁴⁰⁵ See Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363; Case C-409/06 *Winner Wetten* [2010] ECLI:EU:C:2010:503.

⁴⁰⁶ Case C-213/89 *Factortame* [1990] ECLI:EU:C:1990:257.

⁴⁰⁷ *Ibid*, para 21.

⁴⁰⁸ Barav 1994 (n 239).

Claes⁴⁰⁹ contends that in the *Factortame* case, the CJEU created an EU remedy which must be available in all the Member States as a matter of EU law. On the other hand, Harlow assumes that the CJEU did not see the ruling as compelling the introduction of mandatory interim remedies into a system where these were not available. Prechal⁴¹⁰ refers to the differing views on the analysis of this problem, namely, the concept of remedies in continental and common law systems, which produce different results.

In this case, the CJEU implicitly propelled the idea that interim protection was an indispensable component of the principle of effective judicial protection, whereas later, in *Unibet*, this was explicitly stated in the following words:

“The principle of effective judicial protection of an individual’s rights under the EU law must be interpreted as requiring it to be possible in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with EU law, where the grant of such relief is necessary to ensure the full effectiveness of the judgment to be given on the existence of such rights”.⁴¹¹

Another relevant point in this case is that the award of interim relief to the claimant who challenges the compatibility of national law with EU law (on which it is based) is necessary in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law.⁴¹²

Thus, the CJEU provides an instruction about the interpretation of the principle of effective judicial protection:

“[The principle] requires a possibility in the legal order of a Member State for interim relief to be granted until the competent court has given a ruling on whether national provisions are compatible with Community law.”⁴¹³

Finally, *Francovich*⁴¹⁴ is indeed a highly relevant case for the EU system of legal remedies in general terms. With the establishment of the principle of State liability for EU law infringement, individuals were

⁴⁰⁹ Claes et al 2006 (n 20), 146.

⁴¹⁰ Prechal 1995 (n 34), 170.

⁴¹¹ Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163, para 77.

⁴¹² *Ibid*, para 67. In fact, this statement was only a reaffirmation of the *Factortame* case.

⁴¹³ *Ibid*, para 77.

⁴¹⁴ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

given the power to rely on non-directly effective EU law provisions to obtain compensation for damage suffered as a result of the State's breach of EU law.⁴¹⁵

4.2 Scholarly debates on new remedies

Different scholars hold different views about what the primary rationale is behind the *Simmenthal*, *Factortame*, *Unibet* and *Francovich* rulings.

For instance, Eilmansberger claims that the main reason for the creation of the remedies was to achieve *effet utile* of EU law, by protecting individual EU rights,⁴¹⁶ while according to Prechal, the underlying reason for the establishment of these remedies throughout the EU was the pursuit and strengthening of the effective judicial protection principle.⁴¹⁷

According to Caranta⁴¹⁸, effective judicial protection can be seen as independent grounds on which State liability is based, admitting that it remains linked to the principle of effectiveness.

In my view, it is indisputable that the protection of a substantive EU right, namely the right to free movement of goods in the *Simmenthal* case, was effective through the immediate restitution of the illegally levied charges without waiting for the Constitutional Court to declare these charges unconstitutional.

It is also true that the freedom to establishment was effectively protected in *Factortame* through the granting of interim relief to the plaintiffs against the national act incompatible with EU law. Similarly, in *Unibet*, the freedom to provide services was protected by the availability of an interim measure against the conflicting national law.

In these cases, the effective exercise of a substantive EU right was performed through the effective enforcement of EU rules conferring these rights on individuals. Likewise, the effectiveness of EU law was protected through the granting of these remedies.

The fact that effectiveness, effective judicial protection and uniform protection of EU rights were strengthened does not justify the crucial problem that all this was carried out without the creation of an appropriate legal basis on the part of the CJEU. Considering that these powers were created by the CJEU,

⁴¹⁵ For a detailed discussion see Chapter 4.

⁴¹⁶ Eilmansberger 2004 (n 42).

⁴¹⁷ See Prechal 2001 (n 28), 4; and Prechal 1995 (n 34), 141.

⁴¹⁸ See Caranta 1995 (n 255), 710.

one might question its competence to do this. Since national courts' powers flow from the national law, it is solely the national law which is competent to grant them these powers and not the CJEU, in spite of the fact that these national courts perform an EU mission.⁴¹⁹

Next to the question of the foundation of the remedies, there is the question of the conditions that govern them. Conditions for granting compensation for damage suffered as a result of the State's breach of EU law were determined by the CJEU in *Francovich*⁴²⁰ and further fleshed out in *Brasserie du Pêcheur*⁴²¹. These conditions were: an EU rule intended to confer rights on individuals, a sufficiently serious breach of the rule and a direct causal link between the breach and damage suffered.

Regarding the award of an interim measure against a national act due to its incompatibility with the EU law, the CJEU stated in *Unibet* that the grant of interim relief to suspend the application of conflicting national provisions with EU law is governed by the criteria laid down by the national law applicable before the CJEU, provided that the principle of equivalence and minimum effectiveness are satisfied.

The cases in which certain EU law conditions have to be satisfied first for a right to arise were spelled out by the CJEU in cases like *Brasserie du Pêcheur*⁴²² and *Zuckerfabrik*.⁴²³

As will be explained, these conditions were referred to as the new *ius commune* by some authors, as they contribute to the harmonisation of remedies throughout the EU in the area of compensation for damage and interim relief against a national act based on an EU act whose legality is contested.

However, 'constitutive' and uniform EU law conditions for acquiring these EU rights, (namely the right to compensation for damage and right to interim relief against a national act based on an allegedly illegal EU act), appeared to be difficult to apply in the national legal systems in which there were no 'similar actions'. In addition, in both of these cases, the awarding of compensation and interim measures against a national law based on allegedly unlawful EU act before the national courts remained disputable as to the manner in which the national judges should assess and apply the EU law conditions.

⁴¹⁹ In this sense see Prechal 1995 (n 34), 172; Claes et al 2006 (n 20), 132; Harlow 2000 (n 42), 76; Hofstätter 2005 (n 37), 23. This last author considers that the need for a uniform and effective application of EU law cannot justify a reversal of competences between the EU and Member States. Kakouris 1997 (n 65) puts forward the opposite view.

⁴²⁰ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428.

⁴²¹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECLI:EU:C:1996:79.

⁴²² *Ibid.*

⁴²³ Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen* and *Zuckerfabrik Soest* [1991] ECLI:EU:C:1991:65.

Thus, even in circumstances of unified conditions, the outcome of the same claim before national courts in different Member States was still at risk of being divergent, and consequently the uniform application of EU law was violated.

In conclusion regarding the remedies, there are two remedies which need to be granted by the national court according to ‘uniform conditions’ established by the CJEU: compensation for damage sustained from a breach of EU law by the State⁴²⁴ and interim relief against a national act based on an EU act whose compatibility with a higher source of EU law is being challenged. These need to be exercised by the national courts according to specific and cumulative conditions.⁴²⁵

Besides the remedies discussed here above, two other remedies, namely, the restitution of charges levied contrary to EU law and interim relief against a national measure incompatible with EU law were imposed/determined as obligatory in all the legal systems of the Member States. These latter remedies are to be exercised according to the national procedural rules for granting a similar domestic relief, however, by necessarily observing the principles of minimum effectiveness and equivalence.

These remedies, compensation for damage and interim relief against a national act based on an allegedly illegal EU act were created by the CJEU in order to bridge inequalities in the protection of EU rights and ensure the full force and effect of EU law.⁴²⁶

⁴²⁴ Joined Cases C-6/90 and C-9/90 *Francoovich and Bonifaci* [1991] ECLI:EU:C:1991:428 and Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79.

⁴²⁵ A-G Opinion in Joined Cases C-143/88 and C-92/82 *Zuckerfabrik Süderdithmarschen* [1991] ECLI:EU:C:1990:381; Case C-465/93 *Atlanta Fruchtandelsgesellschaft mbH and others* [1995] ECLI:EU:C:1995:369; Case C-334/95 *Krüger* [1997] ECLI:EU:C:1997:378; Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163. Para 47 of *Krüger* contains the cumulative uniform conditions which need to be satisfied in order for the national court to grant interim relief on a national measure, based on an allegedly illegal EU act. These are: firstly that the court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in question before the CJEU, itself refers the question to the Court of Justice. Secondly, there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage to the party seeking the relief. Thirdly, the national court takes due account of the Community interest. In its assessment of all these conditions, the national court respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the Community act or on an application for interim measures seeking similar interim relief at Community level.

⁴²⁶ In the legal literature they were referred to as a new *ius commune*; Caranta 1994 (n 255); Euro-remedy, Smith 1999 (n 34); communitarisation of domestic procedural law and positive convergence, Heukels et al 2002 (n 20).

The conditions or criteria that need to be satisfied in order for an individual to acquire the right to claim a specific Euro remedy, either compensation for damage against the State or interim relief against a national act based on a contested EU act, are called ‘constitutive conditions’ in van Gerven’s terminology⁴²⁷, and they are uniform and equal, compared to remedial or ‘executive conditions’ which differ from one Member State to another and serve to enforce these rights in the national system.

The distinction is necessary because constitutive conditions are created by the CJEU and are obligatory and prevail over national rules related to the awarding of a certain remedy, whereas, executive conditions – or what I called in my Chapter on liability, ‘leftovers’ – are procedural conditions, prescribed by national law and necessary for the enforcement of the right (to compensation or interim relief or restitution etc.). Still, these executive conditions must observe the *Rewe* requirements as was discussed in Chapter 2.

In the scope of these executive conditions fall not only rules on *locus standi*, rules on *ex officio* acting on the part of the national judge, the principle of *res judicata*, standard of proof, burden of proof, as well as time limits for bringing actions, foreclosures and statutory limitations etc. but also certain remedial aspects, such as the form and extent of the remedy, heads of damage that can be recovered, i.e. pure economic loss, moral damages, interest etc. Basically, this distinction is made by van Gerven in order to avoid confusion between the ‘substantive rules’ and ‘procedural rules’. This latter dichotomy, as was mentioned, spurred a lot of debate, since a substantive nature was conferred to certain procedural rules, (as in *Simmenthal* and *Factortame*), and issues arose regarding which approach had to be applied: the immediate ‘setting aside’ of a national norm (*Simmenthal/ Francovich*) or a ‘balancing approach’ (*Rewe/ Comet; Van Schijndel, Alassini*) as will be discussed in the next paragraph.

The creation of EU remedies can be considered as an act of erosion of ‘remedial autonomy’, as a species of procedural autonomy, when it comes to the choice of the conditions for awarding a specific remedy. In both *Zuckerfabrik* and *Brasserie du Pêcheur*, the CJEU drew analogies with the procedures initiated before it under Article 277 TFEU (ex Art. 241 TEC) and Article 340 TFEU (ex Art. 288 TEC) respectively: the award of interim measures against EU acts which are not compatible with a higher ranking EU law and compensation for damage sustained by illegal actions of the EU and the non-contractual liability of the EU.⁴²⁸

⁴²⁷ Van Gerven 2000 (n 42), 501-536.

⁴²⁸ Smith considers necessary the CJEU’s designation of a legal basis for creating common conditions for claiming (by the individuals) and awarding (by the national courts) legal remedies, in order to defuse criticism that it acts without proper legal basis. See Smith 1999 (n 34), 301.

However, it is difficult to accept the CJEU's analogy made between the requisite conditions for awarding interim relief and compensation for damage for non-contractual liability of the EU to an individual who claims these remedies in direct actions before the CJEU on one hand and the conditions required for obtaining these remedies in the national courts of the Member States.

If the CJEU substantially lacks a legal basis to empower national courts to grant specific types of remedies, it is not logical that it goes even further by fleshing out the conditions for these remedies.

The CJEU as an EU institution and promoter of EU integration could intrude to a certain extent on national procedural autonomy in order to alleviate the EU legislator's inactivity for procedural harmonisation. However, there is no legal basis for the CJEU to create powers for the national courts in order to ensure the existence of an effective remedy, when, in the absence of direct competence conferred on the EU, jurisdiction and powers of the national courts fall to be determined by the national law.

The EU legislator can harmonise the substantive law, but the harmonisation of procedural law is disputable, not only through the judge-made rules, but also on the part of the EU legislator.⁴²⁹

In any event, my point here was that in the realm of remedies, there was a direct empowerment by EU law of the national courts to extend their existing powers or to assume (on the basis of EU law) new powers which do not exist under national law. National courts have their formal source of powers based in national law and not in EU law. They remain national judges with an EU law mission. Still, it is disputable whether the CJEU can rely on the principles of effective judicial protection, the full force and effect of EU law, Article 4(3) TEU or Article 263 TFEU, in order to grant these powers to national courts.

5. Balancing approach as a separate category

5.1 The case law

The third approach that was announced in the Introduction is a so-called balancing approach or an approach towards national procedural rules which takes into consideration the legal interest and justification for applying a national restrictive rule. It was also called a 'purposive approach'.⁴³⁰

In fact, contrary to what has been argued in legal writing regarding the issue of 'phases' of CJEU jurisprudence, (that the balancing approach is a third road which is sometimes called a 'procedural rule of

⁴²⁹ Regarding the procedural harmonisation and the CJEU as well as an explanation about the Storm report, see Himsworth 1997 (n 89), 291-311. This was discussed previously in section 1.2 in chapter 2.

⁴³⁰ See Hoskins 1996 (n 20), 7.

reason'), I will attempt to show that in fact, the balancing exercise is neither new nor a last stance in the CJEU's treatment of national procedural rules.

The notion of 'procedural rule of reason' was coined by Prechal and basically means that there is an exercise of balancing different interests: on one hand, a requirement of effective remedies in national courts that ensure the effective protection of EU rights and on the other hand, the specific aim (or aims) pursued by the national rules at issue. Another balancing element is in the search for adequate protection, which implies stricter and higher standards than the 'old' and negative test of minimum protection.⁴³¹

In my view, the weighing and balancing between the principles of effectiveness of EU law and effective judicial protection of EU rights on one hand and the general principles of law common to almost all Member States on the other hand started to be manifest even in the early cases like *Rewe* and *Comet*.

As explained in the second Chapter, the *Rewe/ Comet* approach was only a reflection of the 'relative comprehension' of the principle of national procedural autonomy. National procedural rules which stood in the way of the effective enforcement of EU rights were assessed in light of the general principles of law that gave them justification. These principles are: the principle of legal certainty, legitimate expectation of the parties, prohibition of unjust enrichment and proper conduct of the procedure.

In my 'first approach' in which national procedural autonomy was given precedence in a number of cases, it was also demonstrated that there were certain exceptions stemming from the higher relevance of the general principles of law propping up these rules.

The second approach is characterised by intrusive judicial activity and almost non-observance of any other general principle capable of justifying the procedural rule at hand. However, what matters most is that questions were raised about the reasons for this striking disregard for national procedural rules. This reflects the fact that many scholars were critical about this CJEU intrusion into the national procedural autonomy of Member States and attempted to find the reason behind a behaviour that was difficult to understand. The problem was explained in the previous paragraph.

⁴³¹ See Prechal 2001 (n 28), 6. Also Prechal 1998 (n 37), 690-693. According to this commentator, the 'rule of reason' is a concept that was originally developed within the context of the free movement of goods. Because many national provisions were regarded as a potential obstacle to intra-Union trade, it was deemed necessary to create an escape for the provisions that were designed to protect certain general interests, such as consumer rights and the environment. See Jans et al (n 63), 59.

This balancing approach is a third approach of the CJEU to the national procedural rules, but what is worth emphasising is that it was not invented with *Van Schijndel/ Peterbroeck* case law.⁴³² In his Opinion in the *Van Schijndel* case, AG Jacobs explicitly presented this ‘balancing approach’. However, it is in fact applicable to all the ‘phases’ and ‘approaches’ that the CJEU applies in order to strike a sensible balance between ensuring the effective application of EU law and the need for national procedural efficiency.

AG Jacobs said the following:

“The proper application of the law does not necessarily mean that there cannot be any limits on its application. The interest in full application may need to be balanced against other considerations such as legal certainty, sound administration and orderly and proper conduct of proceedings by the courts. Legal systems commonly impose various restrictions which, in the absence of a reasonable degree of diligence on the part of the plaintiff, will lead to full or partial denial of his claim.”⁴³³

It was in particular in the context of cases dealing with the problem of application of EU law *ex officio* that the ‘procedural rule of reason’ really blossomed. However, the question of whether the general principles of law which justify national procedural rules outweigh the principle of effectiveness of EU law or vice versa extends to almost all types of national procedural rules.

5.2 Intermezzo: *Ex Officio* application of EU Law

Since the ‘weighing’ exercise is truly given attention and clarification in cases concerning *ex officio* application of EU law, it seems appropriate to discuss briefly, at this stage, the relevant case law. The central question is whether the national courts have an obligation and/ or discretion to raise certain EU law claims of their own motion.

Observance of the principle of national procedural autonomy would imply an analogous treatment of national procedural rules. Thus, if a possibility or obligation flows from the national law in raising *ex officio* points of national law, the same would apply to the issues related to EU law. The CJEU’s approach is a bit more complex though.

In *Van Schijndel*,⁴³⁴ a national provision was at stake which stipulates that “in cases involving civil rights and obligations freely entered into by the parties, additional pleas on points of law cannot require courts

⁴³² For a discussion of these two cases and the principle of raising issue *ex officio*, see Lenaerts et al 2014 (n 165), 132-133.

⁴³³ See Opinion of A-G Jacobs in Case C-430/93 *Van Schijndel* [1995] ECLI:EU:C:1995:185, para 31.

⁴³⁴ Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441.

to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which a claim is based.”

This rendered the enforcement of EU rights impossible in practice, since the national court was prevented from taking into consideration a new plea based on binding EU law competition rules, which was raised for the first time before the *Hoge Raad*. However, the CJEU found that the impairment of the exercise of EU rights was justified in the case at hand by a general principle of law reflecting conceptions that prevailed in most of the Member States concerning the relations between the State and the individual. In paragraph 19 of this case the CJEU pointed out that:

“Each case which raises the question whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.”

In this case, the national principle of judicial passivity prevailed over the effectiveness of EU law, due to the fact that its existence was justified by the general principles of law.

In fact, the CJEU gave precedence to the national provision restricting the effective exercise of the EU right, by performing a balancing exercise between the *importance* of the effective enforcement of the EU individual right and a general principle of national law (legal certainty and proper conduct of the proceedings justifying judicial passivity in civil law matters).⁴³⁵

The principle of effective protection of EU rights has not been breached by the national court despite the non-enforcement of the EU right, since the restriction of this right was justified with a principle that, in a civil suit, it is for the parties to take the initiative, and the court is able to act of its own motion only in exceptional cases involving the public interest. That principle safeguards the rights of the defence and ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas.

*Kraaijeveld*⁴³⁶ expressed the CJEU’s view that EU law does not confer a general power on national courts to consider points of EU law of their own motion. However, according to the CJEU:

⁴³⁵ Ibid, para 21.

⁴³⁶ Case C-72/95 *Kraaijeveld and others* [1996] ECLI:EU:C:1996:404.

“Where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding EU rules are concerned”⁴³⁷

And by analogy:

“The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law.”⁴³⁸

Finally, the CJEU concluded in paragraph 60 that:

“Where, pursuant to national law, a court *must or may* raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it *must*, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.”

The *J. van der Weerd* case⁴³⁹ reiterates the CJEU’s ruling in *Van Schijndel*⁴⁴⁰, by concluding that, in circumstances in which the parties to the proceedings had an opportunity to advance certain points of EU law and they did not take advantage of that possibility, the national court was not required to abandon the principle of judicial passivity and raise issues of EU law of its own motion in order to prevent the application of the restrictive national procedural rule. In *van der Weerd* it was also important that the directive was not of public policy and should not be applied *ex officio* under the principle of equivalence (Dutch public policy rules had to be applied *ex officio*). This indicates that in certain circumstances an obligation to *ex officio* application may exist under the principle of equivalence.

Admittedly, in *Van Schijndel* and *Kraaijeveld* where national law prevails over EU law in the field of *ex officio* raising pleas of EU law by the national courts, there is not only a difference in the level of discretion which the national courts were able to apply, but also a difference in the method employed by the CJEU to lay down that national courts are not obliged to raise issues of EU law of their own motion.

⁴³⁷ Ibid, para 57.

⁴³⁸ Ibid, 58.

⁴³⁹ Joined Case C-222/05 to C-225/05 *J. van der Weerd and Others* [2007] ECLI:EU:C:2007:318.

⁴⁴⁰ The essence of and reasons behind the *Van Schijndel* case in the CJEU’s view were summarized by Himsworth. See Himsworth 1997 (n 89), 8.

Thus, in the *Van Schijndel* case, the requirement under the national legislation for the national court not to raise issues of national law *ex officio* in certain circumstances must be well justified by general principles of law, if it entails a restriction of the effective exercise of an EU right by not taking it into consideration *ex officio*.

Considering the CJEU's reasoning that even when the national courts *may* raise issue of their own motion on the grounds of national law, they *must* raise an issue of an EU law nature; it turns out that in the *Kraaijeveld* case, the discretion under national law was transformed into an obligation under the EU law. This was subsequently upheld in cases like *Brusse*⁴⁴¹ and *Jörös*⁴⁴². Both cases concerned the *ex officio* application under Directive 93/13.⁴⁴³

Thus, in *Brusse*⁴⁴⁴, the CJEU held that if the national court *has the power*, under national procedural rules, to annul of its own motion a term which is contrary to public policy or to a mandatory statutory provision, it *must*, as a rule, annul of its own motion a contractual term which it has found to be unfair in the light of the criteria laid down by that directive. The directive in this case was the Directive 93/13/EEC [1993] on unfair terms in consumer contracts.

Similarly in *Jörös*⁴⁴⁵, the CJEU stated that, where a national court, dealing with an appeal concerning the validity of terms in a contract concluded between a seller or supplier and a consumer, *has the power* under its internal procedural rules to examine any grounds for invalidity clearly apparent from the elements submitted at first instance, it *must* assess, of its own motion or by defining the legal basis of the application, whether those terms are unfair in light of the criteria in Directive 93/13/EEC [1993] on unfair terms in consumer contracts.

These cases illustrate an observance of the national procedural rules related to an *ex officio* application of EU law.

One can conclude that the CJEU does not obligate national courts to raise EU law issues of their own motion if the principle of judicial passivity is justified with other general principles of law which may prevail over the effective exercise of an EU right.

⁴⁴¹ Case C-488/11 *Asbeek Brusse* [2013] ECLI:EU:C:2013:341.

⁴⁴² Case C-397/11 *Jörös* [2013] ECLI:EU:C:2013:340.

⁴⁴³ In the context of the Directive 93/13/EEC [1993] on unfair terms in consumer contracts a very specific line of case law developed based on the specific objective of this directive, namely the effective protection of consumers.

⁴⁴⁴ Case C-488/11 *Asbeek Brusse* [2013] ECLI:EU:C:2013:341, para 53.

⁴⁴⁵ Case C-397/11 *Jörös* [2013] ECLI:EU:C:2013:340, para 38.

However, there are some exceptions. The same issue of raising points of EU law *ex officio* occurred in the *Peterbroeck case*⁴⁴⁶, but, unlike in *Van Schijndel*, the national court was prevented from doing this as a result of an elapsed time limit for advancing new pleas by the plaintiff. In spite of this, the CJEU ruled that the national court was obliged to disregard the time limit of 60 days, which was not objectionable *per se*, and to proceed with raising EU law points of law in order to assess the compatibility of the national law with the EU law. By reiterating its previously stated viewpoint about the ‘contextual appraisal’ of the national procedural rule established in *Van Schijndel*, the CJEU concluded that the 60 day time limit which was not objectionable *per se* had to be assessed in light of the *special features* of the procedure at issue.

One of the arguments put forward by the CJEU was the fact that the Court of Appeal was the first court that could make a reference to the CJEU under Article 267 TFEU (ex Art. 234 TEC), and another argument relied on the finding that the impossibility for the national courts or tribunals to raise points of EU law of their own motion did not appear to be reasonably justified by principles such as the requirement of legal certainty or the proper conduct of procedure. Two more arguments were put forward by the CJEU to justify disregarding the national procedural rule by the national court and giving precedence to the effectiveness of the EU law provision.

In fact, the *Peterbroeck* case is illustrative of the relationship between the principles of supremacy, effective judicial protection of EU rights and national procedural rules. In this case, contrary to the *Van Schijndel* case, the first and the last instance which could have referred a preliminary question to the CJEU was the Court of Appeal.

If a national procedural rule which prohibited raising *ex officio* an issue of EU law due to the elapsed time limit were considered in light of the ‘procedural effectiveness’ of the litigation, it would probably prevail over the effective protection of the EU right, as it did in *Van Schijndel*.

Nevertheless, the arguments related to legal certainty and other principles were not deemed sufficient to justify the national restrictive procedural rule, since in this case the litigant would have been left without protection of his EU right, and without even having an opportunity to plead that. The plaintiff’s reference to EU law was made for the first time and if the court *a quo* had not referred to the CJEU, the litigant would have been deprived of ‘access to justice’ and consequently, of the possibility provided to national courts to ‘balance’ between the effective protection of EU rights and the national principles justifying the

⁴⁴⁶ Case C-312/93 *Peterbroeck* [1995] ECLI:EU:C:1995:437.

restrictive national procedural rule. In this case, the exercise of weighing the effectiveness of the EU right and procedural efficiency of the litigation was dependent on the effectiveness of Article 267 TFEU (ex Art. 234 TEC).⁴⁴⁷

The difference between weighing the principles in the *Rewe/ Comet* approach and in the *Van Schijndel/ Peterbroeck* approach is that, in the latter approach, the CJEU provided the national courts with detailed instructions while making the assessment: to examine a national provision which might render the exercise of EU right impossible in practice,

“...by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances”.⁴⁴⁸

On the other hand, while examining the possible infringement of the principle of effective judicial protection, the national courts should consider whether:

“the restrictions in fact correspond to objectives of general interest and whether they do not involve a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.”⁴⁴⁹

5.3 Balancing outside the ‘*ex officio* application’ context

With the principle of effective judicial protection becoming a fundamental right, the ‘balancing exercise’ got a slightly different focus. In fact, the approach was rather one of limitations of fundamental rights, i.e. the limitation of the right to effective judicial protection.

It was stated in *Alassini*⁴⁵⁰, where the right to effective judicial protection was *prima facie* restricted, that:

“Fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to *objectives of general interest* pursued by the measure in question and

⁴⁴⁷ Apart from *Peterbroeck*, further exceptions to the rule (that the national courts are not obliged to raise of their own motion EU law claims which have not been raised by the parties) can be found in Case C-240/98 *Océano Grupo Editorial* [2000] ECLI:EU:C:2000:346; and in Case C-126/97 *Eco Swiss* [1999] ECLI:EU:C:1999:269.

⁴⁴⁸ Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441, para 19.

⁴⁴⁹ Joined Cases C-317/08 to C-320/08 *Alassini and others* [2010] ECLI:EU:C:2010:146, para 63.

⁴⁵⁰ *Ibid*, para 63.

that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.”⁴⁵¹

The issue in *Alassini* was whether the principle of effective judicial protection was observed if an out-of-court settlement of disputes was established as mandatory prior to the initiation of the ordinary procedure.

The CJEU held that the aim of the national provisions at issue was a quicker and less expensive settlement of disputes relating to electronic communications and a lightening of the burden of the court system, and that they thus pursue legitimate objectives of general interest. Secondly, the CJEU found that the imposition of the out-of-court settlement procedure did not seem disproportionate in relation to the objectives pursued.

In *Trade Agency*⁴⁵², the restriction of the principle of effective judicial protection, specifically of the right to a fair trial, was justified by the need for a swift, effective and cost-effective handling of proceedings brought for the recovery of uncontested claims, for the sound administration of justice. In the *Texdata* case, the restriction of the right of the defence was justified by a more swift and efficient disclosure of the balance sheet, in the general interest of ensuring better protection for third parties and shareholders.⁴⁵³

In *Varec*⁴⁵⁴, the applicant, Varec, one of the tenderers that lost the bid in a contract award procedure initiated by the Belgian State, lodged an application before the *Conseil d’Etat* claiming that the Contracting Authority should have communicated to him the tender awarded to the other party so that Varec would be cognizant of the reasons for the refusal of his bid, since otherwise his right to a fair trial and adversarial principle of the proceedings would be impaired.

The other tenderer submitted to the Contracting Authority that his file contained secret information and its disclosure to Varec would violate his right to business secrecy.

The CJEU found that although the adversarial principle implied that the parties were allowed to peruse the evidence and observations submitted to the court, one of the fundamental rights that could be protected was the right to respect for private life (para 48). Inspired by the ECtHR, the right to private life

⁴⁵¹ The same was reiterated in See Case C-619/10 *Trade Agency* [2012] ECLI:EU:C:2012:531, para 55; Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588, para 84.

⁴⁵² See Case C-619/10 *Trade Agency* [2012] ECLI:EU:C:2012:531, para 57.

⁴⁵³ See Case C-418/11 *Texdata Software* [2013] ECLI:EU:C:2013:588, para 86.

⁴⁵⁴ Case C-450/06 *Varec SA* [2008] ECLI:EU:C:2008:91.

was expanded to professional or commercial activities. In fact, business secrecy was a general principle.⁴⁵⁵

Here again, the right of the parties to unlimited access to files was restricted with another important principle. Consequently, according to the CJEU, the right to judicial review by the other party was not an absolute one, but it should be weighed against the principle of business secrecy.

According to the Charter, limitations on the right to effective judicial protection (enshrined in Art. 47), should be tested according to the provisions laid down in Article 52(1) CFR, which reads as follows:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Evidently, apart from the objective of general interest recognised by the Union, another possibility is added, namely the need to protect the rights and freedoms of others.

For example, the *ZZ* case⁴⁵⁶ demonstrates a tension between the principle of effective judicial protection as enshrined in Article 47 CFR and the requirement of State security.

In essence, entry into the UK was denied by the Special Immigration Appeals Commission (SIAC) Act on grounds of national security. The SIAC adopted an ‘open’ and a ‘closed’ judgment, the latter being available only to the Secretary of State and *ZZ*’s special advocates.

The Court of Appeal in England was uncertain as to whether it was permissible for SIAC not to disclose to *ZZ* the essence of the grounds which constituted the basis of the decision to refuse entry.

The preliminary question touched upon the interpretation of Art 30(2) of Directive 2004/38 in light of Article 47 CFR, to determine whether or not a national court is obliged to disclose to the person affected by the decision the essence of the public security grounds, where the competent national authorities contend that such disclosure infringes State security.

Following this, the CJEU referred to its *Byankov* case⁴⁵⁷ and Article 31 of the Directive, stating that:

⁴⁵⁵ Case C-550/07 *Akzo Nobel Chemicals and Akros Chemicals / Commission* [2010] ECLI:EU:C:2010:512.

⁴⁵⁶ Case C-300/11 *ZZ* [2013] ECLI:EU:C:2013:363.

⁴⁵⁷ Case C-249/11 *Byankov* [2012] ECLI:EU:C:2012:608, para 46.

“The citizens whose rights to reside freely are restricted must have access to judicial or administrative redress procedures to appeal against or seek review of such a restrictive decision.”

The CJEU found that it is only by way of derogation from Article 30(2) of the Directive that Member States can limit the information sent to the person concerned in the interest of State security.

The CJEU again referred to its *Varec* case and held that:

“The parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.”

In general terms, Article 47 CFR requires that the person concerned is informed of the essence of the grounds on which a decision refusing entry is based, in order to exercise his right to be heard. If the disclosure of that information is liable to compromise State security, then the national court has the task of assessing whether and to what extent the restrictions of the right to defence affect the evidential value of the confidential evidence (para 67).

“In this case, it is demonstrated that the national courts must take into consideration what is required by Art. 47 CFR and, rather than only accept the statement of a competent authority that the decision of refusal is such as it is because of the reasons of State security, examine themselves the fact and documents so that are sure that the person is informed of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence”⁴⁵⁸

A striking example of the restriction of the fundamental rights and freedoms of the Charter was put forward in *Pušár*⁴⁵⁹. The issue revolved around whether mandatory administrative remedies, posed by Slovak law as a precondition to initiate a legal action, were in line with Article 47 CFR. The CJEU found that the exhaustion of these mandatory remedies as such was restricting the right to an effective remedy, but while respecting the essential content of the right. In any event, they were an additional procedural step to the legal proceedings and had to be justified by a certain objective. This objective could have consisted of the efficiency of the judicial proceedings and facilitation of the task of the courts. But this restriction of the right also had to be proportional and the CJEU stated that that would be true if the administrative remedies did not lead to substantial delay in bringing a legal action, if they involved a suspension of the limitation period of the rights concerned and if they did not involve excessive costs.⁴⁶⁰

⁴⁵⁸ Case C-300/11 ZZ [2013] ECLI:EU:C:2013:363, para 69.

⁴⁵⁹ Case C-73/16 *Pušár* [2017] ECLI:EU:C:2017:725.

⁴⁶⁰ *Ibid*, para 76.

From this, it could be concluded that the balancing approach is a very delicate exercise which the national courts are obliged to perform. Indeed, it is difficult to weigh the relevance of the effectiveness of EU rules or even more an importance of the principle of effective judicial protection with all its sub-rights versus some other objectives of general interest or rights and freedoms of others.

Despite these challenges, the application of the principle of effective judicial protection as well as its embodiment under Article 47 CFR did not prove to undermine significantly the national procedural autonomy of the Member States. To the contrary. It is still very probable that the precedence will be given to objectives of general interests as well as to rights and freedoms to others, if the balancing exercise inclines in that direction. Through the elaboration of the cases above, one could indeed infer that fundamental rights and freedoms do not constitute unfettered prerogatives, exactly as the CJEU stated in *Alassini* case.

6. The relationship between the principles of effective judicial protection, effectiveness of EU law and minimum effectiveness according to *Rewe*

Before winding up this Chapter, it is worth dwelling briefly on the relationship between the principles of effective judicial protection, effectiveness of EU law and minimum effectiveness.

The uniform protection of EU individual rights and the uniform application of EU law throughout the EU proved to be undesirable and although ideal, it would not correspond to political and legal reality, since it would lead to two separate pillars: procedures and remedies for ‘pure’ national law and procedures and remedies for national law with a community law origin.⁴⁶¹ Consequently, the CJEU’s objective should instead be the attainment of an adequate standard of protection of EU rights.⁴⁶²

Uniform and effective enforcement of EU law and the principles from which it is drawn, the principle of supremacy of EU law being at first place, are not overriding principles which prevail over the principles related to procedural efficiency, like legal certainty, proper conduct of the procedure, protection of the rights of the defence and other general principles of law. But the principles of supremacy and direct effect of EU law are not necessarily in collision with the principle of national procedural autonomy as illustrated through the tension between the *Simmenthal* and *Rewe* cases.

⁴⁶¹ See Prechal 2001 (n 28), 14-15; Van Gerven 2000 (n 42), 521.

⁴⁶² See Jacobs 1997 (n 72); Also see Van 2000 (n 42), 501-536.

The majority of scholars firmly endorse this attitude,⁴⁶³ although it cannot be disputed that there are certain authors who give primary importance to the principle of effective and uniform application of EU law at the cost of losing national procedural autonomy.⁴⁶⁴

Supremacy and direct effect should be confined to provisions of the same nature, i.e. a substantive or procedural nature. The supremacy argument⁴⁶⁵ cannot interfere on a national level retained for the Member States' procedural autonomy.

Since the effective and uniform application of EU law may be jeopardised by the application of national rules on procedure and sanctions by national courts, the CJEU has invented certain constraints, such as the principles of equivalence and effectiveness, which are, according to some scholars, a practical expression of the principles of primacy and direct effect of Union law.⁴⁶⁶ According to Wallerman, besides these two principles, there is also a principle of effective judicial protection, which serves as a minimum requirement, setting a threshold that national procedures must surpass.⁴⁶⁷

Since the characteristics of the principle of effective judicial protection have already been discussed in detail,⁴⁶⁸ I will now consider the main traits of the principle of '*Rewe* effectiveness'.

Prechal and Widdershoven⁴⁶⁹ consider that the principle of effective judicial protection can be regarded as a more robust manifestation of the principle of effectiveness, and that the former is gradually developing into a positive standard, and for Krommendijk, *Rewe* effectiveness functions as a limit to the procedural autonomy of the Member States. He also claims that its purpose is the effective application of EU law, and that it is considered milder than the principle of effective judicial protection.⁴⁷⁰

Therefore, the differences between these two principles can firstly be found in their manner of operation but also, in the purposes they serve, their intensity, scope and requirements, how they are formulated, their focus and, as was described above, in the way they are *justified* when national procedural rules stand

⁴⁶³ See more extensively: Van Gerven 2000 (n 42), 505; Prechal 1995 (n 34), 173; Claes et al 2006 (n 20), 133.

⁴⁶⁴ See Kakouris 1997 (n 65), 1396.

⁴⁶⁵ According to Hoskins, "the principle of supremacy should not be overestimated" See Hoskins 1996 (n 20), 10.

⁴⁶⁶ See Lenaerts et al 2014 (n 165), 109.

⁴⁶⁷ Wallerman 2016 (n 95), 342.

⁴⁶⁸ See section 3 of Chapter 3.

⁴⁶⁹ See Prechal et al 2011 (n 234), 6-7.

⁴⁷⁰ See Krommendijk 2016 (n 266), 1395-1418, 2016, p1405, 1406, 1407.

in their way.⁴⁷¹ According to Safjan and Düsterhaus, the interrelationship between the *Rewe* principles and Article 47 CFR can be expressed in four scenarios: superposition, coexistence, infusion and exclusivity.⁴⁷²

Analyzed from the angle of superposition the requirements stemming from Article 47 CFR tend to superpose those attributed to the principle of effectiveness where the former are found to reflect EU secondary law choices.⁴⁷³

Coexistence of the principles means that the principles of equivalence and effectiveness, on the one hand, and the right to effective judicial protection on the other can be treated jointly and harmoniously. In other words, they coexist.⁴⁷⁴

Through the cases *Agroconsulting*⁴⁷⁵ and *Donau Chemie*⁴⁷⁶, the infusion of the *Rewe* principles and the principle of effective judicial protection under Art 47 CFR is presented. According to this scenario the case could be decided under the principle of effectiveness while being nonetheless all about effective judicial protection. This means that although the right to effective judicial protection is not explicitly addressed it may still constitute the backdrop of Court's appreciation.

Finally, exclusivity means that the right to effective judicial protection may well be addressed alone and can, by itself be the appropriate gauge for national rules.⁴⁷⁷

7. Conclusion

In my view, a proper enforcement of EU law has its limits. Justifications for applying restrictive national rules that hinder the enforcement of individual EU rights can normally be found in the general principles of the Member States' legal systems, which are also general principles of EU law.

⁴⁷¹ See Prechal et al 2011 (n 234). See Krommendijk 2016 (n 266), 1395-1418.

⁴⁷² Safjan et al 2014 (n 94), 12-15.

⁴⁷³ This was demonstrated through Case C-169/14 *Sánchez Morcillo* [2014] ECLI:EU:C:2014:2099.

⁴⁷⁴ This was demonstrated through Joined Cases C-317/08 to C-320/08 *Alassini and others* [2010] ECLI:EU:C:2010:146.

⁴⁷⁵ Case C-93/12 *Agroconsulting-04* [2013] ECLI:EU:C:2013:432.

⁴⁷⁶ Case C-536/11 *Donau Chemie and others* [2013] ECLI:EU:C:2013:366.

⁴⁷⁷ This was demonstrated in cases Case C-243/09, *Fuß* [2010] ECLI:EU:C:2010:609; and Case C-279/09 *DEB* [2010] ECLI:EU:C:2010:811.

Principles of minimum effectiveness and equivalence as well as the principle of effective judicial protection need to be applied in light of other important general principles of EU law and, in the case of the principle of effective judicial protection under Article 47 CFR, also taking into account the fundamental rights of other individuals.

The principle of national procedural autonomy and its underlying principles of minimum effectiveness and equivalence are certainly not dead and are widely applied. However, certain cases argued along this line were resolved with the employment of the radical supremacy test,⁴⁷⁸ whereas other cases, although argued along the lines of supremacy, were treated by the CJEU from the angle of national procedural autonomy.⁴⁷⁹ The reasons behind this, as some influential commentators claim, are difficult to grasp.⁴⁸⁰

Whether the principle of effective judicial protection or the principle of effectiveness should be applied mainly depends on one's aim (a safeguard of EU individual rights or the uniform application of EU law throughout the EU), while the issue of whether one would invoke the principle of effective judicial protection only or rely on Article 47 CFR should be resolved in light of the limitations they have; the former is constrained by the objective of general interest, and the latter has its limitation in primary law, i.e. in the Charter itself, under Article 52 (1) CFR.

What is essential is that the 'rule of reason' or 'balancing approach' started to apply long before *Van Schijndel/ Peterbroeck* case law. The CJEU has always played a game of balancing interests and principles, although sometimes explicitly and sometimes less explicitly. Sometimes, it looks at the practical effect of the relevant rule and sometimes it examines in depth the role and purpose of the provision. Sometimes, the justification of the restriction of the principle of effective judicial protection is found only in the importance of the objective of general interest and sometimes, also other fundamental rights are considered.

More generally speaking, the approaches of the CJEU to the question how to deal with national procedural and remedial rules has been partly welcomed, but for another part also criticised.

⁴⁷⁸ See cases like Case C-119/05 *Lucchini* [2007] ECLI:EU:C:2007:434; Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363; and Case C-409/06 *Winner Wetten* [2010] ECLI:EU:C:2010:503.

⁴⁷⁹ Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441; C-453/00 *Kühne & Heitz* [2004] ECLI:EU:C:2003:350.

⁴⁸⁰ See See Prechal et al 2011 (n 234), 32.

Heukels and Tib,⁴⁸¹ for instance, illustrate the CJEU's shortcomings in defining the exact scope, meaning and impact of the principles of effectiveness and equivalence through the cases like *Peterbroeck* and *Levez*. These authors see the application of these principles by the national courts as highly complex.

The emphasis on the difficulty of their application is also put forward by Claes⁴⁸². This author focuses not only on the lack of criteria according to which national courts can determine whether specific national procedural rule makes the exercise of EU rights virtually impossible or excessively difficult, which is, in her words a “matter of taste”, but also on the unjustified plunging of the CJEU into the assessment of the national procedural law, in order to provide national courts with the appropriate response as to whether the principle of minimum effectiveness has been satisfied.⁴⁸³ Similarly, Biondi⁴⁸⁴ condemns the CJEU for embarking on a detailed analysis of the national law, thus blurring the distinction between interpretation of the law and adjudicating on the merits of the case which is the cornerstone of the preliminary rulings procedure. The CJEU does this not only when it comes to the principle of equivalence, but also where the requirement of effectiveness is concerned, most notably when ‘specific circumstances’ of the case are reason for challenging the suitability of the procedural rule at hand which is not objectionable *per se* and which, without the CJEU's interference, would bring about a different result for the party.

The main criticism of the balancing method of assessing the effectiveness of EU law and effective judicial protection resides in the *ad hoc* appraisal by the courts of the national procedural rules.

According to Hoskins, the purposive approach, as he calls it, is vague and almost jurisprudential in nature. Following *Van Schijndel*, a national court must consider not just the practical effect of a rule (as was required in the *Rewe/ Comet* approach), but also the role or purpose which it serves in light of “the basic principles of the domestic judicial system”.⁴⁸⁵

As we stated previously, the balancing exercise or ‘procedural rule of reason’ is also employed, although under different conditions, when the principle of effective judicial protection is at issue. Although, many similarities exist between the rule of reason applied in *Van Schijndel* and in *Alassini*, the most important difference is the intensity of the test, which, in addition to the *Rewe/ Comet* test, is a more stringent test of

⁴⁸¹ Heukels et al 2002 (n 20), 116.

⁴⁸² Claes et al 2006 (n 20), 122-124.

⁴⁸³ In the same vein see S. Prechal, N. Shelkopylas ‘Procedures, Public Policy and EC Law: From Van Schijndel to Eco Swiss and Beyond’ (2004) 12 *European Review of Private Law*, 593.

⁴⁸⁴ Biondi 1999 (n 20), 1274–1279.

⁴⁸⁵ See Hoskins 1996 (n 20), 7- 9.

effective judicial protection, sometimes in combination with supremacy language.⁴⁸⁶ In *Alassini*, an ‘objective general interest’ needed to be shown to exist in order to justify the restrictive rule on the principle of judicial protection.

Regarding the justification-test under Article 52(1) CFR, it differs even more from both *Van Schijndel* and *Alassini*. First the limitation must be provided by law, which is, as such, a new requirement. Second, it must respect the essence of the right, and, third, it must be justified either by an objective of general interest recognised by the Union or by the need to protect the rights and freedoms of others. Finally, the principle of proportionality has to be respected.⁴⁸⁷

According to Prechal, an important difference with *Alassini* lies in the fact that, under Article 52(1) CFR, apart from an objective of general interest, there is another possibility to justify the restriction and that is the ‘protection of rights and freedoms of others’. Arguably, finding a fair balance between two fundamental rights is a different issue than balancing the protection of a right against an objective of general interest.⁴⁸⁸ Krommendijk has a similar stance when it comes to comparing the ‘contextual analysis’ and the ‘proportionality test’ under Article 52(1) CFR.⁴⁸⁹

In my view, the CJEU is unpredictable when it comes to the possible justifications for restrictive national procedural rules put forward by the Member States. National courts have to tackle the difficult and cumbersome task of weighing between national and EU rules with vague and uncertain instructions from the CJEU about what justifies what. If a preliminary question is referred to the CJEU to ‘provide assistance’ with the manner of assessment of a certain national procedural rule in light of the effective exercise of an EU rule, the CJEU is at risk of trespassing its competences of interpretation of EU law and entangling itself in the interpretation of national law and its specificities, which is not its task. National courts are the only bodies that are well equipped with knowledge of the details of their legal order and consequently they are the only ones who are in a position to ‘measure’ the greater relevance of the objectives served by national and EU rule. The question also arises of whether national courts will plunge into this complex analysis themselves or will make a reference to the CJEU.

⁴⁸⁶ Jans et al 2015 (n 63), 60; See also S. Prechal, ‘The Court of Justice and Effective Judicial Protection: What has the Charter Changed?’ in C. Paulussen, T. Takács, V. Lazić, B. V. Rompuy, *Fundamental Rights in International and European Law* (The Hague: T.M.C. Asser Press 2015), 152.

⁴⁸⁷ Ibid, 152 -153.

⁴⁸⁸ Ibid, 153.

⁴⁸⁹ Krommendijk 2016 (n 266), 1395-1418.

Additional knowledge both of CJEU case law and the Charter is required by the national courts, since different variations of the ‘rule of reason’ are applied when the principle of effective judicial protection is at issue, depending on whether it is before the establishment of Article 47 CFR or after the adoption of the Charter and the limitation put forward in Article 52(1) CFR. As was demonstrated above, the intensity of scrutiny and other elements of the ‘balancing exercise’ may considerably differ.

I will end this Chapter with a remark on remedies, which, as explained, were created in order to strengthen the effectiveness of EU law and the protection of individual rights. In fact, they are a consequence of the extended impact of the principles of effectiveness and the principle of effective judicial protection.

The remedy of compensation for damage against the State when it infringes an EU law obligation will be thoroughly examined in the next Chapter. Through the lens of this specific remedy, one can follow the manner in which the CJEU treats both procedural rules and remedial rules which relate *inter alia* to the height and scope of the compensation.

Chapter 4

The principle of State liability for a breach of EU law

In this Chapter I will focus on the principle of State liability in European Union law and the awarding by national courts of compensation for damage caused to individuals by a breach of EU law on the part of the national authorities of the Member States. The remedy of compensation for damage was chosen as a subject for deeper discussion since it reveals in a concrete manner the interrelatedness of EU law and national law in the area of procedures and remedies. Moreover, from the perspective of Macedonian law and the potential effects that EU law may have on it, the evolution of State liability in EU law is an extremely interesting topic.

State liability for a breach of EU law was created as a matter of EU law. The conditions which need to be satisfied in order to give rise to a right to reparation from the recalcitrant Member State were formulated by the CJEU.

In principle, the fulfilment of these conditions is appraised by the national courts of the Member States. Yet, they do this in light of the criteria established by the CJEU itself. These so called ‘constitutive conditions’⁴⁹⁰ are as follows: the EU law provisions breached must *confer rights upon individuals*, the breach by the Member State must be *sufficiently serious* and there must be a *direct causal link* between the infringement and the damage sustained.

As will be shown, in particular in the third section, these conditions are not easy to grasp, especially given the abundant and sometimes inconsistent case law of the CJEU. The parameters provided by the CJEU for the national courts to assess whether the conditions are fulfilled are fairly complex, making it challenging for the national courts to properly apply them in a concrete case. However, these conditions do not suffice

⁴⁹⁰ The expression ‘constitutive conditions’ for conditions which have to be fulfilled in order for the right to reparation to arise was coined by W. van Gerven, although it is not that widely accepted. See Van Gerven 2000 (n 42), 521.

for the application of the State liability rules. There are obviously also other rules that apply, including before which national court, and *according to which* procedural rules a State liability action must be brought. These so-called ‘executive conditions’⁴⁹¹ are in principle a matter for the procedural autonomy of the Member State and are tested against the *Rewe* requirements or, sometimes also, against the principle of effective judicial protection. In this respect, in particular, the present Chapter builds on what was stated in the previous Chapter about these principles.

In the first section, the background and legal basis of the principle of State liability in EU law will be elaborated.

In the second section it will be demonstrated that the compensation awarded to individuals serves both as a remedy to the damaged parties in order to effectively protect their EU individual rights as well as a means of strengthening the principle of effectiveness of EU law. In its capacity as a remedy, it is explained why compensation for damage can sometimes be regarded as a residual remedy and sometimes as a complementary remedy. In the same section, a comparison will be made with EU liability resulting from damage caused to individuals by EU institutions and the conditions which need to be satisfied in order for compensation for this damage to be awarded, for the purpose of exemplifying the mutual influence between EU liability and Member State liability for breaches of EU law.

The third section will explore in detail the three conditions which give rise to the right to compensation for damage by individuals before the courts of the Member States. It will be underlined that the notion of ‘right’ persists to raise problems, due to its different conception not only by the courts of different Member States but also by the CJEU itself. The notions of ‘sufficiently serious breach’ and ‘direct causal link’ will be elaborated mainly through the cases of the CJEU, which sometimes only provides the parameters according to which the national courts are to treat each of these conditions and sometimes goes as far as to determine whether these conditions are fulfilled or not.

The fourth section will deal with the kinds of breaches that might be committed and have been committed by different State bodies of the Member States.

The fifth section will, by way of an illustration, first refer to a number of Member States’ liability regimes and their rules about the liability of each of the State bodies in order to demonstrate the possible obstacles to the implementation of EU State liability.

⁴⁹¹ The term ‘executive conditions’ was coined by Van Gerven. See van Gerven 2000 (n 42), 521.

The sixth section is dedicated to what I would like to call, ‘national leftovers’, namely issues that are closely related to the manner in which compensation is awarded in each Member State. This problem relates to the executive conditions, such as active and passive legitimation, time limits for initiating action, the type of damages awarded and the obligation to limit damage. It will be shown that these national rules must conform to the *Rewe* requirements.

Finally, the seventh section contains a conclusion of the whole Chapter.

1. Background and legal basis of the principle of State liability in EU law

Initially, the State liability principle for breaches of EU law obligations was not a matter of EU law.

In *Russo*⁴⁹², the CJEU stated that:

“It is for the national court to decide on the basis of the facts of each case whether an individual [...] has suffered [...] damage. If [the] damage has been caused through an infringement of Community law the State is liable to the injured party [for] the consequences in the context of the provisions of national law on the liability of the State.”

Accordingly, the task for remedying the consequences of an infringement of EU law by the Member State, which, through this breach, caused damage to individual(s), rested on the Member State itself. It was under the national tort rules that the Member State’s wrongdoing with respect to EU law had to be sanctioned and the damage compensated.

Gradually, however, the European relevance of national tort actions increased. The reasons for this were at least partly derived from the infringement procedure. There were assumptions that the legal grounds for national tort actions could be found in the infringement procedure initiated by the Commission under Article 258 TFEU (ex Art. 226 TEC).⁴⁹³ Indeed, implications from a judgment delivered by the CJEU following an infringement procedure comprised an obligation for the Member States to undertake appropriate measures to remedy the wrongdoing committed.

It was in *Humblet*⁴⁹⁴, that the CJEU pointed out that one of the obligations of the recalcitrant Member State was “to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.”⁴⁹⁵

⁴⁹² Case C-60/75 *Russo* [1976] ECLI:EU:C:1976:9, para 9.

⁴⁹³ See Prechal 1995 (n 34), 272.

⁴⁹⁴ Case C-6/60 *Humblet* [1960] ECLI:EU:C:1960:48.

The CJEU found that the basis of this obligation was enshrined in Article 86 of the ECSC Treaty, the wording of which later appeared in ex Article 10 EC Treaty (now Art. 4(3) TEU).

The judgment in *Francovich*⁴⁹⁶ dispelled doubts as to the legal basis of State liability for the breach of EU law.

In this specific case, the Italian Republic failed to undertake any implementing measures to transpose Directive 80/987/EEC, on the approximation of the laws of the Member States related to the protection of employees in the event of insolvency of their employer, by the date which was prescribed for that purpose, namely 23 October 1983. This default on the part of the State was previously established by the CJEU in an infringement proceedings instituted by the Commission against the Italian Republic.⁴⁹⁷

Mr Francovich and 33 other employees, who had worked for an Italian company, CDN Elettronica SnC, claimed arrears of wages from that company, which had become insolvent. As a result of the bankruptcy, they were unable to receive their sums of money and relied on the above-mentioned Directive, claiming, as an alternative, compensation for damage sustained as a result of the State's failure to implement the Directive on time. They pleaded that the failure of the Italian Republic to take any measures to implement the Directive had deprived them of the minimum guarantee of wages which they would have received had the Directive been transposed in the Italian legal system.

Following the analysis of the possible direct effect of the provisions of the Directive invoked by the plaintiffs in a preliminary procedure, the CJEU found that the individuals were unable to enforce the rights to which they were entitled under the Directive due to the impreciseness of the provision pertaining to the identity of the person liable to provide the guarantee.⁴⁹⁸ Consequently, the issue arose as to whether the individuals could still obtain a remedy, as they were prevented from enjoying their EU rights as a result of the State's breach of EU law, the situation being aggravated by the impossibility of relying on the direct effect of certain provisions as a second rank alternative to the proper implementation of the Directive.

With regard to the legal basis, the CJEU held that:

⁴⁹⁵ Ibid, 569.

⁴⁹⁶ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 35.

⁴⁹⁷ Case C-22/87 *Commission v. Italy* [1989] ECLI:EU:C:1989:45.

⁴⁹⁸ The other provisions of the Directive on which the plaintiffs relied were found to be unconditional and sufficiently precise, thus capable of being directly effective. See Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 14 and 22.

“The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.”⁴⁹⁹

“It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty”.⁵⁰⁰

The CJEU also pointed out another basis, namely, “the obligation of the Member States to nullify the unlawful consequences of a breach of Community law”.⁵⁰¹

According to the CJEU, this was one of the obligations flowing from the wording of the provision enshrined in the ex Article 5 EEC.⁵⁰²

This so called ‘principle of cooperation in good faith’, or ‘principle of loyalty or solidarity’, is nowadays laid down in Article 4(3) TEU, which reads as follows:

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”

According to some scholars, Article 4(3) TEU was even laid down as the primary basis for the principle of State liability under the EU law,⁵⁰³ whereas some other authors have challenged the priority of Article 4(3) TEU as a foundation of the State liability principle and have given priority to the principle of effectiveness of EU law.⁵⁰⁴

⁴⁹⁹ Ibid, para 33.

⁵⁰⁰ Ibid, para 35.

⁵⁰¹ Ibid, para 36.

⁵⁰² Ibid, para 36.

⁵⁰³ Jans 2007 (n 59), 281.

⁵⁰⁴ G. Betlem, ‘Beyond *Francovich*: Completing the Unified Member State and EU Liability Regime’ A Comment on the J. Jans Contribution in D Obradovic and N. Lavranos. *Interface between EU Law and National Law*:

According to Caranta⁵⁰⁵, the importance of *Francovich* lies in the setting out of the principle of effective judicial protection as separate grounds on which State liability is created. However, despite underlining the importance of the insertion of the principle of effective judicial protection as an independent legal basis of the State liability, this author clarified this assertion in the following terms:

“In fact, actions by individuals in national courts have always been considered a powerful tool to force Member States to comply with their obligations”.

In any case, the CJEU used all of the above-mentioned grounds in its case law to justify the principle of State liability in EU law.

2. The status of EU State liability

2.1 The nature and objectives of the principle of State liability

There exist differences in opinion as to the nature of EU State liability. According to Jans, Prechal and Widdershoven⁵⁰⁶, State liability is a means to enable individuals to obtain compensation, *in retrospect*, for damage that has arisen as a result of the improper application of Community law or national law.

Eilmansberger⁵⁰⁷ considers the nature of the principle of State liability both in terms of the necessity for compensation for the injury incurred as a result of infringed primary EU law rights – thus qualifying the *Francovich* liability as a ‘secondary remedy’ – and also as a means of strengthening the effectiveness of EU law as such, where the primary tool for attaining *effet utile* of EU law, namely direct effect of EU law provisions, occurs as inapplicable.

Prechal claims that the Member State liability was both a “second rank alternative for direct effect and consistent interpretation” and “a complement to direct effect and consistent interpretation”.⁵⁰⁸

Considering that direct effect and consistent interpretation of national law are not always possible mechanisms/avenues for remedying the consequences of non-implementation or incorrect implementation of an applicable norm, the principle of State liability has arisen as a principle of EU law which enables

Proceedings of the Annual Colloquium of the G.K. V. Hogendorp Centre for European Constitutional Studies (Europa Law Publisher 2007) 299.

⁵⁰⁵ Caranta 1995 (n 255), 710.

⁵⁰⁶ Jans et al 2015 (n 63), 437.

⁵⁰⁷ Eilmansberger 2004 (n 42), 1204, 1223, 1227.

⁵⁰⁸ S. Prechal, ‘Member State Liability and Direct Effect: What’s the Difference after All?’, 17 (2006) *European Business Law Review*, 301.

individuals to claim compensation for damage sustained from a Member State's breach of EU law obligations.⁵⁰⁹

Certain authors have defended the point of view that the main objective of the CJEU in establishing State liability as an EU law principle was the need to compel the Member States to obey to their EU law obligations.

In this respect, Harlow's⁵¹⁰ critical view towards the establishment of State liability as a matter of EU law goes as far as describing the CJEU as 'selfish' in imposing its doctrine of supranational liability on national systems. Her article sets out a number of theories provided by several authors, according to which State liability is a sanction for the Member States' lack of discipline.

Harlow herself underpins this standpoint by finding that the non-contractual liability of the Member States for a breach of EU law, as determined in *Francovich* in a sense of objective State liability, was found to be in harmony with the "CJEU's intention to urge the Member States to execute such strict Community obligations correctly and in due time and thus avoid possible indemnity payment."

Although Caranta⁵¹¹ highlights the importance of *Francovich* with regard to the fact that the concern for effective judicial protection of individuals was advanced as independent grounds for Member States liability, he actually stated that this principle was also closely linked to the principle of effectiveness of EU law.

In my view, the comprehension of State liability solely as a sanction for the Member States' misconduct under EU law relates only to the achievement of the objective of effectiveness of EU law and disregards its relevance to the effective protection of the EU individual rights and its positioning in the range of EU remedies created so far.

Included in this line of reasoning is Anagnostaras's contention that the State liability pursues a dual objective, namely the financial interests of the specific individuals affected by a given violation and also the general interest of deterring the commission or repetition of socially detrimental activities.⁵¹²

⁵⁰⁹ About the complementarity and priority in the application of the three techniques: direct effect, consistent interpretation of national law and liability, see in more detail Prechal 1995 (n 34), 314-316.

⁵¹⁰ C. Harlow, '*Francovich* and the Problem of the Disobedient State', 2(3) (1996) *European Law Journal*, 205.

⁵¹¹ Caranta 1995 (n 255), 710.

⁵¹² G. Anagnostaras, 'The Principle of State Liability for Judicial Breaches: The Impact of European Community Law', 7 (2001) *European Public Law*, 282-283. Even more specifically, Anagnostaras in his article underlines that

According to Prechal⁵¹³, the non-contractual liability of a State is of a residual (subsidiary) character compared to the other two techniques, direct effect and consistent interpretation, for achieving the objective of an EU act, which implies that the plaintiff is supposed to attempt these two avenues and only if they do not work, resort to State liability.

As the CJEU stated, the impossibility for individuals to rely on the provisions of the Directive due to the fact that these provisions were not directly effective, cannot be a reason or justification for Member States' infringement of EU law, which in this case consisted of the Member State's failure to transpose a Directive into national law as was required under Article 288 TFEU (ex Art. 249 TEC). The recalcitrant Member State should have been sanctioned for this wrongdoing, in order for the EU law objectives of effectiveness of EU law and effective judicial protection of individuals to be properly safeguarded.

In my view, the State liability principle was conceptualised as an EU law principle with a view to achieving two equally important objectives of EU law.

First, State liability has been created in order to effectively protect individuals if their EU law rights are violated, regardless of whether they invoke this principle because of a lack of any other means for redress or because of the inadequacy of the means already at their disposal.

Second, by providing individuals with the possibility to claim reparation of their infringed EU rights resulting from Member States' non-compliance with EU law, the application of this principle also considerably strengthens the effective enforcement of EU law in the Member States.

In *Francovich*, where certain provisions of the Directive were not unconditional and sufficiently precise as to be enforced before the national courts, the Member State's liability for the breach of EU law and its obligation to make good the damage inflicted on individuals flowed from the "concern for effectiveness of EU law and effective protection of individual EU rights".⁵¹⁴ If the Member State had been exonerated from any liability once it had infringed EU law by running counter to its Treaty obligations and by depriving citizens of the individual rights which they would have enjoyed if the Member State had carried out its obligations, not only would the effectiveness of EU law provisions have been impaired but also the right to an effective remedy for individuals under the EU law would have been undermined. In

the *Francovich* principle has been introduced with a dual objective in mind, namely, the enhancement of the effectiveness of the Community legal order and the effective protection of the rights the latter intends to confer upon individuals.

⁵¹³ See Prechal 1995 (n 34), 301.

⁵¹⁴ See Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 33.

circumstances in which the individuals could not rely on EU law provisions to assert their EU individual rights, they would remain without any remedy against the defaulting Member State.

State liability is also vital in disputes between individuals. The claim for compensation for damage occurs as a subsidiary remedy to the interpretation of the national provisions in light of the EU law provisions.

As is well known, situations in which an individual invokes provisions of an EU directive in order to assert a right which that provision confers to him or her are problematic. Due to the prohibition of horizontal effect of directives (i.e. individuals may not rely on directly effective provisions of EU directives against other individuals), the only avenue that remains is a claim for consistent interpretation of national law with EU law by the national courts.⁵¹⁵

However, given that the technique of consistent interpretation of the conflicting national law (if existent at all) by the national judge is not always possible due to the prohibition of a *contra legem* interpretation, claiming compensation for damage remains a last resort remedy.⁵¹⁶

It follows that compensation can be claimed as a residual remedy when the application of direct effect of EU law provisions is not possible (either because the provisions are not such as to produce direct effect or because of the impossibility for individuals to rely on directly effective EU law provisions contained in EU Directives against other individuals), but also when the tool of consistent interpretation is not suitable.

The complementary nature of compensation for damage suffered as a result of a Member State's breach of EU law occurred in the *Brasserie* case, where the direct effect of relevant Treaty provisions could not result in liability as a matter of German law.⁵¹⁷

⁵¹⁵ See Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335, para 48 “a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against individuals”; Case C-397/01 to 403/01 *Pfeiffer* [2004] ECLI:EU:C:2004:584, para 109; Case C-106/89 *Marleasing* [1990] ECLI:EU:C:1990:395, para 8 and case C-334/92 *Wagner Miret* [1993] ECLI:EU:C:1993:945, para 20, according to which: “when applying national law, whether adopted before or after the directive, the national court has to interpret that law, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with the third paragraph of Article 189 of the Treaty.”

⁵¹⁶ See Case C-91/92 *Faccini Dori* [1994] ECLI:EU:C:1994:292, para 27; Case C-54/96 *Dorsch Consult Ingenieurgesellschaft / Bundesbaugesellschaft Berlin* [1997] ECLI:EU:C:1997:413, para 45. Case C-131/97 *Carbonari and others* [1999] ECLI:EU:C:1999:98, para 52. Also, about the manner in which the CJEU instructs the national courts in applying different types of techniques in order to ensure effective application of EU law, see Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33.

In *Comateb*⁵¹⁸, compensation for damage was suggested by the CJEU. In this case, compensation for damage sustained as a result of the State's wrongdoing was not the primary remedy that was claimed by the plaintiff. In fact, the trader did not even advance this claim, but rather concentrated on the other remedy, namely the restitution of unduly levied charges. However, it was the CJEU that suggested compensation for damage suffered as an outcome of decreased sales due to the higher product price for final consumers. The problem in this case was that the restitution of the illegally levied charges could have turned out to be impossible if it were proven that he had already passed these charges on to the final consumers, as this would have violated the principle of prohibition of unjust enrichment. Despite these circumstances, the fact remained that the trader in any case suffered damages which should be compensated by the national court.

There are also cases in which it was impossible to apply other measures for nullifying the unlawful consequences of the breach of EU law, such as revoking or suspending the measure. An example is the *Wells* case in which, “[it] was questionable whether it was possible under the domestic law for a consent already granted to be revoked or suspended”, thus the CJEU proposed compensation as an alternative remedy.⁵¹⁹

The *Maso*⁵²⁰ and *Danila Bonifaci*⁵²¹ cases are also illustrative of the complementary character of compensation for damage sustained as a result of a breach of EU law.

In these two cases (*Maso* and *Bonifaci*) the belated implementation of the directive was the grounds for the compensation which was provided for those who suffered damage in the period between the prescribed deadline for implementation and the date of the actual implementation of the Directive in Italian law. The CJEU stated that this damage could have been “adequately made good” with the retroactive effect of the proper implementing measures, unless the plaintiff proved that he had sustained “additional damage as a result of the fact that the Directive was not transposed on time”, in which case this damage had to be compensated as well.

⁵¹⁷ See also case *Metallgesellschaft*, where the exhaustion of the ‘primary remedies’ was possible but made no sense in that specific case.

⁵¹⁸ Case C-192/95 to C-218/95 *Comateb and others* [1997] ECLI:EU:C:1997:12.

⁵¹⁹ See Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12, para 70.

⁵²⁰ Case C-373/95 *Maso and others* [1997] ECLI:EU:C:1997:353.

⁵²¹ Case C-94/95 and C-95/95 *Bonifaci and others* and *Berto and others* [1997] ECLI:EU:C:1997:29.

To sum up, on the basis of an analysis of the case law, it must be concluded that State liability is based on double grounds: namely the effectiveness of EU law and the effective safeguard of EU individual rights. It is furthermore supported by the principle of loyal cooperation.

The reasons for asserting the principle of State liability as a matter of EU law rather than as a matter of national law is to attain a minimum level of application of EU law in the sense of the uniformity of liability conditions for the Member States and the EU institutions. However, more importantly, it also aimed for a minimum harmonisation among the EU Member States of the conditions for Member State liability for a breach of EU law.

If the conditions are not harmonised, considerable divergences in the national legal systems can lead to both different levels of protection of individual rights and a different intensity of the impact of the sanction of discipline. Indeed in certain EU Member States the liability of the State is excluded in case of a breach of law by the legislator or by the judiciary, or the conditions which would give rise to liability in these States may be so stringent and almost impossible to fulfil that the right to reparation for the State's wrongdoing with regard to EU law would be illusory.

As discussed above, EU State liability has a character of a sanction for Member States' wrongdoing with respect to EU law, and in this respect it contributes to the strengthening of effectiveness of EU law and is a subsidiary and alternative EU law remedy for individuals, which contributes to improving the quality of their effective judicial protection and as such is concerned with the enforcement of EU individual rights.⁵²²

Regarding its effect, the compensation for damage can have an effect of residual remedy, when the application of direct effect of EU provisions is not possible or when the consistent interpretation is not suitable.

It can also have an effect of complementary remedy when it is questionable whether the national remedies can remedy the damage inflicted to individuals at all or when the plaintiffs suffered additional damage as a result of a breach of EU law.

2.2 Non-contractual liability of the EU and its relation to Member State liability

Uniform conditions which give rise to the right to liability regardless of whether the breach was committed by an *EU institution* or a *Member State* would provide for equal treatment of injured parties

⁵²² The manner in which the protection of EU individual rights contributes to the effective enforcement of EU law was elaborated in Chapter 2 section 2.

irrespective of who is responsible for the violation of EU law. To this end, the non-contractual liability systems should be made consistent.⁵²³

Regarding the EU liability established under Article 340 TFEU (ex Art. 288 TEC), one must go back to the *Zuckerfabrik Schöppenstedt* case⁵²⁴, where the CJEU held that a non-contractual liability of the Community for damage suffered by the individual could occur where legislative action involving measures of economic policy is concerned, only where a “sufficiently flagrant violation of a superior rule of law has occurred”. The CJEU has built upon this case law in cases concerning the non-contractual liability of Member States.

Thus, in the *Brasserie du pêcheur* case⁵²⁵, a French company which was exporting beer to Germany was prevented from carrying out its business as a result of an import restriction imposed by the German authorities. This restriction regarding the beer that the *Brasserie* was producing was imposed since this kind of beer did not comply with the purity requirements for beer as laid down in the German “Law on beer”. Following the CJEU’s decision in infringement proceedings initiated by the Commission against Germany⁵²⁶, in which it was established that the provisions of the German Law were contrary to Article 30 EEC, *Brasserie* brought an action against the Republic of Germany before the national court. There it claimed compensation from the German State for damage suffered as a result of the restriction on importing beer in the period between 1981 and 1987.

Under German law the compensation could be awarded only if the plaintiff proved that he was the beneficiary of the obligation that was breached. Obviously, this turned out extremely difficult in practice, since the legislature’s task was to adopt laws for the public at large and not for specific individuals. This impossibility of the individual to obtain compensation for damage in this constellation incited the German *Bundesgerichtshof* to refer several questions to the CJEU.

In another case in the United Kingdom, *Factortame and others* (Spanish fishermen) brought proceedings for compensation for damage sustained as a result of a breach of EU law by the United Kingdom. The Merchant Shipping Act of 1988 had made the registration of fishing boats conditional upon the nationality, residence and domicile of the owners. The fishermen who were unable to be in the new

⁵²³ See W. van Gerven. ‘The ECJ’s recent case-law in the field of tort liability; towards a European *ius commune*’ in R.H.M. Jansen, D.A.C. Koster and R.F.B. van Zutphen, *European Ambitions of the National Judiciary* (The Hague: Kluwer 1997) 99.

⁵²⁴ Case C-5/71 *Zuckerfabrik Schöppenstedt* [1971] ECLI:EU:C:1971:116.

⁵²⁵ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECLI:EU:C:1996:79.

⁵²⁶ Case C-178/84 *Commission v Germany* [1987] ECLI:EU:C:1987:126.

Register were deprived of their right to fish. Similarly to the *Brasserie* case, the Commission brought proceedings against the United Kingdom,⁵²⁷ which resulted in a judgment of the CJEU that the registration conditions laid down in the English law were contrary to EU law, specifically Article 52 TEEC.

As with the German situation, the condition which was required under English law for compensation to be awarded was “proof of misfeasance in public office, an abuse of power which was inconceivable in the case of the legislature” and as such, it infringed the principle of minimum effectiveness.⁵²⁸

Because of the similarities between the two cases and preliminary questions referred to the CJEU by the German and English courts, the CJEU provided its replies in the same judgment.⁵²⁹

The CJEU emphasised the analogy between the conditions necessary for establishing State liability for a breach of EU law and the non-contractual liability of the Community for such an infringement, which, in contrast with State liability was based on a clear legal provision embodied in Article 340 TFEU (ex Art. 215 TEC).

Thus, by referring to uniformity in the protection of rights which individuals derive from EU law, the CJEU stated that:

“The conditions, under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.”⁵³⁰

In listing the conditions which give rise to a right to reparation for Member State liability, the CJEU put forward the necessity of exploring its case law on the non-contractual liability of the EU and particularly on the definition of the new condition that the CJEU inserted regarding State liability for a breach of EU law, namely that the breach must be ‘sufficiently serious’.

⁵²⁷ Case C-246/89 *Commission v United Kingdom* [1991] ECLI:EU:C:1991:375.

⁵²⁸ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 73.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*, para 42. Exactly the same statement was found in Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361, para 41.

The CJEU defined what had to be considered as a ‘sufficiently serious breach of law’ in a question: “did the Member State or the Community institution concerned manifestly and gravely disregard the limits on its discretion?”⁵³¹

In the *Brasserie* case the notion of ‘sufficiently serious breach of law’ was included as a new condition for State liability (in comparison with the *Francovich* case), by referring to the case law on EU liability.

Relying on the concept of wide discretion in which Community institutions act, the CJEU stated that in the context of this wide discretion, non-contractual liability of the Community may occur only if the institution has manifestly and gravely disregarded the limits of its discretion.⁵³² In *Brasserie*, the CJEU took over the requirement of ‘sufficiently serious breach’ as a condition necessary for EU liability and made it a second condition which needs to be satisfied in order to obtain compensation against the State.⁵³³

While the Court aligned in this respect the State liability to the EU liability, regime, there was also a movement other way round. In the *Bergaderm* case⁵³⁴ which concerned an action for compensation against the Commission for adopting a Directive which caused damage to Bergaderm, the CJEU ‘imported’ a requirement from the State liability regime into the EU liability regime. In this case the General Court rejected the plaintiff’s arguments. In appeal proceedings initiated in the Court of Justice, Bergaderm claimed that the General Court erred in law by considering the Directive as a legislative measure, but also by not finding a breach of a superior rule of law. The Court of Justice rejected Bergaderm’s appeal.

The most important point from *Bergaderm* for the current discussion is that in this case, the Court of Justice took over the ‘conferral of rights’ from State liability,⁵³⁵ while previously the condition leading to a right to claim damage from the Community under Article 340 TFEU, was a “sufficiently flagrant violation of a superior rule of law for the protection of the individual.”⁵³⁶

⁵³¹ Ibid, para 55.

⁵³² Joined Cases C-83/76, C-94/76, C-4/77, C-15/77 and C-40/77 *HNL and others v Council and Commission* [1978] ECLI:EU:C:1978:113, paras 5 and 6.

⁵³³ See Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 55.

⁵³⁴ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361.

⁵³⁵ Ibid, para 42.

⁵³⁶ Case C-5/71 *Zuckerfabrik Schöppenstedt* [1971] ECLI:EU:C:1971:116, para 11.

It is also worth underscoring that in *Bergaderm*, the CJEU held that:

“The *individual or general nature of the measure* has no bearing on the determination of the *scope of discretion* which the institution that has adopted the act possesses.”⁵³⁷

This stands in contrast to what was stated in the *Fresh Marine* case⁵³⁸, namely that the qualification of the administrative or legislative nature of the act does make a difference. This approach implied that administrative organs could also make ‘legislative choices’ and enjoy a large margin of discretion, in which case a breach by these organs of EU law should be proven to be ‘sufficiently serious’ in order for the second condition for liability to be satisfied.

Thus, it may be concluded that the CJEU succeeded in realising its intention to unify the conditions for Member State and EU liability. The fact is that what matters now, for EU liability, there is discretion, regardless of whether the choices are legislative or administrative.

3. Conditions for Member State liability

The conditions under which liability can lead to a right to reparation depend on the nature of the breach of Community law which caused the loss and damage.⁵³⁹

In *Francovich*, three conditions were set out for State liability to be established, namely: the directive should give rise to the granting of rights to individuals; it should be possible to identify the content of those rights on the basis of the provision of the directive; and there should be a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties.⁵⁴⁰

These conditions were modified in the *Brasserie* case,⁵⁴¹ namely the second condition disappeared and a requirement was added that the breach of EU law must be ‘sufficiently serious’.

The three conditions spelled out in *Brasserie* are minimum conditions, in the sense that the Member States may not impose stricter conditions to be fulfilled in order for the right to reparation to be asserted.

Thus, according to the *Brasserie* case:

⁵³⁷ Case C-352/98 P *Bergaderm* [2000] ECLI:EU:C:2000:361, para 46.

⁵³⁸ Case T-178/98 *Fresh Marine/ Commission*, [2000] ECLI:EU:T:2004:265.

⁵³⁹ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, para 38.

⁵⁴⁰ *Ibid*, para 40.

⁵⁴¹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame* [1996] ECLI:EU:C:1996:79.

1. The provision at issue must be intended to confer rights on individuals;
2. The breach must be sufficiently serious;
3. There must be a *direct causal link between* the infringement and the damage sustained.

Once these conditions are satisfied, the Member State is obliged to make good the damage incurred under the national procedural rules for liability,⁵⁴² provided that the *Rewe/ Comet* requirements are observed. This means that the principles of minimum effectiveness and equivalence are given significance in the sense that that national rules which run counter to these principles must be set aside by a national court adjudicating in an ‘EU case’.⁵⁴³

The practical application of these mixed EU/ national law requirements related to State liability for the breach of EU law will be more thoroughly analysed below.

Since the obvious change in the conditions for Member State liability incited an academic discussion about the possible existence of two different liability regimes under EU law – one for non-directly effective provisions and the other for directly effective provisions of EU law – it is appropriate to look more closely at the *Brasserie* and *Dillenkofer*⁵⁴⁴ cases.⁵⁴⁵

In *Brasserie*, the CJEU found that whether the EU provisions were directly effective or not was not a condition for claiming damages from the State which breached its EU law obligations.

In this case, the infringement of EU law by Germany and England consisted of adopting/ retaining in force laws whose provisions were contrary to directly effective provisions of EU law.

The CJEU rejected the argument put forward by the governments of Germany, the Netherlands and Ireland,⁵⁴⁶ which considered that the establishment of Member State liability in the *Francovich* case had

⁵⁴² Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428, paras 42-43; Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* [1996] ECLI:EU:C:1996:79, paras 67-68.

⁵⁴³ See extensively about the *Rewe* requirements in the Chapter 2.

⁵⁴⁴ Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375.

⁵⁴⁵ See Prechal 1995 (n 34), 277; J.H. Jans, R. de Lange, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public law*, (Groningen: Europa Law Publishing 2007) 330; Van Gerven 1997 (n 520), 99; Marc Fierstra ‘The significance of the *Francovich* jurisprudence for the national courts’ in R.H.M. Jansen, D.A.C. Koster, R.F.B. van Zutphen, *European Ambitions of the National Judiciary*, (The Hague: Kluwer 1997) 113.

⁵⁴⁶ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame* [1996] ECLI:EU:C:1996:79, para 18.

to be regarded as *filling a lacuna in the system of safeguarding individual rights* and consequently should not have been invoked in the cases in which the provisions had direct effect.

The purpose of the reparation in *Francovich* was to redress the injurious consequences of a Member State's failure to transpose a directive,⁵⁴⁷ while in *Brasserie* the CJEU stated:

“In the event [of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts], the right to reparation is a necessary corollary of the direct effect of the Community provisions whose breach caused the damage sustained.”⁵⁴⁸

According to the first condition in *Francovich*, it was required that the *result* of the directive should entail a right for individuals, whereas in *Brasserie*, it was stated that the *provision at issue must be intended to confer rights on individuals*.⁵⁴⁹ The requirement of ‘conferring rights’ on individuals, as one of the conditions to obtain compensation, became a little perplexing. In the initial phase of State liability jurisprudence, the most relevant issue was whether the provision was specifically intended to confer rights on individuals.⁵⁵⁰ Then, the CJEU started to also tolerate situations in which a provision, apart from conferring individual rights on individuals was also intended to safeguard the public interest or an EU objective.⁵⁵¹ Finally, there are cases in which it is not clearly discernible that the provisions grant rights to individuals, but still the CJEU allowed individuals to claim and obtain compensation against the State.⁵⁵²

Regarding the manner in which one determines whether an EU act (either as a whole or specific provisions of that EU act) confers rights on individuals, Prechal discerns a different language on the part of the CJEU.⁵⁵³ In *Francovich*, the purpose of the directive to confer rights is not an imperative, implying that only the *result* of the directive matters, unlike in *Faccini Dori* where it is the *purpose* of the directive that is important when assessing whether the first condition of liability is fulfilled. In *Brasserie* and

⁵⁴⁷ Ibid, para 21.

⁵⁴⁸ Ibid, para 22.

⁵⁴⁹ Ibid, para 50.

⁵⁵⁰ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428; and Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame* [1996] ECLI:EU:C:1996:79 ; Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375; Case C-91/92 *Faccini Dori* [1994] ECLI:EU:C:1994:292.

⁵⁵¹ See Case C-445/06 *Danske Slagterier* [2009] ECLI:EU:C:2009:178.

⁵⁵² Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12; Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166.

⁵⁵³ See Prechal 1995 (n 34), 107-108.

subsequent case law the CJEU held that the rule of law that was infringed must have *intended* to confer rights.⁵⁵⁴

The CJEU's assessment of the *intention of conferring rights* will be subject to analysis below.

The second problem is the introduction of a new condition, namely the requirement that the breach of EU law must be 'sufficiently serious'.

One of the factors which the national court needs to take into account is the margin of discretion which the EU and/or Community institutions dispose of. On the basis of *Brasserie* it might be suggested that in cases in which the discretion was reduced or even non-existent, a 'mere infringement' of EU law was required, whereas in cases in which the 'discretion was wide, a 'sufficiently serious breach' had to be established by the national courts. The simplest illustration of a 'mere infringement' is provided in cases in which the implementation or transposition of a directive is required before a certain date. Failure on the part of the Member State to undertake any measures to do this is considered a sufficiently serious breach of law.⁵⁵⁵

Thus, EU law might be understood to contain two distinct liability regimes: *Francovich* with strict and objective liability which equates sheer illegality or unlawfulness; and *Brasserie* with more lenient liability providing a subjective liability inquiry, which implies an existence of fault.

This issue was definitely resolved in *Dillenkofer*.⁵⁵⁶

In this case, the Federal Republic of Germany had failed to transpose Directive 90/314/EEC on package travel, package holidays and package tours. A law implementing the Directive entered into force two years late on 1 July 1994. That Directive was aimed at protecting individual package travellers by granting them the individual right to security for money paid and repatriation costs in the event of the insolvency of the travel organisers.

Dillenkofer brought proceedings for compensation for damage suffered as a result of the non-transposition of the Directive in time, and the national court referred 12 questions to the CJEU. The CJEU, by referring to the *Francovich* case, responded that:

⁵⁵⁴ Case C-127/95 *Norbrook Laboratories* [1998] ECLI:EU:C:1998:151; Case C-66/95 *Sutton* [1997] ECLI:EU:C:1997:207.

⁵⁵⁵ See in more detail in Jans et al 2015 (n 63), 447.

⁵⁵⁶ Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375.

“Where, a Member State fails, in breach of the third paragraph of Article 189 of the [EC] Treaty [now Article 288 TFEU], to take any of the measures necessary to achieve the result prescribed by a Directive within the period it lays down, that Member State manifestly and gravely disregards the limits of its discretion”⁵⁵⁷ [...] It constitutes a serious breach of Community law *per se*, giving rise to a right of reparation for individuals suffering injury, if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State’s obligation and the loss and damage suffered.”⁵⁵⁸

In this case it was established that a Member State’s failure to take any measures to implement the Directive was a sufficiently serious breach of law *per se*.

Consequently, in all cases in which the Member States have a clear and straightforward obligation, such as the one flowing from now Article 288 TFEU, they lack any discretion as to whether to transpose/ implement at all.

Not undertaking any implementing measures constitutes a sufficiently serious breach of EU law and it is self-evident, compared to situations in which the Member State or Community institutions do have a certain discretion regarding the measures to be undertaken and the manner of performing this obligation. What can be concluded is that there is one single regime.

3.1 What is the existence of a ‘right’ for the purpose of satisfying the first condition for State liability?

The notion of a ‘right’ is given a different significance in the continental and common law countries. The uncertain definition of the notion of a right by the CJEU further complicates the issue of whether the first condition for State liability in an EU law context has been satisfied. Nevertheless, the case law of the CJEU provides us with a number of indications of the notion of a right within the framework of EU law and more importantly, how it should be conceived when applied for different purposes. The starting point is the different conceptualisation of the notion of a right within the different Member States’ legal systems.⁵⁵⁹

The *Schutznorm* requirement in German legal tradition, which translates into an obligation on the individual who initiates action against the State to prove that the intention of the legislator was to protect

⁵⁵⁷ Ibid, para 26.

⁵⁵⁸ Ibid, para 29.

⁵⁵⁹ Concerning this issue, see more detail in Chapter 1, section 2.

a specific individual right which belongs to him/ her, seems to be dissonant with the CJEU's requirement that the German State protect certain individual rights once the CJEU has found that this right exists under an EU act.

In this regard, there are noteworthy cases in which the CJEU found, following an action initiated by the Commission against Germany, that the directives related to air quality and the protection of ground water were intended to protect human health,⁵⁶⁰ implying that they were creating rights for individuals – a finding that was rejected by the German State.

If the existence of an EU right – or more appropriately, the intention of the EU legislator to confer a right – remains in the realm of assessment by the national courts, it is probable that the same provisions are interpreted differently by different national courts in terms of whether they confer substantive EU rights on individuals or not. The clarification of this issue will give an answer to the question of whether one of the conditions for compensation is fulfilled or not.

One example from *Jans* shows the differences in outcome this may cause.⁵⁶¹ In similar cases, Dutch and French courts have come to opposing decisions with regard to a claim for compensation.

In the Dutch cases, the non-implementation by the Dutch government of the action programmes from Nitrate Directive 91/676 to prevent pollution caused by nitrates was considered by the Dutch court as not resulting in a right for individuals to claim compensation, since the intention of the relevant provision was not intended to confer individual rights.

By contrast, the French courts decided in a comparable case⁵⁶² that the plaintiffs were to be granted compensation for the costs of purifying ground and surface water or the costs of alternative drinking water, since the provision at issue was intended to grant individual rights to them. Therefore more guidance by the CJEU would be welcome, which implies that the existence of a right is a matter of interpretation of EU law.

When looking at the case law of the CJEU, in some cases it is relatively easy to determine the substantive right.

⁵⁶⁰ Case C-131/88 *Commission v. Germany* [1991] ECLI:EU:C:1991:87; Case C-361/88 *Commission v Germany (TA Luft)* [1991] ECLI:EU:C:1991:224; Case C-59/89 *Commission v. Germany* [1991] ECLI:EU:C:1991:225.

⁵⁶¹ *Jans* 2005 (n 59), 289.

⁵⁶² *Société Suez Lyonnaise des Eaux, req* No. 97182 [2001] *Tribunal Administratif Rennes*.

The most instructive examples for this type of situation are the *Francovich*, *Lindopark*, *Brasserie* and *Hedley Lomas* cases,⁵⁶³ where, due to the clear wording of the provision, it was a relatively easy task to determine what the specific individual right was. In all of these cases, apart from *Francovich*, the provisions were directly effective and also provided rights for the purpose of State liability. Clarity, precision and unconditionality of the provisions are necessary for them to have direct effect. However, *not all directly effective provisions necessarily grant rights for the purpose of claiming compensation for damage*.⁵⁶⁴

The notion of direct effect, although sometimes used interchangeably with the term ‘right’, is a broader concept. Direct effect of EU provisions as a tool for attaining effective implementation of EU law and effective protection of EU individual rights was not only employed in circumstances in which there was no national legislation to be applied in the concrete case⁵⁶⁵, but also in situations in which the clarity, precision and unconditionality of the EU provisions served as a *protection against the application of the national law, unfavourable to the applicant and incompatible with the EU law*,⁵⁶⁶ or as a *standard of review* of the existing national norms,⁵⁶⁷ without conferring substantive EU rights on individuals (direct effect in a broad sense).⁵⁶⁸

Moreover, ‘rights’ for the purpose of direct effect and rights for the sake of State liability seem to be subject to different criteria for appraisal, although the ultimate purpose of both direct effect and compensation for damage for a breach of EU law is to remedy the incorrect application of the EU law.

⁵⁶³ See Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428; Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* [1996] ECLI:EU:C:1996:79; Case C-150/99 *Stockholm Lindöpark* [2001] ECLI:EU:C:2001:34; Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193.

⁵⁶⁴ Case C-280/87 *Enichem Base* [1989] ECLI:EU:C:1988:546; Case C-222/02 *Peter Paul and others* [2004] ECLI:EU:C:2004:606. Case C-98/14 *Berlington* [2015] ECLI:EU:C:2015:386.

⁵⁶⁵ Case C-8/81 *Becker* [1982] ECLI:EU:C:1982:7.

⁵⁶⁶ Case C-194/94 *CIA Security* [1996] ECLI:EU:C:1996:172; Case C-443/98 *Unilever Italia* [2000] ECLI:EU:C:2000:496; Case C-456/98 *Centrosteeel* [2000] ECLI:EU:C:2000:402; Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335; Case C-14/83 *Von Colson and Kamann* [1984] ECLI:EU:C:1984:153; Joined Cases C-240/98 to 244/98 *Oceano Grupo Editorial* [2000] ECLI:EU:C:2000:346; Case C-129/94 *Rafael Ruiz Bernaldez* [1996] ECLI:EU:C:1996:143.

⁵⁶⁷ Case C-72/95 *Kraaijeveld and others* [1996] ECLI:EU:C:1996:404.

⁵⁶⁸ See Chapter 1, section 2.

It is necessary that the provision is sufficiently clear and precise so as to identify the content of the right contained in the provisions of the EU act, as well as to identify the beneficiary of the right.

One must admit that this exercise is stricter than the assessment of ‘sufficiently clear, precise and unconditional provisions’ for determining whether the provisions are directly effective. As Prechal observes:

“Clarity and precision in the liability context means that the meaning of the Community law provisions was reasonably beyond dispute and that it does not give rise to various interpretations.”⁵⁶⁹

On the other hand, provisions of a directive might not be directly effective, but still, the content of the right can be determined and thus entail a successful liability claim. Thus, in *Francovich*, the bearer of the right was identified and the content of the obligation was identifiable and identified, however, the bearer of the obligation was not identifiable, since the Directive left open the designation of the competent institution. This resulted in the denial of direct effect of the provisions and the impossibility for individuals to rely on these provisions and directly claim their rights.

Because the individual (bearer of the right) was not able to enforce the rights (wage claims) to which he was entitled under the Directive as a result of the fault of the State, it was the State alone that had to compensate for depriving the individual of the rights he would have enjoyed if the State had fulfilled its obligation, namely to take transposing measures. In both *Francovich* and *Wagner Miret*⁵⁷⁰, the fact that the State did not make use of its discretion to decide who is the competent authority, or used its discretion only partially, was a reason for denying direct effect of the provisions at issue.

Apart from this, the provisions of a directive might be directly effective, the content of the right might be identified, but still not enforceable or in other words, impossible to be judicially protected, because of the principle of prohibition of horizontal direct effect as was the case in *Faccini Dori*.⁵⁷¹

Consequently, the most relevant parameter for determining whether a ‘right’ exists for State liability purposes is the ascertainability or identifiability of the content of the right.⁵⁷²

⁵⁶⁹ Prechal 1995 (n 34), 288.

⁵⁷⁰ Case C-334/92 *Wagner Miret* [1993] ECLI:EU:C:1993:945.

⁵⁷¹ Case C-91/92 *Faccini Dori* [1994] ECLI:EU:C:1994:292.

⁵⁷² S. Prechal, ‘Protection of Rights: How far?’ in S. Prechal and B. van Roermund, *The Coherence of EU law. The Search for Unity in Divergent Concepts*, (Oxford: Oxford University Press 2008), 163.

The second important criterion is the identification of the bearer of the right or the ‘personal scope’ of the EU rules at issue, i.e. whether the person concerned falls within the protective scope of the EU provision(s). The right to reparation might arise only where the objective of the provision(s) is such as also to protect specific individual interest. For instance, it is required that the aim of the EU act in which the provision is contained also includes protecting the legal interest of the individual who claims compensation for damage. Initially, this condition implied that the objective of protecting the individual right was at least one of the objectives of the EU act. However, it was not necessary that it concerned the *exclusive and only objective*.

In *Dillenkofer*, two objectives of the directive could stand alongside each other, namely: an approximation of the laws, regulations and administrative provisions of the Member States relating to package travel, package holidays and package tours sold or offered for sale in the territory of the Community as well as the protection of consumers. The latter objective was a sufficient reason to recognise the existence of a right for the purpose of State liability. In this case, the obligation placed on the travel operators to provide sufficient evidence of payment security in order to protect consumers against the risk of bankruptcy, gave rise to the right of consumers to be reimbursed or repatriated in the event of the insolvency of the organiser from whom they purchased the package travel.⁵⁷³ What is particularly important is that the CJEU underlined that:

“The fact that the Directive is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers”.⁵⁷⁴

This decision of the CJEU stands at odds with its ruling in the *Peter Paul* case⁵⁷⁵, where the CJEU held, in relation to various objectives pursued by Directives 77/780, 89/299 and 89/646 that:

“It does not necessary follow either from the existence of such obligation or from the fact that the objectives pursued by those directives also include the protection of depositors that those directives seek to confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities”.⁵⁷⁶

The clarity and precision of the provision with which the obligation on the Member States is imposed as well as the margin of their discretion are tightly bound to the right of the beneficiary. Thus, the more

⁵⁷³ Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375, para 36.

⁵⁷⁴ *Ibid*, para 39.

⁵⁷⁵ Case C-222/02 *Peter Paul and others* [2004] ECLI:EU:C:2004:606.

⁵⁷⁶ *Ibid*, para 40.

precise the provision in terms of its objective and the clearer the obligation on the Member State, the more easily it is to determine the specific substantive right which that provision confers on individuals. Conversely, the less precise the aim of the provision and the obligation, and the wider the discretion of the Member State's legislative choice, the more difficult is it to identify the content and the beneficiary of a specific right.

The objective(s) of the EU provision(s) is/ are related to their protective scope, i.e. the protective scope of the EU act. Strict application of the protective scope requirement means that a claim for compensation brought by an individual against the State can be upheld only if the EU provision specifically intends to confer rights to individuals.⁵⁷⁷

In *Peter Paul*, the obligation imposed on the Member State was clear: the provision created supervisory obligations vis-à-vis the credit institutions. One of the objectives of the planned harmonisation of the Member States' supervision systems was also the protection of depositors. However, this objective was not expressly mentioned and moreover it was not the only purpose that was to be achieved. With this judgment, the CJEU introduced a sort of strict '*Schutznorm* requirement', typical of the German legal system, and detracted from its previously established stance in *Dillenkofer*, whereby it was sufficient for at least one of the objectives of the EU Directive to be a conferral of individual rights.

In *Peter Paul*, the CJEU approached the issue differently and suggested that in order for the individuals to enjoy substantive rights, their conferral should be the only objective of the EU act. This could be understood as saying that the fact that there is also another objective of the EU act prevents the individuals from claiming rights on the basis of the EU act.

However, *Peter Paul* remained an isolated case. Later, cases like *Danske Slagterier* and *Leth*⁵⁷⁸ point in the direction of 'generosity' by the CJEU in terms of the recognition that individual rights were infringed, along with the conclusion that other public law objectives were entrenched in the EU acts at issue.

The protective scope of the Directive determines the scope of the beneficiaries through the questions of *whether* and *whose* interests are to be protected. If this is not straightforward, the national court should refer a preliminary question to the CJEU regarding the objective of the provision(s) to confer rights.

⁵⁷⁷ About the strict application in some cases and broad application in others of the protective scope requirement, see Jans et al 2015 (n 63), 460.

⁵⁷⁸ See Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, paras 23-24 and Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166, paras 35-36.

One of the greatest examples of problems with regard to the issue of the scope of protection of a directive emerges from the Environmental Directives concerned with the safeguard of human health, clarity of air or water etc.⁵⁷⁹

The CJEU considered a number of cases concerning environmental issues and found that “these directives were intended to create rights for individuals, since their objective was to protect human health”.⁵⁸⁰ German courts have an opposing view on this and consider that the purpose of these directives is too general; i.e. intended to protect the (general) public interest and not the interest of an individual or particular group of individuals.

Indeed, the protection of human health is an objective which benefits the public, in other words, protects a very large number of individuals. Nevertheless, one might ask whether this excludes the right of each of these individuals, belonging to an almost limitless group of individuals, to claim the observance of this right as their own. This issue is subject to controversy and can be regarded differently.⁵⁸¹ One of the best approaches is to propose an inquiry into the *intention* of specific provision(s) of a directive,⁵⁸² apart from the objective of a directive as a whole.

That the Environmental Impact assessment Directive, or at least certain provisions, aim at protecting individual rights as well, is illustrated in the *Wells* case⁵⁸³. In this case, the obligation imposed on the

⁵⁷⁹ For a thorough discussion about the scope of the European legislation and the category of persons on whom the legislation confers rights especially in the field of environmental law, see Jans et al 2015 (n 63), 378-382. See also case English High Court 17 December *Bowden* [1998] 3 C.M.L.R. 330 and Court of Appeal 15 December 1998 [1999] 3 C.M.L.R. 180.

⁵⁸⁰ See case C-361/88 *Commission v Germany (TA Luft)* [1991] ECLI:EU:C:1991:224. In this case, the CJEU ruled that enforcement of Directives on air quality standards with a view, among other things, to protect human health, implied the range of individuals affected by the Directive. This range was very broad since everyone's health is potentially jeopardised by exceeding an air quality limit. Similar cases are: Case C-131/88 *Commission v. Germany* [1991] ECLI:EU:C:1991:87; Case C-58/89 *Commission v. Germany* [1991] ECLI:EU:C:1991:391; Case C-59/89 *Commission v. Germany* [1991] ECLI:EU:C:1991:225; Case C-298/95 *Commission v. Germany* [1996] ECLI:EU:C:1996:501. Also Case C-237/07 *Janecek* [2008] ECLI:EU:C:2008:447, in which the CJEU held: ‘ whenever the failure to observe the measures required by the directives which relate to air quality [...] and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives.

⁵⁸¹ Jans et al 2007 (n 542), 292-293.

⁵⁸² Prechal 1995 (n 34), 120.

⁵⁸³ Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12.

Member States by Directive 85/337 to carry out an environmental impact assessment before a development consent is given by the public authorities, was not observed by the English administrative authorities. Ms. Wells, whose house was situated on an environmentally high risk land (quarry) for which no environmental impact assessment was carried out prior to the award of the development consent, initiated an action before the national court.

The CJEU reminded the national courts of their obligation to “nullify the unlawful consequences of the authorities”, which in this concrete case, implied either revocation or suspension of the consent already given or alternatively, the award of compensation for the harm suffered. If compensation for damage was proposed as an alternative, it is a logical conclusion that the CJEU considered that the directive was intended to confer rights on individuals and the breach of the directive’s obligations by the State gave rise to the right to claim compensation for damage suffered by an individual.

Although the main purpose of this EU Directive was the protection of the environment and the quality of life, in *Wells* and more recently in *Leth*⁵⁸⁴, the CJEU held that the Directive 85/337 on the assessment of the effects of certain public and private projects on the environment conferred a right on individuals to have the environmental effects of the project under examination assessed by the competent services.⁵⁸⁵ It was exactly the breach of this right which gave rise to the possibility for the plaintiffs to claim compensation for damage.

The personal scope was not clear and required a detailed analysis of the Directive. In contrast to this, in cases like *Brasserie* and *Dillenkofer* the personal scope was more obvious and therefore easy to establish.

3.2 ‘Sufficiently serious breach’

The requirement of a ‘sufficiently serious breach of law’ was formulated as the second condition to be satisfied in order to obtain compensation for damage.

It is worth recalling that in *Brasserie*, the CJEU underlined the importance of drawing an analogy between the non-contractual liability of the Community and State liability for the sake of a uniform interpretation of EU law.⁵⁸⁶ In this regard, the CJEU pointed to its jurisprudence under Article 215 EC (now Art. 340 TFEU) and referred particularly to the link between the margin of discretion that the

⁵⁸⁴ Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166.

⁵⁸⁵ Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12, para 61 and Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166, para 32.

⁵⁸⁶ The analogy between the *Brasserie* and *Bergaderm* cases was discussed previously in this Chapter under Section 2.2.

Community institutions are given while making legislative choices and the notion of sufficiently serious breach of law as one of the conditions for giving rise to the right to redress for damage caused.

The comparison between the margin of discretion in a Community institutions action and in the State context was discussed in paragraphs 46-47 of the *Brasserie* case.⁵⁸⁷

Briefly, the CJEU established that the national legislature “does not systematically have a wide discretion when it acts in a field governed by Community law”, and as an example of a reduced margin of discretion of the national legislation, the CJEU referred to Article 288 TFEU (ex Art. 249 EC) where the Member States are obliged to achieve the result required by the directive within a prescribed period of time. Here the breach is sufficiently serious *per se*.

On the other hand, the CJEU stated that in fields in which the Member States have a wide discretion to make legislative choices, the test for a ‘sufficiently serious’ breach requires that it should be proven that the Member State (or a Community institution) has “*manifestly and gravely disregarded the limits on its discretion*”.⁵⁸⁸

Significantly, the CJEU stated that the national courts themselves need to determine whether the breach has been sufficiently serious by following the instructions of the CJEU concerning the factors that should be taken into account.⁵⁸⁹ However, as will be demonstrated, on several occasions the CJEU itself appraised the existence of a ‘sufficiently serious breach of law’. In paragraph 56 of the *Brasserie* case, the CJEU stated that:

“The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.”

In cases like *Konle*⁵⁹⁰, *Haim*⁵⁹¹, *Kobler*⁵⁹² and *Norbroom*⁵⁹³, the CJEU abstained from providing an answer to the national court as to whether the breach was sufficiently serious. In contrast, the CJEU dived into the

⁵⁸⁷ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79 , para 46-47.

⁵⁸⁸ *Ibid*, para 55.

⁵⁸⁹ *Ibid*, para 58.

⁵⁹⁰ Case C-302/97 *K. Konle* [1999] ECLI:EU:C:1999:271, para 59.

appraisal of a sufficiently serious breach of law in other cases: *Gervais Larsy*⁵⁹⁴, *Dillenkofer*⁵⁹⁵, *Rechberger*⁵⁹⁶, *Lindopark*⁵⁹⁷, *Hedley Lomas*⁵⁹⁸ and *Fuß*⁵⁹⁹ clearly show the CJEU's interference in the area which it has in other cases deferred to the national courts.

A finding by the CJEU that the Member State breached the EU law following infringement proceedings by the Commission under Article 258 TFEU (ex Art. 226 EC) or a CJEU judgment under Article 267 TFEU (ex Art. 234 EC) is one of the substantive factors for determining whether the breach was sufficiently serious. Furthermore, it was stated in the *Brasserie* case⁶⁰⁰ that:

“On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the CJEU on the matter from which it is clear that the question constituted an infringement.”

Several cases of the CJEU will be examined below in order to demonstrate what the CJEU considers as a ‘sufficiently serious breach of law’ when the Member State’s latitude is small and what it treats as a ‘sufficiently serious breach of law’ when the discretion of the Member State to make legislative choices is wide. Apart from legislative choices, other scenarios exist, such as judicial decisions and individual administrative decisions. There can also be discretion in those cases.

In *Hedley Lomas*⁶⁰¹, the British Ministry of Agriculture, Fisheries and Food refused to issue licenses to export live animals for slaughter to the Kingdom of Spain in the period between 1990 and 1993, basing this refusal on the incorrect application of Directive 74/577/EEC on the stunning of animals before

⁵⁹¹ Case C-424/97 *Haim* [2000] ECLI:EU:C:2000:357, para 44.

⁵⁹² Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513.

⁵⁹³ Case C-127/95 *Norbrook Laboratories* [1998] ECLI:EU:C:1998:151, para 109.

⁵⁹⁴ Case C-118/00 *Gervais Larsy* [2001] ECLI:EU:C:2001:368, para 40 and 55.

⁵⁹⁵ See Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375, para 29.

⁵⁹⁶ Case C-140/97 *Rechberger and others* [1999] ECLI:EU:C:1999:306, para 53.

⁵⁹⁷ Case C-150/99 *Stockholm Lindöpark* [2001] ECLI:EU:C:2001:34, para 53.

⁵⁹⁸ Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193, para 28.

⁵⁹⁹ Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717.

⁶⁰⁰ See Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 57.

⁶⁰¹ Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193.

slaughter in the slaughterhouses in Spain. The Directive should have been transposed in Spain by the date of its accession into the EU, namely 1 January 1986. This State adopted the implementing legislation only in 1987.

Mr. Lomas brought an action for damages against the UK because he was restricted from exporting livestock to Spain in 1992, the year in which he applied for the license from the British Ministry and was refused. The CJEU stated in paragraphs 27 and 28 of the judgment that:

“As regards the first condition, as is clear from the answer given to the first question, the United Kingdom’s refusal to issue an export license to Hedley Lomas constituted a quantitative restriction on exports contrary to Article 34 of the Treaty which could not be justified under Article 36. Whilst Article 34 imposes a prohibition on Member States, it also creates rights for individuals which national courts must protect.

As regards the second condition, where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.”

The *Rechberger* case⁶⁰² related to the incorrect transposition in Austria of the Directive 90/314/EEC on package travel, package holidays and package tours. Austria undertook a series of legislative measures to transpose the Directive, but it turned out that Article 7 of the Directive, whose purpose was to grant travellers rights guaranteeing the refund of money that they had paid as well as their repatriation in the event of the organiser’s insolvency, was not properly implemented, since according to the national implementing legislation, these rights could be enjoyed by the travellers only if they had booked their travel packages after 1 January with a departure date of 1 May 1995 or later.

The plaintiffs’ trips were to take place between 10 April and 23 July 1995. The travel agency had offered a seven day trip to a European destination as a way of expressing gratitude for subscribers’ loyalty to a daily newspaper (among these subscribers were the plaintiffs in the main proceedings). Since the travel agency was facing insolvency proceedings, Mr. Rechberger and other plaintiffs could not assert their rights to a refund of money paid in advance for their trips. They claimed compensation for damage sustained as a result of the incorrect transposition of the Directive (specifically Article 7) by the Austrian State, since the legislative bodies of this State transposed this Article in a way that limited the protection

⁶⁰² Case C-140/97 *Rechberger and others* [1999] ECLI:EU:C:1999:306.

prescribed by that provision to trips with a departure date of four months or more after the expiry of the period prescribed for transposing the Directive. The CJEU found in paragraph 51 of the judgment that:

“The Member State in question here enjoyed no margin of discretion as to the entry into force, in its own law, of the provisions of Article 7. That being so, the limitation of the protection prescribed by Article 7 to trips with a departure date of 1 May 1995 or later is manifestly incompatible with the obligations under the Directive and thus constitutes a sufficiently serious breach of law.”

Consequently, the main factor that the CJEU considered while assessing the requirement of ‘sufficiently serious breach’ was that the Member State enjoyed no margin of discretion while transposing the Directive in issue. In areas in which the Member States have wide discretion as to the manner of legislation and choices made, it will be more burdensome to prove that the breach was ‘sufficiently serious’. If the discretionary power provided for by a Directive or any other provision of EU law is wide (this is normally estimated by assessing the precision of the provision), then the potential breach of the provisions will probably be ‘excused’ and the Member State will not be held liable for that breach. However, as will be demonstrated, the CJEU is not always tolerant towards the Member States’ breaches of EU law, even where they do enjoy a wide margin of discretion.

If the provision is not clear and precise, the nature of the Member State’s obligation remains vague and it can therefore rely on the possibility to make different legislative choices which implies a wide margin of discretion. This was at issue in the *British Telecom* case.⁶⁰³

In this case, the breach of EU law attributed to the British legislature (the incorrect transposition of the Directive by allowing the Member State to determine which services of contracting entities are to be excluded from the scope of the Directive instead of leaving that discretion to economic operators), was excused by the CJEU due to the *imprecision of the provision* at issue, namely Article 8(1) of the Directive. This view of the CJEU was further strengthened by its finding that the interpretation by the United Kingdom *was not manifestly contrary to the wording of the Directive or to the objective pursued by it*.⁶⁰⁴ Another underpinning in this respect was the circumstance of *non-existence of any guidance on the part of the CJEU*,⁶⁰⁵ as to the interpretation of the provision or any reaction by the Commission when the 1992 Regulations were adopted. There was no sufficiently serious breach of law in this case, despite the error committed by the legislator.

⁶⁰³ C-392/93 *British Telecommunications plc* [1996] ECLI:EU:C:1996:131.

⁶⁰⁴ *Ibid*, para 43.

⁶⁰⁵ *Ibid*, para 44.

When it comes to the precision and clarity of the provision for State liability purposes, the crucial points which should be appraised is whether the State was acting *bona fide* and whether it really had any discretion for a different interpretation of the provision at issue or not. It is possible for the State authorities to transpose or apply an EU law provision in an incorrect manner where the provision was unclear and imprecise and where there was a large margin of discretion regarding the legislative choice. In this context, the breach of law would be treated as made involuntarily, making the error of law committed excusable.

In any event, the interpretation of the provisions to be implemented should not be manifestly contrary not only to the wording of the directive but also to the objective pursued by it.⁶⁰⁶

Apparently, the CJEU also takes into consideration the existence of similar or identical interpretations of the provisions in question by other State governments or the Commission, with a view to justifying the wrongful act committed by the recalcitrant State in their the interpretation.

In *Brinkmann*,⁶⁰⁷ the breach by the administrative organs was excused due to the *imprecision of the provision* at issue and the possibility for it to be interpreted in different ways. In this case, the error committed by the Danish administrative authorities through an erroneous interpretation of the relevant Directive and consequently its defective application (which resulted in a taxation higher than that envisaged by the Directive), was considered as an ‘excusable error’, since the classification made for tobacco was not ‘manifestly contrary’ ‘to the aim of the Directive.’⁶⁰⁸

Finally, the fact of whether a previous judgment by the CJEU or some other EU institution was taken into consideration with regard to the same or a similar EU issue, plays a role in the assessment of the nature of the breach.⁶⁰⁹

For instance, before the *Brasserie* case was delivered, the CJEU had expressed its position regarding the content and interpretation of Article 30 EC in a previous case.⁶¹⁰ Consequently, the German legislative authorities should have been aware that the provisions of the contested law were in breach of the EU law.

⁶⁰⁶ Ibid, para 43.

⁶⁰⁷ Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECLI:EU:C:1998:429.

⁶⁰⁸ Ibid, para 31.

⁶⁰⁹ Regarding the influence of the infringement proceedings enshrined in Art. 258 TFEU (ex Art. 226 EC), see Prechal 1995 (n 34), 272-273, 290; Tridimas 2006 (n 276), 302; T, Lock, ‘Is private enforcement of EU law through State liability a myth? – an assessment 20 years after Francovich’, (2012) Common Market Law Review.

⁶¹⁰ Case C-178/84 *Commission v Germany* [1987] ECLI:EU:C:1987:126.

Therefore the error committed by the German State could not have been considered as an excusable error, as they already knew that their law was contrary to EU law. The fact that the authorities maintained in force the disputable provisions was in fact a *mala fide* action.

Similarly in the *British Telecom* case, the CJEU stated that there was no guidance to the UK authorities from case law of the CJEU and consequently the breach committed was treated as involuntary.⁶¹¹

On the other hand, in *Gervais Larsy*⁶¹², a public organ in Belgium, which had adopted a decision in breach of an EU Regulation regarding insurance contributions and in this way inflicted damage on Mr. Gervais Larsy, was not willing to apply a clearly worded judgment of the CJEU which had been delivered with regard to the same factual situation concerning his brother, and in which the wrongdoing of the national institution was established. In fact, the national organ had followed the CJEU's decision in a certain respect and had revised its previously adopted decision thus refunding Mr. Larsy a certain amount of money which had been unlawfully taken by the State. However, the breach of the national institution consisted of limiting the temporal effect of its new decision without having any grounds for doing this in light of the CJEU's ruling.

The CJEU had not temporarily limited the effect of its judgment by interpreting the contentious articles of the Regulation and consequently the national organ was not allowed to limit the temporal effect of its decision even if the national law prescribed for that. In the end, the CJEU found that limiting the retroactivity of the review by the national organ, to the detriment of the person, constituted a sufficiently serious breach committed by that organ, (i.e. the State) and compensation had to be paid, provided that two other conditions for liability were satisfied.

The problem of State liability for wrongs committed by the judiciary deserves special attention. Here, the key case is *Köbler*⁶¹³. In this case the question was whether the State should have been held liable for the damage caused to the plaintiff by the infringement of EU law by the Highest Austrian Court.

The facts of the case are as follows: Mr. Köbler, a university professor in Austria, applied for a special length of service increment to his salary which was awarded to Austrian professors who spent at least 15 years in an Austrian university. He was refused this benefit with the reasoning that he spent only 10 years in Austria as a professor. However, he claimed that, if all his working years as professor in other Member States were taken into consideration he would be entitled to this special increment. Otherwise, he

⁶¹¹ Case C-392/93 *British Telecommunications plc* [1996] ECLI:EU:C:1996:131, paras 44-45.

⁶¹² Case C-118/00 *Gervais Larsy* [2001] ECLI:EU:C:2001:368.

⁶¹³ Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513.

contended, he was indirectly discriminated against on grounds of nationality and this was contrary to EU law provisions on freedom of movement of workers. When the dispute reached the Austrian Supreme Administrative Court, the latter made a reference for a preliminary ruling to the CJEU in order to have the issue clarified.

Since the CJEU had delivered a judgment in the meantime on *Shöning-Kougebetopoulou*, where it ruled that the Austrian Court could draw a conclusion on how the CJEU interpreted that question, it asked the Austrian Court whether it was willing to maintain the request for a preliminary ruling. The Supreme Administrative Court withdrew the request and gave a judgment in which it held that the special length of service increment asked by Köbler was in fact a loyalty bonus and as such a justifiable derogation from the provisions on free movement. Following this, Mr. Köbler brought an action for compensation against the Austrian State for damage sustained due to the judgment delivered by the Austrian Supreme Administrative Court in which the latter had violated, according to Mr. Köbler, directly effective EU law provisions.

The CJEU, this time adjudicating on the issue of liability, held that with its judgment, the Austrian Supreme Administrative Court had infringed the EU provisions. However, as far as the question of a ‘sufficiently serious breach’ was concerned, the CJEU found that there was no manifest breach of EU law: the answer to whether a loyalty bonus can be justified was not yet clearly answered in the CJEU’s case law.

If the Austrian Supreme Court had maintained its request for a preliminary ruling under Article 267 TFEU, the CJEU would have given a reply.

It is noteworthy that, in the general parts of the judgement dealing with the liability for decisions of last instance courts, the CJEU took into consideration the sensitivity of the judicial function and the issue of the independence of the judiciary and legal certainty while providing a special definition of the notion of sufficiently serious breach when the national judiciary is responsible for the breach. In paragraphs 53, 55 and 56 of its judgment in the *Köbler* case, the CJEU held the following:

“53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended.

State liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred only in the exceptional case where that court manifestly infringed the applicable law.”

“55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.”

“56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the CJEU in the matter [...]”

The Austrian Supreme Court was not held liable since the CJEU itself recognised that in its previous judgment in which it dealt with the relevant issue⁶¹⁴, the answer which it provided was not clear and unambiguous so as to leave no doubts for the Austrian court concerning the content and the aim of that provision. The interpretation provided by the CJEU in that judgment was apparently not unequivocal enough to be understood properly by the Austrian court and the latter thus applied the EU law incorrectly.

If the CJEU had considered that the content of its ruling was sufficiently clear, the Austrian court would not have been spared liability for the erroneous application of the EU law.

In cases in which the CJEU finds that the interpretation provided in its rulings is sufficiently clear, the non-observance of that interpretation either by the legislature, the administrative bodies or the judiciary entails liability for damage on the part of the State, for which it has to compensate the individuals.

In *Köbler*, in the CJEU’s view, it was undisputed that the Austrian Supreme Court infringed Article 45 TFEU and Article 7(I) of Regulation 1612/68.

Apparently, in cases of State liability attributable to national judiciary, the national court needs to have infringed a substantive law provision—failure to refer a question under Article 267 TFEU is not sufficient to establish that the national court manifestly infringed EU law, but *only one* of the factors to be taken into account when addressing the question of a sufficiently serious breach.

According to the CJEU, a court adjudicating in last instance is not obliged to refer a question to the CJEU either when the question raised has already been the subject of a preliminary ruling in a similar case (*acte*

⁶¹⁴ Namely whether a certain amount of money had to be qualified as a loyalty bonus or a salary service increment.

éclairé) or when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be answered (*acte clair*).⁶¹⁵

Regarding an *acte clair*, one of the issues which spurred a debate regarding the CJEU's judgment in *Ferreira da Silva e Brito*⁶¹⁶, was whether the CJEU was indeed obliged to intervene when there were divergent opinions on the manner in which the EU law rule should be applied by different national courts in Portugal. The CJEU held in paragraph 45 that in these circumstances, the court of last instance (or the court against whose decision there is no opportunity for appeal) was obliged to make a reference to the CJEU.

Nevertheless, certain commentators like Kornezov, consider that the viewpoint of the CJEU regarding the obligation of the court to refer to the CJEU or its exoneration from *acte clair*, was such that the CJEU did not explicitly mention the reasons why the national court of last instance should have referred to the CJEU. It is well known that the so-called *CILFIT* reasons are difficult to fulfil, since, although at first sight they seem rigorously objective, they are in fact indirectly subjective. The national judge should be convinced that the correct application of the EU rule is so obvious as to leave no scope for any reasonable doubt. The accent is on the *personal conviction* of the judge and indeed, as Kornezov finds, who can contend that the national court which does not refer the matter to the CJEU was indeed not convinced that the matter should be referred to the CJEU?⁶¹⁷

In Kornezov's view, the conditions for an exception to *acte clair* were relaxed compared to those set out in the *CILFIT* doctrine, which in turn left much greater leeway to the highest national courts as to whether to refer an EU law question to the CJEU or not.

It is well known that the non-contractual liability of the State based solely on a breach of Article 267(3) TFEU is unacceptable for two reasons. In order for the right to compensation to arise there should be a conferral of a substantive right (something that Article 267(3) TFEU does not confer) and there should be a direct causal link between the violation and the damage sustained, which is almost impossible to prove.

⁶¹⁵ For more about the power or duty to refer to the Court, see Jans, et al 2015 (n 63), 354-357.

⁶¹⁶ Case C-160/14 *Ferreira da Silva e Brito and others* [2015] ECLI:EU:2015:565.

⁶¹⁷ See A. Kornezov, 'The new format of *acte clair* doctrine and its consequences' (2016) 53 *Common Market Law Review*, 1317-1342.

Consequently, in order for an action for compensation against the State to be successful, there must be a breach of a substantive EU right.⁶¹⁸

This was what was decided in *Köbler*. Kornezov and some other authors⁶¹⁹ consider that *Köbler* could be developed and that there is a certain possibility that the State is also held liable for a breach committed by the highest national court, in not referring to the CJEU only on the basis of a breach of Article 267(3) TFEU.

This ensues, firstly, from the ‘right to access to a lawful judge’, i.e. Article 47 CFR. Consequently, the refusal to make a reference in manifest violation of Article 267(3) TFEU may also be considered as affecting the rights guaranteed by Article 47 CFR. Another thing is that not making reference under Article 267(3) TFEU might cause non-material damage to the parties, something which is inspired by the ECtHR’s case law. This ‘*moral damage*’ results from a loss of opportunity.

As to the condition of ‘sufficiently serious breach of law’ with respect to all the State authorities, this must not be assessed on the basis of the national requirement of a sufficiently serious breach (if one is prescribed under national law), but only in terms of the CJEU’s understanding of a sufficiently serious breach of law. Consequently, the requirement of fault must not go beyond the extent determined for a sufficiently serious breach under the EU law.⁶²⁰

It follows that within the EU system, one of the conditions for obtaining compensation for damage resulting from a breach of EU law, namely a ‘sufficiently serious breach’, is that it contains elements of ‘culpability’ or ‘fault’, consisting of intent, negligence or gross negligence.

In this sense, it is closer to what is known as subjective liability as opposed to objective liability where sheer illegality suffices and there is no inquiry into the level of culpability.

Despite this summary of cases in which the CJEU itself assessed the issue of ‘sufficiently serious breach’, it should be remembered that the CJEU initially reasoned in a direction that the fulfilment of this

⁶¹⁸ Ibid, 1339.

⁶¹⁹ See also T. Tridimas, ‘State liability for judicial acts: Remedies unlimited?’ in P. Demaret, I. Govaere and D. Hanf (eds), *European Legal Dynamics* (European Inter University Press 2007) .

⁶²⁰ See *Brasserie*, referred to above, para 79, also Case C-173/03 *Traghetti del Mediterraneo SpA* [2006] ECLI:EU:C:2006:391, para 44, with particular reference to the manifest infringement of EU law by the judiciary

condition should be left to the national courts. For example, in the *Konle* case⁶²¹, the CJEU explicitly laid down that:

“It is in principle for the national courts to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual.”

As demonstrated, this latitude left to the national courts to decide on the question of a ‘sufficiently serious breach’ was restricted in several cases and the issue was resolved by the CJEU.

Indeed, one cannot conclude with certainty why and in which situations the CJEU takes over the fulfilment of this condition, but the fact remains that exceptions to the principle were established in the *Konle* case.

3.3 Third condition ‘direct causal link between the breach and damage sustained’

In the *Norbrook*⁶²² and *Hedley Lomas*⁶²³ cases, the CJEU stated that it was for the national court to determine whether there was a direct causal link between the breach of the obligation resting on the State and the damage sustained by the applicant in the main proceedings. In *Gervais Larsy*, the CJEU did not refer at all to the condition of ‘direct causal link’. In *Brinkmann*⁶²⁴ the CJEU considered the condition of ‘causation’.⁶²⁵ This case is relevant for examination for two reasons: first, from the perspective of the non-fulfilment of the third condition required for State liability (i.e. a direct causal link between the breach and the damage) which excluded State liability; and secondly, from the angle of the possibility for the State to evade the liability, despite the undisputed infringement of its obligations by one of its bodies.

In any event, the notion of ‘causation’ between the infringement made and the damage suffered, in a similar way to the notion of ‘sufficiently serious breach’, when appraised by the national courts, should be appraised in light of the EU law understanding of that notion, disregarding the national understandings.

⁶²¹ Case C-302/97 *K. Konle* [1999] ECLI:EU:C:1999:271, para 59.

⁶²² Case C-127/95 *Norbrook Laboratories* [1998] ECLI:EU:C:1998:151, para, 110.

⁶²³ See Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193, para 30.

⁶²⁴ Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECLI:EU:C:1998:429.

⁶²⁵ Most recently in Case C-268/15 *Ullens de Schooten* [2016] ECLI:EU:C:2016:874, para 58. The CJEU held that the system of non-contractual liability of a Member State does not apply in a case of damage allegedly caused to an individual as a result of an alleged breach of fundamental freedoms laid down in Articles 49, 56 and 63 TFEU by the national legislation, where there was no link between the subject of the dispute in the main proceedings and those articles.

This was exemplified in *Rechberger*, where the Austrian government attempted to rely on the interruption of the chain of causation, due to “wholly exceptional and unforeseeable events”⁶²⁶ (in this case there was an unpredicted number of subscribers wanting to obtain the gift from the newspaper), leading to the insolvency of the travel agency and which, if considered, would exclude the liability due to the interruption of causation attributable to these unforeseeable events. This argument was rejected by the CJEU which laid down that:

“Such circumstances, in as much as they would not have presented an obstacle to the refund of money paid over or the repatriation of consumers if the guarantee system had been implemented in accordance with Article 7 of the Directive, are not such as to preclude the existence of a direct causal link.”⁶²⁷

3.4 Interim conclusion

Despite the statement of the CJEU that the notions of ‘sufficiently serious breach’ and ‘direct causal link’ are to be dealt with by the national courts, its case law proves that the CJEU on certain occasions has thrust itself into this analysis.

In my view, as already discussed, for the CJEU to decide on the issue of ‘sufficiently serious breach’ is acceptable, although, for it to appraise this condition, as well as the condition of ‘direct causal link’ is rather a problem of ‘*applying the law*’. In contrast, the issue of a ‘right’ is a ‘*matter of interpretation rather than the applying of European law*’, and this should ultimately be left to the CJEU to decide on this issue.⁶²⁸

In any event, when assessed by the national courts, the conditions of ‘sufficiently serious breach’ and a ‘direct causal link’ are to be conceived as EU law concepts or put differently, the CJEU defines these requirements. The opposite, namely leaving room to the national courts to appraise the fulfilment of these notions as established under the national legal systems, would lead to undeniable divergences in the level of protection of EU rights and serious disruption to the effectiveness of EU law. This flows from the fact that each of these EU law requirements for giving rise to a right of reparation could be comprehended differently in different legal systems which entails a risk of different standards of protection of rights and undermines the effectiveness of enforcement of EU law provisions, under the same legal circumstances.

⁶²⁶ See Case C-140/97 *Rechberger and others* [1999] ECLI:EU:C:1999:306 , para 69.

⁶²⁷ Case C-127/95 *Norbroom Laboratories* [1998] ECLI:EU:C:1998:151, para 76.

⁶²⁸ This line of reasoning was provided by Jans in *Jans* 2005 (n 59), 291.

4. Breach of EU law by the Member States – Situations which lead to liability by different State bodies

In this section I am going to explore what kind of actions or omissions by different State authorities may constitute a breach of EU law for which the Member State may be held liable.

The process of implementation of EU law, particularly of directives, consists of four phases: transposition, operationalisation, application and enforcement.⁶²⁹ When this whole process of implementation is carried out at the level of Member States, each of these stages is linked to certain activities to be undertaken by a particular organ or authority of the State.

Transposition and operationalisation of EU law acts are accorded to the legislative organs, whereas the application of the EU law and its enforcement create obligations for the administrative bodies to monitor and sanction the non-compliance of EU law obligations on the part of national bodies (including police, inspectorates and other parts of the administration which deliver licenses, for instance, or award public contracts).

National courts are tasked with deciding legal disputes between individuals but also in cases when the law is breached by national organs, which could also be absorbed under the title of sanctioning the illegal conduct of the domestic organs (or of individuals).

In fact, effective implementation implies that Member States abide by their EU law obligations. A Member State is regarded as a sole entity under international law:

“In international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their task to comply with the rules laid down by Community law directly governing the situation of individuals.”⁶³⁰

This implies that each of the organs of the State is required to fulfil EU obligations, the failure of which will entail a liability of the State.

⁶²⁹ About the process of application and enforcement of the EU law and the role of the Member States, see also Curtin et al 1994 (n 78), 431-454. See also Jans et al 2007 (n 542), 13-17.

⁶³⁰ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 34.

4.1 Legislative bodies

The actions that the legislature is bound to undertake in order to give effect to EU law consist of the correct and timely transposition of EU law acts into national law where this transposition is necessary, as is the case with EU law directives. Furthermore, the legislature is bound to refrain from maintaining in force laws that contain provisions incompatible with EU law, regardless of the rank of the EU law act.

Amending or repealing these conflicting laws is tantamount to “nullifying the unlawful consequences of a breach of Community law”, which is only one of the obligations flowing from Article 4(3) TFEU.⁶³¹ Thus, not nullifying these consequences would result in a breach of the provision contained in this Article.

So, the main task for the legislature in the process of implementing EU law concerns the proper and timely transposition of EU law into national law, if the EU act needs to be transposed (such as in the case of directives). With regard to the issue of liability of the State for a breach of EU law, there are several ways in which the legislature could infringe EU law and thus make the State liable: by failing to transpose an EU directive,⁶³² by failing to transpose an EU directive on time,⁶³³ by incorrectly transposing an EU directive,⁶³⁴ and by maintaining or adopting laws which conflict with (directly effective) provisions of EU law.⁶³⁵

The most prominent example for this last kind of failure by the State is the *Brasserie* case, analysed and cited often in this Chapter. As stated, the German and English States committed a sufficiently serious breach of law and were held liable by the CJEU for maintaining in force laws which were conspicuously contrary to the EC Treaty.

⁶³¹ Nullifying the unlawful consequences of a breach of Community law was initially expressed in Case C-6/60 *Humblet* [1960] ECLI:EU:C:1960:48, para 569; Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428 , para 36; Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12 .

⁶³² Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECLI:EU:C:1991:428 and Case C-178/94 *Dillenkofer* [1996] ECLI:EU:C:1996:375 .

⁶³³ Case C-373/95 *Maso and others* [1997] ECLI:EU:C:1997:353; and Case C-94/95 and C-95/95 *Bonifaci and others* and *Berto and others* [1997] ECLI:EU:C:1997:29.

⁶³⁴ Case C-392/93 *British Telecommunications plc* [1996] ECLI:EU:C:1996:131; Case C-140/97 *Rechberger and others* [1999] ECLI:EU:C:1999:306, Case C- 2/94 *Denkavit Internationaal and others* [1996] ECLI:EU:C:1996:229; Case C-150/99 *Lindo park* [2001] ECLI:EU:C:2001:34.

⁶³⁵ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79.

One very interesting question was raised about the liability of the State in cases in which it maintains in force certain laws which it considers *in good faith* to be compatible with EU law.⁶³⁶ Could the State be held to have committed a sufficiently serious breach of law in this situation? Certain authors argue against liability in these instances.⁶³⁷ In fact, this question is directly related to the issue of ‘excusable error’ which is closely linked to the precision of the provisions of an EU act, the discretion of the Member States to discharge their obligations and the existence (or lack thereof) of guidance on the part of one of the EU institutions. These issues were subject to a detailed discussion earlier in this Chapter.⁶³⁸

4.2 The Executive

The actions of the administrative organs are directed towards the proper application and where appropriate, enforcement of EU law. This process of application usually implies certain activities on the part of the administration, including: issuing certain authorisations or licenses to individuals, making decisions for awarding certain subsidies or other benefits, undertaking environmental impact assessments prior to issuing certain acts or conducting certain types of supervision or control of the manner of operation of certain institutions, firms etc.

It is noteworthy that in cases of directly effective provisions of EU law conferring specific EU rights on individuals, the executive bodies are bound to fulfil the specific obligations incumbent upon them, irrespective of the actions or omissions made by the legislature. Consequently, in spite of a failure by the legislature to transpose a directive or an incorrect transposition on its part, administrative organs, as part of the State, are themselves obliged to attain the objective of the provision or provisions of that directive. This can be attained through the use of the two main tools created by the CJEU for achieving a proper application of EU law in Member States, namely *direct effect* and *harmonious/ consistent interpretation* of the national law with EU law.

The obligation of ‘consistent interpretation of national law with EU law’ falls not only to the national courts but also to the administrative bodies. The same holds true for the negative obligation of the administrative bodies to ‘set aside’ national provisions that conflict with directly effective EU law provisions. This, so called ‘Costanzo obligation’ will be further elaborated below.⁶³⁹ The breach of these

⁶³⁶ Jans et al 2007 (n 542), 333.

⁶³⁷ Van Gerven 1997 (n 520), 103.

⁶³⁸ See Chapter 4 Section 3.2.

⁶³⁹ In fact, it was stated in general terms in the Opinion of AG Lenz on the *Costanzo* case, para 43 that “the obligations imposed by the directives on Member States do not concern only their legislative competence but extend also to their administrative and judicial competences....”. M. Verhoeven, in her PhD thesis, defines the ‘*Costanzo*

obligations on the administrative bodies spurred discussion as to the identification of the State authority which would be liable to pay the damages.⁶⁴⁰ Sometimes the breach of each of these obligations (for instance the improper application of EU law, whether by avoiding the obligation for harmonious interpretation or by not setting aside national provisions conflicting with higher ranking and directly effective EU law provisions), can be remedied by the administrative body itself by means of rescinding or suspending the illegal administrative act.⁶⁴¹ By undertaking these activities, the executive bodies in fact perform their obligation of ‘remedying’ the injury inflicted on the individual through their breach of the EU law obligations or put differently, they fulfil the obligation for ‘nullifying the unlawful consequences of a breach of Community law’, this time committed by themselves.

The following cases illustrate how the administration can breach EU law in the liability context through a number of examples based on cases decided by the CJEU.

In *Norbrook*⁶⁴², the applicant lodged an action against the Ministry of agriculture, fisheries and food, where it contended that the refusal by the competent authority to grant to him authorisation for a veterinary medicinal product was contrary to EU law, and this wrongful application of EU law by the administrative organ had to result in an award of a compensation by the State for the damage sustained.

In *Hedley Lomas*,⁶⁴³ the plaintiff claimed reparation from the United Kingdom for damage suffered as a result of the refusal by the relevant Ministry to obtain export licenses for Spain, which was contrary to the EC Treaty.

In *Wells*,⁶⁴⁴ the Secretary of State for transport, local government and the regions in the UK failed to carry out an environmental impact assessment before granting a building license, which was a requirement

obligation’ as an obligation of national administrative authorities to set aside provisions of national law which are incompatible with EU law. This may also imply the obligation to apply provisions of European law instead of disappplied provisions of national law, if the disapplication leads to a legal gap. See M. Verhoeven, ‘The *Costanzo* obligation’, (1993) 93 *Ius Comune: European and Comparative law Series*, 10.

⁶⁴⁰ Jans et al 2007 (n 542), 352-355; T. Tridimas, ‘Liability for Breach of Community Law: Growing up and Mellowing Down?’ (2001) 38 *Common Market Law Review*, 317-321.

⁶⁴¹ Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12; Case C-6/60 *Humblet* [1960] ECLI:EU:C:1960:48; Case C-62/00 *Marks & Spencer* [2002] ECLI:EU:C:2002:435; Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335; and Case C-199/82 *San Giorgio* [1983] ECLI:EU:C:1983:318.

⁶⁴² Case C-127/95 *Norbrook Laboratories* [1998] ECLI:EU:C:1998:151.

⁶⁴³ See Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECLI:EU:C:1995:193.

imposed by the EU Directive. Due to this failure, Ms. Delena Wells, on the suggestion by the CJEU, claimed compensation from the State.

In *Transportes Urbanos*,⁶⁴⁵ Transportes Urbanos brought an action for damages against the Spanish State, because the Spanish tax authorities unduly collected VAT payments from the firm, which was contrary to the Sixth Directive and the CJEU's judgment in the case of *Commission v. Spain*. In fact, it was the Spanish legislature that was shown to have incorrectly transposed the EU law Directive and the national administrative authorities rejected the plaintiff's claims due to the fact that he had not requested rectification of that administrative decision in the prescribed period and consequently the direct causal link between the breach of EU law and the loss was broken.

In *Costanzo*,⁶⁴⁶ the issue arose as to whether the national administrative authorities were obliged to set aside national provisions which were contrary to directly effective EU law provisions. The EU law Directive 71/305 concerning the coordination of procedures for the award of public works contracts was incorrectly transposed by the Italian legislature, hence the national implementing legislation did not provide for the possibility of the tendering company (which was excluded from the bid) to provide further explanation, so that the awarding authority could indicate which parts of the offer were unacceptable. Fratelli Costanzo was excluded as a bidder and according to Italian law, he had no opportunity to furnish any other explanation. In a preliminary ruling procedure, the CJEU established the obligation of the administrative authorities to directly apply EU law provisions and set aside conflicting national provisions.⁶⁴⁷ Although this case was not about liability, it could have led to it.

4.3 Judicial organs

National courts are obliged to apply and enforce EU law effectively by remedying the consequences of unlawful actions committed by other State bodies, like the legislature and administration, through a number of activities. Thus, the national court is in particular required to:

Apply direct, sufficiently clear, precise and unconditional EU provisions to the case;

Set aside conflicting national provisions and/ or consistently interpret national law with EU law;

⁶⁴⁴ See Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12.

⁶⁴⁵ See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39.

⁶⁴⁶ Case C-103/88 *Fratelli Costanzo* [1989] ECLI:EU:C:1989:256.

⁶⁴⁷ *Ibid*, para 31.

Award compensation for damage sustained as a result of a breach of EU law by the legislative and executive bodies.

In exceptional cases, they may also be required to award compensation for damage caused to individuals by their own breaches of EU law obligations.

By failing to perform any of the obligations incumbent on them, the courts commit a breach of EU law, for which the State may be held liable. However, as was already discussed before, due to the sensitivity of the judicial function, the CJEU stated in *Köbler*⁶⁴⁸ that the ‘sufficiently serious breach of law’ would be assessed by determining whether the *infringement was manifest*. The liability concerns, only the last instance jurisdictions of the Member State.

Compensation for damage caused by the State can be claimed due to an incorrect interpretation and application of EU law by the judicial organs, provided that the national courts adjudicating ‘at last instance’⁶⁴⁹ breached their obligation to refer to the CJEU under Article 267 TFEU (ex Art 234 (3)) when they were required to do so. As was discussed earlier, a duty to refer to the CJEU concerns the courts adjudicating at last instance, when the act at issue is neither ‘*clair*’ nor ‘*éclairé*’.⁶⁵⁰

In *Köbler*, the Austrian Supreme Court incorrectly interpreted the judgment of the CJEU previously delivered on a similar EU issue. Thereupon it applied the EU law incorrectly to the case at hand. Due to its incorrect interpretation of the CJEU’s judgment, the national court withdrew the preliminary questions, considering that it was aware of the reply that would be provided by the CJEU, which had to be observed and applied in the *Köbler* case. As the CJEU held:

“[The Austrian] court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt (Case 283/81

⁶⁴⁸ Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513 .

⁶⁴⁹ It is important to underline that only decisions of courts adjudicating ‘at last instance’ can lead to liability on the part of the State, which implies that first, the ‘ordinary’ legal remedies of an appeal must be used. See. Jans et al 2015 (n 63), 468. On the issue of ‘abstract theory’ according to which, only courts whose decisions are *never* subject to an appeal under national law should be considered as courts of last instance, and of the ‘concrete theory’ in which the fundamental issue is whether the national court’s decision is subject to appeal in the type of case at issue, see A. Cygan, ‘State Liability After *Traghetti*: Have national courts finally been brought in to line?’ In L. Spadacini, A. Cygan *Constitutional Implications of the Traghetti Judgment. Italian and European Perspectives* (Bibliofabbrica, 2010), 30. See a recent case, C-168/15 *Tomášová* [2016] ECLI:EU:C:2016:602, para 36.

⁶⁵⁰ These notions were also explained in Section 3.2 of this Chapter, where the reference is made to *CILFIT* case law: Case C-283/81 *CILFIT* [1982] ECLI:EU:C:1982:335.

CILFIT and Others [1982] ECLI:EU:C:1982:335, para 14 and 16). It was therefore obliged under the third paragraph of Article 234 of the Treaty to maintain its request for a preliminary ruling.”⁶⁵¹

In *Traghetti del Mediterraneo*⁶⁵², TDM brought an action against a competing company, claiming *inter alia* that it breached EU competition rules. The Court of Appeal in Naples dismissed the pleadings and TDM requested the *Corte Suprema di Cassazione* to submit the relevant questions of interpretation of EU law to the CJEU under Article 234(3) TEC. This request was also refused. Then, TDM instituted proceedings against the Italian Republic before the Genoa District Court for compensation for the damage it had suffered as a result of the errors of interpretation committed by the *Corte Suprema di Cassazione* and of the breach of its obligation to make a reference for a preliminary ruling pursuant to the third paragraph of Article 234 EC (now Art. 267 TFEU).

The CJEU in the *Traghetti* case, referred to what was already stated in *Köbler*, especially regarding the conditions which need to be fulfilled in order for the infringement by the national court adjudicating at last instance to be considered a manifest breach.⁶⁵³

The *Traghetti* case confirms that a non-reference to the CJEU under Article 267(3) TFEU by the national court is not a sole reason for finding that there was a manifest breach of EU law. It is only one of the factors which lead to this finding, provided that there was breach of a substantive rule of EU law.

5. Intermezzo: national liability regimes in light of EU liability requirements

To illustrate the impact of the CJEU’s case law on State liability, what follows here is a brief discussion of various national liability regimes and how they relate to the EU liability regime, the requirement of effectiveness of EU law and effective legal protection.

If the Member States dispose of more generous conditions for awarding compensation for damage under the national law, then the EU law has nothing against the application of these national provisions, since, as the CJEU stated in *Brasserie*⁶⁵⁴, “the conditions established for Member State liability are only minimum conditions”. However, if the national rules are stricter, there is obviously a problem.

⁶⁵¹ Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513, para 118.

⁶⁵² Case C-173/03 *Traghetti del Mediterraneo SpA* [2006] ECLI:EU:C:2006:391.

⁶⁵³ *Ibid*, para 32.

⁶⁵⁴ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79 , para 66; see also Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166, para 42.

More lenient national conditions for granting compensation will certainly be in favour of the effectiveness of EU law, since the success rate of liability claims will be higher. The liability regimes of the Netherlands, Belgium and Spain may be characterised as being among the more lenient ones. Both in the Netherlands and Belgium, general tort liability rules apply to the State's wrongdoings, which are wider and less burdensome than those required by EU law. For instance, in order to appeal an administrative decision in the Netherlands, it suffices that the plaintiff has an interest that is directly affected by the decision; the conditions for giving rise to the right to reparation are contained in Article 6:162 BW and consist of requirements of unlawfulness, imputability, causality and damage.⁶⁵⁵

A Belgian Court of Cassation has explicitly stated in a judgment that the general criteria of Belgian civil liability law are wider than those of Community law.

There is an interesting case where the national rules on liability, which are more plaintiff-friendly than the Community ones, are applied to a situation arising under Community law. In its decision in a case concerning the technical characteristics of vehicles, the Cassation Court (*Cour de Cassation*, No C.98.0477.F (14 January 2000)) spelt out the conditions determining the liability of the state when it adopts or approves a regulation contrary to a Community provision having direct effect. The Court of Appeal, which had heard the case prior to the Cassation court, had referred and applied the criteria set out in the *Brasserie/Factortame* ECJ ruling and did not find a sufficiently serious breach *in casu*. However, the Cassation Court set aside the ruling of the Court of Appeal, for it considered that acts of the Belgian administrative authorities must be examined in the light of the general criteria of Belgian civil liability, which **were wider than those of Community law (Art. 1382 Belgian Civil Code: fault, damage, causal link)**. It stated that, unless there are grounds for exemption (which the Appeal Court did not elucidate), an administrative authority is at fault (note: this is an objective notion, corresponding to unlawfulness) when it passes or adopts a regulation which fails to comply with a provision of international law having direct effect, resulting in civil liability for that fault which caused a damage.⁶⁵⁶

⁶⁵⁵ A tortious act can be attributed to the tortfeasor (the person committing the tortious act) if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).

⁶⁵⁶ See Belgian Civil Code, Article 1382. See Belgian Court of Cassation, No.C.98.0477F. Reported in European Communities 'XVIII th Report on Monitoring the Application of Community Law' COM(2001) 309.

See also Jans 2005 (n 59), 286. See also http://www.asser.nl/upload/eel-webroot/www/documents/cms_eel_id170_1_Applications%20by%20National%20Courts.pdf

The provision of Article 1382 of the Belgian Civil Code clearly refers to more plaintiff-friendly conditions for obtaining compensation (fault, damage, causal link) than the European law criteria.⁶⁵⁷

Spain has the objective liability regime.⁶⁵⁸ The Spanish *Tribunal Supremo* held in a judgment that:

“[...] The pro-individual interpretation of State liability can be inferred from the fact that the conditions set out by the Court of Justice do not prejudice the application of any less restrictive national rules. This is particularly important in the sphere of our national legal system, in which the institute of State liability is of an objective nature. It is therefore sufficient to be in the presence of an individualised, illegal harm and of a causal link between the infringing act and the harm to engender this State liability.⁶⁵⁹

However, in Spain there are restrictions imposed, regarding the actions or omissions of State bodies, for which the State can be held liable. Regarding the *legislative liability* in Spain, there is no specific provision for claiming this type of liability, apart from the general provision pertaining to the liability of public powers.⁶⁶⁰

Problems with the application of the principle of equivalence regarding the legislative wrongdoings in respect of the national and EU law were treated by the CJEU in the case of *Transportes Urbanos*.⁶⁶¹ In this case, according to the Spanish Constitution, the plaintiff was able to obtain compensation for damage sustained as a result of the adoption of an unconstitutional law, only on the grounds that the Spanish Constitutional Court had declared the law unconstitutional. The plaintiff was not required to first exhaust the other remedies available to him, such as requesting the rectification of the administrative decision.

⁶⁵⁷ A number of the cases referred to below, as well as others, can be found in the Commission’s Annual Report on Monitoring the Application of Community Law (Annex VI Application of Community law by national courts: a survey), such as in the 17th Report on 1999, COM (2000) 92, OJ L30. The latest, 22nd Annual Report on Monitoring the Application of Community Law (2004), COM(2005)570, 30/12/2004, like the others, is available at the Commission’s Website. Notes on these cases may also be found in *Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire*, a bulletin in French available at http://curia.eu.int/en/coopju/aperçu_reflets/lang/index.htm.

⁶⁵⁸ See Jans et al 2015 (n 63), 443.

⁶⁵⁹ Sentence of the *Tribunal Supremo* (12/06/2003) on the Case C-390/99 *Canal Satélite Digital SL* [2002] ECLI:EU:C:2002:34.

⁶⁶⁰ See Article 9.3 of the Spanish Constitution which provides that the Constitution “[...] guarantees the principle of legality [...], the liability of public powers and the interdiction of arbitrary actions on the part of the latter”.

⁶⁶¹ Case C-8/08 *Transportes Urbanos*, Judgment of 10th of January 2010 discussed in para 1.1.4 of Chapter 2.

In contrast, in the case of a breach of the EU law by the legislature, the plaintiff was obliged to exhaust all other remedies provided under the national law before claiming compensation for damage, despite the existence of a judgment by the CJEU that the breach of EU law had indeed taken place. This case is relevant from the point of view of the infringement of the equivalence principle between two similar actions (one based on a breach of the national constitutional law and the other based on a breach of EU law).

This situation spurred a debate on whether the Spanish Supreme Court should have maintained its case law on State liability for unconstitutional law and overruled its case law requiring the previous exhaustion of remedies in liability actions for damages caused by the application of law that infringes EU law, or if it should have required in both cases the previous exhaustion of remedies against administrative acts that apply both to the unconstitutional law and the law that infringes EU law.

With an award of compensation to Transportes Urbanos on the grounds of the previous CJEU judgment, the Supreme Court clearly opted for the first option.⁶⁶²

Concerning the *liability of the judiciary*, apart from the general provision contained in Article 9.3 of the Spanish Constitution, there is one specific provision in the Constitution⁶⁶³ devoted to the liability of the judiciary, which lays down that:

“Damages caused by judicial errors, as well as those arising from irregularities in the administration of justice, shall be subject to compensation by the State, in accordance with the law.”

In the majority of Member States, liability of the State for acts and omissions of the legislature and judiciary is either clearly excluded or extremely restricted.

For instance, In the Netherlands, liability for judicial breaches is very limited.⁶⁶⁴

In Belgium, State liability for judicial breaches is not an unknown concept.⁶⁶⁵ However, in order to claim compensation for damage for the delivery of a defective judgment one must prove that ‘the act in question

⁶⁶² See extensively about the significance of this case and the legal debate it raised in C. Plaza, “Member State Liability for Legislative Injustice: National Procedural Autonomy and the Principle of Equivalence; Going too far in *Transportes Urbanos*?” (2010) 3 *Review of European and Administrative Law*, 27-51.

⁶⁶³ Article 121 of the Spanish Constitution.

⁶⁶⁴ See *Anagnostaras* 2001 (n 509), 284; also, Kortmann, ‘Note à propos de l’arrêt de la Cour de Cassation en date du 19 Décembre 1991’ (1994) 2 *European Review of Private law*, 115.

has been removed, amended, annulled or withdrawn by a decision which itself has the authority of *res judicata* and the original act does not itself now have the authority of *res judicata*.⁶⁶⁶

In the UK, there is no separate State liability regime. There are only general tort liability rules and claims can be based on ordinary torts, such as negligence, breach of statutory obligation, and misfeasance in public office.⁶⁶⁷

In the *Bourgoin* case,⁶⁶⁸ the breach on the part of the English Minister of EC provisions, in refusing the import of frozen turkeys from France, was characterised as ‘misfeasance in public office’ which required a *proof of fault*. This element creates an obstacle to obtaining compensation for damage sustained from a breach of EU law by the English legislator and restricts the *principle of effectiveness*, as was previously stated in *Brasserie*.⁶⁶⁹

It is noteworthy that in the UK, it is impossible to impose public liability for infringements committed by the national judiciary.⁶⁷⁰ Moreover, under English law there is no tort-based claim for violations caused by the legislature.⁶⁷¹

In France, the State liability regime is separate from the system of general tort liability rules. The French State can be held liable based on ‘*faute*’ and ‘*sans faute*’ (no-fault liability), a ‘fault’ implying ‘any illegality on the part of the State’.⁶⁷² As such, it can be divided into ‘*faute simple*’ and ‘*faute lourde*’. This division seems relevant from an EU law point of view, which requires that the breach of EU law by the national organs should be a ‘sufficiently serious breach’ as one of the conditions for the State to be held liable on the basis of EU law. Since the CJEU has already stated that the national conditions triggering State liability can be more lenient than those imposed by EU law, it follows that the requirement of ‘*faute*

⁶⁶⁵ H. Toner, ‘Thinking the unthinkable? State liability for Judicial Acts after *Factortame* (III)’, (1997) 17(1) Yearbook of European Law.

⁶⁶⁶ See Anagnostaras 2001 (n 509), 284-285.

⁶⁶⁷ T. Lock, Is private enforcement of EU law through State liability a myth? – an assessment 20 years after *Francovich*, 4 ; see also Caranta 1995 (n 255), 274.

⁶⁶⁸ *Bourgoin S.A. and Others v. Ministry of Agriculture, Fisheries and Food* [1986] QB 716.

⁶⁶⁹ Caranta 1995 (n 255), 276; Lock 1997 (n 665).

⁶⁷⁰ See s. 2 (5) of the Crown Proceedings Act 1947.

⁶⁷¹ J. Steiner, ‘From direct effects to *Francovich*: shifting means of enforcement of Community Law’, (1993) 3 European Law Review, 14.

⁶⁷² See M. Jarvis, ‘Remedies for breach of EC law before French courts’ in J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law* (Wiley 1997) 188.

simple', which is applied while examining the State liability due to the wrongdoings of the administrative organs, is acceptable from an EU law standpoint. In France, a sheer illegality suffices when the administrative bodies infringe either national or EU law.⁶⁷³

Regarding the illegality of acts of Parliament, there is a well-established public law principle in France of the infallibility of Parliament.⁶⁷⁴ In this sense, when it comes to liability of the State which is imputed to the Parliament, it is confirmed in both French jurisprudence and legal doctrine, that if liability is found, it will be based on the notions of 'risk' and 'equality of all citizens in bearing public burdens' (a no-fault liability) and consequently compensation of damage can be awarded, although it will not be based on liability, but rather on one of these two requirements. As stated in Jarvis's article, the "notion that the legislator can do no wrong is deeply rooted in the French Republican tradition and has for many years created insurmountable obstacles to the scrutiny by French courts of the Acts of the Parliament".⁶⁷⁵

However, with two judgments delivered by the *Cour administrative d'appel*, namely the judgment in *Société Jacques Dangeville*⁶⁷⁶ and the judgment in *Société John Walker and Sons Ltd*⁶⁷⁷, it was confirmed that acts of Parliament which are contrary to EU law can bring about a liability of the State to compensate the damage sustained by the plaintiff. In any event, it is noteworthy that the resistance on the part of the *Conseil D'Etat* (the highest administrative court in France) to confirm the liability of the State due to the legislative fault was obvious in the *Rothmans* and *Arizona* cases.⁶⁷⁸ In these cases, the *Conseil D'Etat* was more inclined to hold that the liability of the State stemmed from the illegality of the ministerial degree, rather than from the act of the Parliament on the basis of which that administrative act was founded.

In a more recent judgment of the *Conseil d'Etat, Gardedieu*⁶⁷⁹, the highest administrative court seems to change the premise of no-fault liability regarding the Parliament, into a finding that the liability of the State due to an activity or omission by the Parliament could emerge on the basis of the State's obligation

⁶⁷³ Regarding the liability of the State due to an existence of 'fault' on the part of the executive bodies, see cases: *Société Lefebvre* [1991] *Rec. Lebon* 741; *Société Arizona Tobacco Products et SA Philip Morris France* [1993] 1 *CMLR* 253; [1992] *Rec Lebon* 78; [1992] *Gaz Pal.* No. 355-357, 6; [1992] *Rev. Juris. Fiscale* 362; (1992) *RTDE* 426; [1992] *AJDA* 210.

⁶⁷⁴ See Jarvis 1997 (n 670).

⁶⁷⁵ See Jarvis 1997 (n 670).

⁶⁷⁶ [1992] *Rec. Lebon* 558 [1992] *AJDA* 768; [1992] *Droit fiscal* No. 1665,1420.

⁶⁷⁷ [1992] *Rec. Lebon* 790; (1993) *Droit administrative* March No.130

⁶⁷⁸ *Rothmans* and *Philip Morris* and *Arizona Tobacco* and *Philip Morris* [1993] 1 *CMLR* 253.

⁶⁷⁹ L'arrêt du CE du 8 février 2007 N 279522.

to ensure compliance with international conventions by the public authorities and to compensate the entire damage which results from a law adopted contrary to France's international obligations.

In France, there is an *exclusive* State liability for judicial wrongdoing, which means that the liability falls on the State and not the judge, although the State authorities have the right to initiate a recoupment action against the judge in order to refund the amount of money granted to the plaintiff.⁶⁸⁰ Moreover, in France, for the right to compensation for judicial wrongs to arise one must prove the existence of a serious breach ('*faute lourde*') or a denial of justice on the part of the judge.⁶⁸¹ Some commentators suggest that the EU law requirement of 'sufficiently serious breach of law' or more appropriately a 'manifest infringement' should in fact be equated to, or at least assimilated under the national requirement of '*faute lourde*'.⁶⁸²

Interestingly, in order to comply with the EU law requirement expressed by the CJEU in *Köbler* (according to which even the judgments of the last resort instances can inflict damage on individuals resulting from the judges' breach of EU law, if the breach is manifest), the *Conseil d'Etat* delivered a ruling in the *Gestas* case.⁶⁸³ In this case, the plaintiff claimed State liability for the breach of EU law by the *Conseil d'Etat*. Although the *Conseil d'Etat* found that there was no serious breach of EU law, it nevertheless examined the possibility of wrongdoing on the part of the highest administrative court on the grounds of a breach of EU law.

In Italy, an act or omission can be held to be unlawful only if it infringes a subjective right, and not a mere legitimate interest.⁶⁸⁴ Thus, in order to obtain damage from the ordinary courts in Italy, one must prove that one possesses a 'right' and not just a legitimate interest. Since damage suffered as a result of legislative wrongdoings is considered as a breach of a simple interest and damage suffered as a result of administrative wrongdoings is considered as a breach of a legitimate interest, it follows that individuals can never have standing to sue for damages suffered due to acts of authorities, simply because the individuals only have an 'interest' to initiate the proceedings as opposed to a 'right'.

Furthermore, the restrictions on the liability of the judiciary are so strict, confined only to 'intentional fault' or 'serious misconduct', which it makes it impossible to obtain a right of reparation under EU law for judicial faults resulting in damages. In fact, in Italy, State liability is *excluded* when the damage

⁶⁸⁰ Toner 1997 (n 663) 170.

⁶⁸¹ See Anagnostaras 2001 (n 509), 285. See Art. 141-1 of the Act on judicial organisation

⁶⁸² See C. de Salins, 'la responsabilité de l'État du fait du contenu d'une décision juridictionnelle' (2008) *Conclusions du Conseil d'Etat*; M. Gestas, req. n 295831, 8.

⁶⁸³ See l'arrêt Gestas du 18 juin 2008 N 295831.

⁶⁸⁴ Caranta 1995 (n 255), 287.

inflicted by the court ensues from the interpretation of provisions of law or the assessment of facts or evidence, and it is possible to sue the State only in cases of intentional fault and serious misconduct on the part of the court.

This issue was clearly resolved by the CJEU in *Traghetti del Mediterraneo*,⁶⁸⁵ where it laid down that a ‘sufficiently serious breach’ cannot be appraised in light of the national concepts, but must be assessed under the EU law notions of ‘sufficiently serious breach of a judicial act or omission’, which was called a ‘manifest error’ in case of judicial breaches.

In any case, according to Caranta, *Francovich* and the follow-up cases gave rise to dramatic adaptations to Italian law.⁶⁸⁶

According to German tort liability rules, compensation can be claimed when an official breaches an official duty.⁶⁸⁷ The problem, from the point of view of EU law is that the official must have acted intentionally or negligently, i.e. there is a fault requirement which cannot be imposed in addition to ‘sufficiently serious breach’.⁶⁸⁸

Liability of the State with regard to judicial breaches is possible only where it is proven that the judge committed a criminal offence when delivering the judgment.

Regarding legislative wrongdoings, the claimant can obtain reparation from the State if they can prove that the legislature’s act or omission referred to an individual situation, and as the CJEU stated in the *Brasserie* case, this requirement would make it impossible in practice to obtain compensation, since the task of the national legislature is in principle related to the public at large and not to identifiable persons or classes of persons.⁶⁸⁹

The question that arises is how to reconcile all these national solutions with the EU law requirement set out in *Brasserie* that “all the organs of the State are liable for a breach of EU law”?

The present discussion leads us to conclude that, regarding the acts or omissions of certain State bodies, such as the administrative bodies, national conditions which would give rise to a right to reparation can be more generous compared to those required by the EU law. Nevertheless, in most of the States, as

⁶⁸⁵ Case C-173/03 *Traghetti del Mediterraneo SpA* [2006] ECLI:EU:C:2006:391.

⁶⁸⁶ Caranta 1995 (n 255), 288, 289.

⁶⁸⁷ 839 BGB (German Civil Code).

⁶⁸⁸ Lock 1997 (n 663), 4.

⁶⁸⁹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 71.

demonstrated above, the liability of the State is either excluded or limited when it comes to wrongdoings by the judiciary or the legislature.

Thus, the outcome of the issue of whether the national liability conditions are more lenient and consequently applicable to the case at hand largely depends on the act or omission of a specific State authority.

One cannot conclude that the national requirements are more generous in general terms, but only in relation to the wrongdoings of specific State bodies.

6. National Leftovers

Once the minimum conditions for State liability for a breach of EU law are satisfied, compensation should be awarded under the national tort rules. Therefore, in addition to the constitutive conditions laid down by the CJEU, various other issues governing liability actions are in principle left to the Member State's discretion, restricted by the *Rewe* requirements and, where appropriate, also by the principle of effective judicial protection.

So, national 'executive or remedial rules', which relate to the kind of compensation, limitation periods for initiation of the proceedings, *locus standi*, the type of bodies which can be sued for a certain kind of behaviour, etc. are left to be determined by the national law, provided that the principles of minimum effectiveness and equivalence and sometimes effective judicial protection are observed.⁶⁹⁰

⁶⁹⁰ Van Gerven and Prechal coined the terms 'constitutive conditions', defined exclusively by the CJEU as rules which should be uniform in all the Member States, and 'executive' or 'remedial' rules, through which the course of action is asserted (including *locus standi*, extent of the reparation, time limits, raising *ex officio* pleas of EU law, passive legitimation, etc.). These national 'executive /remedial rules' must satisfy the requirement of adequate protection, as well as the principles of effectiveness and equivalence. This is a pertinent attempt to substitute the separation made between substantive and procedural provisions (which turned out to be confusing grounds for employing the principle of effectiveness or principle of national procedural autonomy respectively) and thus reconcile the principles of uniform application of EU law, uniform protection of EU rights and national procedural autonomy of the Member States. For the obligation to award a compensation for damage due to the breach of EU law according to the national procedural rules, provided that the principles of equivalence and minimum effectiveness are satisfied, See Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717, para 62; Case C-168/15 *Tomášová* [2016] ECLI:EU:C:2016:602, paras 38, 39.

See Van Gerven, 2000 (n 42), 501-536; and Prechal 2001 (n 28).

Now, there may be in the first place a problem of ‘equivalence’. What are the national tort rules which should be applied to an action for State liability as required by EU law, if a similar action, in the sense of compensation for damage due to a breach of law by the judiciary or the legislator, simply does not exist under the national law?

Even if a similar claim does exist theoretically under the national law, conditions for awarding damages on national grounds might not correspond to the requirements created by the CJEU.

What should be considered as a ‘similar domestic claim’?⁶⁹¹

This issue was tackled in the *Transportes Urbanos* case.⁶⁹²

In Member States in which there are actions against the State which are based on claims for legislative or judicial wrongdoings, these will be considered as appropriate causes of action for a breach of their duties by organs of EU law, as long as a comparability or similarity between the actions has been established.

If the conditions for the award of damage for this type of breach conflict with the EU law requirements, then these conditions will be set aside.

The most instructive case law in this situation is that of *Brasserie* and *Traghetti del Mediterraneo* where the EU law conditions of ‘right’ and ‘sufficiently serious breach’ were endangered by the national liability rules.

In the *Brasserie* and *Factortame* cases, a requirement imposed by German law for bringing action for compensation against the State for legislative faults, and the requirement set by the English law (that a ‘misfeasance of public office’ must be proven so that the State can be held liable), were found by the CJEU to be in breach of the principle of effectiveness of EU law and had to be set aside by the national court.

In *Traghetti del Mediterraneo*, the conditions imposed by the national law for State liability excluded State liability for the wrongdoings of the judiciary in all cases in which the breach was the result of an interpretation of law or of an assessment of the facts and evidence carried out by the court. In addition,

⁶⁹¹ Regarding the parameters according to which the similarity of action is determined, see Chapter 2 Section 1.4; Case C-261/95, *Rosalba Palmisani* [1997] ECLI:EU:C:1997:351, para 38; Case C-326/96 *B.S. Levez* [1998] ECLI:EU:C:1998:577, para 41; Case C-231/96 *Edis* [1998] ECLI:EU:C:1998:401, para 41. Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECLI:EU:C:1995:441, para 44.

⁶⁹² See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39.

there was another restriction on this liability in the form of a requirement of proof of intentional fault or serious misconduct on the part of the court.

The CJEU recalled the *Köbler* case and held that the only criterion to be taken into consideration when assessing the ‘sufficiently serious breach’ was whether a ‘manifest infringement of law was committed by the court’ and that under no conditions could national law define criteria relating to the degree of the infringement which were stricter than that of ‘manifest infringement of the applicable law’ as held in the *Kobler* case.⁶⁹³

The requirement of intentional fault or serious misconduct on the part of the court were clearly beyond the condition of ‘manifest breach of applicable law’ and thus had to be set aside by the national court.

When there is no particular basis for certain State bodies’ liability under national law, the breaches by those authorities of their EU law duties are absorbed under the general tort rules with due observance of the EU law requirements as laid down in *Brasserie*.

In any event, the issues which fall under the so-called ‘executive conditions’ must be tested against the *Rewe* principles and effective judicial protection, as will be elaborated in the following paragraphs.

6.1 *Locus standi*⁶⁹⁴

Locus standi is an entitlement of persons to initiate an action against the State due to a wrongdoing on the part of State authorities.

The question by the national court of whether the EU law provision *intends* to confer a right on the plaintiff is examined only after the initiation of the action for compensation. This implies that the issue of *locus standi* is resolved at the national procedural level, whereas the ‘conferral of right’ is as a substantive issue and is governed by EU law.

In the previous Chapter, the influence of the principles of effective judicial protection and minimum effectiveness and equivalence was clearly demonstrated in cases concerning the access to court in environmental issues.⁶⁹⁵

⁶⁹³ Case C-173/03 *Traghetti del Mediterraneo SpA* [2006] ECLI:EU:C:2006:391, paras 43, 44, 46.

⁶⁹⁴ See Chapter 2, Section 2.2.

⁶⁹⁵ See Chapter 3, Section 3.1: See also Lenaerts et al 2014 (n 165), 119. See also Jans et al 2015 (n 63), 379-383.

However, not only persons who are obviously entitled to the substantive right and are part of the envisaged beneficiary group, but also some other individuals, might have a right to action under EU law.⁶⁹⁶

The national procedural rules stipulating which person is entitled to initiate an action and the criteria according to which a plaintiff has a legal interest in the dispute at hand must satisfy both the *Rewe* conditions and the requirement of effective judicial protection.⁶⁹⁷

6.2 Which national organ may be sued for the breach of EU law?

The CJEU stated that the Member States are to ensure that the injured party obtains reparation for the damage sustained, whichever public organ was responsible for the damage and whichever organ was responsible under the national provisions for making that reparation.

In the *Brinkmann* case⁶⁹⁸, both the legislative bodies and the administrative bodies were responsible for the damage sustained by the individual, but in the end, the State was not obliged to pay the compensation for damage. In this case, the incontestable breach of EU law obligations on the part of the Danish legislature, consisting of a failure to undertake any transposing measures to give effect to the Directive in the national system, which in terms of *Dillenkofer* is a sufficiently serious breach *per se*, was ‘excused’ due to the action on the part of the executive authorities which wrongly applied directly effective provisions of the EU Directive.

The breach of EU law by the legislature was disregarded because the ‘incorrect’ application of the provisions by the executive authorities resulted in an ‘interruption of a direct causal link’, i.e. the non-fulfilment of the third condition for liability. Nevertheless, the error committed by the executive authorities in the form of the incorrect application of the Directive is itself a reason for claiming compensation for damage by the State and consequently the Danish State could have been held liable for damages, if the above-mentioned error had been qualified as a ‘sufficiently serious breach’. However, due to the impreciseness of the provisions, this wrongful act was ‘excused’ once again by the CJEU and in the

⁶⁹⁶ See Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and others* [1991] ECLI:EU:C:1991:314, discussed above in Chapter 2, page 46. See also Case C-263/08 *Djurgården – Lilla Värtans Miljöskyddsforening* [2009] ECLI:EU:C:2009:631 and Case C-115/09 *Trianel* [2011] ECLI:EU:C:2011:289.

⁶⁹⁷ Prechal 1995 (n 34), 298.

⁶⁹⁸ Case C-319/96 *Brinkmann Tabakfabriken* [1998] ECLI:EU:C:1998:429.

⁶⁹⁸ Tridimas 2001 (n 637), 301–332.

end, the plaintiff, Brinkmann, could not obtain any reparation for the damage suffered as a result of the State authorities' wrongdoings.

Tridimas⁶⁹⁹ considers that this line of reasoning by the CJEU was an expression of its pragmatic approach or put differently, its objective that in case of a breach of EU law by one of the three public authorities (the legislature in this case), there is still hope that the wrongdoing will be remedied by the other authorities if at all possible. This case raises the issue of liability of the State in cases in which it is not entirely clear which of its bodies has in fact committed the wrongdoing.

In any event, the State will be sued and from the point of view of the plaintiff it is irrelevant whether the compensation is granted to him on the grounds of breaches of EU law made by the legislator, executive or the judiciary.

Apart from this *horizontal dimension* of the liability of the body, as Prechal calls this relation, there is also a *vertical context* which relates to the appropriate organ to be sued in a hierarchical sense, namely when federal bodies, municipalities or other legally distinct authorities can be held liable for a breach of EU law.⁷⁰⁰

The *Konle* case⁷⁰¹ can be viewed as a failure of the legislature to observe directly effective Treaty provisions related to the free movement of capital and freedom of establishment. In 1996, following Austria's accession to the EU, it adopted a law which replaced the former Law on the transfer of land from 1993, under which a procedure of prior authorisation (which entails a restriction on the free movement of capital) could be considered compatible with the Treaty only under certain conditions. It was proven that this requirement of prior authorisation was applied both in a discriminatory and disproportionate manner with regard to the intended objective.

On the grounds of the provisions of this law, Mr. Konle was refused building authorisation and claimed compensation for damage sustained by the Austrian State. However, it is not clear from the judgment whether he claimed the reparation from the State due to the failure of the legislature to comply with directly effective EU law provisions – or more appropriately a failure to abolish a law which contravened EU Treaty provisions – or due to the failure of the regional authorities which refused his application for authorisation, by observing national Law which was incompatible with EU law, instead of setting aside

⁶⁹⁹ Ibid, 301-332.

⁷⁰⁰ Prechal 1995 (n 34), 299.

⁷⁰¹ Case C-302/97 *K. Konle* [1999] ECLI:EU:C:1999:271.

that inconsistent national law provision and directly applying Treaty provisions on free movement of capital.

The most relevant part of the judgment is the CJEU's statement that from an EU law point of view, the defaulting Member State is simply required to make reparation for the damage inflicted, regardless of the internal distribution of powers among the bodies which exist in its national legal order.⁷⁰² The CJEU established that:

“Reparation for damage caused to individuals by national measures taken in breach of Community law did not need to be necessarily provided by the federal State [...] in order for the obligations of the Member State concerned under Community law to be fulfilled.”⁷⁰³

This implies that, once the damage is inflicted on an individual as a result of a Member State's wrongdoing by whatever State organ is at issue, the damage has to be compensated to the person who was injured. Depending on the internal distribution of powers between the State and its federal units or provinces, the latter could be responsible for paying the compensation if this is explicitly laid down in the national law. Thus, it is not necessarily the State as such who should be held liable and compensate the damage. If, under its national law, there is some organ which is liable for compensation for damage, the request for compensation can be made to that organ. However, if the national procedural rules do not determine which organ is responsible for the damage inflicted on the plaintiff, then the State is held liable and must make the reparation.

This stance by the CJEU was reaffirmed in *Haim II*⁷⁰⁴, where the CJEU built upon its approach expressed in *Konle*, regardless of the fact that in *Haim*, the devolving of powers of the central state was not to the regional authorities, but to a public law body legally distinct from the State. The CJEU asserted that the State could not escape its obligations under EU law. It held that:

“Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law”.⁷⁰⁵

⁷⁰² Ibid, para 62.

⁷⁰³ Ibid, para 64.

⁷⁰⁴ Case C-424/97 *Haim* [2000] ECLI:EU:C:2000:357.

⁷⁰⁵ Ibid, para 34.

In my view this implies that, depending on the internal organisation in each Member State about the bearer of the obligation for compensation, it is either the public organ that will compensate the damage suffered from its breach of the EU law or the State itself. Whether afterwards that State will claim a refund from the public law body is not a question to be tackled by EU law. What matters from the EU law perspective is that the injured party obtains its reparation for the damage sustained.

It would seem that if, in a State with a federal structure, that State has not undertaken any steps to indicate the liable body in case of a breach of EU law by a government body for instance, the federal state will remain liable to pay the compensation.⁷⁰⁶

In a State where certain legislative powers are delegated to other bodies, the State itself will be sued for the wrongdoing of these bodies, unless the State has indicated previously that these bodies are responsible for a breach of EU law.

Thus, following the *Konle* case law, the Austrian Supreme Court (*Oberster Gerichtshof*) held that the compensation for damage caused to individuals due to the breach of EU law need not necessarily be provided by the federal state.⁷⁰⁷

In this paragraph I want to underline that the *passive legitimation* or the body to be sued is determined by the national law. If it is expressly stated that for instance, it is the “enforcement agent as a person with public authorisations” who is liable to compensate the damage caused, an action where the State as such is sued will be dismissed as inadmissible. There will still be a possibility for the plaintiff to correct the action and sue the enforcement agent, but if the prescription period has elapsed, the right to compensation will be made impossible.

In conclusion, it is according to national rules on liability that the defendant is determined. If the plaintiff’s lawyer is uncertain who the defendant is, the plaintiff might be deprived of compensation. If it is extremely difficult to establish the appropriate body which should compensate the damage, then a problem of effectiveness of EU law might emerge. In order to avoid this difficulty the solution would seem to sue both: the State as such and the body that would arguably be the defendant.

6.3 Type of compensation

The kind of compensation awarded for a breach of EU law by a Member State is the next issue to be resolved by national law.

⁷⁰⁶ Case C-302/97 *K. Konle* [1999] ECLI:EU:C:1999:271.

⁷⁰⁷ See discussion in Jans et al 2015 (n 63), 475.

In most cases it is pecuniary reparation, although it could also be in the form of a retroactive application of the implementing measures, if this is possible.⁷⁰⁸

Regarding the issue of the extent of the reparation of the damage sustained, the most relevant instructions are provided in the *Brasserie* case.⁷⁰⁹

Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained by individuals so as to ensure the effective protection of their rights.⁷¹⁰ Thus the reparation should be *adequate*.⁷¹¹ From this flows that the issue of damage is in some respects governed by principles like minimum effectiveness and effective judicial protection.

Regarding the inclusion of interest as an obligatory component of the compensation for damage, the CJEU held that:

“The total exclusion of loss of profit as a head of damage for which reparation may be awarded cannot be accepted, since [...] such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.”⁷¹²

The observance of the principle of minimum effectiveness while applying national procedural rules on similar domestic heads of damage was expressed in *Metallgesellschaft*⁷¹³, where the CJEU held that:

“In the absence of Community rules, it is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest; those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.”

⁷⁰⁸ See also Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717, para 98, where the reparation for damage could have taken the form of financial compensation or time off in lieu, for the worker who worked overtime.

⁷⁰⁹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, paras 82-90.

⁷¹⁰ *Ibid*, para 82.

⁷¹¹ See also Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717, para 92.

⁷¹² Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 88; about the differences in national legislation with respect to awarding or excluding purely economic or financial loss, see Van Gerven 2000 (n 520), 92-94.

⁷¹³ Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECLI:EU:C:2001:134, para 96(3)

It was stated by the CJEU in the *Marshall* case⁷¹⁴ that interest was an essential component of the compensation for damage. In this case, the interest was declared as a component part of the compensation for damage, whereas in the *Sutton* case⁷¹⁵, the CJEU stated that the interest was not necessary because the claim consisted of the reimbursement of arrears of remuneration and not of ‘a compensation for damage’.⁷¹⁶

Consequently, determining which specific redress is at issue (reimbursement or compensation) would seem to be an important factor when dealing with the question of whether there needs to be an ‘interest’ or not. Yet, in State liability case it is compensation that is sought and therefore interest should be included.

The requirement by EU law regarding the compensation awarded to the injured party is that it should be adequate, whereas the national rules should not be such as to exclude a loss of profit as a head of damage or an interest, since that type of rule makes the right to compensation virtually impossible or excessively difficult.

6.4 Obligation to limit the damage

With respect to the extent of the compensation by the State it is important that the injured party “must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear it himself.”⁷¹⁷

The national court may inquire whether the injured person showed reasonable diligence to avoid the loss or damage and whether in particular, the plaintiff had availed himself in time of all the legal remedies available to him before initiating an action for compensation for damage.⁷¹⁸

However, in *Danske Slagterier*, the CJEU emphasised that:

⁷¹⁴ Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335.

⁷¹⁵ Case C-66/95 *Sutton* [1997] ECLI:EU:C:1997:207.

⁷¹⁶ About the link between the relevance of qualifying a particular right or remedy and the application of the national rules, see Craig et al 2005 (n 17), 312-313.

⁷¹⁷ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 85; Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, para 61.

⁷¹⁸ See Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717, para 76.

“It would, however, be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required from them.”⁷¹⁹

In this case, the CJEU defined what was not considered as unreasonable use of a legal remedy.⁷²⁰

The possibility of using a legal remedy that would lead to raising a preliminary question was not to be considered as ‘unreasonable’.⁷²¹

In my view, the recourse to direct effect and consistent interpretation as first rank alternatives is not always logical or at least it does not make sense, for example in the *Brasserie* case itself or in *Metallgesellschaft*⁷²².

Even if the applicant made use of other remedies, in the end the result would be the same, thus, such a rigid requirement as ‘all the means available must be first exhausted otherwise the action will be dismissed’, makes the practice of EU rights virtually impossible or excessively difficult.⁷²³

Also, the requirement that all the other legal remedies should be exhausted before the compensation for damage is initiated might breach the principle of equivalence if the same requirement does not exist in the national situations.⁷²⁴

In any event, the CJEU through *Brasserie*, requires that the applicant *reduce the damage*, even if this is not prescribed by the national law, but this requirement should be used in a reasonable and equivalent manner to domestic claims for compensation, so that the principles of equivalence and minimum effectiveness are observed.

6.5 Time limits

Time limits, provided under national law for instituting action for damages against the State for a breach of EU law, fall under the national rules of the Member State prescribed for similar domestic actions.

⁷¹⁹ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, para 62.

⁷²⁰ Case C-429/09 *Fuß* [2010] ECLI:EU:C:2010:717, paras 77-78 provides that the principle of effectiveness is breached if injured parties are obliged to systematically pursue all the legal remedies available to them even if that gives rise to excessive difficulties or cannot reasonably be required of them.

⁷²¹ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, para 65.

⁷²² Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECLI:EU:C:2001:134.

⁷²³ *Ibid*, paras 106-107.

⁷²⁴ Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39.

*Danske Slagterier*⁷²⁵ is a good example of the manner in which the CJEU addresses the issue of national limitation periods. *Danske Slagterier*, an association of Danish slaughterhouses, initiated an action against Germany relating to a loss suffered in the period from 1993 to 1999. The main issue concerned the discrepancies between the systems of checks for non-castrated pigs in Germany and Denmark. The Republic of Germany imposed more restrictive requirements, adopting a different method of control.

Finally, the Federal Court referred several preliminary questions to the CJEU. The applicant put forward that the principle of effectiveness was breached because a legal uncertainty was created, flowing from the unclear legal position of the article to be invoked. The CJEU held that imposing a reasonable time limit for the initiation of proceedings, in this case three years from the date of finding out about the detrimental effects and identification of persons, was not contrary to the principle of effectiveness.⁷²⁶

Nevertheless, it left to the national court to determine whether the fact that the time limit was not prescribed specifically to this kind of action but had to be concluded by analogy with the national time limit for a similar action, entailed a legal uncertainty, which might have involved a breach of the effectiveness principle.⁷²⁷

Moreover, the principle of equivalence was also brought into question with respect to the possibility for the action to be suspended under the national rules and the impossibility for the applicant to rely on the fact that the Commission initiated an action under Article 226 TEC in the middle of 1996 and consequently, to have the period between 1996 and 1999 suspended.

The CJEU stated that the initiation of the action by the Commission differs from the one envisaged under the national law and, even if this were not the case, the time limit for initiating proceedings would have elapsed since the action was brought by the applicants at the end of 1999. Thus, the principle of equivalence was observed.

One can conclude that the time limits for initiation of compensation actions for damage due to a breach of EU law do not necessarily have to be prescribed explicitly and separately from the national time limits for instituting a similar domestic action for compensation, provided that such time limits are reasonable and clear so as not to endanger the principle of legal certainty.

6.6 *Res judicata*

⁷²⁵ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178.

⁷²⁶ *Ibid*, para 32.

⁷²⁷ *Ibid*, paras 33-34.

The issue of *res judicata* may also become somewhat problematic in State liability proceedings. From an EU law point of view, *res judicata* can be defined as the preclusion of a retrial in a dispute between the same parties who advance their claims on the same factual and legal grounds.

The interference of EU law in the national procedural autonomy of the Member States regarding this issue should also be considered in light of the fact that a purpose of EU law is to ensure its effective enforcement as well as the effective safeguard of EU individual rights, which can be hindered by the impossibility of reopening a case in which a breach of EU law was made.

Certain authors claim that *res judicata* is a doctrine, rather than a procedural issue, as can be observed through its deference to the EU law principles of effectiveness and effective judicial protection.⁷²⁸ However, a retrial nullifies the preclusive effects of *res judicata* and allows for new litigation.

Thus, the question arises of in which situations the principle of *res judicata* needs to be retained and the dispute remain untouched, and in which circumstances the negative effects of *res judicata* on EU law should be removed for the sake of attaining other legitimate goals.

For this purpose, it is necessary to consider the meaning and goal as well as the scope of *res judicata* within the area of EU law. The principle of *res judicata* serves a higher legal principle, namely the principle of legal certainty. However, as with other legal principles, if it is treated as sacrosanct it can infringe some other equally legitimate legal goal, such as the protection of human rights, and in the context of EU law, it would violate the principle of effectiveness of EU law.

These presumptions confer a task on the CJEU to delve into a balancing exercise between legitimate goals, which can best be done through the definition of the scope of *res judicata*. Although the scope of this principle is differently defined in different Member States, the viewpoint which is recommended is the one taken by the CJEU. The latter's approach to this issue is based on the triple identity test: identifying the parties, the relief sought and possibly the legal grounds. These components were taken as constitutive parts of *res judicata* in the *Köbler* case.⁷²⁹ In fact, if all the components are different, there is no possibility for subsequent litigation, but rather a new action can be initiated to remedy the flawed judgment. Thus, in *Köbler*, the CJEU found that the compensation for damage against the State due to the breach of EU law by the Austrian courts could have nullified the breach of EU law.

⁷²⁸ See A. Kornezov 'Res judicata of national judgments incompatible with EU law; time for a major rethink?' (2014) 51 Common Market Law Review, 824.

⁷²⁹ Ibid, 826.

If, on the other hand, some of the constitutive elements differ, there is a possibility for a retrial as an extraordinary legal remedy.⁷³⁰ This implies that everything that falls beyond the scope of *res judicata* gives way to the effective application of EU law.

The CJEU has different approaches towards this issue, ranging from a deep respect of an already delivered final judgment despite its breach of EU law⁷³¹, to the possibility of retrial either with regard to final administrative decisions⁷³² or with respect to final judicial decisions⁷³³.

7. Conclusion

Given the objectives of effectiveness of EU law and effective judicial protection, the CJEU created the principle of State liability for breaches of EU law as a matter of EU law.

Consequently, the conditions that give rise to the right to reparation on grounds of infringement of EU law by a Member State have been spelled out through the case law of the CJEU.

National courts of the Member States are bound to award compensation where the three EU law requirements are fulfilled.

Nevertheless, apart from the observance of these rules established at EU level, the concrete award of reparation to individuals is carried out through the national liability rules that apply to similar domestic claims.

In case the national conditions which give rise to the right to reparation for a breach of national law are stricter, the national courts have to operate in a *Simmenthal* like manner and set aside these conditions. Of course, for the individual, more generous (less strict) national conditions are acceptable and desirable. The same is true when EU law is at issue, since more generous national conditions make the granting of compensation for damage resulting from a breach of EU law more probable.

On the other hand, the so called ‘executive conditions’ that are applied by the national courts have to satisfy the *Rewe requirements* of minimum effectiveness and equivalence and the principle of effective judicial protection. In this respect, for instance, compensation must be adequate.

⁷³⁰ See Case C-2/08 *Fallimento Olimpiclub* [2009] ECLI:EU:C:2009:506 .

⁷³¹ Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513.

⁷³² Case C-453/00 *Kühne & Heitz* [2004] ECLI:EU:C:2003:350.

⁷³³ See Case C-2/08 *Fallimento Olimpiclub* [2009] ECLI:EU:C:2009:506 .

The remedy of compensation for damage or the legal means – an action for compensation for damage, depending on its conception in different legal systems – was treated in detail in this Chapter since the elaboration of all of its aspects (its nature, legal basis, EU law conditions for its award, the manner of breaches of EU law committed by different State authorities that lead to damage, as well as the award of reparation in the Member States by the national courts) provides concrete illustration of how the *Rewe* principles and the principles of effectiveness and effective judicial protection, which were dealt with in the previous Chapters, operate in practice.

The brief comparative overview of the tort liability regimes of several Member States was made in order for the reader to have an insight into the manner in which national courts adjudicate EU law cases, the routes they follow in order to award the damage sustained from a breach of EU law, their willingness to compromise between the national and EU law conditions that give rise to reparation and perhaps most importantly their approach to the principles of effectiveness and effective judicial protection, as well as the *Rewe* principles, when ‘remedial or executive rules’ are at issue.

This Chapter will also serve as guidance and a reference point for the next Chapter that will deal with the potential application of this principle of State liability by the Macedonian courts, in light of the strategic objective of the Republic of Macedonia, namely full membership of the EU.

CHAPTER 5

Macedonia

8. Introduction

This Chapter is written from the perspective of a candidate country aspiring for full membership of the EU, the Republic of Macedonia, in order to assess to what extent Macedonian law is already in line with EU law, what the envisaged obstacles are on the road to the EU and what the impact of EU law would be for Macedonian judges.

I would like to underline that the aim of this Chapter is not a scrutiny of the entire legal system of the Republic of Macedonia, but rather, it is restricted to the changes which the Macedonian judges will have to accept in order for EU law to be properly enforced in the future.

Discrepancies in the legal culture between the legal system of the Republic of Macedonia and that of the EU as well as the mindset of the Macedonian judges appear to be a serious impediment to the application of EU law.

In the first section I will refer to the manner in which international law is treated by Macedonian judges in order to envisage what needs to be changed for the purpose of becoming ‘skilful’ in the future. This analysis will be made by examining the relevant national provisions as well as the scarce Macedonian case law concerned with the application of the international law.

In the second section of the Chapter, the analysis will zoom in on the doctrine of State liability and compensation for damage as conceived in EU law and in the Macedonian legal system. The effects of EU judicial protection law are perhaps most visible here, as EU state liability concerns a quite well developed and well elaborated part of EU judicial protection law. This allows for identifying the impact of EU judicial protection law in a concrete manner. Moreover, state liability is firmly embedded in Macedonian law as well. This provides for the necessary ingredients for addressing the question to what extent EU and Macedonian law are aligned in this area.

A comparison will be made between the conditions which are necessary for the right to compensation to arise for a breach of national and international law by the Macedonian authorities in order to weigh these requirements versus the EU law conditions which give rise to the right to compensation in case of breach of EU law.

The third section will deal with the appropriate venues under Macedonian law through which compensation for damage due to the State's wrongdoing can be awarded in cases of a breach of EU law by different State authorities.

The fourth section will consider the national executive conditions under which compensation for breach of EU law can be awarded, in order to assess their compatibility with the *Rewe* requirements imposed by EU law.

The Chapter will end with a conclusion based on the analysis made in the previous sections, including the envisaged problems with the enforcement of the EU law not only from a normative perspective but also in view of the hurdles which could emerge from the different mindset of Macedonian judges compared to the judges from the 'old' Member States.

9. International law in national legal order

2.1 Status of international law in the Republic of Macedonia

Regarding the status of international law in the national legal system, there are two approaches in the legal doctrine.⁷³⁴

Monist theory is based on the presumption that national and international law do not differ, but rather, form part of the same system of legal rules. According to this approach, international law rules do not need to be 'imported' into the internal legal order of the State with a special national Act in order to be applicable. Instead, with an Act of ratification adopted by the Assembly of the State, they enter into the national legal order as an international law.⁷³⁵ Following this simple act of ratification, the rules of

⁷³⁴ See T. Takacs, *Participation in EU Decision Making, Implications on the national level*, (The Hague: Asser Press 2009) 34-36.

⁷³⁵ For example, under Art. 53 of the French Constitution: 'Peace treaties, commercial treaties, treaties or agreements relating to international organisations, those that commit the finances of the State, those that modify the provisions which are matters for statute, those relating to the status of persons, and those that involve the cession,

international law are treated the same way as the other national norms. The rank of these international rules in the national hierarchy of legal sources is differently regulated in different States.

The act of ratification does not call into question the monist doctrine in the specific State and it differs from the more complex process in the dualist legal orders where the competent authorities need to ‘transpose’ the rules of international law in order for these to be treated as national norms. From the moment of transposition, the international law rule is treated as national law and its international origin is ‘forgotten’.

Macedonia has opted for a monist approach towards international law. This can be inferred from the following provisions of the Constitution of the Republic of Macedonia.

Article 118 of the Constitution lays down that:

“The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law.”

In addition, Amendment XXV to the Constitution reads as follows:

“Judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution.”

Article 118 of the Macedonian Constitution determines the rank of international agreements within the national legal order. Since the international agreements ratified in accordance with the Constitution cannot be changed by law, while the ordinary laws can be changed by other laws, it follows that the Act of ratification of international agreements is above the ordinary laws but below the Constitution.⁷³⁶

According to Article 108 of the Constitution,

exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament. They shall not take effect until they have been ratified or approved.

⁷³⁶ Certain commentators claim that the scope of Article 118 is narrow, since it is restricted to ‘ratified treaties’ only. See S. Georgievski, I. Cenevska, D. Presova, ‘Application of the law of the European Union in the Republic of Macedonia’, in S. Georgievski and V. Efremova, *European Union Law Application by the National Courts of the EU-Membership Aspirant Countries from South-East Europe*, (Centre for SEELS 2014) 104.

“The Constitutional Court of the Republic of Macedonia is an organ of the Republic of Macedonia which protects the constitutionality and legality.”

Considering this, and also considering its competences, which are enumerated in Article 110 of the Constitution⁷³⁷, it can be inferred that the Constitutional Court is competent to decide also on the conformity of the Act of ratification with the Constitution.

This Act of ratification, as stated previously, is an Act which is indispensable for international agreements to gain legal force in Macedonia.

This competence of the Constitutional Court of the Republic of Macedonia was exercised until 2002 only in one case.⁷³⁸ After that year, the new composition of the Court refused to exercise its competence to question the constitutionality of international agreements, i.e. of the Act by which they were ratified.

This Court also challenged its competence to question the compatibility of a national law with an internationally ratified agreement, namely the Stabilisation and Association Agreement.⁷³⁹

According to the current composition of the Constitutional Court, the competence to assess the compatibility of international agreements with the Constitution falls to the Parliament of the Republic of Macedonia. According to a former judge of the Constitutional Court, this solution was an absurd one, because this competence is not listed within the scope of the functions and competences of the Macedonian Parliament.⁷⁴⁰

⁷³⁷ Article 110, item 1 of the Constitution of the Republic of Macedonia provides that: “The Constitutional Court of the Republic of Macedonia decides on the conformity of laws with the Constitution.”

⁷³⁸ It was in 2002 when the Constitutional Court repealed the Law on ratification between the Republic of Macedonia and the Republic of Greece on construction of and management with an oil pipeline, since that Agreement contained provisions which were contrary to the Constitution. Thus the Act of ratification of that Agreement ceased to constitute a part of the internal legal order of the Republic of Macedonia. See more thoroughly in И. Спировски, ‘Конституционализација на Европската конвенција за човекови права’, Скопје, “Правник”, 2009, стр 5 [I. Spirovski, ‘Constitutionalization of the European Convention on Human Rights’, (2009) Law Journal Pravnik, 5.

⁷³⁹ У.бр. 132/2005 од 16. 11.2005 [U.no.132/2005 from 16.11.2005].

⁷⁴⁰ According to Article 68 para 1 item 6 of the Constitution of Macedonia, “The Assembly of the Republic of Macedonia” ratifies international agreements”. See also Spirovski 2009 (n 735).

In my view, there is nothing confusing in this decision of the Constitutional Court, since, when ratifying international agreements, the Macedonian Assembly also examines their compatibility with the Macedonian Constitution.

Nevertheless, it is recommended that the Constitutional Court assumes its competence to review the constitutionality of the international agreements, or more precisely the Act of ratification of an international agreement adopted by the Assembly, since it is not impossible for the Assembly to ratify the international agreement in contravention to the Constitution. This competence of the Constitutional Court may result in an open possibility for citizens to raise the issue of compatibility of EU law with the Macedonian Constitution once Macedonia joins the EU.⁷⁴¹

I will now discuss the use of the principle of supremacy of international law in the Republic of Macedonia, the principle of direct effect of international law and the principle of consistent interpretation of national law with international law. This will be done through certain examples from the case law of the ordinary courts and the Constitutional Court of Macedonia, through an interpretation of some ‘clue’ articles from the laws, as well as past court activity.

2.2 Supremacy of international law

Regarding the principle of supremacy of international law, as was stated, the Act of Ratification of an international treaty is above the ordinary laws but below the Constitution.

According to Article 18 of the Law on courts of the Republic of Macedonia:

“(1) The court shall raise an initiative for instituting a procedure for assessing the constitutional compliance of a law when its compliance with the Constitution is questioned, whereupon it shall immediately inform the higher court and the Supreme Court of the Republic of Macedonia.

⁷⁴¹ A striking example can be found in Germany where the objective of the Bundesverfassungsgericht to remain guardian of the German Constitution vis-à-vis EU law resulted in adoption of the landmark decisions like Solange I- decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540; BVerfGE 73, 339 2 BvR 197/83 Solange II- decision. Hungarian Constitutional Court followed the approach taken by the German Constitutional Court. See Takacs 2009 (n 731), 56.

(2) When the court deems that the law that is to be applied in the specific case is not in compliance with the Constitution, and the constitutional provisions cannot be applied directly, it shall suspend the procedure pending the decision of the Constitutional Court of the Republic of Macedonia.

(3) The decision for suspending the procedure as of paragraph 2 of this article may be appealed by the party. The procedure for the appeal shall be urgent.

(4) When the court deems that the law that is to be applied in the specific case is not in compliance with the provisions of an international agreement ratified in conformity with the Constitution, it shall apply the provisions of the international agreement provided that they are directly applicable.”

As one can conclude from paragraphs one and two of this provision, the courts do not apply the Constitution directly.

Paragraph 4 of Article 18 of the Law on courts obliges the court to apply the provisions of the international agreement ratified in accordance with the Constitution if the ordinary law does not comply with the international agreement. The condition is that the provisions of the international agreement are directly applicable.

The most illustrative application of the principle of supremacy of an international agreement whose provisions were directly applicable is the case of *Makpetrol* which I will elaborate in detail, not solely for the purpose of underlining that only ratified agreements are applicable in the Macedonian legal system and demonstrating the lack of legal force of the international agreements which are not ratified, but also to illustrate the capacity of the courts to deal with issues which require adjudication on the compatibility of an administrative decision with a ratified international agreement.

This case relates to the application of the Interim Agreement between the Republic of Macedonia and the EC which formed part of the Stabilisation and Association Agreement and is also relevant for further examination of the obligations it imposes on the national authorities in the pre-accession phase of the Republic of Macedonia into the EU.

The Stabilisation and Association Agreement between (SAA) between the Republic of Macedonia and the European Communities and their Member States was signed on 9 April 2001.

On the same date, an Interim Agreement covering trade and trade-related aspects of the SAA between the Republic of Macedonia and the European Communities was also signed, the purpose of which was given in Article 128 of the SAA:

“In the event that, pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions of certain parts of this Agreement, in particular those relating to the free movement of goods, are put into effect by means of an Interim Agreement between the Communities and the Former Yugoslav Republic of Macedonia, the Parties agree that, in such circumstances, for the purpose of Title IV, Articles 69, 70 and 71 of this Agreement and Protocol 1 to 5 hereto, the terms ‘date of entry into force of this Agreement’ mean the date of entry into force of the Interim Agreement in relation to obligations contained in these Articles and Protocols.”

The SAA was ratified with an Act of Ratification, adopted by the Assembly of the Republic of Macedonia on 12 April 2001 and published in the Official Gazette of the Republic of Macedonia.⁷⁴² Article 18 paragraph 4 of the Stabilisation and Association Agreement reads:

“Quantitative restrictions on imports into the former Yugoslav Republic of Macedonia of goods originating in the Community and measures having equivalent effect shall be abolished upon the date of entry into force of this Agreement.”

Article 5 paragraph 4 of the Interim Agreement is worded in an identical manner to Article 18 paragraph 4 of the SAA.

On 24 April 2001 the Government of the Republic of Macedonia adopted a Decision on the entry into force of the Interim Agreement.⁷⁴³ According to the first point of the above stated Decision:

1. The Interim Agreement covering trade and trade-related aspects of the SAA between the Republic of Macedonia and the European Communities, adopted on 9 April 2001, enters into force on 1 June 2001 on the grounds of the agreement made between the contracting parties and will stay in force until the entry into force of the SAA.

The second point of the Decision provides that:

2. The Interim Agreement covering trade and trade-related aspects of the SAA between the Republic of Macedonia and the European Communities is constitutive part of the ratified SAA and is concluded with the aim of faster realization of the provisions of the SAA which cover trade and trade-related aspects.⁷⁴⁴

⁷⁴² See Official Gazette, N. 28/2001 of 13 April 2001.

⁷⁴³ See Decision N. 23-2676/1, published in Official Gazette of the Republic of Macedonia, N. 35/2001 on 7th of May 2001.

SAA is an international agreement ratified in accordance with the Macedonian Constitution and in that regard it is a part of the internal legal order.⁷⁴⁵

The Republic of Macedonia and all of its authorities are obliged to abide by the obligations undertaken pursuant to this agreement.

Due to the measures of quantitative restrictions imposed by the Government of the Republic of Macedonia, the oil company A.D. Makpetrol from Skopje, had supplied in the previous years oil and oil derivatives exclusively from the company OKTA-Skopje, which was a monopoly.

From the entry into force of the Interim Agreement on 1 June 2001, the company Makpetrol started to import oil and oil derivatives from the European Communities which were more favourable to it. The company was in a position to make a choice of supplier from the EC from whom it could purchase oil and oil derivatives, which also implied the possibility for cheaper supply compared to the prices imposed by the monopoly of OKTA.

During the months of June, July and August 2001, Makpetrol imported a greater amount of oil and oil derivatives from the EC, which was duly registered in order to be subject to the Customs Office of the Republic of Macedonia.

The Customs Office, contrary to Article 18 paragraph 4 of the SAA, treated the goods as forbidden imports and retained the trucks/ tanks loaded with oil derivatives at the border crossing in Gevgelija, preventing their distribution.

⁷⁴⁴ That the Interim Agreement is constitutive part of the SAA was also accepted by the ordinary courts in Macedonia, although the status of the Interim Agreement is not specified in Article 128 of the SAA. This solution seemed necessary in order to avoid confusion with the fact that the Interim Agreement was not ratified and could not as such produce effects in the Macedonian legal system. The Interim Agreement, being part of a ratified SAA was also a source of law with a higher legal force than the ordinary laws. This issue of whether and for what purpose was the Interim Agreement treated as a constitutive part of a ratified SAA was raised by С. Георгиевски, Примената на меѓународните спогодби склучени во поедноставена форма во поредокот на Република Македонија: меѓу дуалистичкиот и монистичкиот режим, во Зборник во чест на Миле Хаџи Василев, “Универзитет Св Кирил и Методиј”, Правен факултет “Јустинијан Први”, Скопје, 2004 [S. Georgievski, ‘The application of the international agreements concluded in a simplified form in the legal order of the Republic of Macedonia: between the monist and dualist regime, Review in honor of Mile Hadzi Vasilev ’, University, (2004) St. Cyril and Methodious , Faculty of Law Justinijan I st .

⁷⁴⁵ Article 118 of the Constitution of the Republic of Macedonia.

This conduct on the part of the Customs Office induced material damage to the plaintiff, following which Makpetrol initiated proceedings for compensation for damage against the Republic of Macedonia Ministry of finance Customs Office before the First Instance Court Skopje I in Skopje.

In a civil procedure before the First Instance Court and the Appellate Court, the courts found that the Customs Office, through its illegal conduct, inflicted damage on Makpetrol to the amount of 186 495 686 denars (approximately 3 million euros), including under the head of real damage 51 695 590 denars and a loss of profit of 134 836 096 denars.

The Republic of Macedonia introduced an appeal on points of law before its Supreme Court,⁷⁴⁶ which dismissed the appeal as unfounded and upheld in its entirety the arguments of the First Instance and Appellate courts which previously adjudicated on the merits of the action for compensation. With the judgments of these courts, compensation for damage was awarded to Makpetrol. Consequently, the action for compensation for damage was successful and the Supreme Court ordered the Republic of Macedonia to pay to Makpetrol the established amount of money with an appropriate statutory interest.

The liability of the Republic of Macedonia for compensation for damage caused to the plaintiff consisted of the illegal conduct on the part of the Customs Office which, following the duly performed customs procedure, retained the trucks with oil derivatives originating from the European Communities at the border and prevented their distribution throughout the territory of the Republic of Macedonia.

This illegal behaviour on the part of the State administrative organ in fact consisted of a breach of the ratified SAA, specifically of Article 5 paragraph 4 of the Interim Agreement, which, as stated above was considered as a constitutive part of the SAA and entered into force on 1 June 2001.

In this specific case, it was the Customs Office as an administrative organ which was obliged to respect the ratified international agreement.

Apart from this constitutional obligation, the Customs Office was also faced with a statutory obligation, prescribed by Article 13 of the Law on the organization and operation of the organs of the administrative authority⁷⁴⁷ according to which:

“The organs of the administrative authority operate in the framework of their competences pursuant to the Constitution, the law and ratified international agreements.” (my translation)

⁷⁴⁶ See Judgment of the Supreme Court of the Republic of Macedonia N. 23/04 from 10.06.2004.

⁷⁴⁷ See Law on organization and operation of the organs of the administrative authority, Official Gazette of the Republic of Macedonia N. 58/2000.

Regarding the nature of the monist system used in the Republic of Macedonia, namely entry of an international agreement into the legal order of the Republic of Macedonia with an Act of ratification, the legislature confirmed this approach towards international law with the Law on Amendment and supplement of the general administrative procedure.⁷⁴⁸

Thus, Article 2 of the Law on amendment and supplement to the Law on administrative procedure provides that:

In Article 4, paragraph 1 is amended and lays down that:

“While deciding in administrative matters, the organs of Article 1 of this Law adjudicate on the basis of and in the limits of the law and international agreements ratified in accordance with the Constitution and other rules of the administrative organs and legal and other persons in the exercise of the public authorities.”

Apart from invoking the SAA for the sake of challenging its breach through the adoption of an administrative decision, no Act of the Parliament has been pleaded to be in opposition to the SAA so far.

2.3 The application of the European Convention on Human Rights

In order to fully understand the application of international law by Macedonian judges, I would like to explore their approach to the European Convention on Human Rights (ECHR).

The ECHR was ratified by the Assembly of the Republic of Macedonia in 1997 and since then it is a self-standing legal source. Therefore it is directly applicable and has a higher legal force than ordinary laws.⁷⁴⁹

Despite this, there are only a few cases in which the ordinary courts have relied on the ECHR as a separate legal source to substantiate their decisions.

It was only in 2006 that the Supreme Court of the Republic of Macedonia relied on both the provisions of the ECHR and the case law of the European Court of Human Rights (ECtHR), although without pointing to concrete rulings delivered by the ECtHR.⁷⁵⁰

⁷⁴⁸ See Law on Amendment and supplement of the general administrative procedure, Official Gazette of the Republic of Macedonia N. 51 from 13.04.2011

⁷⁴⁹ For more about the application of the ECHR in Macedonia, see Spirovski 2009 (n 735).

⁷⁵⁰ See Вкз. Бр. 12/2006 од 19.09.2006 and Вкз. Бр.15/2006 од 31.05.2006.

Moreover, the Department for criminal issues of the Supreme Court of the Republic of Macedonia adopted a legal opinion in 2007 in which it stated that:

“The ECHR forms a constituent part of the legal order of the Republic of Macedonia and it is directly applicable. Concerning the rights and freedoms regulated by the ECHR, the safeguard of which is carried out before the ECtHR, the courts in the Republic of Macedonia directly apply its judgments, and according to the Law on criminal procedure, in the rationale of their decisions they should invoke the judgments of the ECtHR.”

Relying on the ECHR as well as the case law of the ECtHR is very rare in the legal arguments which Macedonian courts apply in their rationales. This can be ascribed to the legal culture and mindset of the Macedonian judges which differ notably from the legal culture and approach towards the law and its purpose employed by the judges from the longer-standing Member States. This will be further elaborated below.

For the moment it is appropriate to note that certain normative amendments have been made in order to incite the judges to apply both the ECHR and the case law of the ECtHR.

To illustrate the necessity of inserting new provisions into the Laws as a reaction to the fact that the courts have scarcely applied the ECHR, a provision was included in the new Law on courts of 2006⁷⁵¹ under Article 2:

“While applying the law, the judges shall protect the human rights and freedoms.”

Applications lodged by Macedonian citizens before the ECtHR largely referred to a breach of Article 6 of the ECHR, pursuant to which everyone is entitled to a fair and public hearing within a reasonable time before an independent and impartial court established by law. For this reason, and in order to lighten the burden imposed on the ECtHR with applications lodged before this Court, Article 6 paragraph 2 of the Law on courts stipulates that:

“While deciding on civil rights and obligations as well as deciding on criminal liability, everyone shall be entitled to a just and public trial within a reasonable time before an independent and impartial court established by law.”

The Constitution does not contain a comparable fundamental right.

⁷⁵¹ Law on courts of the Republic of Macedonia (Official Gazette N. 35/2006)

The insertion of this provision into the new Law on courts can be explained by the fact that the Macedonian judges made no reference to Art 6 ECHR (associated with the right to a fair trial), despite the fact that the ECHR is a valid legal source in the Republic of Macedonia. The protection of a right to a fair trial had to be inserted conspicuously in a national statute so that the national judges were stimulated or rather obliged to apply it.⁷⁵²

The inclination towards creating normative obligations on the courts was further confirmed with the wording of Article 35 of the Law on courts of 2006, which laid down that among the competences of the Supreme Court is the adjudication of disputes concerning the right to a fair trial within a reasonable time.⁷⁵³

Article 3 of the Law on amendments to the Law on courts⁷⁵⁴ further supplemented Article 35 and read that adjudication in a dispute related to the right to a fair trial by the Supreme Court of the Republic of Macedonia shall be made “in accordance with the rules and principles established in the ECHR and taking into consideration the case law of the ECtHR.”

Article 4 of this Law on amendments provides that the Supreme Court will grant just compensation for damage sustained by the party following a breach of the right to a fair trial made by the Macedonian courts.

There are also some other national laws which were subject to amendments in order to highlight the relevance of the ECHR, the ECtHR and its case law.⁷⁵⁵

⁷⁵² Reference to a fair trial within a reasonable time was also made in Art. 10 para 1, item 3 of the Law on courts, which provides that: “The procedure before a court shall be regulated with a law and it shall rest on the following principles: - trial within reasonable time.”

⁷⁵³ See Art 35, item 6 of the Law on courts of the RM.

⁷⁵⁴ Law on amendments to the Law on courts (Official Gazette 35/2008).

⁷⁵⁵ See Law on litigation procedure (Official Gazette N. 79/2005) , where it is provided in Article 400 that: “(1) When the European Court of Human Rights confirms violation of certain human right or of the fundamental freedoms anticipated in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, ratified by the Republic of Macedonia, the party can, in a period of 30 days as of the final verdict of the European Court of Human Rights, file a request to the court in the Republic of Macedonia, having tried in the first instance in the procedure wherefore the decision violating some human right or fundamental freedom is adopted, to amend the decision violating such right or fundamental freedom. (2) The provisions on repeating the procedure shall accordingly apply to the procedure referred to in paragraph 1 of this Article. (3) In the repeating of the procedure the courts shall be obliged to obey the legal opinions stated in the final verdict of the

This was done due to the approach of the ordinary courts towards the ECHR as a source of law. They are simply not inclined to consider it as a source of law. Thus the right to a fair trial had to be inserted in many different laws. It certainly did have impact on the length of the proceedings in front of the national courts and decreased the pressure of this kind of proceedings in front of the ECtHR.

Regarding the application by the Constitutional Court of the ECHR and the case law of the ECtHR, one can conclude that it was also used very rarely. On certain occasions, as a matter of principle, the Court confirmed that the Macedonian Constitution should be interpreted in view of the General Principles of law enshrined in the ECHR and that the ECHR itself should be interpreted and applied in light of ECtHR case law.⁷⁵⁶

European Court of Human Rights confirming the violation of the fundamental human rights and freedoms.”; See also Article 43, para 1, alinea 7 of the Law on administrative disputes (Official Gazette N 62/2006) prescribes that: “The procedure terminated with verdict or a decision shall be repeated: upon a request of the party following a decision of the European Court of Human Rights.”; Article 449, para 1, alinea 6 of the Law on criminal procedure (Official Gazette 150/2010) provides that: “(1) The criminal procedure terminated with a final judgment could be repeated in favour of the convicted person, if: (6) an infringement of the human rights and basic freedoms during the procedure is established with a final decision of the European Court of human rights.”

⁷⁵⁶ Decision U.br.31/26 of 1 April 2006. See Georgievski et al 2014 (n 734), 107. Just for the sake of comparison, the Constitutional Court in Slovenia, which is considered as one of the “stronger” Constitutional Courts in Europe, in a period from 1994 (when it officially started to apply the ECHR) to 2005 directly cited the ECHR in 300 decisions of the Court and in approximately 80 cases it referred to the case law of the ECtHR. See E. Zagorc and S. Bardutzky, ‘The Application of EU Law in Slovenia: Teething Troubles of the Blue-eyed Boy’ in A. Łazowsky, *The Application of EU Law in the New Member States – Brave New World* (The Hague: T.M.C. Asser Press 2010), 422.

2.4 Direct effect and consistent interpretation

With respect to the principle of direct applicability of provisions, as was stated above, it is regulated by paragraph 4 of Article 18 of the Law on courts:

“When the court deems that the law that is to be applied in the specific case is not in compliance with the provisions of an international agreement ratified in conformity with the Constitution, it shall apply the provisions of the international agreement provided that they are directly applicable.”

A problem arises in cases in which the provisions are not directly applicable: this would create a hurdle for the court to apply the international agreement. Furthermore, in Macedonian law there are no specific criteria which define whether the provision is directly applicable or not. Regarding EU law, if in the future EU law is absorbed under international law, the status of secondary EU acts such as regulations and directives would not be determined. For these reasons I will argue in Chapter 6, Section 2.2 that the Constitution of the Republic of Macedonia will certainly have to be amended for the purpose of the application of EU law. Apart from many other issues that will have to be regulated with the “authorisation article” or even more specifically with the “Act on membership of the European Union”, the role of the courts will also have to take its place, in order for the courts to be able to review the national legislation in light of the EU law.⁷⁵⁷ The mandate of the courts to apply EU law with all the principles it imposes should be regulated in a more explicit manner in the Law on Courts. Still, these options remain open and depend on the will of the legislator in future.

It seems that the ordinary courts in Macedonia do apply international law when its provisions are directly applicable, though very seldom.⁷⁵⁸

⁷⁵⁷ Thus, the role of the courts was regulated with a provision in the Slovak Constitution which lays down that the courts have to initiate constitutional review proceedings should they deem an act incompatible with the Constitution, EU law or with a directly applicable treaty provisions. See Article 144 of the Slovak Constitution.

⁷⁵⁸ See Georgievski et al 2014 (n 734), 118- 122. Thus, the Supreme Court directly applied the European Convention on extradition. See Judgment of the Supreme Court of Macedonia of 14 February 2007, Kvp.no.80/05. It also applied the Convention on the privileges and immunities of the United Nations and the Cooperation Agreement between the Republic of Macedonia and the UNICEF. See Judgment of the Supreme Court of Macedonia of 19 June 2002, U.no.1423/01. The Administrative Court of the Republic of Macedonia also applied directly certain directly applicable provisions of International Agreements. See Judgment of the Administrative Court of Macedonia of 14 December 2013, U -6.no.47/2012; Judgment of the Administrative Court of Macedonia of 13 December 2013, U-6, no.44/2012. Judgment of the Administrative Court of Macedonia of 13 January 2013, U-5.no.117/2012. Regarding the application of the ECHR and its directly applicable provisions, see Georgievski et al 2014 (n 734), 119-121.

This is due to the fact that the national courts consider international law as something still very distant and rarely as a source of law. One part of the judges are not acquainted with the international law obligations and another part do not know how to apply it.

The principle of consistent interpretation of national law or interpretation of national law in compliance with international law can boil down to usage by the Constitutional Court of the Republic of Macedonia as an ‘additional or persuasive argument’ in the interpretation of constitutional law. This Court referred specifically to the status of the ECHR, stating that:

“Although the [ECHR] is an integral part of the domestic legal order its status is below the Constitution and it cannot represent direct legal grounds upon which the Court can base its decision [...] Namely, the provisions of the Convention, as well as the practice of the European Court of Human Rights can represent only an additional argument in the interpretation of the constitutional norms.”⁷⁵⁹

It is worth mentioning that the Court has granted legal force to secondary EU law even in the pre-accession phase, although in a supporting, interpretative authority. In one case it stated:

“Although the directives of the European Union as a supranational law are not part of the legal order, they are not a source of law in the Republic of Macedonia, and as such are not the subject matter of appraisal before the Constitutional Court. Nevertheless, in support of its legal standing, the Court took into consideration Directive 2002/21 of the European Parliament and the Council of Europe of 7 March 2002 regarding a common regulatory framework for electronic communication networks and services (Framework Directive) [...]”⁷⁶⁰

2.5 Obligations arising from the pre-accession phase to the EU

The Republic of Macedonia concluded the Stabilisation and Association Agreement (SAA) with the European Communities and their Member States, in order to provide a framework for political dialogue, allowing the development of close political relations between the parties.⁷⁶¹ It forms part of the stabilisation and association process initiated by the EU in order to consolidate the Western Balkans region.

⁷⁵⁹ U.br.39/2004 and U.br. 59/2004 21.04.2004.

⁷⁶⁰ U.br.26/2009 from 15.04.2009.

⁷⁶¹ For the full text of the SAA see

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=602>

Among the SAA's objectives are the development of economic and international cooperation, the promotion of harmonious economic relations and the fostering of regional cooperation in all the fields covered by this Agreement.

From a European perspective, this Agreement contains a future developments clause in its preamble confirming FYROM's⁷⁶² status as a potential candidate for EU accession.⁷⁶³ Reference to this Agreement is made in order to assess which obligations arise for the national judges in the pre-accession phase of the Republic of Macedonia to the EU.

One of the tools to achieve the objectives of the Treaty is the approximation of its legislation to that of the Union.

According to Article 68 of the SAA between the Republic of Macedonia and the EC and their Member States:

“The Parties recognise the importance of the approximation of the existing and future laws of the former Yugoslav Republic of Macedonia to those of the Community. The former Yugoslav Republic of Macedonia shall endeavour to ensure that its laws will be gradually made compatible with those of the Community.”

A provision with very similar wording was inserted into the Europe Agreements that the European Communities and their Member States concluded with each of the following States: the Republic of Poland, Republic of Hungary, Czech Republic, Slovak Republic, Romania, Republic of Bulgaria, Republic of Lithuania, Republic of Latvia, Republic of Estonia and the Republic of Slovenia.

Equally, since the SAA was also signed between the Republic of Croatia and the EC and their Member States, it is worth making reference to Article 69 of this Agreement which is almost identically worded as the one in the SAA with the Republic of Macedonia. It lays down that:

⁷⁶² By resolution [A/RES/47/225](#) of 8 April 1993, the General Assembly decided to admit the Republic of Macedonia as a Member State of the United Nations being provisionally referred to for all purposes within the United Nations as the “former Yugoslav Republic of Macedonia” pending settlement of the difference that had arisen over its name.

⁷⁶³ See

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=158>

" The Parties recognise the importance of the approximation of Croatia's existing legislation to that of the Community. Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis."⁷⁶⁴

In terms of content and structure, all Europe Agreements were quite similar if not exactly the same.⁷⁶⁵

A glimpse at the practices in some of those Member States may be useful since they have gone through a similar process as that which Macedonia will likely experience.

The grounds for analysis will be Article 68 of the Europe Agreement with Poland for instance, (although it is exactly the same article in all other Europe Agreements), which states that:

“The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.”

According to Capeta⁷⁶⁶, there is a slight difference between the provisions in the SAA concluded between the Croatia and the EC and their Member States and the EA`s.

Firstly, the wording used in the SAA is "Croatia shall endeavour", whereas the one used in the EA is "Poland shall use its best endeavours". Obviously, there is a milder obligation in the case of the EA.

Secondly, in the EA, there is an obligation for Poland to ensure compatibility with Community legislation of its future legislation, whereas in the SAA with Croatia, the endeavours shall be directed towards gradually making compatible the existing and future legislation of Croatia with the Community acquis. Thus, the SAA`s provision refers to entire internal law of Croatia.

In the SAA between the Republic of Macedonia and the EC and their Member States there is a phrase that " its (Macedonia`s) laws will be gradually made compatible with those of the Community.” Consequently, as in the Croatian case, the compatibility of the entire law of the Republic of Macedonia is expected to be in line with the Community legislation.

⁷⁶⁴ <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=584>

⁷⁶⁵ See A. Lazowski 'It works! The European Union in the wake of 2004 and 2007 enlargements', in A. Lazowski, *The application of EU law in the new Member States* (The Hague: Asser Press 2010), 10.

⁷⁶⁶ See T. Capeta, 'Interpretativni učinak europskog prava u članstvu i prije članstvu u EU' (*Interpretative effect of EU law in and before the membership in the EU*), *Zbornik Pravnog fakulteta u Zagrebu*, 56 (5) (2006) 1443-1494.

Moreover, as Capeta argues in her article, Croatia is obliged to comply in its legislation with the entire EC acquis and not just with those parts of it covered with the SAA.

The same counts for Macedonia.

What needs to be underlined is that the process of harmonization does not end with the formal transposition of the EU acts into the national legislation, but it also refers to the proper application/practice of this legislation by the courts of the relevant state in a way that these organs endeavour to interpret the national law in line with the norm which is transposed. It ensues that the courts should use EU law as an interpretative tool while applying a national norm.

Moreover, the courts are expected to perform this task only with regards to the EU acts that are required to be transposed according to the NPAA (National Programme for the Adoption of the Acquis) and not in view of those which, for certain reasons are postponed for harmonisation according to NPAA .

In view of this author, the acceptance of the interpretative effect of the EU law, might be motivated with the breach of the SAA.⁷⁶⁷ However, another reason for this could be a possible infringement action against the State once it joins the EU due to the wrongful interpretation of the EU acts.

According to Capeta, there are several reasons for certain resistance on the part of the courts to use the EU law as an interpretative tool in the pre accession phase. They lie in the reluctance of the courts to social critique and additional burden imposed on them, as well as in the Croatian legal culture which is formalistic and positivistic rather than the one predominant in the EU, which confers a proactive and creative role to the judges in the application of the law. Finally, the practical obstacles, like the lack of translated ECJ judgements and the lack of knowledge in EU law.

This overview of the content of the SAA with Croatia, the reasons for accepting the interpretative effect of the EU law as well as the enumeration of the possible reasons for resistance by the courts to perform that task , was made due to the identically worded provision in the Croatian SAA with the one contained in the SAA with Macedonia, the similarities in the legal culture and mindset of the judges of the two states and the similarities regarding the practical obstacles which the judges face.

⁷⁶⁷ See T. Capeta, 'Interpretativni učinak europskog prava u članstvu i prije članstvu u EU' (*Interpretative effect of EU law in and before the membership in the EU*), Zbornik Pravnog fakulteta u Zagrebu, 56 (5) (2006), p. 1477.

At this juncture, I find appropriate to go back to the interpretation of the provisions in the EA's by the highest courts of the then candidate countries. Thus, in one of its judgments, the Polish Constitutional Court found that:

“Of course, EU law has no binding force in Poland. The Constitutional Tribunal wishes, of course, to emphasize the provisions of Article 68 and Article 69 of the [Polish Association Agreement] ... Poland is thereby obliged to use ‘its best endeavours to ensure that future legislation is compatible with Community legislation’... The Constitutional Court holds that the obligation to ensure compatibility of legislation (borne, above all, by parliament and government) results also in the *obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility.*”⁷⁶⁸

Similarly, the Czech Constitutional Court emphasised, in the *Skoda Auto case*⁷⁶⁹, that both the Treaty of Rome and the EU Treaty derive from the same values and principles as Czech Constitutional law, therefore the interpretation of European antitrust law by European bodies is valuable for the interpretation of the corresponding Czech rules.

Though not as explicitly as the Czech and Polish Constitutional Courts, some other courts of the then candidate countries made reference to EU law and its principles.⁷⁷⁰

Nevertheless, it is to be underlined that there were also judgments delivered by some (mostly the highest courts) of the candidate countries, which refuted the competence to apply or even refer to EU law,

⁷⁶⁸ Gender Equality in the Civil Service Case. In Polish decision K. 15/97, *Orzecznictwo Trybunalu Konstytucyjnego* [Collection of Decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation 5 E.Eur. Case Rep. of Const. L.271, at 284 (1998).

⁷⁶⁹ *Re Scoda Auto, Sbirka nalezu a usneseni* [Collection of Judgments and Rulings of the Constitutional Court, Vol8, p 149 (in Czech).

⁷⁷⁰ Thus, the Supreme Court of Estonia stated in a judgment that “the general principles of Community law form part of the sources of Estonian law”. See in A. Lazowski, *The application of EU law in the new Member States* (The Hague: Asser Press 2010) 161. The Constitutional Court of Lithuania made a reference to EU legal acts, among other sources of doctrinal interpretation as far as in December 1998. See more extensively about these judgments of the Lithuanian Constitutional Court in I. Jarukaitis, “Lithuania’s membership in the European Union and application of EU law at national level”, 224; and in Lazowski 2010 (n 766); Some lower courts in Romania, even before accession made reference to the supremacy of EU law as well as to CJEU jurisprudence. In several judgments a specific reference was made to EC directives or regulations. See K.T. Szabó “The application of EU law in Romania”, 510 in Lazowski 2010 (n 766), the Bulgarian Supreme Administrative Court referred to the EA Bulgaria in case ‘168 HOURS’ EODD. See J- 4420/30.07.1999 of the SAC on C-1257/1999.

because they were still not Member States of the EU and were constrained by their binding domestic law.⁷⁷¹

The previous discussion about the application of international law in the Republic of Macedonia was in anticipation of the application of harmonised national law by the national judges in an EU-friendly manner on the basis of the SAA, prior to Macedonia's accession. It must be underlined that this is not an ordinary international agreement, but provides for closer relations between the parties compared to the relations which exist within the framework of other international agreements.

Formally, there is no obligation for Macedonian judges to apply EU law prior to the accession of the State to the EU, since EU law becomes a legal source only after ratification of the Accession Treaty.

However, as Capeta claims, not taking into consideration the interpretative effect of EU law while applying the national norms in the pre accession phase by the national courts, could be considered as a breach of the SAA. The final say of whether it is a breach or not of the SAA have the national courts.⁷⁷²

Nevertheless, as was demonstrated, some courts of the States which joined the EU in 2004 and 2007 relied on an article contained in the Europe Agreement concerning an obligation to approximate the law.

In my view, it is advisable that Macedonian judges use national law in a Euro-friendly manner in order both to respond to an extensive interpretation of Article 68 SAA and to manifest an ambition and ability to adjudicate according to EU law in the future.

Some argue that certain provisions of the SAA between the Republic of Macedonia and EU and its Member States should be applied in an EU spirit and also take into consideration the CJEU jurisprudence on Articles 101, 102 and 107 TFEU.⁷⁷³

⁷⁷¹ Thus, Slovak Supreme Court openly refused to consider EU law as an argumentative tool to interpret domestic law in a Euro-friendly way. See Z. Kühn, 'The application of European law in the new Member States: Several (Early) Predictions', (2005) 6(3) German Law Journal, 568. Czech Supreme Court laid down in a judgment that: "...laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the Community, and that is why the Czech Republic is not bound by these laws". See Decision of the Czech Supreme Court of December 12, 2000, 25 Cdo 314/99 (not published but available at <http://www.nsoud.cz>); Also, the Hungarian Constitutional Court ruled that the Hungarian Parliament should not amend the Constitution in a 'disguised manner' by making an external legal order superior to it. See Constitutional Decision No. 30/1998, (VI.25.) ABH Magyar Közlöny [Official Gazette] MK 1998/55.

⁷⁷² See T. Capeta, 'Interpretativni učinak europskog prava u članstvu i prije članstvu u EU' (*Interpretative effect of EU law in and before the membership in the EU*), Zbornik Pravnog fakulteta u Zagrebu, 56 (5) (2006), p. 1492.

For instance, paragraph 2 of Article 69 of the SAA is almost identically worded to Articles 81, 82 and 87 of the TEC (now 101, 102 and 107 TFEU), and provides that:

“Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community.”

Despite these arguments in favour of an EU-friendly application of national law one should not perhaps carry too high hopes: the ECHR which has been in force since 1997 in Macedonia has very rarely been relied upon, let alone the case law of the ECtHR. The openness to international law seems to be limited.

10. Principle of State liability and compensation for damage in the Republic of Macedonia in light of EU law

3.1 Introduction

In this section I will attempt to make a bridge from the State liability principle as conceived in EU law to the national State liability regime, in order to understand to what extent the Macedonian judges will be prepared to apply the principle of State liability and award compensation for damage for a breach of EU law once the Republic of Macedonia accedes to the EU. The objective is to use this as a test case for the interplay between EU and national (procedural) law.

State liability is taken as an example since it is one of the core principles of EU law and a platform for national judges to prove their ability and willingness to apply the principles of effective judicial protection, effectiveness and equivalence of EU law.

As was demonstrated in the previous Chapter, although an action for compensation for damage caused by the State authorities exists in the legal orders of all the Member States, problems have occurred due to the lack of certain heads of claim for compensation for damage, and due to differences in the conditions necessary for the right to compensation to arise.

In addition, the reasoning of some of the national courts regarding the application of the twin principles of minimum effectiveness and equivalence to the so called ‘executive conditions’ turned out to be a challenge in its own right.

My intention in this section is to deal with the envisaged application of the principle of State liability in EU law by the Macedonian judges following accession to the EU and to underline both the advantages

⁷⁷³ Spirovski 2009 (n 735), 4; Also Skoda case in the Czech Republic (n 766) .

and disadvantages that the Macedonian legal order provides to the national judges in their attempt to comply with EU law requirements.

I will start with the manner in which compensation is awarded to natural and legal persons following a breach of national law by the State authorities.

The main objective of this section is to compare the national conditions with the EU law conditions and test the former for compatibility.

3.2 Liability regime in the Republic of Macedonia

In the Republic of Macedonia, general tort rules exist for the violation of national law obligations according to which an action for compensation may be initiated, regardless of whether the breach of law was committed by individuals or State authorities. These rules are contained in Section II entitled ‘Cause of damage’ of the Law on Obligations of the Republic of Macedonia. There is no separate State liability regime in Macedonia as is the case in France for instance.⁷⁷⁴

Liability of the State due to a breach of the national law by State authorities is claimed under Article 141 jointly with Article 158 and Article 142 of the Law on obligations of the Republic of Macedonia (LO).⁷⁷⁵

It is noteworthy that recently new Articles in the Law on courts were inserted pursuant to which the liability of the State can also be claimed for infringements made by the judiciary. Consequently, a separate State liability regime as opposed to general tort liability exists in Macedonia only with regard to infringements by national courts.⁷⁷⁶ This was done in order to strengthen the regime to include breaches of the judiciary as well. Concerning the breaches made by the administrative authorities and legislative authorities, the legal basis established in Articles 141, 158 and 142 of the LO is clear and undisputed.

Article 141 reads:

“(1) Everyone who inflicts damage on a third party with a fault is obliged to compensate that damage.

(2) For the damage caused by objects or activities from which stems an increased danger of damage for the environment, there is a liability regardless of fault.

⁷⁷⁴ See Jarvis 1997 (n 670), 188.

⁷⁷⁵ Law on obligations of the Republic of Macedonia No 18/2001 of 05.03.2001 (Official Gazette N. 18/2001 from 05.03.2001...2009).

⁷⁷⁶ Article 69 and 70 of the Law on courts of the Republic of Macedonia will be dealt with below in this Chapter.

(3) There is a liability regardless of fault also in other cases provided by law.”

Thus, paragraph 1 establishes the principle of subjective liability, where an obligation to compensate the damage is required where there is a fault in a sense of ‘culpability’.

The second paragraph refers to the principle of objective liability, i.e. without the element of *culpa* whereas the third paragraph has an objective liability regime which equally does not contain a requirement of fault. It is exactly this paragraph that serves as a legal basis for the liability of State authorities.

Since it is worded in a way that liability exists regardless of fault, “also in other cases provided by law”⁷⁷⁷ one of these cases can be found in Article 158 of the LO:

(1) A legal entity is liable for damage caused by its body to a third person (party) in the course of or in connection with, the performance of its duties.

(2) Except where in a particular case otherwise provided by the law, the legal entity has a right to restitution from the person that has caused the damage on purpose or with negligence.

(3) The prescription period for the right to restitution is six months from the day of the paid compensation for damage.

For a more comprehensive analysis of the character of liability, I will highlight that the notion of liability can spring from either sheer illegality or culpability, which consists of intent, negligence and gross negligence.⁷⁷⁸

⁷⁷⁷ Other cases in which there is an objective liability, i.e. there is no requirement of fault in a sense of culpability, are provided in the Law on obligations are to be found in Article 152 of this Law lays down that the parents are liable for the damage caused by their child who is no older than 7 years, regardless of his fault. Article 157 of the same Law provides that the employer is liable for the damaged caused by his employee in a course of the work or related to the work..., whereas Article 170 is associated with the liability of the organizer of public events.

⁷⁷⁸ About the nature of the State liability, which could be objective or subjective, see B. Blagojevic, and V.Krulj, *Comment on the Law on obligations* (First edn, Savremena Administracija 1983) 613-617. See also Dougan 2004 (n 20), 238 who refers to the ‘culpability criteria’; In the Introduction of J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law* (Wiley 1997), the authors maintain that certain elements of the notion of ‘fault’ were already catered in the criterion of ‘sufficiently serious breach’, whereas in Plaza 2010 (n 660), 39, the author elaborates the nature of State liability in Spain, which is of objective character, since there is no requirement of ‘sufficiently serious breach’, but rather a sheer ‘unlawfulness of the damage’. Apparently in the Spanish system the notion of

In the Macedonian legal system, this could be also inferred from Article 145 of the LO which provides that:

“There is a fault when the person that committed the damage made that intentionally or with negligence.”

“Regardless of the fault”, when the fault is conceived as ‘culpability’, implies that the State is held liable for the actions or omissions of its powers simply because they breached the law, without inquiring about the intensity of *culpa* (whether it was intent, negligence or gross negligence). In this case, the State is liable because of ‘sheer illegality’ committed by its bodies. Still, this is only so when the law explicitly provides for non-fault liability. The regular situation between individuals, prescribed by Article 141 (1), necessitates the existence of fault to bring about a right to compensation.

In other words, in Macedonia, “regardless of fault” means ‘regardless of *any* culpability’, which entails liability on the basis of ‘sheer illegality’.

It follows both from the case law and the scarce scholarly comments that the State is a “legal entity” and as such it is a legal subject. The State is held liable when the damage is caused by “its body”, namely the legislative, executive and judicial bodies.

In Macedonia, State liability is ‘exclusive’ in the sense that it is always the State as such which is liable for the damage inflicted by its organs and not the organ (legislative, administrative or judicial) itself that committed the illegal action or made the omission. It must be noted that the municipality is not one of the State powers in Macedonian law, but presents a separate legal entity. Since the municipality is also a legal entity, it may be held liable for the torts of its bodies.⁷⁷⁹ As will be demonstrated, there are certain specific provisions which stipulate that the action can be initiated only when ‘persons with public authorisations’ are responsible for the wrongdoing, rather than the State as such. These provisions, which are contained in the Law on enforcement of the Republic of Macedonia and in the Law on notary publics, stand alone in

‘fault’ is understood as ‘culpability’, thus, if there is no ‘culpa’ but a mere infringement of the law, the State can be held liable on the basis of objective liability.

⁷⁷⁹ According to Law on local self-government (Official Gazette of the RM N 5 of 29.01.2002) Art 3 para 2 provides that “Municipalities are legal entities”. This entails that they are legal entities in their own right and are not treated as part of the State, but as another legal entity.

the entire context of passive legitimation, i.e. in the context of the organ which can be sued. More in-depth reference to these provisions will be made later in this Chapter.

Although there is one action for compensation for damage against the State, there are three types of breach of law for compensation for damage against the State to arise, namely: wrongdoing by the legislator, wrongdoing by the administrative bodies and wrongdoing by the judicial bodies.

The different types of breach are in fact related to the actions and omissions committed by the corresponding public organs of the State.

In practice, only two types of breach of the law against the State have led to an action for compensation against the State so far, namely, a breach committed by the executive authorities and one committed by the judiciary.

Compensation for damage against the State in the Republic of Macedonia is a substantive right, rather than a remedy, as is the case in common law legal systems. Once it arises, it is enforced through the employment of procedural rules, commencing with the right to action against the State for compensation for damage.

Still, in order for the right to compensation to arise, several constitutive conditions must be fulfilled.

3.3 Constitutive conditions for the right to compensation for damage in the Republic of Macedonia

In this section, the conditions under which a right to compensation for damage against the State can arise will be scrutinised, in cases of a breach of both national and international law by different State bodies in Macedonia.

Following that analysis I will conclude whether the national substantive conditions are stricter or less strict than the EU law conditions for the right to compensation, and thus anticipate the problems which Macedonian judges might face in the application of EU law or, in case of more lenient conditions, demonstrate that the Macedonian substantive conditions are already in line with the EU law conditions.

From an EU law point of view, the national substantive or more appropriately 'constitutive' conditions which should be fulfilled for the right to compensation to arise are allowed to be less strict than those imposed by EU law.

For the sake of an easier comparison between the EU and national substantive conditions, it is necessary to reiterate the three conditions that exist under EU law: the existence of a 'right', a 'sufficiently serious breach of law' and a 'direct causal link' with the damage.

In the Macedonian legal system, the conditions which give rise to right to compensation are not expressly enumerated, but rather are inferred from the case law of the courts and the legal doctrine.⁷⁸⁰ In fact, what is required in Macedonian law for the right to compensation to arise is the existence of damage, the existence of harmful conduct and a causal link between the damage and harmful conduct.

The notion of damage is defined in Article 142 of the LO:

“Damage is the reduction [*diminution*] of one’s property (actual damage) and the prevention of accrual thereof (loss of earnings) as well as the infringement of subjective rights.”

Macedonian judges regularly refer to this provision in actions for compensation for damage. In fact, by determining that damage exists, Macedonian judges, founding their reasoning on the factual circumstances, infer that there is an infringement of a certain substantive right. Consequently, it follows that the infringement of a right is also required, as it is under EU law, although the starting considerations are different. What Macedonian judges assess is whether there is damage while the ‘EU judges’ inquire whether there is a breach of a substantive right.

For instance, in Macedonian legal proceedings the judges start by examining whether the damage was really inflicted on the plaintiff.

The damage may be material or immaterial under Macedonian law; the former is related to an infringement of property, whereas the latter to an infringement of other “substantive subjective” rights, the infringement of which the courts do not attempt to identify, but rather cite Article 189 of the LO, the content of which is explained below. With only the determination that the plaintiff is the owner of property that was destroyed and the claim is based on this destruction, the judge will conclude that the ‘right to property’ was breached and award compensation for real damage and if necessary also a loss of profits.

Still, when compensation for real damage is claimed, the judges refer to a breach of specific substantive rights, such as the ‘right to pledge’ or the ‘right to servitude’, although the starting point of examination is the existence of damage and not of a right. The existence of a breached substantive right seems to be implicit in the reference to the existence of damage. Therefore, it appears to be self-evident that if there is damage, there must be an ‘infringed right’.

One of the crucial factors in Macedonian law when awarding compensation is the existence of ‘damage’, without necessarily a determination of which ‘right’ is breached. This is illustrated in cases where

⁷⁸⁰ See Blagojevic et al (n 774).

compensation for immaterial damage is awarded where there has been a violation of a 'subjective' right. When awarding compensation for immaterial damage such as sustained emotional pain and/ or fear, the judges need to know whether and to what extent the plaintiff sustained damage. In these cases, they do not delve into an enquiry of which 'substantive subjective right' is breached. Rather, they cite Article 189 of the LO which is worded as follows:

“For physical and mental distress suffered due to impairment of normal life, deformity, injury to the reputation, the honour, the freedom or the rights of a person, or suffered due to the death of a close person or apprehension [fear], a court shall, if it finds that the circumstances of the case and particularly the extent of distress and apprehension [fear] justify it, decide on fair pecuniary compensation, as a separate compensation from that for physical damage or in its absence.”

In situations in which EU judges would find that, the 'right to health', for example, has been infringed and as a result damages should be awarded, Macedonian judges only find that there is “physical and mental distress suffered due to impairment of normal life, deformity” in order to award an immaterial damage, without mentioning the 'subjective' right that has been violated.

Regarding the second condition, namely the existence of 'harmful conduct', what Macedonian courts actually look for is whether the State authority committed an *unlawful/ illegal* act or omission, without diving into an assessment of whether that activity or omission was carried out with intent or negligence. The notion of 'fault' comprehended as 'culpability' is not a condition for the right to compensation to arise in Macedonian tort law when it comes to the State liability. This results therefore from the case law and underlines the objective nature of state liability in Macedonia.

The third condition of a 'causal link between the damage and illegal conduct' is in line with the EU law condition of 'direct causal link between the damage and the infringed right', since 'causal link' is less stringent than 'direct causal link' required in EU law. It is a well-established in the case law that States are allowed to have more lenient conditions.

So, briefly put, because the 'establishment of damage sustained' suffices as one of the national State liability conditions, Macedonian judges do not need to explore whether the EU law provision at issue confers rights or not.

The same is true with regard to the requirement of a 'sufficiently serious breach' imposed as an EU law liability requirement. The Macedonian condition that 'simple unlawfulness' is found, is less stringent than the requirement of 'sufficiently serious breach' and it will therefore apply.

As will be demonstrated from the case law of the Macedonian courts further on in this chapter⁷⁸¹, sheer illegality or unlawfulness suffices, whereas in EU law, as seen in the previous Chapter, the notion of ‘sufficiently serious breach’ contains elements of ‘fault’.⁷⁸²

Problems related to the EU law notions of ‘rights’ and ‘sufficiently serious breach’ could come to the fore only if one relies on these conditions because there is not sufficient protection offered by the national liability rules. Compared to EU law substantive conditions for the right to compensation against the State, Macedonian conditions are less strict and the liability of the State is of an objective nature. Consequently, at least in terms of constitutive conditions, Macedonian judges are not expected to encounter any serious problems.

11. Appropriate actions under Macedonian law that could potentially be used for EU law purposes

4.1 Introduction

In this section I intend to determine appropriate actions under Macedonian law to claim damages following a future breach of EU law. An analysis will be made of the manner in which Macedonian courts apply the substantive conditions for different heads of claim for State liability: breaches of ordinary national law, constitutional law and international law. An analysis of the types of breach of national (ordinary and constitutional) and international law is necessary to determine which of these actions for breaches by the legislative, administrative and judicial authorities would be considered as ‘appropriate’ to an action for compensation for damage against the State for a potential breach of EU law by the Macedonian authorities. This will reveal whether differences in application exist depending on the head of claim.

4.2 Appropriate actions in case of breaches committed by the legislator

In the previous Chapter we found that, in a number of Member States it has been difficult to establish State liability for a breach of the Constitution or international law by State legislators, and thus damages sustained on these grounds have only exceptionally been awarded by the courts.⁷⁸³ It is indisputable that State liability for legislative wrongdoing is a sensitive issue in most Member States. In certain countries

⁷⁸¹ See Chapter 5 Section 4.3 and 4.4.

⁷⁸² See also Lonbay et al 1997 (n 774), where the authors maintain that certain elements of the notion of ‘fault’ were already catered for in the criterion of ‘sufficiently serious breach’.

⁷⁸³ See Section 5 of Chapter 4.

this type of breach has even had to be created as new in order to satisfy the EU law requirement that all the three State authorities may be held liable for a breach of EU law.⁷⁸⁴ Since EU law clearly requires the possibility of State liability following a breach of the EU law by the Parliament of the Member State, it was necessary to propose appropriate national proceedings to ensure compensation for damage incurred.

Similarly, in Macedonia the breach by the Macedonian legislator (the Parliament of the Republic of Macedonia) is a sensitive and unexplored issue.

It may be underlined that, until now, neither a natural nor a legal person has ever relied on Article 158 jointly with Article 141 and 142 of the LO to claim damages against the State due to a legislative tort. Although a claim for compensation against the State for damage originating from the legislator's failure to comply with national law has never been invoked before the national courts, this does not mean that there is no appropriate legal basis for this type of claim or that it could not be invoked in the future. Yet, Article 158 LO provides a clear foundation for initiating this type of action against the State for violations caused by its administrative and judicial authorities only. Therefore it is questionable in how far it may also serve as a legal basis for actions for legislative torts.⁷⁸⁵

Considering that an action for compensation for damage due to a legislative wrongdoing has never been awarded to individuals in the Macedonia, it is first necessary to identify different scenarios which may lead to the introduction of such an action. In order to find an 'appropriate domestic action' which could serve as a basis for awarding damages in future cases of infringement of EU law by the Macedonian legislator, I will look into two possible avenues, one concerning the breach of national (constitutional) law and one concerning the breach of international law. While doing this, I will also examine the procedural conditions applicable to these proceedings in order to determine whether some of them breach the requirements of equivalence and effectiveness.

As was previously advanced, Macedonian courts' case law regarding compensation against the State, in the two existing types of breach committed by the administration and the judiciary, requires a mere 'illegality' of the act as one of the conditions that gives rise to the right to compensation. Consequently,

⁷⁸⁴ Ibid.

⁷⁸⁵ A provision enshrined in an article of the Constitution of Spain which was sufficient enough to serve as a legal basis for this type of head of claim, although pretty vague and general, could be an inspiration and justification for a provision of an article contained in a substantive law as the Law on Obligations of the Republic of Macedonia is. See Article 9.3 of the Spanish Constitution which provides that the Constitution ' [...] guarantees the principle of legality [...], the liability of public powers and the interdiction of arbitrary actions on the part of the latter'.

in the case of the legislature, the plaintiff would be required to prove the ‘unlawfulness’ of a certain Act of the Parliament of the Republic of Macedonia, which would in fact consist of proving its ‘unconstitutionality’. In the case of the Parliament, that breach could be made in respect of a higher source of law, such as the Constitution.

Breach of the Constitution

The ‘unconstitutionality’ of an Act of Parliament is necessary to consider that there has been a breach of national law by the Parliament. This ensues from the fact that the Macedonian Constitution is the highest source of national law and an assessment of a wrongdoing of the Parliament is only possible by gauging the compatibility of its action with the Constitution. Just a remark on the scope of this section: as it is dedicated to breaches of the Constitution, it will not address the adjacent issue of breaches of international agreements.

As a matter of principle, a declaration of unconstitutionality of law by the Constitutional Court of the Republic of Macedonia would thus suffice as evidence of the fulfilment of one of the substantive conditions required under domestic law: the requirement of ‘unlawfulness of the act’. Indeed, such a declaration of unconstitutionality by the Constitutional Court is indispensable for the award of damages by the ordinary courts.

With regard to the issue of unconstitutionality, the relevant Rules of Procedure of the Constitutional Court apply.⁷⁸⁶ When the unconstitutionality of an Act of the Parliament is questioned, the ordinary court may stay the proceedings and refer to the Constitutional Court concerning the issue of incompatibility of the Act with the Constitution.⁷⁸⁷ The competent court before which the proceedings are initiated cannot declare a provision unconstitutional by itself, nor can it apply the Constitution instead of the Act of the Parliament if the constitutional provisions are not directly effective. This can only be done by the Constitutional Court.

⁷⁸⁶ According to Article 113 of the Constitution of the Republic of Macedonia: “The manner of work and the procedure in front of the Constitutional Court are regulated with an act of the Court.”

⁷⁸⁷ See Article 18, para 1 and 2 of Law on courts of the Republic of Macedonia, which states that:

(1) The court shall raise an initiative for instituting a procedure for assessing the constitutional compliance of a law when its compliance with the Constitution is questioned, whereof it shall inform immediately the higher court and the Supreme Court of Republic of Macedonia.

(2) When the court deems that the law that is to be applied in the specific case is not in compliance with the Constitution, and the constitutional provisions cannot be applied directly, it shall suspend the procedure pending the decision of the Constitutional Court of the Republic of Macedonia.

This follows from Article 18, paragraphs 1 and 2 of the Law on courts of the Republic of Macedonia that was elaborated previously in section 2.2.

Although there is a possibility for the ordinary court to stay the proceedings and refer the issue of constitutionality of an Act to the Constitutional Court, this has never been exercised by the courts in Macedonia. Normally, it is the citizens who question the constitutionality of a law in front of the Constitutional Court.

Article 112 of the Constitution concerns the effects of a Constitutional Court decision declaring a law unconstitutional. The law may be repealed with effect *ex nunc* but may also be invalidated or declared null, producing effect *ex tunc*. Article 112 provides that:

“The Constitutional Court shall repeal or invalidate a law if it determines that the law does not conform to the Constitution”.

Since the unconstitutionality of a law can be declared solely by the Constitutional Court of the Republic of Macedonia, it is necessary to delve into an analysis of the relevant Articles of the Rules of Procedure of the Constitutional Court which serve as a basis for repealing and invalidating of a law. Scrutiny of these provisions reveals the potential impediments to an award of compensation for damage due to legislative wrongdoing, not only with respect to national law following a breach of the Constitution, but also and more importantly in view of a potential breach of EU law. This analysis will be made since the CJEU states in its case law that an action for damages alleging a breach of EU law may be regarded as similar to an action that the plaintiff could bring on the basis of a possible breach of the Constitution.⁷⁸⁸

What follows is a separate appraisal of each of the two relevant Articles from the Rules of Procedure, Articles 80 and 81, in order to conclude whether their usage could serve EU law purposes for awarding compensation for damage sustained due to wrongdoing on the part of the legislator.

Article 80 of the Rules of Procedure deals with repealing law, while Article 81 refers to its annulment.

According to Article 73 of the Rules of Procedure,

“When deciding whether the law, the regulation or the general act will be annulled or repealed, the Constitutional Court will take into consideration all the circumstances which are of relevance for the protection of constitutionality and legality and in particular the weight of the infringement, its nature and its significance for the enforcement of rights and freedoms of the citizens or the relations which were

⁷⁸⁸ See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39 , para 45.

established on the basis of these acts, legal security and other circumstances of the relevance for adopting a decision.”

Article 80 of Rules of Procedure No. 70/1992 of 14 November 1992 of the Constitutional Court of the Republic of Macedonia reads:

“The enforcement of the final individual acts adopted on the basis of a law, regulation or any other act of general application which has been repealed with a decision of the Court cannot be permitted nor carried out, whereas in those cases in which the enforcement has commenced, it will be ceased.”

The provision above refers to the legal destiny of individual acts adopted on the basis of a repealed law, but says nothing about the possibility to claim compensation for damage against the State due to the adoption of the law by the legislator.

One of the reasons for the impossibility to institute an action against the State for damage sustained as a result of an act adopted on the basis of a repealed law is the effect of a repealed law. In fact, when the effect of the law which is declared as unconstitutional is *ex nunc*, the actions or omissions made on the basis of the unconstitutional law by any of the State powers must be considered as lawful until the moment the declaration of their unconstitutionality is published in the Official Gazette of the Republic of Macedonia.

Another problem with this Article from an EU law angle is the fact that its provision is worded with an assumption or better, a requirement, that there is a final individual act. There is no reference to a situation in which there is no individual act on the basis of which the damage is inflicted, as it would be, for instance, in a case of damage sustained on the grounds of a law which was repealed by the Constitutional Court.

If an action against the State for compensation for damage due to the Assembly’s breach of the Constitution is taken as ‘appropriate’ to an action for compensation for damage from an infringement of EU law by the Macedonian Parliament in a case where the law is repealed,⁷⁸⁹ there will be no basis for claiming and obtaining damages from the State due to its breach of EU law.

⁷⁸⁹ When the law is ‘repealed’, i.e. the effect of the declaration of the Constitutional Court is *ex nunc*, it follows that the individual acts adopted on the basis of the repealed law were (until the moment of declaration of unconstitutionality) lawful. Consequently, a plaintiff in this case cannot claim compensation for damage sustained due to an unlawful act, since that act was lawful.

This possibility is clearly at odds with the EU law requirement that if EU law is breached by the Assembly and all the substantive/ constitutive conditions are satisfied, compensation must be awarded to the plaintiff.

However, there is another possible avenue, namely Article 81 of the Rules of Procedure, which covers cases where a plaintiff seeks to remedy damage he sustained due to an *annulled* law. Even though “compensation for damage” is mentioned in this provision, there are a variety of problems which could ensue from the application of this provision for EU law purposes. These issues will be clarified following the citation of the Article.

Article 81 of the Rules of Procedure No. 70/1992 of 14.11.1992 of the Constitutional Court of the Republic of Macedonia lays down that:

“Every person, whose right is breached with a final act adopted on the basis of a law, regulation or any other act of general application which has been annulled with a decision of the Court, has a right to request from the competent authority to annul the individual act within a period of 6 months of the day of publication of the decision of the Court in the Official Gazette of the Republic of Macedonia”.

If, with the rectification of the individual act according to paragraph 1 of this Article, consequences flowing from the application of the law, regulation or other act of general application which was annulled with a decision of the Constitutional Court could not be removed, the Court may decide that the consequences are to be removed by restoring the condition that existed prior to the causing of the damage, by the awarding of compensation for damage or in some other manner.

The enforcement of the final individual acts adopted on the basis of a law, regulation or any other act of general application which has been annulled with a decision of the Court cannot be permitted nor carried out, whereas in those cases in which the enforcement has commenced, it will be ceased.

The legal effect of the Court’s decision annulling the law (the effect *ex tunc*) has for its purpose not only the elimination of the unconstitutional or illegal normative act from the legal order, but also the possibility for the annulment of the individual acts adopted on its basis. This retroactive effect of the Court’s annulment decision depends on the presentation of the legal interest of the subjects for the amendment of the individual acts within a period of six months following the date of publication of the Court’s decision, while the authority which adopted the individual act is obliged to amend it.⁷⁹⁰

⁷⁹⁰ “Types of legal effect of the decision of the Constitutional Court of the Republic of Macedonia”, See <http://www.ustavensud.mk/domino/WEBSUD.nsf>

A plaintiff who has suffered damage due to the effects of an individual act adopted on the basis of a law which has been annulled, has several options to remedy the loss. I will analyse these options on the basis of the available legal provisions in the Macedonian legal order only, since there is no case law, due to the fact that an action for compensation for damage against the State for legislative wrongdoing has never been initiated.

In Article 81 quoted above, the ‘competent authority’ may be an administrative body, a court (civil, administrative or criminal) or any other private or public body which adopted the individual act. If the applicant considers that the redress is insufficient, he can initiate an action against the State for compensation for the legislative wrongdoing before the competent court within a period of three years from the date he found out about the damage.⁷⁹¹

For the sake of illustration, an individual may suffer the loss of a certain amount of money which he was required to pay according to an administrative act. The individual then challenges the decision of the competent organ (administrative act or judicial act) within six months of the declaration of unconstitutionality of the law on which that decision was founded, the decision is annulled and the illegally levied amount of money is refunded to the individual, however, without interest or additional costs such as procedural costs. In this case, he can subsequently lodge an action for compensation against the State for damage due to the legislative wrongdoing, in order to fully remedy the loss suffered.

From an EU law point of view, in this kind of situation, a number of problems may be identified.

The award of compensation from the State resulting from an infringement of the Constitution of the Republic of Macedonia is plausible only in its capacity as a complementary (alternative) remedy. This implies that it can be claimed before the national courts only in cases in which the plaintiff considers that ‘the annulment of the individual act’ by the competent authority, claimed within a period of six months from the day of publication of the decisions of the Court in the Official Gazette of the Republic of Macedonia, has not succeeded in fully remedying the breach.

As an example, and to demonstrate that the abstract request for the assessment of constitutionality under Macedonian law is indeed applied and used in practice, I now discuss the following situation. A female employee contends that she was fired by her employer on grounds of sex. Her dismissal by the employer was made by an individual act by the employer (in this case an administrative organ) on the basis of a labour law adopted by the Parliament of the Republic of Macedonia, according to which a pregnant

⁷⁹¹ See Art. 365 para 1 of the Law on Obligations of the Republic of Macedonia.

woman is obliged to inform her employer of her pregnancy within a period of two months. Failure to fulfil this obligation is grounds for dismissal for the female employee.

Because the employee did not inform her employer about her pregnancy, the employer dismissed her by a decision based on this law. The applicant considered this act to be discriminatory, i.e. contrary to the constitutional right of equality between men and women.

Convinced that her dismissal was contrary to the Constitution of Macedonia, she initiates an action for a declaration of unconstitutionality of the law before the Constitutional Court.

Following the annulment of the law by the Constitutional Court she claims, on the basis of Article 81 of the Rules of Procedure, an annulment of the judicial decision confirming the final administrative act (the employer is an administrative organ) within a period of six months from the day of publication of the decisions of the Court in the Official Gazette of the Republic of Macedonia.

The annulment of the individual act (the final judicial decision) requires the annulment of the final administrative act according to which she has been fired. The plaintiff will be reposted but she may claim additional damages from the State due to the legislative wrong which led to the adoption of individual acts by the administrative organ and the judiciary. However, the plaintiff may not be willing to sue the State for the adoption by the legislature of an unconstitutional law, since she could be satisfied already with the annulment of the individual act and her reinstatement.

Another problem with this type of proceedings, although not insurmountable, lies in the fact that there might not be an individual act on the basis of which the damage was sustained, but rather the damage to an individual or a number of individuals is inflicted by a law.

The same disadvantage that occurred in Article 80 of the Rules of Procedure occurs here as well. There is no possibility for the plaintiff to claim compensation for damage against the State for legislative wrongdoing if there is no individual act under this type of proceedings, which means that a plaintiff cannot claim compensation for damage sustained solely as a result of an annulled law.

The issue arises also with regard to paragraph 2 of Article 81 of the Rules of Procedure of the Constitutional Court which is not very fortunately worded:

“If, with the rectification of the individual act according to paragraph 1 of this Article, consequences flowing from the application of the law, regulation or other act of general application which was annulled with a decision of the Constitutional Court, could not be removed, the Court may decide that the

consequences are to be removed by restoring the condition that existed prior to the causing of the damage, by the awarding of a compensation for damage or in some other manner.”

This seems to indicate an interpretation that in a case of insufficient remedying of the situation by the annulment of the individual acts, it will always be the Constitutional Court that will award compensation for damage. It is hardly imaginable that the Constitutional Court would have the capacity to rule whether and to what extent an additional award of compensation for damage is needed for hundreds or thousands of individual acts that were annulled by the competent authority. In fact, the real problem ensues not from the unrealistic award of damage to a huge number of plaintiffs by the Constitutional Court, but rather from the fact that from an EU law perspective, ordinary courts should be competent to adjudicate on this issue.

It follows from the arguments above that an action for compensation against the State ensuing from the legislature’s breach of the Constitution is only partly appropriate as an action for compensation for damage due to a prospective breach of EU law by the Macedonian Parliament.

Considering this finding, it remains to be examined whether another action for compensation for damage under the national law could be regarded as similar and appropriate for EU law purposes.

Thus, an attempt will be made to compare an action for compensation for damage against the State due to a breach of international law in order to find out whether it can be treated as a similar to a State liability action based on EU law.

More specifically, I will appraise the effect of the ECtHR rulings on the Macedonian legal system in order to conclude whether an action for compensation for damage against the State following a ruling of the ECtHR could be considered as similar to such an action following a ruling of the CJEU.

Compensation for breaches of the ECHR

An action for compensation for damage could be initiated before the Macedonian courts following a ruling of the ECtHR which establishes that some of the State authorities have failed to fulfil their obligations under the ECHR. This kind of action can be initiated only if the plaintiff considers that a retrial by the national court on the basis of a ruling of the ECtHR is not reasonable and the compensation from the State remains the only way to remedy the violated ECHR right.

It may be emphasised that a retrial by the national court as an extraordinary legal remedy following a judgment delivered by the ECtHR was inserted in the Law on administrative disputes of the Republic of

Macedonia⁷⁹², the Law on criminal procedure of the Republic of Macedonia⁷⁹³ and the Law on litigation of the Republic of Macedonia⁷⁹⁴.

In the majority of the cases before the ECtHR, Macedonian applicants were claiming compensation for damage resulting from a breach by Macedonian courts of Article 6 of the ECHR. Judicial procedures were excessively long and as a result of the ECtHR's establishment of a breach of this Article, they were receiving a certain pecuniary compensation for immaterial damage by the ECtHR.

In these cases, the applicants could have claimed before the ordinary courts compensation from the State for material damage, not only from judicial actions or omissions but also from the wrongdoing of the legislature, since, as will be demonstrated, the ECtHR points to failures and deficiencies in the national laws which led to that unfavourable outcome. Nevertheless, no plaintiff has ever initiated proceedings for compensation for damage against the State due to a *legislative* wrong established within a judgment of the ECtHR. Neither has an action for compensation for damage been initiated for a *judicial* wrongdoing, although it could have been. Still, this will be addressed in the section related to the possibility to sue the State for judicial errors.

⁷⁹² Article 43, alinea 7 of the Law on administrative disputes (Official Gazette of the Republic of Macedonia N. 62 from 22.05. 2006), prescribes that: "The procedure terminated with verdict or a determination shall be repeated: - upon a request of upon a decision of the European Court of Human Rights."

⁷⁹³ Article 449 Para 1 alinea 6 of the Law on the Criminal Procedure Law (Official Gazette No. 150 from 18 November 2010) provides that: Any criminal procedure that ended with a judgment that entered into effect may be repeated in favor of the convicted person in the following situations: 6) If the European Court of Human Rights establishes with a decision that has entered into effect, any violations of the human rights and fundamental freedoms during the procedure.

⁷⁹⁴ Article 400 of the Law on litigation procedure of the Republic of Macedonia lays down that: "(1) When the European Court of Human Rights confirms violation of certain human right or of the fundamental freedoms anticipated in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, ratified by the Republic of Macedonia, the party can, in a period of 30 days as of the final verdict of the European Court of Human Rights, file a request to the court in the Republic of Macedonia, having tried in the first instance in the procedure wherefore the decision violating some human right or fundamental freedom is adopted, to amend the decision violating such right or fundamental freedom; (2) The provisions on repeating the procedure shall accordingly apply to the procedure referred to in paragraph (1) of this Article; (3) In the repeating of the procedure the courts shall be obliged to obey the legal opinions stated in the final verdict of the European Court of Human Rights confirming the violation of the fundamental human rights and freedoms."

At this stage I would like to refer to several ECtHR rulings, which could have been a basis for the initiation of proceedings against the State due to legislative omissions, if a retrial before the national courts following an ECtHR judgment would have been unreasonable and the immaterial damage awarded by the ECtHR was insufficient.

However, it is first necessary to consider what the probability is for an individual to initiate an action for compensation for damage against the State due to a legislative wrong with regard to the ECHR.

In the case of *Krsto Nikolov v. the “Former Yugoslav Republic of Macedonia”*, no. 13904/02, § ..., 23 October 2008, the ECtHR established breaches of Article 6 paragraph 1 and Article 13 of the ECHR. The proceedings before the national courts related to the enforcement of a judicial decision and lasted a total of 19 years without being completed. In its reasoning the ECtHR found that there were a number of delays in the hearings over long temporal intervals. Clearly, the ECtHR was underlining the failure of the legal system of the Republic of Macedonia to allow the judges to guarantee to everyone the right to receive a final judicial decision related to citizens’ rights and obligations within a reasonable time.

In another case before the ECtHR, *Dimitrievski v. the “Former Yugoslav Republic of Macedonia”*, no. 26602/02, § ..., 18 December 2008, the ECtHR found that Article 6 paragraph 1 ECHR was breached because of the conduct of the national courts which were dealing with an action introduced by Mr. Dimitrievski who sued the Author Rights Agency. The proceedings lasted 7 years. The ECtHR found that these significant delays in the proceedings could be ascribed to the domestic authorities. Here, the ECtHR underscores the weakness of the State’s legal system as such, without specifically emphasising which of the State authorities committed the infringement.

In the cases *Velova*⁷⁹⁵ and *Gjozev*⁷⁹⁶, references to the failures of the Assembly as such are even more precise, where “serious deficiencies of the legal system” are underlined.

In *Gjozev* the ECtHR even states that:

“Although the Court is not in a position to analyse the quality of the decisions of the domestic courts, it considers that, since the remittal of cases for re-examination is usually ordered as a result of errors committed by lower courts, the repetition of such orders within one set of proceedings may disclose a serious deficiency in the judicial system.

⁷⁹⁵ *Velova v. “the former Yugoslav Republic of Macedonia”*, no. 29029/03, 6 November 2008.

⁷⁹⁶ *Gjozev v. “the former Yugoslav Republic of Macedonia”*, no. 14260/03, 19 June 2008.

In this context, the Court recalls that it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes relating to civil rights and obligations within a reasonable time." (Paragraph 51)

In these latter cases the real problems, which, according to the Strasbourg Court, had been caused by the legislature, led to the inflicting of damage on the plaintiff, who, in spite of this, had not introduced an action for compensation against the State based on a legislative wrong. Usually, if not always, the ECtHR awards a certain amount of immaterial damage in cases of a breach of Article 6 ECHR. It is however intriguing why no plaintiff has ever initiated an action for compensation for damage against the State due to the legislature's failure or a judicial wrongdoing. The material damage claimed from the Macedonian courts for exceedingly long judicial procedures can include court costs, lawyer's costs and expert's fees, which are almost never awarded by the ECtHR due to lack of proof that these expenses were really made.⁷⁹⁷

On the basis of these cases one may conclude that compensation from the State for damage due to a legislative breach of the ECHR has never been awarded nor claimed. On the other hand, it is not *per se* excluded neither.

Would this be an appropriate avenue for legislative wrongdoings pertaining to EU law? In this respect, I would like to underline that a retrial by the national court due to a breach of an ECHR right and the retrial of an individual right contained in the corpus of EU law can be regarded as adequate.⁷⁹⁸

Nevertheless, according to the case XC, YB and ZA, explained below in section 5.7, these two actions could not be considered as similar.

Compensation for damage against the State following a ruling of the ECtHR is possible if the plaintiff considers that a retrial is not reasonable. This can happen, for example, where there has been a breach of Article 6 ECHR or where a right to property (Article 1 Protocol 1 of the ECHR) has been breached and it

⁷⁹⁷ Case Gjozev v. "the former Yugoslav Republic of Macedonia", no. 14260/03, 19 June 2008, paras 58-60; Case Pecevi v "the former Yugoslav Republic of Macedonia", no. 21839/03, 6 November 2008, paras 38, 39, 42; Case Parizov v. "the former Yugoslav Republic of Macedonia", no. 14258/03, 7 February 2008, paras 68, 71-72.

⁷⁹⁸ This argument is advanced by Kornezov who considers the similarity between the actions of retrial on the basis of their purpose (to remedy a violation of an individual right) and essential characteristics, the fact that a retrial would allow compliance with a rule stemming from an external legal order and as well as the fact that in both cases, the breach would be established by a supranational court, whose judgments are binding on the Member States. See Kornezov 2014 (n 725), 836.

is impossible to restore the previous state. Only in these cases would an action for compensation based on a ruling of the ECtHR be probable. If a CJEU ruling is accepted as grounds for retrial, then compensation for damage due to a legislative tort will either have a complementary character, if the retrial is insufficient to compensate the damaged party, or a subsidiary character, if the retrial does not make any sense.

It is true that an action for compensation for damage against the State was first invented in the *Francovich* case as a residual (subsidiary) remedy⁷⁹⁹ since the other techniques of direct effect and consistent interpretation were not possible, but it is also critical to recall that in *Brasserie du pecheur* and *Maso and Bonifaci*, an action for compensation for damage against the State due to a legislative wrong gained a status of complementary (alternative) remedy, when the remedying of the violated right with some other means was either unreasonable or insufficient.

It follows that neither of the actions advanced above, be it an action for compensation based on a legislative wrongdoing which has been established with a declaration for unconstitutionality of a law delivered by the Constitutional Court, or an action based on a legislative wrongdoing which is found to exist following a ruling of the ECtHR, seem to be entirely appropriate while adjudicating in the context of EU law.

The first action could be regarded as appropriate, since in *Transportes Urbanos* case, it was treated as a ‘similar’ action.⁸⁰⁰ However, there are arguments against treating this action as ‘appropriate’ for EU law purposes under the Macedonian law.

It was underlined that in the absence of an individual act which inflicted the damage, it is impossible for the plaintiff to follow this action successfully. This holds true for an action under Article 80 and under Article 81 of the Rules of Procedure. However, this does not mean that the plaintiff(s) will remain without compensation for damage suffered due to an unconstitutional law. In these situations, where there are no individual acts, but the damage follows from the law as such, the plaintiffs may initiate an action for compensation before the ordinary courts, by invoking Article 141 jointly with Article 158 and Article 142 of the Law on obligations of the Republic of Macedonia.⁸⁰¹ Since these Articles apply to breaches made

⁷⁹⁹ See Chapter 4.2 for an explanation of State liability as a subsidiary remedy, and for more detail, see Prechal 1995 (n 34), 301-302.

⁸⁰⁰ See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39 , para 45.

⁸⁰¹ Law on obligations of the Republic of Macedonia No 18/2001 of 05.03.2001 (Official Gazette N. 18/2001 from 05.03.2001...2009).

by the administrative and judicial organs, there is no reason for them not to apply to infringements made by the Parliament. Consequently, the plaintiffs will retain their protection, but it won't be from Article 81.

As was stated previously, the main argument against the appropriateness of this action for EU law sake is the fact that in this action, it should be the ordinary courts rather than the Constitutional Court that should be competent to award compensation for damage resulting from a breach of EU law. Another difficulty arises from the fact that compensation for damage due to a legislative wrong vis-à-vis the Constitution has never been invoked to date, which further complicates the manner in which this action could be used for EU law purposes.

The second action for compensation for damage against the State, which can take place only after a ruling of the CJEU is delivered, will require a legislative insertion of these grounds as separate grounds for retrial. Requiring this, would be contrary to direct effect and supremacy.

In addition, an action for compensation for damage due to the legislative wrongdoing concerning the ECHR has never been invoked either. This leads us to believe that the probability is very low that an action is brought for compensation for damage due to a breach of EU law by the Parliament of Macedonia in a case in which a judgment by the CJEU is inserted as grounds for retrial.

In any event, the proposed actions seem to be only partly appropriate for comparison to an EU law action for compensation for damage against the State due to a legislative wrong.

Besides, compensation for damage caused by the legislator to the damaged party has never been awarded in either of these situations (a breach of the Constitution or a breach of the ECHR). This fact seriously casts doubts on the probability that the national courts will award damages on the grounds of a breach of EU law. Finding an appropriate action will certainly be a challenge for Macedonian judges in the future. Nevertheless, since the CJEU requires that compensation for damage must be available to the plaintiffs if the Macedonian Parliament breaches the EU law, a certain solution needs to be proposed.

4.3 Appropriate actions in case of breaches committed by the administrative organs

Regarding the head of claim of State liability concerned with wrongdoings committed by the Macedonian administrative authorities vis-à-vis national law obligations, the case law of the Macedonian courts is much more abundant than for the other two types of claim.

Article 158 together with Articles 141 and 142 of the LO jointly provide the legal basis for claiming compensation for damage due to the wrongdoings made by Macedonian administrative authorities. The passive legitimation in these cases has never been brought into question. It is always the Republic of

Macedonia that is sued, and the right to compensation for damage arises if the claim is brought by an entitled person in the time limit provided under Article 365 LO, provided there is damage, harmful conduct and a causal link between the action or lack thereof and the damage suffered by the plaintiff.

It suffices for the court to award compensation if there is a sheer ‘illegality’ of the act adopted by the executive authorities. ‘Intent’ or ‘purpose’ when adopting the acts or refraining from their adoption has never been examined by the Macedonian courts. It suffices to determine that the competent administrative authority performed the activities ‘illegally’, contrary to the law or any other code of conduct applicable to it. What the court appraises is whether the administrative organ held to be liable for the damage carried out its obligations in accordance with the law and other acts to which it is subject.

For the sake of illustration, in case No. 106/05 of 7 September 2005, the Supreme Court of the Republic of Macedonia was adjudicating on an appeal on a point of law, in proceedings initiated by 82 plaintiffs (individuals) against the Republic of Macedonia. The action consisted of claiming compensation for damage inflicted by a wrongdoing of the Macedonian Ministry of defence.

The plaintiffs, military reservists in the Army of Republic of Macedonia, were engaged in the 2001 military conflict between the Republic of Macedonia and illegal terrorist groups. They were being transported by the Macedonian Army from the city of Prilep to the city of Tetovo in two civilian buses. These buses were preceded by another vehicle in order to provide traffic security but not military security to the reservists. The buses were followed by a vehicle loaded with weapons and ammunition. The superior officer of the reservists was in a vehicle at the end of the column. In the municipality of Karpalak on the road between Skopje and Tetovo, the column with reservists was suddenly attacked by an armed terrorist group. The vehicle loaded with weapons and ammunition was also attacked.

The plaintiffs in the proceedings suffered fear and emotional pain which incited them to bring an action for compensation from the State. The plaintiffs claimed that they would not have suffered the fear and pain had the Ministry of defence, through its superiors, observed the previously given orders in respect of the security of the transport of the plaintiffs.

The Basic and the Appellate court upheld the action, finding that there were violations of the internal code of the Macedonian Army. Financial compensation was awarded to the plaintiffs. The Supreme Court upheld the judgments of the lower instance courts and dismissed the appeal on a point of law initiated by the Republic as unfounded. This illustrates the willingness of the courts to award damages when administrative organs breach the law.

In another case, No. 268/2008 from 5 September 2009, the Supreme Court adjudicated on an appeal on a point of law submitted by the plaintiff S.K. from the city of Gostivar against the Republic of Macedonia. The plaintiff claimed compensation for damage sustained as a result of an illegal activity of the Ministry of finance's Public Revenue Office. Allegedly, the illegal activity of the defendant consisted in the submission of an application to initiate a bankruptcy procedure for the firm in which the plaintiff was working. The plaintiff contended that the defendant should not have submitted this application for a bankruptcy procedure since he sustained damage from that procedure. The lower instance courts dismissed the action as unfounded and held that the defendant, the Public Revenue Office, had worked in the framework of its competences and that the introduction of the application for a bankruptcy procedure had been in accordance with the law, and the bankruptcy procedure itself was also conducted legally.

These findings of the lower instance courts were upheld by the Supreme Court and the appeal on a point of law was dismissed, since the conduct of the Public Revenue Office had been in accordance with the Law on bankruptcy. There had been no illegal behaviour and consequently the Ministry of finance, i.e. the State, was not found to be liable for damage.

Although the outcome of the case might not support the finding that the courts easily award damages when the wrongdoing is made by the administrative organs, my intention in including this example was to demonstrate the manner in which the courts appraise whether the law was breached or not. If they find illegal behaviour on the part of the administration, jointly with the other substantive conditions, they will certainly award the compensation without requiring a fault.

We can conclude from these cases, involving breaches of national law by the administrative authorities, that in an envisaged parallel application to EU law (i.e. in cases in which an action for compensation for damage against the State due to administrative wrongdoing is initiated on grounds of breach of EU law), there will be no problems for the redress to be awarded if pure illegality is determined. This follows from the relatively mild test which Macedonian courts apply in national cases concerning the application of constitutive conditions. The most remarkable and perhaps the most difficult condition to be satisfied which arises in all cases of breach of EU law, whether the perpetrator is the legislative, administrative or judicial authority, is the issue of 'sufficiently serious breach of law', which in Macedonian system has reduced to a simple requirement of 'unlawfulness' or 'sheer illegality'. In fact, this EU law condition, or a condition which is similar to it, does not play a role as a matter of Macedonian law since in the Macedonian system, the simple requirement of unlawfulness suffices.

In my opinion, national actions for damage due to administrative wrongs can be considered as appropriate for the purposes of EU law.

Concerning the outcome of actions for compensation for damage brought against the State for the torts of the administrative bodies in view of international law, the case of *Makpetrol* which was mentioned earlier in this Chapter, demonstrates that Macedonian courts are willing to award compensation for damage sustained by a legal person when caused by a breach of an international agreement by an administrative body. As stems from the judgment in this case, pure ‘illegality’ sufficed for the compensation to be awarded by the Supreme Court of the Republic of Macedonia.

For EU law purposes, an envisaged breach of EU law obligations by the administrative authorities of the Republic of Macedonia could easily be remedied by awarding compensation for damage against the State for the administrative wrongdoing by following the similarity to any of the previously proposed actions for compensation. In both cases which concerned the breach of a higher source of law by the executive authorities, be it an Act or an international agreement, the ordinary courts were willing to award compensation to the plaintiff by the simple requirement that there existed damage, illegal behaviour and a direct causal link. These conditions, as stated, are more lenient than the EU law conditions relating to the award of compensation for damage against the State and are therefore acceptable.

4.4 Appropriate actions in cases of a breach committed by the judiciary

As the issue of breaches on the part of the Assembly and the administrative organs was treated both with regard to national and international law in order to discern an ‘appropriate’ action for a breach of EU law, the same approach will be applied for breaches made by the judiciary.

Articles 158, 141 and 142 LO provide the legal basis for claiming compensation for damage resulting from wrongdoing by the judicial authorities of the Republic of Macedonia. The conditions which need to be fulfilled are the same as with administrative bodies.

It is always the State itself that is sued (passive legitimation), although the illegality pleaded is on the part of the court (an erroneous application of the law).

Case law of the Macedonian courts in this respect is very scarce. Up until 2016, there have been only five cases in which an action for compensation of damage against the State for the actions or omissions of the judiciary has been brought before Macedonian courts, but no redress was awarded to the plaintiffs, since the courts competent to hear the dispute found that their colleagues had adjudicated lawfully.⁸⁰²

⁸⁰² Пресуда ГЖ. Бр. – 2645/10 од 08. 07. 2010 година од Апелациониот суд Скопје [Judgment N. 2645/10 of 8 July 2010 of the Appellate Court Skopje of the Republic of Macedonia]; Пресуда ГЖ. Бр. –547/11 од 08.04. 2011 година од Апелациониот суд во Штип [Judgment N. 547/11 of 8 April 2011 of the Appellate Court Stip of the

Macedonia does have experience in liability for court decisions in Ruling No 2645/10 of 8 July 2010, delivered by the Appellate court in Skopje. The plaintiff, S.N from the city of Kocani, initiated an action for compensation against the Republic of Macedonia, for immaterial damage suffered as a result of an illegal activity of the courts in Kocani and Stip.

The court in Kocani sentenced the plaintiff to two months imprisonment after finding that he had committed a crime, namely offending the court, according to Article 180 of the Criminal Code of the Republic of Macedonia.⁸⁰³ Following this, the plaintiff introduced an action for damage before the court in Stip, claiming that the ruling which had sentenced him to imprisonment had tainted his reputation and honour. The action for damage against the State due to the court's illegal conduct was dismissed as unfounded by the Appellate Court in Skopje, which found that the judgments of the lower courts on the basis of which he was sentenced to jail had been delivered in accordance with the law, therefore the courts could not be held liable. The plaintiff was not awarded compensation for damage from the State.

Thus, the competent court adjudicating the case for compensation for damage against the State has to assess whether some of his colleagues, i.e. the judges that were involved in the primary proceedings, delivered a judgment which breached the law and inflicted damage on the individual.⁸⁰⁴

Republic of Macedonia]; Рев бр 372/2007 од 30. 04. 2008 година на Врховниот суд на РМ [Appeal on points of law N 372/2007 from 30. 04. 2008 of the Supreme Court of the Republic of Macedonia]; Рев бр 472/2008 од 25. 02. 2009 година на Врховниот суд на РМ [Appeal on points of law N 472/2008 from 25. 02. 2009 of the Supreme Court of the Republic of Macedonia]; Рев бр 705/ 2008 од 26. 06. 2008 година на Врховниот суд на РМ [Appeal on points of law N 705/ 2008 from 26. 06. 2008 of the Supreme Court of the Republic of Macedonia].

⁸⁰³ Article 180 of the Criminal Code of the Republic of Macedonia (Official Gazette from 2009 year) provides that: "A person who in a procedure before the court ridicules the court, the judge or the jury-judge, or who commits this in a written submitted paper to the court, shall be punished with a fine, or with imprisonment of up to one year."

⁸⁰⁴ There are two other Articles concerning the liability of the State for compensation for damage committed by judge or lay judge contained in the Law on courts, which is in fact *lex specialis*, and which provides that it is the State as such against which the action for compensation is to be brought and not against the judges. These articles are Article 69 and Article 70 of the Law on courts of the Republic of Macedonia They clearly exclude the possibility of suing a judge. It is always the State which is considered liable, due to the illegal activities of the judge and the action for compensation for damage sustained as a result of judicial wrongdoing is to be initiated against the State.

In this sense, the judges are protected, i.e., their personal independence is not brought in issue.

Article 69 of the Law on courts of the Republic of Macedonia provides that: "A procedure for compensation for damage or another procedure cannot be conducted against a judge or a lay judge by a party that is not satisfied with the decision of the judge." Article 70 of the same Law, reads as follows: (1) The Republic of Macedonia shall be

There has, as yet, never been a case in which an action for damages against the State due to the wrongdoing of the Supreme Court was initiated in front of the ordinary court/court of first instance and consequently it is not known how would this court adjudicate in case of an alleged illegal behaviour of the judges from the Supreme Court. It is even more questionable how would these lower courts react to the infringement of EU law in future by the Highest court of the state.

Apart from the introduction of these five actions for compensation for damage from a judicial error, all of which finished unfavourably for the plaintiffs, there are also three other types of proceedings against the State for judicial failure which, although they can be initiated, have never been used so far.

One of these is proceedings which can be initiated when a law has been annulled by the Constitutional Court. In this case a damaged party could claim the annulment of an individual act by the competent authority that adopted the act on the basis of the annulled law, within a period of six months from the publication of the Constitutional Court decision in the Official Gazette.

This situation was discussed above in the context of State liability for legislative wrongdoing. However, in this kind of situation, ‘the competent authority’ which is obliged to annul its own act adopted on the basis of the annulled law could be a court which upheld an erroneous decision by an administrative organ. Even if it is possible to restore the damage by *restitutio in integrum*, as advanced, it is not excluded that there is additional damage which has been sustained by the plaintiff who, besides the legal opportunity to sue the State for wrongdoing by the Macedonian Parliament can also sue the State for a judicial wrongdoing. This follows from the provisions contained both in the Constitution and in the Law on courts of the Republic of Macedonia.

Amendment XXV to the Constitution of the Republic of Macedonia reads as follows:

liable for the damage that a judge or a lay judge has caused to citizens or legal entities by unlawful work in the exercise of their function; (2) In case where, due to the damage caused from paragraph 1 of this Article, the judge is dismissed, the Republic of Macedonia, by means of a lawsuit shall require from the dismissed judge to return the amount of the paid damage referred to in paragraph (1) of this Article in the amount defined by the court in accordance with the law; (3) After the dismissal of the judge who caused damage to citizens or legal entities with an unlawful work in the exercise of his function, the Judicial Council of the Republic of Macedonia in a period of eight days following the finality of the decision on dismissal, informs the Attorney General to undertake the measures from paragraph 1 of this Article, within the limits of his competences determined by law.

“Judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution.

According to Article 18 of the Law on courts of the Republic of Macedonia:

“(1) The court shall raise an initiative for instituting a procedure for assessing the constitutional compliance of a law when its compliance with the Constitution is questioned, whereof it shall immediately inform the higher court and the Supreme Court of the Republic of Macedonia.

(2) When the court deems that the law that is to be applied in the specific case is not in compliance with the Constitution, and the constitutional provisions cannot be applied directly, it shall suspend the procedure pending the decision of the Constitutional Court of the Republic of Macedonia.

(3) The decision for suspending the procedure as of paragraph 2 of this article may be appealed by the party. The procedure for the appeal shall be urgent.

(4) When the court deems that the law that is to be applied in the specific case is not in compliance with the provisions of an international agreement ratified in conformity with the Constitution, it shall apply the provisions of the international agreement provided that they are directly applicable.”

If the judge considers that a constitutional provision is directly applicable to the case at issue, he is obliged to apply that provision and disregard the law. If the constitutional provision(s) is (are) not directly applicable, according to paragraph 2 of the Law on courts, he is obliged to suspend the procedure pending the decision of the Constitutional Court.

Following a decision of the Constitutional Court that the law has been annulled, a plaintiff who has suffered damage due to the application of the law by the court which did not take into consideration the primacy of the Constitution and delivered a judgment, could claim compensation from the State for judicial wrongdoing. In this case, the judicial wrongdoing would consist of a breach of Article 18 paragraph 2 of the Law on courts. However, since the provision is worded “when the court deems”, no one can argue with certainty that the court deemed that the law was not in compliance with the Constitution and it intentionally did not apply the Constitution. In this case, the ‘intention’ of the court or more precisely its ‘fault’ needs to be examined.⁸⁰⁵

⁸⁰⁵ According to *Brasserie* case, there is no fault requirement. See Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79.

A second situation in which the plaintiff may initiate an action for compensation for damage against the State for judicial wrongdoing is when the Constitutional Court has annulled a final judicial decision on the grounds of a breach of a constitutional provision. This is contained in Article 110 of the Constitution:

“[The Constitutional Court of the Republic of Macedonia] protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.”

According to Article 51 of the Rules of Procedure of the Constitutional Court:

“Every citizen who considers that, with a single act or effect of this act, his right or freedom enshrined in Article 110 paragraph 3 of the Constitution is infringed, is allowed to claim protection from the Constitutional Court within a period of 2 months of the day of submission of the final single act to the Constitutional Court, i.e. the day of becoming aware of the undertaking of the action with which the breach was made, but not later than 5 years from the day of its undertaking.”

The claim for protection of the rights or freedoms established in Article 110 of the Constitution resembles what is known in other States as a ‘constitutional complaint’. However, it is obviously restricted only to the rights and freedoms explicitly enumerated in Article 110 of the Constitution.

If the Constitutional Court finds that one or more of these rights or freedoms had been infringed with a delivery of a final judicial decision, it will annul the individual act with a decision.⁸⁰⁶ Following this decision, the ordinary courts will have to re-examine the action lodged with them and adjudicate the issue according to the instructions of the Constitutional Court contained in the decision.

For instance, if the right to equality on the basis of sex was violated and the court upheld the act which established the discrimination, the damaged party can be compensated by *restitutio in integrum* but additional damage could be claimed from the State for the judicial error which consisted in a violation of a constitutional right.

It is worth noting that despite the submission of numerous claims related to the protection of rights and freedoms enshrined in Article 110, paragraph 3 of the Constitution, there has been only one case where the Constitutional court has declared the claim as admissible and annulled the single final act.

⁸⁰⁶ Article 56 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia.

This case related to the right to election of a mayor of the village of Zajas in the Republic of Macedonia. The plaintiff contended that his right to political association and activity was violated and the Constitutional Court found that this was the case. The decision of the Constitutional Court was adopted one year after the completion of the local election, which demonstrates the ineffectiveness of its decision. National and international organisations reproached this inactivity on the part of the Constitutional Court when the individuals claimed the protection of their basic rights and freedoms.

One can conclude that it is highly improbable that this action for compensation for damage against the State due to judicial wrongdoing is treated as ‘appropriate’ for EU law purposes, since the plaintiff was successful in challenging the final judgment in only one case, despite the fact that there was a clear breach of the Constitution by the judges (the erroneous application of the law cannot be denied).

Finally, an action for compensation for damage against the State resulting from a judicial wrongdoing can be initiated following a judgment delivered by the ECtHR, which, as observed previously, is one of the grounds for a retrial. Still, if the applicant considers that it is not reasonable to initiate an action for retrial before the ordinary courts, as would be the case where there is a breach of Article 6 ECHR for instance, he can directly lodge an action against the State for compensation for damage due to the breach of an international agreement by the judiciary, which is prescribed by Article 18 paragraph 4 of the Law on courts. However, this kind of action has not been initiated so far before the ordinary courts, although, as demonstrated in the cases elaborated above, it could have been.

In spite of problems which thwart the application of any of these last three actions against the State for judicial wrongdoing analogous to an action for compensation for damage sustained by a breach of EU law, it is possible to take as appropriate ‘the action for compensation for damage against the State due to a breach of the ordinary national law by the national courts’, which was proposed in the beginning of this sub-section.⁸⁰⁷

In this type of action, namely an action for compensation for damage against the State due to a judicial breach of national law, the court competent to award compensation for damage considers this judgment in order to determine whether the judges who were adjudicating breached the law or made an unlawful exercise of office.

This condition, as was underlined, is less strict than the requirement of ‘sufficiently serious breach of law’. What suffices is the establishment by a competent court that there is damage, an ‘erroneous

⁸⁰⁷ Пресуда ГЖ. Бр. – 2645/10 од 08. 07. 2010 година од Апелациониот суд Скопје [Judgment N. 2645/10 of 8 July 2010 of the Appellate Court Skopje of the Republic of Macedonia].

application of the law by the court' and a direct causal link: conditions which are satisfactory from an EU law perspective.

4.5 Interim Conclusion

An attempt was made in this section to detect, among the national actions against the State for compensation for damage committed by the legislative, administrative and judicial authorities, an action which could be considered as 'appropriate' for EU law purposes.

The conclusion from the discussion above is that the most important and complex problems concerning the finding of an appropriate action could in the future emerge from *legislative* wrongdoing, although in the end, a solution was proposed. Neither an action for compensation for damage against the State following a declaration of 'unconstitutionality' of a law, nor one following a ruling of the ECtHR could be accepted in a case where EU law is breached by the legislator. The reasons were set out in the paragraph devoted to this type of wrongdoing. However, it was proposed that a possible remedy to this situation would consist in returning to the basics of EU law State liability enunciated in *Francovich*, which in the Macedonian circumstances would entail an application of the Law on obligations.

'Appropriate actions' for EU law aims can be found in one of the advanced actions for compensation for damage committed by the administrative and judicial authorities.

It was stated above that Macedonian constitutive conditions giving rise to the right to compensation for damage against the State are more lenient than those required by EU law. This is particularly the case with the requirement of 'conferral of rights' versus 'damage' and the requirement of 'direct causal link' versus the requirement of 'causal link' under Macedonian law. What is particularly worth noting is the requirement of 'sheer illegality' or 'unlawfulness' in Macedonian law as opposed to the condition of 'sufficiently serious breach of law'.

When administrative authorities are at issue, actions for damage due to breaches of both national and international law could be considered as 'appropriate' for EU law, whereas in the case of the judiciary, the action for compensation for damage against the State due to the 'erroneous application of the ordinary national law' is the most suitable for the instances in which EU law is infringed.

In the following section I will consider the appropriateness of the executive conditions through which the compensation for damage against the State is awarded in a Macedonian context and juxtapose them with the EU law requirements at this level.

12. Executive conditions under Macedonian law for awarding compensation for damage

5.1 Introduction

National procedural rules apply on the level of the implementation of the State liability provided that they do not run counter to the principles of equivalence and minimum effectiveness, and increasingly also the principle of effective judicial protection. If the procedural rules violate these principles they have to be set aside by the national court. Moreover the conflict can also be resolved through interpretation.

In the following paragraphs, six Macedonian executive conditions will be explored from the viewpoint of their compatibility with the *Rewe* principles, in order to detect the problems which Macedonian judges might face following accession of the Republic of Macedonia to the EU. Undoubtedly, the analysis could also be extended to some other executive conditions, such as the issue of proof or competent courts. Nevertheless, I have restricted the discussion to these six executive conditions as they are the focal point in the majority of EU law books and articles.

5.2 *Locus standi*

It was underlined in the second Chapter⁸⁰⁸ that the question of who has a right to bring an action before national courts in an EU law dispute is regulated by the national law, more precisely, the national rules which apply in a similar domestic action, provided that they do not render virtually impossible or excessively difficult the enforcement of the EU right. The principle of effective judicial protection was an additional factor in this discussion.

In this paragraph I will consider the issue of who possesses *active legitimation* under Macedonian law to initiate an action for compensation for damage before the Macedonian courts, as well as the relevant articles to which the courts refer when appraising this issue.

The issue of compensation for damage is regulated by the Law on litigation procedure of the Republic of Macedonia.⁸⁰⁹ According to Article 70 of the Law on litigation:

“(1) Any natural person and legal entity can be a party in a procedure.”

⁸⁰⁸ See Section 2.2 of Chapter 2.

⁸⁰⁹ See Article 1 of the Law on litigation procedure of the Republic of Macedonia No. 79/2005 of 21.09.2005, which provides that: “This Law shall regulate the rules of the procedure on basis of which the court contends and decides upon the basic rights and obligations of the person and citizen in the disputes within the field of personal and family relations, labour relations, as well as property and other civil relations of natural persons and legal entities, unless it is envisaged, by a special law, that the court decides upon some of the listed disputes according to the rules of another procedure.”

Pursuant to Article 175 of the Law on litigation:

“A litigation procedure shall be initiated upon a lawsuit.”

The content of the action is laid down in Article 176, paragraph 1 of the Law on litigation:

“The action should contain a certain claim with regard to the main issue and the additional claims, facts on the basis of which the plaintiff grounds the claim, evidence with which these facts are established, as well as other data which any submission contains.”⁸¹⁰

For the submission of an action for compensation for damage, according to the Law on litigation, it is not required that the plaintiff possesses a legal interest, since the legal interest is considered as a procedural presumption. By virtue of the Law on litigation of the Republic of Macedonia, possessing or proving legal interest is necessary only for an action for declaration.⁸¹¹ For this reason, the lack of legal interest in a case of compensation for damage (a condemnatory action), does not result in the action being dismissed as inadmissible.

The claim of the plaintiff will be dismissed as unfounded if it is determined that he/ she does not possess active legitimation, since he/she does not have a legally substantive relation with the defendant, i.e. there is no infringement of his/her right provided in the substantive law. Thus, the issue of whether or not there is a right infringed depends on the facts, which will be assessed.

Consequently, the ability to be a party to the procedure should be differentiated from the active legitimation of the parties (*legitimatia ad causam*), since the latter corresponds to whether a certain claim belongs to a certain person, which can be found in the substantive laws. Because of this, a lack of active legitimation leads to the action being dismissed as unfounded, rather than it being dismissed as inadmissible.⁸¹²

5.3 Time limits for initiating proceedings

⁸¹⁰ Article 98 of the Law on litigation of the Republic of Macedonia.

⁸¹¹ Article 177, para 1 and 2 of the LL and Article 274, para 2 (the action will be dismissed as inadmissible if there is no legal interest).

⁸¹² See K. Cavdar ‘Comment on the Law on litigation procedure of the Republic of Macedonia’, (2011) Akademik – Skopje, 133.

Regarding the time limits for raising a compensation claim, Article 365 of the Law on obligations⁸¹³ lays down that:

“1. A claim of compensation for damage becomes time barred due to a statute in three years after the damaged party has found out about the damage and the party causing the damage.

2. In any case, this claim becomes time barred due to a statute in five years after the damage has been caused.”

In my view, provided that these national rules relating to time limits are also applied when claiming compensation for damage against the State due to EU law breaches, this time limit will be accepted as ‘reasonable’. This view is backed up by CJEU case law. In *Aprile*⁸¹⁴ and *Marks & Spencer*⁸¹⁵, the CJEU explicitly stated that a time limit of three years appeared to be reasonable, and it reiterated this finding in *Danske Slagterier*⁸¹⁶.

5.4 Passive legitimation

Concerning the issue of which organ may be sued in an action for compensation for damage against the State in the Republic of Macedonia, it can be unquestionably inferred from the relevant provisions that it is always the ‘legal entity’, i.e. the State as such, which is held liable for wrongdoing by the administrative, legislative and judicial organs. As was stated previously, Article 70 of the Law on courts specifically refers to the State as being liable for the wrongdoings of the judiciary.

According to Article 158 of the LO, a municipality can also be regarded as a ‘legal entity’, thus implying that the municipality can also be sued and held liable for the erroneous conduct of some of its bodies.

Furthermore, there are two provisions contained in *leges specialis* which relate to the passive legitimation of the enforcement agents and the notary publics:

Article 43 of the Law on enforcement⁸¹⁷ reads:

“(1) The enforcement agent shall be held liable for all the damage that he/she caused towards third parties, by illegal performance of enforcement actions and by lack of fulfilment of the duties that he/she

⁸¹³ See Law on obligations of the Republic of Macedonia No 18/2001 of 05.03.2001.

⁸¹⁴ Case C-228/96 *Aprile* [1998] ECLI:EU:C:1998:544, para 19.

⁸¹⁵ Case C-62/00 *Marks & Spencer* [2002] ECLI:EU:C:2002:435, para 35.

⁸¹⁶ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, para 32.

⁸¹⁷ See Law on enforcement of the Republic of Macedonia No. 35/2005 of 18.05.2005.

has as enforcement agent according to this Law. As third parties shall be considered all persons to whom damage was caused, with the exception of the persons from Article 44 of this Law.

(2) The enforcement agent shall be held accountable for the damage that results from the performance of single actions caused by the persons from Article 42 of this Law.”

Article 35 of the Notary Public Law⁸¹⁸ prescribes that:

“(1) The Notary Public is liable for the damage, which, in the course of its service or in relation to its service, he has inflicted on purpose or with gross negligence on a party to the proceedings or on a third party.

(4) The State is not liable for the damage caused by the Notary Public.”

With regard to the enforcement agents as persons granted with public authorisations by the State, there is a clear provision that it is the enforcement agent who is liable for the damage caused. Paragraph 2 of Article 43 of the Law on enforcement regulates the accountability of the enforcement agent for the persons employed in his office. Interestingly, concerning the notary publics who are also persons with public authorisations, besides the provision in which it is held that they are the ones who are liable for the damage, there is an explicit provision which excludes the possibility to sue the State instead of the notary public.

What also makes the provisions on notary publics unique is that a subjective liability or, in other words, ‘culpability’ is required in order for the notary public to be held liable. *Culpa* is not required with regard to any other organ of the State.

Apart from this, the issue of liability of the enforcement agents and notary publics, where these are both persons with public authorisations, remains unclear due to what the legislator regulated in a different manner.

Concerning the actual solutions in the laws of the Republic of Macedonia, it is apparent that in future disputes related to EU law, it is the State that will have passive legitimation for the wrongdoings of its bodies, the municipality will have it for the activities or lack of activities of *its* bodies, and, where relevant, enforcement agents and notary publics will as well.

⁸¹⁸ See Notary Public Law No 55/2007 of 04.05.2007.

However, if the municipality, the enforcement agent or even the notary public attempts to dodge their obligations to compensate damage or for other reasons they are not able to fulfil their obligation, the passive legitimation will always fall to the State.

Paragraph 4 of Article 35 of the Notary Publics Law is at odds with the EU law requirement that damage inflicted by State bodies through an action or a lack of action contrary to EU law should be compensated anyway.

As was stated in *Konle*⁸¹⁹ and in *Haim*⁸²⁰, if some of these bodies defy their liability and the claim for compensation as a result of their breach of the EU law, the State cannot evade its obligation to make redress to the plaintiff, i.e. the plaintiff must be compensated for the damage sustained, regardless of the internal relations between the different State bodies or bodies with public authorisations within the State.

What might also be contrary to EU law is the proof of *culpa* requirement on the part of the notary public which is necessary for the judge to award compensation to the plaintiff. As the CJEU stated, it is contrary to EU law to have a requirement of *culpa* which goes beyond the requirement of ‘sufficiently serious breach’ as comprehended in EU law.⁸²¹ The proper test to apply would be to examine to what extent *culpa* according to Macedonian law is equivalent to ‘sufficiently serious breach’. In so far as these two terms correspond, the *culpa* requirement can be upheld.

5.5 Type of damage, forms of redress and amount of compensation

Previously in this Chapter⁸²² the definition of damage in the Macedonian legal system was employed for the purpose of demonstrating that it is one of the substantive conditions which need to be fulfilled in order for the right to compensation to arise.

This provision refers to the types of damage provided for under the national tort rules, namely: an actual (real) damage, loss of earnings and immaterial damage and it appears to be consistent with the EU law concept of damage.

Real damage and the loss of earnings are reiterated in Article 178 paragraph 1 of the LO, which provides that:

⁸¹⁹ Case C-302/97 *K. Konle* [1999] ECLI:EU:C:1999:271.

⁸²⁰ Case C-424/97 *Haim* [2000] ECLI:EU:C:2000:357.

⁸²¹ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 79.

⁸²² See Section 3.3 of this Chapter.

“A damaged party is entitled both to compensation for real damage and loss of earnings.”

Article 179 of the LO is entitled “Full/complete compensation” and it appears that this provision is not only in line with EU law, but even presents a more lenient condition, since in EU law, an adequate compensation suffices, whereas in Macedonian law a complete compensation of the damage is required.⁸²³

Regarding the forms of redress, Article 174 of the Law on obligations provides that:

“1. The person responsible is obliged to restore the condition that existed prior to the causing of the damage.

2. Where the restoring of the previous condition does not eliminate the damage entirely, the person responsible is obliged to pay compensation for the rest of the damage.

3. Where restoring of the previous condition is not possible or a court determines that it is not necessary for the person responsible to undertake it, the court shall determine an appropriate pecuniary compensation for the damage to be paid to the damaged party by the person responsible.

4. At the request of the damaged party, a court shall decide on the pecuniary compensation for the damaged party, unless the circumstances of the particular case justify restoring the condition that existed prior to the damage.”

This provision is also satisfactory for understanding the character of compensation for damage in the Macedonia legal order. In Macedonian law, it seems that compensation for damage serves both as an ‘alternative remedy’ or a ‘complement’ to *restitutio in integrum*, namely, an award of compensation if restoring to the previous condition cannot be carried out entirely and as a ‘subsidiary remedy’ or a ‘supplement’ to *restitutio in integrum*, namely, an award of compensation for damage if restoring to the previous condition is not possible at all.

This is relevant from the point of view of EU law and to the nature and role of the compensation for damage in EU law, which performs both subsidiary and complementary roles in terms of remedies to individuals.

⁸²³ See Article 179 of the Law on obligations which provides that: “the court, taking into consideration the circumstances that arose after the damage has been caused, shall decide on the amount of compensation necessary to restore the financial state of the damaged party to the state it would have been in had there not been the damaging action or omission.”

The nature and objectives of State liability as a principle of EU law were considered in the previous Chapter⁸²⁴, and the fact that the role of State liability was considered in terms of ‘remedies’ should not cause any confusion. What was asserted in respect of the State liability as a remedy for individuals, also applies to the right to compensation for damage. In most of the continental legal systems, a wide understanding of the notion of remedy is accepted. It is a legal means through which the substantive right to compensation for damage against the State is enforced, by following certain procedural rules. The provision in Article 174 LO treats the role of the State liability and the ensuing right to compensation for damage in a same manner as the EU law does, conferring to it both subsidiary and complementary characters, when the primary rights are infringed and need to be remedied. If the same national rules apply to the case of a breach of EU law by the national authorities, they will be entirely consistent with the EU law approach.

The amount of compensation for a breach of national law by the State authorities is expressed in Article 266(1) of the Law on obligations:

“A debtor party that is overdue in the payment of a monetary obligation shall owe, in addition to the principle, default interest at a rate determined by law.”

This provision is also important, since it is in line with CJEU case law relating to the amount of compensation awarded, namely that the default interest is always an essential component of the compensation for damage, due to the effluxion of time.⁸²⁵

5.6 Mitigation of loss (divided liability)

It was stated in *Brasserie*⁸²⁶ that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risks he has to bear⁸²⁷ and that:

“The national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether in particular he availed himself in time of all the legal remedies available to him.”⁸²⁸

⁸²⁴ See Section 2.1 of Chapter 4.

⁸²⁵. See Case C-271/91 *Marshall* [1993] ECLI:EU:C:1993:335 and Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 70; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECLI:EU:C:2001:134 .

⁸²⁶ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:. See also Section 6.4 of Chapter 4.

⁸²⁷ Joined Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, [1996] ECLI:EU:C:1996:79, para 85

The provision in Article 181(1) LO supports the CJEU's attitude that the 'mitigation of the loss' and liability of the party to do everything necessary to mitigate this loss are indeed important principles also in the Macedonian legal order.

Article 181(1) of the Law on obligations which is entitled 'divided liability', lays down that:

"A damaged party, who has contributed to causing the damage or to making the damage higher than it otherwise would have been, is entitled only to a proportionally reduced compensation."

This is a highly relevant provision from an EU law point of view. What the court held in *Brasserie* and restated in *Danske Slagterier*⁸²⁹ is in fact already applied by Macedonian courts when adjudicating on disputes which concern compensation for damage against the State. Whether the individual availed himself of some other remedies before invoking the principle of State liability and claiming compensation for damage against the State is already applied in the practice of Macedonian courts.

The issue of mitigation of the loss and invoking of other legal remedies prior to relying on the compensation for damage claim will be considered in more detail below, jointly with the doctrine of *res judicata*.

5.7 *Res judicata* – does it pose problems?

Considering that the subject of this section is the principle of State liability and an award of compensation for damage against the State in case of a prospective breach of EU law by Macedonian authorities (administrative authorities, the legislator and the judiciary), an analysis was made of the actions in damages against the State in order to propose among these actions the most 'similar' ones for EU law purposes.

Now, although it is not one of the executive condition, the issue of *res judicata* in the Macedonian system will be considered, as well as the cases in which this principle can be disregarded through a legal remedy retrial in actions which we suggest may be considered 'similar', in order to establish whether in this respect problems may arise within the Macedonian legal context. Since there is no formal definition of the doctrine of *res judicata* and its scope within the Macedonian legal system, an overview of the relevant Articles will be made, so that certain conclusions may be drawn.

Article 184 paragraph 3 of the Law on litigation of the Republic of Macedonia provides that:

⁸²⁸ Ibid, para 84.

⁸²⁹ Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178.

“If there is already an initiated litigation, a new litigation cannot be instigated between the same parties with regard to the same claim, and in case this kind of action is initiated, the court shall dismiss it as inadmissible.”

Paragraph 3 of the same Article prescribes that:

“During the course of the entire procedure, the court will watch *ex officio* whether there is already another litigation underway for the same claim between the same parties.”

Pursuant to Article 176 of the Law on litigation:

“The action should contain a certain claim with regard to the main issue and separate claims, facts on the basis of which the plaintiff grounds his/her claim, evidence on the basis of which these facts could be determined, as well as other data which any submission should contain.”

It follows from the above cited provisions that a re-examination of a dispute cannot be made if the dispute is initiated between the same parties, with regard to the same relief and the same factual background.

This is in line with the triple identity test established in *Köbler*.

Regarding the issue of retrial which in fact undermines the doctrine of *res judicata*, Macedonian law allows a retrial in cases in which there is a judgment delivered by the ECtHR, following which, the court which adopted the final judgment contrary to the ECHR annuls it (at the request of the plaintiff) and the dispute is re-adjudicated.⁸³⁰

Another situation in which a final judgment could be annulled occurs when the final judgment runs counter to the Macedonian Constitution and it is annulled by the Constitutional Court itself. However, the courts which delivered the flawed judgment are then obliged to remedy the breach, but this re-adjudication does not represent a retrial as a separate extraordinary remedy, as is the case with a breach of the ECHR, but rather a specific annulment by the Constitutional Court when a constitutional complaint is brought.⁸³¹ Since the CJEU found that a breach of the Constitution and a breach of the EU law can be

⁸³⁰ See Article 400 of the Law on litigation procedure of the Republic of Macedonia and Article Article 449 Para 1 alinea 6 of the Law on the Criminal Procedure Law (Official Gazette No. 150 from 18 November 2010) (footnote 55).

⁸³¹ According to Article 56 of the Rules of Procedure of the Constitutional Court : “With the decision on protection of rights and freedoms , the Constitutional Court will establish whether there exist their infringement and depending on that it will annul the individual act, will foreclose the action with which the breach was made or will dismiss the constitutional complaint as unfounded.

considered as similar,⁸³² it follows that a retrial which is prescribed for a breach of the Constitution can also be prescribed for a breach of EU law.⁸³³ Furthermore, since the actions based on a judgment delivered by the ECtHR and a judgment delivered by the CJEU can also be treated as similar⁸³⁴, a retrial following a breach of EU law could also be provided as a remedy in cases of a breach of EU law by the Macedonian courts.

Nevertheless, contrary to this, in Case XC, YB and ZA⁸³⁵, the CJEU held that the action for re hearing of a case where it is found in a judgment of the ECtHR that a judgment or a decision of a criminal court has infringed the ECHR, given its purpose, cause of action and essential characteristics, cannot be regarded as similar to an action seeking to protect a fundamental right guaranteed by the EU, in particular by the Charter.⁸³⁶ This, according to the CJEU, is due to the specific characteristics arising from the very nature of the EU law.

Finally, with regard to final administrative decisions, Macedonian law provides that under certain circumstances these disputes may be reopened.⁸³⁷ However, an analysis of these provisions does not conclude that these administrative decisions could be reopened in the future for the sake of protecting EU law, since the cumulative conditions enumerated in *Kühne & Heitz*⁸³⁸ would not be satisfied under Macedonian law.⁸³⁹

From what is set out above, one may conclude that the rules on *res judicata* and retrial under Macedonian law are to a great extent already compatible with EU law, especially with regard to the scope of *res judicata*.

5.8 Interim conclusion

⁸³² See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39, para 43.

⁸³³ See *Kornezov* 2014 (n 725), 835.

⁸³⁴ *Ibid*, 836.

⁸³⁵ See Case C-234/17 *XC, YB and ZA*, ECLI:EU:C:2018:853.

⁸³⁶ See Case C-234/17 *XC, YB and ZA*, ECLI:EU:C:2018:853, para 35.

⁸³⁷ See Arts 267, 268 of the Law on administrative procedure 38/2005.

⁸³⁸ C-453/00 *Kühne & Heitz* [2004] ECLI:EU:C:2003:350 .

⁸³⁹ Even in those legal systems in which the reopening of final administrative decisions is possible, there might be certain requirements which, if applied, could make the enforcement of EU right virtually impossible or excessively difficult. In these cases, the national courts should set these requirements aside. See Case C- 249/11 *Byankov* [2012] ECLI:EU:C:2012:608.

The ‘executive’ or ‘procedural’ conditions which allow for an actual award of compensation for damage under Macedonian law, after being compared to the procedural conditions under the EU law for awarding a compensation for damage against the State, were found to be compatible with the requirements of EU law.

The issue of whether a judgment covered with *res judicata* should be reopened for the sake of protecting the effectiveness of EU law might place an additional burden on the judges if there is a retrial even when it is not provided for under national law.

Overall, the executive conditions under Macedonian law seem compatible with EU law demands.

13. Conclusion

The right to compensation for damage against the State in Macedonia is subject to less strict substantive conditions than those required by EU law. Instead of the requirement that breaches need to be ‘sufficiently serious’ it suffices that the act or omission of the State authorities is illegal/ unlawful. Thus, State liability in Macedonia is of an objective nature.

Unlike in common law legal systems where compensation for damage is treated as a remedy, in the Republic of Macedonia it is a substantive right which is enforced through an action for damages against the State.

The action against the State may include claims for wrongdoing by executive, judicial and legislative authorities.

State liability in the Republic of Macedonia is exclusive, in a sense that it is always the State as such which is sued, rather than any of its constituent authorities. Municipalities however, have their own passive legitimation and they are treated as separate legal persons, rather than organs of the State. Moreover, two specific provisions regulate the liability of enforcement agents and notary publics as liable persons in case of breaches of national law.

National implementation of an action for compensation against the State is carried out in accordance with conditions contained in the provisions of the substantive and procedural laws, which, following their analysis appear to be consistent with EU law.

It was found in this Chapter that the Macedonian judges’ approach towards international law is somewhat reserved. It was argued that the awareness of the Macedonian judges of the status, role and purpose of international law and its inclusion in judgments needs to be increased.

This consideration was relevant in order to anticipate whether the acceptance of EU law in the national legal order, as well as its enforcement by Macedonian judges will be serious hurdles, and if the process of accepting EU law as a ‘specific legal order’ will go smoothly in the Republic of Macedonia. The relevant provisions along with the case law of Macedonian courts, although meagre, uphold the view that some more substantive problems are to be expected with the infiltration of EU law into the Macedonian legal order, in addition to the necessary change of the mindset of the Macedonian judges.

Regarding the issue of an ‘appropriate action’ for EU law purposes, it was underlined that there will be no major problems regarding judicial and administrative breaches since compensation based on these types of infringements of the law does exist and is applied by Macedonian judges. What turned out to be difficult was finding an ‘appropriate action’ for a legislative wrongdoing. However, a solution was also proposed for this type of breach in the future. A number of national actions were proposed and it will fall to the national judges to choose the most appropriate one. It needs to be emphasised that this is not an easy exercise. In-depth understanding of the manner in which the principles of effectiveness and equivalence are appraised will be required. Since an ‘appropriate domestic claim’ for a future breach of the EU law by the legislator is difficult to find either with regard to a breach of the Constitution, or with respect to the incompatibility of the national law with the ECHR, most probably the national courts will have to apply the ordinary provisions from the Law on obligations of the Republic of Macedonia. As was previously explained, no one has ever invoked either of these actions for damage against the State.

Macedonian substantive conditions which give rise to compensation for damage are less strict than those imposed by EU law, while the executive conditions are in line with EU law.

The State liability claim is already existent in the Macedonian legal order and there is no need to insert a separate EU law claim of State liability, since there are national law heads of claim of State liability for the legislative, executive and judicial authorities. What needs to be done is the appraisal of the national head of claim of State liability in accordance both with the EU law substantive requirements and with the *Rewe* requirements.

Concerning the issue of whether or not a claim of State liability for an infringement of EU law is a national head of claim or is based directly on EU law, German judges and academics take divergent views, with as prevailing attitude that it is still *not* a national law claim as such, i.e. a ‘head of claim for

infringing EU law’, but rather a head of claim based on EU law, which is accepted and applied within the context of ‘national heads of claims of State liability’.⁸⁴⁰

In this light, I do not find indispensable an act of normative regulation in terms of inserting a new head of claim of State liability for infringement of EU law into the Macedonian legal system, since the head of claim of State liability for the infringement of the national law by the all the three authorities does exist, though under different conditions, which appears to be in line with EU law.

However, there is an argument in favour of inserting a new head of State liability claim for the legislator’s wrongdoing in view of the EU law. Namely, the very fact that the State liability claim for an infringement of the national Constitution by the legislator has never been invoked by individuals, makes even more unlikely the idea that individuals would invoke a head of claim for State liability due to a legislative breach of EU law in circumstances in which it is not explicitly/normatively regulated.

As was stated above, State liability could have been invoked so far, following a judgment of the ECtHR which found a breach of the ECHR. Nevertheless, no one has ever initiated an action for compensation for damage on these grounds.

In any event, even with regard to the other heads of claim in an action for compensation against the State, a wide knowledge of EU law will be required.

CHAPTER SIX

Summary of findings and outlook for the future

⁸⁴⁰ See T. Krummel and R.M. D’SA, ‘Implementation by German Courts of the Jurisprudence of the European Court of Justice on State liability for breach of Community law as developed in Francovich and subsequent cases’, (2009) 20(2) European Business Law Review, 273-286.

In this final Chapter I am firstly going to summarise the main findings relating to the central questions posed in the Introduction. The first of these is how EU law, and in particular CJEU case law, limit the competence of Member States to set and subsequently apply their domestic rules on procedures and remedies. The second question is how EU law defines the regime of State liability and how this regime operates, in particular with a view to answering the third question, namely how this regime of State liability would be applied in the Republic of Macedonia, in case Macedonia becomes a Member State of the EU.

Secondly, I will reflect in more general terms on the hurdles that have to be overcome in Macedonia in order to prepare Macedonian judges for their mission as ‘European law judges’, which will imply that they will be called upon to follow EU (case) law on the limits of national procedural autonomy, effective judicial protection and State liability. As we have seen in the previous Chapter, the openness towards – and acceptance of – an international law system is rather limited for the time being. As I have argued, quite a lot needs to be done in order to increase the awareness of Macedonian judges with respect to the status, role and purpose of international law and its inclusion in the judgments.

1. Summary of findings

1.1 The existence of national procedural autonomy of the Member States as conceived by the Rewe/ Comet case law

One can infer from an overview of CJEU case law, in which the principles of minimum effectiveness and equivalence have affected the application of different national procedural rules, that the CJEU mainly intervened in cases in which certain specific circumstances occurred. These circumstances include cases where a complete denial of access to justice was at stake or when obtaining an ‘effective remedy’ was hindered. In an important number of cases, it was due to unacceptable behaviour by the party (most frequently State authorities) which made the exercise of the right at issue virtually impossible. Such behaviour included deceit, deliberate delays in providing the plaintiff with necessary and correct information, and the intentional insertion of certain provisions specifically introduced for the purpose of escaping EU law obligations. The CJEU proved to be intolerant towards States which, at the cost of depriving its citizens of their EU rights, attempted to benefit from their own wrongdoing.

Overall, the impact of the principles of equivalence and minimum effectiveness has been rather limited. On the other hand, this development made clear that national procedures and remedies are not protected against the influence of EU law.

As to the doctrinal debate on the nature and meaning of procedural autonomy, an understanding of the principle of national procedural autonomy in its *absolute* sense – a lack of any respect of common harmonised standards – is in my view not desirable, not only because the issue will arise in which a same individual right (for instance, the right to restitution of illegally levied charges) will have to be exercised according to different procedural norms (EU or national provisions contained in different codes of the Member States) depending on whether that right occurs as a remedy to the infringement of an EU individual right or as a purely national individual right, but also because it is well established that every principle has its restrictions.

Considered in the light of *relativity*⁸⁴¹, embracing ‘corrections’ by the CJEU, Member States are still free to a great extent to apply domestic procedural and remedial rules in order to ensure the protection of EU rights which individuals assert before national courts, a finding that I attempted to demonstrate through an analysis of the CJEU’s case law treating different types of procedural rules.

1.2 The impact of the principles of effectiveness and effective judicial protection on the national procedural autonomy of the Member States and the creation of ‘new’ remedies

The uniform protection of EU individual rights and the uniform application of EU law throughout the Member States proved to be neither possible nor necessary. In this context, the CJEU’s objective should rather be an attainment of an adequate standard of protection of EU rights.

The uniform and effective enforcement of EU law and the principles from which it is drawn – the principle of supremacy of EU law being at first place – are not overpowering principles prevailing over principles related to procedural efficiency, such as legal certainty, proper conduct of the procedure, protection of the rights of the defence and other general principles of law. The principles of supremacy and direct effect of EU law are not necessarily in collision with the principle of national procedural autonomy, as illustrated through the tension between the *Simmenthal* and *Rewe* cases.

The majority of scholars firmly endorse this stance, although it cannot be disputed that there are certain authors who pay primary importance to the principle of effective and uniform application of EU law at the cost of the disappearance of national procedural autonomy. Supremacy and direct effect should be confined to provisions of the same nature, i.e. either substantive or procedural provisions. The supremacy argument cannot interfere on a national level retained for the Member States’ procedural autonomy.

⁸⁴¹ The notion of national procedural autonomy conceived in its “relative” sense, embraces the corrections made by the CJEU. Both relative and absolute national procedural autonomy are explained in Chapter 2.3.

Since an effective and uniform application of EU law may be jeopardised by the application of national rules on procedure and sanctions by national courts, the CJEU has created certain constraints, such as the principles of equivalence and effectiveness, in order to set certain limits.

Besides these two principles, there is also the much more intrusive principle of effective judicial protection, which serves as a fundamental requirement, setting a threshold for national procedures. The principle of effective judicial protection, both before and after the entry into force of the EU Charter of Fundamental Rights, has had an impact on national procedural rules, though to different degrees. While on certain occasions the CJEU allowed some room for national procedural autonomy, in other cases, the impact of the principle of effective judicial protection was considerable. In general, the principle, strengthened by its reaffirmation in Article 47 CFR, seems to have become an independent source of obligations on national courts and national procedural and remedial law.

As a conclusion regarding the remedies, there are two remedies which need to be granted by the national courts according to ‘uniform conditions’ established by the CJEU. These two remedies, the award of compensation for damage resulting from a breach of EU law by the State and the award of interim relief against a national act based on an EU act whose compatibility with a higher source of EU law has been challenged, need to be exercised by the national courts according to specific and cumulative conditions.

Apart from this, two other remedies, namely the restitution of charges levied contrary to EU law and interim relief against a national measure on the grounds of its incompatibility with EU law, were imposed on all the legal systems of the Member States. However, these latter remedies remain to be exercised according to the national procedural rules for granting an equivalent domestic relief, while observing the principles of minimum effectiveness and equivalence.

Despite the *prima facie* far-reaching consequences for national procedural and remedial law, the impact has been mitigated by the acceptance of the so-called ‘balancing approach’, i.e. that the minimum effectiveness of EU law and effective judicial protection can be outweighed by other principles such as legal certainty, the proper administration of justice, and so on. Yet this has opened up new uncertainties. As with the *Rewe/ Comet* dilemma, the unpredictability of which principle should prevail seems to persist.

It is essential to observe that the ‘rule of reason’ or ‘the balancing approach’ existed long before *Van Schijndel/ Peterbroeck* case law. The CJEU has always played a game of balancing interests and principles, although sometimes explicitly and sometimes less so. Sometimes it looks at the practical effect of the relevant rule at issue and sometimes the focus is on the role and purpose of the provision. In some

cases, a justification of the restriction of the principle of effective judicial protection was found only in the importance of objectives of general interest and in other cases, the fundamental rights of others were also considered.

With the entry into force of the Charter, the limitation of effective judicial protection as laid down in Article 47 was given a new dimension as that limitation is provided for in Article 52(1) CFR.

1.3 The principle of State liability in EU law and the prospective award by Macedonian judges of compensation for damage following a breach of EU law by Macedonian State bodies

In view of the twin objectives of effectiveness of EU law and effective judicial protection, the CJEU created the principle of State liability for EU law breaches as a matter of EU law.

Consequently, the conditions that give rise to a right to reparation on grounds of infringement of EU law by a Member State were spelled out through the case law of the CJEU.

National courts of the Member States are bound to award compensation for damage when the three EU law requirements are fulfilled, namely:

1. The provision at issue must be intended to *confer rights* on the individual;
2. The breach must be sufficiently serious;
3. There must be a *direct causal link* between the infringement and the damage sustained.

The CJEU should not decide on the issues of ‘sufficiently serious breach’ and causality since these conditions are more a problem of *applying the law*, whereas the issue of ‘right’ is a ‘*matter of interpretation*’ rather than of *applying of European law*’ and it should be ultimately left to the CJEU to decide on this issue.

Apart from the observance of these rules established at EU level, the concrete award of reparation to individuals must be carried out through the national liability rules applicable to similar domestic claims. If the national conditions which give rise to right to reparation for a breach of national law are stricter, the national courts have to operate in a *Simmenthal* like manner and set aside those conditions. Of course, for the individual, more generous national conditions are acceptable and desirable. The same applies when EU law is at issue, since more generous national conditions would make more probable the granting of compensation for damage due to a breach of EU law.

On the other hand, the so called ‘executive conditions’ that are applied by the national courts have to satisfy the *Rewe* requirements of minimum effectiveness and equivalence as well as the principle of effective judicial protection, which requires, for instance, that compensation be adequate.

In Macedonia, an action for compensation for damage against the State is subject to less strict substantive conditions than those required by EU law. Instead of the requirement that breaches need to be ‘sufficiently serious’ it suffices that the act or omissions of the State authorities is illegal/ unlawful. Thus, State liability in Macedonia is of an objective nature.

Unlike in common law legal systems where compensation for damage is treated as a remedy, in the Republic of Macedonia it is a substantive right which is enforced through an action for damages against the State.

An action against the State may include claims for *executive* and *judicial* wrongdoings. It was not difficult to find ‘similar’ domestic actions to an EU action when these organs run counter to EU law. However, a problem might arise when attempting to find an appropriate national action for awarding a compensation for damage due to a breach of EU law by the national *legislator*.

None of the actions advanced in the previous Chapter, be it an action for compensation for damage against the State due to the legislative wrongdoing established with a declaration for unconstitutionality of a law delivered by the Constitutional Court or an action for compensation for damage against the State due to the legislative wrongdoing found to exist following a ruling of the ECtHR, seemed to be entirely appropriate to use when adjudicating in light of EU law.

The first action, based on a declaration for unconstitutionality of a law delivered by the Constitutional Court, could be regarded as appropriate since in the *Transportes Urbanos* case, it was treated as a ‘similar’ action.⁸⁴² However, there are arguments under Macedonian law against treating this action as ‘appropriate’ for EU law purposes. It was underlined that, in the absence of an individual act which inflicted the damage, it would be impossible for the plaintiff to introduce this action successfully. This holds true both for an action under Article 80 and one under Article 81 of the Rules of Procedure of the Republic of Macedonia.

However, this does not mean that the plaintiff(s) will remain without compensation for damage suffered due to an unconstitutional law. In these situations, where there are no individual acts, but the damage results from the law as such, the plaintiffs may initiate an action for compensation for damage before the

⁸⁴² See Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECLI:EU:C:2010:39, para 45.

ordinary courts, by invoking the relevant articles, namely, Article 141 jointly with Article 158 and Article 142 of the Law on obligations of the Republic of Macedonia.⁸⁴³ Since these articles apply to breaches made by the administrative and judicial organs, there is no reason for them not to be applied with regard to infringements made by the Parliament. Consequently, the plaintiffs retain their protection, but not under the rules laid down in Article 81 of the Rules of Procedure.

As was stated previously, the main argument against the appropriateness of this action for EU law is the fact that it should be the ordinary courts rather than the Constitutional Court that should be charged with awarding compensation for damage due to the breach of EU law.

Another difficulty arises from the fact that compensation for damage due to the legislative wrong with respect to the Constitution has never been invoked, which makes more complicated the manner in which this action could be used for EU law purposes.

The second possible action for compensation for damage against the State, following the ECHR model and which can take place only after a ruling of the CJEU is delivered, requires a legislative insertion of these grounds as a separate grounds for retrial. In addition, an action for compensation for damage due to the legislative wrongdoing vis-à-vis the ECHR has never been invoked either. This leads us to believe that the probability is very low that an action is brought for compensation for damage due to a breach of EU law by the Parliament of Macedonia in a case in which a judgment by the CJEU is inserted as grounds for retrial.

In any event, the proposed actions seem to be only partly appropriate for consideration as an EU law action for compensation for damage against the State due to the legislative wrong.

In none of these actions, be it a breach of the Constitution or a breach of the ECHR, has compensation for damage incurred by the legislator to the damaged party ever been awarded. This fact seriously casts doubts on the probability that the national courts will award damages on grounds of a breach of EU law. Finding an appropriate action will certainly be a challenge for Macedonian judges in the future. Nevertheless, since the CJEU requires that compensation for damage must be available to the plaintiffs once the Parliament of the Republic of Macedonia breaches the EU law, a solution needs to be proposed.

State liability in the Republic of Macedonia is exclusive in the sense that it is always the State as such which is sued rather than any of its constituent organs. Municipalities however have their own passive

⁸⁴³ Law on obligations of the Republic of Macedonia No 18/2001 of 05.03.2001 (Official Gazette N. 18/2001 from 05.03.2001...2009).

legitimation and are treated as separate legal persons rather than organs of the State. Moreover, two specific provisions regulate the liability of enforcement agents and notary publics as liable persons in case of breaches of national law.

National implementation of the action for compensation against the State is carried out through the conditions contained in the provisions of the substantive and procedural laws, which, following their analysis appeared to be consistent with the EU law as well.

2. Problems Macedonian judges may face following Macedonia's accession to the EU and proposed solutions

2.1 The problems mapped

As was explained in the previous Chapter, the application of the EU State liability regime will meet certain concrete hurdles that have to be overcome in order to meet the EU standard for State liability. However, these specific challenges have to be placed into a broader context of problems that Macedonian judges are going to encounter once Macedonia becomes a Member State of the EU. Republic of Macedonia applied for full membership of the European Union in March 2004, following which the European Commission issued a positive Opinion in November 2005. In December 2005, the European Council conferred the status of candidate country onto Macedonia. Since then, for a variety of internal and external reasons, a Recommendation for opening Accession Negotiations between the Republic of Macedonia and the EU has not been issued. Each year, the Republic of Macedonia receives a Progress Report from the Commission.

Still, according to Article 68 of the Stabilisation and Association Agreement:

“The Parties recognise the importance of the approximation of the existing and future laws of the former Yugoslav Republic of Macedonia to those of the Community. The Former Yugoslav Republic of Macedonia shall endeavour to ensure that its laws will be gradually made compatible with those of the Community.”

The approximation of laws and the endeavours made by the Republic of Macedonia to ensure that its laws are gradually made compatible with those of the Community (now European Union) are in fact an obligation on all the State organs, including the judiciary.⁸⁴⁴ As was stated previously, although there is no obligation for the Macedonian courts to apply EU law before the date of accession, there is an

⁸⁴⁴ See to this effect T. Capeta, *Courts, Legal Culture and EU Enlargement*, (Croatian Yearbook of European Law and Policy 2005), 18; See Georgievski et al 2014 (n 743), 101; See Kühn 2005 (n 768), 564.

obligation for indirect interpretation of the national law with EU law or an interpretation in a ‘Euro-friendly’ manner. One might argue that it is simply too early to propose any constitutional and normative amendments to Macedonian law since the accession negotiations are still not open.⁸⁴⁵ Still, I would like to make an attempt at detecting the hurdles that Macedonian judges might encounter, by drawing on the experiences of the so-called ‘new Member States’⁸⁴⁶. The experiences and approach towards the process of joining the EU by these countries are taken as guidance, due to the common communist past which largely affected the legal systems. Of course, certain problems are unique and will be discussed in that context. Subsequently, my idea is to propose how these obstacles might be surmounted.

In some of the old Member States, the European Union was not mentioned at all in the legislation, whereas in others, only a delegation of sovereignty to an international organisation was mentioned in the Constitution. Still, in others, like Germany, France and Sweden, an explicit article was inserted into the Constitution.⁸⁴⁷

The Constitutions of the ‘new Member States’ (of Central and Eastern Europe – CEE) were characterised as “sovereignist” and in the initial draft amendments, the ‘international organisation’ approach was taken almost universally across the CEE, although some countries opted for explicit EU amendments at a later stage.⁸⁴⁸ In some of these countries, specific Acts were adopted, whereas in others, constitutional amendments were made.⁸⁴⁹

⁸⁴⁵ The “Europe Agreements” with the Member States which acceded to the EU in 2004, were signed between 1992-1995 and the European Council decided on opening accession negotiations with the first group of countries in December 1997, whereas the negotiations were completed during the meeting in Copenhagen in December 2002. The Accession Treaty entered into force on 1 May 2004. See Łazowski 2010 (n 766), 12-13. This implies that negotiations last for approximately five years and after this, a period of ratification of Accession Treaty by all the parties follows. Since in 2017, accession negotiations between the EU and the Republic of Macedonia are still not open, it might seem pointless to discuss about possible constitutional and mindset changes. It is also worth mentioning that the major constitutional reforms in the abovementioned countries were made predominantly in 2001-2003 (with the exception of Poland and Cyprus). From this, one could conclude that the amendments were inserted in a period between the completion of the negotiations and shortly before the ratification of the Accession Treaty.

⁸⁴⁶ By ‘new Member States’, I refer to States which joined the EU in 2004, 2007 and 2013.

⁸⁴⁷ See Łazowsky 2010 (n 839), 70.

⁸⁴⁸ Ibid, 71-72.

⁸⁴⁹ Thus, in Lithuania, a new Constitutional Act on Membership was adopted in 2004. See Łazowsky 2010 (n 839), 210; Estonia adopted a Constitution of the Republic of Estonia Amendment Act in 2003. See Łazowsky 2010 (n

Regarding the issue of supremacy of EU law vis-à-vis the national Constitution, all the Member States, both ‘old’ and ‘new’, with the exception of The Netherlands and Estonia,⁸⁵⁰ consider that the national Constitution takes precedence over EU law and that the national Constitutional Courts retain the right to assess the compatibility of certain EU acts with the national Constitution.⁸⁵¹

From the perspective of the CJEU, there should be an ‘ultimate supremacy’ that would entail that:

- The EU law has primacy over the national Constitution of the Member State
- An EU Act must not be assessed in light of the Constitution of the Member State

Obviously, some of the Constitutional Courts of the Member States went in exactly the opposite direction. There is a possibility for the Constitutional Courts to review an EU act against the Constitution in almost all the Member States.⁸⁵²

A problem could arise when the Constitutional Court, which assesses the constitutionality of the laws, is supposed to appraise the constitutionality of a law with an EU law origin (implementing legislation), which would in fact imply that the Constitutional Court assesses whether the EU act is in line with the Constitution.

From the point of view of the CJEU this is not allowed.

839), 160; In Bulgaria, four amendments to the Constitution were made. See Łazowsky 2010 (n 839), 554-556. Romania`s Constitution was amended in 2003, incorporating the principle of supremacy of EU Founding Treaties and mandatory legislation. See in Łazowsky 2010 (n 839), 508. In Slovenia, national laws were amended shortly after the accession, the crucial one being the Act Amending the Courts Act which came into force in 2004. See Zagorc et al 2010 (n 757), 439. The Polish Constitution was adopted in 1997 with the view of potential membership in the European Union. See Łazowsky 2010 (n 839), 278; In Latvia the solution came in the shape of amendments to the Constitution. See Łazowsky 2010 (n 839), 248. In contrast to the Czech Constitution, the Slovak Constitution explicitly deals with the application of European Union and its effects. See Łazowsky 2010 (n 839), 358.

⁸⁵⁰ Ibid, 81.

⁸⁵¹ See P. Craig & G de Burca, *EU Law- text, cases and materials*, (4th edition, Oxford: Oxford University Press 2007) 345-375. See also the constitutional provisions and judgments delivered by the Constitutional and/or Supreme Courts of the CEE`s Member States in Łazowsky 2010 (n 839).

⁸⁵² About the difference between an abstract and constitutional review , see S. Rodin, ‘Ustavni sud i članstvo Republike Hrvatske u Europskoj uniji’, LIBER AMICORUM JADRANKO CRNIĆ, Novi informator, Zagreb 2009.

There is a new trend in France, sparked by a decision of the *Conseil d'Etat*, which stated that, in so far as the contested domestic provision is based on legitimate EC law, the national provision cannot be repealed, since this would essentially invalidate the EC law.⁸⁵³

What was most important for the ordinary courts of the Member States, would also apply to the Macedonian national courts. These courts are allocated a 'European mandate'.⁸⁵⁴ They have a duty to give full effect to provisions of EU law, if necessary refusing of their own motion to apply any conflicting provision of national legislation, even if adopted subsequently, without needing to request or await the prior setting aside of such a provision by legislative or other constitutional means.⁸⁵⁵

This implies that any provision of a national legal system, including provisions of a constitutional nature, and any legislative, administrative or judicial practice, that might impair the effectiveness of EU law by preventing the national court from doing everything necessary to set aside national legislative provisions that might curtail the full force and effect of EU rules, are incompatible with those requirements.

Such would be the case, for example, in the event of a conflict between a provision of EU law and a national law, if the solution to the conflict were to be attributed to an authority with a discretion of its own, other than the national court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary.⁸⁵⁶

For example, a national court that considers a provision of national law to be not only contrary to EU law, but also unconstitutional, does not lose the right (or escape the obligation) under Article 267 TFEU to refer questions to the CJEU on the interpretation or validity of EU law. This is because the declaration

⁸⁵³ See Łazowsky 2010 (n 839), 201.

⁸⁵⁴ See in Takacs 2009 (n 731), 47.

⁸⁵⁵ See, inter alia, the judgments of 9 March 1978, *Simmenthal*, 106/77, ECLI:EU:C:1978:49, para 21 and 24; Case C-314/08 *Filipiak* [2009] ECLI:EU:C:2009:719, para 81; Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363; and Case C-189/10 *Abdeli* [2010] ECLI:EU:C:2010:363, para 43; Case C-617/10 [2013] ECLI:EU:C:2013:105, para 45; Case C-112/13 A [2014] ECLI:EU:C:2014:2195, para 36; and Case C-5/14 *Kernkraftwerke Lippe-Ems* [2015] ECLI:EU:C:2015:354, para 32.

⁸⁵⁶ See the Cases C-106/77 *Simmenthal* [1978] EC:I:EU:C:1978:49, paras 22 and 23; Case C-213/89 *Factortame and Others* [1990] ECLI:EU:C:1990:257, para 20; Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363; C189/10 *Abdeli* [2010] ECLI:EU:C:2010:363, para 44; Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 46; Case C-112/13 A [2014] EU:C:2014:2195, para 37; Case C-5/14 *Kernkraftwerke Lippe-Ems* [2015] ECLI:EU:C:2015:354, para 33.

that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court.⁸⁵⁷

In sum, national courts need to be free to refer any question that they consider necessary to the CJEU for a preliminary ruling, at whatever stage of the proceedings they consider that such a reference is appropriate, even at the end of an interlocutory procedure for the review of constitutionality.⁸⁵⁸

This is only one of the lessons that Macedonian judges will have to learn especially when they are required to apply Article 18 of the Law of Courts, which stipulates:

“(1) The court shall raise an initiative for instituting a procedure for assessing the constitutional compliance of a law when its compliance with the Constitution is questioned, whereupon it shall immediately inform the higher court and the Supreme Court of Republic of Macedonia.

(2) When the court deems that the law that is to be applied in the specific case is not in compliance with the Constitution, and the constitutional provisions cannot be applied directly, it shall suspend the procedure pending the decision of the Constitutional Court of the Republic of Macedonia.

If Macedonian judges are uncertain about the constitutional compliance of a law, they can refer the question to the Constitutional Court if they suspect a conflict with a constitutional provision, but they can also refer a preliminary question to the CJEU if it is a law with an EU law origin and they are unsure of its compatibility with a higher source of EU law. This was the issue in the *Aziz Melki* case.⁸⁵⁹ Of course, before making a reference, they should also try to interpret national law with EU law, as was done by their counterparts in the other Member States on the basis of Article 4(3) TEU.

Macedonian judges will moreover have to be aware of the binding precedent nature of CJEU judgments.⁸⁶⁰

⁸⁵⁷ See Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363, para 45; and Case C-112/13 A [2014] EU:C:2014:2195, para 38.

⁸⁵⁸ See Case C-112/13 A [2014] EU:C:2014:2195, para 39; Case C-5/14 *Kernkraftwerke Lippe-Ems* [2015] ECLI:EU:C:2015:354, para 35; and, to that effect, Joined Cases C-188/10 and C-189/10 *Melki* [2010] ECLI:EU:C:2010:363, para 51 and 52.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ See Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513, para 56. See also the decision of the Constitutional Court of Italy, according to which: “ECJ’s case law is binding on Italian national authorities as part of directly applicable Community law. Specification of the meaning of Community law by declaratory judgment of the ECJ has

The mindset of Macedonian judges and their approach towards the law and its application largely differs from the conception of law in the older Member States. As Capeta argues, there is a long tradition of strict formalism and positivism in Central and Eastern Europe. All that this author claims for the situation in CEE countries counts for Macedonia as well. She gives a beautiful definition of legal culture, that is a prevailing opinion in a society on the purpose of law and the role of different institutions within the legal order, as well as the way in which legal rules are interpreted.⁸⁶¹ In her view, judges from the ‘West’, where strong formalism was replaced by pragmatism and where the judges were perceived as participators in the creation of law, are unlike the judges from the ‘East’ where the positivistic and formalistic legal culture was maintained.

Regarding the valid legal sources, judges from the CEE use only written legal sources that form part of the domestic law, while the judges from the older Member States use also non-binding sources, i.e. soft law, case law, which is also important, and even the doctrine. In terms of the interpretation of law, CEE countries employ textual interpretation as the principal method, unlike Western judges who use contextual, purposive or teleological methods, by taking into consideration the social and political reality. Finally, concerning the arguments that are used by the judges from the ‘two blocs’, there exist vast differences as well. Eastern judges use exclusively legal arguments while Western judges are much broader and generous in their argumentation, for instance including principles as arguments. The main difference is the state of mind of the Eastern judges who see themselves as ‘mechanical applicers’ of written law and cannot imagine that they can also actively participate in law making.⁸⁶²

There is concern among scholars such as Capeta, Kuhn and Bobek for the application of EU law principles, such as effectiveness, equivalence, effective judicial protection and the principle of proportionality. Kuhn considers that the legal order can only be sustained as a ‘living entity’ through legal principles. This element can introduce a dynamic factor into the legal system, on the basis of which law might be formed in a continual way.⁸⁶³ He underlines the idea behind EU law and that it rests more on soft law than on hard law. Appropriately enough, Bobek considers that a judge should be a “European Hercules in action”, in order to respond to the complex and sometimes puzzling requirements of EU law.

the same direct effect in Italian law as the interpreted provision itself.” Then also, the German Federal Constitutional Court concluded that if the German national court declines to follow interpretation of community law given by the ECJ, it is bound to refer the issue again to the ECJ according to procedure found in EEC Treaty 177 para 3 (now Article 267 (3)) TFEU. See Kühn 2005 (n 768), 571.

⁸⁶¹ Capeta 2005 (n 838), 7.

⁸⁶² See Capeta 2005 (n 838), 8-14.

⁸⁶³ Kühn 2005 (n 768), 577.

Judges are required to consider other language versions of the relevant Community legislation and they are obliged to use comparative methodology, which does not stop at the level of ‘advisable’. This is especially so where concepts like *acte clair* need to be deciphered.⁸⁶⁴

The most important thing is that judges should know European law, which is abundant. They should learn not only the basic EU law principles, such as the duty of loyal and sincere cooperation, but also the case law of the CJEU (and its effect) and the case law and application of EU law by judges in other Member States. Bobek underscores that there are certain deficiencies in this system of expectation. There are practical constraints, he argues, as well as procedural, political and economic ones. According to him, the classic objection to the use of purposive reasoning and giving effect to a norm in light of *effet utile* of EU law is the unpredictability and lack of democratic legitimacy.⁸⁶⁵ In contrast to Capeta and Kuhn, who mainly advance the hurdles which Eastern European judges face when applying EU law, Bobek refers to all the judges in the European Union.

In my view, the application of EU law by Macedonian judges will be a difficult and considerably bewildering task, due to their mindset that was described above in the context of Eastern European judges, but also because of the abstractness and obscurity of certain EU law concepts and requirements. Macedonian judges are not used to invoking international law – an indication of how they would approach EU law, which is of a *sui generis* character. As was mentioned above, they refer very rarely to the ECHR and the case law of the ECtHR and thus it would be too ambitious to expect them to assess the prevalence of the principle of prohibition of unjust enrichment or perhaps the effectiveness of EU law in a concrete case. As Capeta rightly points out, they are expected to be creative, to move boundaries and internalise the intuition during a long process of learning to understand law differently.⁸⁶⁶

On the other hand, there is certainly a hope and a way to learn EU law so that it is properly applied. In Macedonia, the Academy for training of judges and public prosecutors was established in 2007 and offers seminars, workshops and training courses in EU law.⁸⁶⁷

⁸⁶⁴ See M. Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: Don't Do as I Say?' (2000) 10 Cambridge Yearbook of European Legal Studies.

⁸⁶⁵ Ibid, 12-13.

⁸⁶⁶ Capeta 2005 (n 838), 21.

⁸⁶⁷ About more specific data related to the Macedonian Academy and availability of professional training, see Georgievski et al 2014 (n 734), 123-124. In Croatia, the Academy was established in 2004 as part of the Ministry of Justice. See Capeta 2005 (n 838), 18; In Latvia, the Latvian Judicial Training was set up in 1995 ‘with the aim of providing continuing legal education and training , as well as improving the level of professional knowledge and

2.2 Possible solutions to the anticipated problems

To conclude, regarding the structure of certain parts of the Macedonian judicial system as well as the mindset of judges which tends towards a textual interpretation of law and a preference for dealing with national law and circumventing international law, I am of the opinion that several constitutional amendments are necessary to smoothen the integration of EU law in Macedonia. First of all, a specific ‘authorisation article’ should be inserted into the Macedonian Constitution that may address this.

Regarding the status of the international law in the Republic of Macedonia it was stated in Article 118 of the Constitution that:

“The international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law.”

Article 118 of the Macedonian Constitution determines the rank of international agreements within the national legal order. Since international agreements ratified in accordance with the Constitution cannot be changed by law, while the ordinary laws can be changed by other laws, it follows that the Act of ratification of international agreements is higher in ranking to ordinary laws but lower in ranking to the Constitution.⁸⁶⁸

If the position is taken that EU law is absorbed under the provisions of international law, with which I personally do not agree, given the “sui generis” nature of the EU law as a primary argument, the Act of Ratification of the Accession Treaty in the EU shall be below the Constitution of the Republic of Macedonia.

ethics for all judges, court employees, bailiffs and other legal professionals in Latvia. See Łazowsky 2010 (n 839), 246. Regarding the training of EU law and its application in Hungary see T. Takács, *Participation in EU Decision Making: Implications on the National Level* (The Hague: T.M.C. Asser Press 2009) 63. Compared to Czech, Polish or Lithuanian Supreme administrative courts where specialized research and documentation departments were set, staffed with (typically younger) lawyers or university lecturers skilled in European Union law and foreign languages, the Slovak Constitutional Court judges are provided with advisors, but there is no European Union law Unit or any research service. See Łazowsky 2010 (n 839), 366.

⁸⁶⁸ Certain commentators claim that the scope of Article 118 is narrow, since it is restricted to ‘ratified treaties’ only. See S. Georgievski, I. Cenevska, D. Presova, ‘Application of the law of the European Union in the Republic of Macedonia’, in S. Georgievski and V. Efremova, *European Union Law Application by the National Courts of the EU-Membership Aspirant Countries from South-East Europe*, (Centre for SEELS 2014) 104.

This is, however, contrary to the ECJ requirement for "ultimate supremacy", according to which the EU law has primacy over the national Constitution of the Member State.

Although, almost all of the Constitutions of the Member States do not formally and fully recognize the primacy of EU law over the national Constitution, perhaps with the notable exception of Estonia⁸⁶⁹, with certain amendments of contestable constitutional provisions, an effect could be reached that the supremacy of EU law over the Constitutions is established in a subtle manner through a prior revision of the Constitution.

Looking at other Member States, constitutional amendments in light of EU membership have included the general issue of the "transfer of powers or sovereign right to the EU"⁸⁷⁰, as well as more specific issues such as provisions on extradition, on the acquisition of real estate and election rights. These issues are relevant for Macedonia as well.

Regarding sovereignty, the Macedonian Constitution provides in article 1:

"The sovereignty of the Republic of Macedonia is indivisible, inalienable and non-transferable."

In other Member States similar provisions have been amended to avoid possible legal conflicts. They have done so by for instance creating a specific legal basis for enabling membership in the EU.⁸⁷¹ Regardless of possible divergences in views on sovereignty and on how national sovereignty, if at all, is affected by EU membership, it would be good for Macedonia to adopt similar provisions in order to firmly embed EU membership in the Macedonian legal order, thereby sending a clear message to Macedonian courts as well.

Also on extradition the Macedonian Constitution should be amended.

According to Amendment XXXII:

"Any citizen of the Republic of Macedonia may not be deprived of the citizenship, nor may be exiled from Republic of Macedonia. Any citizen of the Republic of Macedonia may not be extradited to other country except based upon ratified international agreement, with court decision."

⁸⁶⁹ See Łazowsky 2010, 81.

⁸⁷⁰ See Łazowsky 2010, 71-77.

⁸⁷¹ See Łazowsky 2010, 75 in the case of Estonia and T. Capeta, D.Mihelin and S.Rodin "National Constitution" in "The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre)candidate Countries, A. Kellermann, J. Czuczai, S. Blockmans, A. Albi, W. Douma (ed.), Hague: T.M.C. Asser Press, 2006, in case of Croatia. .

This, in future would be contrary to the European Arrest Warrant framework decision and should therefore be addressed.

These amendments would be necessary in order to decrease the possibility for objection of constitutionality of the Accession Treaty with the Macedonian Constitution.

Although an *ex ante* review of the constitutionality of the treaties by the Constitutional Court of Macedonia is not possible in the Macedonian legal order,⁸⁷² *ex post* review by the Constitutional Court of the EU law with the Constitution, would provide an opportunity to the Court to express its view towards the EU law, either in a direction of not recognizing the supremacy of the EU law versus the Constitution, as in most of the Member States⁸⁷³ or in a direction of recognizing that supremacy, as in Estonia.⁸⁷⁴

Another constitutional change could relate to regulating the specific EU mandate of ordinary courts, either in the Constitution or in an amended Law on courts.⁸⁷⁵

A specific provision or empowerment needs to be inserted according to which a national court of any rank has the power to conduct a judicial review of primary national law. This power cannot be restricted to the Constitutional Court.⁸⁷⁶

Article 18 paragraph 4 of the Law on courts of the Republic of Macedonia states:

"(4) When the court deems that the law that is to be applied in the specific case is not in compliance with the provisions of an international agreement ratified in conformity with the Constitution, it shall apply the provisions of the international agreement provided that they are directly applicable."

The issue with this provision regarding the necessity of direct application of EU law by the ordinary courts lies in the fact that this provision is restricted to ratified international agreements only, thus the status of the secondary acts of EU law shall be unknown. The fact that the rules on the application of EU

⁸⁷² See Georgievski et al 2014 (n 734), 103.

⁸⁷³ See See Łazowsky 2010, 82

⁸⁷⁴ See Łazowsky 2010, p. 166

⁸⁷⁵ In Slovakia the role of courts is regulated in the Constitution, See Łazowsky 2010, p.79, whereas in Slovenia, the preliminary ruling procedure for the courts in the national law was regulated with an Act Amending the Courts Act. See See Łazowsky 2010, p.439

⁸⁷⁶ Takács proposed this explicit empowerment because in contrary the courts could be prompted to refer to the Constitutional Court (in a scenario where they are not aware of the "Simmenthal mandate"). See Takács 2009 (n 861), 59.

law directly flows from EU law itself, may not be sufficient to incentivise national courts, so constitutional arrangements could help here. Another problem arises from the requirement that the provisions of the agreement are directly applicable, without having any criteria in the literature or the case law about what direct applicability is. Finally, despite that this provision is at disposal of the courts, they very rarely use it, so it will be ambitious to expect from Macedonian judges to rely on this provision every time they should set aside a national norm in order to apply an EU law norm.

In this, presumably amended Law on courts, the judges should also be cognizant of the doctrines of 'harmonious interpretation of national law' and the principle of State liability in EU law. As was previously demonstrated, the ordinary courts do not apply this technique. It is only the Constitutional Court which uses it for the proper construction of the constitutional law.

Even more, courts should be well acquainted with the preliminary references procedure and the conditions and manner in which questions may be referred to the CJEU.⁸⁷⁷

The possibility to refer to a "higher" court in order to clarify certain questions is provided to them through Article 18 (paragraphs 1 and 2)

“(1) The court shall raise an initiative for instituting a procedure for assessing the constitutional compliance of a law when its compliance with the Constitution is questioned, whereupon it shall immediately inform the higher court and the Supreme Court of the Republic of Macedonia.

(2) When the court deems that the law that is to be applied in the specific case is not in compliance with the Constitution, and the constitutional provisions cannot be applied directly, it shall suspend the procedure pending the decision of the Constitutional Court of the Republic of Macedonia.”

Despite this provision, the courts almost never stay the proceedings in order to refer to the Constitutional Court. Consequently, a very explicit provision with the conditions for referring a question to the CJEU should be inserted, as well as the consequences for non-referral.

⁸⁷⁷ For instance in Slovakia, came to divergences in submitting preliminary questions due to confusing procedural framework. The issue arose as to whether there should be one single order in which the procedure is stayed and question submitted or perhaps two separate orders to the CJEU. Still, these are procedural questions which should be regulated in the procedural laws in Macedonia. See Łazowsky 2010 (n 839), 368.

The issue of whether the Constitutional Court of the Republic of Macedonia should be obliged to refer questions to the CJEU should also be regulated and determined whether it will be considered a court for the purpose of Article 267 (3) TFEU.⁸⁷⁸ This could be done for the *Simmenthal* mandate of ordinary courts as well.

These suggestions all involve codifying matters which are perhaps from an EU law point of view redundant as they flow directly from EU law itself. I consider such changes however necessary as these would address one of the main issues for the future application of EU law in Macedonia: the legal culture in Macedonia. It is crucial for Macedonian judges to understand what EU law really is, what are its principles and values and very importantly, the manner in which they should be applied in each specific case. As was mentioned, the legal culture of the Macedonian judges, encompassing the way of interpretation of legal rules, the usage of legal arguments and sources differs from the culture in which purposive and contextual approach is applied and principles and case law form part of the legal arguments.

Macedonian judges will have to get acquainted with the case law of the ECJ and keep themselves informed and they have to be prepared to play a creative role required from them by the EU law. For that purpose, the changes should be made even in the process of legal education and following that, during the process of training at the Academy for training of judges and public prosecutors.

Of course, many more systemic and profound constitutional and legal changes will hopefully be made once there is a political will for that and it will certainly be done in a much more concrete and in-depth manner. Considering the topic of my thesis, I have only modestly attempted to confine myself to the obligations of the judiciary.

⁸⁷⁸ For instance, certain Constitutional Courts in EU like the Spanish CC rejects and connection with Article 267(3) TFEU, whereas the German, Belgian, Austrian, Lithuanian, Italian, Romanian and Slovak Constitutional Courts are considered to be courts within the sense of Article 267 (3) TFEU. See Łazowsky 2010 (n 839), 373.

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- 4. Judgment of the Supreme Court of the Republic of Macedonia N. 23/04 of 10 June 2004.
- 5. Decision of the Constitutional Court of the Republic of Macedonia N. 102/2008 of 10 September 2008.
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Samenvatting in het Nederlands

Dit proefschrift analyseert in de eerste plaats de jurisprudentie en literatuur over procedurele autonomie (beperkt door de Rewe-beginselen van gelijkwaardigheid en minimum effectiviteit) in het EU-recht, mede in het licht van de beginselen van effectiviteit en effectieve rechtsbescherming. Het gaat in op de vraag wat deze autonomie omvat en of dit daadwerkelijk te gelden heeft als een juridisch beginsel. Daarbij is de vraag of de klassieke indeling van de aanpak van het Hof van Justitie van de Europese Unie (hierna: Hof) in drie fases overeenkomt met de werkelijkheid. Zo niet, dan moeten we ons afvragen of er geen andere, betere, structurering van de jurisprudentie passend zou zijn, te bepalen.

Ten tweede gaat dit proefschrift in op de toepassing van deze beginselen op een concreet leerstuk, namelijk het leerstuk van EU-staatsaansprakelijkheid dat voortvloeit uit de Francovich zaak. Dit maakt het mogelijk om te analyseren hoe de centrale thema's van dit proefschrift – hoe het autonomie beginsel verband houdt met het effectiviteitsbeginsel en het beginsel van effectieve rechtsbescherming – uitwerken in de praktijk en wat de consequenties zijn voor de Republiek Noord-Macedonië na toetreding tot de Europese Unie (EU).

Volgens de Rewe-beginselen, wordt nationale procedurele autonomie begrensd door het gelijkwaardigheidsbeginsel en het beginsel van (minimum-) effectiviteit.

Om te bepalen of het gelijkwaardigheidsbeginsel is geschonden, moet er aangetoond worden dat er sprake is geweest van een ongunstigere behandeling van de vordering ten opzichte van vergelijkbare nationale vorderingen. Allereerst blijkt het echter in de praktijk lastig om vast te stellen wat een vergelijkbare nationale vordering is. Zelfs als een vergelijkbare nationale vordering geïdentificeerd kan worden, is het moeilijk om te bepalen welke voorwaarden gunstiger zijn voor nationale vorderingen en welke ongunstig zijn voor Europese vorderingen. Hierbij moeten verschillende aspecten – zoals de gevallen waarin een vordering voorgelegd kan worden, de complexiteit van de procedure, de termijnen waarbinnen een vordering voorgelegd kan worden en de proceskosten – beoordeeld worden

Daarbij laat de analyse van de jurisprudentie zien hoe de beginselen van gelijkwaardigheid en minimumeffectiviteit de toepassing van verschillende nationale procedurele regels hebben beïnvloed. Deze beïnvloeding was alleen op te merken in specifieke zaken waar mogelijk toegang tot de rechter geweigerd zou worden of waar het recht op effectieve rechtsbescherming werd gehinderd. In

sommige zaken was het het gelijkwaardigheidsbeginsel dat tot interessante uitkomsten leidde (zie bijvoorbeeld de Weber's Wine World zaak, de Transportes Urbanos zaak en de Draemphael zaak), terwijl in andere zaken juist het beginsel van minimum effectiviteit bepalend was.

In sommige zaken heeft het effectiviteitsbeginsel een groot verschil gemaakt. Dat is vooral het geval geweest in zaken waarin één van de partijen (meestal overheidsinstanties) verwijtbaar gedrag heeft vertoond en daarmee de uitoefening van rechten gebaseerd op het EU-recht onmogelijk heeft gemaakt. Misleiding, opzettelijke vertraging in het voorzien van de eiser van informatie, en het opzettelijk toepassen van wettelijke bepalingen met als doel om plichten te ontwijken die voortvloeien uit EU recht zijn voorbeelden hiervan. Het Hof heeft in die gevallen geen meegaandheid betoond met Staten of andere partijen die pogen te profiteren van hun eigen wangedrag, ten koste van de burger (Emmott, Santex, Levez).

Ten slotte, met betrekking tot de vraag of het beginsel van nationale procedurele autonomie nu nog bestaat in het licht van met name jurisprudentiële ontwikkelingen het volgende. Een absolute invulling van het beginsel zou onwenselijk zijn in het licht van het benodigde respect voor gemeenschappelijke geharmoniseerde normen.

Met betrekking tot de kwestie van de klassieke driedeling in de ontwikkeling van de jurisprudentie van het Hof, en de vraag of dit overeenkomt met de praktijk, kunnen we concluderen dat een andere manier om de jurisprudentie in te delen passender is.

Hierna volgt eerst een korte bespreking van de verschillende aanpakken die het Hof heeft toegepast, die overigens niet per se opeenvolgend zijn, maar deels overlappen.

Volgens de eerste aanpak is het nationale procedurele recht leidend in geval er geen geharmoniseerd EU-recht bestaat voor de bescherming van materieel EU- recht. Dergelijke rechten worden uitgeoefend volgens het nationale procedurele recht dat evenzeer van toepassing zou zijn op de uitoefening van vergelijkbaar nationaal materieel recht. Alleen wanneer het nationale procesrecht de uitoefening van de door Europees recht verleende rechten niet nagenoeg onmogelijk of uiterst moeilijk maakt, leidt dit uitzondering. Dit impliceert dat het nationale procesrecht van toepassing is, voor zover dit voldoet aan de beginselen van gelijkwaardigheid en minimeffectiviteit.

In de tweede aanpak van het Hof (zie Simmenthal, Factortame, Francovich en Unibet) kwamen er twee elementen naar voren: het opzij zetten van ongunstige nationale procesregels en het toekennen van specifieke schadevergoeding (volgens EU-recht). In het bijzonder is van belang dat het nationale procesrecht dat de mogelijkheid tot het effectueren van rechten op het EU-recht gebaseerd niet

getoetst werd op basis van het gelijkwaardigheidsbeginsel en het beginsel van minimeffectiviteit. In andere woorden, de focus lag niet op de vraag of handhaving van materieel recht nagenoeg onmogelijk of uiterst moeilijk was, maar alleen op het Europese effectiviteitsbeginsel en het beginsel van effectieve rechtsbescherming. Bij strijd met deze beginselen werd het nationale procesrecht opzij gezet. Hierbij vond geen afweging plaats die juist typerend is voor de andere aanpakken van het EU Hof.

Volgens de derde aanpak van het Hof (volgend uit de Van Schijndel en Peterbroeck zaak) bepaalt het Hof dat een nieuwe afweging plaats moeten vinden om vast te stellen of nationaal procesrecht de uitoefening van een individueel EU recht beperkt. Deze nieuwe afweging werd toegepast in zaken als Van Schijndel, Peterbroeck en Alassini. Hierbij werd het belang van een effectieve toepassing van EU recht en het beginsel van effectieve rechtsbescherming afgewogen tegen een algemeen nationaal beginsel welke de handhaving van individuele EU rechten beperkt.

De vierde aanpak van het Hof is gebaseerd op de toepassing van het Handvest van de Grondrechten van de Europese Unie (hierna: Handvest). In de eerder genoemde aanpakken volgde de definitie van het beginsel van effectieve rechtsbescherming uit de Johnston zaak. Het beginsel van effectieve rechtsbescherming is een algemeen EU-rechtsbeginsel, voortvloeiend uit Artikel 6 en 13 EVRM en de constitutionele tradities van de lidstaten. Echter in de nieuwe, vierde, aanpak gaat het Hof uit van het beginsel van effectieve rechtsbescherming zoals dat is neergelegd in artikel 47 van het Handvest en dat er geen noodzaak is om te verwijzen naar artikel 6 en 13 EVRM. Desondanks neemt het Hof in al deze zaken de jurisprudentie van het EHRM als uitgangspunt voor haar eigen uitspraken. In deze aanpak is er ook sprake van een afweging tussen het beginsel van effectieve rechtsbescherming en een ander toepasselijk recht.

Met betrekking tot de kwestie van de relatie tussen, aan de ene kant, het effectiviteitsbeginsel en het beginsel van effectieve rechtsbescherming en aan de andere kant het beginsel van nationale procedurele autonomie kunnen we het volgende concluderen.

Het gelijkwaardigheidsbeginsel, het beginsel van minimeffectiviteit en het beginsel van effectieve rechtsbescherming moeten allemaal toegepast worden in het licht van een ander belangrijk algemeen EU beginsel. In het geval van het beginsel van effectieve rechtsbescherming volgens artikel 47 van het Handvest, moeten ook de fundamentele rechten van individuen gewaarborgd worden.

Het beginsel van nationale procedurele autonomie en de onderliggende beginselen van gelijkwaardigheid en minimeffectiviteit worden zeker nog op grote schaal toegepast. Er zijn echter

zaken die uitgaan van de voorrang die het EU recht heeft op de nationale rechtsorde, terwijl andere zaken beoordeeld zijn vanuit het oogpunt van nationale procedurele autonomie. Het is moeilijk om de gronden hiervan te achterhalen.

Of het beginsel van effectieve rechtsbescherming of het effectiviteitsbeginsel toegepast moeten worden hangt voornamelijk af van het doel (het waarborgen van individuele EU rechten of juist de uniforme toepassing van EU recht), terwijl de toepassing van slechts het beginsel van effectieve rechtsbescherming volgens artikel 47 van het Handvest juist af zou moeten hangen van de beperkingen die opgelegd worden. De eerste afweging wordt gemaakt in het licht van het algemeen belang, terwijl de tweede afweging wordt beperkt door primair recht, zoals bijvoorbeeld artikel 52 lid 1 van het Handvest.

Deze afweging, de ‘rule of reason’ toets, was al van toepassing lang voor de uitspraken in de Van Schijndel en Peterbroeck zaken. Het Hof heeft altijd een afweging gemaakt tussen beginselen, hoewel in sommige zaken explicieter dan in anderen. Het Hof kijkt soms naar de praktische effecten van een rechtsregel terwijl het in andere zaken grondig de rol en het doel van een rechtsregel onderzoekt. Soms wordt de rechtvaardiging van het beperken van een beginsel gevonden in de bescherming van het algemeen belang terwijl in andere zaken de waarborging van fundamentele rechten doorslaggevend is.

In het algemeen wordt de aanpak van het Hof met betrekking tot de vraag hoe om te gaan met het beginsel van nationale procedurele autonomie deels warm ontvangen, maar deels ook bekritiseerd. Dit brengt ons bij de concrete toepassing op het leerstuk van EU-staatsaansprakelijkheid, hetgeen in het kader van deze studie als een case study is behandeld. Dit leerstuk is ontwikkeld als een leerstuk van EU-recht in het licht van het EU effectiviteitsbeginsel en het beginsel van effectieve rechtsbescherming. Het Hof heeft daarnaast de vereisten die leiden tot het recht op vergoeding van schade veroorzaakt door een inbreuk van EU recht vastgesteld en nader uitgelegd. Nationale gerechten zijn daarom gebonden aan het toekennen van compensatie als aan drie vereisten is voldaan. Desondanks wordt de concrete toekenning van schadevergoeding voor een belangrijk deel bepaald door nationale aansprakelijkheidsregels. Indien de nationale vereisten die recht geven op vergoeding van schade strikter zijn, dan moeten de nationale gerechten handelen zoals bepaald in de Simmenthal zaak en deze striktere vereisten opzij zetten. Soepelere nationale vereisten zijn voor een individu juist wenselijk en daarom geaccepteerd.

Aan de andere kant moeten de zogenoemde ‘uitvoerende voorwaarden’ die toegepast worden door nationale gerechten voldoen aan de Rewe-beginselen van gelijkwaardigheid en minimumeffectiviteit

alsmede het beginsel van effectieve rechtsbescherming. Compensatie moet bijvoorbeeld ‘toereikend’ zijn.

In het hoofdstuk over Noord-Macedonië is geanalyseerd hoe het huidige Macedonische recht zich verhoudt tot de algemene beginselen van autonomie en rechtsbescherming uit het EU-recht en op het gebied van staatsaansprakelijkheid in het bijzonder. Daarbij is ingegaan op de formele, juridische rechtsregels maar ook op de rechtspraktijk en hoe rechters in Macedonië zich verhouden tot rechtsregels van internationale oorsprong en de wetgever. Het leerstuk van staatsaansprakelijkheid bestaat al binnen de Macedonische rechtsorde en er is daarom geen noodzaak om een apart systeem van staatsaansprakelijkheid volgens EU recht te introduceren. Staatsaansprakelijkheid op basis van nationaal recht moet echter wel in lijn zijn met EU materieel recht en de Rewe-beginselen. Voor de meer fundamentele vraag of het recht tot vergoeding van schade voor een schending van EU-recht voortvloeit uit nationaal recht of rechtstreeks gebaseerd kan worden op het EU-recht zijn met name de opvattingen van Duitse rechters en academici relevant. Die opvattingen lopen sterk uiteen, maar een dominante positie in het discours is dat staatsaansprakelijkheid geen nationale eis is, maar een eis gebaseerd is op EU recht, welke vervolgens toegepast en uitgewerkt wordt binnen de kaders van de rechtsordes van de lidstaten. Ook daarom is er geen noodzaak om een nieuwe vorm van staatsaansprakelijkheid te introduceren voor schendingen van EU recht in de Macedonische rechtsorde.

Het recht op compensatie voor schade veroorzaakt door de Republiek Noord-Macedonië is echter onderworpen aan minder strikte voorwaarden dan die voortvloeien uit het EU-recht. In plaats van het vereiste dat schendingen ‘voldoende gekwalificeerd’ moeten zijn om voor vergoeding in aanmerking te komen, wordt in het Macedonische enkel de eis gesteld dat het betreffende overheidshandelen onrechtmatig is. Daarmee heeft het leerstuk van staatsaansprakelijkheid in Macedonië een objectief karakter.

Terwijl in ‘common-law’-stelsels compensatie wordt beschouwt als een rechtsmiddel (remedy), wordt het in de Republiek Noord-Macedonië gezien als een materieel recht dat wordt geëffectueerd door middel van een vordering tot schadevergoeding tegen de Staat. Voor wat betreft het toepassingsbereik van succesvolle vorderingen tot vergoeding van schade veroorzaakt door de overheid, geldt dat onrechtmatig gedrag door de uitvoerende, wetgevende en gerechtelijke autoriteiten als basis voor een dergelijk vordering kan gelden.

Staatsaansprakelijkheid in de Republiek Noord-Macedonië is exclusief, wat betekent dat het altijd de Staat is die aangeklaagd wordt en niet een van haar autoriteiten. Gemeenten hebben echter hun eigen

passieve legitimiteit en worden als afzonderlijk rechtspersoon, in plaats van als een orgaan van de Staat aangemerkt. Daarnaast zijn er twee specifieke vereisten om aansprakelijkheid van handhavingsagentschappen en notarissen te bewerkstellingen zodra zij nationaal recht schenden.

Vorderingen voor schadevergoeding moeten voldoen aan materiële en procedurele vereisten. Deze vereisten bleken in lijn te zijn met het EU-recht. Wel zouden bij de toepassing van het leerstuk van EU-staatsaansprakelijkheid in Noord-Macedonië problemen kunnen rijzen vanwege de benadering van Macedonische rechters. Gebleken is dat die houding afwerend is ten aanzien van de toepassing van internationaalrechtelijke normen. Dit kan ook de toepassing van het EU-recht beïnvloeden. Naast dit algemene probleem, dat te maken heeft met de manier waarop Noord-Macedonische rechters de status, rol en het doel van internationaal recht en de integratie daarvan in de nationale rechtsorde zien, zijn er een aantal specifieke problemen en aandachtspunten. Dit betreft in de eerste plaats vergoeding van schade vanwege onrechtmatig wetgevend handelen. In de Macedonische rechtsorde wordt vergoeding van schade op deze grond niet categorisch uitgesloten, maar zal het toch lastig blijken te zijn een dergelijke vordering succesvol te doen zijn. Dat betreft eerst en vooral de rechtsgrondslag voor een dergelijke vordering. Nationale rechtbanken zullen vermoedelijk gebruikelijke bepalingen uit het Macedonische verbintenissenrecht toepassen. Een vordering wegens schending van de Macedonische grondwet door de wetgever is echter tot op heden nog nooit succesvol geweest. Hetzelfde geldt voor vorderingen wegens schending van het EVRM, een mogelijkheid die door het EHRM is bevestigd. Dit onderstreept eens te meer het belang van een goed begrip onder Macedonische rechters van met name de EU-beginselen van effectiviteit, gelijkwaardigheid en effectieve rechtsbescherming.

In dit licht sluit het proefschrift af met een aantal aanbevelingen die wellicht strikt genomen niet juridisch noodzakelijk zijn, maar wel de integratie van het EU-rechtsbeschermingsrecht in de Macedonische rechtsorde sterk zouden bevorderen. Dat is vooral zo, vanwege de status die nationale wetgeving heeft voor Macedonische rechters. Een van die aanbevelingen betreft het (grond-)wettelijk verankeren van de mogelijkheid tot toekenning van schadevergoeding bij inbreuken van de Macedonische wetgever op het EU-recht.

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