

PREFACE

The central focus of this book is unjust enrichment. It examines in particular the consequences which the EU principle prohibiting unjust enrichment, has or may have for private-law relationships.

EU law has increasingly influenced national private law in the Netherlands, which it does in various ways. EU law occasionally contains express provisions on the private-law consequences of breach of a rule of EU law. Article 101(2) of the Treaty on the Functioning of the European Union (TFEU), for example, provides that agreements which prevent, restrict or distort competition within the internal market are void. Article 340 TFEU obliges the Union to make good any damage resulting from its non-contractual liability in accordance with the general principles common to the laws of the Member States.

Frequently, however, it will be necessary to consult the case law of the Court of Justice to obtain clarity on how a rule of EU law influences a legal relationship between individuals. In a number of cases the Court of Justice interpreted a rule of EU law as creating rights and obligations for individuals in their relationships with other individuals. Where parties conclude an agreement that contravenes such a rule, the agreement may be void. A party injured by the breach of such a rule can derive a right to damages from this. With regard to primary EU law, for example, the Court of Justice has given such an interpretation to the prohibition of discrimination on grounds of nationality (Art. 18 TFEU). A number of the fundamental freedoms provided for in TFEU will, under certain circumstances, likewise create rights and obligations for individuals in relationships with other individuals. EU law leaves it to the Member States to decide on the private-law consequences thereof, subject, however, to the requirement that the provisions of national law employed to find and apply private-law remedies ensure the full effect of the rights derived from EU law, and that the national remedies used to uphold rights derived from EU law are compatible with the principle of equivalence.

In her thesis, Van de Moosdijk examines whether the prohibition of unjust enrichment is an EU standard which creates rights and obligations for individuals in various types of legal relationships. The study presents a thoroughly structured survey of the judgments issued by the Court of Justice on the EU principle prohibiting unjust enrichment. Against the background of the functions of unjust enrichment in a number of national law systems and the functions of general principles of EU law, Van de Moosdijk analyses whether, and if so how, unjust enrichment can have an effect on legal relationships involving one or more individuals. For analytic purposes, links are identified between EU causes of action based on undue payment, unjust enrichment and unlawful act, respectively, followed by a discussion whether or not such actions can be founded on violation of an EU provision having direct horizontal effect.

The qualification of the possible consequences of the EU principle prohibiting unjust enrichment has both academic and practical importance. It gives an insight into how the Court of Justice may further develop EU law on the basis of private-law principles and it makes clear which rights individuals may derive from such legal principles.

This study forms part of the research programme Business and Patrimonial Law, which is mainly focused on understanding the EU aspects of current private law. The editors are pleased to include the work in the Series Law of Business and Finance.

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CHAPTER 1

INTRODUCTION

1.1 Unjust enrichment and EU law

1. EU law recognises the need to prevent and prohibit unjust enrichment. The four cases discussed in this introduction illustrate how variously the Court of Justice of the European Union (CJEU) has applied the legal doctrine of unjust enrichment.

The first case, known as *Comateb*, is an example of EU law granting individuals¹ the right to raise unjust enrichment by way of defence in a legal relationship with a public authority.² *Société Comateb* and other companies (*Comateb*) were obliged to pay dock dues. The dock dues were levied by the Department of Customs and Indirect Taxes of Guadeloupe (France) on goods imported from various countries, including Member States. It is contrary to Article 30 of the Treaty on the Functioning of the European Union (TFEU) for a Member State to impose levies on goods imported from other Member States. Such a levy constitutes a charge with an effect equivalent to customs duties on imports. Article 30 TFEU has direct vertical effect and can thus be relied upon by an individual in proceedings against a public body of a Member State before the national courts. *Comateb* could therefore

1 The term individuals includes all natural persons and legal entities established under private law and not entrusted with the performance of public tasks or whose acts cannot be attributed to the state.

2 The relevant public authorities can be EU or national authorities. The EU public authorities are listed in Art. 13 of the Treaty of the European Union (TEU): the European Parliament, the European Council, the Council of the European Union, the European Commission, the CJEU, the European Central Bank and the Court of Auditors. Public authorities of a Member State include the institutions of the central government as well as local and regional authorities. Legal entities established under private law but entrusted with the performance of a public task or whose acts can be attributed to the state (and whose structure or business are often publicly controlled or financed) are considered to be part of the Member State under EU law, too. The concept 'Member State' is thus interpreted broadly. See for example CJ 24 November 1982, 249/81, ECLI:EU:C:1982:402 (*Commission v Ireland*) in which a campaign by a private-law entity whose structure, financing and goals were determined by the national authorities could be reviewed against Art. 34 TFEU. A more recent example is CJ 10 October 2017, C-413/15, ECLI:EU:C:2017:745 (*Farrell*).

rely on the provision and claim reimbursement.³ The Director-General of the Department argued that the dock dues in question should not be reimbursed to Comateb. He alleged that dock dues were designed by French law to be passed on to purchasers. Reimbursement would then constitute unjust enrichment of Comateb, since it was not Comateb but its purchasers who would eventually bear the economic burden of the dock dues. The CJ did not accept the assumption that in French law the dock dues were to be passed on. It held that the Member State was, in principle, required to repay charges levied in breach of EU law.⁴ There is, however, an exception to this principle. A plaintiff may be refused repayment of a charge levied in breach of EU law where it is established that the charge has been borne in its entirety by someone else and that reimbursement would entail unjust enrichment of the plaintiff.⁵ On other occasions, the CJEU has similarly reasoned that EU law allows national law to ensure that the protection of rights guaranteed by EU law does not entail unjust enrichment of those who enjoy them.⁶

The second case, *Medici Grimm*, shows how EU law grants individuals the right to rely on unjust enrichment as a review criterion in legal relationships with EU public authorities. A Council Regulation imposed a 38 percent anti-dumping duty on the import of handbags manufactured in China. Medici Grimm KG (Medici) and its Chinese producer had not participated in initial proceedings prior to the adoption of the regulation. Therefore, imports of their handbags into the EU were subject to the anti-dumping duty. Six weeks after the Regulation was published, undertakings

3 In addition, Comateb claimed reimbursement of the dock dues it was obliged to pay on goods imported from non-Member States and from other parts of French territory into Guadeloupe. As a preliminary point the CJ noted that EU law does not govern reimbursement of the dock dues levied on products imported from non-Member States; see CJ 14 January 1997, Joined Cases C-192/95 to C-218/95, ECLI:EU:C:1997:12 (*Comateb*), para. 9. The CJ did not mention reimbursement of the dock dues paid on the import of goods from other parts of French territory. This part of the dispute should be considered an internal affair and is therefore governed by French law.

4 CJ *Comateb*, para. 20 under reference to the first judgment on this subject CJ 9 November 1983, 199/82, ECLI:EU:C:1983:318 (*San Giorgio*); see point 59.

5 CJ *Comateb*, paras. 21 ff. and in particular para. 27. See point 55 ff. on *condictio indebiti* in vertical relationships and point 81 ff. on unjust enrichment raised by way of defence.

6 See for example CJ 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage v Crehan*), para. 30 on a defence of passing-on in horizontal relationships; see points 157-158.

were invited to submit evidence for the purposes of reviewing the duty measure. Medici and its partner did so. During the investigation Medici paid the duty of 38 percent, and requested its refund on the basis of the retroactive effect it expected to be given to the second regulation that would be adopted after the review procedure. The investigation confirmed that the transactions between Medici and its producer did not entail dumping. The second Council regulation therefore reduced their individual dumping margin to 0 percent, but it was not given retroactive effect.⁷ Consequently, the second regulation abolished the duty on future imports, but not on those of the past. Medici was not entitled to reimbursement of the anti-dumping duties it had paid. In order to obtain restitution, it sought partial annulment of the second regulation insofar as the Council had omitted to give retroactive effect to the amendment of the duty imposed. The General Court (GC) granted the partial annulment because full validity of the second regulation would result in unjust enrichment of the Union at the expense of Medici.⁸

In the third case, *Vieira*, unjust enrichment was used as a tool to interpret secondary EU legislation and an Agreement concluded between the European Economic Community (EEC) and the Argentine Republic on the basis of that legislation. The interpretation of both instruments affected the legal relationships between Eduardo Vieira SA and other undertakings (*Vieira*) and the European Commission. Within the regulative framework of the Agreement on relations in the sea fisheries sector between the EEC and the Argentine Republic, financial aid was granted to facilitate the establishment of joint enterprises. A decision of the Commission suspended payment of and reduced the financial aid enjoyed by *Vieira*. *Vieira* fought to keep its financial aid and contested the decision before the CJEU. It

⁷ GC 29 June 2000, T-7/99, ECLI:EU:T:2000:175 (*Medici Grimm I*), para. 20.

⁸ GC *Medici Grimm I*, para. 89. Other reasons for the partial annulment of the Commission decision were stated by the GC in its observations that (i) the scheme and purpose of a review procedure cannot raise any obstacles to restitution, (ii) the investigation led to the finding that Medici and its Chinese partner did not engage in dumping during that period meaning that the conditions for imposing the measure were not satisfied, (iii) the purpose of a review procedure does not include the power to penalise traders for their failure to participate in initial anti-dumping proceedings and (iv) retroactive application of legislation, though an exception, is permissible if it places the person concerned in a more favourable situation and provided that his legitimate expectations are properly respected. In this case the Council could have limited the retroactive effect of the second regulation exclusively to traders who benefitted from an amendment of the rate of duty applicable to their products. See GC *Medici Grimm I*, paras. 81-94.

relied on the fisheries Agreement between the EEC and Argentine concluded on the basis of a Council regulation, under which Agreement the aid had been awarded. The GC interpreted the Agreement as providing the Commission with the power to suspend and reduce the aid if an undertaking failed to comply with its obligations.⁹ Any other interpretation of the Agreement would be contrary to the principle prohibiting unjust enrichment. As a result, the Commission's decision was upheld.¹⁰

2. The fourth case, *Masdar*, led to the CJEU's acknowledgement of unjust enrichment as a cause of action¹¹ in legal relationships between an individual and an EU public authority. With its judgment the CJEU established the right of an individual under EU law to sue the Union for compensation on the basis of unjust enrichment pursuant to Article 340(2) TFEU. So EU law now recognises unjust enrichment as a cause of action. The facts of the case were as follows. Under an EU programme of Technical Aid to the Commonwealth of Independent States, the Commission concluded a contract with Hellenic Management Investment Consultants SA (Helmico) for the performance of services in Moldavia and Russia. The services included assistance in organising a private farmers' association and the certification and testing of seeds. Helmico in its turn entered into a contract with Masdar (UK) Ltd (Masdar). Under this contract Masdar undertook to provide some of Helmico's services in Eastern Europe, which it did as agreed. As a result, the EU projects were executed in part. However, Masdar never received any payment from Helmico. To vindicate its non-performance under the contract, Helmico told Masdar that the Commission had temporarily fallen short in its contractual obligation to pay. After contacting the Commission, Masdar learnt that Helmico had in fact been paid. Further investigation

9 GC 3 April 2003, Joined Cases T-44/01, T-119/01 and T-126/01, ECLI:EU:T:2003:98 (*Vieira*), para. 86.

10 The CJ dismissed *Vieira's* appeal to set aside the judgment of the GC insofar as it did not grant the claim for annulment of the Commission's decision. Whilst arriving at the same outcome, the CJ interpreted the fisheries Agreement without referring to the principle of unjust enrichment; see CJ 13 January 2005, C-254/03 P, ECLI:EU:C:2005:19 (*Vieira*).

11 CJ 16 December 2008, C-47/07 P, ECLI:EU:C:2008:726 (*Masdar*), para. 49. For a similar interpretation of the case, see Van Leuken, *WPNR* 2009/6793, pp. 271-272; Wakefield 2010, p. 429; Hartkamp, *WPNR* 2011/6901, pp. 780-789, pp. 788-789; Müller-Graff 2012, p. 822 ff.; Van de Moosdijk, *WPNR* 2013/6977, pp. 420-427; Hartkamp 2016/79; Ligteringen 2016/156, 158 and 266; Schrage 2017/172; Strand 2017, pp. 119-123. A different reading of *Masdar* is found in Williams 2010, pp. 229-230; see point 72.

revealed fraudulent behaviour by Helmico. The Commission thereupon declined to pay the outstanding invoices and demanded that Helmico refund the payments already made, which totalled €2,000,000.¹² Masdar and the Commission were unable to reach agreement that the Commission would pay Masdar for the work it had carried out and invoiced to Helmico. Masdar sued Helmico in its national courts for the sum owed by the latter under the contract. At some point during the legal proceedings Helmico was declared bankrupt. Masdar then brought an action for compensation based on unjust enrichment against the Commission. It argued that the Union had benefitted from its performance under the contract with Helmico. The EU projects had been partially completed without the Union being obliged to pay the costs of this partial performance. In addition, Masdar argued that it was unable to recover these costs from its insolvent contracting party Helmico.¹³ Both the GC and the CJ emphasised the right of an individual

“(…) of bringing an action arising from unjust enrichment against the Community [as it] cannot be denied to a person solely on the ground that the EC Treaty does not make express provision for a means of pursuing that type of action. If Article 235 EC and the second paragraph of Article 288 EC [now Art. 340 (2) TFEU¹⁴] were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection (…).”¹⁵

3. The cases set out in points 1 and 2 above deal with a relationship between individuals and an EU institution or a national public authority. These relationships are generally called vertical relationships. Confronted with these disputes concerning a public body being enriched at the expense of a private party or *vice versa*¹⁶ without acting in breach of EU law, the CJEU found the necessary solution in rules of unjust enrichment as applied in the

12 See GC 16 November 2006, T-333/03, ECLI:EU:T:2006:348 (*Masdar*) and in appeal CJ 16 December 2008, C-47/07 P, ECLI:EU:C:2008:726 (*Masdar*).

13 The fact that Helmico became insolvent has implications for the successful use of the action arising from unjust enrichment. The legal systems compared in this study have rather different ways of dealing with this point.

14 Art. 340(2) TFEU 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; see point 113 ff.

15 CJ 16 December 2008, C-47/07 P, ECLI:EU:C:2008:726 (*Masdar*), para. 50.

16 Although not relevant in the cases discussed in points 1-2, the ‘inverse vertical effect’ can play a role in vertical relationships. It describes the situation in which a public authority can invoke a rule against an individual, which is only permitted under strict conditions.

legal systems of the Member States. For the purposes of the present study, I define unjust enrichment as an enrichment of one party at the expense of another that must be prevented or wholly or partially reversed by reimbursement. The party that received the enrichment must reimburse the party at whose expense the enrichment has occurred. The definition is used throughout the book for the EU counterpart of the legal doctrine of unjust enrichment. It includes the doctrine known as undue payment in various national legal systems. Both claims are derived from the legal principle of unjust enrichment, but a distinction is made between claims arising from undue payment (*condictio indebiti*)¹⁷ and from unjust enrichment. Not all legal systems compared here make the distinction between the two legal doctrines or claims. Nevertheless, it is relevant to EU law.¹⁸ Both claims are discussed in this book as general remedies to reverse an unjust enrichment. In this manner, I follow the terminology and the interpretation of the legal doctrines as developed by the CJEU.¹⁹ This interpretation under EU law is influenced by the laws of the Member States and their history. The legal principle of unjust enrichment can be traced back as far as Roman law. Nowadays, most continental countries acknowledge a principle that prohibits the receipt or retention of an unjust enrichment at the expense of another party.²⁰ In addition, countries recognise unjust enrichment as a cause of action for compensation. The CJEU has also used the legal principle of unjust enrichment to ensure the effectiveness²¹ of EU law. Since first

17 I use the term '*condictio indebiti*' instead of '*condictio sine cause*' to refer to the recovery of a performance lacking a legal basis. I will thus follow the terminology used by Hartkamp 2016/82 to refer to the substantive interpretation of the legal doctrine of undue payment in EU law. On the difference in terminology, see, for example, Verhagen, *RLR* 2004/12, pp. 132-150.

18 See point 52 ff.

19 In most of the analysed cases the CJEU gives preference to the term 'unjust enrichment' over 'unjustified enrichment'; see Part II. National connotations are taken into account only when explicitly mentioned. For a justification of this approach, see points 9-10 below.

20 Jansen, *ERPL* 2016, 3-4, pp. 473-488, pp. 486-487.

21 The effectiveness or full effect of EU law (and the rights conferred on individuals or the particular interests protected by it) is upheld by a number of legal principles, doctrines and mechanisms, for example the principles of effectiveness and equivalence, the principles of effective judicial protection enshrined in Art. 19(1) TEU and Art. 47 of the Charter of Fundamental Rights of the European Union, the principle of sincere cooperation expressed in Art. 4(3) TEU, the primacy and direct effect of EU law and consistent interpretation of national law. There is discussion on the interrelationship of the principles of effectiveness and effective judicial protection; see for example Prechal & Widdershoven 2011, p. 296. In this study I make a distinction between the two legal principles; cf. CJ 22 December 2010, C-279/09, ECLI:EU:C:2010:811 (*DEB*). The principle of effectiveness refers to the requirement

applying it to a vertical relationship,²² the CJEU has gradually and increasingly been shaping its application as needed to protect EU rights.²³ In various cases it used unjust enrichment as a legal principle with different functions to determine relationships between an individual and an EU institution or a national public body. In *Masdar* it allowed the principle of unjust enrichment to develop into an EU action that can be brought against the Union to obtain restitution of a benefit unjustly gained at the expense of the plaintiff. As a result, individuals can now derive rights²⁴ from unjust enrichment against public institutions in cases governed by EU law. Even more important, they can do so regardless of the availability of such rights under their national laws.

established in CJ 16 December 1976, 33/76, ECLI:EU:C:1976:188 (*Rewe*), para. 5 and CJ 16 December 1976, 45/76, ECLI:EU:C:1976:191 (*Comet*), paras. 12-16 that national actions upholding EU rights must not be subject to national rules that make the exercise of those rights virtually impossible or excessively difficult. The principle of effective judicial protection follows from the national and international constitutional legal orders and is expressed in Art. 19(1), second sub-paragraph TEU (“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”) and Art. 47 of the Charter (“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”) As stated at the beginning of this footnote, both principles are used to uphold the effectiveness or full effect of EU law. Throughout this book the term ‘effectiveness of EU law’ is reserved for the general aim of safeguarding EU rights; when the *principle* of effectiveness is discussed, it is explicitly referred to as such.

22 It could be argued that it did so as early as in CJ 4 April 1960, Joined Cases 4/59 to 13/59, ECLI:EU:C:1960:13 (*Mannesmann*); see point 78.

23 EU law dictates the interpretation and use of the legal principle of unjust enrichment. The method by which EU law is developed is explained in points 9-10.

24 Van Gerven, *CMLR* 2000, 3, pp. 501-536, p. 502 describes a right as a legal position applying to everyone, like the right to life, or to a specific individual, such as the right of ownership. I will follow this terminology. The holder of the right should normally be able to enforce that right in court using an effective remedy that is governed by procedures laid down by applicable law. ‘Remedy’ is used by me to mean a legal action resulting in, for example, injunctions, damages or restitution. Throughout this book the term ‘cause of action’ means the substantive ground on which injunctions, damages or restitution are to be awarded; ‘action’ or ‘claim’ refer to the actual procedural claim brought against another party before a court. For a different model on rights and remedies in the context of a study on unjust enrichment in EU law, see Williams 2010 with reference to Birks.

4. The judgments of the CJEU on unjust enrichment in vertical relationships between individuals and public bodies have already received extensive scholarly consideration.²⁵ Cases of a private party being unjustly enriched at the expense of another have received much less attention from scholars than unjust enrichment in vertical relationships. An obvious reason is the lack of EU case law on the use of unjust enrichment in horizontal relationships governed by EU law. Any discussion of this use of unjust enrichment is therefore speculative. Hartkamp was the first scholar in the Netherlands to address the principle of unjust enrichment as a rule of EU law that could potentially affect horizontal relationships.²⁶ Other scholars have made observations on the use and interpretation of unjust enrichment in horizontal relationships governed by EU law.²⁷ I have also contributed to this debate myself.²⁸ So far, however, there has been no in-depth study of the possible use of unjust enrichment in horizontal relationships governed by EU law. Precisely the possible and expected future use of unjust enrichment in those relationships is the subject of this book.²⁹

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- 25 See Jones 2000 and Williams 2010 on restitution or unjust enrichment, respectively, and the influence of EU law. From a private-law perspective Jones could be said to discuss the recovery of sums paid without legal basis in both vertical and horizontal relationships, while Williams also includes cases of unjust enrichment in three-party situations but merely focuses exclusively on vertical relationships.
- 26 See Hartkamp 2007. Many specific contributions on the subject followed, for example Hartkamp, *RabelsZ* 2011, pp. 241-259; Hartkamp 2014b and Hartkamp 2016.
- 27 See for example Snijders, *WPNR* 2008/6739, pp. 65-73, pp. 66-67; and, following in Hartkamp's tracks, Van Leuken, *WPNR* 2009/6793, pp. 271-272; Ligteringen 2016/159 and Van Leuken 2017/30-31. Strand wrote an extensive study on the passing-on problem in the context of claims for damages and restitution under EU law. He addresses unjust enrichment as defence and cause of action in vertical and horizontal relationships from the perspective of passing-on situations; see Strand 2017.
- 28 Van de Moosdijk, *WPNR* 2013/6977, pp. 420-427 on unjust enrichment as a cause of action in relationships between individuals and EU institutions and Van de Moosdijk 2017 and Van de Moosdijk 2018 on the legal principle of unjust enrichment in vertical and horizontal relationships. See also Van Leuken, Van de Moosdijk & Tweehuysen, *Hartkamps Compendium van het vermogensrecht* 2017/511-512 and 520-521.
- 29 For that reason, this study does not elaborate on follow-up cases, i.e. national judgments in which the rulings of the CJEU on unjust enrichment are applied.

1.2 Research objectives

5. Unjust enrichment is not mentioned in the EU treaties. The CJEU has applied unjust enrichment on a case-by-case basis depending on the issue submitted. As a result, the EU interpretation and use of unjust enrichment is fragmented and not always easy to understand.³⁰ The present study presents a systematic analysis of the case law of the CJEU. In Part II I categorise the cases by the manner in which unjust enrichment is used to determine different types of legal relationships. The legal relationships distinguished in this study are between an individual on the one hand and (i) an EU institution³¹, (ii) a public body of a Member State³² or (iii) another individual on the other hand. The categorisation of case law in Part II is relevant to legal actors.³³ It sheds light on the different ways in which the legal principle of unjust enrichment is used in vertical and horizontal relationships governed by EU law. They show that unjust enrichment can affect the legal position of individuals. Unjust enrichment is thus a material issue of EU law. The principle may confer rights on individuals. In certain circumstances, for example relating to the nature of the legal relationship in question, and in the absence of similar national rules, individuals can directly rely on it before their national courts and without the intervention of the national legislature. In the following points, I will further elaborate the various categories and give a first overview of their relevance for both vertical (points 6 and 7) and horizontal relationships (point 8).

6. The various application categories of the legal principle of unjust enrichment in EU law resemble the functions of the principle of unjust enrichment in the laws of the Member States³⁴ and the functions of the

30 See most recently Jansen, *ERPL* 2016, 3-4, pp. 473-488, pp. 477 and 479.

31 The CJEU has exclusive jurisdiction in such cases. Apart from lawyers who conduct legal proceedings before the CJEU, legal actors will not have occasion to deal directly with the rights and obligations based on unjust enrichment in vertical relationships between individuals and EU institutions.

32 Inverse vertical effect can potentially grant a public institution the right to rely on unjust enrichment against a private party; see footnote 16 for the definition of inverse vertical effect. It is dealt with in the present study because it can put individuals under a corresponding obligation on the basis of unjust enrichment, see for example the last paragraph of point 57.

33 The term includes parties, attorneys, judges and legal scholars.

34 See Part I.

general principles of EU law.³⁵ The CJEU has applied unjust enrichment as a review criterion,³⁶ as an interpretation tool and as a cause of action or defence in relationships between an individual and an EU institution. In these relationships the General Court (GC) has additionally used unjust enrichment as a supplementary tool. Furthermore, the GC has labelled the principle of unjust enrichment as a rule of EU law that confers rights on individuals and, as a consequence, it continued by ruling that a sufficiently serious infringement of the principle can give rise to a claim arising from unlawful act. The cases in which unjust enrichment is being applied in these ways fall in different regulatory fields, which include, for example, agricultural legislation and tax law.³⁷ The CJEU respects the differences between the areas of law when it applies the principle of unjust enrichment. This means that an individual can rely on unjust enrichment against public authorities of EU origin in various ways and circumstances.

7. The cases governed by EU law in which individuals may possibly rely on unjust enrichment against Member States are similar to the cases involving vertical relationships between individuals and EU institutions. The CJEU has already explicitly accepted some of the functions of the legal principle of unjust enrichment in relationships between an individual and a Member State. The most important ones are unjust enrichment used as a defence and as a basis for undue payment as cause of action (*condictio indebiti*). It should be noted that it will not always be necessary to apply the EU principle of unjust enrichment, since national law, too, will usually recognise unjust enrichment as a legal principle or a cause of action.³⁸ In theory, therefore, public institutions of Member States have the same responsibility to individuals in cases governed by EU law as EU institutions. Individuals can rely on the EU principle of unjust enrichment when bringing an action before the national courts against a public authority of a Member State independent of available national law remedies.

35 See chapter 6.

36 The review criterion is an EU manifestation of the supplementary and the restrictive or controlling function of unjust enrichment; see point 30. For the current application of the principle of unjust enrichment as a review criterion in vertical legal relationships, see point 47 ff. In points 179-181 I will discuss the hypothetical future use of this function in horizontal legal relationships governed by EU law.

37 Unjust enrichment in the context of private international law lies outside the scope of this study.

38 See chapter 6.