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**Striking a Balance of Power Between  
the Court of Justice and the EU Legislature:  
The Law on Competition Damages Actions as a Paradigm**

Jens-Uwe Franck<sup>1</sup>

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<sup>1</sup> Professor of Law, University of Mannheim and MaCCI

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# Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm

Jens-Uwe Franck\*

*University of Mannheim and MaCCI<sup>+</sup>*

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## Abstract

*The framework of EU law on cartel damages actions consists in part of rules established by the ECJ based on arts 101 and 102 TFEU in conjunction with the principle of effectiveness. These rules are an integral part of EU primary law. The notion of institutional balance, however, requires the Court to consider its own inherent limits on democratic legitimacy, accountability and expertise. In particular, the Court has to ensure that adequate scope remains for the EU legislature to exercise its legislative power pursuant to art.103 TFEU. It is argued that the ECJ has disregarded these restrictions and overstretched the principle of effectiveness—for instance, in its adjudication on liability for umbrella pricing and on access to leniency files, respectively. Consequently, the EU legislature must not consider itself bound by these standards.*

## Introduction

For a long time, European law did not contain any provision that dealt explicitly with competition damages actions, and the European Court of Justice (ECJ) did not go beyond asserting that competition law rules “create direct rights in respect of the individuals concerned, which the national courts must safeguard”.<sup>1</sup> This has changed dramatically since the ECJ’s seminal judgment in *Courage v Crehan*.<sup>2</sup> The case marked the starting point for a line of judgments on damages for breach of the EU competition rules. Shortly afterwards, the European Commission initiated a legislative process

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<sup>1</sup> *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* (C-127/73) EU:C:1974:6; [1974] 2 C.M.L.R. 238 at [16].

<sup>2</sup> *Courage Ltd v Crehan and Crehan v Courage Ltd* (C-453/99) EU:C:2001:465; [2001] 5 C.M.L.R. 28.

that resulted in Directive 2014/104, which harmonises essential elements of Member States' laws on competition damages actions.<sup>3</sup>

Therefore, rules now exist, both at the level of the Member States and at that of the Union, that in each case apply both to the infringement of EU competition law and to the competition law of the Member States. Such a regulatory framework, consisting of overlapping and divergent rules established by the Union and the Member States, nowadays seems to be almost the usual case in the internal market. Yet the EU law on actions for competition damages are horizontally and vertically fragmented, too, as they have been established, on the one hand, by the EU legislature at the level of secondary legislation and, on the other, by the ECJ, based on arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) in conjunction with the principle of effectiveness.

This article analyses conflicts that follow therefrom for the inter-institutional balance of power within the EU. The focus, thus lies on an aspect that has not only been largely ignored in the debate on EU competition damages law, but that goes far beyond the question of how certain inconsistencies between the Court's adjudication and the Directive on Actions for Competition Damages have to be resolved. The reference to "institutional balance" as a constitutional concept of EU law is most often made to assess the shape of the triangle consisting of Parliament, Council and Commission, and to explain how the Court's adjudication<sup>4</sup> has influenced the balance of power among these institutions.<sup>5</sup> By contrast, the EU law on cartel damages actions provides us with an illuminating case study on tensions between the Court and the legislative institutions of the Union. While the academic debate appears to be less focused on this facet of institutional balance,<sup>6</sup> the proper separation of judicial and legislative functions is no less important in respect of the democratic legitimacy and accountability of European law making.

In the following sections, this analysis will be presented in four steps. First, while the rise of private enforcement of competition law in the aftermath of *Courage v Crehan* is a narrative that has often been told, there is still considerable uncertainty about the normative nature of the ECJ's statements. Thus, this first section contains a methodological reconstruction of the Court's reasoning. This analysis will clarify that the Court builds its case law in part on an *effet-utile* interpretation of art.101 TFEU and in part on an application of the principle of effectiveness à la *Rewe* and *San Giorgio*. While

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<sup>3</sup> Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1 (hereinafter referred to as "the Directive" or "the Directive on Actions for Competition Damages").

<sup>4</sup> See, e.g., on the question whether the European Parliament had a right to bring an action for annulment against acts of the Council or the Commission *European Parliament v Council of the European Communities (Chernobyl)* (C-70/88) EU:C:1990:217; [1992] 1 C.M.L.R. 91.

<sup>5</sup> Good examples of this are J.-P. Jacqu , "The Principle of Institutional Balance" (2004) 41 C.M.L. Rev. 383–391; and K. Lenaerts and A. Verhoeven, "Institutional balance as a guarantee for democracy in EU governance" in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002), pp.49–88.

<sup>6</sup> But see A. Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev. 361; P. Syrpis, "Theorising the relationship between the judiciary and the legislature in the EU internal market" in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2012), p.3; P. Syrpis, "The Relationship Between Primary and Secondary Law in the EU" (2015) 52 C.M.L. Rev. 461. See also K. Lenaerts, "The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice" in M. Adams, H. de Waele, J. Meeusen and G. Staetmans (eds), *Judging Europe's Judges* (Oxford: Hart, 2013), pp.17–29 (defending the Court's adjudication under the rubric "external legitimacy") and J.H.H. Weiler's reply in the same volume: "Epilogue: Judging the Judges—Apology and Critique", pp.240–246.

these lines of reasoning cannot always be distinguished precisely, it can be established that the standards that the Court specifies must be regarded as an integral part of EU primary law.

For the second part, it will be posited that art.103 TFEU confers on the Council the power to adopt measures in regard to the private law consequences of infringements of arts 101 and 102 TFEU. We will see that the EU legislature has used this competence to some degree already, in the context of Regulation 1/2003, and then, of course, by adopting the Directive on Competition Damages Actions.

To the extent to which rules set by the EU legislature at the level of secondary legislation conflict with statements of the ECJ that are based on arts 101 and 102 TFEU, in conjunction with the principle of effectiveness, the statements of the ECJ do not necessarily prevail. As will be demonstrated in the third part, the notion of institutional balance requires the Court to consider its own inherent limits in terms of democratic legitimacy, accountability and expertise, and, more particularly, its responsibility to ensure that adequate scope remains for the EU legislature to exercise its legislative power pursuant to art.103 TFEU. The Court has to take that into account by exercising only a restricted judicial review when applying arts 101 and 102 TFEU in conjunction with the principle of effectiveness.

Finally, in the fourth part, we will look into the conclusions that can be drawn from the above in regard to the topical institutional clash over access to leniency documents and their admissibility as evidence. It will be argued that the Court inappropriately interfered with the legislature's power in stipulating that conflicting interests have to be weighed up on a case-by-case basis and in regard to each document to which access is refused. In particular, if the assumption is correct that it is only in very rare cases that injured parties have no alternative means available to substantiate their claim for damages, it is within the legislature's discretion to exclude altogether access to leniency material and its admissibility as evidence.

### **EU primary law in the aftermath of *Courage v Crehan*: on the *effet utile* of the EU competition rules and the principle of effectiveness à la *Rewe***

While it was, at least practically, for many years only the Member States that determined the rules for competition damages, this has changed, starting with the ECJ's judgment in *Courage v Crehan*. Since then, the ECJ has repeatedly seized the opportunity to establish rules with regard to damages actions for breach of EU competition law, which, as we will see, must be considered an integral part of EU primary law.

#### *Courage v Crehan: breach of competition law as a shield and as a sword in private litigation*

The circumstances of the *Courage v Crehan* saga are well known. A brewery (*Courage*), which possessed a large number of public houses through a shareholding, brought an action against one of its tenants (*Crehan*) because of outstanding payments. The tenant objected by stating that the exclusive purchase obligation contained in the lease agreement infringed art.101 TFEU. By way of a

counterclaim, the tenant claimed damages,<sup>7</sup> because the brewery had supplied independent tenants of public houses at lower prices.

Therefore, the defendant sought to employ competition law both as a “shield” and as a “sword”, to use a common metaphor. The Court of Appeal presumed that he was not entitled to the latter because, pursuant to English law, the defence of “unclean hands” applied: a party may not rely on its own illegal conduct in order to substantiate a claim for damages. Furthermore, the court presumed that art.101 TFEU is intended to protect third parties, competitors or consumers, but not the parties to an agreement that (pursuant to competition law) is illegal.<sup>8</sup> Therefore, the Court of Appeal referred to the ECJ the question whether it was consistent with Community law to deny *Crehan* a claim for damages.

#### *A right to damages established on the basis of an effet utile interpretation of art.101 TFEU*

The ECJ used the preliminary reference to establish new rules with regard to actions for damages for breach of competition law. The Court referred to *Van Gend en Loos*<sup>9</sup> in order to emphasise that “not only the Member States but also their nationals” are “subjects” of EU law. Rights for the benefit of individuals could arise not only out of express provisions but also, as a supplementing equivalent, out of the obligations that Community law imposes on individual market operators.<sup>10</sup> The ECJ affirmed that art.101 TFEU produces “direct effects in relations between individuals and create[s] rights for the individuals concerned which the national courts must safeguard”.<sup>11</sup>

The Court continued to explain that these rights of individual market participants, which have to be derived from art.101 TFEU—namely, not to have to suffer disadvantages due to infringements of EU competition law—had to be protected effectively by the courts of the Member States.<sup>12</sup> This is followed by the most frequently quoted sentence of EU competition damages law:

“The full effectiveness of Article 85 of the Treaty [now art.101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”<sup>13</sup>

With this statement, the Court clarified that art.101 TFEU contains an implicit right for persons affected by a breach of competition law to claim damages from the infringer. Thus, the Court follows a long line of case law from *Francovich*<sup>14</sup> back to *Van Gend en Loos*<sup>15</sup> as it derives individual rights from the Treaties in order thereby to supervise the implementation and effective enforcement of EU law.

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<sup>7</sup> There remained some uncertainty as to whether this was a claim in tort or in restitution: see A.P. 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, 461–462.

<sup>8</sup> Cf. *Courage v Crehan* (C-453/99) EU:C:2001:465 at [11]–[12].

<sup>9</sup> *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (C-26/62) EU:C:1963:1; [1964] C.M.L.R. 423 at [12].

<sup>10</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [19].

<sup>11</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [23] (references omitted).

<sup>12</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [25].

<sup>13</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [26].

<sup>14</sup> *Francovich and Bonifaci v Italian Republic* (C-6/90) EU:C:1991:428 [1993] 2 C.M.L.R. 66 at [31].

<sup>15</sup> *Van Gend en Loos* (C-26/62) EU:C:1963:1 at [12].

In this respect, the principle of effectiveness serves as a rule of interpretation for primary law. The (positive) statement, pursuant to which “any individual” shall be entitled to claim damages from a cartel, therefore holds the rank of primary law.

*The principle of effectiveness à la Rewe and San Giorgio as the source of a minimum standard for national remedies*

While the ECJ in *Courage v Crehan* established a right to damages, it remains a matter of national law to provide an appropriate cause of action.<sup>16</sup> In its subsequent case law, and in particular in its *Kone* judgment, the Court made it clear that it would not define positively the pertinent conditions of this remedy. Rather, the Court contented itself with a negative approach, i.e. with verifying whether conditions under national law infringe the principles of equivalence and effectiveness.

In *Kone*, the Court had to judge whether cartellists should be liable for losses resulting from umbrella pricing, i.e. whether they should also have to compensate those who have not purchased from the cartel but from its competitors who had raised their prices in reaction to the cartel-induced price increase in the market.<sup>17</sup> Advocate General Kokott suggested that the Court should answer questions that concern “the *existence* of claims to compensation (i.e. the question *whether* compensation is to be granted)” directly, based on art.101 TFEU and not by reference to the principle of effectiveness.<sup>18</sup> She proposed that, in order to establish detailed conditions for such a remedy, the Court should rely on the principles of the non-contractual liability of EU institutions under art.340(2) TFEU,<sup>19</sup> on the common principles of the national systems of civil law as embodied in the Draft Common Frame of Reference<sup>20</sup> and on the jurisprudence of the highest courts of the Member States.<sup>21</sup> The ECJ did not follow that suggestion but instead argued that

“[i]n the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed”.<sup>22</sup>

If contrasted with the position of the Advocate General, it becomes apparent that, although the ECJ—fully consistent with *Courage v Crehan*—derives from art.101 TFEU a right to damages for parties suffering damage due to a cartel, the Court does not, however, derive therefrom the conditions of such a claim in detail, as

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<sup>16</sup> See, e.g., A.P. 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, 480. In cases commenced in the High Court of England and Wales or the Competition Appeal Tribunal, the cause of action is generally based on the tort of breach of statutory duty: see R. Whish and D. Bailey, *Competition Law*, 8th edn (Oxford: OUP, 2015), p.331.

<sup>17</sup> *Kone AG v ÖBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2006] 5 C.M.L.R. 17. Among other commentaries, see, in particular, N. Dunne, “It never rains but it pours? Liability for umbrella effect in EU competition law after *Kone*” (2014) 51 C.M.L. Rev. 1813; G. Monti, “Umbrella pricing as a sword” (2014) 21 M.J. 464.

<sup>18</sup> *Kone* (C-557/12) EU:C:2014:45 at [21]–[30], in particular at [23].

<sup>19</sup> *Kone* (C-557/12) EU:C:2014:45 at [34].

<sup>20</sup> *Kone* (C-557/12) EU:C:2014:45 at [35] with fn.24.

<sup>21</sup> *Kone* (C-557/12) EU:C:2014:45 at [38] with fn.28.

<sup>22</sup> *Kone* (C-557/12) EU:C:2014:1317 at [24] (reference omitted).

“in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)”.<sup>23</sup>

The principles of equivalence and effectiveness as restrictions on Member States’ regulatory leeway are based on the (general) duty of loyalty pursuant to art.4(3) of the Treaty on European Union (TEU). According to the passage quoted above, these restrictions apply with regard to Member States’ “procedural rules”. This includes not only provisions on jurisdiction, time-limits, the furnishing of proof etc., but also the substantive requirements for a claim for damages. For example, in *Manfredi* the Court declared that it was for the law of the Member State to define the concept of “causal relationship” between the infringement of competition law and the damage suffered, “provided that the principles of equivalence and effectiveness are observed”.<sup>24</sup> By means of the term “procedural rules” in the citation above, the Court thus embraces all provisions, whether of procedural or substantive nature, which have an impact on the effectiveness of the private enforcement of EU competition law.

The principle of effectiveness as invoked in *Courage v Crehan* can be traced back to the *Rewe* judgment, in which the Court stated that national cut-off periods for legal actions must not render it “impossible in practice to exercise the rights which the national courts are obliged to protect”.<sup>25</sup> The supplementary statement, pursuant to which also those provisions are inconsistent with EU law, which makes it “excessively difficult” to enforce Community law rights, was added by the Court in the *San Giorgio* case that involved requirements of proof applicable to the repayment of charges levied contrary to Community law.<sup>26</sup>

Today, the Court still adheres to this standard.<sup>27</sup> In particular, in *Donau Chemie*, the Court did not follow a suggestion by Advocate General Jääskinen, in light of art.19(1) TEU, to replace this formula with a “more demanding” standard.<sup>28</sup> Instead, it examined national measures that are relevant to the exercise of rights established under EU law, based on two separate yardsticks<sup>29</sup>: one based on the principle of effectiveness, as defined in *Rewe* and *San Giorgio*, and the other on the principle of effective judicial protection, as established in the case law starting from *Johnston*<sup>30</sup> and now enshrined in art.47 of the EU Charter of Fundamental Rights and art.19(1) TEU.

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<sup>23</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [29] (reference omitted).

<sup>24</sup> *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) EU:C:2006:46; [2006] 5 C.M.L.R. 17 1 at [63]–[64].

<sup>25</sup> *Rew-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (C-33/76) EU:C:1976:188; [1977] 1 C.M.L.R. 533 at [5].

<sup>26</sup> *Amministrazione delle finanze dello Stato v San Giorgio* (C-199/82) EU:C:1983:318; [1985] 2 C.M.L.R. 658 at [14].

<sup>27</sup> See J.-U. Franck, “Rights, remedies and effective enforcement in air transportation: *Ruijsenaars*” (2017) 54 C.M.L. Rev. 1867, 1876–1878.

<sup>28</sup> *Donau Chemie* (C-536/11) EU:C:2013:67 at [47].

<sup>29</sup> *Alasini v Telecom Italia SpA* (C-317/08) EU:C:2010:146; [2010] 3 C.M.L.R. 17 at [47]–[60] (principle of effectiveness à la *Rewe* and *San Giorgio*) and at [61]–[66] (principle of effective judicial protection).

<sup>30</sup> *Johnston v Chief Constable of the Royal Ulster Constabulary* (C-222/84) EU:C:1986:206; [1986] 3 C.M.L.R. 240 at [18]–[19].

*The minimum standards à la Courage as an integral part of EU primary law*

The minimum standards for actions for competition damages formulated by the ECJ in *Courage v Crehan* and the subsequent case law are rules of primary law. Therefore, at least as a matter of principle, they bind not only the Member States but also the EU legislature. This follows from the primary-law rank of the competition law rules: the fact that a breach of art.101 TFEU must trigger liability for damages follows from an *effet-utile* interpretation of EU competition law. Yet, if the jurisprudence has created an implicit right for damages that forms an integral part of primary law, than it stands to reason that the minimum standards required in order to guarantee its effective assertion must also be of primary law rank.<sup>31</sup> Otherwise, there would remain the possibility that the EU legislature could undermine the effectiveness of a rule laid down in the Treaties, which is precisely the type of risk that should be excluded by enshrining certain rules in those Treaties.

The Court's statements in *Courage* and the subsequent case law do not conflict with this interpretation. It is true that the Court usually states that the standards it derives from the principle of effectiveness establish requirements for "the domestic legal system of each Member State", which applies "in the absence of Community rules governing the matter".<sup>32</sup> Yet the obvious reason for the latter proviso is that in each case the Court was called upon to rule only on the conformity of national law with art.101 TFEU and the principle of effectiveness. Thus, by stressing that it assesses domestic law in an area that is not governed by (secondary) EU legislation, the Court did not rule out that the same standard would apply if the matter were actually to be governed by (secondary) Community rules—such as the Directive on Competition Damages Actions. As a matter of fact, this is very much in line with the Court's rhetoric on the scope of the fundamental freedoms: while the Court regularly states that it will not assess national measures in the light of the fundamental freedoms "in an area which has been the subject of exhaustive harmonisation at Community level",<sup>33</sup> this does not, however, prevent it from applying the fundamental freedoms "also to measures adopted by the Community institutions".<sup>34</sup>

Furthermore, it should be noted that the Court does not distinguish between whether it derives a standard from an *effet-utile* interpretation of art.101 TFEU or bases its statements on the principle of effectiveness à la *Rewe*. This becomes clear, for example, in *Kone*, in which the Court, first of all, repeats that the principles of equivalence and effectiveness mark the limits of Member State leeway with regard to designing the right to competition damages. The Court then summarises its adjudication by stating that

“[t]he full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link”.<sup>35</sup>

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<sup>31</sup> See W. Wurmnest and C. Heinze, "General Principles of Tort Law in the Jurisprudence of the European Court of Justice" in R. Schulze (ed.), *Compensation of Private Losses* (Munich: Sellier, 2011), p.45.

<sup>32</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [29].

<sup>33</sup> *Gysbrechts and Santurel Inter BVBA* (C-205/07) EU:C:2008:730; [2009] 2 C.M.L.R. 2 at [33].

<sup>34</sup> *Meyhui NV v Schott Zwiesel Glaswerke AG* (C-51/93) EU:C:1994:312 at [11].

<sup>35</sup> *Kone* (C-557/12) EU:C:2014:1317 at [33].

It is remarkable that the ECJ does not rely on *Rewe* effectiveness to reason that a complete exclusion of liability for indirectly caused damage is not acceptable under Community law. Rather, the Court resorts to the “full effectiveness” of art.101 TFEU and, thus, applies an *effet-utile* interpretation of art.101 TFEU. The ease with which the Court uses this approach (at least rhetorically) in order to justify a result that it achieves essentially by way of subsumption under the principle of effectiveness indicates that it makes no difference to it which line of justification a statement is ultimately based upon. Therefore, given that there can be no doubt that an *effet-utile* interpretation of art.101 TFEU generates statements of primary-law rank, it must be assumed that, in the Court's view, the same applies to such minimum standards as are derived from the principle of effectiveness.

## Secondary legislation on damages actions for breach of arts 101 and 102 TFEU

### *The legislative power of the EU institutions pursuant to art.103 TFEU*

Article 103(1) TFEU confers upon the Council power to adopt measures to implement arts 101 and 102 TFEU. It can, however, only legislate on a proposal from the Commission and after consulting the European Parliament. The non-exhaustive list of potential measures contained in art.103(2) TFEU refers only to measures of public enforcement<sup>36</sup> and measures aimed at clarifying issues of substantive competition law.<sup>37</sup> Therefore, art.101(2) TFEU, which provides that “any agreements or decisions prohibited pursuant to this Article shall be automatically void”, contains indeed the only explicit reference to private enforcement. As the Treaty thus remains silent on other aspects of private enforcement, it has been suggested that it was beyond the Union legislature's powers to introduce or flesh out the different types of active private enforcement such as actions for damages or injunctive relief.<sup>38</sup>

However, such a restrictive reading of art.103 TFEU neglects the fact that the Treaties allocate competences in a “functional” manner: the EU legislature must be able to implement effectively the objectives and policy goals embodied in the Treaties.<sup>39</sup> The Court has recognised that, for example, the competence in fostering the integration of the internal market pursuant to art.114 TFEU not only allows for harmonisation of substantive law but also permits the adoption of rules for the enforcement of internal market legislation. Accordingly, it is within the realm of the EU legislature's competence pursuant to art.103(1) TFEU to “give effect to the principles set out in Articles 101 and 102” TFEU

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<sup>36</sup> Article 103(2) (a) and (d) TFEU.

<sup>37</sup> Article 103(2) (b), (c) and (e) TFEU.

<sup>38</sup> See, e.g., E.J. Mestmäcker, *Europäisches Wettbewerbsrecht* (Munich: C. H. Beck, 1974), p.568; C. Jung, in C. Calliess and M. Ruffert (eds), *EUV/AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, 5th edn (Munich: C. H. Beck, 2016), on art.103 para.23 (“Art.103 enthält weder eine Ermächtigung zum Erlass von Strafvorschriften noch für die Schaffung zivilrechtlicher Rechtsfolgen über Art.101 Abs. 2 hinaus.” [“Art.103 TFEU contains neither the power to adopt criminal sanctions nor to regulate civil law consequences beyond art.101(2) TFEU.”]).

<sup>39</sup> See, in regard to the Union's power to harmonise national legislation under art.114 TFEU, for example, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (C-66/04) EU:C:2005:743; [2006] 2 C.M.L.R. 1 at [45] (“Next, it should be observed that by the expression ‘measures for the approximation’ in Article 95 EC [now art.114 TFEU] the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields which are characterised by complex technical features.”); *Federal Republic of Germany v Council of the European Union* (C-359/92) EU:C:1994:306; [1995] 1 C.M.L.R. 413 at [37]; *United Kingdom v Parliament and Council* (C-217/04) EU:C:2006:279 at [44].

also by way of “appropriate” rules that foster private enforcement. This requirement of “appropriateness” should be understood as a reference to the principles of subsidiarity and proportionality as laid down in art.5(4) TEU. EU rules on actions for competition damages actions must, therefore, have a certain added value in terms of the practical effectiveness of EU competition law. Yet the ECJ grants the EU legislature a broad political margin of discretion in this respect. Only such measures as appear—viewed from an ex-ante perspective—to be “manifestly inappropriate” will not meet the standard of proportionality pursuant to art.5(4) TEU.<sup>40</sup>

### *Regulation 1/2003: initial steps to foster private enforcement*

At the turn of the millennium, the EU legislature envisaged a reform of the enforcement of EU competition law, which at that time was regarded as revolutionary.<sup>41</sup> Administrative enforcement was no longer to be monopolised in the hands of the Commission. Yet decentralised enforcement by Member State authorities was met with a fair amount of distrust. Against this background, *Courage v Crehan* came at a convenient time for the EU legislature.<sup>42</sup> The judgment highlighted that private enforcement could play a role in complementing public enforcement and, in particular, could function as a safety net in the event of public enforcement failing. Consequently, by adopting Regulation 1/2003,<sup>43</sup> the Commission not only introduced the powers of the national competition authorities to enforce arts 101 and 102 TFEU<sup>44</sup> but also emphasised the (existing<sup>45</sup>) power of Member States’ courts to apply EU competition law rules directly.<sup>46</sup> In that regard, Recital 7 of Regulation 1/2003 states that

“[n]ational courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States”.

In view of this envisaged complementary role of private enforcement, arts 15 and 16(1) of Regulation 1/2003 contain several provisions as to the relationship between administrative enforcement and application of the competition rules by the civil courts. For the EU legislature, it was of vital concern to secure the central role of the European Commission and the primacy of public enforcement. At the same time, however, these provisions also strengthened the role of private enforcement. This ambivalence becomes apparent, for example, in viewing the binding effect of adopted and contemplated decisions of the Commission as laid down in art.16(1) of Regulation 1/2003. This

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<sup>40</sup> See, in regard to the common agricultural policy: *H. Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (C-189/01) EU:C:2001:420 at [81]–[84].

<sup>41</sup> See A.P. 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 (“the most revolutionary project ... in the last decades”).

<sup>42</sup> See A.P. 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, 485 (“The importance of this ruling for the modernization plans of DG COMP is evident.”).

<sup>43</sup> Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L2003/1.

<sup>44</sup> Regulation 1/2003, art.5.

<sup>45</sup> However, the power of the courts had been extended insofar as it included the right to apply the exemption clause according to art.101(3) TFEU.

<sup>46</sup> Regulation 1/2003, art.6.

provision effectively codifies the *Masterfoods* adjudication of the Court.<sup>47</sup> First and foremost, this is aimed at guaranteeing legal certainty and a uniform application of EU competition rules.<sup>48</sup> At the same time, however, injured parties are relieved of the burden of proving infringement of arts 101 or 102 TFEU before national courts in cases in which the Commission has already rendered a decision to that effect. Thus, the provision facilitates follow-on actions for competition damages.

*Directive 2014/104: harmonisation of essential aspects of competition damages law*

The Directive on Actions for Competition Damages resulted from a capricious and changeable legislative process the origins of which date back to the year 2004.<sup>49</sup> The Directive provides, inter alia, for prohibition of any kind of over-compensatory damages<sup>50</sup> and contains provisions on the disclosure of evidence and, in particular, on access to files of competition authorities,<sup>51</sup> the binding effect of decisions by national competition authorities,<sup>52</sup> limitation periods,<sup>53</sup> joint and several liability,<sup>54</sup> the availability of a passing-on defence and standing rights of indirect purchasers<sup>55</sup> along with some rules on the quantification of harm,<sup>56</sup> and the effects of consensual dispute resolution.<sup>57</sup> The Directive aims for full harmonisation of domestic law. This follows from the objective of fostering the proper functioning of the internal market by means of the approximation of laws.<sup>58</sup> More tellingly, this is also suggested by the fact that a few issues are explicitly harmonised only at a minimum level, with a noteworthy example being the rule that the limitation period for bringing actions must be “at least” five years.<sup>59</sup>

When the Directive was adopted, the EU legislature presumed, without much ado, to have the power to regulate actions for competition damages in the internal market.<sup>60</sup> It relied not only on art.103 TFEU but also on the internal market competence pursuant to art.114 TFEU, in affirming that

“[an] uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision

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<sup>47</sup> *Masterfoods Ltd v HB Ice Cream Ltd* (C-344/98) EU:C:2000:689; [2001] 4 C.M.L.R. 14 at [51]–[52].

<sup>48</sup> See Recital 22 of Regulation 1/2003 (“In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States.”).

<sup>49</sup> See the Ashurst study prepared by D. Waelbroeck, D. Slater, and G. Even-Shosham: *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report* (2004).

<sup>50</sup> Directive 2014/104, art.3(3).

<sup>51</sup> Directive 2014/104, arts 5–8.

<sup>52</sup> Directive 2014/104, art.9.

<sup>53</sup> Directive 2014/104, art.10.

<sup>54</sup> Directive 2014/104, art.11.

<sup>55</sup> Directive 2014/104, art.12.

<sup>56</sup> Directive 2014/104, art.17.

<sup>57</sup> Directive 2014/104, art.18.

<sup>58</sup> Directive 2014/104, Recitals 7–9.

<sup>59</sup> Directive 2014/104, art.10(3).

<sup>60</sup> See Directive 2014/104, Recital 8, and European Commission, Proposal for a Directive of the European Parliament and of the Council 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 COM(2013) 404 final, pp.8–10.

of goods or services in those Member States where the right to compensation is enforced more effectively”.<sup>61</sup>

Therefore, the EU legislature not only aims to facilitate the effective assertion of claims for damages in the interest of the injured parties; it also intends to ensure a level playing field for undertakings operating in the internal market. One important reason for pursuing this objective is that otherwise the Member States whose enforcement of competition law infringements is particularly effective might be at a disadvantage as regards its attractiveness for entrepreneurial investments relative to other Member States whose enforcement procedures are deficient.<sup>62</sup> This recourse to art.114 TFEU and to the concept of a level playing field as an essential objective in the harmonisation of competition damages law entails two important implications: first, it allows the EU legislature to harmonise liability for damages for infringements of national competition law,<sup>63</sup> and secondly, the joint legal basis requires the use of the ordinary legislative procedure instead of the special legislative procedure pursuant to art.103 TFEU, under which the European Parliament would merely have to be consulted. This extended involvement of the Parliament strengthens the legitimacy of the measure, and it seems reasonable to assume that this was also in the interest of the European Commission as the driving force behind the Directive.<sup>64</sup>

The Directive does not address a number of essential issues, such as collective redress,<sup>65</sup> culpability, imputability of damages that were caused indirectly,<sup>66</sup> and details of the concept of “relative responsibility”.<sup>67</sup> Thus, the regulatory power remains with the Member States, whose regulatory leeway is, however, restricted by the principles of equivalence and effectiveness.<sup>68</sup>

### **The concept of institutional balance as a safeguard for the EU legislature’s leeway against usurpation by the Court**

Given that the standards established by the Court in *Courage v Crehan* and in subsequent cases must be regarded as an integral part of primary law, and given that Directive 2014/104 holds the rank of secondary legislation, it seems obvious which set of rules will prevail in the event of a conflict. The hierarchy of norms upon which EU law is based<sup>69</sup> requires that the provisions of Directive 2014/104

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<sup>61</sup> See Directive 2014/104, Recital 8, 2nd sentence.

<sup>62</sup> See European Commission, Proposal for a Directive of the European Parliament and of the Council 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, COM (2013) 404 final, pp.9–10 (“Conversely, uneven enforcement is a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. The differences in the liability regimes may thus negatively affect competition and run a risk of appreciably distorting the proper functioning of the internal market.”).

<sup>63</sup> See Directive 2014/104, Recital 10, 3rd sentence (“In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003.”).

<sup>64</sup> Cf. W. Wils, “Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future” (2017) 40 *World Competition* 1, 24, fn.88 (“This broader scope allowed ... hence the use of the ordinary legislative procedure rather than the special legislative procedure foreseen in Art. 103 TFEU”).

<sup>65</sup> See Directive 2014/104, Recital 13, 2nd sentence.

<sup>66</sup> See Directive 2014/104, Recital 11.

<sup>67</sup> Directive 2014/104, art.11(5), and Recital 37, 3rd sentence.

<sup>68</sup> Directive 2014/104, art.4.

<sup>69</sup> P. Craig and G. de Búrca, *EU Law*, 6th edn (Oxford: OUP, 2015), pp.110–122.

must be construed in compliance with the ECJ's standards and, if there is a conflict with those standards that cannot be "interpreted away", the conflicting rule of secondary law must be invalidated. This could be otherwise, however, where the ECJ has neglected the institutional restrictions it faces with regard to rule making.

### *Institutional balance as a barrier to judicial law making*

It is the ECJ's responsibility to "ensure that in the interpretation and application of the Treaties the law is observed".<sup>70</sup> It follows that the Court is empowered to interpret the constituent Treaties, which includes the competence to develop doctrines that go beyond the text of the Treaty provisions. Thus, at least as a matter of principle, it is perfectly legitimate for the Court to read general principles, such as proportionality, legal certainty or effectiveness,<sup>71</sup> into the Treaty and to employ them as a basis for judicial review.<sup>72</sup> Yet while the ECJ is legitimately engaged in judicial law making, it encounters essential limits, which are due to institutional characteristics that are common to the judiciary. It is as true for the ECJ as it is for every court that its first and foremost task is to resolve actual cases.<sup>73</sup> Even where the Court is invoked to provide a preliminary ruling, it does so against the background of a particular legal dispute. Therefore, the Court's statements with regard to the interpretation of EU law should be read in light of the facts of the respective case. The importance of the factual context is underlined by the fact that the Court refuses to respond to a preliminary reference if the national court does not sufficiently explain the factual circumstances of its case.<sup>74</sup> On that account, as a matter of fact, the Court's resources, its internal organisation, its modus operandi and the mindset of its staff tend to be aligned (as, ideally, they should be) with its core responsibility to resolve, or contribute towards resolving, actual disputes. Thus, it appears fair to state that the Court is institutionally not well equipped to act as a quasi-legislator.

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<sup>70</sup> Article 19(1), 2nd sentence TEU.

<sup>71</sup> See T. Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford: OUP, 2006).

<sup>72</sup> Note that the Court considered it legitimate for it to act against the express wording of the Treaty to satisfy the institutional balance: see *Parliament v Council (Chernobyl)* (C-70/88) EU:C:1990:217 at [26] ("The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.").

<sup>73</sup> J. Neuner, "Judicial Development of Law" in K. Riesenhuber (ed.), *European Legal Methodology* (Cambridge: Intersentia, 2017), p.299, para.9.

<sup>74</sup> See, e.g., *Telemarsicabruzzo SpA v Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa* (C-320–322/90) EU:C:1993:26.

What is more, in contrast with that of the essential legislative institutions of the Union, the Court enjoys only a lower level of democratic legitimacy. The democratic legitimacy of the judges is only (quite) indirect. They are collectively appointed by the Member States.<sup>75</sup> However, the process of their nomination and appointment appears to attract relatively little public scrutiny at either Member State or Union level.<sup>76</sup> The Court itself identified the participation of the European Parliament in the legislative process as the “essential factor in the institutional balance intended by the Treaty” because it “reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly”.<sup>77</sup> This statement correctly reflects that the Court is not accountable to the people in any way comparable with that in which the essential legislative institutions of the Union may be held democratically accountable.<sup>78</sup>

These inherent institutional limits to legitimacy, accountability and expertise underlie the normative restrictions that the judiciary has to accept vis-à-vis the legislature. While the Treaties do not provide for a tripartite separation of powers in the classical sense (yet neither does any national constitutional system, in a strict sense),<sup>79</sup> the EU institutions have a responsibility to respect the powers conferred on other institutions.<sup>80</sup> This requirement is indeed the essence of the concept of institutional balance as fashioned by the Court:

“The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.”<sup>81</sup>

The ECJ makes it abundantly clear, first, that the concept of institutional balance is aimed at safeguarding the power conferred upon the Union’s institutions by the Treaties<sup>82</sup> and, secondly, that

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<sup>75</sup> Article 19(2), 4th sentence TEU (“They shall be appointed by common accord of the governments of the Member States for six years.”).

<sup>76</sup> G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP 2012), p.187.

<sup>77</sup> *SA Roquette Frères v Council of the European Communities* (C-138/79) EU:C:1980:24 at [33]; *Maizena GmbH v Council of the European Communities* (C-139/79) EU:C:1980:250 at [34].

<sup>78</sup> D. Grimm, “Constitutional Adjudication and Democracy” in M. Andenas, *Liber Amicorum in Honour of Lord Slynn of Hadley, Judicial Review in International Perspective* (The Hague: Kluwer, 2000), p.112.

<sup>79</sup> K. Lenaerts and A. Verhoeven, “Institutional balance as a guarantee for democracy in EU governance” in C. Joerges and R. Dehousse (eds), *Good Governance in Europe’s Integrated Market* (Oxford: OUP, 2002), p.38; G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: CUP 2012), pp.178–200; A. Fritzsche, “Discretion, Scope of Judicial Review and Institutional Balance in European Law” (2010) 47 C.M.L. Rev. 361, 385–386.

<sup>80</sup> See, in particular, art.13(2) TEU.

<sup>81</sup> *Parliament v Council (Chernobyl)* (C-70/88) EU:C:1990:217 at [21]–[22]; see also *European Parliament v Council of the European Union* (C-133/06) EU:C:2008:257; [2008] 2 C.M.L.R. 54 at [56]–[57]. The concept of institutional balance as a legal principle restricting the exercise of competences of EU institutions had already been developed by the Court in *Meroni*, in which it invalidated the delegation of discretionary power to bodies not provided for by the ECSC Treaty: *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (C-9/56) EU:C:1958:7 (see, in particular, at 152: “balance of powers which is characteristic of the institutional structure of the Community”).

<sup>82</sup> Insofar as the Court refers to the “institutional balance” to demand respect for the competences that the Treaties confer upon the institutions (i.e. the aspect that is relevant in the present context), it cogently refrains from calling it a “principle”. Indeed, such terminology seems to be justified only in a context in which the Court modifies the legal position of an institution, e.g. as in *Chernobyl* (fn.81 above); see B. de Witte, “Institutional Principles: A Special

the notion gives rise to real normative power.<sup>83</sup> Moreover, the Court recognises that it plays a fundamental role in maintaining the institutional balance.<sup>84</sup> Consequently, it has to accept that, in fulfilling its judicial function, it has to respect the legislature's competences and its prerogative with a view to political decision-making.

Against this background, it is evident that the institutional balance is particularly at risk where the Court adopts certain principles and standards that then constitute an integral part of the Union's primary law.<sup>85</sup> Such judicial law-making has the potential effectively to erode the competences conferred by the Treaties upon the Commission, the Council and the Parliament as the essential legislative institutions.<sup>86</sup> This was pointed out, for instance, by A.G. Trstenjak in *Audiolux* in a quite decisive manner. The Advocate General referred to the institutional balance in order to explain why the Court should refrain from establishing a general Community law principle of equal treatment of shareholders. With such a principle, all shareholders would have been entitled to a share of the so-called control premium in the event of a change of control.<sup>87</sup> The ECJ accepted the argument. While the Court did not expressly invoke the concept of institutional balance, it stressed that it did not consider itself in a position to establish a principle of equal treatment of shareholders as a general principle of "constitutional status" because such a step required the drafting of detailed legislation.<sup>88</sup> The emphasis on the hierarchical status of general principles (and standards derived therefrom) indicates that the Court did indeed consider the institutional balance. It appears that the Court assumed that these standards derived from general principles would bind the EU legislature<sup>89</sup>, as *Audiolux* illustrates.

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Category of General Principles of EC Law" in U. Bernitz and J. Nergelius (eds), *General Principles of European Community Law* (The Hague: Kluwer Law International, 2000), pp.151–152.

<sup>83</sup> K. Lenaerts and A. Verhoeven, "Institutional balance as a guarantee for democracy in EU governance" in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002), pp. 44–47; A. Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev 361, 383.

<sup>84</sup> *Commission of the European Communities v Ireland* (C-415/85) EU:C:1988:320; [1988] 3 C.M.L.R. 189 at [8]–[9]; *National Carbonising Co v Commission* (C-109/75 R) EU:C:1975:133; [1975] 2 C.M.L.R. 457 at [8]. S. Prechal, "Institutional balance: A fragile principle with uncertain contents" in T. Heukels, N. Blokker and M. Brus (eds), *The European Union after Amsterdam* (The Hague: Kluwer Law International, 1998), p.281; K. Lenaerts and A. Verhoeven, "Institutional balance as a guarantee for democracy in EU governance" in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford: OUP, 2002), p.45; A. Fritzsche, "Discretion, Scope of Judicial Review and Institutional Balance in European Law" (2010) 47 C.M.L. Rev 361, 384; P. Syrpis, "Theorising the relationship between the judiciary and the legislature in the EU internal market" in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2012), pp.14–16.

<sup>85</sup> See P. Syrpis, "Theorising the relationship between the judiciary and the legislature in the EU internal market" in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2012), pp.7–8.

<sup>86</sup> Cf. Opinion in *Parliament v Council (Chernobyl)* (C-70/88) EU:C:1989:604 at [6] ("The distinction ... between the interpretation of the Treaty with a view to ensuring that there is an adequate and coherent system of legal protection and its interpretation in a manner which might interfere with the delicate political balance between the institutions is in my view an essential one. Whereas the first is the inalienable task of the courts, the second falls to the (primary) legislature.").

<sup>87</sup> *Audiolux SA v Groupe Bruxelles Lambert SA (GBL) and Bertelsmann AG* (C-101/08) EU:C:2009:410; [2010] 1 C.M.L.R. 39 [103]–[108].

<sup>88</sup> *Audiolux* (C-101/08) EU:C:2009:626 [63] ("The general principles of Community law have constitutional status while the principle proposed by *Audiolux* is characterised by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law. Therefore, the principle proposed by *Audiolux* cannot be regarded as an independent general principle of Community law.").

<sup>89</sup> See W. Schön, "Allgemeine Grundsätze im Europäischen Gesellschaftsrecht" in S. Grundmann et al (eds), *Unternehmen, Markt und Verantwortung, Festschrift für Hopt* (Berlin: de Gruyter, 2010), p.1354.

In very much the same vein, the notion of institutional balance must limit the scope for the Court to use arts 101 and 102 TFEU in conjunction with *Rewe* effectiveness as a basis for developing the elements of actions for competition damages. However, there remain the crucial questions of where the line has to be drawn between legitimate and illegitimate use of the principle of effectiveness, and how those limits will have to be taken into account.

### *Downgrading Courage & Co to quasi-secondary legislation?*

It has been argued that the Court's statements in *Courage v Crehan* and subsequent case law merely constituted "placeholders" for EU legislation. Thus, in light of art.103 TFEU, the standards established by the Court had to be understood as part of secondary law, which the EU legislature was therefore free to correct.<sup>90</sup> The apparent motivation of this approach in not restricting the powers of the EU legislature is, of course, justified and most welcome. Thus, it appears convincing to argue that the EU legislature may overrule statements of the Court that infringe the institutional balance as they unduly restrict the EU legislature's competence under art.103 TFEU.

On the one hand, a general downgrading of the rules on actions for competition damages as developed by the Court would appear to be an over-reaction as it would seem to deprive the Court completely of the power to establish standards that are binding on the EU legislature. Downgrading, however, would appear to be insufficient insofar as it would amount to accepting excessive judicial law making simply because the legislature might ultimately overrule these standards. Thus, no effective ex-ante protection against an illegitimate interference with the legislature's competence would be provided.

Against this background, it is important to note that there are no indications that the Court itself assumed that its statements should be regarded as having the rank of only secondary legislation. As has been emphasised already, the Court makes no effort to distinguish statements based on *Rewe* effectiveness from statements that it derives from an *effet-utile* interpretation of arts 101 and 102 TFEU.<sup>91</sup> Furthermore, characterisation as quasi-secondary legislation could only maintain the institutional balance incompletely, as it would not effectively protect the freedom of the legislator *not* to use its power pursuant to art.103 TFEU. There are good reasons to refrain from harmonisation of domestic laws<sup>92</sup> and, thus, deliberately to leave it to Member States to regulate certain aspects of the law on competition damages. Indeed, the Directive on Competition Damages Actions eventually leaves out essential issues.<sup>93</sup> First, it may be a good idea to leave Member States' legislatures some leeway due to their diverse legal traditions or other institutional differences. Secondly, to endorse a differentiated development of liability rules opens up an array of parallel experimentation that allows for mutual observation and learning from respective experiences. Thirdly, there is an inherent risk of "petrification" in premature harmonisation, if one bears in mind that complex political compromises

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<sup>90</sup> W.-H. Roth, "Privatrechtliche Kartellrechtsdurchsetzung zwischen primärem und sekundärem Unionsrecht" (2015) 179 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 668, 681–684.

<sup>91</sup> See text and quote accompanying fn.35 above.

<sup>92</sup> As to the pros and cons of decentralised rule making, see K. Gatsios and P. Holmes, "Regulatory Competition" in P.K. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. 3 (London: Macmillan, 1998), pp.273–275; S. Woolcock, "Competition among rules in the Single European Market" in W. McCahery, J. Bratton, S. Picciotto and C. Scott (eds), *International Regulatory Competition and Coordination* (Oxford: Clarendon Press, 1996), pp.298–301.

<sup>93</sup> See text accompanying fnn.65 and 66 above.

typically underlie law making at the EU level. For these and other reasons, the question whether the Union should make use of its power to harmonise the law on competition damages should be answered carefully by the legislative institutions of the Union. However, the Court may easily undermine this prerogative if it is not effectively restricted in its judicial law making *from the outset*, as the only remedy is a potential over-ruling by the legislature. It is true that the EU legislature could theoretically circumvent a judgment of the ECJ subsequently, by way of determining that an aspect addressed by the Court is *not* regulated at the level of the EU, but, in practice, such a legislative act seems hardly conceivable.<sup>94</sup>

Finally, it must be pointed out that the drafters of the Treaties deliberately ranked the provisions on competition law as part of what we now regard as the primary law of the Union.<sup>95</sup> Irrespective of whether, from today's perspective, this is deemed convincing in terms of constitutional policy, for the time being, it must be respected that the EU legislature is deprived of making certain fundamental decisions with regard to the design of EU competition law. Therefore, for reasons of internal consistency, the ECJ must, as a matter of principle, be in a position to control the EU legislature with regard to the design of the rules on liability for breaches of competition law.

Hence, the ECJ is entitled to make statements of primary-law rank that are binding on the EU legislature. However, such a power entails a special duty on the part of the Court to maintain the institutional balance and not to restrict inappropriately the power of the EU legislature as enshrined in art.103 TFEU. Thus, in each case in which the Court is called on to establish legal standards for competition damages, those standards will have to be regarded as an integral part of primary law. When performing this task, the Court must not act as though it has been called upon to fill gaps left by the EU legislature but rather as though it has to decide whether to substitute its own appraisal for the legislature's regulatory choice.<sup>96</sup>

#### *Striking the institutional balance: discretionary legislative power and restricted judicial review*

The Court can do justice to its responsibility by adapting its standard of review and, thus, by leaving sufficient discretionary power to the legislative institutions of the Union. This interrelation between the notion of institutional balance and the scope of judicial review has been made explicitly by Advocate General Tizzano in regard to the (then) Court of First Instance's power to review the Commission's decisions in the field of competition law:

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<sup>94</sup> However, cf. art.2(1) TFEU, according to which the EU legislature may empower Member States to legislate in an area in which the Treaties confer exclusive competence on the Union. This is not of direct relevance to the rules of competition damages law, which have to be regarded as "procedural rules" (see text accompanying fn.24 above) and which, therefore, can be adopted by Member States anyway (even though art.3(1)(b) TFEU confers upon the Union exclusively the competence to establish competition rules necessary for the functioning of the internal market). However, the enactment of such rules, which endorse a transfer of regulatory competences from the EU back to national level, reflects the fact that the Union legislature is well aware of the potential advantages of decentralised law making. Examples include art.7 of Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40, and art.30 of Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L190/1. See also art.3 of the Commission's Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM(2017) 487 final.

<sup>95</sup> See D.J. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford: OUP, 1998), p.334.

<sup>96</sup> Cf. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), p.68.

“The rules on the division of powers between the Commission and the Community judicature, which are fundamental to the Community institutional system, do not ... allow the judicature ... to substitute its own point of view for that of the institution.”<sup>97</sup>

The Court must take a similar approach to prevent its adjudication from unduly interfering with the EU legislature’s competences. Taking a look at the way in which the Court phrases the principle of effectiveness as established in *Rewe* and *San Giorgio*,<sup>98</sup> and as it has been adopted in *Courage v Crehan*, the ECJ’s rhetoric seems to consider those concerns. Accordingly, the Court will invalidate only those measures that render the exercise of the right to damages “practically impossible or excessively difficult”.<sup>99</sup>

To verify whether, judged by this yardstick, certain potential elements of actions for damages are acceptable, the Court has to take into account why it considered it to be crucial in the first place that injured parties have a right to damages. The Court’s references to the “full effectiveness” and the “practical effect” of art.101 TFEU<sup>100</sup> need to be read as shorthand for the objectives associated with actions for competition damages. While, in *Courage v Crehan*, the Court referred to the role of those actions as an effective mechanism of (private) enforcement of the competition law rules,<sup>101</sup> in *Donau Chemie* it extended its understanding of the “practical effect” by referring to corrective justice as an additional purpose.<sup>102</sup>

If we bring these regulatory aims together with a limited standard of review, the Court should look out only for those legislative measures that have the potential effectively to hinder actions for damages based on breaches of EU competition law from working as an effective instrument for the benefit of private enforcement and corrective justice. On this basis, an analysis of the ECJ’s jurisprudence reveals a lack of judicial self-restraint. This may be illustrated by the judgment in *Kone*. There, the Court held that cartellists’ liability for losses resulting from umbrella effects<sup>103</sup> must not be excluded “categorically and regardless of the particular circumstances of the case”<sup>104</sup>—which is to say that, as a matter of principle, such losses have to be compensated.<sup>105</sup>

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<sup>97</sup> *Tetra Laval BV v European Commission* (C-12/03 P) EU:C:2004:318; [2005] 4 C.M.L.R. 8 at [89].

<sup>98</sup> See text and quotes accompanying fnn.25 and 26 above.

<sup>99</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [29].

<sup>100</sup> See quote accompanying fn.13 above.

<sup>101</sup> *Courage v Crehan* (C-453/99) EU:C:2001:465 at [27] (“Indeed, the existence of such a right ... discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.”).

<sup>102</sup> *Bundeswettbewerbshörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [24] (“Secondly, that right constitutes effective protection against the adverse effects that any infringement of Article 101(1) TFEU is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest” (reference omitted)).

<sup>103</sup> See text accompanying fn.17 above.

<sup>104</sup> *Kone* (C-557/12) EU:C:2014:45 at [33].

<sup>105</sup> The ECJ clarified that cartel members might not be held liable in circumstances in which they could not have foreseen the mere possibility of an umbrella effect: *Kone* (C-557/12) EU:C:2014:45 at [34]. Thus, the Court arguably had in mind a criterion that is comparable to the doctrine of reasonable foreseeability under English law: see J.-U. Franck, “Umbrella pricing and cartel damages under EU competition law” (2015) 11 *European Competition Journal* 135, 163–165.

First, as I have argued in detail elsewhere,<sup>106</sup> liability for umbrella pricing is ambiguous as far as effective deterrence of cartels is concerned. While it entails, on the one hand, a systematic risk of over-deterrence, it can be useful to make up for looming risks over under-deterrence that may likewise arise due to umbrella effects. Thus, whether or not liability for umbrella damages is advisable with regard to effective and efficient enforcement of competition law ultimately depends very much on the legal and institutional framework in which the action for competition damages is embedded. Secondly, while it is, of course, in accordance with ideas of corrective justice that cartelists have to make good harm done by their illegal activities, even a rigorous implementation of corrective justice as a rationale underpinning the law on competition damages does not require that *any* individual loss associated with an infringement of competition law has to be compensated.<sup>107</sup> Thus, the crucial question is where to draw the line between damage for which compensation is cogent in terms of corrective justice and damage for which compensation may be excluded under legal doctrines such as remoteness. It is, however, by no means clear which criteria could provide guidance in this regard.<sup>108</sup> One may therefore doubt whether ideas of corrective justice can meaningfully be employed to define the limits of damages liability.<sup>109</sup> Coherence with existing case law often appears to be the most that courts and commentators strive for.<sup>110</sup> Be that as it may, given that national legal systems differ quite considerably as to whether, or under which circumstances, a chain of causality is broken where the action of a third party was a contributory cause of the loss sustained, one may safely conclude that the compensation of umbrella damages cannot be regarded as an *imperative* necessity in terms of corrective justice.

All in all, as the compensation of umbrella damages remains ambiguous in terms of both effective enforcement and corrective justice, the ECJ has overstretched the concept of effectiveness. The Court should have left it within the discretionary power of the legislature—be it the EU legislature or the Member State legislature—to exclude compensation for losses resulting from umbrella pricing. Thus, *Kone* has to be regarded as a case in which the Court has not sufficiently respected the institutional balance, thereby unduly restricting the EU legislature’s power under art.103 TFEU. Therefore, the latter should not consider itself bound by the Court’s statement.

### **Resolving a sharp institutional conflict: accessibility and admissibility of leniency documents**

The Court’s undue establishment of liability for umbrella damages did not result in an actual conflict with the EU legislature, as this issue has essentially been left out of Directive 2014/104.<sup>111</sup> However, a

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<sup>106</sup> J.-U. Franck, “Umbrella pricing and cartel damages under EU competition law” (2015) 11 *European Competition Journal* 135, 139–149.

<sup>107</sup> See, e.g., in regard to umbrella damage, Opinion in *Kone* (C-557/12) EU:C:2014:45 at [33] (“it is perfectly legitimate, for the purposes of examining the existence of a causal link, to lay down criteria which ensure that cartel members are not subject to unlimited liability to provide compensation for any losses, however remote, for which their anti-competitive behaviour may have been the cause in the sense of a ‘*conditio sine qua non*’ (also known as an *equivalent causal link* or a *but-for* causal link”).

<sup>108</sup> See further, on this point, J.-U. Franck and M. Peitz, “Toward a Coherent Policy on Cartel Damages” (2017), sub IV. B., pp.39–43, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2913572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913572).

<sup>109</sup> J.-U. Franck, “Umbrella pricing and cartel damages under EU competition law” (2015) 11 *European Competition Journal* 135, 150–152.

<sup>110</sup> See, e.g., in regard to umbrella damage, Opinion in *Kone* (C-557/12) EU:C:2014:45 at [34]–[38].

<sup>111</sup> See, however, art.11(4) of the Directive, where the issue is touched upon implicitly. An undertaking that has been awarded immunity under the leniency programme is jointly and severally liable only “to its direct or indirect buyers

sharp conflict has been provoked by the highly restrictive approach that the legislature has implemented in regard to access to leniency documents and their admissibility as evidence in actions for damages.

*Position of the Court: weighing up of conflicting interests on a case-by-case basis*

Leniency statements constitute the essential source of information about hard-core cartels. Therefore, competition authorities are keen to ensure that the prospect of having to pay damages does not compromise the effectiveness of leniency programmes. However, if the access of potential plaintiffs to leniency statements is restricted, this must not render the exercise of a right to competition damages “practically impossible or excessively difficult”.<sup>112</sup> Thus, in *Pfleiderer* the ECJ held that national courts that have to rule on access to documents of national competition authorities, including leniency documents, must balance the opposing interests “on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case”.<sup>113</sup> Consequently, in *Donau Chemie* the Court asserted that an “absolute refusal to grant access to the documents in question ... is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals”.<sup>114</sup> Therefore, a “refusal [has] to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused”.<sup>115</sup>

Subsequently, the Court relaxed this standard with regard to plaintiffs who sought access to the files of the Commission based on Regulation 1049/2001.<sup>116</sup> The Court maintained that the Commission could *presume* that the disclosure of such documents would affect the protection of the commercial interests of the undertakings involved and the protection of the purpose of the investigations relating to the legal proceedings. The Commission, therefore, was entitled to refuse access to documents without prior examination of every individual document.<sup>117</sup> However, applicants had to remain free to rebut this presumption by demonstrating an overriding public interest in the disclosure of the documents in question.<sup>118</sup> While, in *EnBW*, the Court had to consider access to Commission files under Regulation 1049/2001, its formulation was in general and abstract terms with regard to any action for damages based upon an infringement of art.101 TFEU. Thus, it seems at least plausible that the Court has deemed it permissible to presume (subject to rebuttal) that leniency statements can be exempted from a right to access the competition authority’s files because of overriding interests of the parties involved or because of looming interference with the authority’s investigation.<sup>119</sup>

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or providers”—which excludes umbrella plaintiffs—and “to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law”.

<sup>112</sup> See text and quote accompanying fn.23 above.

<sup>113</sup> *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7 at [31].

<sup>114</sup> *Donau Chemie* (C-536/11) EU:C:2013:366 at [31].

<sup>115</sup> *Donau Chemie* (C-536/11) EU:C:2013:366 at [47].

<sup>116</sup> Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

<sup>117</sup> *European Commission v EnBW Energie Baden-Württemberg AG* (C-365/12 P) EU:C:2014:112; [2014] 4 C.M.L.R. 30 at [93] and [97].

<sup>118</sup> *Commission v EnBW* (C-365/12 P) EU:C:2014:112 at [100].

<sup>119</sup> E.-J. Mestmäcker and H. Schweitzer, *Europäisches Wettbewerbsrecht*, 3rd edn (Munich: C. H. Beck, 2014), p.610, §23 para.59k.

*Position of the EU legislature: leniency documents shall be neither accessible nor admissible as evidence in competition damages legislation*

Contrary to the case-by-case approach requested by the Court in *Pfleiderer*, *Donau Chemie* and *EnBW*, the EU legislature adopted a rigid solution to protecting the integrity of the machinery of public enforcement. While national courts are entitled to order the disclosure of documents by the defendant or a third party (including competition authorities<sup>120</sup>), the disclosure of leniency statements<sup>121</sup> is exempted.<sup>122</sup> Where a claimant still obtains such documents—for example, by accessing the files of a competition authority—the claimant is not to be permitted to present them as evidence in legal proceedings.<sup>123</sup> Thus, arts 6(6) and 7(1) of the Directive amount to a complete ban on leniency statements as evidence in actions for damages. This seems to contradict the Court’s position pursuant to which it must be possible to state and prove the necessity for the access to specific documents on a case-by-case basis. While some authors seem to have accepted the Directive’s approach as a legislative “correction”<sup>124</sup> or “clarification”<sup>125</sup> of the Court’s adjudication, others consider the restrictions adopted in the Directive to be in breach of EU primary law.<sup>126</sup>

In defence of the Directive’s approach, it has been argued that it is in conformity with the Court’s view, as art.15(1) of Regulation 1/2003 provides for an alternative mechanism for introducing leniency material into competition damages proceedings.<sup>127</sup> According to this provision, the courts of the Member States may ask the Commission to transmit information. As the case may be, this would enable the Commission to allow access to be granted to leniency statements on a case-by-case basis. However, art.15(1) of Regulation 1/2003 foresees only the option to demand access to files of the European Commission. Thus, insofar as the competition authorities of the Member States enforce arts 101 and 102 TFEU, this provision is, from the outset, not capable of ensuring that leniency statements could be introduced in competition damages litigation.<sup>128</sup> In any case, the Commission has committed itself to the statement that it “will not at any time transmit [leniency corporate statements] to national courts for use in actions for damages for breaches of Article 101 or 102 of the Treaty”.<sup>129</sup>

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<sup>120</sup> As defined in art.2 no.8 of the Directive.

<sup>121</sup> As defined in art.2 no.16 of the Directive.

<sup>122</sup> Directive 2014/104, art.6(6).

<sup>123</sup> Directive 2014/104, art.7(1).

<sup>124</sup> See, e.g., A. Howard, “Disclosure of Infringement Decisions in Competition Damages Proceedings: How the UK Courts Are Leading the Way Ahead of the Damages Directive” (2015) 6 *Journal of European Competition Law & Practice* 256, 257.

<sup>125</sup> See, e.g., P. van Cleynenbreugel in M. Bergström, M. Iacovides, and M. Strand (eds), *Harmonising EU Competition Litigation, the New Directive and Beyond* (Oxford and Portland, Oregon: Hart, 2016), p.114. See also I. Lianos, P. Davis, and P. Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford: OUP, 2015), p.41.

<sup>126</sup> See, e.g., C. Kersting, “Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht” (2014) *Wirtschaft und Wettbewerb* 564, 566–567; H. Schweitzer, “Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen” (2014) *Neue Zeitschrift für Kartellrecht* 335, 342–343; G. Dawirs, *Der vorprozessuale und innerprozessuale Zugriff auf Kronzeugenerklärungen im Private Enforcement unter der Kartellschadensersatzrichtlinie 2014/104/EU* (Baden-Baden: Nomos, 2017), pp.297–298 (deriving also an infringement of art.47 of the EU Charter of Fundamental Rights).

<sup>127</sup> See W. Wils, “Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future” (2017) 40 *World Competition* 1, 34–35.

<sup>128</sup> See Regulation 1/2003, art.5.

<sup>129</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54, as amended by Communication from the Commission [2015] OJ C256/5 at [26a]. The Commission’s leniency notice contains an identical provision: see Commission

### *Resolving the clash in respect of the institutional balance*

The ECJ alone has the power to invalidate an act of secondary legislation due to its non-conformity with primary law.<sup>130</sup> As the period for bringing an action for an annulment of the Directive pursuant to art.263(6) TFEU has expired, the Member States continue, at least for the time being, to be bound by its provisions, and have to transpose them into national law. Thus, it will be for the national courts to provide the ECJ with an opportunity of resolving the ascertained normative clash by way of a preliminary reference under art.267 TFEU.

With this preliminary reference, the Court will be given the chance to recalibrate its case law with regard to the role of leniency documents in litigation involving competition damages. In doing so, the Court must take account of the institutional balance and must leave the EU legislature sufficient scope for design. The current requirements as laid down in *Pfleiderer* and *Donau Chemie* are not sufficient in this respect. A concept according to which the national courts should solve the clash on a case-by-case basis, taking into account all the relevant factors of a case and weighing up the conflicting interests with regard to each document amounts to nothing more than a pipe dream. This is because the courts may very well reach a conclusion about how important access to certain documents is for plaintiffs in order to substantiate their claims. However, by the same rate at which the importance of access to a specific leniency document for the individual claimant grows, so increases the public interest in refusing access to safeguard the attractiveness of the leniency policy.

Given all this, how is a court, and in particular a lower-level national court such as the *Amtsgericht Bonn*—the court that had initiated the preliminary reference in *Pfleiderer*—supposed to balance this public interest in a meaningful manner against the individual interest of a claimant to have his or her damage fully compensated? In *Pfleiderer*, the *Amtsgericht Bonn* ultimately rejected the request for access to the leniency documents.<sup>131</sup> The court essentially argued that the effectiveness of the leniency programme, and thus the effectiveness of public enforcement, could be undermined. In particular, the court pointed out that, ultimately, this was in the interest of actions for private damages, as they depend on the exposure of cartels by public enforcement. Thus, the *Amtsgericht* performed a balancing of incommensurable interests, a task that should be carried out at legislative level instead. Therefore, should the ECJ ever again consider access to leniency material, essentially, it should leave the matter to the EU legislature.

Provided that the EU legislature was right in assuming that only in a few cases would access to leniency documents be absolutely necessary for claimants to substantiate actions for damages,<sup>132</sup> it

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Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17, as amended by Communication from the Commission [2015] OJ C 256/1 at [35a].

<sup>130</sup> *Foto-Frost v Hauptzollamt Lübeck-Ost* (C-314/85) EU:C:1987:452; [1988] 3 C.M.L.R. 57 at [15]–[20].

<sup>131</sup> Case 51/Gs53/09, (2012) *Neue Juristische Wochenschrift* 947, 949. In contrast, in the UK, the High Court in the *National Grid* case decided in favour of the disclosure of documents that contained extracts from the corporate leniency statements: [2012] EWHC 869 (Ch) per Roth J. at [30]–[60].

<sup>132</sup> See Directive 2014/104, Recital 27, 1st sentence (“The rules in the Directive on the disclosure of documents other than leniency statements and settlement submissions ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages.”); see also W. Wils, “Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future” (2017) 40 *World Competition* 1, 34 (“the situation in which ... it would be necessary for the claimant to be able to use a leniency statement ... is highly unlikely to arise, as there are all kinds of other documents that can be used, including in particular the competition authority’s final decision”).

should indeed be within the legislature's discretionary power to exclude such access or the admissibility of such documents as evidence in an action for damages. Otherwise, the EU legislature would have to define circumstances and procedures that would at least allow claimants on a case-by-case basis to obtain access to leniency documents and provide for their admissibility in an action for competition damages.

The assessment necessary in this regard—which requires both normative and empirical evaluations—might be carried out by the ECJ itself or the Court might assign it to the EU legislature. In any event, the Court will have to abandon the rigid approach adopted in *Pfleiderer* and *Donau Chemie*, pursuant to which the principle of effectiveness allows the protection of leniency documents only after a balancing of interests in relation to each individual document.

## **Conclusion**

The legitimacy and acceptability of the law of the European Union are fragile. Concepts that have been developed to guarantee good governance and the legitimacy of law-making, such as the separation of powers among institutions and the respect of a normative hierarchy, may therefore be even more crucial to a sui generis political entity such as the European Union than in the context of a nation-state. This presupposes the responsibility of each institution of the Union to respect the powers conferred upon the others: an obligation that the Court has effectively established under the rubric “institutional balance”. While this terminology, with its rhetorical resemblance to the ideal of “checks and balances”, seems to indicate a (mere) political principle, the Court has in fact created a legal barrier that not least forces the Court to restrict itself to its judicial role and to respect the competences and discretionary powers of the EU legislative institutions. This presupposes that the Court has to adapt the intensity of review of legislative choices accordingly.

This is of particular importance with regard to EU law on competition damages, which is an outstanding example of a field in which judicial activity has given rise to tension between the Court and the EU legislature whose secondary legislation may easily come into conflict with rules of primary law that have been established by the Court. The ECJ has deduced from arts 101 and 102 TFEU a right to damages for parties injured by a breach of competition law. On this basis, it follows that the Court can supervise and regulate the implementation of the right by defining a minimum standard of competition damages law as a yardstick against which to judge not only Member States' rules, but also secondary legislation. The standards that the Court derives in conjunction with the principle of effectiveness are an integral part of primary law, as they are (legitimately) aimed at safeguarding the effectiveness of a right that is enshrined in primary law. However, the Court encounters essential restrictions in this regard. This is mainly because of the inherent limits in its democratic legitimacy, accountability and expertise, but also because the Court has to respect the EU legislature's power that is enshrined in art.103 TFEU. The Court has to accept that the legislature enjoys considerable discretionary power and it must therefore exercise only limited judicial review. While this is certainly a plea for judicial self-restraint, but, at the same time, it should be understood as a defence of a clear hierarchy of norms that, as a matter of principle, allows the Court to review secondary legislation on actions for competition damages based on criteria derived from arts 101 and

102 in conjunction with the principle of effectiveness. The main argument here is that the legitimacy of the latter presupposes the former.<sup>133</sup>

While the Court has adopted the well-known formula à la *Rewe* and *San Giorgio* and, therefore, its rhetoric is in line with those restrictions, it did not always do justice to the institutional balance in its case law. Thus, it overstretched the principle of effectiveness as it established a general liability for umbrella damages in *Kone*, and, in *Pfeiffer* and *Donau Chemie*, it required that access to leniency material may be blocked only on the basis of weighing up conflicting interests following a case-by-case analysis and in regard to each document. The EU legislature should not consider itself bound by these statements. Indeed, the EU legislature took the liberty of deviating from the Court's adjudication and sought to completely exclude the use of leniency material from competition damages litigation. It is, however, presumably the ECJ that will have the final word on the matter. Hence, the responsibility for demarcating the powers of the institutions lies with the Court, which is both judge and judged, drawing the outer limits of its own jurisdiction. This should remind us that the success of even the most sophisticated institutional arrangement ultimately depends upon the persons who man the institutions involved.<sup>134</sup>

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<sup>133</sup> Thus, the analysis presented in this article can be understood as striving to bridge the two opposing visions of the relationship between the Court and the EU legislative institutions as drawn in P. Syrpis, "Theorising the relationship between the judiciary and the legislature in the EU internal market" in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge: CUP, 2012), pp.4–6.

<sup>134</sup> Cf. K.R. Popper, *Conjectures and Refutations* (New York: Harper & Row, 1963), pp.133–134.