Towards a European Civil Code

Fourth Revised and Expanded Edition

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Chapter 6
The Influence of Primary European Law on Private Law

Arthur S. Hartkamp*

1. INTRODUCTION

1.1. THE ECJ AS AN ACTOR IN THE EUROPEANIZATION OF PRIVATE LAW

In the slow but fascinating process of Europeanization of private law various actors play their respective roles. The most visible among them are the European legislature (directives, mainly concerned with consumer law, and regulations on a more limited scale) and European legal scholarship (Principles projects, Common Frame of Reference). These constitutive forces of European private law receive ample consideration in a number of contributions to this book. In this article I shall pay attention to a more distant player in this field, the European Court of Justice (ECJ). As Walter van Gerven has pointed out in his contribution to the third edition, the impact of the ECJ and the Court of First Instance (CFI) will not result in the unification of national private laws, but will only lead to piece-meal harmonization, that is harmonization in those limited fields of private law over which the EU has jurisdiction. Nevertheless, as will be shown in this article, the influence of the

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1. The ECJ Case-Law as a Means of Unification of Private Law?, 101–123

European courts on private law is by no means negligible and eventually it may well extend beyond what we now consider to be its natural confines.

The case law may relate to the FEU Treaty,\(^2\) to the general principles of EU law and to secondary legislation. I shall deal with the case law in this order, while realizing that a sharp distinction between Treaty and general principles cannot be drawn. I shall be mainly concerned with the FEU Treaty and the general principles, but the secondary legislation cannot remain entirely out of sight.

1.2. **The Main Focus of Interest of this Survey: Direct Horizontal Effect**

The discussion will be restricted to the law of obligations, so that property law and intellectual property law will not be covered. Within the law of obligations the focus is on the general part of that branch of the law, namely, contracts in general, torts and restitution.

What interests me specifically is to what extent European law has direct horizontal effect, meaning that it may be directly applied to legal relationships between individuals, so that subjective rights and obligations are created, modified or extinguished between individuals. For example, a contract or contractual stipulation concluded between them in violation of a provision of European law is null and void or an act by an individual violating such a provision constitutes an illegal act as against another individual. This direct horizontal effect is to a large extent created by the ECJ.

1.3. **Indirect Horizontal Effect not to be Dealt with in this Article**

European law – the EC (now FEU) Treaty as interpreted by the ECJ, general principles of EU law or secondary legislation – may exert an influence on private law in manners different from horizontal direct effect in the sense mentioned in section 1.2 *supra*. For instance, a national measure of a private law character may be declared incompatible with a Treaty provision on free movement or with a prohibition of discrimination.\(^3\) The same may occur to a national measure of a public law character which affects the validity or the performance of a contract between two private undertakings. Sometimes here too the concept of direct horizontal effect is used, when the proceedings take place between two individuals.

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In my view, it is not illuminating to bring this case under the notion of horizontal effect. It is true that from a procedural point of view the dispute concerns two individuals, but that does not mean that the Treaty provision itself has a horizontal effect. If the national rule is found to be contrary to the Treaty provision, the consequence is that the national rule cannot be applied; but the consequence is not that the Treaty provision determines the content of the relationship between the parties. That content is determined by national law or depending on the circumstances by a contract between the parties.4

There is also the possibility that a provision of European law may exert its influence through the interpretation of national law. A well-known application is the harmonious interpretation of national law in relation to directives which have not (yet) or incorrectly been implemented. Another application is the interpretation of open-textured national rules (e.g., good faith, boni mores, public order, appropriate societal conduct) in the light of a provision of European law in order to realize the purpose of that provision even in the absence of direct horizontal effect.5 Yet another type of indirect horizontal effect exists where the FEU Treaty is construed as to imply an obligation for the Member States to protect and safeguard, to the extent possible, the rights to be derived from the fundamental freedoms and the non-discrimination provisions also in ‘horizontal’ relationships.6 These aspects of the relationship between European law and private law will not be discussed in this article.7

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4. A case in point is ECJ 9 Jun. 1992 Delhaize v. Promalvin and AGE C-47/90 [1992] I-3669: a national law containing an export restriction contrary to Art. 29 EC Treaty impeded a seller from performing his obligations under a sales contract; the impediment ceased to exist when the national law was declared incompatible with the Treaty. The same may happen where national legislation infringes upon a general principle of community law, a regulation or a directive. In the latter case, the relationship will normally be a ‘vertical’ one, since directives do not have a horizontal direct effect, neither in the sense that they apply directly to a private relationship, nor in the sense that they can be invoked in order to declare a conflicting national measure inapplicable. In exceptional cases this is different; see ECJ 26 Sep. 2000 Unilever v. Central Food C-443/98 [2000] I-7535.

5. Just one example. The provisions on state aid (87 ff EC) are directed to Member States and have no direct horizontal effect. This means that if an undertaking receives state aid, its competitors which are prejudiced thereby are not allowed to rely on the violation of Art. 87 as against the undertaking concerned. However, this does not preclude the possibility that a national court will consider the act of that undertaking an illegal act according to national tort law. In that context, where the national provisions contain open-ended clauses (such as ‘breaching a rule of unwritten law pertaining to proper social conduct’ in Art. 6:162 of the Netherlands Civil Code) the court may take into consideration the fact that the granting of the aid violated Art. 87 EC and that the defendant was fully aware of that violation. The ECJ explicitly recognizes this type of influence; see e.g., ECJ 11 Jul. 1996 SFEl/La Poste C-39/94 [1994] I-3547, para. 75.


2. **THE FEU-TREATY**

2.1. **Effects in Contract Law**

2.1.1. **Articles 101 and 102 FEU [81 and 82 EC]**

In contract law the FEU Treaty only contains one provision of an explicit private law character. Article 101 paragraph 2 [81 paragraph 2 EC] declares automatically void any agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market. This nullity is absolute, but it may be ‘partial’, that is it affects only those provisions of the agreement that violate the prohibition.\(^8\) The consequences of the nullity for other parts of the agreement and for other agreements, either between the parties or between one of the parties and a third party, are governed by national law. It is not clear whether this is also true for other doctrines mitigating the effects of absolute nullity such as ‘re-interpretation’ (‘Umdeutung’) or ‘ratification’ (‘Konvaleszens’). On the one hand, it could be said that such corrections of the absolute character of voidness would run contrary to the stern decisions of the European Court. On the other hand, dogmatically there are overlappings between partial nullity and ‘re-interpretation’ (‘Umdeutung’), so it does not make much sense to leave the one to national law whereas the other would be jealously reserved for the European Courts.

Perhaps more important in practice is whether European law requires a national court to apply the nullity of its own motion. This was for the first time generally stated in *Manfredi*,\(^9\) but in the eyes of some scholars this statement is not convincing since it is to be found in the section of the judgment relating to the admissibility of the questions referred for a preliminary ruling. However, the statement was recently repeated and reinforced in *T-Mobile*.\(^10\)

Article 102 [82 EC] (abuse of dominant position) may also be invoked directly by individuals. Since the Article does not provide for the nullity of legal acts violating the provision, in principle the consequences of such violation are left to be decided by national law.

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8. See Fetsch, in Gebauer and Wiedemann, Zivilrecht unter europäischem Einfluss (Stuttgart: Boorberg Verlag, 2005), Kap. 23, Rn. 42, with references.

9. ECJ 13 Jul. 2006 *Manfredi v. Lloyd Adriatico* C-295/04 [2006] I-6619, para. 31: ‘Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts’ (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paras 39 and 40).

10. ECJ 4 Jun. 2009 *T-Mobile Netherlands v. Raad van bestuur NMA* C-8/08, para. 49: ‘It should be borne in mind at the outset that Art. 81 EC, first, produces direct effects in relations between individuals, creating rights for the persons concerned which the national courts must safeguard and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the Community, which must be automatically applied by national courts’ (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paras 36 and 39, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paras 31 and 39).
2.1.2. Article 108 FEU [88 EC]

In the chapter on competition law Article 108 paragraph 3 FEU [88 paragraph 3 EC] has been construed by the Court in such a way that it has horizontal direct effect. In the interpretation of the Court the third sentence of this provision\textsuperscript{11} entails nullity of any legal act constituting state aid which has been executed before the measure has been notified to the European Commission or the investigation by the Commission into the nature of the measure has been completed.\textsuperscript{12}

Relating to the character of the nullity the same questions as in section 2.1.1 are pertinent. In the judgment mentioned in the previous footnote the Court has ruled that the subsequent adoption by the Commission of a final decision declaring the measures compatible with the common market does not have the effect of regularizing the invalid measures ex post facto, since otherwise the direct effect of that prohibition would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded.

From this statement it might be inferred that in spite of the positive Commission decision there is an obligation for the Member State to recover the aid that has been granted. However, a recent judgment makes clear that such an obligation does not flow from EU law.\textsuperscript{13} Where state aid consists in the payment of money EU law only requires the recovery of the undue advantage resulting from such aid, which is the interest in respect of the period of unlawfulness.

It remains to be seen what this judgment means for the nullity of a legal transaction (e.g., the transfer of immovable property) which was executed before the Commission decision. The Court will have to make clear whether this is a matter of European law or a matter to be decided by national law. In the latter case, national law will have to solve the interesting problem whether the act may be considered as ‘ratified’ by the Commission decision, and if so, with or without retroactive effect.

2.1.3. Prohibitions of Discrimination

Article 18 FEU [12 EC] prohibits any discrimination on grounds of nationality. In so far as the provisions laying down the fundamental freedoms are directed against discrimination on the grounds of nationality of persons or origin of goods and services they are considered by the Court as applications of the general principle of Article 12. According to Article 157, paragraph 1, FEU [141 EC] each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

\textsuperscript{11} ‘The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’


\textsuperscript{13} ECJ 12 Feb. 2008 \textit{CELF} v. \textit{SIDE} 199/06 [2008] I-469.
Article 157 has a horizontal direct effect. In *Defrenne II* the Court ruled that, Article 141 EC being one of the foundations of the Community and therefore mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals. Furthermore, the Court decided that the principle of equal pay contained in Article 157 may be relied upon before the national courts. Remarkably, the fact that the provision according to its wording is directed against the Member States did not prevent the Court from reaching this solution.

An infringement of Article 18 will have the same consequences. This follows already from *Walrave*, deciding that the prohibition of this Article (and of Articles 49 and 56 FEU [39 and 49 EC], see below) does not only apply to the action of public authorities but extends likewise to rules of any other nature, including legal acts of persons and associations who do not come under public law. See also, e.g., *Angonese*, deciding that Article 39 EC [49 FEU], which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in (now) Article 18 FEU, applies to private persons as well. Recently, this was confirmed in *Raccanelli*, stating that ‘the prohibition against discrimination applies equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals’.

The Court is not very explicit about the effects of the horizontal direct effect. Usually the observation suffices that the Treaty provisions also apply to the collective regulations or contracts involved. Obviously the effect is left to the national court for its decision. It is clear that one of the possible effects is the nullity of the regulations or stipulations in question. This is confirmed by the observation in *Walrave* and in *Donà* that the Treaty provisions may (or must) be taken into account by the national court in judging the validity or the effects of a provision inserted in the rules of a sporting organization.

2.1.4. Fundamental Freedoms

More difficult is the possible direct horizontal effect of the fundamental freedoms. Judging from the case law of the European Court of Justice a distinction must be drawn between the free movement of goods on the one hand and the freedoms

19. An effect in the sphere of private international law flows from the decision in Case C-381/98 *Ingmar v. Eaton* [2000] ECR I-9305, where the Court, referring to the freedom of establishment, restricted the effect of a choice of law clause in order to protect an independent commercial agent.
The Influence of Primary European Law on Private Law

centering persons and services (free movement of workers, freedom of establishment, freedom to provide services) on the other.\(^{20}\)

The provisions concerning free movement of goods (Articles 34 and 35 FEU [28 and 29 EC] on import and export restrictions) have been denied horizontal effect in several judgments, the latest being *Sapod*,\(^ {21}\) where the Court held that a provision in a private contract cannot be regarded as a barrier to trade for the purposes of Article 28 EC, since it was not imposed by a Member State but agreed between individuals. Previous cases include *Vlaamse reisbureaus*\(^ {22}\) and *Süllhofer*.\(^ {23}\) The first decision briefly and clearly held that Articles 28 and 29 EC concern only public measures and not the conduct of undertakings. For that reason the Court did not examine the compatibility of the contractual clauses in question with those Articles. Consequently, it seems that according to the Court these contracts only enter into the ambit of the EC Treaty insofar as Articles 101 ff. [81 ff. FEU] on anti-competitive agreements are called into question.\(^ {24}\)

On the other hand, the Court has attributed a direct horizontal effect to the fundamental freedoms concerning persons and services (free movement of workers, freedom of establishment and freedom to provide services). In this regard usually mention is made of ‘collective regulations’ concerning employment and services,\(^ {25}\) but as we saw in section 2.1.3 after a cautious start in *Walrave*, this restriction was abandoned in *Angonese* followed by *Raccanelli*.\(^ {26}\) The horizontal direct effect clearly exists where the prohibition of discrimination on the ground of nationality is concerned, but other cases indicate that the same is true where the articles apply to non-discriminatory restrictions. One example is *Viking*, to which I shall return later.\(^ {27}\)

The distinction drawn by the Court between the free movement of goods and the freedoms relating to persons and services is unsatisfactory and hard to explain. It is difficult to see why a contractual provision restricting the freedoms relating to

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26. See also ECJ 11 Dec. 2007 *ITF v. Viking* C-438/05 [2007] I-10779, where mention is made of ‘collective agreements and other acts concluded or adopted by private persons’ (para. 34).

27. See previous footnote and infra s. 2.2.3.

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persons and services may violate the FEU Treaty, whereas a contractual restriction of the free movement of goods is outside the ambit of the Treaty except where Articles 101 or 102 are affected.\footnote{I see merit in the criticism directed by E. Steindorff, *EG-Vertrag und Privatrecht* (Baden-Baden: Nomos 1996), 291 against the view that Art. 81 EC implies a contrario that contracts may not infringe upon Art. 28 EC. Compare T. Körber, *Grundfreiheiten und Privatrecht* (Tübingen: Mohr Siebeck, 2004), 745 ff. A discriminatory contract will not always fall under Arts 81 and 82, for instance because of the exception for *de minimis* infringements, comprising 10\% (in agreements between competitors) and 15\% (agreements between non-competitors) of the market share of the undertakings concerned; *see* Notice of the Commission, OJ 2001, C 368/13. Moreover, why should the general principle of concurrence of remedies not apply in this context? Arts 81 and 82 are also applicable to restrictive practices in the area of services.}

In the long run this dichotomy seems untenable, if only because the fundamental freedoms – and the economic activities to which they refer – often overlap.\footnote{Providing services or capital may be related to both movement of persons and movement of goods.} Not surprisingly, in other fields there is a tendency towards a convergent interpretation of the freedoms.\footnote{Reference may be made to the development of the fundamental freedoms as prohibitions against discrimination towards prohibitions against non-discriminatory measures, the converging interpretation of the exceptions and the restrictive interpretation of the concept of ‘internal situation’.}

In my view, it would be preferable for the Court of Justice to steer the same course for all freedoms. Perhaps *Viking*,\footnote{ECJ 11 Dec. 2007 *Trade Unions v. Viking* C-438/05 [2007] I-10779. *See* on this case also *infra*, s. 2.2.3.} paragraph 62, points into this direction: the horizontal direct effect in a case of freedom of establishment is said to be ‘supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the result of actions by individuals or groups of such individuals rather than caused by the State’ and reference is made to *Schmidberger*.\footnote{ECJ 12 Jun. 2003 *Schmidberger v. Austria*, C-112/00 [2003] I-5659.} This language differs considerably from *Sapod* (*cited supra*); moreover, *Schmidberger* was not a case between two individuals but a case between an individual and a Member State. So the distinction between the free movement of goods and the other freedoms as far as horizontal direct effect is concerned may start to get blurred.

### 2.2. Effects in Tort Law

#### 2.2.1. Liability of EU Institutions

Article 340 paragraph 2 FEU [288 paragraph 2 EC] provides that in the case of non-contractual liability the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. This provision is the basis of an extensive case law relating to the non-contractual liability of the

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Union. In *Bergaderm* the ECJ has summarized its decisions as follows. The rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. As to the second requirement, the decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach. The rule of law infringed may be any rule of EU law, including a general principle; it need not have direct effect.

### 2.2.2. Liability of Member States

The liability of Member States has no explicit basis in the EC/FEU Treaty. The Court of Justice has created this liability as ‘inherent in the system of the Treaty’ and considers it to be a general principle of EU law. After being recognized for the first time in *Francovich* the rationale of this head of liability was fully set out in *Brasserie du Pêcheur*:

27. Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 [now 220] of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

28. Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 [now 288] of the Treaty refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29. The principle of the non-contractual liability of the Community expressly laid down in Article 215 [now 288] of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

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30. In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.

31. In view of the foregoing considerations, the Court held in Francovich and Others, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32. It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

In Bergaderm (see the previous section) the Court has aligned the conditions for liability with those worked out for liability of Community institutions based on Article 288 EC [now 340 FEU]. The Member State liability, created in Francovich as a sanction for failing to implement a directive, was gradually extended to all types of breaches of Community law, including legislative acts (Brasserie) and judgments of national courts adjudicating at last instance. In this connection the Court also recognized a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (Brasserie, paragraph 85).

2.2.3. Liability of Individuals

In Francovich, paragraph 31, the Court, while conferring on the citizens of the Union the right to claim damages in tort from a Member State for breaches of Community law, referred to the seminal judgment in Van Gend en Loos:

It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 Van Gend en Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).

This reasoning was further extended in Courage/Crehan, where the Court accepted the liability of individuals for breach of Article 81 EC [101 FEU]. This liability may be invoked by 'any individual...for loss caused to him by a contract or by conduct liable to restrict or distort competition', including a party to such a contract, provided this party does not bear significant responsibility for the breach.

distortion of competition. In Courage the Court did not lay down the conditions for liability. As Tridimas writes, the rule of EU law infringed must be intended to grant rights to individuals and there must be a causal connection between the breach and the damage suffered; there appears no reason why the seriousness of the breach must be a general condition for the liability of private parties.

As was stated above (section 2.1.1) Article 101 is the only provision where horizontal direct effect follows explicitly from the FEU Treaty. However, there seems to be no reason why this liability should not be accepted in other cases, mentioned in the previous sections, where Treaty provisions have been construed as having a horizontal direct effect. This view is corroborated by the recent judgments in Viking and Laval relating to labour disputes between companies and trade unions. The companies asserted that collective action of the unions (strike and blockade of a building site) was contrary to Articles 49 and 56 FEU (freedom of establishment, freedom to provide services) and requested the national court to order the unions to refrain from actions infringing the rights which the companies enjoyed under Community law; moreover, in one of the cases, the plaintiff claimed compensation. The unions for their part relied on the right of collective action recognized inter alia by the European Social Charter and the Charter of Fundamental Rights of the European Union. The ECJ decided, firstly, that collective action constitutes a restriction in the sense of Articles 49 and 56 FEU which may be justified by an overriding reason of public interest. Secondly, it reaffirmed the horizontal direct effect of those Articles and held that it depends on the circumstances of the case whether the rights conferred by these Articles take precedence over the unions’ right to collective action.

Finally, there may arise liability of individuals for breach of provisions of regulations and even for breach of general principles of EU law, always assuming that the rule in issue has a direct horizontal effect.

2.3. Effects in the Law of Restitution

2.3.1. The Condictio Indebiti

In EU law the condictio indebiti (the recovery of payments made without a legal ground) is an important action. The EC Treaty is silent on this matter, but the condictio is not unknown in secondary legislation. Moreover, the condictio

39. In the same sense Tridimas, referring to Art. 39 EC and Angonese (see fn. 16)
40. ECJ 11 Dec. 2007 Trade Unions v. Viking C-438/05. See on this case also supra, s. 2.1.4.
41. ECJ 18 Dec. 2007 Laval v. Trade Unions C-341/05.
42. See ECJ 17 Sep. 2002 Muñoz v. Frumar C-253/00 [2002] I-7289, on which infra s. 4.2.
43. See infra s. 3.1.
44. See for a full analysis Alison Jones, Restitution and European Community Law (London: Mansfield Press, 2000).
indebiti has been recognized by the European Courts in several strings of cases. It is not clear whether in EU law this action must (always) be understood as being an application of the principle of unjustified enrichment. Apparently, the CFI is inclined to do so; in Corus/Commission\textsuperscript{46} it is pointed out in paragraph 59 ‘that, according to a principle generally accepted in the domestic law of the Member States, in an action for the recovery of a sum unduly paid based on the principle prohibiting unjust enrichment, the claimant is normally entitled to the lower of the two amounts corresponding to the enrichment and the loss’.\textsuperscript{47} The ECJ, however, seems to prefer to base the condictio indebiti directly on the provisions or the system of EU law, if necessary in combination with the principle of effectiveness, but it does recognize corrections based on the principle of unjustified enrichment (see section 2.3.6 \textit{infra}).

Elsewhere, I have systematized the relevant case law of the ECJ.\textsuperscript{48} I shall briefly resume here the main elements of that discussion.

2.3.2. The Condictio Indebiti Brought by An Individual against the Member State Or the EU

The condictio indebiti may be instituted by an individual against a Member State (or state entity) or against the European Union. The first case is the situation where a Member State has levied taxes or other duties in violation of EU law. An example would be a national legislative measure imposing a duty for the examination of imported products which turns out to be a measure having equivalent effect in the sense of Article 34 FEU [28 EC]; or a tax prohibited by Article 110 FEU [90 EC]. An undertaking which pays such a duty or tax has a right to repayment against the national authority to which it has been paid. The ECJ held that ‘the entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes.’\textsuperscript{49}

The Union itself, too, may be successfully sued with the \textit{condictio indebiti}, e.g., in the case where the CFI annuls a Commission decision imposing a fine, after the fine has been paid by the undertaking concerned. The annulment operates with retroactive effect. The sums paid may be recovered from the Union, together with legal interest.\textsuperscript{50}

2.3.3. The Condictio Indebiti Brought by a Member State against An Individual

The condictio indebiti may be instituted by a Member State (or state entity) against an individual. One case is the situation where a EU aid or subsidy has been paid out without a legal basis, e.g., because the product for which it was paid did not fall under the relevant EU regulation. The Member State implementing the regulation is authorized (and is under a duty) to claim repayment from the undertaking to which the subsidy was paid out. The claim for repayment is governed by national law and procedures, provided that the principles of effectiveness and non-discrimination are taken into account, which means that the application of national law must not make the recovery of sums wrongly paid impossible or very difficult in practice and that the recovery is not subject to conditions or rules less favourable than those which apply to similar national cases.\(^{51}\)

A strict regime applies to aid which is granted by a Member State in violation of Article 107 FEU \(\{87\text{EC}\}\) and which is incompatible with the common market. Building on the case law of the ECJ allowing the Commission to order a Member State to recover sums unduly paid, Regulation No. 659/1999\(^{52}\) provides that the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary, including interest, unless this would be contrary to a general principle of EU law. Notwithstanding the exception, this obligation for Member States is practically of an absolute character. In principle, the only defence accepted by the Court is absolute impossibility (which does not include bankruptcy of the recipient of the state aid). The principle of legitimate expectation does not apply to state aid granted contrary to Article 107, since the recipient is under a duty to verify that all the conditions for granting such aid are fulfilled.\(^{53}\)

2.3.4. The Condictio Indebiti Brought by An Individual against An Individual

As was pointed out in section 2.2.3 \textit{supra}, in \textit{Courage/Crehan}\(^{54}\) the ECJ accepted the liability of individuals for breach of Article 81 EC. Taking into account the general wording of the questions referred to the Court and the Court’s answer (`to obtain relief from the other party;’ ‘all the legal remedies available to him’) it may safely be assumed that the decision is also applicable to the right to claim the


\(^{53}\) ECJ 20 Mar. 1997 \textit{Land Rheinland-Pfalz v. Alcan Deutschland} C-24/95 [1997] I-1591. According to this judgment the recipient may not rely on the defence of loss of enrichment (see s. 2.3.6 \textit{infra}).

recovery of any performance made by the protected party in the execution of the contract, including the repayment of sums paid by him.55

2.3.5. An Action based on Unjust Enrichment

The condictio indebiti may be considered as being an application of the enrichment principle. Does EU law, apart from the condictio indebiti if conceptualized in this way, accept actions or exceptions based on unjust enrichment?

As far as the action is concerned, the answer is in the affirmative. In *Masdar v. Commission*56 the CFI held that the second paragraph of Article 288 EC [340 FEU] bases the obligation which it imposes on the Community to make good any damage caused by its institutions on ‘the general principles common to the laws of the Member States’ and therefore does not restrict the ambit of those principles solely to the rules governing the non-contractual liability of the Community for the unlawful conduct of those institutions (paragraphs 65 and 66). The CFI went on to examine the applicant’s claim for compensation insofar as it was based on ‘rules on non-contractual liability which do not entail unlawful conduct on the part of the Community institutions or its agents in carrying out their task (unjust enrichment and negotiorum gestio).’ The Commission had a contract with an undertaking, Helmico, which in its turn had called in Masdar as a sub-contractor. After Masdar had rendered its performance it did not obtain payment from Helmico, due to the latter’s bankruptcy. Masdar instituted proceedings against the Commission and alleged that the Commission had been unjustly enriched by the performance. The CFI refused the claim because in the case at hand the principle of subsidiarity was not satisfied:

97 According to the general principles common to the laws of the Member States, those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation. Further, in accordance with those same principles, it is generally possible to plead such actions only in the alternative, that is to say where the injured party has no other action available to obtain what it is owed.

In appeal, this decision was upheld by the ECJ.57 In paragraphs 47 and 48 the Court ruled:

Given that unjust enrichment, as defined above, is a source of non-contractual obligation common to the legal systems of the Member States, the Community cannot be dispensed from the application to itself of the same principles where a natural or legal person alleges that the Community has been unjustly enriched to the detriment of that person.

55. In the same sense Jones, [fn. 44], 188–189; Thomas Riem, in Katja Langenbücher (ed.), *Europarechtliche Bezüge des Privatrechts* (Baden-Baden: Nomos, 2005), 187 ff.
57. ECJ 16 Dec. 2008 *Masdar v. Commission* C-47/07P.
Moreover, since any obligation arising out of unjust enrichment is by definition non-contractual in nature, it is necessary to allow it to be invoked pursuant to Article 235 EC and the second paragraph of Article 288 EC, as the Court of First Instance did in the case before it.

The Court added that if Article 235 EC [268 FEU] and the second paragraph of Article 288 EC [340 FEU] were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection, laid down in the case-law of the Court and confirmed in Article 47 of the Charter of fundamental rights of the European Union (paragraph 50). The ECJ as the CFI rejected the claim on the ground that an enrichment cannot be categorized as ‘unjust’ where it derives from contractual obligations (paragraph 54). It did not explicitly rely on the concept of subsidiarity.

2.3.6. Exceptions Based on Unjust Enrichment

In the cases on the recovery of payments discussed in sections 2.3.1 ff. two defences based on unjustified enrichment may play a role.

The first is a defence based on the loss of the enrichment. A condicio indebiti may be barred by the defence that the defendant is not or is no longer enriched by the payment received by him.58

Secondly, a condicio indebiti may be barred by the defence that by allowing the claim the plaintiff would be unjustly enriched because he did not suffer a loss as a result of making his payment. In several cases59 the ECJ has allowed the national courts to accept this defence, holding that Community law does not require the repayment of taxes, charges and duties levied in breach of Community law where it is established that the person required to pay such charges has actually passed them on to other persons, except where he has suffered other losses, e.g., because of a loss of market share, profits or turnover. The burden of proof relating to the plaintiff’s loss rests with the defending Member State.60

It appears that the reason why the Court of Justice accepted this defence is to be explained partly by the consideration that if the trader who paid the charges passed them on to his purchasers, these purchasers have a right of action against the Member State in order to claim compensation for their loss.61 But since this does

61. Comateb (C-192/95), para. 24.
not occur in practice, accepting the defence is at odds with the principle of effectiveness.62

Not only in the context of the condictio indebiti but also in the context of a claim based on tort the ECJ has referred to this defence, as may be seen in the judgment in Courage v. Crehan (paragraph 30). This is understandable, since here we are concerned with a claim for damages. If the plaintiff succeeds in passing on to his purchasers the loss incurred by him as a result of illegal taxes or duties or of an infringement of Article 81 EC and if he also does not suffer other losses of the types mentioned above (loss of market share, profits or turnover), he would be unjustly enriched if his claim for the repayment of the amounts paid by him were to succeed.

In this light we must also understand the consideration in Comateb (paragraph 34), where the Court noted by way of an obiter dictum that traders 'may not be prevented from applying to the courts (...) for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on.' The 'Francovich claim' against the Member State is also a claim for damages which, consequently, presupposes that the plaintiff has suffered a loss. It may be instituted with success by a trader who has paid the taxes or duties to the State and has not been able to pass them on; by the trader who has passed them on but who has suffered other losses, e.g., lost profits or turnover; and by the purchaser to whom the charge has been passed on.63

3. THE GENERAL PRINCIPLES OF EU LAW64

3.1. THE PRINCIPLE OF EFFECTIVENESS

The importance of the general principles of EU law, as elaborated by the Court of Justice on the basis of Article 19 EU [220 EC], in the legal framework of the Union is evident. They have a public law character and are primarily conceived as yardsticks for reviewing the legality of legislation and other legal acts of the EU organs and of the Member States acting within the ambit of EU law. For the private lawyer two questions arise: What is the importance of the general principles, as they now stand, for private law? Do there exist general principles of a private law nature?

Of paramount importance for private law is the principle of effectiveness. It has worked in several ways. Its effect is most powerful where it works in an supplementing fashion, namely, when it is used in the interpretation of the EC Treaty in such a way that it leads to the creation of entire new branches of EU law –

62. See A.G. Tesauro in his Conclusions in Comateb, paras 21–22.
63. This is overlooked by Tridimas, The General Principles of EU Law (Oxford University Press, 2006) 542.
64. See more extensively on the relationship between the general principles of EU law and private law my contribution (written after the present article was finalized) to Rabels Zeitschrift, to be published in 2011.
including private law, of which the most notable example is the case law on Member State liability. In *Francovich* (see section 2.2.2 supra) the Court held that ‘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’ (paragraph 33). In *Courage v. Crehan* (see section 2.2.3 supra) this reasoning was extended to the liability of private persons in case of infringement of Article 101 FEU [81 EC], and in *Masdar v. Commission* (see section 2.3.5 supra) to the liability of the Community in case of unjustified enrichment. In the same vein, the principle of full effectiveness – in its guise of ‘principle of effective judicial protection’- has led to the necessity for the Member States to create new means of legal redress in a procedural sense.65

The principle has also a ‘corrective’ or ‘controlling’ function, *namely*, where it is used to examine the acceptability of national law which in principle is applicable in the framework of the protection of EU rights. Where the protection of such rights is at stake, in the absence of EU rules governing the matter 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 which individuals derive directly from EU law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).66 What here loosely is labelled as ‘procedural rules’ in fact covers the whole of national private and procedural law, in so far as it is of relevance for the protection of the ‘EU right’ at hand. Under this heading the Court of Justice has reviewed an extensive number of national rules, *inter alia* relating to prescription, damages, interest, abuse of right, proof, application by a court of rules ‘of its own motion’ and res judicata.67 In carrying out this review the ECJ from time-to-time indicates what it considers to be a just and fair solution in private law, e.g., that a limitation period should not start to run before the claimant knows of the existence of the fact causing the damage.68

Yet another aspect of the significance of general principles of EC Law for private law is that they may have a direct horizontal effect in the same way as

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68. *See* ECJ 13 Jul. 2006 *Manfredi v. Lloyd Adriatico* C-295/04 [2006] I-6619, para. 77 ff. This decision is corroborating in an entirely different context ECJ 7 Nov. 1985 *Adams v. Commission* 145/83 [1985] 3539 (reaffirmed in ECJ 17 Jul. 2008 *Commission v. Dolianova* C-51/05 P, para. 67) relating to the limitation period mentioned in Art. 46 Statute of the Court of Justice (‘Proceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto.’).
Treaty provisions. If it is true that the Treaty provisions prohibiting discrimination have such an effect, leading e.g., to nullity of an agreement which violates the provision (see section 2.1.3 supra), the same effect will probably occur where a general principle prohibiting discrimination is infringed upon. And if it is true that the infringement of a Treaty provision may lead to liability in tort or to the possibility of a private enforcement action, the same is true for the violation of a general principle of EU law.  

3.2. GENERAL PRINCIPLES OF EU LAW ORIGINATING IN PRIVATE LAW

Has the case law of the Luxembourg courts already developed general principles of EU law of a (exclusively or partly) private law nature? The answer is yes in so far as the principle of unjustified enrichment is concerned. This principle was developed by the Court for public law purposes: as is the case with the other general principles of EU law, legislative and administrative acts of the Union may be reviewed as to their compatibility with the enrichment principle, which may lead to the annulment of the act in question. The principle may also have consequences in the field of tortious liability for damages: a sufficiently serious breach of the principle will entail liability in damages of the Union (Article 340 FEU [288 EC]). In the framework of a more specific action against the Union the principle may lead to an additional liability, e.g., an obligation to pay interest over a sum of money which was illegally withheld from the plaintiff. Then the principle was recognized in private law relations as being able to support an exception against a condicio indebiti or an action in tort. Finally, the principle was recognized as a separate basis for liability within the ambit of Article 288 EC. See the discussion in section 2.3 supra.

At the present stage, although a general principle of good faith (reasonableness and fairness) has not been recognized as such by the ECJ, it would seem that good faith can nevertheless be considered as a general principle of EU law. It figures not only in the case law of the Court but also in secondary EU law. This is not true for the so called restrictive function of good faith, which would lead to a derogation of rules otherwise applicable between two parties to a contract or, even wider, to an

70. ECJ 10 Jul. 1990 Hellenic Republic v. Commission C-259/87 [1990] I-02845 (summary publ.);
74. Article 3 and 4 Directive 85/653 (commercial agents); Art. 3 Directive 93/13 (unfair terms in consumer contracts); Art. 3 para. 2 Directive 2002/65 (distance marketing of consumer financial services). See also Regulation 43/2003, Recital 38 (the principle of good faith throughout the Community, where unduly paid amounts are recovered).
obligation. However, some principles which may be considered as applications of good faith, such as the prohibition of *venire contra factum proprium* or *dolo agit qui petit quod statim redditurus est* seem to have been adopted by the CFI.75 It also is probable that the ECJ has adopted a general principle of EU law prohibiting abuse of right. This principle operates in the general context of EU law, e.g., in *Centros*, paragraph 24.76

It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (. . .). It operates also in a more specific private law context, such as in *Diamantis*,77 where the ECJ allows national courts to apply a provision of national law prohibiting abuse of a right deriving from Community law, provided that this will not compromise the uniform application and full effect of Community law.78 In other cases the ECJ has acknowledged the existence of principles of private law of a more limited character. For example, in *Werhof*79 the ECJ recognized the principle of party autonomy and as a consequence the principle that contracts cannot impose obligations on third parties. And in *Hamilton*80 the Court identified ‘one of the general principles of civil law, namely that full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract.’ This principle was used in the interpretation of Article 4 of the doorstep selling directive (85/577/EEC).

4. SECONDARY LEGISLATION

4.1. DIRECTIVES

Case law of the ECI interpreting a specific provision of a directive – such as: does the concept of ‘damage’ in Article 5 paragraph 2 of the Council Directive on package travel, package holidays and package tours encompass non material damage?81 – does not present difficulties different from those known in national law and need not detain us here.

However, the case law may become a creative force in private law where decisions are based on more general concepts or instructions expressed in or

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75. *IPK* (see fn. 72), para. 71.
underlying a directive, such as in the following two examples, which I mention here although they are not concerned with direct horizontal effect.

In Schulte/Deutsche Bausparkasse Badenia\(^{82}\) a bank had offered a loan to a consumer, without supplying information relating to his right to cancel the agreement in seven days. The money was used to buy immovable property and this transaction resulted in great losses for the consumer. The loan was covered by the doorstep selling directive (85/577/EEC) (and by the German implementing legislation), but the acquisition of the immovable property was not. The consumer had the right to cancel the credit agreement after having received the notice concerning his right of cancellation. When he eventually received the notice he did cancel, but this did not affect the validity of the purchase of the immovable property, since this matter is left to national law\(^{83}\) and German law in the interpretation of the German Bundesgerichtshof does not consider the two agreements as interlinked as far as their validity is concerned. Interestingly, in these circumstances which looked rather gloomy for the consumer, the Court concentrated on Article 4, second sentence, of the directive, which provides: ‘Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.’ This article was applied in order to suggest that the bank be rendered liable for all the losses sustained by the consumer, since: (i) the Member States are required to adopt the appropriate measures in order to render the bank liable for all consequences connected with its failure to supply the information and (ii) the national courts are required to interpret national legislation so far as possible in order to achieve that result.

In a string of cases beginning with Océano Gruppo Editorial\(^{84}\) the Court has made clear that the Directive No. 93/13/EC on unfair terms in consumer contracts requires that a national court has the power to determine of its own motion whether a contract term is unfair in the sense of Article 6 of the Directive. This decision goes to the heart of national private and procedural law relating to the effect of provisions of consumer law. However, it is still not entirely clear whether the directive requires the Member States to oblige or merely to empower the national courts to effect this examination, nor is it clear under which European directives (or regulations) other than the directive on unfair contract terms such an obligation exists.\(^{85}\)


In the words of Van Gerven\textsuperscript{86} it may be said that in cases such as these ‘the Court seems to have re-discovered, in matters dealt with in directives, the boldness of interpretation which has been its trademark in landmark cases such as (Francovich or Courage v. Crehan).’

4.2. \textbf{REGULATIONS}

According to Article 288 paragraph 2 FEU \textsuperscript{[249 EC]} a regulation has general application; and it is binding in its entirety and directly applicable in all Member States. This means that, differently from directives which have to be transposed by national legislation or other measures, regulations are able to create private law directly binding upon individuals. The content of these regulations – which are not numerous – will not detain us here, since we are concerned with the case law of the ECJ. Two aspects are interesting here, one relating to contract law and the other to tort law. Since regulations have a horizontal direct effect, the position is comparable with what has been discussed in section 2.1.1 ff. \textit{supra} relating to Treaty provisions.

Regulations normally contain mandatory law. This means that contracts derogating from regulation provisions are normally null and void. An example is offered by \textit{Safety Hi-Tech}.\textsuperscript{87} Regulation No. 3093/94 restricts the use and marketing of substances that deplete the ozone layer. Contracts infringing this prohibition are void, as was correctly decided by the referring national court at the request of a buyer who was sued by the seller to pay the purchase price. This decision was upheld because the appeal by the seller that the prohibition was invalid was rejected by the ECJ.

Another consequence of the horizontal direct effect of a regulation is that non-compliance of its provisions by an individual, e.g., a trader, may constitute a tort as against another individual, e.g., a competitor. Regulation No. 2200/96 on the common organization of the market in fruit and vegetables was infringed by a trader in England who did not comply with its requirements as regards variety name laid down by a quality standard. The question arose whether a competitor has the right to bring a civil action directed at enforcing the duty imposed by the regulation. The ECJ answered in the affirmative, since this is necessary to give consumer credit, and speaks (in the same vein as \textit{Océano}, para. 29) of ‘allowing national courts to apply of their own motion’ that provision (para. 69), whereas in \textit{Mostaza Claro} (see preceding footnote) it is stated that the national court is ‘required’ to assess of its own motion whether a contractual term is unfair (para. 38). Should the decision in \textit{Mostaza Claro} be understood as being restricted to the specific clause in issue in that case? Or does \textit{Rampion} come back on \textit{Mostaza Claro} returning to \textit{Océano}? Or does the ECJ not perceive a relevant difference in substance between ‘a court being allowed to’ or ‘a court being required to’ act of its own motion?

86. Walter van Gerven [fn. 1] at 120.
full effectiveness to the rules in question. It is not doubtful that in principle an action in damages would also be successful.

5. CONCLUSION

Although private law hardly has a place in the FEU Treaty, its importance in the structure of EU law has increased significantly. On the basis of Articles 114 and 115 FEU [94 and 95 EC] and some specific bases for legislative competence (e.g., Article 169 FEU [153 EC]) a substantive legislative activity has developed covering topics such as product liability, consumer sales law, general conditions, doorstep selling, distance selling by electronic means as well as topics in the fields of labour law and company law. Article 65 EC [81 FEU] has proven a fertile source of private law legislation in the fields of international procedural law and private international law.

In addition, the European Court of Justice broadly speaking has intervened in private law along two lines (apart from its case law on the directives and regulations). A survey of that intervention has been presented in this article. On the one hand, the Court has interpreted some central Treaty provisions in such a way that they have become directly applicable to relationships between individuals, so that they create subjective rights and obligations between them. Put in another way: those provisions now produce a direct horizontal effect in private law relationships. This is – apart of course from Article 101 paragraph 2 FEU – true for Article 108 paragraph 3 FEU, the provisions on discrimination and the fundamental freedoms concerning persons and services (free movement of workers, freedom of establishment, freedom to provide services). Whether the same interpretation will be adopted for the freedom of goods is not yet clear. Moreover the Treaty (in combination with the principle of effectiveness) has been interpreted in such a way that new branches of EU private law have been created: liability of Member States and individuals for the violation of EU law, condicio indebiti and liability in case of unjustified enrichment.

On the other hand, private law is affected by the general principles of EU law, which the Court has developed on the basis of Article 19 EU [220 EC]. In particular, combined with Treaty interpretation the principle of effectiveness has thoroughly affected private law, both as a source of new legal rules and remedies and as a means of control and correction of national rules unduly restricting the exercise of rights granted by European Union law.

EU law has developed into a legal order which is also a legal order of private law. It is clear that this development has not come to an end yet, quite apart from what will eventually happen to Great Ideas such as the Common Frame of Reference, an Optional Instrument or even a European Code of Contract Law. Working on those projects is intellectually highly stimulating and adventurous, but private law scholars are well advised not to neglect the actual developments in the case law of the ECJ.