INTRODUCTION*

A. THE VIGILANCE OF INDIVIDUALS IN EU LAW

1. The creation of a private enforcement model

In its *Van Gend en Loos* judgment dating from over half a century ago, the Court of Justice of the European Union (“Court of Justice” or “Court”) made it clear that the new legal order established through the creation of the European Union ("EU") concerns not only the Member States, on the one hand, and the EU’s institutions and other bodies, on the other hand. Rather, the relationship is triangular in nature, in that private parties can also have a legal position under EU law. Not only can this law create obligations for these private parties, it can also confer rights on them, even where that is not expressly stated, provided that the provision in question is sufficiently clear and unconditional. EU law therefore constitutes ‘a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to the legal relationships under [EU] law’. As is well known, *Van Gend en Loos* thus articulated the principle of direct effect. Equally well known is that shortly afterwards the

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* The author completed a PhD at the University of Leiden on the same topic, supervised by Professor H.J. Snijders and Professor S.C.G. Van Den Bogaert, and this book draws upon that research.


2 Unless expressly indicated otherwise, in the following reference is consistently made to the current names of the EU, the EU’s institutions and other bodies and the relevant acts of EU law. Similarly, the current numbering of the EU Treaties is consistently used throughout this book.


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Court confirmed the existence of the principle of primacy of EU law over national law. Together these two principles constitute the ‘essential characteristics’ of the EU legal order.

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

1.02 In the first place, the scope for enforcing EU law at the central, European level (that is, before the EU courts in Luxembourg) is limited for legal reasons. The main mechanisms designed to ensure such supervision and enforcement at that level, to which reference was made in Van Gend en Loos, are infringement proceedings. The relevant Treaty provisions, Articles 258 and 259 of the Treaty on the Functioning of the EU (“TFEU”), allow both the Member States and

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5 CoJ case 6/64, Costa v ENEL, pp. 593–4.
6 CoJ opinion 1/91, EEA Agreement, para 21.
8 While in the case law of the EU courts reference is typically made to ‘individuals’, the term generally used here to designate the persons that may initiate these private enforcement proceedings is “private parties”. This latter term can encompass legal and natural persons and covers the range of terms used in specific legislation and situations, such as undertaking, rightholder or consumer. It includes public authorities where they do not act in a public capacity, that is, where they do not exercise public powers derogating from the rules of law applicable to relations between private individuals but instead act in accordance with these latter rules. Cf. e.g. CoJ case C-167/00, Henkel, para 30.
12 For the present purposes, the term “national court” corresponds, broadly speaking, with the term “court or tribunal of a Member State” within the meaning of Article 267 TFEU on the preliminary reference procedure, discussed in para 1.02 below.
the Commission to bring a case before the Court of Justice when they consider that a Member State has infringed EU law. Private parties can neither initiate these proceedings nor can they be taken to court in this context. Infringement proceedings thus remain an affair from which private parties are largely excluded.

Furthermore, it is of course true that the Treaty on the European Union (“TEU”) and the TFEU (collectively “EU Treaties”) allow private parties to initiate “direct actions” before the EU courts. But these actions can only be brought in a limited number of circumstances. In particular, in order to have legal standing (locus standi, that is, the legal capacity to bring an action before the court) under Article 263 TFEU, a private party must demonstrate that it is directly and individually concerned by the act that is the object of the legal action in question. As construed by the EU courts, this threshold can be notoriously difficult to overcome. The amendment of this article in 2009 (Treaty of Lisbon) has relaxed this test somewhat in certain cases. This has not, however, fundamentally altered the restrictive approach with respect to the private party’s possibility of bringing these direct actions before the EU courts. Direct actions are moreover limited to contesting the legality of acts or failures to act of the institutions and other bodies of the EU, as well as claims in connection with the EU’s contractual or non-contractual liability. No such actions can be brought against Member States, let alone against other private parties.

In addition, under Article 267 TFEU, the Court of Justice can give preliminary rulings in proceedings that private parties have brought before the courts or tribunals of the Member States in cases where there is uncertainty as to the interpretation or validity of provisions of EU law. The Court has clarified that this term “courts or tribunal” refers to independent and permanent bodies established by law with compulsory jurisdiction, which apply rules of law on the basis of inter partes proceedings. Such preliminary rulings clarify EU law as it

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13 Cf. e.g. General Court (“GC”) Order case T-532/12, Morea, para 7.
14 See further subsection 2.C.1 below.
16 It follows from the fourth subparagraph of Art. 263 TFEU, as amended, that a private party applicant is no longer required to demonstrate individual concern in relation to regulatory acts that do not entail implementing measures. See e.g. CoJ case C-583/11 P, Inuit, para 45–62 and 68–77; CoJ case C-456/13 P, T & I Sugars, para 29–32 and 43–50. On this amendment, see further e.g. Ward (2009), pp. 357–9; Craig (2010), pp. 129–32; Kornezov (2014), p. 251; Van Mallegem and Baeten (2014), p. 1187.
17 See Articles 263, 265 and 340 TFEU respectively. Cf. e.g. GC Order case T-635/13, Aïmovici, para 6.
18 E.g. CoJ case 175/84, Krohn, para 18; CoJ case C-407/04 P, Dalmine v; para 62; GC Order case T-469/11, Al Qadhafi v France, para 9; GC Order case T-311/13, PQ.
19 E.g. CoJ case 246/80, Broekmeulen, para 18; CoJ case C-54/96, Dersch Consult, para 23; CoJ case C-136/11, Westbahn Management, para 27; CoJ joined cases C-58/13 and C-59/13, Totti, para 17–19; CoJ case
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ought to have been understood from its entry into force and as such they are also of relevance to legal relationships other than those between the parties to the case at hand.\textsuperscript{20} The preliminary reference procedure has been held to be ‘essential for the preservation of the [EU] character of the law established by the [EU] Treaties’ and an element of the ‘complete system of legal remedies and procedures designed to ensure judicial review of the legality of [those] acts’.\textsuperscript{21} These characteristics have led some to call it the ‘infringement procedure for private parties’.\textsuperscript{22} However, there are also certain important limits in this case. The preliminary reference system establishes in essence a form of direct cooperation between the national courts and the Court of Justice.\textsuperscript{23} Procedurally speaking, such a reference is no more than a sidestep in the proceedings before the former.\textsuperscript{24} Where the Court of Justice has issued a preliminary ruling it remains for the national court concerned to apply that ruling to the case at hand.\textsuperscript{25} Moreover, while EU law can require the latter to make a preliminary reference, the decision whether or not to do so is, as a matter of EU law, taken independently from the acts or views of the parties to the legal proceedings.\textsuperscript{26}

1.03 In the second place, there are practical considerations that limit the scope for enforcement of EU law at the central, European level. To begin with, in practice the Member States hardly ever use the above-mentioned powers to initiate infringement proceedings against other Member States.\textsuperscript{27} It is therefore, in practice, primarily for the Commission to bring such proceedings. While the Commission, as the “guardian” of the EU Treaties,\textsuperscript{28} is generally willing to use its powers in this regard where it deems this necessary, its resources (in terms of information-gathering capacity, manpower as well as financial means) are

\begin{itemize}
\item C-222/13, TDC, para 27–32. Although certain arbitration bodies may meet these conditions, alternative dispute resolution bodies normally do not. See e.g. CoJ case 102/81, Norder, para 9–16; CoJ Order case C-555/13, Merox Canada, para 17–25.
\item \textsuperscript{20} E.g. CoJ case 61/79, Denkavit, para 16; CoJ case C-231/96, Edis, para 15.
\item \textsuperscript{21} CoJ case C-583/11 P, Inuit, para 92. See e.g. also CoJ opinion 2/13, ECHR, para 198, where this procedure is called ‘the keystone of the judicial system established by the [EU] Treaties’.
\item Pescatore, cited in Micklitz (2012), p. 393.
\item \textsuperscript{22} E.g. CoJ opinion 1/09, Patent Court Agreement, para 84; CoJ case C-416/10, Križan, para 66.
\item \textsuperscript{23} Cf. the standard phrase used by the CoJ in relation to the allocation of costs associated with preliminary references, according to which ‘these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court’. See e.g. CoJ case C-416/10, Križan, para 117.
\item \textsuperscript{24} E.g. CoJ case 51/74, Van der Hulst, para 12; CoJ joined cases C-175/98 and C-177/98, Lirussi, para 38.
\item \textsuperscript{25} E.g. CoJ case 70/77, Simmenthal, para 10; CoJ case C-2/06, Kempter, para 41–2; CoJ case C-137/08, Pérez Cózar Lizing, para 28–9; CoJ case C-561/11, Fédération Cynologique Internationale, para 30. This is not to say, however, that the parties to the proceedings before a national court may not suggest making a preliminary reference, in accordance with the applicable national procedural rules. Some also link the preliminary reference procedure to the principle of effective judicial protection discussed in subsection 2.B below. See e.g. Opinion AG Léger case C-224/01, Köhler, para 147; Opinion AG Ruiz-Jarabo Colomer case C-14/08, Roda Golf, para 29.
\item \textsuperscript{26} Only four such cases have been brought in the period up until 2012. See Lock (2012), p. 1677.
\item \textsuperscript{27} Cf. Art. 17 TEU.
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limited, however. This was already the case in the early days of the process of European integration, but it arguably carries even more weight today in an EU that has been enlarged to 28 Member States and over 500 million citizens and that is, moreover, involved in many different fields of law. As a consequence, in its own words, the Commission cannot act as ‘a kind of “super enforcement authority”’. 

Similar considerations apply to the EU courts. They have over the decades been confronted with a virtually permanently increasing number of cases brought before them. This is illustrated by the fact that the published case law of the Court of Justice for 2001 alone takes up the same shelf space as that for the first 19 years of case law up to 1972. Whereas in 2000 around 900 new cases were brought before the EU courts (with approximately 1450 cases pending), ten years later this number had risen to around 1250 new cases per year (with approximately 2100 cases pending), an increase of almost 40 per cent. As a result the EU courts regularly struggle with their workload. Structural and organisational changes have been enacted, most notably through the creation of the General Court in 1988. More recently the Court of Justice, which is charged \textit{inter alia} with ruling on preliminary references and in infringement proceedings, has been able to cut back the length of the proceedings before it. However, the General Court especially, which acts mainly as the first instance court for direct actions, continues to struggle with its workload and the resulting long delays. Indeed, the length of the proceedings before this latter court has already several times been held to have exceeded a reasonable time period. Discussions on reforms therefore continue.

Lastly, as a general rule, EU law is \textit{implemented by the Member States}. This implementation therefore takes place primarily at national level. It follows that

\footnotesize{29 Cf. e.g. recital 6 Directive 2006/123/EC on services in the internal market, OJ 2006, L 376/36 ("Services Directive"), where it is noted that seeking to remove the barriers identified there on a case-by-case basis through infringement procedures under primary EU law ‘would, especially following enlargement, be extremely complicated for national and [EU] institutions’. 


31 The term “EU courts” is used here to refer to the Court of Justice of the European Union, which consists of the Court of Justice and the General Court as well as the Civil Service Tribunal (“CST”) as a specialised court.


33 See CoJ, Annual reports 2000 and 2010, respectively.

34 E.g. CoJ case C-40/12 P, Garoigne, para 102; CoJ case C-243/12 P, FLS Plast, para 142; CoJ case C-467/13 P, ICF, para 57–60.

35 On the functioning and workload of the EU courts as well as past and possible future reforms, see further e.g. Rasmussen (2000), p. 1071; Schiemann (2008), p. 3; Forwood (2008), p. 34; Meij (2013), p. 3; Hadroušek and Somlek (2015), p. 188.

36 Cf. Art. 291(1) TFEU. See e.g. also CoJ case C-201/04, Molenbergnatie, para 52: ‘according to the general principles on which the [EU] is based and which govern the relations between it and the Member States, it is for the Member States, under Article [4(3) TFEU], to ensure that [EU] rules are implemented on their territories’.
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there is also considerable potential for the enforcement of EU law at that level, that is, before the competent national courts. The above-mentioned finding in Van Gend en Loos that under certain conditions EU law confers rights on private parties on which these parties can rely directly in legal proceedings allowed the unleashing of this potential for decentralised enforcement, particularly in combination with the principle of primacy of EU law. Indeed, after that judgment it did not take the Court of Justice long to clarify that ‘every time a rule of [EU] law confers rights on individuals, those rights, without prejudice to the methods of recourse made available by the Treaty, may be safeguarded by proceedings brought before the competent national courts’. Earlier it had already held that ‘it may generally be assumed that a substantive right has as its corollary that it provides the person in whose interest it operates with the means of enforcing it himself by proceedings before the courts rather than the intervention of a third party’.

Since Van Gend en Loos, which concerned a provision of the EU Treaties, it has been made clear that the principle of direct effect extends to potentially all binding EU legal acts. Provided that they are sufficiently clear and unconditional, provisions of regulations and decisions can therefore also be directly effective. The same applies to directives, but only in “vertical” legal relationships, that is, in actions between a private party, on the one hand, and a Member State (including its decentralised entities and semi-public bodies), on the other hand. The Court of Justice has consistently held that directives have no horizontal direct effect. This means that, in and of themselves, provisions of directives cannot impose obligations on private parties and cannot be invoked and enforced in legal relationships between private parties. The effects of this position tend to be moderated somewhat by the fact that the concept of a “state” – and therefore that of a vertical relationship – is a rather wide one in this connection. The capacity in which the latter acts is not of relevance. Provisions of directives that are capable of having direct effect may therefore be relied upon against any body, whatever its legal form, which has been made responsible

38 For whereas direct effect can be understood as meaning that EU law is to be considered as the “law of the land”, it is the combination with the principle of primacy that ensures that EU law is also the “higher law of the land”. See Weiler (1991), p. 2415.
40 Coj case 6/60, Humblet, pp. 571–2. This case relates to the European Coal and Steel Community (“ECSC”) and not to the EU Treaties, but considering its nature in principle and the similarity of the relevant provisions at issue, there appears to be no reason why this statement would not be equally applicable as a matter of EU law. That is confirmed by the reference to this case made in Coj joined cases C-6/90 and C-9/90, Franovch, para 36.
41 Coj case 9/70, Grad, para 5; Coj case 39/72, Commission v Italy (slaughtered cows), para 17.
42 Coj case 41/74, Van Duyn, para 12.
43 E.g. Coj joined cases C-397/01 to C-403/01, Pfiffer, para 108; Coj case C-282/10, Dominguez, para 37 and 42.
pursuant to a measure adopted by a Member State for providing a public service under the control of the State and which has for that purpose special powers beyond those which result from the normal rules applicable in relations between private parties. But, for instance, an association governed by private law with a social objective does not meet these conditions. This absence of horizontal direct effect furthermore does not mean that the application of a directly effective provision of EU law in a vertical context cannot, indirectly, have certain adverse repercussions for another private party or have “collateral effects” in horizontal legal relationships. The fact nonetheless remains that the Member States first need to transpose a directive into national law for the rules of EU law in question to have effect in “truly” horizontal legal relationships.

The aforementioned potential is reinforced by other “weapons” that private parties can use in proceedings before national courts where claims based on EU law are at stake. Of particular importance is the principle of consistent interpretation (also known as “harmonious interpretation” or “indirect effect”). Under this principle, as construed by the Court of Justice, national law must be interpreted, in so far as possible, in light of the wording and the purpose of the EU law at issue. This means that national courts must do whatever lies within their jurisdiction, taking the whole body of national law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the rule of EU law in question is fully effective and to achieving an outcome consistent with the objective pursued by it. The principle of consistent interpretation finds its limits in the general principles of law that form part of the EU legal order, in particular those of legal certainty and non-retroactivity, which can thus constitute a bar to incurring criminal liability and preclude an interpretation contra legem. Given the aforementioned absence of horizontal direct effect of directives, the principle of consistent interpretation is particularly relevant in actions between private parties concerning rights and obligations derived from directives, especially where they have not been transposed into national law in a correct and timely manner. Other such “weapons” at the disposal of private parties seeking to assert their rights derived from EU law

44 E.g. CoJ case C-282/10, Dominguez, para 38–9; CoJ case C-425/12, Portgès, para 24–6.
45 CoJ case C-176/12, Association de médiation sociale, para 37.
46 E.g. CoJ case C-443/98, Unilever, para 49–51; CoJ case C-201/02, Wells, para 57. See further Prechal (2005), pp. 255–70.
47 Cf. Art. 288 TFEU, pursuant to which a directive is ’binding, as to the result to be achieved, upon each Member State to which it is addressed’, while leaving ’to the national authorities the choice of form and methods’.
48 E.g. CoJ case 80/86, Kolpinghuis Nijmegen, para 13–14; CoJ case C-106/89, Mariating, para 8; CoJ joined cases C-397/01 to C-403/01, Pfeiffer, para 118; CoJ case C-42/11, Lopes De Sílvia Jorge, para 54–6; CoJ case C-176/12, Association de médiation sociale, para 38–9. See further Prechal (2005), pp. 180–215, Craig and De Búrca (2011), pp. 200–207.
before the courts of the Member States are the principle of Member State liability and the (nascent) principle of private party liability. Pursuant to these latter two principles, infringers must compensate for the harm caused as a consequence of their breaches of EU law.49

1.05 National courts are therefore generally the primary venue for private parties to assert their rights vested in EU law.50 When considering and deciding the resulting cases, those courts do not act in a purely national capacity. They rather act in effect as a judicial organ of a unitary EU judicial power.51 As the Court of Justice put it, together with the Court itself, the courts of the Member States are the ‘guardians of [the EU] legal order and the judicial system of the European Union’, as it is for them to ‘ensure that the full application of [EU] law in all Member States and to ensure judicial protection of a [private party’s] rights under that law’.52 As such these national courts can be seen as the “ordinary courts within the European Union legal order”.53

2. EU involvement with private enforcement

1.06 It is remarkable in light of this crucial role in the EU legal order of national courts and the private enforcement proceedings brought before them, as set out above, that there are comparatively few EU rules that regulate the role of those courts and those proceedings. EU law typically defines the rights and obligations of private parties, but it generally does not provide for the remedies (that is, the classes of actions intended to make good infringements of the right at issue) and the procedural rules (that is, the rules governing the exercise of these remedies that are intended to make them operational) that are necessary for their enforcement at national level.54

This certainly holds true where primary EU law is concerned, that is, the rules laid down in the EU Treaties. While this primary EU law, as interpreted by the EU courts, is often “generous” in conferring rights on private parties,55 it is largely silent on the remedies and procedures necessary to enforce them.56 In

49 See further section 2.D below.
51 GC case T-51/89, Tetra Pak, para 42; Opinion AG Cosmas case C-83/98 P, France v Ladbroke Racing and Commission, para 92.
52 CoJ Opinion 1/09, Patent Court Agreement, para 66 and 68.
53 Ibid., para 80.
55 See further para 11.13 and 11.17 below.
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fact, primary EU law contains only one explicit reference to the term “remedies”, namely in Article 19(1) TEU. Tellingly, this reference was only introduced in 2009 (Treaty of Lisbon). Even more tellingly perhaps, this provision recalls that it is for the Member States – and therefore in principle not for the EU – to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by EU law’. Article 19(1) TEU thus essentially confirms and formalises the dominant pattern of decentralised judicial review discussed above. As such, it ensures the observance of the fundamental right to effective judicial protection within the EU.

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

It is important to note that all this is not a matter of mere formalities. While attention may often tend to focus on the substantive provisions conferring rights on the private parties that are subject to EU law, the significance of remedial and procedural rules can hardly be overstated. As the Commission put it, ‘rights which cannot be enforced are worthless’. The European Parliament has similarly noted that ‘citizens and companies must not only enjoy rights, but must also be able to enforce those rights effectively and efficiently’. Formulated somewhat more elegantly, it has been said that (civil) procedural law serves ‘to infuse life into all other areas of the law, to bring into actual being and to give reality and effect

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59 E.g. CoJ case C-418/11, Textdata, para 78; CoJ case C-583/11 P, Inuit, para 100. On the right to effective judicial protection set out in Art. 47 Charter, see further section 2.B below. Cf. Opinion AG Jääskinen case C-536/11, Donau Chemie, para 47, where it is argued that Art. 19(1) TEU supplies a supplementary guarantee to the “Rule of law” principle of effectiveness, discussed in subsection 2.A.3 below.
60 Cf. Art. 288 TFEU.
61 For an overview, see subsection 1.B.1 below.
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to all the legal rights and duties of every person and body in society”. Remedial and procedural rules may therefore in practice often be at least as important for the private parties concerned as their abstract substantive entitlements under EU law. Without having legal standing, for instance, a private party cannot bring an action before the competent national court in the first place. Similarly, rules on issues such as access to evidence, the burden of proof, causality and legal costs tend to determine to a great extent whether there is any point in bringing such a claim and, when it is brought, whether it will be successful.

The rules on remedies and procedures that apply in private enforcement proceedings can therefore have a substantial impact on the effectiveness of the substantive EU law at stake. Particularly at national level issues of enforcement of and compliance with EU law have long been – and continue to be – a matter of particular concern in the EU legal order. The assessment that ‘it is not enough to pass laws and simply to hope that they will be applied evenly in all Member States’ seems as valid today as it was over two decades ago. Indeed, two more recent studies found that ‘it would be a mistake to hold that the enforcement issue is “solved”, far from it’ and that ‘much of the evidence […] suggests that there is a significant problem with enforcement across the Single Market’. In addition, the predominant reliance on the domestic laws of the Member States to regulate remedial and procedural matters related to the private enforcement of EU law before national courts inherently also implies that differences can and do exist in this respect across the EU, both as regards the manner in which this enforcement takes places and the outcomes to which it may lead. A system of decentralised judicial enforcement that principally relies on national law for the adjudication of private enforcement actions can thus also lead to inconsistencies and unequal treatment.

Thus, in an EU that has been founded on the rule of law, and that moreover aspires to have a positive impact on the lives of the citizens of its Member States, not least through its extensive “language of rights”, ensuring that the applicable rules of substantive EU law are capable of actually having an effect in practice must be a matter of priority. Facilitating private enforcement may be only one of a range of measures that can conceivably be taken to this effect, yet it

65 Flynn (2008), p. 245.
69 Art. 2 TEU.
70 Wakefield (2009), p. 410. See also para 11.13 below.
is undoubtedly an important one, particularly in light of the characteristics of the EU legal order set out above.

Over the decades significant steps have been taken in the case law of the Court of Justice that mitigate the effects of the general absence of EU rules in the field of remedies and procedures applicable in proceedings before national courts concerning the enforcement of rights vested in EU law. In so doing, that EU institution has corrected to some extent the apparent imbalance referred to above between, on the one hand, the reliance on enforcement of EU law at national level and on the other hand the general lack of common remedial and procedural provisions. However, such intervention can ‘by the nature of things only alleviate, but not eliminate the problem’. Crucial as this case law surely has been and indeed continues to be, for reasons of principle as well as practice there are limits to what can be expected from the judiciary in this respect. While the EU courts are obliged to do justice in the cases brought before them, it is nonetheless primarily for the EU legislature to address these issues in a more systematic and general matter. While that holds true generally, it arguably applies even more so in the specific context of EU law. For where the EU courts come close to or are seen as overstepping the line between the resolution of concrete cases and laying down quasi-legislative measures, they become vulnerable to “accusations” of judicial activism. All this applied in 1979 when Advocate General Warner noted that the Court of Justice ‘cannot create [EU] law where none exists: that must be left to the [EU]s legislative organs’. And it still applies today, as is illustrated by Advocate General Trstenjak’s observation thirty years later that the EU courts ‘may not assume the role of the [EU] legislature if a gap in the law can be filled by the [EU] legislature’.

While highlighting especially the (potential) differences in treatment of private parties resulting from the lack of uniformity in this respect, the Court of Justice therefore spoke in 1980 of a ‘regrettable absence’ of EU law provisions on the
remedies and procedures regarding the enforcement of EU law at national level.\textsuperscript{78} It held that ‘[i]t is not for the Court to issue general rules of substance or procedural provisions, which only the competent institutions may adopt’.\textsuperscript{79} Particularly from the 1980s onwards and increasingly throughout the 1990s, this barely disguised call for EU legislative action on these matters also started to resonate in the legal literature, often as part of broader concerns relating to the effectiveness and practical effects of EU law in the Member States.\textsuperscript{80}

\textbf{B. THE EU LEGISLATIVE FRAMEWORK}

1. Brief overview

Gradually the EU legislature started responding to the calls for the establishment of EU legislation to facilitate the private enforcement of EU law before national courts referred to at the end of the previous section. Although early examples can be traced back as far as the 1960s,\textsuperscript{81} it is appropriate to consider the late 1970s as the period in which the EU legislature took the first, still rather hesitant, steps in this regard.\textsuperscript{82} Most notably, in 1976 in the field of gender equality Directive 76/207 was adopted, which has been later recast in Directive
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2006/54 (‘‘Gender Equality Directive’’).83 This directive requires measures to be taken at national level to ensure effective review possibilities through judicial and administrative procedures, touching upon issues such as compensation for damage, legal standing and the burden of proof. Another early example is Directive 85/374 (‘‘Product Liability Directive’’).84 In order to protect consumers, this directive establishes the principle of civil liability in damages without fault of producers for defective products. It also addresses a number of related issues, such as the available heads of damages and the limitation periods that apply in legal proceedings brought under this directive.

Especially in the 1990s and the 2000s the EU’s legislative involvement with private enforcement-related matters became more intense. The adoption at EU level of specific provisions relating to remedies and procedures available to private parties in proceedings before their national courts became increasingly common. These provisions were – and often still are – typically part of legal acts setting out substantive rules. Examples can be found in fields as diverse as the protection of personal data, e-commerce and the environment. As to the former, Directive 95/465 (‘‘Data Protection Directive’’) and Directive 2002/586 (‘‘E-Privacy Directive’’) follow an approach that is essentially based on establishing a right to effective redress and to reparation in damages for persons having suffered injury. Directive 2000/31 on certain legal aspects of information society services (‘‘E-Commerce Directive’’) encourages out-of-court settlements, stipulates that rapid court actions, including interim measures, must be available to terminate infringements and prevent further impairment of the interests involved, and contains certain exemptions from liability.87 And while Directive 2004/35 on environmental liability88 (‘‘Environmental Liability Directive’’) is not concerned with civil liability, it nonetheless includes noteworthy rules on legal standing for private parties, including parties not representing strictly individual interests, such as non-governmental organisations.

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83 Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976, L 39/40. See also Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1980, L 14/6. These two directives have since been replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006, L 204/23.
85 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and of the free movement of such data, OJ 1995, L 281/13.
With respect to environmental impact assessments, common rules on review were inserted in 2003 in Directive 2011/92 (“Environmental Impact Assessment Directive”), *inter alia* on legal standing and legal costs.89

Around the same period the EU legislature also took more ambitious action, in the sense that it adopted broader, free-standing legal acts that are *exclusively* concerned with setting out measures aimed at facilitating the private enforcement of the rules of substantive EU law in a given sector. Prime examples are the twin Directives 89/665 and 92/13 relating to EU public procurement law (“Procurement Remedies Directives”).90 These directives stipulate that effective and rapid remedies should be available to aggrieved private parties. They also contain specific rules on legal standing, forum, interim relief and actions for damages. Similarly Directive 2004/48 (“IPR Enforcement Directive”) is dedicated specifically to the private enforcement of intellectual property rights.91 To this aim it harmonises national remedial and procedural rules on matters such as legal standing, evidence, interim relief, injunctions, damages and legal costs. Furthermore, Directive 98/27, later codified in Directive 2009/22 (“Consumer Injunctions Directive”), seeks to protect consumers’ interests by specifying rules on legal standing and providing for certain specific remedies, most notably injunctive relief.92

1.11 More recent developments indicate that legislative measures of the type at issue here continue to be considered, proposed and adopted at EU level. Indeed, it is noticeable that many of the pressing current-day EU-level challenges are addressed by an approach that involves a private enforcement element. For instance, the EU’s response to the economic crisis included an amendment to Regulation 1060/2009 on credit rating agencies (“Credit Rating Agencies Regulation”), which established a strengthened regime on the civil liability in...
B. THE EU LEGISLATIVE FRAMEWORK

damages of those agencies. In the area of free movement of persons and employment, Directive 2014/54 ("Free Movement of Workers Enforcement Directive") requires judicial procedures to be made available to EU citizens who exercise their rights in this regard and who are confronted with unjustified restrictions and discrimination. These procedures are also to be made available to certain associations acting on behalf or in support of the private parties concerned. A comparable approach can be found in Directive 2014/67 ("Posting of Workers Enforcement Directive"). While this latter directive mainly strengthens public enforcement, it also requires the Member States to ensure that affected private parties as well as certain third parties (for example trade unions) can initiate legal proceedings at national level to safeguard the rights vested in EU law in this domain. Yet another politically charged topic is the protection of personal data. The proposed strengthening of the EU’s regime in this regard includes more elaborate provisions on the right of redress of the private parties concerned. Reference can also be made to developments in the area of passengers’ rights, where acts such as Regulation 261/2004 ("Air Passengers’ Rights Regulation") and Regulation 1371/2007 ("Rail Passengers’ Rights Regulation") require compensation for passengers in certain cases. Last but not least, at the end of 2014, Directive 2014/104 ("Competition Damages Directive"), which provides for common rules on actions for damages in cases of competition law infringements, was adopted. Those rules include specifications on what damage is to be compensated, who can bring such actions, which defences can be raised and the disclosure of evidence.

96 Commission, Proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2012) 11.
Chapter 1 INTRODUCTION

1.12 A final and separate issue that merits attention when discussing EU rules relating to proceedings brought by private parties before national courts concerns another “branch” of EU legislative activity, namely judicial cooperation in civil matters. While historically also this subject matter has received comparatively little attention at EU level, more recently it has been rising up the agenda. Especially in the course of the 2000s, a considerable body of secondary EU law has been established in this domain. Prime examples are Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which has since been replaced by Regulation 1215/2012 (“Brussels I Regulation 1215/2012”), Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (“Evidence Regulation”), Directive 2003/8 concerning legal aid in cross-border disputes (“Legal Aid Directive”), Regulation 861/2007 establishing a European small claims procedure (“Small Claims Regulation”) and Regulation 864/2007 on the law applicable to non-contractual obligations (“Rome II Regulation”).

1.13 The foregoing overview is by no means meant to be complete and exhaustive. It rather serves to illustrate three main points. First, despite a late and somewhat hesitant start, over the past decades the EU legislature has repeatedly demonstrated its willingness and ability to adopt private enforcement-related legislation where this was considered appropriate. Second, the above overview highlights that the relevant provisions are not limited to specific sectors or fields of EU law. They can be found scattered across the body of EU law. The need to facilitate legal actions brought by private parties before their national courts to address infringements of EU law can thus be felt in many different areas. Third, even though these legislative measures tend to have certain common characteristics, the diversity is significant. The arrangements sometimes consist of only one article, whereas in other instances a more elaborate regime or even a

101 For an overview of the legislation and other developments in this field, see e.g. Storskrubb (2008); Storskrubb (2011), p. 299.
103 Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001, L 174/1.
free-standing legal act is provided for. The level of detail also tends to vary considerably. These rules, moreover, may or may not contain certain provisions on specific issues such as the burden of proof, legal standing, actions for damages and alternative dispute resolution.

2. Purpose and selection

This book is essentially concerned with the EU’s law-making activities of the sort outlined above that are related to facilitating the private enforcement of EU law before national courts. It aims to establish what such legislation entails, particularly in terms of remedies and procedures enacted, and how it is to be understood more generally, notably as regards its typical characteristics and its underlying objectives as well as the advantages and drawbacks of and the limits to the choices made by the EU legislature in this connection. In a nutshell, under consideration are the how, when and why of the EU legislative framework on this subject matter.

Whereas the above questions can only be answered having regard to certain EU legislative measures that have been adopted and subsequently applied in a particular context and at a particular point in time, the resulting findings can have broader implications, particularly for any possible future legislative developments relating to the private enforcement of EU law before national courts. For the relevant requirements, limitations and preferences of a legal nature identified in this regard often apply more broadly. Especially where certain issues have been regularly or even consistently encountered in the (recent) past, the same or similar issues can be expected to emerge in the future. Therefore, for legal reasons of an essentially “horizontal” (that is, cross-cutting) nature, certain options that are theoretically conceivable or desirable may have to be discarded or, on the contrary, there may be reasons to apply certain specific law-making approaches more generally. And even apart from these legal considerations, path dependency is a well-documented phenomenon in EU decision-making processes. It implies that already the simple fact that at an earlier stage certain steps were taken in a particular direction may well elicit further moves in that direction along similar lines. Although at every step along the way there remain choices to be made, there can thus be a sort of self-reinforcing mechanism at work at the level of EU policy and law-making. Consciously or not, the actors involved in EU legislative activities on the matters under

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107 Here the term “legislation” generally refers to secondary EU law, although it can also include primary EU law (notably Art. 101(2) TFEU).


consideration here may therefore well be inclined to copy, extend or build on already existing legal measures.

1.15 For the present purposes, four fields of EU law and the EU legislation on private enforcement relating thereto have been selected. The first field is public procurement law. As was noted above, the two Procurement Remedies Directives that were adopted in this field provide an early and important example of two (very similar) free-standing EU legal acts that address the issues under consideration here. That makes them obvious candidates for further in-depth analysis. These directives have, moreover, been in force for a considerable period of time. This means that experience has been gained as regards their application in practice and that relevant case law has been generated. Furthermore, these directives were substantially revised in 2007, which means that their analysis does not only offer an insight into the choices at the time of their adoption (that is, around 1990), but also those made roughly a decade and a half later. The Procurement Remedies Directives have over the years also attracted considerable attention in the academic literature.

In the second place, the IPR Enforcement Directive relating to intellectual property law has been selected. Also this directive concerns a specialised, free-standing EU legal act that aims to facilitate the private enforcement of EU law before national courts. It sets out a broad range of relatively detailed rules relating to remedies and procedure designed for this purpose. This directive has also been applicable for a number of years, allowing for the generation of practical experience, case law and academic publications. The more recent assessment of the functioning of this directive and reflections on possible amendments reveal the evolution in the thinking in this regard.

The third field addressed below is that of consumer protection law. Also in this field can various relevant private enforcement-related provisions of EU law be found. The situation here is somewhat different from the two above-mentioned fields, however, in that there is not one single legal act that is concerned with the issues that are of interest for the present purposes. The relevant provisions are rather mostly spread over a considerable number of directives. This therefore necessitates a somewhat broader assessment. While not overlooking other provisions that may be of interest, attention therefore focuses, to begin with, on the above-mentioned Consumer Injunctions Directive. This is also a stand-alone directive of broader application, even if it is limited in various respects. In addition, the relevant provisions on contractual remedies (that is, private enforcement actions aimed at invalidating or otherwise making ineffective contractual arrangements entered into in violation of EU law), primarily those...
found in the Directive 93/13 on unfair terms in consumer contracts\textsuperscript{110} ("Unfair Terms Directive"), are analysed. That is followed by an assessment of the Product Liability Directive, which focuses on civil liability in damages in relation to defective products. The topic of collective redress is also addressed here.

Fourth and finally, the relevant EU legislation and related developments in the field of competition law are assessed. Two types of EU legislative measures are analysed in particular. It concerns in the first place the contractual remedy set out in Article 101(2) TFEU, pursuant to which forbidden anticompetitive agreements are automatically void. In addition, the Competition Damages Directive is an important recent example of an act of secondary EU law relating to private enforcement. While there is at present neither practical experience with nor case law relating to this directive, this is compensated for by the case law of the Court of Justice pre-dating the directive that relates to similar matters, as well as the extensive studies, official documents, consultations, academic publications and debates that preceded and accompanied it and that provide important indications as to the coming into being and the understanding of a directive such as this one.

It is clear that, despite the selection made along the lines set out above, the issues under consideration here are still rather broad and diverse. They relate to a considerable number of legal acts and official documents regarding various fields of EU law and numerous specific issues. It should be noted in this connection that the aim here is not to assess any of these issues for their own sake. The intention is instead to consider them in sufficient detail to come to a meaningful analysis for the purposes of drawing broader conclusions. Making a selection further necessarily implies relegation as much as it implies prioritisation. That is to say, there are certainly also other EU legal acts and developments that can be of interest in the present context, which have nevertheless been mostly left aside here. The Gender Equality Directive, the Environmental Impact Assessment Directive and the principle of Member State liability are but three examples thereof. While the focus here remains firmly on the four selected fields of law, they are occasionally taken into account in the latter parts of this study when this is considered helpful to sketch the broader context or to illustrate a particular point emerging on the basis of the analysis related to the selected fields. Similarly, by means of an illustration, reference is sometimes made to certain relevant developments at national level. In addition, in what follows, account is also taken of several other elements, in particular the EU law principles of national procedural autonomy, equivalence, effectiveness and

effective judicial protection. The legislation under consideration came into being and continues to operate against the background of a legal environment that is to a large extent shaped by these principles. Not only do they define the status quo ante, they also continue to play an important role in the interpretation of this legislation. The applicable public enforcement framework is also considered, as the legislation under consideration co-exists and to some extent interacts with the relevant rules on the enforcement of EU law by the competent EU and national public authorities. Lastly, several key rulings of the Court of Justice related to the enforcement of EU law at national level are examined in some detail, as they establish a number of fundamental concepts in the context of which the EU legislation of the type under consideration should be understood and without which such legislation would arguably hardly be conceivable.

3. Outline

This book consists of four parts. Part A introduces the subject matter under consideration and sketches the relevant background and context. In addition to the present chapter, this first part also consists of Chapter 2. The latter introduces the principles of national procedural autonomy, equivalence, effectiveness and effective judicial protection. It also outlines the general public enforcement context and discusses and analyses five rulings by the Court of Justice that are of particular importance in a private enforcement context.

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

Part C builds on the findings of the two foregoing parts. It analyses the legislation and other developments that have been considered in Part B in a comparative and contextual manner, with particular emphasis on the relevant provisions on remedies and procedures. More specifically this part consists of three chapters. Chapters 7 and 8 are concerned with the available remedies. In the former, actions for damages and for injunctions are assessed, whereas the latter concentrates on contractual remedies and the other remedies for private
enforcement purposes. Chapter 9 analyses the procedural provisions that are of broader interest.

The final Part D addresses a number of more general aspects related to EU legislation facilitating the private enforcement of EU law before national courts. Chapter 10 first sets out to answer a set of questions that can be summarised as the how, when and why of this legislation. Chapter 11 then seeks to place in a broader perspective the phenomenon of private enforcement generally and EU legislating thereon specifically. It assesses these matters from two angles, namely those of effectiveness and what is called the “horizontalisation” of EU law. Finally, Chapter 12 summarises the main findings of the foregoing chapters and sets out the conclusions.