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FROM *VAN GEND EN LOOS* TO *MANFREDI*: DEVELOPING THE RIGHT TO COMPENSATION AMONG INDIVIDUALS UNDER EU LAW

Abstract

The article analyses the development of a right to compensation operating among individuals under EU law. In particular, the discussion focuses on a series of judgments of the European Court of Justice over a period of four decades, which culminated in the Court's findings in the seminal Courage (2001) and Manfredi (2006) judgments. These judgments show the emanation of a right to damages as a (somewhat) logical "offshoot" of the more general principle of effectiveness of EU law, with the Court motivated by a willingness to introduce the principle of ubi ius ibi remedium as a rule of the EU's supranational legal order.

Keywords: European Court of Justice, compensation, damages, EU law, competition, effectiveness.

Ključne reči: Evropski sud pravde, naknada štete, odšteta, pravo EU, konkurencija, delotvorna primena.

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1. INTRODUCTION

In its seminal (and somewhat controversial) judgment in ***Courage***, the European Court of Justice famously held:

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[1]

Five years later, in ***Manfredi***, it reiterated this position [2] and held that, as a result:

It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101] EC.[3]

The core of the controversy, at the time of the ***Courage*** judgment and, to a smaller extent, to this day, lies in the idea that there exists a 'Community' (now, post-Lisbon Treaty-Union or EU law ***right to damages***, which somehow follows from the direct effect of Article 101.[4] Opposed to this view lies the concept of 'national procedural autonomy' (also sometimes termed 'national judicial autonomy') which, according to its proponents, states that, while EU law lays down substantive rights and obligations for its subjects, the elaboration of rules of liability, procedure and remedies falls within the sphere of national law.[5]

In practice, the contrast between the two positions is not black and white, with some authors supporting, simultaneously, the existence of both a 'Community right to damages' and 'national procedural autonomy.'[6] Indeed,

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[1] Case C-453/99, ***Courage v. Crehan*** [2001] ECR I-6297, para. 26.

[2] Cases C-295 to C-298/04, ***Manfredi et al. v. Lloyd Adriatico et al.*** [2006] ECR I-6619, para. 60.

[3] ***Ibid.***, para. 61.

[4] Probably the first author to expose this idea ***in extenso***: A. P. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: ***Courage v. Crehan*** and the Community Right to Damages', ***CMLRev.*** 39 (2002): 447.

[5] See point 2.4. below.

[6] A. P. Komninos, ***EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*** (Oxford: Hart, 2008), Part III; D. Chalmers et al., ***European Union Law*** (Cambridge: CUP, 2006), 390–408 and 968–971.

the Court itself has referred to the latter concept, in a judgment subsequent to ***Courage***.[7] As will be seen below, the conundrum arises from different interpretations of this concept: while there can be no doubt that national law applies, in a subsidiary fashion, to fill the gaps in legal protection left by the (incomplete) EU legal system, legitimate questions may arise with regard to how these gaps may be filled by EU itself, in the absence of specific legislation.

The ***Courage*** and ***Manfredi*** judgments in particular pose a host of questions that are highly pertinent for a fuller understanding of the nature of EU law. First and foremost, is there, indeed, an EU law right to damages based on direct effect of Treaty provisions? Second, if such a right exists, is it embedded in previous case law of the Court, or did the the Court of Justice suddenly 'invent' it in ***Courage***? Third, assuming that there is a right to damages which is well-founded in the case law, can that right be distinguished from the right to damages operating against Member States and EU institutions? These and other, related questions are the subject of the present article.

2. FROM DIRECT EFFECT TO REMEDIES FOR INDIVIDUALS

2.1. Direct effect

The idea that individuals should have a right to compensation for breach of Articles 101 and 102 is premised on the principle of (horizontal) direct effect, which applies to some EU law norms.[8]

Direct effect, under EU law, is built on a well-known concept of public international law commonly referred to as the 'self-executing norm.'[9] Under this concept, if a norm contained in an international treaty is sufficiently precise and unconditional and is legally perfect, in the sense that it does not require further implementing legislation, it may be applied directly in the

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[7] Case C–201/02 ***The Queen ex parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions*** [2004] ECR I–723, para. 70.

[8] See, generally, P. Craig & G. De Búrca, ***EU Law: Text, Cases and Materials,*** 3rd edn (Oxford: OUP, 2003), Ch. 5.

[9] On the divergence between the Court's judgment and the status quo in international law at the time, see B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in ***The Evolution of EU Law,*** ed. P. Craig & G. De Búrca (Oxford: OUP, 1999), 181.

municipal legal order, with no need for additional state measures.[10] It should be stressed that, under public international law, the self-executing nature of a norm entails the ***possibility*** of a municipal legal order applying it directly. There is no (international) ***obligation*** to do so, as the modalities for the enforcement of international treaty obligations depend on the laws of the individual state.

In its landmark 1963 judgment in ***Van Gend en Loos***,[11] the Court of Justice deviated from the international norm and held (against the wishes of all three Member States intervening in the proceedings) that the Union (then Community) represents a 'new legal order', which bestows rights and obligations not only on states but on 'peoples' and which has 'institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.'[12] It also referred to 'the task assigned to the Court of Justice under Article [267], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, [which] confirms that the States have acknowledged that [EU] law has an authority which can be invoked by their nationals before those courts and tribunals.' Accordingly, the direct effect of sufficiently precise and unconditional norms of EU law (in that case, Article 25 of the Treaty – now Article 30), could not be denied on the basis of national law and the Court of Justice had competence to determine whether or not EU norms had direct effect.

The arguments of the Court were, for the most part, novel interpretations of the Treaty, which, arguably, had no direct basis in its text (or the will of at least one half of the signatories). In response to the Member States' argument to the effect that their obligations under EU law would be sufficiently well-enforced by the Commission and other Member States through the public

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[10] See e.g., Advisory Opinion on the Jurisdiction of the Courts of Danzig, of 3 Mar. 1928, PCIJ, Ser. B, No. 15. The Court of Justice in Case 26/62, ***NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*** [1963] ECR 3, [1963] Eng. Spec. Ed. 1. followed a non-controversial definition in that case, stating that a directly effective provision must contain:

A clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law.

[11] See previous note.

[12] ***Ibid.***

enforcement procedures of Articles 258 and 259,[13] the Court laid out one practical argument for the necessity of having direct effect as a matter of EU law:

A restriction of the guarantees against an infringement of Article [30] by Member States to the procedures under Article [258] and [259] would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258] and [259] to the diligence of the Commission and of the Member States.[14]

More so, perhaps, than in any other judgment of the Court, the second part of this quote accentuates the role of the 'private attorney general' in boosting the overall level of detection and punishment of infringements of EU law. It also represents the twofold source of the justification for private enforcement in the EU: the vindication of individual rights on the one hand and greater effectiveness of EU law on the other.[15] In the words of Craig:

If the burden of pursuing claims becomes too great then the Commission will have relatively less time to, for example, devise legislation, which is one of its main tasks under the Treaty. Private actions, rendered possible by the concept of direct effect, complement the enforcement role of the Commission by sanctioning claims brought by individuals in their own capacity. Another way of putting the same point is that direct effect creates a large number of 'private attorney-generals', who operate not only to vindicate their own private rights, but also to ensure that the norms of the...Treaty are correctly applied by the Member States.[16]

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[13] Under Art. 258, if the Commission finds that a Member State has failed to fulfil its Treaty obligations, it issues a reasoned opinion and allows the Member State to submit observations. If the Member State fails to comply within the time limit specified by the Commission, the Commission can bring proceedings before the Court of Justice. Under Art. 259, a Member State can bring proceedings before the Court against another Member States, after receiving a reasoned opinion of the Commission on the issue.

[14] See n.10 above.

[15] Whether this is, indeed, a twofold source is debatable, as will be seen below.

[16] P. P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law', ***Oxford Journal of Legal Studies*** 12 (1992): 453, at 455.

One vital aspect of direct effect is, therefore, its substantial capacity to make EU law more widely observed in practice, by filling in a gap in the detection and enforcement of infringements. Another fundamental aspect is its equally substantial capacity to generate individual rights and thus legitimize, as it were, the 'expansion' of EU law into national systems of judicial protection.[17]

Indeed, the referring national court in ***Van Gend en Loos*** pointed out that, under Dutch constitutional law, provisions of international agreements can only have direct effect if they confer rights on individuals. It is more likely than not that the Court of Justice picked up on this 'rights theme' and felt that its findings would be more easily accepted by the Member States if 'individual rights' were found to emanate from Article 30 of the Treaty.[18] As will be seen below, the Court has been far from oblivious to the legitimizing power of individual rights in its subsequent case law.

2.2. Primacy

The direct effect of EU law would be of little significance in practice, had the Court not issued another seminal ruling, one year after ***Van Gend en Loos***, in ***Costa***.[19] Once more, it deviated from the public international law norm and interpreted EU law in such a way that the latter prevailed not only over national norms adopted prior to the coming into force of the Treaty, but also over norms adopted subsequently.

Starting from the premise that 'the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves,'[20] it found that 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions,'[21] so that 'the executive force of the Treaty cannot vary from one State to another in deference to subsequent domestic laws.'[22]

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[17] The word 'expansion' is placed in quotation marks here because its use connotes, in and of itself, a conceptualisation of the EU legal order as operating under some form of 'national procedural autonomy'. This conceptualization is discussed below, at point 2.4.

[18] T. Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link', ***CMLRev.*** 41 (2004): 1199, at 1202–1203.

[19] Case 6/64, ***Flaminio Costa v. E.N.E.L.*** [1964] Eng. Spec. Ed. 585.

[20] ***Ibid***.

[21] ***Ibid***.

[22] ***Ibid***.

One could lament, as in ***Van Gend en Loos***, the existence of self-justifying premises in this judgment and the absence of a higher premise to draw from. Once again, it is, in reality, the very ***existence*** of the Treaty that shapes its relationship with national law, the argument being that, since the Member States chose to sign the Treaty, they must do whatever it takes to ensure its effective application.

As a principle of interpretation, primacy stands in clear opposition to the then prevailing general principle, applied in monist and quasi-monist states, which is that, even if an international norm becomes effective directly in the national legal order, a subsequent unilateral legislative measure could still supersede that norm, under the principle of ***lex posterior derogat legi priori***.[23] In combination with direct effect, the doctrine of primacy thus ensured that EU law not only became the 'law of the land' in the Member States; it became, rather, the 'higher law of the land,' in a manner that is found, generally, in federal states,[24] thus obtaining a 'constitutional' or 'quasi-constitutional' status.

In this respect, it must be noted that the commonly used term 'supremacy' may be misleading in this context. German legal writing makes a clear (and helpful) distinction between ***Anwendugsvorrang*** on the one hand and ***Geltungsvorrang*** on the other.[25] In the words of Prechal:

The former is the expression of priority of application. The latter term refers to the idea of hierarchy of rules within a legal system and is closely linked to the question of what is the validating norm of all rules in the legal system concerned. One of the more practical effects is that in case of incompatibility, the higher norm invalidates the norm of lower ranking. This is indeed a far more drastic consequence than priority in application.[26]

This interpretation finds support not only in the constitutional case law and doctrine of Germany but also France, Poland and Spain (and, arguably, the

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[23] J. H. H. Weiler, ***The Constitution of Europe: 'Do the New Clothes have an Emperor?' and Other Essays on European Integration*** (Cambridge: CUP, 1999), 21.

[24] ***Ibid.***, 22.

[25] S. Prechal, 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', in ***The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate***, ed. C. Barnard (Oxford: OUP 2007), 35–69, at 51.

[26] ***Ibid***.

UK),[27] it also finds indirect support in older Court of Justice case law. Indeed, the Court has always phrased the ***disapplication*** of national law as precisely that. At no point did it indicate that national norms that conflict with EU law would be ***null*** or ***void***, with the obvious and explicit exception of Article 101(2) of the Treaty, which refers, however, to norms adopted among individuals. Arguably, had it done so, it would have inferred that national laws somehow depend for their validity on EU law-which is manifestly not the case. More recently, when it was confronted with the issue directly, the Court left it to the national legal systems to decide the exact effects of the incompatibility of a national norm of general application with EU law, stating that EU law merely requires that such norms be set aside.[28]

Be all that as it may, when read in conjunction, direct effect and primacy represent a formidable engine for eliciting (or generating?) individual rights: if EU law enjoys 'primacy' in its relationship with conflicting national law and if it is capable of being relied on directly by individuals, then the Member States' laws could be circumvented entirely, when it comes to regulating relations between Member States and individuals, as well as among individuals. Simultaneously, therefore, EU law could assert itself as both master and servant of the individual, a role traditionally reserved for the legal systems of nation states.

2.3. Horizontal direct effect

Although, strictly speaking, the judgment in ***Van Gend en Loos*** was concerned with what subsequently came to be known as 'vertical direct effect', that is, the direct effect of provisions in relations between an individual and a Member State, the Court also sowed the seeds of (the more relevant for the present purposes) 'horizontal direct effect' by stating:

The fact that Articles [258 and 259] enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations

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[27] For the first four Member States, see Prechal, n. 25 above, 51–52. The position as regards the UK is derived from the reactions to the ***Factortame*** judgment of the Court, whereafter the so-called parliamentary sovereignty (the principle that Parliament can adopt any laws whatever, without possibility of constitutional review by reference to a higher legal norm) was trumped as regards the UK's obligations under EU law, but only as a result of and to the extent commanded by a national statute regulating that country's accession to the EU. See the discussion below, point 2.5.

[28] Cases C-10 to 22/97, ***Ministero delle finanze v. IN.CO.GE*** [1998] ECR I-6307, para. 28; also cited to this effect by Prechal, n. 25 above, 53.

does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, ***any more than the fact*** that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, ***in actions between individuals*** before a national court, of ***pleading infringements of these obligations***.[29]

The notion of horizontal direct effect was cemented eleven years later, in ***BRT***,[30] when the Court of Justice had to determine whether a national court should be considered as a national authority and thus subject to the duty under Article 9 of Regulation 17/62[31] to stay proceedings launched before it under Articles 101/102 in the face of a Commission decision to initiate proceedings with regard to the same alleged infringement. The Court ruled that the national court was not bound to stay its proceedings not only because it was not a national authority for the purposes of the Regulation but, more generally, because:

The competence of [national courts] to apply the provisions of [EU] law, particularly in the case of such disputes, derives from the direct effect of those provisions.

As the prohibitions of Articles [101(1)] and [102] tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard.

To deny, by virtue of the aforementioned Article 9, the national courts' jurisdiction to afford this safeguard, would mean ***depriving individuals of rights which they hold under the Treaty itself***.[32]

Here the Court effectively sanctioned the 'expansion' of EU law from 'public' to 'private' law, by imposing the duty on national courts to apply Treaty provisions in relations between individuals.[33] It was clear, long before that

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[29] ***Van Gend en Loos***, n. 10 above (emphasis added).

[30] Case 127/73 ***BRT v. SABAM*** [1974] ECR 51.

[31] Council Regulation (EEC) 17/62, First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Eng. Spec. Ed. 81.

[32] ***BRT v. SABAM***, n. 30 above, paras 15–17 (emphasis added).

[33] The mid-1970s also revealed the ability of Treaty provisions to generate 'individual rights' in the face of the legislative lethargy of the Member States acting in the Council. In Case 2/74 ***Reyners v. Belgium*** [1974] ECR 631 and Case 43/75, ***Defrenne v. Societe anonyme belge de navigation aerienne Sabena*** [1976] ECR 455, the Court found Treaty provisions to be directly

judgment, that ***some*** national courts already considered that Article 101 ***could*** be applied directly between individuals under ***national*** law.[34] Following ***BRT***, the 'could' became a 'must,' as a matter of ***EU*** law. In addition, what was also confirmed is that, in case of conflict, the direct effect of these norms prevails over any secondary EU legislation.

Nevertheless, to state, in the abstract, that an individual enjoys a certain right is not saying very much, if that individual is incapable of exercising that right in practice. It is all very well for the Court to say that, under the Treaty, one should enjoy, say, 'freedom of establishment'.[35] The mere declaration of a 'freedom' or a 'right' is a dead letter unless its holder can obtain an effective ***remedy***. This is, perhaps, why the Court did not stop at merely asserting the existence of individual rights but went further and required that they be effectively protected by the Member States.

2.4. No new remedies?

In the context of determining how far EU law goes in setting out remedies and procedure for the protecting EU rights, the Court famously held, in ***Rewe-Zentralfinanz***:[36]

Applying the principle of cooperation laid down in Article [4(3)] of the [EU] Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of [EU] law.

Accordingly, ***in the absence of [EU] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law***, it

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effective in the absence of implementing directives that should have been enacted but were not. In examining the freedom of establishment under Art. 49 and the principle of equal pay for equal work between men and women, the Court distilled those parts of the EU law rights that could be relied on by individuals directly, in cases of an obvious infringement, while leaving to secondary legislation the regulation of less clear-cut cases and the enactment of positive measures to remove national and sex discrimination.

[34] See e.g., the Art. 267 (formerly 234) reference in Case 56/65, ***Société Technique Minière v. Maschinenbau Ulm*** [1966] ECR Eng. Spec. Ed 235.

[35] As set out in Art. 49 TFEU and the implementing legislation.

[36] Case 33/76, ***Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland*** [1976] ECR 1989.

being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary, Articles [122] to [124] and [268] of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the common market.

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

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.[37]

This formula has been repeated, in essentially unaltered form, in numerous subsequent judgments of the Court from that time until the present day, including ***Courage*** and ***Manfredi***.[38] The alleged principle of 'national judicial autonomy' (discussed below) would hold, in particular on the basis of the phrases in italics above, that the Treaty, as interpreted by the Court, had somehow 'left' the competence to adopt rules on remedies and procedure to national law, while EU law remained competent only to adopt substantive rules.[39]

Four years after ***Rewe-Zentralfinanz***, the Court held, in ***Rewe-Handelsgesellschaft Nord***: [40]

Although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice***, it was not intended to create new remedies in the national courts to ensure the observance of [EU] law other than those already laid down by national law.*** On the other hand the system of legal protection established by the Treaty, as set out in Article [267] in particular, implies that it must be possible for every type of action provided for by national law to be available for the purpose of

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[37] ***Ibid.,*** para. 5 (emphasis added).

[38] ***Courage***, n. 1 above, para. 29 and ***Manfredi***, n. 2 above, para. 62.

[39] With the exception, of course, of procedural and remedial rules in cases of EU liability, where the Court of Justice has exclusive jurisdiction, as under Arts 268 and 270.

[40] Case 158/80, ***Rewe-Handelsgesellschaft Nord v. Hauptzollamt Kiel*** [1981] ECR 1805.

ensuring observance of [EU] provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.[41]

Some authors have termed the above passage a 'no new remedies' principle (although with some doubt as to its validity),[42] which would hold that national courts are not required to create remedies that do not otherwise exist in their legal systems in order to give effect to rights bestowed upon individuals under EU law.

Of the two principles set out in ***Rewe-Zentralfinanz***, one at least seems uncontroversial: certainly, if EU law is taken seriously by the Member States and if it enjoys precedence over national law, national remedies and procedures that are applied to EU law infringements must be at least the same as or better than remedies and procedures applied to infringements of national law ('principle of equivalence').

The meaning and content of the second principle is elusive. The idea that national law should not make it impossible to enforce EU law rights seems innocuous enough. The wording of the Court in ***Rewe-Zentralfinanz*** states, however, that this should not be '***impossible in practice***.' In other words, what seems to be at stake here is more than a mere requirement not to adopt rules that directly preclude the protection of EU rights.

Indeed, in ***Rewe-Zentralfinanz*** and in subsequent case law, the Court has interpreted the duty of sincere co-operation, set out in Article 4(3) of the EU Treaty post-Lisbon (formerly Article 10 of the EC Treaty), as requiring the Member States to take positive steps to ensure the effective enforcement of EU law before their domestic courts.[43] The criterion of 'non-impossibility' then becomes a much wider and almost infinitely flexible criterion of 'effectiveness' of national remedies and procedures. As a consequence, the tentative 'no new remedies' principle also becomes highly questionable, when one considers the scope of remedies subsequently imposed by the Court on national jurisdictions.

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[41] ***Ibid.,*** para. 44.

[42] P. Craig & G. De Búrca, ***EU Law: Text, Cases and Materials,*** 3rd edn (Oxford: OUP, 2003), p. 232.

[43] See the discussion of ***Francovich*** and ***Brasserie du Pêcheur*** at point 3.2. below.

2.5. Towards 'new' remedies

A judgment that drives the previous point home is ***Simmenthal***,[44] laid down three years ***before Rewe-Handelsgesellschaft Nord***. In that case, an Italian court of first instance asked the Court of Justice whether, in the face of incompatibility of a national legislative provision with EU law, it must wait for legislative amendment or a finding of unconstitutionality by the Italian Constitutional Court or whether, on the contrary, it could proceed to disapply the provision in question itself in the case before it. Notwithstanding the existence of the above-mentioned national constitutional procedures, the Court of Justice held:

The effectiveness of [the EU law provisions in question] would be impaired if the national court were prevented from forthwith applying [EU] law in accordance with the Decision or the case-law of the court.

It follows from the foregoing that ***every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule.***

Accordingly ***any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [EU] law*** by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent [EU] rules from having full force and effect are incompatible with those requirements which are the very essence of [EU] law.[45]

Building on the fundamental premise of ***Costa*** that, in the event of conflict, EU law prevails over national law, the Court used the need to ensure the effectiveness of EU law to decide how ***exactly*** such a conflict should be resolved by national courts.

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[44] Case 106/77, ***Amministrazione delle finanze dello Stato v. Simmenthal*** [1978] 629. The Art. 234 (now 267) reference proceeded nonetheless, as the Court will only consider a reference to be withdrawn when this is done by the referring court or if it is quashed by a superior court: ***ibid.,*** para. 10. In this case, there was an appeal pending against a ruling of the referring court, so, presumably, it was in its interest to have the issue resolved, so as not to suffer an overruling at the appellate level.

[45] ***Ibid.,*** paras 20–22 (emphasis added).

The requirement imposed on national courts goes clearly beyond 'equivalence:' the national court is, in fact, asked to accord far superior treatment to EU law claims than it would accord to national law claims, as a national law that infringes the Italian Constitution could only be set aside by the Parliament or the Constitutional Court and ***not*** by a court of first instance. Furthermore, it can hardly be said that the Italian system made it ***impossible*** to exercise a EU law right: one had to await legislative amendment or a judgment of the Constitutional Court abrogating or annulling the national law. It is with this judgment that the distinction between impossibility and 'impossibility in practice' becomes clear. The former term would refer, if anything, to a formal, absolute impossibility, while the latter would refer to impossibility in a realistic, material sense.

Indeed, the ***Simmenthal*** judgment set out both a rule of ***substance***, stating that national rules of ***any kind*** (whether substantive, procedural or remedial) must give way to the requirement of effectiveness of EU law and a rule of ***procedure***, stating that all national courts competent to hear the substance of a dispute are also competent to disapply national provisions incompatible with EU law. Arguably, the Court had also laid down a basic form of particular legal remedy that did not exist in the national legal system in question before – the setting aside of national legislation by a court of first instance in the case before it.[46]

The position established in ***Simmenthal*** was confirmed decisively in ***Factortame***,[47] where several Spanish fishing companies brought proceedings before courts in the UK to have the operation of an act of Parliament suspended, on the grounds of infringement of Articles 49 and 55 (TFEU) and the (subsequently repealed) ex Article 7 of the (EEC) Treaty.

Traditionally, in the UK, it is an axiomatic rule of the national constitutional order that no court can stop the operation of a duly enacted act of Parliament, either permanently or temporarily (the doctrine of parliamentary

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[46] Some authors have termed the setting aside of legislation as a 'general remedy' consequent on primacy and direct effect: W. Van Gerven, 'Of Rights, Remedies and Procedures', ***CMLRev.*** 37 (2000): 501, at 503. Without dwelling on the need for a distinction between 'general' and 'specific remedies,' such a remedy could be framed as a ***negative injunction***, that is, a judicial order to refrain from doing something, in this case, enforcing a national law norm that infringes EU law.

[47] Case C-213/89, ***R v. Sec. of State for Transport***, ex parte ***Factortame*** [1990] ECR I-2433.

sovereignty).[48] In referring the case to the Court of Justice, the House of Lords was of the opinion that the national legislation runs counter to EU law but found that it cannot suspend its operation due to the above-mentioned rule. In its reply, the Court of Justice held simply (yet with very deep repercussions for the UK constitutional system):

[EU] law must be interpreted as meaning that a national court which, in a case before it concerning [EU] law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.[49]

The Court's disregard of national constitutional law was not altogether surprising,[50] considering that it had never limited its doctrine of primacy of EU law in ***Costa*** to national norms of ***sub-constitutional*** rank. In addition, reasoning on the basis of ***Simmenthal***, if Italian courts could be empowered to set aside Italian legislation on the basis of incompatibility with EU law, there is, from a EU law viewpoint, no reason why courts in the UK should not be equally empowered. Quite the contrary: the equal empowerment of courts among the Member States serves to ensure that the 'executive force' of EU law, referred to by the Court of Justice in ***Costa***, be uniform throughout the EU.

Factortame established a EU law power to grant interim relief in favour of individuals against national legislation that infringes EU law. The '***Factortame*** injunction' is a very specific remedy whose procedural operation is regulated, to a significant extent, by EU law which, under the principle in ***Simmenthal***, very specifically states that not only appellate or supreme courts, but also courts of first instance may apply it, in each and every case they deem necessary for the purpose of protecting EU law rights. Viewed in light of the

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[48] See, e.g., A. W. Bradley & K. D. Ewing, ***Constitutional and Administrative Law*** (Harlow: Pearson, 2003), 52–71.

[49] ***Ibid.,*** para. 23 and the operative part of the judgment.

[50] Nonetheless, this simple phrase has raised such commotion among UK constitution lawyers as was not seen in living memory. Arguments were developed by numerous commentators that would enable to fit this 'new' rule with the UK's age-old principle of parliamentary sovereignty, whereby Parliament could legislate on any matter whatever as it sees fit, without fear of judicial sanction. See, generally, A. W. Bradley & K. D. Ewing, ***Constitutional and Administrative Law,*** 13th edn (Harlow: Pearson Education, 2003), 134–144.

judgment in ***Zuckerfabrik***,[51] issued two years earlier, where the Court laid down ***exact criteria*** for granting an injunction against a national measure adopted in furtherance of yet contrary to EU law,[52] one can hardly doubt, as a matter of principle, the notion that EU law can and does lay down rules of procedure and remedies.[53]

3. TOWARDS A RIGHT TO COMPENSATION

3.1. Restitution/compensation: the beginning

In ***San Giorgio***,[54] the plaintiff sought to reclaim taxes that were levied by Italy in an unlawful manner. The situation was somewhat similar to that addressed in EU secondary legislation dealing with unlawful withholding of funds under EU measures, yet not actually covered by it.[55] Although there was no opposition from the Italian State to the general notion that charges unlawfully levied should be repaid, Italian law required that the claimant produce documentary evidence proving that he did not 'pass-on' the unlawfully levied amount to his customers.[56] This requirement was non-discriminatory, as it applied both to claims under EU law and to claims under Italian law.[57]

In finding the national law requirement of documentary proof incompatible with EU law,[58] on the grounds of making protection of EU rights excessively difficult in practice, the Court also made a statement of wider import:

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[51] Cases C-143/88 and C-92/89, ***Zuckerfabrik Suderdithmarschen v. Hauptzollamt Itzehoe and Zuckerfabrik Soest v. Hauptzollamt Paderborn*** [1991] ECR I-415.

[52] ***Ibid.,*** paras 23–27.

[53] It should also be noted that, more recently, in Case C-198/01, ***Consorzio industrie fiammiferi v. Autorità garante della concorrenza e del mercato*** [2003] ECR I-8055, the Court confirmed the applicability of the ***Simmenthal/Factortame*** principles in the context of application of EU competition law by an administrative authority (see, esp. para. 58 of the judgment).

[54] Case 199/82, ***Amministrazione delle Finanze dello Stato v. SpA San Giorgio*** [1983] ECR 3595.

[55] Council Regulation (EEC) 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, [1979] OJ L175/1.

[56] For a discussion of the problem of 'pass-on', see the discussion in V. Milutinović, ***The 'Right to Damages' under EU Competition Law: From*** Courage v. Crehan ***to the White Paper and Beyond*** (The Hague, Kluwer Law International, 2010), at point 9.2.

[57] ***San Giorgio***, n. 54 above, para. 16.

[58] ***Ibid.,*** paras 14–15.

…entitlement to the repayment of charges levied by a Member State contrary to the rules of [EU] law is a ***consequence of, and an adjunct to, the rights conferred on individuals*** by the [EU] provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes.[59]

This statement was not strictly necessary for the disposal of the case. Italy had recognized its own prima facie liability, subject to a requirement of documentary evidence of no pass-on by the claimant. The Court could have stopped at finding that this particular evidentiary burden harmed the effectiveness of EU law. It went further, however, in order to construct the restitution of unlawfully levied charges as a 'consequence of, and an adjunct to' individual rights derived from the Treaty and thus firmly as a matter of EU law.[60]

In view of the previous existence of EU secondary law commanding repayment in the event of unlawful levying for the benefit of the EU and of the recognition of the principle ***as a matter of national law*** in some or all Member States, this development may seem trivial at first glance. At second glance, however, it represents the first time the Court has declared, under the Treaty, the existence of a EU law right to reparation against Member States – albeit in the form of restitution for unjust enrichment.[61]

The Court's pronouncement of restitution of unlawfully levied taxes as a requirement of EU law could be justified as being the logical corollary of public law censure of unlawful conduct my Member States. ***Arguendo***, the Court was merely ensuring that no one should be allowed to benefit from his own wrongdoing. Under EU law, this principle operates both in favour of and, in certain cases, against individuals.[62]

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[59] ***Ibid.,*** para. 12 (emphasis added).

[60] For the significance of this development for private enforcement of EU competition law, see Milutinović, n. 56 above, Ch. 8.

[61] The importance of the distinction between the concepts of damage and unjust enrichment is discussed in detail in Milutinović, n. 56 above, at point 8.2.4.

[62] Just as Member States are prohibited from becoming unjustly enriched from proceeds collected or withheld in infringement of EU law, thus the Commission may by decision order that a Member State require the repayment of unlawful state aid by an undertaking: Case 70/72, ***Commission v. Germany*** (***'Kohlgesetz'***) [1973] ECR 813, para. 13. Recently, the Court has held that, where a national court has ignored a Commission decision prohibiting a state aid, the ***res judicata*** effect of such a judgment cannot be used to prevent repayment: Case C-119/05, ***Ministero dell'Industria, del Commercio e dell'Artigianato v.***

The issue becomes somewhat more complicated, however, when the Member State receives no (tangible) benefit as a result of its own unlawful act. Until the Court's seminal judgment in ***Francovich*** in 1991, there seemed to be no rule under EU law that would compel Member States to compensate individuals for damage sustained as a result of the Member State's breach of EU law if such compensation was not available under national law and in the absence of unjust enrichment. It is at that point that EU law made the vital transition from merely ensuring compliance by Member States to setting out a positive right to compensation for individuals.

3.2. Compensation in full view

In ***Francovich***,[63] a number of former employees of insolvent undertakings in Italy claimed compensation from that Member State, on account of its failure to implement Directive 80/987.[64] The Directive required the Member States to, ***inter alia***, put in place a system guaranteeing that workers will not be deprived of wages as a result of the insolvency of their employer.[65] This obligation was found to be capable of having direct effect. Nevertheless, in the absence of implementation, Member States could not be asked to become guarantors themselves, so that liability to individuals could not be based on direct effect. The Court thus refused to infer an obligation of the Member States to shoulder directly the financial burden of the system set out therein.

Instead, the Court went on to examine whether there is a ***general principle of liability*** of Member States for breach of EU law:

The full effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of [EU] law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of [EU] rules is

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Lucchini SpA [2007] ECR I-6199 para. 63. See, generally, Notice from the Commission: ***Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid*** [2007] OJ C272/4.

[63] Cases C-6 and 9/90, ***Francovich and Bonifaci v. Italy*** [1991] ECR I-5357.

[64] Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L 283/23.

[65] ***Ibid.,*** Arts 3(2) and 4(2) and paras 15–16 of the judgment, n. 63 above.

subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by [EU] law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of [EU] law for which the State can be held responsible is inherent in the system of the Treaty.

A further basis for the obligation of Member States to make good such loss and damage is to be found in ***Article [10] of the Treaty***, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under [EU] law. Among these is the ***obligation to nullify the unlawful consequences of a breach of [EU] law*** (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 Humblet v Belgium [1960] ECR 559).

It follows from all the foregoing that ***it is a principle of [EU] law that the Member States are obliged to make good loss and damage caused to individuals by breaches of [EU] law for which they can be held responsible.***[66]

The Court seems to have reached beyond the bounds of the Treaty and into a universal principle of law of ***ubi ius ibi remedium*** that is, that for every right there should be an appropriate remedy.[67] This does not, however, fully account for its actual findings. The right in ***Francovich*** was already subject to a public law remedy, under Articles 258 and 259 of the Treaty. That remedy had, in fact, been exercised by the Commission and the Court had entered a judgment against Italy accordingly.[68]

Essentially, by fashioning a right to compensation, the Court extended the scope of the ***ius*** that requires a ***remedium*** from the EU to the individual. Indeed, what the Court seems to be referring to is a principle of compensation for damage resulting from harmful conduct, often referred to as the principle

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[66] ***Ibid.,*** paras 33–37 (emphasis added).

[67] Komninos, n. 6 above, 148 and Van Gerven, n. 46 above, at 511.

[68] It could be argued, perhaps, that, since the Treaty as it stood at the time did not provide for financial penalties against Member States in cases of non-compliance with EU law, a pecuniary remedy for the benefit of individuals was necessary to ensure deterrence. Nevertheless, seventeen years after the judgment and fourteen years after the coming into force of the Maastricht Treaty – which did introduce such penalties – ***Francovich*** remains good law.

of ***neminem laedere***,[69] generally accepted in civil law legal systems. If that is, indeed, the case, the Court has created a universal civil obligation in EU law, which, to this day, has no civil code or other comprehensive civil law of its own.

Beyond this general obligation, the Court proceeded to lay down the conditions of liability under EU law:

The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on [EU] law.[70]

The Court was thus set on a course of establishing a ***system of liability*** for infringements of EU law. It maintained this course in ***Brasserie du Pêcheur***,[71] where it essentially upheld the principles of ***Francovich*** in the context of claims for damages for breach of directly effective EU law through incompatible national legislation of general application. The Court rejected the arguments of some Member States namely, that ***Francovich*** merely filled a lacuna in legal protection and that, in the case of breach of directly effective Treaty provisions, Member States enjoyed freedom of action, within the limits of the ***Rewe-Zentralfinanz*** equivalence/effectiveness criteria.[72] On the contrary, the existence of the right to damages is:

All the more so in the event of infringement of a right directly conferred by a [EU law] provision upon which individuals are entitled to rely before the national courts. In that event, ***the right to reparation is the necessary corollary of***

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[69] Cf. Art. 1382 of the French Civil Code; Art. 2043 of the Italian Civil Code; the problems incumbent on this principle are discussed in Milutinović, n. 56 above, at point 5.2.2.

[70] ***Francovich***, n. 63 above, paras 38–41. These conditions have been continuously upheld by the Court ever since, e.g., more recently, in Case C-244/01 ***Köbler v. Austria*** [2003] ECR I-10239, para. 51.

[71] Cases C-46 and 48/93, ***Brasserie du Pêcheur v. Germany and R v. Sec. of State for Transport ex parte Factortame*** [1996] ECR I-1029.

[72] ***Ibid.,*** para. 18.

the direct effect of the [EU law] provision whose breach caused the damage sustained.[73]

As the Treaties do not contain an explicit provision setting out Member State liability and as the Court has the most broadly defined task, under Article 19(1) of the EU Treaty (formerly Article 220 EC), of ensuring that, in the interpretation and application of the Treaties the law is observed,' the Court chose to model Member State liability explicitly on that of the EU, as set out in Article 340(2) (formerly Article 288(2) EC) for, indeed:

The principle of the non-contractual liability of the [EU]…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.[74]

…the second paragraph of Article [340] of the Treaty refers, as regards the non-contractual liability of the [EU], to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of [EU] law.

… the conditions under which the State may incur liability for damage caused to individuals by a breach of [EU] law cannot, in the absence of particular justification, differ from those governing the liability of the [EU] in like circumstances. The protection of the rights which individuals derive from [EU] law cannot vary depending on whether a national authority or a [EU] authority is responsible for the damage.[75]

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[73] ***Brasserie***, n. 71 above, para. 22 (emphasis added).

[74] ***Ibid.,*** para. 29.

[75] ***Ibid.,*** paras 41–42. It is not immediately clear why the EU and the Member States should be placed on an equal footing in the absence of a Treaty provision to that effect. The approach of the Court is rather instrumentalist and it views the problem from the perspective of effective protection of EU law rights. Clearly, it would be unacceptable for the Member States that the EU should receive more lenient treatment in terms of liability for breach of EU law. If the pendulum of leniency were to swing in the opposite direction, however, however, the only way to do this would have been to leave the Member States to their own (national law) devices. This would create the possibility for unequal protection of EU law rights among the Member States which, if Member States chose to be lenient on themselves, could lead to ineffective enforcement.

In terms of conditions of liability, the Court has held that, in cases where a Member State enjoys a wide discretion in adopting the impugned legislation:

[EU] law confers a right to reparation where three conditions are met: 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.[76]

As is immediately apparent, the Court added the requirement of 'sufficient seriousness' to the concept of a breach of a superior rule of law elicited in ***Francovich***. The Court explained, however, that:

On any view, a breach of EU law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.[77]

This was manifestly the case in ***Francovich***, where, at the time the preliminary reference was made, the Court had long since ruled against Italy for the same infringement, in Article 258 (ex Article 226 EC) proceedings brought by the Commission. The 'sufficiently serious' criterion remains significant in this context, however, as it may be queried whether it could be applied to acts of individuals.[78]

3.3. Towards a right to compensation operating between individuals

While ***Brasserie du Pêcheur*** was pending before the Court, Advocate General Van Gerven issued his opinion in ***Banks***,[79] a case concerning actions for damages under Articles 101 and 102 (TFEU) and the (now defunct) Articles 60, 65 and 66 of the European Coal and Steal Community Treaty (the ECSC competition rules) and . In reply to the question whether a right to damages emanates from the EU competition rules, he found:

The general basis established by the Court in the Francovich judgment for State liability also applies where an individual infringes a provision of [EU] law to which

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[76] ***Ibid.***, para. 51.

[77] ***Ibid.***, para. 57.

[78] See the discussion in Milutinović, n. 56 above, points 4.3.2. and 5.3.3.

[79] Case C-128/92, H. J. Banks & Co. v. British Coal Corporation ('Banks') [1994] ECR I-1209.

he is subject, thereby causing loss and damage to another individual. The situation then falls within the terms stated by the Court in paragraph 31 of the Francovich judgment (and even earlier in Van Gend en Loos), namely breach of a right which an individual derives from an obligation imposed by [EU] law on another individual. Once again, the full effect of [EU] law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of [EU] law - all the more so, evidently, if a directly effective provision of [EU] law is infringed…[80]

The Advocate General advocated, essentially, the further extension of both the rule on availability of compensation and the conditions of liability to individuals, with the exception of the condition of 'sufficiently serious breach', which he found to be solely applicable to the EU and to the Member States.[81] The Court did not address the issue in its judgment, as it found that only the ECSC competition rules and not Articles 101 and 102 were applicable in that case and that the former did not enjoy direct effect.

It was not for almost another decade that the Court could face this issue head on. In the interim, however, it issued an important but rarely cited judgment in ***GT-Link***.[82] There, the Court was asked whether a victim of an overpricing abuse, within the meaning of Article 102, could claim the surcharge from an undertaking performing services of a general interest.[83] The Court found, in that case, that the undertaking may well be a provider of services of general economic interest for the purposes of Article 106(1). Even so, its pricing policy could not be justified under Article 106(2) as indispensable for the purposes of providing the said services. Thus:

Entitlement to repayment of charges levied by a Member State in breach of the rules of [EU] law is a consequence of, and an adjunct to, the rights conferred on individuals by the [EU] provisions prohibiting such charges. The Member State is therefore in principle required to repay charges levied in breach of [EU] law, except where it is established that the person required to

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[80] ***Ibid.***, para. 43 (emphasis added).

[81] ***Ibid.***, para. 53; see the discussion of this distinction in Milutinović, n. 56 above, at point 4.3.2.

[82] Case C-242/95, GT-Link A/S v. De Danske Statsbaner (DSB) [1997] ECR I-4449.

[83] In that case, a public undertaking in Denmark owned a seaport and applied discriminatory pricing in docking fees that favoured its own vessels and those of its usual trading partners. The practice was sanctioned by Danish law.

pay such charges has actually passed them on to other persons (Comateb, paragraph 21, and cases cited therein).

The same reasoning applies in any event where duties are levied by a public undertaking which is responsible to the Danish Ministry of Transport and whose budget is governed by the Budget Law….

It should be emphasized, however, that traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 Brasserie du Pecheur and Factortame [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on (Comateb, paragraph 34).

In the light of those considerations the answer to the seventh question must be that persons or undertakings on whom duties incompatible with Article [106(1)] in conjunction with Article [102] of the Treaty have been imposed by a public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law are in principle entitled to repayment of the duty unduly paid.[84]

The Court transposed, essentially, the EU law right to repayment of unlawfully collected taxes (from ***San Giorgio*** and, more recently, ***Comateb***,[85] which was cited by the Court) into the field of competition law. As it was, in all likelihood, aware of the implications of this judgment, it hastened to include the qualification 'public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law' in its identification of the entity liable in restitution. Despite the ostensible state regulation element, it must be noted that Article 106(2) did not apply to the infringement in this case, so this qualification was irrelevant under the circumstances. Accordingly, there are no grounds on which this judgment could be distinguished in future cases where restitution might be sought against an undertaking ***not*** performing services of a general economic interest under Article 102.[86]

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[84] ***Ibid.,*** paras 58–61.

[85] ***San Giorgio***, n. 54 above, para. 12 and ***Comateb***, n. 84 above, para. 20.

[86] Indeed, for the present purposes, ***GT Link*** merely represents a situation of an undertaking abusing its dominant position through excessive pricing and the Court saying that the undertaking's customers have a right to repayment of the excess amounts. As such, the

What is somewhat confusing about the Court's findings is that, while it claimed that the right to repayment of unlawfully levied charges arose from the ***San Giorgio/Comateb*** case law, the enforcement of that right was subject to national law and the conditions laid down in ***Brasserie du Pêcheur***. This finding is peculiar because, in the case of liability of the Member States, ***San Giorgio/Comateb*** principles predate ***Francovich/Brasserie du Pêcheur*** and do not list the cumulative criteria laid down by the Court in the latter. In particular, it seems evident that liability in ***restitution***, as a matter of EU law, is not premised on any criterion of fault, not least a 'sufficiently serious breach.' Equally, a causal link between infringement and damage need not be proven, save where it is arguable that the plaintiff has passed on the unlawfully levied amount.[87]

4. COURAGE AND MANFREDI

4.1. Courage

It was seen, in the previous section, how a EU right to restitution for unjust enrichment was developed by the Court of Justice in the ***San Giorgio/Comateb*** / ***GT-Link*** line of cases, while an EU right to damages was developed in ***Francovich/Brasserie du Pêcheur***. The first line of cases was built around the idea of restitution of payments unlawfully received by the Member State, while the second line emerged from the idea of compensating actual damage / loss of profits resulting from the acts of a Member State. It was not until the judgment of the Court of Justice in ***Courage***, however, that it became clear that individuals had the right to claim damages from other individuals under EU law.

When the issue finally came to be decided by the ***Courage*** Court without the confusing element of state involvement that was present in ***San Giorgio/Comateb/GT-Link***, the Court did not rely on that line of (restitution) case law but seems, instead, to have relied on a concept of compensation.

Courage was an Article 267 (formerly Article 234 EC) reference from the English Court of Appeal. In the context of a beer supply / tenancy agreement between a brewer and a publican, where the agreement infringed Article 101,

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principle enunciated in the judgment should apply, ***mutatis mutandis***, to any abuse under Art. 102 that involves an unlawful overcharge.

[87] The (as yet not entirely clear) distinction between restitution and compensation under EU law is discussed in Milutinović, n. 56 above, Ch. 8.

one questioned raised by the latter court was whether the English doctrine of ***in pari delicto potior est conditio defenditis*** could be used to defeat the publican's damages claim. Under this doctrine, if both parties are 'at equal fault', the plaintiff cannot claim damages from the defendant. It would seem that, under English law, the publican was 'at equal fault' with the brewer and his claim could not therefore stand.[88]

The Court began, rather safely, with the ***Van Gend en Loos/Costa*** argument – recalling that the Treaty has created its own legal order, whose subjects are not only the EU and the Member States but also their nationals and which provides rights and obligations for all of these subjects.[89] It then proceeded to emphasize the vital 'constitutional' role played by Article 101:

According to Article [3(1)(g) EC—now modified in Article 3(1)(b) TFEU], Article [101] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the [EU] and, in particular, for the functioning of the internal market (judgment in Case C-126/97 ***Eco Swiss*** [1999] ECR I-3055, paragraph 36).

Indeed, the importance of such a provision led the framers of the Treaty to provide expressly, in Article [101(2)] of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void….

That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article [101(1)] are met and so long as the agreement concerned does not justify the grant of an exemption under Article [101(3)] of the Treaty….[90]

Then, however, the Court threaded on much thinner ice:

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[88] In the US, the Supreme Court famously rejected the applicability of the Common Law doctrine (whose general validity it also questioned) in the context of claims for antitrust damages: ***Perma Life Mufflers Inc. et al. v. International Parts Corp. et al.*** 392 U.S. 234 (1968), at 137–139. Indeed, according to the Supreme Court: 'The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favour of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.' ***Ibid.***, at 139.

[89] ***Courage***, n. 1 above, para. 19.

[90] ***Ibid.,*** paras 19–22.

it should be borne in mind that the Court has held that Article [101(1)] of the Treaty and Article [102 TFEU]… produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard….

It follows from the foregoing considerations that any individual can rely on a breach of Article [101(1)] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.

As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of [EU] law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see ***inter alia*** the judgments in Case 106/77 ***Simmenthal*** [1978] ECR 629, paragraph 16, and in Case C-213/89 ***Factortame*** [1990] ECR I-2433, paragraph 19).

The full effectiveness of Article [101] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed, ***the existence of such a right*** strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [EU].

There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.

However, 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)….[91]

It is evident that ***Courage*** follows the line adopted in ***Brasserie du Pêcheur***, insomuch as it makes an explicit link between direct effect and the subjective right to reparation. What the Court did ***not*** do and as at least one author pointed out, is to follow the '***Brasserie du Pêcheur*** orthodoxy' to its logical conclusion, which would be to lay down the ***conditions*** for non-contractual liability in a taxative manner (i.e., sufficiently serious breach of a superior rule of law for the protection of individuals, damage and causation). [92] This is not to say, however, that such conditions cannot be deduced from its other judgments.[93]

Indeed, it is submitted the omission of conditions of liability was not a purposeful omission. Rather, to lay down these conditions would be to stray too far outside of the scope of the reference from the English Court of Appeal. Already, the Court answered more than it was asked when it said that it should be 'open to any individual' to claim compensation under Article 101, whereas the question before the Court was merely whether ***a person prima facie subject to the English in pari delicto rule*** could be precluded from claiming damages solely on the basis of the latter.

The Court sought to set out a general principle of EU law that was not strictly necessary for the disposal of the case at hand. The issue of whether liability would exist and how it should be determined ***after*** the disapplication of the ***in pari delicto*** rule was not really contentious for the English court, save to the extent that methods alternative to ***in pari delicto*** could be applied in order to take into account the fact that the plaintiff was himself a party to an unlawful agreement within the meaning of Article 101. In that connection, the Court did proceed to lay down some EU law principles:

The Court has held that [EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [EU] law does not entail the unjust enrichment of those who enjoy them….

Similarly, provided that the principles of equivalence and effectiveness are respected…, [EU] law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of

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[91] ***Ibid.,*** paras 23–29 (emphasis added).

[92] Komninos, n. 4 above, at 469–470 (emphasis in the original).

[93] See the discussion in Milutinović, n. 56 above, Chs 5 and 6.

competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see Case 39/72 ***Commission*** v ***Italy*** [1973] ECR 101, paragraph 10), ***a litigant should not profit from his own unlawful conduct***, where this is proven.

…the ***matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves*** and, as the United Kingdom Government rightly points out***, the respective bargaining power and conduct of the two parties to the contract***.

In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.[94]

In effect, the Court elicited a EU law notion of inequality of bargaining power and (partially) regulated the mitigation of liability. It therefore took a leap further toward defining a perfect EU law ***civil obligation***. Indeed, although it did not transpose the ***Francovich/Brasserie du Pêcheur*** list of conditions into the liability of individuals, it may have done something equally or more important.

4.2. Manfredi

In ***Manfredi***,[95] the Court heard a preliminary reference from an Italian small claims court, regarding claims for damages launched by users of car insurance, against a cartel of insurance companies that effectively eliminated price competition in premiums for third-party liability. At the time of the proceedings, some authors and a section of the Italian Court of Cassation held the view that, under Italian competition law, consumers were not entitled to claim compensation for loss resulting from an infringement of the Italian competition rules, which were otherwise identical to EU rules in terms of their substance (minus the requirement of effect on inter-state trade).[96] The

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[94] ***Courage***, n. 1 above, paras 30–33 (emphasis added).

[95] ***Manfredi***, n. 2 above.

[96] The purported rule is not referred to as such in the judgment but is, rather, evidenced in the phrasing of the reference. By the time the Court had issued its judgment, however, the

referring court asked, essentially, whether consumers could claim under EU law.[97] The Court held, in reply:

The full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (***Courage and Crehan***, cited above, paragraph 26).

It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU].[98]

While maintaining its ***Rewe-Zentralfinanz*** 'in the absence of EU rules' stance,[99] the Court clarified the ***Courage*** right to compensation by introducing the requirement of a 'causal relationship' between the damage suffered and the infringement. The Court also seized the opportunity to lay down some rules on limitation periods:

A national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.

In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual

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United Sections of the Court of Cassation issued a judgment declaring that such a rule did not, indeed, exist; see: ***Corte di Cassazione***, ***Sezione I civile,*** Sentenza 9 dicembre 2002, n. 17475.

[97] ***Manfredi***, n. 2 above, paras 20 and 21, questions 2 and 3, respectively; the actual words used by the national court were:

Is Article [101 TFEU] to be interpreted as meaning that it entitles third parties who have a relevant legal interest to rely on the invalidity of an agreement or practice prohibited by that [EU] provision and claim damages for the harm suffered where there is a causal relationship between the agreement or concerted practice and the harm?

[98] ***Ibid.***, paras 60–61.

[99] ***Ibid.***, para. 62.

who has suffered harm after the expiry of the limitation period to bring an action.[100]

The Court pointed the attention of the national court to the problem of continuous infringements that may go unpunished if time limits do not take this continuity into account. Although the assessment of the national rule with EU law is ultimately left to the national court, that assessment should take place under rather strict EU law parameters.

The inclusion of limitation periods on the Court's effectiveness 'watch list' in this context is not surprising: indeed, it is consistent with previous interventions in the area of state liability.[101] Another area where intervention has been known to occur is that of the availability of damages that exceed actual damage to the plaintiff.[102] In this connection, the Court found:

It follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (***damnum emergens***) but also for loss of profit (***lucrum cessans***) plus interest.

Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of [EU] law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible…

As to the payment of interest, the Court pointed out in paragraph 31 of Case C-271/91 ***Marshall*** [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.

It follows that,…in the absence of [EU] rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice

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[100] ***Ibid.,*** paras 78–79.

[101] Case 271/91, ***Marshall v. Southampton and South-West Hampshire Area Health Authority*** ('Marshall II') [1993] ECR I-4367, paras 31–32.

[102] See, inter alia, ***San Giorgio*** [1983] ECR 3595, n. 54 above; Case C-192/95 to 218/95, ***Société Comateb et al. v. Directeur général des douanes et droits indirects*** [1997] ECR I-165 and Case 68/79, ***Hans Just I/S v. Danish Ministry for Fiscal Affairs*** [1980] ECR 501.

prohibited under Article [101 TFEU], provided that the principles of equivalence and effectiveness are observed.

…in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the [EU] competition rules, it must also be possible to award such damages in actions founded on [EU] rules. However, [EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by [EU law] does not entail the unjust enrichment of those who enjoy them.[103]

This passage makes it apparent that the Court views 'effectiveness' as a minimal requirement and not as an imperative to ***maximize*** 'effectiveness'. Thus, while ***damnum emergens***, ***lucrum cessans*** and interest are guaranteed to the successful plaintiff under EU law, the resolution of the issue of punitive damages is deferred to the moral precepts of the Member States, who may or may not find it appropriate to grant damages that exceed the actual damage suffered by a victim of anticompetitive conduct.[104]

4.3. Muňoz

In the intervening period between ***Courage*** and ***Manfredi***, another important case was decided by the Court in the field of horizontal direct effect: ***Muňoz***.[105] In that case, the Court was asked whether Regulations 1035/72 and 2200/96 on the quality standards of fruit were capable of enforcement in civil proceedings between individuals. Article 3(1) (of both regulations), the provision in question, prohibited traders from displaying products or

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[103] ***Ibid.,*** paras 95–99.

[104] In this respect, it must be noted that some authors have argued, with convincing figures, that pre-judgment interest (which exists in all the Member States but not in the US) and treble damages (which exist in the US) are interchangeable for the purposes of deterrence of unlawful conduct and thus, by logical extension, the effective enforcement of a norm such as Arts 101 and 102 TFEU: C. A. Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in ***European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law***, ed. C.-D. Ehlermann & I. Atanasiu (Oxford: Hart, 2003), 95, at 103–105. It must be noted, however, that the Court's deferral to national choices in this matter applies, as with all national rules on liability and remedies in this field, ***in the absence of EU rules***.

[105] Case C-253/00, ***Muñoz v. Frumar*** [2002] ECR. I-7289; See S. Drake, 'Scope of ***Courage*** and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice', ***European Law Review*** 31 (2006): 841, at 859–862.

offering them for sale within the EU unless they comply with the quality standards set out in the directive.[106] As to its applicability in civil proceedings, the Court held:

The full effectiveness of the rules on quality standards and, in particular, the practical effect of the obligation laid down by Article 3(1) of both Regulations No 1035/72 and Regulation No 2200/96 imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor.[107]

The Court did not specifically refer to claims for damages. The reasoning does, however, follow along the 'effectiveness' line pursued by the Court from ***Van Gend en Loos*** through to ***Courage*** and it reiterates familiar arguments in favour of private enforcement, that is, the strengthening of effective application of the rules themselves and the supplementary role to public enforcement, deterrence of unlawful practices which are difficult to detect. It may well be that this judgment indicates a willingness of the Court to extend the principle in ***Courage*** to directly applicable provisions of Regulations. Although there is, as yet, no direct precedent on this point, it is submitted that this view is logical and that there is, in principle, nothing that would prevent the Court from doing so, as all of the arguments mentioned by the Court in favour of a EU right to damages under Articles 101 and 102 can be restated identically in the case of other directly applicable provisions of EU law, including Regulations.

5. CONCLUSION

Starting in the mid-1960s, the Court of Justice progressively laid down a body of case law that proceeded from the right of individuals to rely directly on provisions of the Treaty to a right to claim damages and restitution from the Member States. In the process, the primacy of EU law over conflicting national law, coupled with the obligation for national courts to disapply national law automatically in the case before them was established and this served as an additional generator of individual rights based on the Treaty. By the late 1990s, the Court had also established a right to restitution operating

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[106] Regulation (EEC) No. 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables [1972] OJ L 118/1; Council Regulation (EC) No. 2200/96 of 28 Oct. 1996 on the common organization of the market in fruit and vegetables [1996] OJ L 297/1.

[107] N. 105 above, para. 30.

among individuals under the competition rules, albeit in the (ostensible) context of undertakings performing a service of a general economic interest.

Although no direct line can be drawn from ***Van Gend en Loos*** to ***Courage*** and ***Manfredi***, in terms of progressive development of the case law, the same fundamental principle underlies all of the relevant judgments of the Court: the idea of effective enforcement of EU law before national courts. This principle is powerful as much as (or perhaps because) it is utterly vague: there is no consistent method of determining with any degree of precision, ***ex ante***, which type of legal remedy may turn out to be indispensable for the effective enforcement of EU law. The Court has been more pragmatic than systematic in this respect, proceeding on a case-by-case basis.

The application of the principle of effectiveness has, however, spawned, another principle which, unlike effectiveness itself, is characteristic of (and familiar to) national legal orders: the principle of ***ubi ius ibi remedium***. The only conclusion that can be made with reasonable certainty, therefore, is that, where national law would leave victims of an infringement of EU law without a remedy-the Court of Justice ***may*** be willing to intervene. This intervention depends, in turn, on the interpretation of another vague concept namely, practical (as opposed to formal) impossibility of protecting a right before a national court. In this respect, perhaps, ***Simmenthal*** may prove much more important than ***Courage*** in the long run: it is precisely on the determination of the level of inconvenience imposed by national law on the victim of an infringement that the question of whether an EU law remedy should be introduced ultimately hinges. As was shown in this article, however, there can no longer be any question as regards the possibility of EU law introducing 'new' remedies. Not only has the Court of Justice left this possibility open in terms of EU ***legislation***, from its first relevant judgment in ***Rewe-Zentralfinanz***, it has, single-handedly, introduced several new remedies ***judicially***, in order to fill gaps-real or perceived-in the enforcement of EU law.

Veljko Milutinović*

OD PRESUDE *VAN GEND EN LOOS* DO PRESUDE *MANFREDI*: POGLED NA RAZVOJ PRAVA NA NAKNADU ŠTETE IZMEĐU POJEDINACA U PRAVU EU

Rezime

U svojoj, reklo bi se, istorijskoj presudi u predmetu Courage (2001.) Evropski sud pravde je prvi put izričito ustanovio da tadašnje komunitarno pravo (danas, posle Lisabonskog ugovora, pravo Evropske unije ili pravo EU), sadrži, samo po sebi i bez obzira na norme nacionalnog prava, pravo na naknadu štete koje funkcioniše horizontalno, između pojedinaca, na osnovu kršenja direktno primenjivih normi prava EU. Presudom Manfredi (2006.), načela istaknuta u Courage su dalje definisana, razvijena i proširena, te je pravu na naknadu štete, u širem smislu, pripojeno i pravo na zateznu kamatu, kao i na obavezu Država članica EU da imaju razumne rokove zastarevanja, koji bi omogućili delotvoran postupak za naknadu štete.

Presude Courage i Manfredi su bile i ostale kontroverzne, stoga što mnogi autori zastupaju tezu da, u pravu EU, postoji tzv. "autonomija nacionalnog prava", tj. tobožnje načelo koje drži da, dok pravo EU propisuje norme ponašanja u apstraktnom smislu, pitanja postupka i pravnih lekova ostaju, na neki način, u eksluzivnom, "autonomnom" domenu Država članica. Serija presuda Evropskog suda pravde, od najčuvenije presude Van Gend en Loos (1963.), u kojoj je Sud ustanovio evropsku verziju načela direktne primenjivosti, ukazuje, međutim, na to da Sud nikada nije povukao jasnu crtu između "domena" prava EU sa jedne strane i "domena" nacionalnog prava, sa druge strane. Naprotiv, kroz razvoj načela "delotvorne primene" (effectiveness) prava EU, Sud je ostavio mogućnost isključenja gotovo bilo koje norme nacionalnog prava i, u nekim slučajevima, njenu zamenu normom prava EU, kada god je takvo rešenje bilo potrebno da bi se pojedincu omogućilo da "delotvorno" zaštiti prava koja mu garantuje EU.

Ipak, logički (is)korak koji je napravio Sud prelazeći sa opšteg načela da pravo EU mora biti "delotvorno" primenjeno pred sudovima Država članica na konkretna pravila potrebna za "delotvornu" primenu (između ostalog, pravo na naknadu štete koje proizilazi is "samog prava EU") nije potpuno jasan. Stoga se može reći, u nastojanju da se objasni ovaj fenomen, da je Sud

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bio motivisan namerom da, bar što se tiče naknade štete, "uvede" načelo ubi ius ibi remedium kao posebnu normu prava EU-bez konkretnog izvora u Rimskom ili kasnijim Ugovorima.