

## What is the Role of the ECJ in EC Private Law? - A Comment on the ECJ judgments in *Océano Grupo*, *Freiburger Kommunalbauten*, *Leitner* and *Veedfald*

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### A. Introduction

The body of EC private law is on the increase. The EC keeps adopting Directives in the field of consumer law, and modernised Directives such as the forthcoming Consumer Credit Directive will be much more detailed than their predecessors. Far more importantly, the Commission intends to create a European Contract Law, that would in the not so near future replace the national contract laws.<sup>1</sup> The reasons for this process are manifold but centre around the establishment and functioning of the internal market.<sup>2</sup>

However, even with an ever denser and maybe at one point total harmonisation of private law, the problem is merely postponed to the next level: the application or interpretation of the harmonised provisions. Only if the harmonised law is applied in the same manner by all courts EC-wide, will the final goal of legal certainty and of uniformity be achieved. Identical interpretation of harmonised law by all courts will not emerge automatically. Even within national jurisdictions, the interpretation of legal rules varies greatly, in particular, amongst the lower instance courts. In a Community of 25 or more Member States with 25 or more grown private law systems, the differences may be even stronger.

Experience with the application of new rules derived from EC directives in the field of consumer law shows a tendency of at least some national courts to seek continuity with old (pre-harmonisation) case-law.<sup>3</sup> Rather than trying to think in the logic of EC private law,

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<sup>1</sup> EC Commission, 'Communication on European Contract Law', COM(2001) 398 final; EC Commission, 'Action Plan on European Contract Law', COM(2003) 68 final; EC Commission, 'European Contract Law and the revision of the *acquis*: the way forward', COM(2004) 651 final.

<sup>2</sup> See, in particular, D. Staudenmayer, 'Die Mitteilung der Kommission zum Europäischen Vertragsrecht', *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 2001, 485, 486 ff.; id., 'The Commission Communication on European Contract Law: What Future for European Contract Law?', *European Review of Private Law* (ERPL) 2002, 249, 254 ff.; id., 'Der Aktionsplan der EG-Kommission zum Europäischen Vertragsrecht', *EuZW* 2003, 165, 166 ff.; id., 'The Commission Action Plan on European Contract Law', *ERPL* 2003, 113, 120 ff.

<sup>3</sup> See, for example, the judgment by the Oberlandesgericht (regional court) Hamm, *Neue Juristische Wochenschrift – Rechtsprechungsreport* (NJW-RR) 2003, 1360, on the new German sales law after the implementation of the Consumer Sales Directive 1999/44/EC. The court held that the mere fact that a Renault car was not produced by Renault in France but by Matra in Italy, did not affect its conformity with the contract, although this had an impact on the market value of the car. The court explicitly referred to pre-reform case-law by the German Bundesgerichtshof. See, in contrast, the judgment by the Landgericht (district court) Ellwangen, *NJW-RR* 2003, 517, on the same issue where the court held that one of the defects of the Volkswagen car at stake was that it had been manufactured in the Republic of South Africa whereas it was sold as manufactured in the EC.

they look for common ground between the old law and the new rules, in an attempt to preserve as much as possible.

Another telling example is the Rome Convention on the Law Applicable to Contractual Obligations.<sup>4</sup> The Rome Convention does not form part of EC law in its narrow sense but was established through a treaty between the EC Member States. Thus, the ECJ was not automatically competent for the interpretation of the Rome Convention. For this purpose, two protocols were agreed upon<sup>5</sup> but only recently did the last ratification by Belgium occur. Without binding decisions by the ECJ, national courts have interpreted the provisions of the Rome Convention in different ways, frequently guided by their own traditions in private international law. Clearly, the Rome Convention has failed to achieve the harmonisation of private international law.<sup>6</sup>

In EC law, both substantive law principles and institutional arrangements can serve to achieve the highest possible degree of harmonisation of law in practice. The relevant principles of substantive law are the principle of autonomous interpretation of EC law and the principle of interpretation of national law in the light of the relevant Directive (B.). At the institutional level, it is primarily the jurisdiction of the ECJ that is designed to ensure such harmonisation (C.). Both are discussed controversially in academic writing, in particular with a view to general clauses, and recent ECJ case-law in the field of private law has not brought much clarity with regard to the ECJ's own approach (D.). This article argues that the ECJ will inevitably have to play a decisive role in the harmonisation of private law throughout the EC if harmonisation is the goal to be achieved (E.)

## **B. Autonomous interpretation of EC private law and interpretation in the light of the relevant directive**

The principle of autonomous interpretation of EC law has first been established by the ECJ in a judgment of 1964<sup>7</sup> and has never been doubted since. In essence, the principle of autonomous interpretation means that there is only one correct interpretation of a term used in EC legislation, and that this one correct meaning must be found independently from national or other interpretations of the same term. Exceptions are only made where an EC Directive explicitly refers to national law.<sup>8</sup> Under the principle of interpretation of national law in the light of the relevant Directive, national courts are required to interpret their

<sup>4</sup> Consolidated version in O.J. 1998, C 27/34.

<sup>5</sup> First Protocol on the interpretation of the 1980 Convention by the Court of Justice and Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention, consolidated versions in O.J. 1998, C 27/47 and C 27/52.

<sup>6</sup> See, for example, the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. COM(2002) 654 final, 18.

<sup>7</sup> ECJ, judgment of 19/3/1964, Case 75/63 *Mrs M.K.H. Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, [1964] ECR 379.

<sup>8</sup> See, for example, ECJ, Case 327/82, *Ekro B.V. Vee- en Vleeshandel v. Produktschap voor Vee en Vlees*, [1984] ECR 107, at para 11; ECJ, Case C-287/98, *Luxembourg v. Berthe Linster, Aloyse Linster und Yvonne Linster*, [2000] ECR I-6917, at para 43; ECJ, Case C-357/98, *The Queen v. Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom*, [2000] ECR I-9265, at para. 26.

national law in the light of the wording and the purpose of relevant EC Directives in order to achieve the result referred to in Article 249 (3) EC.<sup>9</sup> The combination of the two principles should ensure that national courts do not follow the interpretation principles of their national legal orders but apply national law, that is derived from EC private law, in a manner that is consistent with EC private law as interpreted autonomously.

Admittedly, the principle of autonomous interpretation causes difficulties where EC legislation uses general clauses. It was therefore submitted that general clauses should be exempted from the principle of autonomous interpretation. Instead, general clauses should leave Member States the liberty to find their own interpretation, within the limit of the wording of the general clause.<sup>10</sup> This approach, however, is unacceptable if the EC wishes to achieve the harmonisation of the Member States' laws,<sup>11</sup> which it claims to do in the recitals of all consumer law Directives, and which it has to attempt to achieve when it uses the internal market competence of Article 95 EC.<sup>12</sup> The use of a general clause is a regulation technique that is frequent at least in continental legal system when it is impossible to define specific cases in advance but is not meant to limit the influence of EC law on national legal systems.<sup>13</sup> Of course, this approach makes it difficult for Member States to implement EC Directives correctly unless they simply copy their wording. Each concretisation of a general rule may turn out later, after a contradictory ECJ judgment, as being incorrect.<sup>14</sup> However, this peril is acceptable since it will not lead to any negative consequences for the Member State concerned. In particular, this Member State will not be liable under ECJ case-law on state liability. Under the *Francovich* doctrine,<sup>15</sup> as amended in

<sup>9</sup> Established case-law since ECJ, judgment of 10/4/1984, Case 14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891, at para 26.

<sup>10</sup> See, in particular, W.-H. Roth, 'Generalklauseln im Europäischen Privatrecht', in: J. Basedow et al., *Festschrift für Ulrich Drobniß zum siebzigsten Geburtstag* (Mohr Siebeck 1998), pp. 135 ff.

<sup>11</sup> See W. Nassall, 'Die Auswirkungen der EU-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen auf nationale Individualprozesse', *Wertpapier-Mitteilungen* (WM) 1994, 1645, 1650; id., 'Die Anwendung der EU-Richtlinie über missbräuchliche Klauseln in Verbraucherverträgen', *Juristenzeitung* (JZ) 1995, 689, 690; E. N. Kapnopoulou, *Das Recht der missbräuchlichen Klauseln in der Europäischen Union* (Nomos 1997), pp. 115 f.; J. Basedow, 'Der Bundesgerichtshof, seine Rechtsanwälte und die Verantwortung für das europäische Privatrecht', in: G. Pfeiffer et al. (eds), *Festschrift für Hans Erich Brandner* (Otto Schmidt 1996), p. 651, 675; K. Markwardt, *Die Rolle des EuGH bei der Inhaltskontrolle vorformulierter Verbraucherverträge* (Nomos 1999), pp. 109 ff.; S. Leible, 'Gerichtsstandsklauseln und EG-Klauselrichtlinie', *Recht der Internationalen Wirtschaft* (RIW) 2001, 422, 426; A. Staudinger, 'Der Bauträgervertrag auf dem Prüfstand des Gemeinschaftsrechts', *Deutsche Notarzeitung* (DNotZ) 2002, 166, 177; H.-W. Micklitz, 'Missbräuchliche Vertragsklauseln', in: N. Reich & H.-W. Micklitz, *Europäisches Verbraucherrecht*, 4th ed. (Nomos 2003), p. 491, 514 f.; R. Freitag, 'Kurzkommentar', *Entscheidungen zum Wirtschaftsrecht* (EWiR) 2004, 397 f. Even those that have criticised ECJ case-law on the autonomous interpretation of general clauses concede that harmonisation of private law would be seriously hampered otherwise. See, for example, R. Doehner, 'Anmerkung', *EuZW* 2002, 340, 341.

<sup>12</sup> See P. Rott, 'Minimum harmonisation for the completion of the internal market? – The example of Directive 1999/44/EC', *Common Market Law Review* (CMLR) 40 (2003), 1107 ff.

<sup>13</sup> See also B. Heiderhoff, 'Die Berücksichtigung des Art. 3 Klauselrichtlinie bei der AGB-Kontrolle', *WM* 2003, 509, 511.

<sup>14</sup> This problem was raised by G. G. Howells, 'Interpretation of EC Consumer Law', in: R. Schulze (ed.), *Auslegung europäischen Privatrechts und angelegenen Rechts* (Nomos 1999), p. 115.

*Brasserie de Pêcheur*,<sup>16</sup> a Member State is only liable for a "sufficiently serious" breach of EC law. The well-meaning but failed attempt to concretise a general clause cannot be regarded as a sufficiently serious breach of EC law.

### C. The Role of the ECJ under Article 234 EC

According to Article 234 EC, the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of this Treaty and the validity and interpretation of acts of the institutions of the Community. Where such a question on interpretation is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. If there is no judicial remedy available under national law against the ruling of the national court or tribunal in question, that court or tribunal has to bring the matter before the ECJ.

In essence, Article 234 EC is designed to ensure that all national cases whose outcome depends on the interpretation of EC law are referred to the ECJ, at the latest in the last instance, if the correct interpretation of EC law is not clear. According to established ECJ case-law, it is not the responsibility of the ECJ to decide national cases but only to interpret EC law.<sup>17</sup> It is then for the national court to apply EC law as interpreted by the ECJ to the instant case.<sup>18</sup> Indeed, it is important to note that the obligation to interpret national law in the light of the relevant Directive is an obligation that national courts are able to perform without referring cases to the ECJ<sup>19</sup> – unless they are in doubt about the meaning of the relevant provisions of EC law.

Again, academics have discussed controversially the issue of to what extent the ECJ should control the application of national law that implements EC law, under Article 234 EC. While a number of authors have opined in favour of self-restriction by the ECJ,<sup>20</sup> others prefer the ECJ to play an active role in shaping EC private law.<sup>21</sup>

<sup>15</sup> See ECJ, judgment of 19/11/1991, Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, [1991] ECR I-5357.

<sup>16</sup> ECJ, judgment of 5/3/1996, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996] ECR I-1029.

<sup>17</sup> The line between interpreting EC law and applying national law is sometimes very thin. See, for example, W. Nassall, WM 1994, 1645, 1646.

<sup>18</sup> See, for example, ECJ, judgment of 29/4/1982, Case 17/81 *Pabst & Richarz KG v. Hauptzollamt Oldenburg*, [1982] ECR 1331, at para 12.

<sup>19</sup> See, for example, B. Heiderhoff, WM 2003, 509, 510.

<sup>20</sup> See, for example, C.-W. Canaris, 'Der EuGH als zukünftige privatrechtliche Superrevisionsinstanz?', EuZW 1994, 417; G. Borges, *Die Inhaltskontrolle von Verbraucherverträgen* (Duncker & Humblot 2000), pp. 78 ff. See also the comments on the four cases discussed under D.

<sup>21</sup> See, for example, W. Nassall, WM 1994, 1645 ff.; O. Remien, 'Einheit, Mehrstufigkeit und Flexibilität im europäischen Privat- und Wirtschaftsrecht', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 62 (1998), 627, 642 f.; A. Staudinger, DNotZ 2002, 166, 175 ff.

## D. ECJ case-law

The ECJ's attitude towards its own competence in the field of interpreting EC law and of determining the solution to actual cases is somewhat ambiguous. This can be best illustrated by four private law cases that were referred to the ECJ by national courts. The first two cases, *Océano Grupo*<sup>22</sup> and *Freiburger Kommunalbauten*<sup>23</sup> are cases in which national courts posed questions on the unfairness of specific standard contract terms to the ECJ. The relevant EC legislation is the Unfair Contract Terms Directive 93/13/EEC.<sup>24</sup> The other two cases, *Leitner*<sup>25</sup> and *Veedfald*,<sup>26</sup> are cases in which the ECJ was asked by national courts to give its opinion on the interpretation of rules on damages under the Package Travel Directive 90/314/EEC<sup>27</sup> and the Product Liability Directive 85/374/EEC<sup>28</sup> respectively.

### I. *Océano Grupo*

The crucial clause in *Océano Grupo* was a jurisdiction clause. That clause conferred jurisdiction on the courts in Barcelona where the trader had its principal place of business but where none of the defendant consumers in the main proceedings lived. In principle, the Juzgado de Primera Instancia (Court of First Instance) No 35, Barcelona, had merely asked the ECJ whether the court might determine of its own motion whether a term of a contract was unfair or whether it could merely act on request by the consumer. Implicitly, the issue was raised whether the above-mentioned jurisdiction clause was unfair.

Under Article 3 (1) of this Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The ECJ applied this provision to the clause in question and held that a clause that obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile was unfair because it may hinder the consumer's right to take legal action.<sup>29</sup> Neither Advocate General Saggio nor the ECJ raised issues of autonomous interpretation or of the ECJ's competence under Article 234 EC.

<sup>22</sup> ECJ, judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades and others*, [2000] ECR I-4941.

<sup>23</sup> ECJ, judgment of 1/4/2004, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, not yet reported.

<sup>24</sup> O.J. 1993, L 95/29.

<sup>25</sup> ECJ, judgment of 12/3/2002, Case C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, [2002] ECR I-2631.

<sup>26</sup> ECJ, judgment of 10/5/2001, Case C-203/99 *Henning Veedfald v. Århus Amtskommune*, [2001] ECR I-3569.

<sup>27</sup> O.J. 1990, L 158/59.

<sup>28</sup> O.J. 1985, L 210/29.

<sup>29</sup> See ECJ, judgment of 27/6/2000, Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Rocío Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades and others*, [2000] ECR I-4941, at para 22 ff.

The judgment provoked heavy criticism by some academics. Whilst they did not oppose the substance of the decision as such, they argued that the ECJ should not have decided on the unfairness of the jurisdiction clause at all.<sup>30</sup> Other academics have doubted that the ECJ really decided on the unfairness of jurisdiction clauses at all but read the judgment in such a way that the ECJ made a reservation that left the final decision to the national court,<sup>31</sup> a view that is difficult to maintain after the subsequent decision in *Freiburger Kommunalbauten*.

## II. *Freiburger Kommunalbauten*

In the case of *Freiburger Kommunalbauten*, the municipal construction company Freiburg Kommunalbauten had sold to Mr and Mrs Hofstetter a parking space that Freiburg Kommunalbauten had to build. Under the relevant clause, the whole of the price was due upon delivery of a security by Freiburg Kommunalbauten, irrespective of any progress made in the construction. Mr and Mrs Hofstetter regarded this clause as unfair because it reversed the order for performance of the obligations as determined by § 641 of the BGB, and only paid after having accepted the parking space as free of defects. Freiburg Kommunalbauten claimed default interest for late payment. The German Bundesgerichtshof (BGH) recognised that the clause in question fell within the scope of application of Directive 93/13/EEC. The court was inclined to the view that the clause was not unfair but was not free from doubt and therefore referred to the ECJ.

In this case, the Commission was of the view that the disputed clause gave rise to a disadvantage that was detrimental to the consumer but that the question whether it causes a significant and unjustified imbalance for the purposes of Article 3 (1) of Directive 93/13/EEC was a matter to be decided by the national court.<sup>32</sup> Advocate General Geelhoed proposed not to judge on the clause but to refer the case back to the BGH. He argued that Directive 93/13/EEC never intended to bring the decision on the question whether a particular clause is unfair within the scope of application of Community law but that the Directive merely established abstract preconditions that have to be applied by the national courts.<sup>33</sup> He also stressed that national courts must be able to fulfil their role in applying the Directive without constantly having to refer questions on the unfairness of particular clauses to the ECJ, and that the multiplicity of terms which currently appears in consumer

<sup>30</sup> See, for example, G. Borges, 'AGB-Kontrolle durch den EuGH', *Neue Juristische Wochenschrift* (NJW) 2001, 2061, 2062; D. Buchberger, 'Die Entscheidung des EuGH in der Rs 'Océano/Quintero' – der effet d'exclusion von Richtlinien', *Österreichische Juristenzeitung* (ÖJZ) 2001, 441, 442. More cautious W. Hau, 'Vorgaben des EuGH zur Klausel-Richtlinie', *Praxis des Internationalen Privatrechts* (IPRax) 2001, 96, 97. The issue was not touched in the case-notes by A. Staudinger, *Der Betrieb* (DB) 2000, 2058 ff., and A. Schwartze, *JZ* 2001, 246 ff.

<sup>31</sup> See J. Stuyck, 'Joined Cases C-240/98 to C-244/98, Océano Grupo Editorial SA vs. Rocío Murciano Quintero and Salvat Editores SA v. José M. Sánchez Alcón Prades et als, Judgment of the Full Court of 27 June 2000, nyr', *CMLR* 2001, 719 (726 ff.); H.-W. Micklitz (n. 11 above), p. 491, 516 f.

<sup>32</sup> See ECJ, judgment of 1/4/2004, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, not yet reported, at para 18.

<sup>33</sup> A.G. Geelhoed, opinion of 25/9/2003, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, not yet reported, at para 17 f.

agreements could give rise to continual references for preliminary rulings under Article 234 EC.<sup>34</sup>

The ECJ followed the proposal not to decide on the particular clause that was referred to it by the BGH, but with a different reasoning. Two different arguments were put forward. The first argument relates to the unfairness test, as concretised by Article 4 (1) of the Directive. According to this provision, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. This means, and this is important for the case of *Freiburger Kommunalbauten*, that the ECJ cannot decide on the unfairness of a particular clause without knowing firstly the national law that forms the background of the decision, and secondly the circumstances of the individual case.<sup>35</sup> The second argument is based on Article 234 EC. According to the ECJ, it may merely interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.<sup>36</sup>

This logic behind this judgment is not entirely clear. The ECJ's reluctance may not have been caused by fear from opening the floodgates for national unfair contract term cases as A.G. Geelhoed had suggested.<sup>37</sup> Rather, it might have been due to the character of the unfairness test as designed by Directive 93/13/EEC that requires consideration of the circumstances of the individual case.<sup>38</sup> In fact, information provided by the BGH was not sufficiently detailed.<sup>39</sup> The ECJ explained that the case of *Freiburger Kommunalbauten* was different from the case of *Océano Grupo* because in the latter case, the jurisdiction clause in question was plainly unfair. This is because it was solely to the benefit of the trader and contained no benefit in return to the consumer. It undermined the effectiveness of the legal protection of the rights which Directive 93/13/EEC afforded to consumers. With this explanation, the ECJ has reserved its competence to overrule a national court where the unfairness of a clause is evident or where it can test a clause against harmonised EC law that could serve as a frame of reference.<sup>40</sup>

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<sup>34</sup> Ibid., at para 29.

<sup>35</sup> ECJ, judgment of 1/4/2004, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, not yet reported, at para 21. See also W. Nassall, WM 1994, 1645, 1652 on the relevance of full information to the ECJ.

<sup>36</sup> Ibid., at para 22.

<sup>37</sup> See also R. Freitag, EWiR 2004, 397, 398; against I. Tilmann, 'Die Auslegung der Richtlinie 93/13/EWG durch den Europäischen Gerichtshof', *Zeitschrift für Gemeinschaftsprivat Recht* (GPR) 2004, 182, 188.

<sup>38</sup> The BGH had not given sufficient information to the ECJ, see B. Heiderhoff, WM 2003, 509, 513.

<sup>39</sup> See also I. Tilmann, GPR 2004, 182, 188.

<sup>40</sup> See also R. Freitag, EWiR 2004, 397, 398.

### III. *Leitner*

The *Leitner* case turned on package travel law. The family of Simone Leitner booked a package holiday including a stay at a holiday club in Turkey where she fell ill from salmonella poisoning that was attributable to the food offered in the club. Amongst others, she brought an action in the court of her Austrian domicile for damages for the loss of enjoyment which had never been granted under Austrian law. Package travel law is subject to Directive 90/314/EEC. Under Article 5 (2) of this Directive, "with regard to the damage resulting for the consumer from the failure to perform or the improper performance of a package travel contract, Member States shall take the necessary steps to ensure that the organiser and/or retailer is/are liable (...)". The second instance court, the Landgericht (regional court) Linz, referred to the ECJ the question whether or not the notion of "damage" necessarily included non-material damages. The defendant, TUI, and the Austrian, French and Finnish Governments argued that the harmonisation of national laws sought by the Directive consisted merely of defining a minimum level of protection for consumers of package holidays. In consequence, anything not expressly covered by the Directive, and in particular damages for the loss of enjoyment, should be regarded as remaining within the competence of the national legislatures. Advocate General Tizzano focused predominantly on the nature of the harmonisation achieved by Directive 90/314/EEC. He argued that although not being a total harmonisation instrument, the Directive sets out minimum standards that need to be given an autonomous and uniform interpretation throughout the Community. For a number of reasons, A.G. Tizzano proposed to interpret Article 5 (2) of Directive 90/314/EEC in such a way that it covers non-material damages.<sup>41</sup> The ECJ followed this opinion.<sup>42</sup> It stressed the purpose of the Directive was to eliminate the disparities between the national laws and practices of the Member States and concluded that this elimination of disparities required the uniform interpretation of the term "damages".

Most commentators have ignored the competence issues and have rather been fascinated by the ECJ's potential first step to create a truly European notion of damages.<sup>43</sup> However, there were also critical voices who have blamed the ECJ of overstepping its competence.<sup>44</sup>

### IV. *Veedfald*

In *Veedfald*, a man had donated a kidney to his brother. This kidney was prepared for transplantation through flushing with a perfusion fluid designed for that purpose. This fluid, however, was defective, and the kidney was unusable for any transplant. Mr.

<sup>41</sup> A.G. Tizzano, opinion of 20/9/2001, Case C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, [2002] ECR I-2631.

<sup>42</sup> ECJ, judgment of 12/3/2002, Case C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, [2002] ECR I-2631. Austrian law was amended accordingly, see P. Bydliński, 'Geld statt Urlaubsfreude nun auch in Österreich – zwei Fragen zum neuen § 31e Abs 3 KSchG', *Juristische Blätter* (JBl.) 2004, 66 f.

<sup>43</sup> See, in particular, K. Tonner, 'Anmerkung', *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2003, 623 ff.

<sup>44</sup> See O. Remien, 'Die Vorlagepflicht bei Auslegung unbestimmter Rechtsbegriffe', *RabelsZ* 66 (2002), 503, 528; R. Doehner, *EuZW* 2002, 340, 341.

Veedefald who was to receive the kidney claimed damages under Danish product liability law.

One of the issues at stake under the Product Liability Directive 85/374/EEC was whether the destruction of a kidney that was to be transplanted constituted a "damage caused by death or by personal injuries" under Article 9 lit. a) or a "damage to, or destruction of, any item of property other than the defective product itself" under Article 9 lit. b). This distinction is important because Article 9 lit. b) provides for a lower threshold of 500 Euros whereas Article 9 lit. a) does not.

Amongst others, the EC Commission argued that the expressions that are used in Article 9 had to be defined by Community law so that they are applied uniformly throughout the Community. In fact, according to ECJ case-law,<sup>45</sup> Directive 85/374/EEC, aims at total harmonisation of product liability law, as far as its scope of application reaches.<sup>46</sup> Advocate General Ruiz-Jarabo Colomer followed this approach and proposed to regard the case as a case of Article 9 lit. a).<sup>47</sup> Nevertheless, the ECJ refrained from making a decision. It held that it was left to national legislatures to determine the precise contents of those two heads of damage. However, the ECJ also emphasised that application of national rules was not allowed to impair the effectiveness of the Directive and that the national court had to interpret its national law in the light of the wording and the purpose of the Directive.<sup>48</sup>

Comments on this case are scarce. Merely one commentator appeared astonished that the ECJ has not decided on Article 9 of the Directive.<sup>49</sup>

## V. Conclusion

Until now, the ECJ has not developed a clear line between cases where it exercised deference and cases where it made a final decision, a finding that is by no means unique to the field of EC private law.<sup>50</sup> Substantive differences between the cases in which the ECJ took different approaches are difficult to see. In particular, the diverging decisions in *Leitner* and *Veedefald* are surprising. Since the Product Liability Directive 85/374/EEC aims, according to the ECJ, at harmonising this field of law totally, arguments for the uniform and autonomous interpretation of its Article 9 were much stronger than in the case of the minimum harmonisation Directive 90/314/EEC on package travel. One explanation

<sup>45</sup> ECJ, judgments of 25/4/2002, Case C-52/00, *Commission v. France*, [2002] ECR I-3827, at para 24, and Case C-154/00, *Commission v. Greece*, [2002] ECR I-3879, at para 20.

<sup>46</sup> See, for example, R. Schaub, 'Abschied vom nationalen Produkthaftungsrecht? Anspruch und Wirklichkeit der EG-Produkthaftung', ZEuP 2003, 562 ff.

<sup>47</sup> A.G. Ruiz-Jarabo Colomer, opinion of 14/12/2000, Case C-203/99 *Henning Veedefald v. Århus Amtskommune*, [2001] ECR I-3569, at para 30 ff.

<sup>48</sup> ECJ, judgment of 10/5/2001, Case C-203/99 *Henning Veedefald v. Århus Amtskommune*, [2001] ECR I-3569, at para 27.

<sup>49</sup> See W. Posch, 'Inverkehrbringen eines Produkts' nach der EuGH-Entscheidung *Veedefald gegen Århus*', *wirtschaftsrechtliche blätter* (wbl) 2001, 411, 412. A. Geiger, 'Anmerkung', EuZW 2001, 381 f., does not comment on this issue.

<sup>50</sup> See S. Weatherill, 'Prospects for the Development of European Private Law Through 'Europeanisation' in the European Court – the Case of the Directive on Unfair Terms in Consumer Contracts', ERPL 1995, 307, 327 f.

might lie in the different chambers concerned with the above-mentioned cases: *Océano Grupo* was decided by the full court, *Leitner* by the sixth chamber. In contrast, both *Veedfald* and *Freiburger Kommunalbauten*, where the ECJ refrained from making a decision in substance, were decided by the fifth chamber of the ECJ. It seems that the various chambers of the ECJ still have to find agreement on the ECJ's appropriate role.

#### **D. Increasing Occasions for Proceedings under Article 234 EC**

Situations similar to that under Directive 93/13/EEC can easily be imagined under other Directives. A prime example is the Consumer Sales Directive 1999/44/EC.<sup>51</sup> This Directive sets out rules as to under what circumstances a good is defective. Now, a national court may be uncertain as to whether or not a particular good is defective in a particular situation. Is a car that was manufactured in Italy but was sold as manufactured in France defective?<sup>52</sup> Or take the example of goods that are declared to be produced in an environmentally sound way but are in fact not. Are such goods that are of equal quality but that were produced in a manner that damaged the Amazonian rain forest for years "in conformity with the contract"?<sup>53</sup> Thus, the national court will refer the question to the ECJ, under Article 234 EC. Obviously, many such questions may arise under Directive 1999/44/EC, and these questions may be very detailed.

The need for national courts to ask rather detailed questions may increase with the recent trend to total harmonisation of EC consumer law and, more dramatically, with a totally harmonised EC private law. Under the minimum harmonisation approach that dominated EC consumer law, and therefore most of EC private law, over the last two decades, only cases that touched on the minimum standard set by the relevant directives needed to be referred to the ECJ. Where national law was above the minimum standard (of consumer protection), there was no need for referring cases to the ECJ.<sup>54</sup> With a total harmonisation approach, all cases in which the underlying EC law is unclear would have to be referred to the ECJ.

#### **E. What Future Role for the ECJ?**

It seems rather obvious that the ECJ's future role cannot be to give countless judgments on the unfairness of standard contract terms, on the conformity of goods with the contract, on the adequacy of damages in travel law etc. This would not only overburden the ECJ,<sup>55</sup> it would also render court proceedings excessively lengthy<sup>56</sup> and complicated. Against this

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<sup>51</sup> O.J. 1999, L 171/12.

<sup>52</sup> See supra, n. 3.

<sup>53</sup> On this problem, see C. Glinski & P. Rott, 'Umweltfreundliches und ethisches Konsumverhalten im harmonisierten Kaufrecht', *EuZW* 2003, 649 ff.

<sup>54</sup> See also A.G. Geelhoed, opinion of 25/9/2003, Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter*, not yet reported, at para 19.

<sup>55</sup> See, in particular, W.-H. Roth (n. 10 above), p. 135, 143.

fear, one could point at the practice of national courts until now. Although there were good reasons to refer a number of cases to the ECJ, they have only rarely done so.<sup>57</sup> More importantly, the aim of harmonisation requires not only harmonisation of laws but also their uniform application by the courts. The ECJ has emphasised this, in particular, in *Leitner*. As experience with the Rome Convention shows, this is impossible without the ECJ making decisions on the correct interpretation of EC law, which are then binding on national courts. The more general the terms of EC legislation are, the more difficult it is to find a common interpretation.<sup>58</sup> In cases such as the interpretation of the notion of good faith in the Unfair Contract Terms Directive 93/13/EEC, the ECJ should not be too reluctant.<sup>59</sup> Decisions on a number of clauses may be necessary to illustrate the protection afforded by this Directive.<sup>60</sup> Equally important is that suitable cases are referred to the ECJ by national courts that allow the ECJ to develop concepts of EC private law.<sup>61</sup> Too great a deference might discourage national courts to refer cases to the ECJ in the future, thereby depriving the ECJ of opportunities to concretise and shape EC private law. Certainly, requests under Article 234 EC would decrease over time with a view to the so-called *acte clair* doctrine. Under this doctrine, a national court is merely obliged to bring a matter before the ECJ unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the ECJ or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt.<sup>62</sup> However, this doctrine must be handled with care. If a court obtains knowledge of a diverging decision by another court of the same or another Member State, there seems to be sufficient reason for referring the case to the ECJ.<sup>63</sup> Should the number of private law cases nevertheless increase dramatically, the most sensible consequence would lie in the

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<sup>56</sup> ECJ proceedings under Art. 234 EC nowadays take on average more than 24 months, see the Annual Report of the ECJ at <http://www.curia.eu.int/en/instit/presentationfr/index.htm>. Compared to up to three court instances in national law, this is still no excessively long period of time, see J. Basedow (n. 11 above), p. 651, 673.

<sup>57</sup> See, in particular, J. Basedow (n. 11 above), p. 651, 665 ff., 674 f., on the practice of the German Bundesgerichtshof. A striking example from English court practice is the case of *Director General of Fair Trading v. First National Bank plc*, [2001] 2 All ER (Comm.) 1000, where the House of Lords held that the interpretation of the term "good faith" clearly meant a requirement of "fair and open dealing". See also H.-W. Micklitz, 'Anmerkung', ZEuP 2003, 868 ff.

<sup>58</sup> See also I. Tilmann, GPR 2004, 182, 188.

<sup>59</sup> See also O. Remien, *RabelsZ* 62 (1998), 627, 643.

<sup>60</sup> See I. Tilmann, GPR 2004, 182, 188. See also W. Nassall, WM 1994, 1645, 1651. S. Weatherill, ERPL 1995, 307, 308 ff., points at the law of misleading advertising under Directive 84/450/EEC where the ECJ has decided a number of cases, thereby clarifying the underlying concepts. See also G. G. Howells (n. 14 above), p. 115, 117 ff.

<sup>61</sup> See S. Weatherill, ERPL 1995, 307, 327.

<sup>62</sup> See ECJ, judgment of 6/10/1982, Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, [1982] ECR 3415, at para 21. See also C.-W. Canaris, EuZW 1994, 417; W. Nassall, WM 1994, 1645, 1649.

<sup>63</sup> See also C.-W. Canaris, EuZW 1994, 417, who proposes to restrict procedures under Art. 234 EC to cases where the highest court of another Member State has made a diverging decision. According to W. Nassall, WM 1994, 1645, 1647, Art. 234 EC even requires the national court to be certain that no court of another Member State would be in doubt about this decision.

enlargement of the ECJ and in the establishment of special chambers for private law.<sup>64</sup> This might, at the same time, prevent such diverging approaches to the handling of private law cases as occurred in the four cases discussed above.

Alternative routes are difficult to see. One could think of a duty of national courts to consider decisions by courts of other Member States and thus interpret national law that is derived from EC law in a comparative way.<sup>65</sup> Advocate General Tizzano has, for example, performed such a comparative analysis when interpreting the term "damage" in Article 5 (2) of Directive 90/314/EEC, in the above-mentioned *Leitner* case.<sup>66</sup> This approach, however, has its narrow practical limits. To start with, decisions by courts of other Member States may not be publicly available, or only in a language that is not accessible to the instant court. In the case of the Unfair Contract Terms Directive 93/13/EEC, the Commission has made the laudable attempt to organise the setting up of a database called CLAB in which case-law by all (old) Member States on this Directive is made available.<sup>67</sup> This, however, is a costly and difficult undertaking, and at least in the first years, the database had little impact on the harmonisation of national case-law.

A further alternative option is currently being pursued by the Commission. The Commission intends to create a "Common Frame of Reference" that shall provide definitions for abstract legal terms, hoping to reduce diversity in interpretation by national courts. This Common Frame of Reference is being prepared by a huge network mainly of academics under the 6<sup>th</sup> Framework Programme for Research.<sup>68</sup> Still, even if this Common Frame of Reference succeeds in reducing the number of conflicts, it is never possible to rule out all uncertainty in advance, or to avoid general terms. In the end, someone will have to decide on the remaining issues of interpretation, and this can only be a supranational court: the ECJ.

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<sup>64</sup> See A. Staudinger, 'Die Mitteilung der Kommission zum Europäischen Vertragsrecht', *Verbraucher und Recht* (VuR) 2001, 353, 358.

<sup>65</sup> See, for example, U. P. Gruber, 'Zur Rolle der Rechtsvergleichung nach der Schuldrechtsreform', *Zeitschrift für vergleichende Rechtswissenschaft* (ZVglRWiss) 101 (2002), 38, 42.

<sup>66</sup> See A.G. Tizzano, opinion of 20/9/2001, Case C-168/00 *Simone Leitner v. TUI Deutschland GmbH & Co. KG*, [2002] ECR I-2631, at para 40 ff.

<sup>67</sup> Available on internet at <http://europa.eu.int/clab>. See also H.-W. Micklitz (n. 11 above), p. 491, 528 ff.; H.-W. Micklitz/M. Radeideh, 'CLAB Europa – Die europäische Datenbank missbräuchlicher Klauseln in Verbraucherverträgen', *ZEuP* 2003, 85 ff.

<sup>68</sup> See, in particular, D. Staudenmayer, *ERPL* 2003, 113, 123 f. For critical comments see A. Colombi Ciacchi, 'Der Aktionsplan der Kommission für ein kohärenteres Vertragsrecht: Wo bleibt die Rückbindung an die Europäische Verfassung?', to be published in *Jahrbuch junger Zivilrechtswissenschaftler* 2004.