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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

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[Courage Ltd v Crehan \(C453/99\) \[2001\] E.C.R. I-6297 \(ECJ\)](#)
[Crehan v Inntrepreneur Pub Co \(CPC\) \[2006\] UKHL 38; \[2007\] 1 A.C. 333 \(HL\)](#)
[Manfredi v Lloyd Adriatico Assicurazioni SpA \(C-295/04\) \[2006\] E.C.R. I-6619 \(ECJ \(3rd Chamber\)\)](#)

**841 This article explores the controversy and uncertainty surrounding the scope of the judgment of the European Court of Justice in *Courage v Crehan*, its subsequent application by national courts in the Member States (including the recent House of Lords judgment in *Crehan v Inntrepreneur*) and its implications for the development of the principle of effective judicial protection by the Court through its case law. It argues that the Court's ruling should be interpreted broadly and viewed as authority for a new Community remedy of "individual liability" in the field of EC competition law. It also assesses the recent attempt by the Court of Justice to clarify the scope of this new remedy in *Manfredi*. It is suggested that the Court should, where the opportunity arises, extend the civil right to damages to breaches of other horizontal and directly effective provisions (outside the scope of EC competition law) such as Treaty provisions and Regulations. Finally, the paper considers the limitations of relying on the ad hoc development of the principle of effective judicial protection as a means of developing an effective and coherent system of private enforcement of Community law.*

Introduction

In 1999, the European Commission issued its White Paper on the modernisation of the rules implementing Arts 85 and 86 (now Arts 81 and 82) EC¹ in which it proposed the decentralisation of the enforcement of EC competition law to national courts (and national competition authorities). One objective of the reforms was to increase the private enforcement of EC competition law as a complement to the public enforcement regimes at both European and national level. The Commission claimed that national courts are the most effective forum for the enforcement of EC competition law in view of the fact that the latter are able to order interim measures and, unlike the Commission, grant **842* damages.² However, the Commission's new strategy for modernising EC competition law could still be undermined by the fact that, in some Member States, national rules may not provide an adequate system for damages for breach of those rules in proceedings between individuals.³ The White Paper did not contain any proposals to provide a uniform Community

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right to damages for private parties who suffer loss as a result of an infringement of the EC competition law rules. Council Regulation 1/2003,⁴ which gave effect to the reforms and came into force on May 1, 2004, is equally deficient. However, reference is made in Recital 7 to the essential role played by national courts in the protection of Community rights in disputes between private individuals by granting, for example, an award of damages to victims of an infringement. In the meantime, in 2001, the Court delivered its ruling in *Courage v Crehan*.⁵ This ruling has played an important role in filling this (legislative) gap by arguably introducing a Community right to bring an action for damages against another private party for breach of Art.81 EC. Nevertheless, given the inadequacies of using case law to fill this lacuna, the European Commission published in December 2005 its Green Paper on damages for actions for breach of the EC antitrust rules.⁶ It explores further the issue of private litigation as an effective mechanism for the enforcement of the EC competition law rules, and damages actions in particular.

The development of appropriate remedies for breach of Community law rights began with the seminal ruling of the Court of Justice in *Van Gend en Loos* in 1963.⁷ The introduction of the principle of direct effect, which enabled individuals to bring an action for breach of Community law directly before their national courts, transformed the Treaty project from a legal system rooted in public international law to one which was *sui generis* in nature.⁸ The principle of direct effect confirms first the Court's recognition of the inadequacy of the enforcement mechanisms laid down in the original E(E)C Treaty, and secondly, its decision to develop a mechanism of private enforcement of Community rights by individuals before national courts as an important complement to their public enforcement by the Member States and/or the Community institutions. It held that:

“The vigilance of individuals concerned to protect their rights amounts to an effective supervision *in addition* to the supervision entrusted by Articles 169 and 170 [now 226 and 227 EC] to the diligence of the Commission and of the Member States.”⁹

***843** To achieve this goal, the Court thus conferred on national courts the role of primary enforcers¹⁰ with individuals playing the additional role of “Community policemen”.¹¹ The principle of direct effect was soon complemented by the introduction of the principle of supremacy in 1964.¹² Thus, in the event of a breach, an individual would not only be able to invoke directly effective rights before his or her national court, but where a conflict between Community law and national law arises, the former would prevail. The principles of direct effect and supremacy are therefore seen as the twin constitutional pillars of the Community legal order. The ability of the Court of Justice itself to introduce these key principles and expand them further was made possible through the use made by national courts of the preliminary ruling procedure laid down in Art.234 EC.

It is argued in this article that over the past four decades, this judge made system of private enforcement has been underpinned by a general principle of Community law known as the principle of effective judicial protection. This article will first define briefly the nature and scope of the principle of effective judicial protection and will explain how the Court's approach to providing effective judicial protection has fluctuated. The paper will then consider the contribution of the Court's decision in *Courage* and its relevance to the principle of effective judicial protection. It explores both the broad and narrow interpretations of the *Courage* ruling which emerged in the literature. It argues that a broad interpretation of its *Courage* ruling should be followed, namely that it has introduced a Community legal basis for an individual's right to damages for breach of Art.81 EC. The article will also explore the arguments for expanding this new remedy beyond the scope of competition law, to other horizontal (and directly effective) provisions such as Treaty provisions and Regulations. The paper will also explain why the hybrid nature of the Court's judgment in *Courage* allows national courts some discretion in applying the remedy and hence, in practice, limits the level of “effective” protection on offer by national courts. This leads the writer to question the value of the judge made principle of effective judicial protection and its characteristics in seeking to protect individuals' Community rights be-

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fore national courts.

Defining the principle of effective judicial protection

It is submitted that the principle of effective judicial protection has been developed on an ad hoc basis by the Court in its case law. An analysis of the Court's jurisprudence reveals that no single definition of the principle of effective judicial protection has been laid down by the Court.¹³ On the contrary the case law is strewn with intermittent and inconsistent references to “effectiveness”,¹⁴ “effective protection”¹⁵ and “effective judicial *844 protection”.¹⁶ The translation of these terms into the different language versions of the Court's judgments also varies.¹⁷ There are some references to “the principle of effective judicial protection” by several of the Advocates General¹⁸ and academic commentators,¹⁹ but its meaning has varied depending on the context of each case. Very often, its use in Community law is confined to the right to effective judicial review.²⁰

This author submits that the principle of effective judicial protection which underpins the Court's case law is broader than a mere right of access to judicial review proceedings. In the absence of a comprehensive system of enforcement laid down in the Treaty, specific obligations have been imposed upon the national courts which are designed to guarantee the effective exercise of the individual's Community rights. These obligations arguably represent characteristics of the principle of effective judicial protection.²¹ The principle reveals itself through a complex paradigm woven around four inter-linking features of the Community system of enforcement,²² namely the principle of direct effect, the principle of indirect effect,²³ the relationship between Community law and national procedural rules and remedies and the principle of state liability. The Court has used various arguments to justify the duties and obligations it has imposed upon the national courts which have included the principle of *effet utile*, the principle of co-operation or loyalty laid down in Art.10 EC, Art.6 of the European Convention on Human Rights, the “full effectiveness and effective protection” of Community law and inherence in the system of the Treaties.²⁴ However, it has been argued by Prechal that the Community law basis for empowering the national courts in this way is “rather tenuous”.²⁵ She adds that,

“(...) the national courts' Community law mission is in urgent need of obtaining a more solid theoretical underpinning and, in terms of positive law, an explicit basis, preferably in both Community and national law.”²⁶

*845 The amended version of Art.220 EC in the form of Art.I-29 of the Treaty establishing a Constitution for Europe 2004²⁷ states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”²⁸ If ratified, this provision could provide an enhanced Treaty basis upon which the Community could build its system of remedies and engage the national courts in accomplishing this task.

Scope of the principle of effective judicial protection

Inconsistencies in the Court's case law continue when seeking to identify the scope of the principle of effective judicial protection. The Court's case law in this area is extremely dynamic. Academic writing in this field has traditionally recognised three “non-linear generations”²⁹ in the Court's case law. “First generation” case law is most commonly characterised by the Court's decisions on direct effect and supremacy which provide the foundations of the Community legal order. The Court's attention then turned to the remedies available before national courts. This case law is characterised by tension between allowing national courts to apply national procedures and remedies, which often reflect the interests of the Member States, and requiring national courts to apply a Community standard of effective judicial protection. “Second generation” case law therefore concerns the scope of the principle of national procedural autonomy, the parameters of

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which were laid down in *Rewe*³⁰ and *Comet*.³¹ The Court held that in the absence of Community legislation, national courts could apply national procedural rules subject to the provisos of effectiveness and equivalence. The principle of effectiveness allows national courts to apply national procedural rules provided that the latter do not make it virtually impossible in practice to enforce Community rights.³² The principle of equivalence permits national procedural rules to be applied provided they are not less favourable than those which apply to domestic actions.³³

The Court's "third generation" case law encroaches on this principle of national procedural autonomy to a greater extent and seeks to lay down uniform Community rules. Key characteristics of the principle of effective judicial protection introduced during this phase include the right of access to effective judicial control (*Von Colson*,³⁴*Johnston*,³⁵*846 *Heylens*³⁶) and the right to interim relief (*Factortame (No.1)*).³⁷ This period culminated with the Court's landmark ruling in *Francovich*³⁸ in 1991 in which the Court expressly laid down a *Community obligation* upon the national courts to create a new remedy, namely an action for damages for state liability.

It has been argued that since its *Francovich* judgment, the Court has moved into a new phase of "selective deference".³⁹ The writer suggests that this could be called the "fourth" generation in the development of the principle of effective judicial protection.⁴⁰ The Court arguably now tends to grant more discretion to national courts to provide effective protection and is being more selective when making more radical interventions of its own. Arnall claims that this new phase represents the Court trying to "redress the balance" between encroaching on the principle of national procedural autonomy and securing the effective protection of individuals' Community rights and questions whether the Court has struck the right balance.⁴¹

It is arguable that the scope of the Court's judgment in *Courage* is more restrictive than its *Francovich* judgment, but is not as deferential as its "second generation" case law typified by the Court's *Rewe* and *Comet* decisions. It is somewhere in the middle; a hybrid which borrows from both genres of case law. *Courage* is thus an example of a path breaking judgment⁴² in a phase of "selective deference". There are several features of the judgment which lead this writer to this conclusion, which will be explored below.

Extension of the principle of effective judicial protection: the principle of individual liability

The post-Francovich debate

The introduction of the principle of state liability in *Francovich* led to a debate on whether the Court should also recognise the right to damages as against private parties (as distinct from damages against the state) where directly effective Community rights are infringed and cause loss. At the time, individual liability for damages resulting from a breach of Community law was only available where it was provided for under national law and subject to the principles of effectiveness and equivalence.⁴³

*847 In post-*Francovich* literature, a number of academics and practitioners considered it feasible for the Court to move away from this "default" position and introduce a Community based action for damages for individual liability.⁴⁴ Indeed, D'Sa argued that the Court could not continue to ignore the issue of individual liability since the matter was becoming of increasing importance to individual litigants.⁴⁵ However, some writers were concerned that its introduction could conflict with the principle of legal certainty by imposing liability for damages upon individuals where no such liability is incurred under national law.⁴⁶

The opportunity for the Court to introduce a general principle of individual liability arose in *Banks* in 1994.⁴⁷ The Court was asked to rule, *inter alia*, on whether Community law imposes on national courts a duty to award damages in respect of losses sustained by a company as a result of various breaches of the competition rules of the ECSC Treaty (and, in the alternative, Arts 85 (now Art.81) and 86 (now Art.82) of the

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Treaty) by another company. In the event the Court side stepped the issue by ruling that the relevant provisions did not have direct effect.⁴⁸ However, Advocate General Van Gerven considered the issue in depth.⁴⁹ Adopting a “third generation” approach, he argued that the principle of state liability laid down by the Court in *Francovich* should be extended to include the liability of individuals in the event of a breach of Community law. The rationale for the introduction of the principle of state liability is equally applicable in the context of individual liability. He argued that,

“(...) the full effect of Community law would be impaired if the (...) individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law (...).”⁵⁰

He added that this was particularly the case if a directly effective provision of Community law had been infringed. In this regard, he referred to the Court's decision in *Simmenthal* in which it held that directly effective provisions provide:

“a direct source of (...) duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.”⁵¹

***848** He pointed out that Arts 85 (now Art.81) and 86 (now Art.82) of the Treaty *have horizontal direct effect*.⁵² Furthermore, he argued that recognition of the right to obtain reparation would be a logical conclusion of the horizontal effect of the rules concerned and the only truly effective method by which the national court would be able to fully safeguard the directly effective provisions which have been infringed. He emphasised that a declaration by virtue of Art.85(2) EC (now Art.81(2)) that the legal relationship between the parties is void is insufficient for making good the loss and damage suffered by a third party. In addition, he argued that a rule on reparation of this kind would make the Community rules of competition more “operational” by encouraging EC competition disputes to be resolved more frequently before the national courts (as in the USA),⁵³ rather than by the European Commission.⁵⁴

The Courage judgment

The Court's opportunity to readdress the issue of individual liability in damages arose in a reference from the English Court of Appeal in *Courage v Crehan*.⁵⁵ The Court's decision was eagerly awaited. What approach would the Court adopt in this post-*Francovich* era of “selective deference”? In 1997, in *GT Link*,⁵⁶ the Court had held in the context of a breach of Art.82 EC in conjunction with Art.86 EC that the *Francovich* criteria should be applied to a claim for damages. In *Courage*, the Court renders an interesting hybrid decision which reflects both “second” and “third” generation case law.

In 1991, the claimant, Mr Crehan, entered into agreements to take leases of two public houses in the United Kingdom owned by the defendant, Inntrepreneur Pub Company (hereinafter Inntrepreneur), which in turn was co-owned by Courage and Grand Metropolitan Plc. The leases were in standard form and contained ties which obliged Mr Crehan to buy his beer from Inntrepreneur's nominated supplier, Courage Ltd (hereinafter Courage), at its list prices. The businesses failed because Mr Crehan could not compete with the tenants of independent public houses who were able to buy their beer at lower prices. He did not do enough trade to cover his rent, had to surrender his two leases, and lost a substantial amount of money. When Courage sued Mr Crehan for outstanding beer invoices, he counterclaimed against Courage and Inntrepreneur for damages, alleging that his losses had been caused by a tie agreement which was unlawful under Art.81 EC.⁵⁷

***849** The Court of Appeal referred several questions to the Court of Justice which the latter reformulated into two questions. First, can a co-contractor rely on a breach of Art.81 EC before a national court to obtain relief from the other contracting party or does Art.81 EC only provide relief for third parties such as competitors (and possibly consumers)?⁵⁸ In particular, can that party obtain compensation for loss sustained as a

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result of being subject to a contractual clause which is allegedly contrary to Art.81 EC and can Community law preclude the application of a rule of national law that denies a person a right to rely on his own illegal actions, to obtain damages?⁵⁹ If this is the case, the Court would then address the second question, namely the factors which should be taken into account when assessing the merits of a claim for damages of this sort. As a result, the judgment of the Court of Justice⁶⁰ can be divided into two parts which reflect the Court's "third" and "second" generation responses.

A new Community remedy of individual liability in damages for breach of Art.81 EC, or just more effective application of national procedural law?

It has been argued that the Court's judgment is "riddled with ambiguity"⁶¹ which has given rise to diverse interpretations of the ruling by commentators and varied applications by the national courts. Controversy has primarily arisen as to whether the Court has taken the bold step of introducing a new *Community* law remedy of individual liability either generally, or specifically in the context of EC competition law and Art.81 EC and if so, the scope of this new remedy.

For some commentators (including this author), the *Courage* judgment sends "a clear message"⁶² to national courts that they are now under a *Community* obligation to provide a remedy of damages for individuals who have suffered loss arising from a breach of Art.81 EC.⁶³ The basis for this view is the text of the Court's judgment itself. In this regard, the first part of the Court's judgment starts in a fashion which is reminiscent of its "third generation" remedies case law which embraces the maxim, *ubi ius, ibi remedium*. This suggests that the Court was paving the way for the introduction of a new *Community* remedy. It recalled the *sui generis* nature of the *Community* legal order, the fundamental importance of Art.81 EC for the functioning of the internal market and the horizontal direct effect of the Treaty provision which the national courts are under a duty to safeguard. It followed that "any individual" can rely on a breach of Art.81(1) EC before national courts including a co-contractor (and not just competitors). Citing its *Simmenthal* and *Factortame (No.1)* decisions, the Court recalled that national courts ***850** must ensure that *Community* rules take full effect in the national legal order which it is their duty to protect. Most importantly, the Court then stated that,

"The full effectiveness of Article 85 [now 81] of the Treaty 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."⁶⁴

It also stressed that the existence of such a right (to damages) would strengthen the working of and compliance with the EC competition law rules by discouraging restrictive practices which are often covert in nature.⁶⁵

Unfortunately, the Court created some confusion by concluding the first part of its judgment by stating that,

"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"⁶⁶

(as was the case in English law by virtue of the principle of illegality). It is not clear from this paragraph whether the right to damages is derived from *Community* or national law. Indeed, it could be read either way. This lack of clarity has allowed other commentators to argue that a narrow interpretation of the *Courage* judgment should be adopted which reflects the Court's "second generation" approach, namely that the ruling is no more than an application of the principle of effectiveness in the specific context of a breach of Art.81 EC.⁶⁷ These views tend to be based on the precise factual and legal context of the case rather than on the text of the judgment itself. Komninos notes that this more restrictive interpretation has been put forward by French and German commentators.⁶⁸ This may arguably be explained by the fact that, as in English law,

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a remedy in damages already exists in German law and French law for breach of Art.81 EC. These commentators would prefer to view the *Courage* decision as an example of the Court adhering to the principle of national procedural autonomy and simply providing guidance as to the application of the principle of effectiveness in the specific context of the case. Obviously, this is the part of the judgment which is of relevance to their national courts.

This view finds support in the Opinion of Advocate General Mischo.⁶⁹ He adopts the traditional *Rewe* and *Comet* formula to resolve the dilemma which is clearly reminiscent of the Court's "second generation" case law on remedies. Having acknowledged that a co-contractor can rely on Art.81 EC, Advocate General Mischo argued that Community law should not permit a claim for damages that exists under national law to be barred on the sole ground that the claimant is a party to the contract. Such an interpretation of Art.81 EC is "too formalistic and does not take into account the particular facts of individual cases".⁷⁰ Indeed, in some circumstances, where the weaker party has in reality *851 had no freedom of contract, it will have "more in common with a third party than with the author of the agreement".⁷¹ To support this view, he recalled that Art.81 EC has horizontal direct effect and that national courts are under a duty to protect such rights by virtue of Art.10 EC.⁷² He then argued that in exercising this duty, national courts must apply national rules subject to the principles of equivalence and effectiveness. He applied this formula to the case. He deduced that *although the rule of English law at issue does not infringe the principle of equivalence,*⁷³*it does potentially infringe the principle of effectiveness.*⁷⁴ Like the Court, the Advocate General then argues that the right to damages should be subject to rules of unjust enrichment and indicates the factors that the national court should have taken into account including the bargaining power of the parties, economic and legal background, conduct of the parties and whether losses had been mitigated.

What is significant about the Advocate General's Opinion is that even though he acknowledges that an action for damages constitutes "an effective means of protecting the rights of an individual", particularly since the nullity provided for under Art.81(2) EC does not compensate for any losses sustained,⁷⁵ he does not make any reference to an individual being able to claim damages as against another private party *as being based in Community law* rather than national law. His analysis is confined to applying the principles of equivalence and effectiveness and thus implies that the right to damages is derived from *national law*. Moreover, the Court of First Instance in *Atlantic Container Line*,⁷⁶ implies that *Courage* is authority for the application of the principles of effectiveness and equivalence only.⁷⁷

The general drawback of a narrow interpretation of *Courage* is that by relying on national procedural autonomy subject to the principles of effectiveness and equivalence, the uniform application of Community law in the national courts is undermined. Yet, this approach would seem to reflect a general trend in the case law of the Court post-*Francovich* where it appears that greater diversity in the application of the rules of judicial protection subject to a minimum standard guaranteed by the *Rewe* and *Comet* formula is acceptable. This indicates that the Court is prepared to tolerate some lack of uniformity between Member States and that this might result in national courts providing individuals with a qualitatively lower level of *effective* judicial protection than that guaranteed by the Court's "third generation" case law.

It is argued that Court's decision in *Courage* should be given a broader interpretation. The rationale and language of the judgment is in line with the earlier cases of *Simmenthal*, *Factortame (No.1)* and *Francovich*. The text also clearly reflects a departure from the approach of Advocate General Mischo and the adoption of a more radical reasoning than simply respecting national law subject to the provisos of effectiveness and equivalence. Moreover, it is argued that in question two of its reference, the English Court of Appeal *852 sought clarity on whether a breach of Art.81 EC gives rise to a *Community law right* to civil damages for breach of the EC competition law rules.⁷⁸ Indeed, as the *Courage* saga has proceeded through the domestic courts (on the substantive issue and measure of damages), both the High Court⁷⁹ and Court of Appeal⁸⁰ have made the assumption that, despite the merging of the questions posed by the Court of Justice, the

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second question referred by the national court was answered in the affirmative and that a Community right to damages in this context does indeed exist. Indeed, in the English High Court, Park J. held that,

“It [the Court of Justice] concluded that a party to a contract which infringes Article 81 EC is in principle entitled to damages under Community law for any loss which the contract causes to him.”⁸¹

Unfortunately, the decision of the House of Lords⁸² in *Crehan* throws no further light on this issue. The House of Lords ruled (reversing the Court of Appeal) that Park J. had been correct to form his own view on the economic assessment of the market and not to consider himself bound by a European Commission decision on infringements of Art.81 EC in similar cases.⁸³ This meant, in effect, that no infringement of Art.81 EC had occurred and so the damages issue did not need to be considered.⁸⁴

Authoritative support for this broader view of *Courage* can be drawn from Advocate General Jacob's Opinion in 2003 in *AOK Bundesverband*.⁸⁵ In this case, the Advocate General stated that if the conduct in question amounted to a breach of Art.81 EC (which could not be defended under Art.86(2)),

“I have no doubt that both damages and injunctive relief would *as a matter of Community law* be available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness.”⁸⁶

Unfortunately, the Court did not consider it necessary directly to address the issue.⁸⁷

***853** It has been suggested that, in practical terms, the lack of Community legal basis for a civil right in damages for breach of Art.81 EC is of little importance since all Member States provide a remedy under national law. However, a 2004 study on the conditions for damages for breach of the EC competition law rules in all 25 Member States notes that the diversity of national legal bases for such actions undermines legal certainty and clarity and ultimately discourages private litigation.⁸⁸

In 2006, the Court was presented with the opportunity to revisit various issues connected with damages for breach of Art.81 EC in *Manfredi*,⁸⁹ a reference from the Italian courts (discussed in more detail below). However, in his Opinion, Advocate General Geelhoed did not expressly confirm whether the right to damages finds its legal basis in Community law or national law.⁹⁰ The Court was also not explicit on the point, but did continue to use the language of its third generation case law, in that it enunciated that the full effectiveness and practical effect of Community law would be undermined if an individual did not have a right to obtain damages for breach of Art.81 EC.⁹¹ To the extent that this language may offer support for a broader interpretation of *Courage* it is to be regarded as preferable and has several advantages. In doctrinal terms, a more coherent legal framework would permit the national courts to provide a higher level of judicial protection for individuals whose rights under Art.81 EC have been infringed. It would improve uniformity⁹² and reduce the risk of forum shopping. It would also increase legal certainty which may ultimately encourage more claims in line with the Commission's strategy outlined in its Green Paper.

A “fourth” generation case?

Yet, even if it is accepted that in *Courage*, the Court introduced a new Community right to damages for breach of Art.81 EC between private parties, the Court's judgment arguably did not go as far as its *Francovich* decision.⁹³ In laying down a basis for the new remedy, the Court did not seek to rely (as it did in its *Francovich* decision) on Art.10 EC⁹⁴ or the inherence of the right to damages in the system of the Treaty as additional legal bases. On the other hand, it might be argued that it was not necessary for the Court ***854** to do so, since it was able to draw instead, on the fact that the full effectiveness and practical effect of the prohibition laid down in Art.81(1) EC would be put at risk if it was not open to individuals to claim damages for loss caused to them by a breach of Art.81.⁹⁵ More significant is the fact that the Court chose at this stage

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not to introduce common Community conditions of liability.⁹⁶ These would be determined instead by national law, subject to the principles of effectiveness and equivalence. *Courage* is arguably a “hybrid” judgment.⁹⁷ In the first part of its judgment, it is not as interventionist as its *Francovich* decision since it does not lay down Community conditions of liability. Nevertheless, it is not as deferential as case law based on the *Rewe* and *Comet* formula since it arguably provides for a Community remedy in civil damages for breach of Art.81 EC.

In the second part of its judgment, the Court specified the factors that a national court must take into account when assessing the *merits* of a damages claim. Here, the Court's approach is similar to its “second” generation case law. It held that national courts should apply national rules provided that the latter comply with its well established *Rewe* and *Comet* formula, namely the principles of effectiveness and equivalence.⁹⁸ The Court did take steps to clarify the scope of the application of these two principles in the context of a claim for damages against another private party for breach of Art.81 EC and in doing so drew upon previous case law on restitution, Art.288 EC and state liability. First, the Court held that national courts should not be prevented by Community law from taking measures to ensure that the party who is seeking to protect his/her rights is not unjustly enriched.⁹⁹ Secondly, it held that a Member State may prevent a party with significant responsibility for the distortion of competition from having a right to claim compensation from the other contracting party.¹⁰⁰ Finally, the Court placed a duty on claimants to mitigate their losses, in particular by availing in good time of all legal remedies available.¹⁰¹

*855 The effect of the *Courage* judgment could be argued to be typical of its “fourth generation” case law, which shows a retreat from the pinnacle case of *Francovich*. This general approach is followed in the subsequent decision in *Manfredi* (discussed below).¹⁰² The failure to lay down Community conditions of liability and merely to require national courts to apply national law subject to the principles of effectiveness and equivalence potentially undermines an individual's ability to obtain, by virtue of this new remedy, full and complete judicial protection of his/her Community rights.¹⁰³ This author argues that the trend to allow national courts greater scope to apply national law on remedies shows that the Court is making a distinction between a level of judicial protection which it deems to be *effective* and that which is *full and complete*. Post-*Francovich*, the Court has thus shown a willingness to compromise in its quest for the full and complete enforcement of Community law and, in this respect, balance this goal with the interests of the Member States and their autonomy.

The parameters of the principle of effective judicial protection are generally illustrative of the Court's developing and ongoing relationship with the national courts. It is fully aware that an effective system of enforcement depends upon the co-operation of the national courts of the Member States. National courts have in the past refused to apply Community principles, which they have considered to be too intrusive. Since *Francovich* and claims of illegitimate activism on the part of the Court of Justice,¹⁰⁴ it has been more circumspect in expanding the scope of its principle of effective judicial protection. The hybrid structure of the Court's judgment in *Courage* reflects this.

Thus, it is argued that the *Courage* judgment is evidence of the Court “deferring” to some degree to the interests of the Member States. It could be argued that by granting the national courts increased flexibility in how they will apply the different characteristics of the principle of effective judicial protection, the Court is adhering to the notion of “subsidiarity”. Alternatively, it may be concluded that the Court's policy towards the enforcement of Community law has matured¹⁰⁵ and become more focussed. The Court has realised that the paradigm of the principle of effective judicial protection is in fact sufficient to secure the “effective” protection of individuals' Community rights before the national courts and indicates that diversity in the standards of judicial protection in the Member States will be tolerated.

Application of the Courage doctrine by national courts

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There are other aspects of the Court's ruling which are ambiguous and have given rise to different interpretations being delivered on the same issue by national courts in the Member States. Divergence in Germany and Italy has stemmed in part from the Court's statement in *Courage* that "any individual" could expect to rely on a breach of Art.81(1) EC.¹⁰⁶ Some commentators have argued that the broad approach adopted by the ^{*856} Court is to be welcomed since it is clearly seeking to allow both contractual and non-contractual claims.¹⁰⁷ In other words, it does not intend to confine its judgment to private actions between co-contractors only. On the other hand, the phrase is ambiguous in the sense that although *Courage* itself concerned a co-contractor, it is not clear whether "any individual" includes *both* competitors and consumers. In Germany, this ambiguity has been exploited to restrict claims to co-contractors and competitors only and not consumers.¹⁰⁸ In contrast, in Italy, the Corte di Cassazione has interpreted the reference to "any individual" more broadly and held that it *does* include consumers. It thus overruled previous interpretations of Italian case law which limited the protection of competition law to commercial enterprises.¹⁰⁹ Thus, the lack of clarity in *Courage* has led to differing levels of effective judicial protection for individuals before their respective domestic courts.

Effect of the Manfredi judgment on the principles established by the Court of Justice in Courage

Pending the (possible) introduction of Community measures in this field, it will be for the Court to shape the contours of this new remedy of a right in damages based on Art.81 EC in subsequent referrals from the Member States.¹¹⁰ The first ruling of this nature was delivered in 2006. In *Manfredi*,¹¹¹ a reference from the Italian courts, the Court was asked to address a range of questions including the entitlement of third parties (consumers) to damages, the jurisdiction of national courts, national limitation periods and when they begin to run, and whether punitive damages should be awarded where the damages that can be awarded under national law are lower than the economic advantage gained from being involved in an illegal cartel. In his Opinion, Advocate General Geelhoed¹¹² confirmed that third parties could claim damages for losses sustained as a result of a breach of Art.81 EC. However, with regard to which national courts have jurisdiction in actions for damages based on competition law, limitation periods and punitive damages, he held that national procedural rules should apply, subject to the principles of effectiveness and equivalence.

Manfredi is an important and interesting decision on the part of the Court of Justice. The Court accepted the opportunity to delineate the scope of this new remedy on certain issues. The Court's judgment is once again an example of a hybrid, fourth generation ^{*857} decision in which the Court's reasoning fluctuates between a second and third generation approach to its development of the principle of effective judicial protection. In its decision, the Court confirmed the existence of a right to damages for breach of Art.81 EC (discussed above) and that its availability extends to "any individual" including consumers, but added that proof of a causal link between the breach of Art.81 EC and the loss sustained is required.¹¹³ However, the Court went on to state that in the absence of Community rules on the application of this new remedy, national rules apply, subject to the principles of effectiveness and equivalence "(...) including those on the application of the concept of 'causal relationship'".¹¹⁴ This is consistent with the approach in *Francovich* and the introduction of a Community condition of liability, namely the need for causation in a claim for damages brought by litigants (in this case consumers). As in *Francovich*, if national rules on causation apply this will allow some degree of diversity, which may lead to differences in result in the Member States.¹¹⁵

In response to procedural questions regarding the jurisdiction of the national courts and (to a more limited extent) the applicable time-limits, the Court reverted to its *Rewe* and *Comet* formula. It held that national procedural rules should be applied in order to determine for example, which national court has jurisdiction to hear a claim based on Art.81 EC and to prescribe the detailed procedural rules governing those actions.¹¹⁶

National time-limits will also be applied provided they do not make it "practically impossible" to bring a

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claim. The Court envisaged that this might occur where the limitation period for seeking compensation for a breach of Art.81 EC begins to run on the day that the illegal restrictive practice was adopted, particularly if the time-limit is short and cannot be suspended. This could lead to a situation where the national limitation period may have even expired before an infringement has been brought to an end, particularly if the breach is continuous or repeated, thus rendering it practically impossible or excessively difficult for the individual affected to exercise their right to seek compensation for the harm suffered.¹¹⁷ The Court thereby gave some indication on where the acceptable limits of national procedural autonomy may lie in such cases.

With regard to the extent of damages available, the Court reiterated the need for national law courts to ensure that Community rights take full effect and that the full effectiveness and practical effect of Community law would be undermined if an action for damages for breach of Art.81 EC was unavailable. Such a right strengthens compliance with, and general operation of, the EC competition law rules. It then held with specific regard to the availability of punitive or exemplary damages, that in the absence of Community rules on the matter, these should be determined by national law subject to the principles of equivalence and effectiveness.¹¹⁸ As a result, punitive damages may be available if they are also available for similar domestic claims. However, they are not specifically required as a head of damage under Community law. The Court added that Community law did not prohibit Member States from legislating to prevent unjust enrichment¹¹⁹ Finally, drawing *⁸⁵⁸ upon its case law on state liability, Art.288 EC and its ruling in *Marshall (No.2)*,¹²⁰ the Court held that heads of damage must include actual loss and loss of profit and interest.¹²¹ Total exclusion of loss of profit in economic or commercial litigation would make reparation for damage “practically impossible”¹²² and the payment of interest was an essential component of compensation.¹²³

From the perspective of effective judicial protection, the Court's *Manfredi* decision is to be welcomed since it clarifies the scope of the civil right to damages for breach of Art.81 EC in relation to, *inter alia*, the ability of consumers to sue, causation, limitation periods and the extent of damages available. The Court is keen to maintain coherence within the Community legal order and where possible is developing these rules in parallel with those relating to damages in other areas. Nevertheless, the *Manfredi* decision continues to leave some considerable discretion to national courts to apply national rules which can arguably lead to differing levels of protection in the Member States.

A general principle of individual liability in damages, or not?

Another issue which arises post-*Courage* is whether, if it is accepted that the Court has introduced a Community right to damages between individuals under Art.81 EC (and arguably Art.82 EC), this has broader implications in the sense of extending beyond the scope of Community competition law. On the one hand, it could be argued that this right to bring an action for damages against a private party *is limited to breaches of Art.81 EC by a co-contractor* and is further limited to the context where first, the claimant is in a *less* powerful bargaining position than the defendant, secondly where he/she has mitigated losses as far as possible and thirdly, has also not been unjustly enriched. However, it is submitted that the judgment of the Court has broader implications. As discussed above, its effect within Art.81 EC may not be restricted to co-contractors. Competitors and consumers may also benefit in the context of the EC competition rules. Furthermore, it is arguably also implicit in the ruling that Art.82 EC grants Community rights that are equally capable of protection and that a right of damages may exist in the event of a breach of that provision also. It is further arguable that *Courage* has broader significance that extends beyond the scope of EC competition law. This writer argues that the principle of individual liability in damages as established by the Court in *Courage* is capable, in principle, of being extended to parties suffering loss as a result of a breach by another individual, of any *horizontal and directly effective* provision, whether a Treaty Article or a Regulation.

Treaty provisions

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It would follow from the Court's reasoning in *Courage* that Treaty provisions with the same characteristics as Art.81 EC should also give rise to an action for damages as against a private party. Therefore where a Treaty provision confers a horizontal and directly ^{*859} effective right on a private individual deserving of protection which is fundamental to the completion of the internal market, a right to damages is essential in the event of a breach in order to ensure its effectiveness and practical effect and to achieve the broader goals of efficient compliance and deterrence.¹²⁴ Treaty provisions which could, in certain circumstances, fulfil the above criteria include Article 12 EC (principle of non-discrimination based on nationality),¹²⁵ Article 39 EC (free movement of workers),¹²⁶ Articles 43 and 49 EC (free movement of services)¹²⁷ and Article 141 EC (equal pay).¹²⁸

Regulations

This author submits that the *Courage* principle of individual liability should apply equally to regulations which can have horizontal direct effect. Article 249 EC states that regulations are directly applicable and of general application. Any obligations they contain are automatically and immediately binding on all, including individuals. It is important to note however that not all the provisions of a regulation will have direct effect. The need for the provision to be sufficiently clear and precise as well as complete and legally perfect still applies.¹²⁹ It is therefore argued that a general principle of individual liability in damages could also apply to directly effective regulations in disputes between private parties.

The Court has arguably paved the way for this future development in its ruling in *Muñoz*.¹³⁰ Although the issue of damages did not occur in this case, the Court was required to rule on whether the relevant Regulations were capable of enforcement in civil proceedings as between two private parties. In this case, Muñoz alleged that one of its competitors, Frumar, had infringed Art.3(1) of Regulations 1035/72 and 2200/96 on the quality standards of fruit.¹³¹ This provision prohibits traders from displaying products or offering them for sale within the Community unless they conform with those standards.¹³²

^{*860} Frumar had allegedly sold grapes in the United Kingdom which were labelled incorrectly in breach of Art.3(1). Muñoz complained to the public body charged with investigating instances of non-compliance, but it failed to act.¹³³ Muñoz then brought civil proceedings against Frumar. At first instance, Muñoz's claim was dismissed on the ground that none of the provisions of the Regulations at issue suggested that the intention of the Community legislator had been to create rights enforceable by traders and customers. On appeal to the English Court of Appeal, a reference was made to the Court of Justice on whether the provisions of Regulation 2200/96 (and Regulation 1035/72 when it was in force) on quality standards applicable to fruit and vegetables are capable of enforcement by means of civil proceedings instituted by a trader against a competitor *in addition to* the public enforcement mechanism laid down in the Regulations.

The Court's ruling in *Muñoz* is short and brief, but the underlying rationale of the decision is that the private enforcement of individuals' Community rights plays an important and complementary role to the public enforcement regime. The Court held that on the basis of Art.249 EC, Regulations confer rights on individuals which the national courts have a duty to protect.¹³⁴ Citing its decisions in *Simmenthal*,¹³⁵ *Factortame (No.1)*¹³⁶ and *Courage*, it held that national courts are under a duty to ensure that such rights take full effect.¹³⁷ It then referred to the rationale of the Regulations at issue which is to impose common quality standards in order to promote fair trading and market transparency. This includes keeping unsatisfactory products off the market and guiding production to meet consumer requirements. The common standards bind all operators so as to ensure that their impact is not distorted.¹³⁸ The Court went on to state that:

“(...) 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

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competitor.”¹³⁹

The Court then emphasised several policy advantages that the availability of civil proceedings in this context could bring. First, it strengthens the practical working of the rules on quality standards. Secondly, it supplements the public enforcement mechanisms which are available. Thirdly, it acts as a deterrent to unlawful practices which the Court acknowledged (as it did in *Courage*) are difficult to detect and which distort competition in the market. Fourthly, such actions contribute “substantially” to fair trade and market transparency.¹⁴⁰

***861** The Court's judgment in *Muñoz* makes a clear attempt to ensure that in accordance with the principle of effective judicial protection, individual traders are able to effectively enforce their Community rights, by allowing the relevant Regulations to be invoked in civil proceedings between private parties. It is argued that the judgment will play an important role in enhancing the enforcement of Regulations between private parties in the future. Thus, private enforcement must be seen to complement any public enforcement regime that has been put in place. In this respect, parallels may be drawn with the Court's judgment in *Van Gend en Loos* and *Courage*. It is also argued that the judgment is not confined to the private enforcement of CAP Regulations and applies more generally.

*However, it must be noted that in Muñoz the Court did not refer expressly to the damages issue. Nevertheless, it is arguable that, in a suitable context, where damage to a competitor can demonstrably be shown to have been caused by the relevant breach, and based on the broader view of the Courage judgment discussed above, a right to damages may be made available, outside the context of EC competition law, and even for breach of a Regulation. It has been suggested by Dougan¹⁴¹ that if this situation did arise before the Court, the latter may apply its case law whereby Member States have been required to impose sanctions for breach of Community law which are “effective, proportionate and dissuasive”.¹⁴² That being the case, Dougan is of the view that only financial penalties would be sufficiently dissuasive. In the context of private proceedings such as *Muñoz*, the Court may thus arguably rely, in the future, on its *Courage* judgment to create a right to damages for breach of relevant provisions of Community Regulations.*

Directives

It is well established in the case law of the Court of Justice that Directives do not have horizontal direct effect.¹⁴³ The rationale for the Court's approach is that only Regulations (and Treaty provisions) confer rights directly on individuals. Directives do not. Article 249 EC expressly states that they are addressed to the Member States only. However, in its reasoning in *Courage*, the Court referred expressly to the *horizontal* direct effect of Art.81 EC. This would seem to suggest that horizontal direct effect is a pre-requisite for a damages action between private parties. If so, given that the Court has consistently held that Directives do not have horizontal direct effect, *a breach of a Directive would not generally give rise to a right to damages in an action between private parties or if it did, it would be tantamount to granting horizontal direct effect of Directives.* However, it should be noted that the position may differ *where the Community has legislated on the issue of damages.* For example, the Package Holidays Directive¹⁴⁴ expressly provides for the payment of compensation in horizontal relations where a travel operator/agent has infringed its obligations contained in the Directive which have caused the consumer loss.¹⁴⁵

***862 The limits of the principle of effective judicial protection**

The Community's system of private, decentralised enforcement based on the principle of effective judicial protection to date has several flaws.¹⁴⁶ An analysis of the principle reveals a complicated jumble of legal rules which is being continuously developed and fine-tuned by the Court of Justice. It may be argued that the sheer complexity of the Community system of enforcement may in itself weaken an individu-

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al's right to effective judicial protection. Moreover, despite the Court's attempt to create common, Community remedies, it has to wait for an appropriate case to appear before it so that it can extend or refine its case law. Litigation rates in the Member States can vary due to differences in legal cultures.¹⁴⁷ This leads to gaps in the system and undermines effective judicial protection for individuals. Furthermore, there are limits to the scope of the principle of effective judicial protection and its key characteristics.

The Court's current position on remedies clearly illustrates that it tries to strike a balance between national interests and the effectiveness of Community law. It has thus been reluctant to encroach too far on a Member State's competence to legislate on procedural rules and remedies. In this current period of general restraint, judicial protection may be considered to be *effective* rather than *full and complete*. In addition, despite the elaboration of principles at Community level, their effective application often depends on the attitude of the national courts. This can often be less than satisfactory and can lead to diversity in the level of protection available. The recent *Köbler*,¹⁴⁸ *Traghetti*¹⁴⁹ and *Commission v Italy*¹⁵⁰ cases illustrate the Community's attempt to bring extreme behaviour by national courts into line. Finally, the constant uncertainty surrounding the scope of the principle of effective judicial protection and the absence of a clear Treaty basis means that its legitimacy is constantly under review.¹⁵¹

It may be argued that this is an unsatisfactory state of affairs, particularly if the Commission wishes to encourage private litigation in the context of EC competition law. A system of enforcement which is not full, complete and uniform¹⁵² has the potential to undermine the Community legal order as well as the Single Market and economic and monetary union. The hostility expressed by the Member States towards the Court's attempt to ensure full and complete protection through the further development of the principle of effective judicial protection in line with the principle of *effet utile* suggests that the only feasible alternative would be for the Community to introduce harmonising legislation in relation to remedies for breach of Community law.¹⁵³ However, to date, *863 such action on a general scale has not been forthcoming and has been the subject of limited debate.¹⁵⁴

The *Courage* and *Manfredi* judgments (together with the White Paper) may have acted as a stimulus for a change in policy in the field of EC competition law. There have been various calls for legislative activity in this sector in recent years¹⁵⁵ and it has been argued by Dougan that uniform remedies are more suited to policy areas which are characterised by a considerable degree of substantive uniformity such as EC competition law.¹⁵⁶ Van Gerven has argued that the development of uniform Community rules should only be undertaken following comparative research of the now diverse legal families that make up the Community legal order.¹⁵⁷ In this regard, the European Commission commissioned a study of the conditions for claims for damages arising from a breach of the EC competition law rules in all 25 Member States. The Ashurst Report was published in 2004 and noted the "astonishing diversity and total underdevelopment" of the law in this area.¹⁵⁸ Indeed, the Report reveals that between 1962 and 2004, there had been only 12 cases brought between private parties for damages for breach of the EC competition rules and only eight awards had been granted. This is in marked contrast to the USA where private actions amount to at least 90 per cent of Federal antitrust claims.¹⁵⁹ This Report provides a valuable insight into the problems that prospective harmonising legislation in the field of remedies will need to address. The European Commission's Green Paper on Damages sets out different policy options to overcome the obstacles identified in the Ashurst Report.¹⁶⁰ It is clear that the Commission is keen to establish an efficient, effective and uniform legal framework in order to foster private actions in damages for breach of the EC competition law rules to further strengthen its modernised two-pronged enforcement regime.¹⁶¹

Concluding remarks

This article examines the judgment of the Court of Justice in *Courage v Crehan* from the perspective of the principle of effective judicial protection, which is arguably a general principle of Community law created

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and developed by the Court upon *864 which its decentralised system of private enforcement of Community law rights is based. In *Courage*, the Court has arguably developed another element of this general principle, namely the principle of horizontal individual liability in damages for breach of Community law in the context of EC competition law under Art.81 EC. The scope of this new judicial development is explored and it is submitted that its application should not be confined to breaches of Arts 81 and 82 EC, but should be extended to other horizontal and directly effective Treaty provisions, and also arguably to relevant provisions of Regulations. Despite the introduction of this new Community remedy, much of its practical application will be decided in accordance with national law. This general approach is continued in *Manfredi*. This deference to national rules is typical of the Court's "fourth generation" case law on national remedies. It reflects the current policy of the Court which fluctuates between securing an *effective* standard of protection based on a "second generation" approach and a *full and complete* level of protection which is illustrated by its "third generation" case law on national remedies. The *Courage* judgment has also raised many specific questions regarding the scope of the application of damages as a remedy for breach of the EC competition rules. These issues will continue to be addressed in subsequent preliminary rulings such as *Manfredi*, delivered by the Court of Justice on an ad hoc basis. However, in the light of both the decentralisation of the enforcement of the EC competition rules under Regulation 1/2003 and the drawbacks of relying on a judge made system of private remedies, the European Commission has published its Green Paper on Damages Actions for breach of the EC antitrust rules. If Community measures in this field are adopted, the move will mark an important paradigm shift in the private enforcement of the EC competition law rules. In this event, the potential for a wider impact on national procedural rules applied in general civil law cases should not be underestimated.

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1. COM (1999) 101 final. This follows the principle adopted in most Member States and by the Court in its previous case law that a litigant cannot profit from his/her own wrongdoing: *ibid.*, at [31] citing Case 39/72, *Commission v Italy* [1973] E.C.R. 101, at [10]. The Court added that the national court would make this decision taking into account the economic and legal context of the position of the contractual parties, their conduct and their respective bargaining power including whether the party who claims to have suffered loss by concluding the illegal contract is in a substantially weaker position than the other party to the extent that his/her freedom to contract has been seriously compromised or even eliminated. It also ruled that in the context of exclusive purchasing agreements, a contract may infringe Art.81 EC simply because it is part of a network of similar contracts which, taken together, seal off the market from competition. In such cases, the weaker party cannot bear significant responsibility for the breach of Art.81 EC, particularly if the terms of the contract were imposed on him/her by the party controlling the network: *ibid.*, at [32]-[34] citing Case 23/67, *Brasserie de Haecht* [1967] E.C.R. 127, and C-234/89, *Delimitis* [1991] E.C.R. I-935, at [14]-[26].
 2. *ibid.*, paras 46-47. *ibid.*, at [33]. This is consistent with its case law on Art.288 EC (Joined Cases C 104/89 & 37/90, *Mulder* [1992] E.C.R. I-3061, at [33]) and state liability (Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)*, cited above, at fn.15, at [85]).
 3. See further the detailed, Commission sponsored, Ashurst Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Ashurst, Brussels, August 31, 2004 published on the European Commission DG Competition website. The national report on the UK is contributed to by Mark Clough Q.C. and Arundel McDougall of Ashurst, London. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89.

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4. [2004] O.J. L1/1. See further Van Gerven, cited above, at fn.49, at p.544.
5. Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297. See further J.H.H. Weiler, *The Constitution of Europe, "Do the New Clothes have an Emperor?" and Other Essays in European Integration* (Cambridge: Cambridge University Press, 1999), at pp.217-218.
6. COM (2005) 672 final. See also the detailed Annex to the Green Paper: Commission Staff Working Paper, SEC (2005) 1732. See also Komninos, cited above, at fn.55, at p.476.
7. Case 26/62, *Van Gend en Loos* [1963] E.C.R. 1. Case C-453/99, *Courage v Crehan*, cited above, at fn.5, at [24].
8. See further E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *American Journal of International Law* 1. W. Van Gerven, "Bringing (Private) Laws Closer to Each Other at the European Level" in *Institutional Framework of International Private Law* (F. Cafaggi ed., Oxford: OUP, 2006), 37, at p.55.
9. Case 26/62, cited above, at fn.7, at p.13. Author's emphasis. Yet note the Court's restrictive approach to judicial review of Community acts under Art.230 EC in Case 25/62, *Plaumann* [1963] E.C.R. 95, which was also delivered in 1963. Reich, cited above, at fn.63, at p.40.
10. For a comprehensive analysis of the national courts' acceptance of their new Community powers, duties and competences, see M. Claes, *National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006). R. Incardona and C. Poncibo, "The Corte di Cassazione takes 'Courage'. A Recent Ruling Opens Limited Rights for Consumers in Competition Cases" [2005] 8 E.C.L.R. 445.
11. See further J. Weiler, "The Community System: The Dual Character of Supranationalism" (1981) 1 *Yearbook of European Law* 273. Issues likely to arise include fault, "anti-trust injury", the "passing on" defence, indirect purchasers, causation, standing, quantification of damages, burden of proof, class actions, discovery procedures, contingency fees, forum shopping, time-limits and treble damages. Most of these issues are discussed in the Green Paper and the Annex, cited above, at fn.6.
12. Case 6/64, *Costa v ENEL* [1964] E.C.R. 585. See further K. Alter, *Establishing the Supremacy of European Law* (Oxford: OUP, 2001). Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89. Joined Cases C 438-439/03, 509/03 & 2/04, *Cannito*, Order of the Court, [2004] O.J. C106/18, was an earlier reference from the Italian courts which dealt with similar issues, where the Court deemed the reference inadmissible on the ground that insufficient information relating to the factual and legal context of the disputes had been provided which would enable it to give a ruling. The *Cannito* case was later joined with the *Manfredi* case.
13. See further S. Drake, "The Principle of Effective Judicial Protection in Actions for Breach of Community Law Before National Courts", Ph.D thesis (unpublished), University of Glamorgan, 2000. *ibid.*
14. Joined Cases C 6/90 & 9/90, *Francovich* [1991] E.C.R. I-5357, at [33] and [34]. *ibid.*, at [61].
15. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)* [1996] E.C.R. I-1029, at [39]. *ibid.*, at [64].
16. Case 14/83, *Von Colson* [1984] E.C.R. 1891, at [23]. This approach has been criticised in relation to state liability, see for example, L. Woods and F. Smith, "Causation in *Francovich* : The Neglected Problem" (1997) 46 I.C.L.Q. 925.
17. In Case C-453/99, *Courage*, cited above, at fn.5, at [26], the French terms " *la pleine efficacité* " and " *l'effet utile* " have been translated into English as "full effectiveness" and "practical effect". Whilst at [29], " *le principe d'effectivité* " has been translated as the "principle of effectiveness". The French version is clearly more precise than the general English terms. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, at [72].
18. See, for example, A.G. Alber in Case C-63/01, *Evans* [2003] E.C.R. I-14447, at [76]; A.G. Léger in Case C-224/01, *Köbler* [2003] E.C.R. I-10239, at [35]. See also former A.G. Van Gerven writing extra-judicially in "Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?" (1995) 32 C.M.L.Rev. 679. *ibid.*, at [82].
19. See, for example, R. Caranta, "Judicial Protection Against Member States: A New *Jus Commune* Takes

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Shape” (1995) 32 C.M.L.Rev. 704; N. Gravells, “Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?” (1989) P.L. 568.*ibid.*, at [92] *et. seq.*

20. See, for example, Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] E.C.R. I-6677, at [44].*ibid.*, at [94].

21. In contrast to the “principles of effective judicial protection” identified by Dougan which are based on the following four concepts: the fundamental right of access to judicial process; the presumption of national competence to determine remedies and procedural rules; the limits to that presumption imposed by Community law and the legal basis for such Community intervention: M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart, 2004), pp.4-65. Case C-271/91, *Marshall (No.2)* [1993] E.C.R. I-4367.

22. See further, S. **Drake**, cited above, at fn.13. See also F. Snyder, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques” (1993) 56 M.L.R. 19. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, at [95].

23. See further, S. **Drake**, “Twenty Years after *Von Colson* : The Impact of ‘Indirect Effect’ on the Protection of the Individual's Community Rights” (2005) 30 E.L.Rev 329.*ibid.*, at [96].

24. *ibid. ibid.*, at [97].

25. S. Prechal, *Directives in EC Law* (Oxford: OUP, 2nd edn., 2005), at p.172. The Court has held that Arts 87-88 EC on state aid do not impose any obligations directly on undertakings receiving such aid. Thus, it has been argued that the Court would be unlikely to extend the *Courage* principle to these Treaty provisions: Dougan, cited above, at fn.21, at p.386. Note that although Arts 28-30 EC do not apply to private parties in general, these Treaty provisions may have some *effect* on private parties in the field of intellectual property rights: R. D'Sa, cited above, at fn.45, at p.241. However, Snell argues that in many intellectual property cases, Art.28 EC has been used by the Court to target the national legislation which had conferred certain rights on individuals. It has not recognised the application of Art.28 EC to private parties per se: See further J. Snell, “Private Parties and the Free Movement of Goods and Services” in M. Andenas and W-H. Roth, *Services and Free Movement in EU Law* (Oxford: OUP, 2002), pp.210-243.

26. *ibid.* Case 36/74, *Walrave* [1974] E.C.R. 1405.

27. [2004] O.J. C310/1. Case C-415/93, *Bosman* [1995] E.C.R. I-4921; Case C-281/98, *Angonese* [2000] E.C.R. I-69. See also Van Gerven, cited above, at fn.49, at pp.531-532.

28. Note that this change was to accommodate calls for amendments to Art.230(4) EC rather than to address the legitimacy deficit of the Court's judge made remedies system before national courts. See Discussion Circle on the Court of Justice. Final Report of March 25, 2003, at p.6. See further discussion in C. Koch, “Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals' Rights to an Effective Remedy” (2005) 30 E.L.Rev. 511. Case 36/74, *Walrave*, cited above, at fn.26 2nd ser. For criticism of the application of Art.49 EC to private parties, see Snell, cited above, at fn.25 2nd ser.

29. D. Curtin and K. Mortelmans, “Application and Enforcement of Community Law by Member States: Actors in Search of a ‘Third Generation’ Script” in *Institutional Dynamics of European Integration, Vol. II, Essays in Honour of Henry G. Schermers* (D. Curtin and T. Henkels eds, Dordrecht: Nijhoff, 1994), 303 at p.425 who in turn refer to Mertens de Wilmars who introduced the phrase “Problems of a Second Generation” in “L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales” in Fide, London, 1980, Vol.1, *Remedies for Breach of Community Law*, I.2. Case 43/75, *Defrenne* [1976] E.C.R. 455.

30. Case 33/76, *Rewe* [1976] E.C.R. 1989. Case 34/73, *Variola* [1973] E.C.R. 990.

31. Case 45/76, *Comet* [1976] E.C.R. 2043. Case C-253/00, *Muñoz v Frumar* [2002] E.C.R. I-7289. See further A. Biondi, Annotated Case Note (2003) C.M.L.Rev. 1241; Dougan, cited above, at fn.21, at pp.42-45; G. Betlem, “Torts, A European Ius Commune and The Private Enforcement of Community Law” (2005) 64 C.L.J. 126 at 134-148.

32. See, for example, Case C-62/00, *Marks and Spencer* [2002] E.C.R. I-6325. Council Regulation 1035/72

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of the Council, [1972] O.J. Spec. Ed. 437, which was incorporated into and then repealed by Council Regulation 2200/96 with effect from January 1, 1997 on the common organisation of the market in fruit and vegetables, [1996] O.J. L297/1.

33. See, for example, Case C-326/96, *Levez* [1988] E.C.R. I-7835. The quality standards for grapes were laid down in Commission Regulation 1730/87. This is accompanied by an Annex which lists the only varieties that can be marketed in the Community. Regulation 93/91 added the “Superior Seedless” variety of grapes to the exhaustive list. Regulation 291/92 removed the exhaustive nature of the list. Note that with effect from February 1, 2000, Commission Regulation 2789/1999 laying down the marketing standard for table grapes, [1999] O.J. L336/13, has incorporated and repealed the earlier Regulation 1730/87.

34. Case 14/83, cited above, at fn.16. UK Horticultural Marketing Inspectorate. The Horticultural and Agricultural Act 1964 as amended imposes penalties for the sale of regulated produce in breach of the Community's quality standards.

35. Case 222/84, [1986] E.C.R. 1651. Case C-253/00 *Muñoz*, cited above, at fn.31 2nd ser., at [27], citing Case 34/73, *Variola*, cited above, at fn.30 2nd ser., at [8].

36. Case 222/87, [1987] E.C.R. 4097. Case 106/77, [1978] E.C.R. 629.

37. Case C-213/89, [1990] E.C.R. I-2433. Case C-213/89, [1990] E.C.R. I-2433.

38. Joined Cases C 6/90 & 9/90, cited above, at fn.14. Case C-253/00 *Muñoz*, cited above, at fn.31 2nd ser., at [28].

39. T. Tridimas, “Liability for Breach of Community Law: Growing Up and Mellowing Down?” (2001) 38 C.M.L.Rev. 301 at p.303. *ibid.*, at [29].

40. Note that Tridimas has confined his analysis to remedies and as such recognises three phases in the Court's case law. He makes no reference to the Court's case law on direct effect and supremacy. See also A. Arnall, *The European Union and its Court of Justice* (Oxford: OUP, 1999), pp.143-189. *ibid.*, at [30].

41. *ibid.*, p.143. *ibid.*, at [31].

42. See also Case C-224/01, *Köbler*, cited above, at fn.18, which is discussed further in this respect in S. Drake, “State Liability for Judicial Error: A False Dawn for the Effective Protection of the Individual's Community Rights” (2004) 11 *Irish Journal for European Law* 34. Dougan, cited above, at fn.21, at p.44.

43. See the Commission Notice on co-operation between national courts and the Commission applying Arts 85 and 86 [now 81 and 82] of the EEC Treaty, [1993] O.J. C39/6, at para.11. In the UK, the House of Lords had held obiter dicta in *Garden Cottage Foods v MMB* [1984] A.C. 130, that damages are available before a national court *in principle* for breach of Art.82 EC by another individual and that the appropriate cause of action is breach of statutory duty. Case 68/88, *Commission v Greece* [1989] E.C.R. 2965.

44. M. Hoskins, “Damages for Breach of Article 85 [now Article 81 EC]”, unpublished paper presented on February 26, 1998, at Centre of European Law, School of Law, King's College, London, at pp.7-8. Case 152/84, *Marshall (No.1)* [1986] E.C.R. 723; Case C-91/92, *Faccini Dori* [1994] E.C.R. I-3325; Joined Cases C 397/01-403/01, *Pfeiffer*, cited above, at fn.64.

45. R. D'Sa, *European Community Law and Civil Remedies in England and Wales* (London: Sweet and Maxwell, 1994), at p.174. Directive 90/314 on package travel, package holidays and package tours, [1990] O.J. L158/59.

46. E. Deards, “ ‘Curiouser and Curiouser’? The Development of Member State Liability in the Court of Justice” (1993) 3 E.P.L. 117 at p.143. Directive 90/314, Art.5. In Case C-168/00, *Leitner* [2002] E.C.R. I-2631, the Court held that under this provision, consumers may receive payment of compensation for non-material damage.

47. Case 128/92, [1994] E.C.R. I-1209. See also Snyder, cited above, at fn.22, at pp.50-53.

48. The Court held that since it was the sole responsibility of the Commission for ensuring the enforcement of these provisions, it followed that national courts had no competence to rule on the compatibility of the provisions or to award damages for breach of the said provisions; *ibid.*, at [21]. *ibid.*, p.52.

49. He subsequently expressed his views on the matter writing in an extra-judicial capacity post-*Brasserie du Pêcheur*: W. Van Gerven, “Bridging the Unbridgeable: Community and National Tort Laws after *Fran-*

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covich and Brasserie” (1996) 45 I.C.L.Q. 507. Case C-224/01, [2003] E.C.R. I-10239.

50. Case 128/92, cited above, at fn.47, at p.1249. Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica Italiana*, judgment of June 13, 2006 (not yet reported).

51. Case 106/77, *Simmmenthal* [1978] E.C.R. 629, at [15]. In Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)*, cited above, at fn.15, at [22], the Court confirmed that the principle of state liability also applies to infringements of directly effective Treaty provisions. Note that in *Francovich*, the provision which the claimant sought to rely on did not have direct effect. Case C-129/00, [2003] E.C.R. I-14637.

52. Case 127/73, *BRT v SABAM* [1974] E.C.R. 51. This may have been resolved by Art.I-29 of the Treaty establishing a Constitution for Europe, cited above, at fn.27.

53. See further C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: OUP, 1999). *cf.* Dougan argues that a unified system of judicial protection is an out-dated concept in today's Community legal order: cited above, at fn.21.

54. Case 128/92, cited above, at fn.47, at pp.1250-1251. Harmonising legislation has been introduced in a limited number of fields, for example, public procurement. See further Dougan, cited above, at fn.21, at pp.14-18.

55. For a comprehensive analysis, see A. Komninos, “New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages” (2002) 39 C.M.L.Rev. 447. Some examples include: Contribution by the Commission to the Intergovernmental Conference (1991) (Document drawn up on the basis of COM (90) 600 and SEC (91) 500), published in “Intergovernmental Conferences: Contributions by the Commission,” *EC Bulletin*, Supplement 2/91, pp.151-154; M. Storme (ed.), Report on the “Approximation of Judiciary Law in the European Union” (Dordrecht: Martinus Nijhoff, 1994); C. Himsworth, “Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited” (1997) 22 E.L.Rev. 291.

56. C-242/95, [1997] E.C.R. I-4449. See further W. Van Gerven, “Substantive Remedies for the Private Enforcement of EC Anti-trust Rules before National Courts” in *European Competition Law Annual 2001: Effective private Enforcement of EC Antitrust Law* (C. Ehlermann and I. Atanasiu eds, Oxford: Hart, 2003), pp.53-93, which includes a draft Regulation.

57. The Court of Justice had previously held in the context of a German beer supply agreement that Art.81 EC is infringed if the following two cumulative conditions are met: i) taking into account the economic and legal context of the agreement at issue, competitors find it difficult to enter the market or increase market share and gain access to the market for the distribution of beer in premises for the sale and consumption of drinks. The cumulative effect on competition of a number of similar agreements being one factor to be taken into account when making this assessment; ii) the agreement at issue must make a significant contribution to the sealing-off of the market caused by the totality of the agreements in their economic and legal context. The contribution made by an individual agreement to this sealing-off effect will depend upon the position of the contracting parties in the relevant market and the duration of the agreement: C-234/89, *Delimitis* [1991] E.C.R. I-935, at [27]. Dougan, cited above, at fn.21, at pp.200-208.

58. In *GibbsMew* [1998] Eu.L.R. 588, at 606, the Court of Appeal had ruled that Art.81 EC grants protection to third party competitors only and not to co-contractors. This case also concerned the compatibility of a tied lease with Art.81 EC, but no reference was made to the Court of Justice under Art.234 EC. W. Van Gerven, cited above, at fn.49, at p.541.

59. In English law, the principle of illegality prohibits parties to an illegal contract from claiming damages *inter se*: *Langton v Hughes* (1813) 1 M. & S. 593, at 596, per Lord Ellenborough; *Boissevain v Weil* [1950] A.C. 327, HL. *Study on the conditions of claims for damages in case of infringement of EC competition rules*, cited above, at fn.3, at p.1.

60. Case C-453/99, *Courage v Crehan*, cited above, at fn.5. Jones, cited above, at fn.53, at p.16.

61. Dougan, cited above, at fn.21, at p.378. The Commission refers to the problems collectively as “information asymmetry”. See Commission Staff Working Paper, Annex to the Green Paper, cited above, at

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fn.6, at para.45.

62. A. Jones and B. Sufrin, *EC Competition Law: Text, Cases and Materials* (2nd edn., Oxford:OUP, 2004), p.1214. See further [26]-[31] of the Opinion of A.G. Geelhoed in Joined Cases C 295-298/04, *Manfredi*, cited above, at fn.89.

63. See also N. Reich, "The 'Courage' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?" (2005) 42 C.M.L.Rev. 35, at pp.38-39; Komninou, cited above, at fn.55, at p.449.

64. Case C-453/99, cited above, at fn.5, at [26]. For similar legal reasoning, see Joined Cases C 6/90 & 9/90, *Francovich*, cited above, at fn.14, at [36] and [37]; Joined Cases C 397/01-403/01, *Pfeiffer* [2004] E.C.R. I-8835, at [114].

65. *ibid.*, at [27].

66. *ibid.*, at [28].

67. See, for example, A. Albers-Lorens, "*Courage v Crehan* : Judicial Activism or Consistent Approach?" (2002) 61 C.L.J. 38 at p.41

68. For extensive references, see Komninou, cited above, at fn.55, at 456-457 and 483.

69. Case C-453/99, *Courage v Crehan*, cited above, at fn.5.

70. *ibid.*, at [41].

71. *ibid.*, at [43].

72. *ibid.*, at [46], citing Case 33/76, *Rewe*, cited above, at fn.30 and Case C-213/89, *Factortame (No.1)*, cited above, at fn.37.

73. *ibid.*, at [51].

74. *ibid.*, at [53].

75. *ibid.*, at [54].

76. Case T-395/94, [2002] E.C.R. II-875, at [414].

77. See further Dougan, cited above, at fn.21 at pp.379-380.

78. Question two asks whether a party can sue a co-contractor for damages arising from his/her adherence to a clause in an agreement which is prohibited under Art.81 EC. See also *Courage v Crehan* [1999] E.C.C.455, at [26].

79. *Crehan v Inntrepreneur Pub Company (CPC)* [2004] E.C.C.8.

80. *Crehan v. Inntrepreneur Pub Company (CPC)* [2004] E.C.C.28. The Court of Appeal's decision to award damages to Mr Crehan for breach of Art.81 EC is the first in the UK.

81. *Crehan v. Inntrepreneur Pub Company (CPC)*, cited above, at fn.79, at [130].

82. *Inntrepreneur Pub Company (CPC) v Crehan*, judgment of the House of Lords, July 19, 2006, [2006] UKHL 38. Available at www.publications.parliament.uk/pa/ld/ldjjudgmt.htm.

83. The House of Lords decided, *inter alia*, that contrary to the view of the Court of Appeal, the first instance (national) judge was right to decide for himself whether the first *Delimitis* condition (referred to at fn.57 above) had been satisfied and that he was not obliged to follow the factual assessment of the market made by the European Commission in its earlier *Whitbread* and other decisions. As a result, no infringement of Art.81 EC was found to have been committed, and the damages issue became irrelevant.

84. After 13 years of legally aided litigation, Mr Crehan's victory in the Court of Appeal on the issue of his right to damages, now seems pyrrhic. The House of Lords decision on the substantive issue has already been the subject of criticism: see P. Stanley, "European Briefing" (2006) *Solicitors' Journal* 1018.

85. Joined Cases C 264/01, 306/01, 354/01, 355/01, [2004] E.C.R.I-2493, at [103]-[105].

86. *ibid.*, at [104]. Author's emphasis.

87. The European Commission appears explicitly to support, in the Annex to its Green Paper, the existence of a Community law remedy of damages against individuals for breach of Arts 81 and 82 EC. It also accepts that that Court of Justice has ruled that "in the absence of Community rules on the matter, it is for the legal systems of the Member States to provide for detailed rules for bringing damages actions". See Commission Staff Working Paper, Annex to the Green Paper, cited above, at fn.6, at para.20. However, the view expressed in the Green Paper itself is arguably more guarded. For instance, the Commission states that the

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Court has held that the “(...) effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss arising from an infringement of Arts 81 or 82 have the right to claim damages” (but does not elaborate whether this right is based on Community law or national law): see Green Paper, Damages actions for breach of the EC antitrust rules, cited above, at fn.6, at para.1.1, p.4.

88. See *Study on the conditions of claims for damages in case of infringement of EC competition rules*, cited above, at fn.3.

89. Joined Cases C 295/04, 297-298/04, *Manfredi*, judgment of July 13, 2006 (not yet reported).

90. *ibid.*, at [52]-[58].

91. See for example, [60] and [90] of the *Manfredi* judgment.

92. Dougan, cited above, at fn.21, at p.380.

93. Dougan draws parallels with the Court's rulings in Case C-213/89, *Factortame (No.1)*, cited above, at fn.37, and Case 177/78, *Pigs and Bacon Commission v McCarren* [1979] E.C.R. 2161, cited above, at fn.21 at pp.383-384.

94. It could be argued that Art.10 EC applies to Member States only and therefore would not be an appropriate source for a new remedy of individual liability: see A. Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford: OUP, 2000), at p.127.

95. Case C-453/99, *Courage v Crehan*, cited above, at fn.5, at [26]. See also Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, at [60] and [90].

96. But see Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, which is discussed further below.

97. *Francovich* is also a hybrid judgment since the Court laid down Community conditions for establishing state liability, but left the award of damages to be determined by the national courts subject to the principles of effectiveness and equivalence. See Joined Cases C 6/90 & 9/90, *Francovich*, cited above, at fn.14, at [42] and [43].

98. Case C-453/99, *Courage v Crehan*, cited above, at fn.5, at [29].

99. *ibid.*, at [30] citing Case 238/78, *Ireks-Arkady* [1979] E.C.R. 2955, at [14]; Case 68/79, *Just* [1980] E.C.R. 501, at [26]; Joined Cases C 441-442/98, *Michaˆlidis* [2000] E.C.R. I-7145, at [31].

100. COM (1999) 101 final. This follows the principle adopted in most Member States and by the Court in its previous case law that a litigant cannot profit from his/her own wrongdoing: *ibid.*, at [31] citing Case 39/72, *Commission v Italy* [1973] E.C.R. 101, at [10]. The Court added that the national court would make this decision taking into account the economic and legal context of the position of the contractual parties, their conduct and their respective bargaining power including whether the party who claims to have suffered loss by concluding the illegal contract is in a substantially weaker position than the other party to the extent that his/her freedom to contract has been seriously compromised or even eliminated. It also ruled that in the context of exclusive purchasing agreements, a contract may infringe Art.81 EC simply because it is part of a network of similar contracts which, taken together, seal off the market from competition. In such cases, the weaker party cannot bear significant responsibility for the breach of Art.81 EC, particularly if the terms of the contract were imposed on him/her by the party controlling the network: *ibid.*, at [32]-[34] citing Case 23/67, *Brasserie de Haecht* [1967] E.C.R. 127, and C-234/89, *Delimitis* [1991] E.C.R. I-935, at [14]-[26].

101. *ibid.*, paras 46-47. *ibid.*, at [33]. This is consistent with its case law on Art.288 EC (Joined Cases C 104/89 & 37/90, *Mulder* [1992] E.C.R. I-3061, at [33]) and state liability (Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)*, cited above, at fn.15, at [85]).

102. See further the detailed, Commission sponsored, Ashurst Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Ashurst, Brussels, August 31, 2004 published on the European Commission DG Competition website. The national report on the UK is contributed to by Mark Clough Q.C. and Arundel McDougall of Ashurst, London. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89.

103. [2004] O.J. L1/1. See further Van Gerven, cited above, at fn.49, at p.544.

104. Case C-453/99, *Courage v Crehan* [2001] E.C.R. I-6297. See further J.H.H. Weiler, *The Constitution of*

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Europe, "Do the New Clothes have an Emperor?" and Other Essays in European Integration (Cambridge: Cambridge University Press, 1999), at pp.217-218.

105. COM (2005) 672 final. See also the detailed Annex to the Green Paper: Commission Staff Working Paper, SEC (2005) 1732. See also Komninos, cited above, at fn.55, at p.476.

106. Case 26/62, *Van Gend en Loos* [1963] E.C.R. I. Case C-453/99, *Courage v Crehan*, cited above, at fn.5, at [24].

107. See further E. Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *American Journal of International Law* 1. W. Van Gerven, "Bringing (Private) Laws Closer to Each Other at the European Level" in *Institutional Framework of International Private Law* (F. Cafaggi ed., Oxford: OUP, 2006), 37, at p.55.

108. Case 26/62, cited above, at fn.7, at p.13. Author's emphasis. Yet note the Court's restrictive approach to judicial review of Community acts under Art.230 EC in Case 25/62, *Plaumann* [1963] E.C.R. 95, which was also delivered in 1963. Reich, cited above, at fn.63, at p.40.

109. For a comprehensive analysis of the national courts' acceptance of their new Community powers, duties and competences, see M. Claes, *National Courts' Mandate in the European Constitution* (Oxford: Hart, 2006). R. Incardona and C. Poncibo, "The Corte di Cassazione takes 'Courage'. A Recent Ruling Opens Limited Rights for Consumers in Competition Cases" [2005] 8 E.C.L.R. 445.

110. See further J. Weiler, "The Community System: The Dual Character of Supranationalism" (1981) 1 *Yearbook of European Law* 273. Issues likely to arise include fault, "anti-trust injury", the "passing on" defence, indirect purchasers, causation, standing, quantification of damages, burden of proof, class actions, discovery procedures, contingency fees, forum shopping, time-limits and treble damages. Most of these issues are discussed in the Green Paper and the Annex, cited above, at fn.6.

111. Case 6/64, *Costa v ENEL* [1964] E.C.R. 585. See further K. Alter, *Establishing the Supremacy of European Law* (Oxford: OUP, 2001). Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89. Joined Cases C 438-439/03, 509/03 & 2/04, *Cannito*, Order of the Court, [2004] O.J. C106/18, was an earlier reference from the Italian courts which dealt with similar issues, where the Court deemed the reference inadmissible on the ground that insufficient information relating to the factual and legal context of the disputes had been provided which would enable it to give a ruling. The *Cannito* case was later joined with the *Manfredi* case.

112. See further S. Drake, "The Principle of Effective Judicial Protection in Actions for Breach of Community Law Before National Courts", Ph.D thesis (unpublished), University of Glamorgan, 2000. *ibid.*

113. Joined Cases C 6/90 & 9/90, *Francovich* [1991] E.C.R. I-5357, at [33] and [34]. *ibid.*, at [61].

114. Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)* [1996] E.C.R. I-1029, at [39]. *ibid.*, at [64].

115. Case 14/83, *Von Colson* [1984] E.C.R. 1891, at [23]. This approach has been criticised in relation to state liability, see for example, L. Woods and F. Smith, "Causation in *Francovich* : The Neglected Problem" (1997) 46 I.C.L.Q. 925.

116. In Case C-453/99, *Courage*, cited above, at fn.5, at [26], the French terms "*la pleine efficacité*" and "*l'effet utile*" have been translated into English as "full effectiveness" and "practical effect". Whilst at [29], "*le principe d'effectivité*" has been translated as the "principle of effectiveness". The French version is clearly more precise than the general English terms. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, at [72].

117. See, for example, A.G. Alber in Case C-63/01, *Evans* [2003] E.C.R. I-14447, at [76]; A.G. Léger in Case C-224/01, *Köbler* [2003] E.C.R. I-10239, at [35]. See also former A.G. Van Gerven writing extra-judicially in "Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?" (1995) 32 C.M.L.Rev. 679. *ibid.*, at [82].

118. See, for example, R. Caranta, "Judicial Protection Against Member States: A New *Jus Commune* Takes Shape" (1995) 32 C.M.L.Rev. 704; N. Gravells, "Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?" (1989) P.L. 568. *ibid.*, at [92] *et. seq.*

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119. See, for example, Case C-50/00 P, *Unión de Pequeños Agricultores* [2002] E.C.R. I-6677, at [44].*ibid.* , at [94].

120. In contrast to the “principles of effective judicial protection” identified by Dougan which are based on the following four concepts: the fundamental right of access to judicial process; the presumption of national competence to determine remedies and procedural rules; the limits to that presumption imposed by Community law and the legal basis for such Community intervention: M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart, 2004), pp.4-65. Case C-271/91, *Marshall (No.2)* [1993] E.C.R. I-4367.

121. See further, S. Drake, cited above, at fn.13. See also F. Snyder, “The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques” (1993) 56 M.L.R. 19. Joined Cases C 295/04, 297-298/04, *Manfredi*, cited above, at fn.89, at [95].

122. See further, S. Drake, “Twenty Years after *Von Colson* : The Impact of ‘Indirect Effect’ on the Protection of the Individual’s Community Rights” (2005) 30 E.L.Rev 329.*ibid.* , at [96].

123. *ibid. ibid.* , at [97].

124. S. Prechal, *Directives in EC Law* (Oxford: OUP, 2nd edn., 2005), at p.172. The Court has held that Arts 87-88 EC on state aid do not impose any obligations directly on undertakings receiving such aid. Thus, it has been argued that the Court would be unlikely to extend the *Courage* principle to these Treaty provisions: Dougan, cited above, at fn.21, at p.386. Note that although Arts 28-30 EC do not apply to private parties in general, these Treaty provisions may have some *effect* on private parties in the field of intellectual property rights: R. D’Sa, cited above, at fn.45, at p.241. However, Snell argues that in many intellectual property cases, Art.28 EC has been used by the Court to target the national legislation which had conferred certain rights on individuals. It has not recognised the application of Art.28 EC to private parties per se: See further J. Snell, “Private Parties and the Free Movement of Goods and Services” in M. Andenas and W-H. Roth, *Services and Free Movement in EU Law* (Oxford: OUP, 2002), pp.210-243.

125. *ibid.* Case 36/74, *Walrave* [1974] E.C.R. 1405.

126. [2004] O.J. C310/1. Case C-415/93, *Bosman* [1995] E.C.R. I-4921; Case C-281/98, *Angonese* [2000] E.C.R. I-69. See also Van Gerven, cited above, at fn.49, at pp.531-532.

127. Note that this change was to accommodate calls for amendments to Art.230(4) EC rather than to address the legitimacy deficit of the Court’s judge made remedies system before national courts. See Discussion Circle on the Court of Justice. Final Report of March 25, 2003, at p.6. See further discussion in C. Koch, “Locus Standi of Private Applicants Under the EU Constitution: Preserving Gaps in the Protection of Individuals’ Rights to an Effective Remedy” (2005) 30 E.L.Rev. 511. Case 36/74, *Walrave*, cited above, at fn.26 2nd ser. For criticism of the application of Art.49 EC to private parties, see Snell, cited above, at fn.25 2nd ser.

128. D. Curtin and K. Mortelmans, “Application and Enforcement of Community Law by Member States: Actors in Search of a ‘Third Generation’ Script” in *Institutional Dynamics of European Integration, Vol. II, Essays in Honour of Henry G. Schermers* (D. Curtin and T. Henkels eds, Dordrecht: Nijhoff, 1994), 303 at p.425 who in turn refer to Mertens de Wilmars who introduced the phrase “Problems of a Second Generation” in “L’efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales” in Fide, London, 1980, Vol.1, *Remedies for Breach of Community Law*, I.2. Case 43/75, *Defrenne* [1976] E.C.R. 455.

129. Case 33/76, *Rewe* [1976] E.C.R. 1989. Case 34/73, *Variola* [1973] E.C.R. 990.

130. Case 45/76, *Comet* [1976] E.C.R. 2043. Case C-253/00, *Muñoz v Frumar* [2002] E.C.R. I-7289. See further A. Biondi, Annotated Case Note (2003) C.M.L.Rev. 1241; Dougan, cited above, at fn.21, at pp.42-45; G. Betlem, “Torts, A European Ius Commune and The Private Enforcement of Community Law” (2005) 64 C.L.J. 126 at 134-148.

131. See, for example, Case C-62/00, *Marks and Spencer* [2002] E.C.R. I-6325. Council Regulation 1035/72 of the Council, [1972] O.J. Spec. Ed. 437, which was incorporated into and then repealed by Council Regulation 2200/96 with effect from January 1, 1997 on the common organisation of the market in fruit and ve-

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getables, [1996] O.J. L297/1.

132. See, for example, Case C-326/96, *Levez* [1988] E.C.R. I-7835. The quality standards for grapes were laid down in Commission Regulation 1730/87. This is accompanied by an Annex which lists the only varieties that can be marketed in the Community. Regulation 93/91 added the “Superior Seedless” variety of grapes to the exhaustive list. Regulation 291/92 removed the exhaustive nature of the list. Note that with effect from February 1, 2000, Commission Regulation 2789/1999 laying down the marketing standard for table grapes, [1999] O.J. L336/13, has incorporated and repealed the earlier Regulation 1730/87.

133. Case 14/83, cited above, at fn.16. UK Horticultural Marketing Inspectorate. The Horticultural and Agricultural Act 1964 as amended imposes penalties for the sale of regulated produce in breach of the Community's quality standards.

134. Case 222/84, [1986] E.C.R. 1651. Case C-253/00 *Muñoz*, cited above, at fn.31 2nd ser., at [27], citing Case 34/73, *Variola*, cited above, at fn.30 2nd ser., at [8].

135. Case 222/87, [1987] E.C.R. 4097. Case 106/77, [1978] E.C.R. 629.

136. Case C-213/89, [1990] E.C.R. I-2433. Case C-213/89, [1990] E.C.R. I-2433.

137. Joined Cases C 6/90 & 9/90, cited above, at fn.14. Case C-253/00 *Muñoz*, cited above, at fn.31 2nd ser., at [28].

138. T. Tridimas, “Liability for Breach of Community Law: Growing Up and Mellowing Down?” (2001) 38 C.M.L.Rev. 301 at p.303. *ibid.*, at [29].

139. Note that Tridimas has confined his analysis to remedies and as such recognises three phases in the Court's case law. He makes no reference to the Court's case law on direct effect and supremacy. See also A. Arnall, *The European Union and its Court of Justice* (Oxford: OUP, 1999), pp.143-189. *ibid.*, at [30].

140. *ibid.*, p.143. *ibid.*, at [31].

141. See also Case C-224/01, *Köbler*, cited above, at fn.18, which is discussed further in this respect in S. Drake, “State Liability for Judicial Error: A False Dawn for the Effective Protection of the Individual's Community Rights” (2004) 11 *Irish Journal for European Law* 34. Dougan, cited above, at fn.21, at p.44.

142. See the Commission Notice on co-operation between national courts and the Commission applying Arts 85 and 86 [now 81 and 82] of the EEC Treaty, [1993] O.J. C39/6, at para.11. In the UK, the House of Lords had held obiter dicta in *Garden Cottage Foods v MMB* [1984] A.C. 130, that damages are available before a national court *in principle* for breach of Art.82 EC by another individual and that the appropriate cause of action is breach of statutory duty. Case 68/88, *Commission v Greece* [1989] E.C.R. 2965.

143. M. Hoskins, “Damages for Breach of Article 85 [now Article 81 EC]”, unpublished paper presented on February 26, 1998, at Centre of European Law, School of Law, King's College, London, at pp.7-8. Case 152/84, *Marshall (No.1)* [1986] E.C.R. 723; Case C-91/92, *Faccini Dori* [1994] E.C.R. I-3325; Joined Cases C 397/01-403/01, *Pfeiffer*, cited above, at fn.64.

144. R. D'Sa, *European Community Law and Civil Remedies in England and Wales* (London: Sweet and Maxwell, 1994), at p.174. Directive 90/314 on package travel, package holidays and package tours, [1990] O.J. L158/59.

145. E. Deards, “ ‘Curiouser and Curiouser’? The Development of Member State Liability in the Court of Justice” (1993) 3 E.P.L. 117 at p.143. Directive 90/314, Art.5. In Case C-168/00, *Leitner* [2002] E.C.R. I-2631, the Court held that under this provision, consumers may receive payment of compensation for non-material damage.

146. Case 128/92, [1994] E.C.R. I-1209. See also Snyder, cited above, at fn.22, at pp.50-53.

147. The Court held that since it was the sole responsibility of the Commission for ensuring the enforcement of these provisions, it followed that national courts had no competence to rule on the compatibility of the provisions or to award damages for breach of the said provisions; *ibid.*, at [21]. *ibid.*, p.52.

148. He subsequently expressed his views on the matter writing in an extra-judicial capacity post-*Brasserie du Pêcheur*: W. Van Gerven, “Bridging the Unbridgeable: Community and National Tort Laws after *Francoovich* and *Brasserie*” (1996) 45 I.C.L.Q. 507. Case C-224/01, [2003] E.C.R. I-10239.

149. Case 128/92, cited above, at fn.47, at p.1249. Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica*

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blica Italiana, judgment of June 13, 2006 (not yet reported).

150. Case 106/77, *Simmenthal* [1978] E.C.R. 629, at [15]. In Joined Cases C 46/93 & 48/93, *Brasserie du Pêcheur and Factortame (No.3)*, cited above, at fn.15, at [22], the Court confirmed that the principle of state liability also applies to infringements of directly effective Treaty provisions. Note that in *Francovich*, the provision which the claimant sought to rely on did not have direct effect. Case C-129/00, [2003] E.C.R. I-14637.

151. Case 127/73, *BRT v SABAM* [1974] E.C.R. 51. This may have been resolved by Art.I-29 of the Treaty establishing a Constitution for Europe, cited above, at fn.27.

152. See further C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: OUP, 1999).cf. Dougan argues that a unified system of judicial protection is an out-dated concept in today's Community legal order: cited above, at fn.21.

153. Case 128/92, cited above, at fn.47, at pp.1250-1251. Harmonising legislation has been introduced in a limited number of fields, for example, public procurement. See further Dougan, cited above, at fn.21, at pp.14-18.

154. For a comprehensive analysis, see A. Komninos, "New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages" (2002) 39 C.M.L.Rev. 447. Some examples include: Contribution by the Commission to the Intergovernmental Conference (1991) (Document drawn up on the basis of COM (90) 600 and SEC (91) 500), published in "Intergovernmental Conferences: Contributions by the Commission," *EC Bulletin*, Supplement 2/91, pp.151-154; M. Storme (ed.), Report on the "Approximation of Judiciary Law in the European Union" (Dordrecht: Martinus Nijhoff, 1994); C. Himsworth, "Things Fall Apart: The Harmonisation of Community Judicial Procedural Protection Revisited" (1997) 22 E.L.Rev. 291.

155. C-242/95, [1997] E.C.R. I-4449. See further W. Van Gerven, "Substantive Remedies for the Private Enforcement of EC Anti-trust Rules before National Courts" in *European Competition Law Annual 2001: Effective private Enforcement of EC Antitrust Law* (C. Ehlermann and I. Atanasiu eds, Oxford: Hart, 2003), pp.53-93, which includes a draft Regulation.

156. The Court of Justice had previously held in the context of a German beer supply agreement that Art.81 EC is infringed if the following two cumulative conditions are met: i) taking into account the economic and legal context of the agreement at issue, competitors find it difficult to enter the market or increase market share and gain access to the market for the distribution of beer in premises for the sale and consumption of drinks. The cumulative effect on competition of a number of similar agreements being one factor to be taken into account when making this assessment; ii) the agreement at issue must make a significant contribution to the sealing-off of the market caused by the totality of the agreements in their economic and legal context. The contribution made by an individual agreement to this sealing-off effect will depend upon the position of the contracting parties in the relevant market and the duration of the agreement: C-234/89, *Delimitis* [1991] E.C.R. I-935, at [27]. Dougan, cited above, at fn.21, at pp.200-208.

157. In *GibbsMew* [1998] Eu.L.R. 588, at 606, the Court of Appeal had ruled that Art.81 EC grants protection to third party competitors only and not to co-contractors. This case also concerned the compatibility of a tied lease with Art.81 EC, but no reference was made to the Court of Justice under Art.234 EC. W. Van Gerven, cited above, at fn.49, at p.541.

158. In English law, the principle of illegality prohibits parties to an illegal contract from claiming damages *inter se*: *Langton v Hughes* (1813) 1 M. & S. 593, at 596, per Lord Ellenborough; *Boissevain v Weil* [1950] A.C. 327, HL. *Study on the conditions of claims for damages in case of infringement of EC competition rules*, cited above, at fn.3, at p.1.

159. Case C-453/99, *Courage v Crehan*, cited above, at fn.5. Jones, cited above, at fn.53, at p.16.

160. Dougan, cited above, at fn.21, at p.378. The Commission refers to the problems collectively as "information asymmetry". See Commission Staff Working Paper, Annex to the Green Paper, cited above, at fn.6, at para.45.

161. A. Jones and B. Sufrin, *EC Competition Law: Text, Cases and Materials* (2nd edn., Oxford: OUP,

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2004), p.1214. See further [26]-[31] of the Opinion of A.G. Geelhoed in Joined Cases C 295-298/04, *Manfredi*, cited above, at fn.89.

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