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A Look Back at Courage and a Look Forward to the Future of Non-Contractual Liability of Individuals for Breaches of EU Law

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1 Introduction

Delivered on 20 September 2001, the judgment in *Courage* [1] occupies a firm place among the 'classics' of the Court of Justice of the European Union ('the Court'). The case concerned the interpretation of what is now Art. 101(1) TFEU, which prohibits undertakings from engaging in anti-competitive agreements and practices. The Court ruled that a private party that has suffered damages due to another private party's infringement of Art. 101(1) TFEU can rely on that provision in order to obtain compensation from the latter. *Courage* does not only mark an important step in the enforcement of competition law in the EU but constitutes in all respects a milestone in the development of European private law and a turning point for the judicial protection of rights under EU law. The judgment is in fact the first where the Court accepted the liability of private parties for a breach of a provision of primary EU law.

The facts of the case are in essence as follows. Bernard Crehan, a British pub tenant, had entered into agreements with Inntrepreneur Estate Ltd for the lease of two pub locations in Staines-upon-Thames, a town a few kilometres west of London. The lease agreements contained so-called 'beer-tie' clauses, whereby Mr. Crehan was obliged to purchase a fixed minimum quantity of beer at full list prices from Courage Ltd, a brewing company holding half the shares of Inntrepreneur Estate. Facing heavy competition from neighbouring pubs that were able to purchase beer from Courage at discounted prices, the activities of Mr. Crehan soon turned out to be unprofitable. When sued by Courage for the recovery of unpaid beer supplies, he contended that the beer-tie clauses in the lease contracts amounted to illegal anti-competitive agreements contrary to what is now Art. 101(1) TFEU, and counterclaimed for damages.[2]

The Court of Appeal of England and Wales filed a request for a preliminary ruling under what is now Art. 267 TFEU, asking in essence *i)* whether a private party that suffered damages caused by an anti-competitive conduct contrary to (now) Art. 101(1) TFEU was entitled to compensation under that provision, and *ii)* whether the common law doctrine of *in pari delicto* – whereby a party to an illegal covenant cannot claim from other parties to the covenant the damages suffered thereunder[3] – constituted an insurmountable barrier to such a claim. The Court of Justice ruled the following:

i. National courts are under the obligation to safeguard the rights conferred on individuals by Art. 101(1) TFEU,[4] a fundamental provision of the Treaty, which is essential for the functioning of the internal market;[5]
ii. Attaching non-contractual liability in damages to violations of Art. 101(1) TFEU should discourage undertakings from engaging in anti-competitive behaviour contrary to that provision, and should thereby contribute to that provision's full effectiveness;[6]

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1. Case C-453/99 *Courage* [2001] ECR I-6297.
2. As noted by Sieburgh, the claim brought by Mr. Crehan in this case, which was presented by the claimant and handled by the competent courts as a claim for damages, actually resembles more of a claim for restitution of an undue payment. In this case, Mr. Crehan merely sought recovery of the 'excess amount he had had to pay for the beer', and did not seek 'compensation for other loss items, such as loss of profits, or the decline in his competitive position'. See C.H. Sieburgh, 'EU Law and Non-Contractual Liability of the Union, Member States and Individuals', in A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus, J.S. Kortmann, and M.H. Wissink (Eds.), *The Influence of EU Law on National Private Law*, Deventer, Kluwer, 2014, p. 465, p. 520 (especially at footnote 193).
3. '*In pari delicto potior est conditio defendentis*' ('when parties are equally at fault, the condition of the defendant is stronger'). See H. Beale (Ed.), *Chitty on Contracts*, 31 edn., London, Sweet & Maxwell, 2012, pp. 1135-6.
4. *Courage* (n. 1), para. 23.
5. *Ibid.*, para. 20.
6. *Ibid.*, paras. 26-27.

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iii. Any individual, including parties to an anti-competitive agreement contrary to Art. 101(1) TFEU, should thus be allowed to claim compensation for the damages caused to them by a breach of that provision;[7]
iv. National law may not put up an absolute barrier to those claims.[8] The common law doctrine of *in pari delicto* thus has to be 'reshaped' to meet the standards of EU law:[9] only parties that 'bear significant responsibility for the distortion of competition', in view of their 'bargaining power' in setting the terms of the illegal covenant, can be denied a claim for compensation.[10]

This article takes up the invitation by the editors of this journal to reflect on the acceptance of liability of individuals for breaches of EU law by the ECJ. It recalls the reasoning behind the Court's decision in *Courage* and speculates about the future of the doctrine established in that judgment. The article focusses exclusively on the recognition by the Court of the non-contractual liability of private parties for breaches of Art. 101(1) TFEU, and does not deal with the merits of the Court's approach to the common law doctrine of *in pari delicto*.[11] Section 2 argues that the Court's decision *Courage* was not hard to anticipate, as it follows logically from the 'direct horizontal effect' of the prohibition laid down in Art. 101(1) TFEU, which had clearly been recognized by the Court in its previous case law, and which could be inferred from the wording of Art. 101(2). Proceeding from that first conclusion, section 3 suggests that the doctrine established by the Court in *Courage* can be extended to other provisions of primary EU law with 'direct horizontal effect' – notably the provisions in the TFEU concerning the fundamental movement freedoms and, against the recent case law of the Court of Justice, possibly also the fundamental rights provisions enshrined in the EU Charter. Section 4 signals some persisting points of ambiguity in the '*Courage* doctrine', concerning notably the constitutive conditions for '*Courage* liability' to arise. Section 5 concludes.

2 A logical development

As mentioned already, the decision in *Courage* was based on the need to ensure the 'full effectiveness' of Art. 101(1) TFEU.[12] In the Court's discourse, the concept of 'full effectiveness' has a twofold meaning. On the one hand, 'full effectiveness' refers to the effective pursuit of the objective sought by a legal provision, which, in the case of Art. 101(1) TFEU, is the maintenance of competition within the internal market.[13] On the other hand, 'full effectiveness' stands for the effective judicial protection of the rights that individuals derive from a legal provision.[14] Referring to the latter dimension of 'effectiveness', Advocate General Van Gerven had argued in his *Banks* Opinion of 1993 that the non-contractual liability of private parties for breaches of Art. 101(1) TFEU constituted '*the logical conclusion*' of that provision's '*horizontal direct effect*'.[15] The reasoning behind the Advocate General's argument, which seems convincing, is detailed below.

The expression 'horizontal direct effect' (or 'direct horizontal effect') indicates the capacity of a legal provision to directly influence the substance of relationships between private parties, creating, modifying and extinguishing rights and obligations between them.[16] It has been considered settled since the Court's 1974 judgment in *BRT* that Art. 101(1) TFEU has direct horizontal effect.[17] The Court has held on multiple occasions that the provision imposes on private parties the obligation not to engage in anti-competitive agreements and practices, and thereby confers on other private parties a right which they can enforce against the former.[18] On the other hand, the Court has never taken up the occasion to define with some precision the content and the contours of that right, which surely does not add to clarity.[19] What the Court has been clear about is that national courts are under the obligation to safeguard that right.[20] This means that, when the obligation imposed by Art. 101(1) is breached and the right conferred by that provision is encroached upon, a suitable

7. *Ibid.*, para. 24.
8. *Ibid.*, para. 28.
9. See N. Reich, Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights', (2007) 44 *Common Market Law Review*, p. 705, 708.
10. *Courage* (n. 1), paras. 31-33.
11. The Court's review of the doctrine of *in pari delicto* under the EU law principle of effectiveness has also been discussed extensively in legal scholarship. For a criticism, see among others H. Schepel, 'The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalize' Private Law', (2004) 12 *European Review of Private Law*, p. 661, pp. 666-9.
12. On the concept of 'full effectiveness', see further the contribution by I.V. Aronstein in this volume.
13. See *Courage* (n. 1), paras. 26-27.
14. See *ibid.*, para. 25. On the various facets of the principle of effectiveness, see among others M. Klamert, *The Principle of Loyalty in EU Law*, Oxford, Oxford University Press, 2014, pp. 125-40.
15. AG Van Gerven in Case C-128/92 *Banks* [1994] ECR I-1209, para. 44 of the Opinion (emphasis as in the original).
16. See A.S. Hartkamp, *European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, 2nd edn.,Cambridge, Intersentia, 2016, p. 14; and the contribution by I.V. Aronstein in this volume.
17. Case C-127/73 *BRT* [1974] ECR 51, para. 16: 'the [prohibition] of [Art. 101(1)] tend[s] by [its] very nature to produce direct effects in relations between individuals'.
18. See *e.g. Courage* (n. 1), para. 23; Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 39; Case C-557/12 *Kone* ECLI:EU:C:2014:1317, para. 20.
19. See D. Leczykiewicz, 'Private Party Liability in EU Law: In Search of a General Regime', (2010) 12 *Cambridge Yearbook of European Legal Studies*, p. 257, pp. 278-9. The very proposition that Art. 101(1) TFEU confers rights on individuals '*by virtue of*' the obligations it imposes on other private parties might in itself appear confusing. See *e.g. Courage* (n. 1), para. 19. Lawyers are in fact generally used to think that it is the obligation not to interfere with a certain right which follows logically from the recognition of that right, *i.e.* that it is the right that precedes the obligation from a logical point of view, and not vice versa. See further T. Eilmansberger, 'The relationship between rights and remedies in EC law: in search of the missing link', (2004) 41 *Common Market Law Review*, p. 1199, pp. 1236-40.
20. See *e.g. Courage* (n. 1), para. 23; *Manfredi* (n. 18), para. 39; *Kone* (n. 18), para. 20.

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remedy has to be made available. A first remedy for breaches of Art. 101(1) TFEU is provided for by Art. 101(2), which sanctions anti-competitive agreements contrary to Art. 101(1) with nullity – a nullity which is absolute in nature and can be relied on by anyone.[21] However – as AG Van Gerven noted in *Banks* – when a private party has suffered damages, the remedy of nullity falls short of fully restoring his or her rights.[22]. In this case, the effective judicial protection of the right which the injured party derives from Art. 101(1) TFEU can only be achieved by affording him or her the remedy of compensation.

In light of this, it seems fair to say that the ruling of the Court in *Courage* could be anticipated with relative ease. As shown, the possibility for private parties to claim compensation for the damages caused by another party's failure to comply with Art. 101 TFEU follows logically from two well-established premises. The first is that Art. 101 TFEU creates rights and obligations between private parties (*i.e.* has 'direct horizontal effect'), which is clear since the Court's judgment in *BRT*; the second is that national courts are under the obligation to grant effective judicial protection to the rights that individuals derive from EU law, which constitutes a settled principle in the case law of the Court.[23]

3 'Crehan and the way ahead'[24] – non-contractual liability of private parties for breaches of the EU free movement provisions and of EU fundamental rights provisions

Hence, agreeing with AG Van Gerven in *Banks*, the Court's ruling in *Courage* constitutes 'the logical conclusion' of the direct horizontal effect of Art. 101(1) TFEU. Taking that reasoning one step further, it would seem 'logical' that the principles established by the Court in *Courage* with regard to Art. 101(1) TFEU should extend to other provisions of EU law that produce direct horizontal effect. These are Art. 102 TFEU prohibiting abuses of dominant position;[25] Art. 157 TFEU on equal pay for men and women;[26] Art. 45 TFEU on the free movement of workers;[27] Art. 49 TFEU on the freedom of establishment;[28] Art. 56 on the freedom to provide services;[29] subject to certain qualifications, Art. 18 TFEU on non-discrimination on grounds of nationality;[30] and, subject to other and seemingly more stringent qualifications, Art. 34 TFEU on the free movement of goods.[31]

A ruling by the Court recognizing (or rejecting) the non-contractual liability of private parties for breaches of any of these provisions is, however, still pending. The closest to a pronouncement on the matter one can find is paragraph 51 of *Raccanelli*, a judgment concerning the free movement of workers. There, the Court held that 'it [was] for the referring court to assess, in the light of the national legislation applicable in relation to *non-contractual liability*, the nature of the *compensation* which the applicant', who had suffered discrimination contrary to Art. 45 TFEU by another private party, 'would be entitled to claim'.[32] This passage may be taken as indicating that private parties that violate Art. 45 TFEU shall incur liability in tort, and that the nature of the compensation they are liable to pay shall be determined by Member States' courts according to the applicable national law.[33] However, the statement can also be interpreted in another way, namely as leaving it to national law to determine not only the nature of compensation, but also *whether* the breach of Art. 45 TFEU by private parties should trigger tort liability in the first place.[34]

Pending a clear decision of the Court on the matter, national courts have on occasion held private parties liable in damages for breaches of provisions of the TFEU other than Art. 101(1) on their own initiative. The follow-up decision of the District Magistrate's Court of Bolzano in the *Angonese* case is, to this

21. See *Courage* (n. 1), para. 22.
22. AG Van Gerven in *Banks* (n. 15), para. 44 of the Opinion.
23. See, in this sense, Hartkamp (n. 16) 16: 'once a Treaty provision has been interpreted in such a way as to produce direct horizontal effect, it may in principle lead to ... different consequences. For example, once the ECJ has recognized the direct horizontal effect of a Treaty provision in the context of a contract that is at variance with that provision, it may very well be that an act contrary to that provision will also give rise to a claim for damages or for an injunction'.
24. The section borrows the title from a lecture given by Van Gerven at the British Institute of International and Comparative Law in 2004. The text of the lecture was published in the *European Business Law Review*. See W. Van Gerven, '*Crehan* and the Way Ahead', (2006) 17 *European Business Law Review*, p. 269.
25. See *BRT* (n. 17), para. 16.
26. See Case C-43/75 *Defrenne* [1976] ECR 445.
27. See *e.g.* Case C-36/74 *Walrave and Koch* [1974] ECR 1405; Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-281/98 *Angonese* [2000] ECR I-4139; Case C-94/07 *Raccanelli* [2008] ECR I-5939.
28. See *e.g.* Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-438/05 *Viking Line* [2007] ECR I-10779.
29. See *e.g. Wouters* (n. 28); Case C-431/05 *Laval un Partneri* [2007] ECR I-11767.
30. See Case C-411/98 *Ferlini* [2000] ECR I-8081. Sticking to the letter of the judgment, Art. 18 TFEU only imposes obligations on private parties that exercise 'a certain power over individuals'. See para. 50.
31. See Case C-171/11 *Fra.bo* ECLI:EU:C:2012:453. Sticking to the letter of the judgment, Art. 34 TFEU only imposes obligations on private bodies engaging in certification and standardization activities, 'national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body'. See para. 32.
32. Emphasis added.
33. See *e.g.* U. Bernitz and N. Reich, 'Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet et al.*', (2011) 48 *Common Market Law Review*, p. 603, p. 612.
34. See *e.g.* J. Malmberg, 'Trade Union Liability for 'EU-Unlawful' Collective Action', (2012) 3 *European Labour Law Journal*, p. 5, p. 11: 'the sentence is to be read as "the Member State court shall decide both if damages are to be awarded and the more precise modalities", rather than "damages must be available at national level, but the more precise modalities are to be decided by the Member State court"'.

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author's knowledge, the first judgment in this line.[35] The case concerned the compatibility of the recruitment practices of a private employer with Art. 45 TFEU on the free movement of workers. Mr. Angonese had sought employment with the local branch of a private bank, responding to the notice of an open post published in the local newspaper. His application had however been rejected, on grounds that he did not fulfil one condition for participating in the recruitment competition, namely the possession of a specific certificate of fluency in German that could only be obtained in the Province of Bolzano. In its preliminary ruling on the case, the Court confirmed that the prohibition on discrimination laid down in Art. 45 TFEU imposes obligations on individual private parties,[36] and ruled that the bank's requirement to possess a language certificate easily accessible only to Italian nationals amounted to indirect nationality discrimination among job candidates, which is prohibited by Art. 45 TFEU.[37] Following the preliminary ruling, the Bolzano District Magistrate's Court condemned the bank to compensate Mr. Angonese for the 'loss of chance' he had suffered.

The follow-up decision of the District Magistrates' Court in *Angonese* predates the Court's preliminary ruling in *Courage* by a few months, and cannot obviously be regarded as an extension of the '*Courage* doctrine' to the sphere of the free movement of workers. The Italian judge did not go into detail about the grounds on which its decision to award the payment of damages was based, and made no mention of the need to ensure the 'full effectiveness' of Art. 45 TFEU or to grant 'effective judicial protection' to the rights that individuals derive from that provision.

A genuine extension of *Courage* outside the sphere of Art. 101(1) TFEU can in turn be seen in the follow-up judgment of the Swedish Labour Court in *Laval*.[38] The case concerned collective action taken by some Swedish trade unions against a Latvian company posting its workers to Sweden, with the aim of forcing the latter to enter into negotiations on the workers' rates of pay. The unions' initiative was found by the Court of Justice to contradict Art. 56 TFEU, and to constitute an unjustified restriction of the company's right to freely provide its services across the internal market.[39] The Swedish Court considered that a remedy had to be granted for that violation, in the form of damages. The decision was directly based on *Courage*, which was taken as establishing a 'general principle within [EU] law that damages are ... to be able to be awarded between private parties upon a violation of a treaty provision that has direct horizontal effect'.[40]

The ruling of the Swedish court has attracted some criticism from legal scholars. Malmberg, notably, has openly argued against the existence of a general principle providing for the non-contractual liability of private actors breaching provisions of EU law with direct horizontal effect, and has maintained that the reasoning of the Swedish court, extending the '*Courage* doctrine' to Art. 56 TFEU, was 'far from convincing'.[41] It can indeed be debated whether the Swedish court was mistaken in its view that the liability of private parties for breaches of EU law enjoys the status of 'general principle of EU law'. I will not engage in that discussion here.[42] The point I would like to make is that another principle exists within EU law, the validity of which cannot be called into question – and that is the principle of effectiveness. It has been shown in the preceding paragraph how the principle of effectiveness in the sense of 'effective judicial protection' implies that a private party that suffered damages as a result of another party's failure to comply with a provision of EU law with direct horizontal effect must be entitled to claim compensation from the latter. This author would thus argue that, regardless of whether the liability of private parties for breaches of EU law provisions of direct horizontal effect does or does not constitute 'general principle', the Swedish court's decision remains convincing in its substance, since the considerations made by the Court in *Courage* with regard to Art. 101 TFEU seem to apply with equal value to Art. 56 TFEU.[43]

To be sure, however, a number of reasons have been given in legal scholarship against the possibility of extending *Courage* outside the sphere of competition law. Leczykiewicz has, for instance, identified two. The first is that Art. 101 TFEU (like Art. 102 TFEU) is 'explicitly addressed' to private undertakings, whereas Arts. 18, 34, 45, 49, 56 and 157 TFEU are not; according to Leczykiewicz, the imposition of non-contractual liability on private parties for breaches of provisions of EU law which are not 'explicitly addressed' to them would bring about an unjustified intrusion on their private autonomy.[44] The second is that 'the level of unification of remedial and procedural law should reflect the level of substantive integration in a particular field, partially informed by the extent of the Commun-

35. Pretore di Bolzano 29.5.2001 no. 226. To the author's knowledge, the judgment of the Bolzano District Magistrates' Court has not been published in any journal or case law report. Parts of the judgment of the Italian Cassation Court in this case (Corte di Cassazione (Sez. Lavoro) 11.10.2004 no. 20116) are published in English translation and commented on in R.W.E. van Leuken, B. de Clavière, J.-S. Bergé, and O. Remien, 'Fundamental Freedoms: TFEU Provisions on Free Movement', in A.S. Hartkamp, C.H. Sieburgh, and W. Devroe (Eds.), *Cases, Materials and Text on European Law and Private Law (Ius Commune Casebooks for the Common Law of Europe),* Oxford, Hart Publishing, 2017, p. 169, pp. 186-9.
36. *Angonese* (n. 27), para. 36.
37. *Ibid.*, para. 45.
38. Arbetsdomstolen 2.12.2009 no. 89/09. An English translation of the judgment by L Carlson was published in M. Rönnmar (Ed.), *Labour Law, Fundamental Rights and Social Europe*, Oxford, Hart Publishing, 2011, p. 227.
39. See *Laval un Partneri* (n. 29), para. 111.
40. Arbetsdomstolen 2.12.2009 no. 89/09 (n. 38) 248-9.
41. See Malmberg (n. 34), especially pp. 9-11.
42. On the point, see further Leczykiewicz (n. 19).
43. In the same sense, see Bernitz and Reich (n. 33), especially p. 622.
44. Leczykiewicz (n. 19), pp. 275-6.

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ity competence'.[45] Accordingly, in the opinion of Leczykiewicz, the legislative or judicial harmonization of remedies is easily justified in the area of competition law, where the Union has an exclusive competence,[46] but would be less easily justified in areas such as the regulation of the internal market or the development of social policy, where the Union only enjoys a shared competence with the Member States.[47] While these considerations undoubtedly carry some weight, they are – it seems to this author – overweighed by the need to ensure the effectiveness of the various provisions of the Treaty that have been given direct horizontal effect and by the need to guarantee the effective judicial protection of the rights that private parties derive therefrom.

In any event, the fact remains that the Court in *Courage* and its progeny referred exclusively to Art. 101(1) TFEU, and did not in any way indicate that the breach by a private party of other provisions of EU law should result in the latter's liability in tort.[48] Whether the principles established in *Courage* can be extended beyond the sphere of Art. 101(1) should be for the Court of Justice to clarify. The Swedish Labour Court can thus be criticized for deciding on the issue of damages in *Laval* without seeking a preliminary ruling from the Court of Justice – all the more so considering that the Swedish court was acting in this case as a judge of last instance and that, under the settled case law of the Court of Justice, judges of last instance are exempted from the obligation to request a preliminary ruling on the interpretation of EU law only if the point of law at issue is 'so obvious as to leave no scope for any reasonable doubt'.[49]

According to the view defended here, it can be reasonably inferred – more than that, *logically* inferred – from *Courage* that private parties are entitled to bring a claim against one another for damages caused by breaches of provisions of EU law with direct horizontal effect. However, it certainly cannot be said that that the ruling in *Courage* makes this clear beyond 'any reasonable doubt'. It can thus be hoped and expected that, the next time the question will emerge before national courts whether private parties may be held liable in damages for the breach of a provision of EU law with direct horizontal effect other than Art. 101(1) TFEU, this will be referred to the Court through the preliminary ruling procedure.

As a conclusion to this section, it should be noted that that catalogue of provisions of EU law producing direct horizontal effect appears to be expanding. In three recent judgments, the Court of Justice has indicated, albeit *obiter* and in not unequivocal terms, that certain provisions of the Charter of Fundamental Rights create rights and obligations between private parties. Referring to its case law on the direct horizontal effect of Arts. 157, 45, 18 and 49 TFEU, the Court held in *Egenberger* that Art. 21 of the Charter prohibiting discrimination on various grounds including religion also applies to 'discrimination deriv[ing] from contracts between individuals'.[50] The statement, which was later repeated in *Cresco*,[51] was read by some authors as indicating that Art. 21 of the Charter imposes obligations on individuals.[52] In *Bauer*, the Court gave an even stronger indication about the direct horizontal effect of Art. 31(2) of the Charter, holding that 'the *right* of every worker to paid annual leave entails, by its very nature, a corresponding *obligation* on the employer, which is to grant such periods of paid leave'.[53] These statements remain, in any event, *obiter dicta* and should therefore be approached with caution. It will be for the Court in the future to clarify whether it effectively intended to interpret these provisions (or other provisions of the EU Charter) as imposing obligations on private parties and, eventually, whether the breach of those obligations by private parties entails their liability in tort.

4 'Crehan and the way ahead'[54] – the constitutive conditions for liability of private parties for breaches of EU law

Since the 2001 judgment in *Courage*, it is clear that private parties are liable to compensate for the damages caused by a breach of Art. 101(1) TFEU. Almost eighteen years after that judgment was rendered, on the other hand, considerable uncertainty remains regarding the material conditions for that liability to arise.

The Court ruled already in *Courage* that actions for compensation of loss resulting from anti-competitive behaviour of private parties (as all remedies for the enforcement of rights originating in EU law) fall under the principle of national 'procedural competence', which is limited by the requirements of

45. *Ibid.*, 279; see M. Dougan, 'Enforcing the Single Market: The Judicial Harmonisation of National Remedies and Procedural Rules', in C. Barnard and J. Scott (Eds.), *The Law of the Single European Market: Unpacking the Premises*, Oxford, Hart Publishing, 2002, p. 153, pp. 159-61.
46. Art. 3(1) TFEU.
47. Art. 4(2) TFEU; see Leczykiewicz (n. 19), pp. 279-80.
48. See *ibid.*, pp. 260-1.
49. See Case C-283/81 *CILFIT* [1982] ECR 3415, para. 16; Malmberg (n. 34), p. 11; Bernitz and Reich (n. 33), p. 605. The same criticism should be levelled against the judgment of the Bolzano District Magistrate's Court, which also decided in *Angonese* to award damages without seeking guidance from the Court. As noted by Van Gerven, the fact that the Italian judge did not refer to the Court the question whether the defendant in that case had to compensate the claimant for the loss of a chance he had suffered due to a breach of Art. 45 TFEU is all the more regrettable, since 'loss of a chance is a head of damage which is not treated in a uniform way (if accepted at all) in the Member State tort laws'. See Van Gerven (n. 24), p. 271.
50. Case C-414/16 *Egenberger* ECLI:EU:C:2018:257, para. 77.
51. Case C-193/17 *Cresco* ECLI:EU:C:2019:43, para. 77.
52. See *e.g.* A.S. Hartkamp, 'Rechtstreekse doorwerking van het EU Handvest van de grondrechten in privaatrechtelijke rechtsverhoudingen', (2019) 31 *Ars Aequi*, p. 218, p. 224 (especially footnote 19).
53. Joined Cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871, para. 90 (emphasis added).
54. See *supra*, n. 23.

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'equivalence' and 'effectiveness'.[55] This means that, in the absence of uniform EU rules, Member States are free to 'designate the courts and the tribunals' competent to hear those actions 'and to lay down the detailed procedural rules' governing the latter, on the condition that these rules 'are not less favourable than those governing similar domestic actions' and that they are not such as to render 'impossible or excessively difficult' the enforcement of EU rights.[56] At first glance, this statement would seem to indicate that the conditions for '*Courage* liability' to occur are primarily for Member States law to determine, subject to the requirements of 'equivalence' and 'effectiveness'. However, some authors have taken an alternative view.

In a seminal and celebrated paper published before *Courage*, Van Gerven has argued that, notwithstanding the principle of national procedural competence, the constitutive conditions of remedies intended to make good infringements of rights conferred by EU law should be established in a uniform manner by the EU legislature or by the Court of Justice.[57] The reasoning behind this assertion is that, since rights and remedies are inseparably linked ('*ubi ius, ibi remedium*'), and since EU rights should have a uniform content across the Union, the constitutive conditions of remedies for breaches of EU rights should be set out uniformly at the Union level.[58]

In line with this, after *Courage* was rendered, Van Gerven argued that the conditions for '*Courage* liability' to arise had to be laid down drawing inspiration from the case law on the 'vertical' liability of Member States and EU institutions for breaches of EU law.[59] According to that case law, the liability of Member States and EU institutions is subject to three constitutive conditions: *i)* firstly, the provision of EU law that is breached must be 'intended to confer rights on individuals'; *ii)* secondly, the breach must be 'sufficiently serious'; *iii)* thirdly, there must be a 'direct causal link' between the breach of the provision of EU law and the damage sustained by the claimant.[60]

The case law after *Courage* does not reveal a clear stance of the Court on the point. In paragraph 61 of *Manfredi*, it was held that 'any individual can claim compensation for the harm suffered where there is a *causal relationship* between that harm and an agreement or practice prohibited under [Art. 101 TFEU]'.[61] There, the Court appeared willing to take on the task to define the conditions for '*Courage* liability' to arise, and seemed to indicate that one of those conditions was the existence of a direct causal link between the harm and the breach of Art. 101(1) TFEU.[62] Only three paragraphs later, however, the Court added that (absent uniform EU rules and subject to equivalence and effectiveness) 'it is for the legal system of each Member States to prescribe the detailed rules' governing *Courage*-type compensation claims, "including those on the application of the concept of 'causal relationship'".[63] This was later repeated in *Kone*.[64]

In the absence of a clear pronouncement by the Court on whether the constitutive conditions of '*Courage* liability' fall within the procedural competence of the Member States or whether they rather constitute a matter covered by EU law, different opinions have surfaced in legal scholarship. Even authors who agree that those conditions should be defined by the EU legislature or by the Court in a uniform manner do not agree on whether they should be mutuated by the case law on the 'vertical' liability of EU institutions and of Member States, as laid down respectively in Art. 340 TFEU and in the *Francovich* ruling.[65]

A key point of debate concerns the requirement of 'sufficiently serious' breach. Reich has for instance argued that the 'sufficiently serious' character of the breach should also constitute a condition for the 'horizontal' liability of private parties, and observed that the case law of the Court on the 'vertical' liability of Member States and EU institutions – which provides in essence that a 'sufficiently serious breach' occurs where Member States or EU institutions infringe an obligation with respect to which they had no or limited discretion[66] – 'should be taken over by analogy to cases' concerning 'horizontal' liability.[67] On the contrary, Sieburgh considers that, since the requirement of a 'sufficiently serious breach' relates to the discretion which EU institutions or Member States enjoy, it cannot apply to the liability of private parties. In the case of private parties, she argued, there is simply no discretion and the requirement of 'sufficiently serious breach' does not apply here.[68]

In sum, one can only hope that the degree of uncertainty surrounding the material conditions for '*Courage* liability' to arise

55. On the 'procedural competence' of the Member States and on its limits, see among many others W. Van Gerven, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, p. 501. On the relationship between 'effectiveness' as a limit to the competence of Member States in procedural matters and 'effectiveness' as the requirement to grant 'effective judicial protection' to the rights which individuals derive from EU law, which was repeatedly referred to above, see among others A. Prechal and R.J.G.M. Widdershoven, 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection', (2011) 4 *Review of European Administrative Law*, p. 31.
56. See *e.g. Courage* (n. 1), para. 29.
57. Van Gerven (n. 55).
58. See *ibid.*, especially pp. 525-6.
59. Van Gerven (n. 24), p. 272.
60. See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, para. 51 (where the Court set out those conditions with regard to Member States' liability) and para. 42 (where the Court stated that, 'in the absence of particular justification', the conditions under which EU Institutions incur liability for breaches of EU law cannot differ from those governing Member States' liability).
61. *Manfredi* (n. 18), para. 61 (emphasis added).
62. See Sieburgh (n. 2), p. 527.
63. *Manfredi* (n. 18), para. 61.
64. See *Kone* (n. 18), para 24.
65. Case C-6/90 *Francovich* [1991] ECR I-5357.
66. See *e.g. Brasserie du Pêcheur* (n. 60), paras. 55-56.
67. See Reich (n. 9), pp. 713-5.
68. See Sieburgh (n. 2), p. 529.

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will diminish in the future. Here, an important occasion was missed with the enactment of Directive 2014/104/EU 'on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union'.[69] The Directive sought to harmonize various procedural aspects of actions for compensation of damages caused by breaches of Arts. 101 and 102 TFEU committed by undertakings. Quite surprisingly, however, it did not deal with the constitutive elements of the non-contractual liability from which those actions arise and rather left 'considerable discretion for national law as regards the required causal link'.[70]

5 Conclusion

In *Courage*, the Court held that private parties are entitled to claim compensation from other private parties for damages resulting from a failure by the latter to comply with Art. 101(1) TFEU. This development should not have come as unexpected, since it constitutes the logical conclusion of the direct horizontal effect of Art. 101(1) TFEU. The reasonable consequence of this seems to be that the breach by private parties of other provisions of EU law with direct horizontal effect should also result in their liability in tort. This has yet to be confirmed by the Court. In the near future, the Court will be under pressure to clarify whether the provisions of the EU Charter of Fundamental Rights have direct horizontal effect, as the recent judgments in *Egenberger, Cresco* and *Bauer* appear to suggest. Another point which the Court will have to decide upon is whether the conditions for '*Courage* liability' to occur lie within the procedural competence of the Member States or rather constitute a matter for EU law. In the latter case, the Court will also have to indicate whether these conditions coincide or not with those it set out for liability of Member States and EU institutions.

69. OJ L 349, 5.12.2014, 1.
70. W. Devroe, C.A.N.M.Y. Cauffman, and U. Bernitz, 'Competition Law', in A.S. Hartkamp, C.H. Sieburgh, and W. Devroe (Eds.), *Cases, Materials and Text on European Law and Private Law (Ius Commune Casebooks for the Common Law of Europe)*,Oxford, Hart Publishing, 2017, p. 23, p. 108.