

XXXI. European Union

BERNHARD A KOCH AND THOMAS THIEDE

The five selected decisions of the Court of Justice of the European Union (CJEU), formerly known as the European Court of Justice (ECJ), between 2001 and 2025 illustrate the profound and, at times, intrusive influence of EC and EU law on the tort regimes of the Member States. Together, these judgments (ranked chronologically below) redefine fundamental tort concepts through the prism of the Union's legal principles, that are effectiveness, functional equivalence, and the protection of fundamental rights.

1. *Veedfald*¹

In the very first ruling on the substance of the 1985 Product Liability Directive (PLD),² the ECJ immediately shattered several expectations with regard to the PLD that had developed until then.

The plaintiff was in need of a kidney transplant, and his brother had agreed to donate one of his. After the healthy kidney had been removed, it was placed into a perfusion fluid while on its way to the operating theatre where the recipient awaited the transplant. The liquid had been concocted by a laboratory belonging to the same hospital operator specifically for this particular surgery. Since it turned out to be defective, the donor kidney could no longer be used. The intended recipient now sued the hospital operator for compensation, and when the case reached the Danish Supreme Court, the latter asked the ECJ for a preliminary ruling on several aspects of the case.

¹ ECJ 10.5.2001, C-203/99, *Henning Veedfald v Århus Amtskommune*, ECLI:EU:C:2001:258. See *BA Koch*, European Union in: H Koziol/BC Steininger (eds), *European Tort Law* 2001 (2002) 473, no 31 ff.

² Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] Official Journal (OJ) L 210/29, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1999] OJ L 141/20.

One question concerned the type of harm. After all, art 9 PLD only recognises bodily (including fatal) injuries as well as certain property damage as compensable losses. At first sight, it was unclear under which category the damage at stake fell – it could have been a property damage (but whose – of the donor or of the recipient?) or personal injury instead (but again whose – of the donor who had lost a healthy kidney, or of the frustrated recipient who was still missing one, even though that condition per se was pre-existing?). The ECJ failed to reply to this crucial question by arguing evasively that it must have been at least one (no matter which) kind of harm covered by the PLD, leaving it to the national court to ultimately decide.

Another important question referred to the fact that the liquid in question had never actually been put onto any market, since it was produced internally by the hospital's own infrastructure exclusively for the very operation they were called to perform. However, putting the product into circulation is the key moment of the 1985 PLD, and in this case, it never actually happened. Again, the ECJ circumvented this problem by claiming that the liquid was effectively used, so it must have been circulated somehow somewhere by someone. The Court thereby opened Pandora's box. After all, what was at the centre of the case was actually a (failed) service rendered to the claimant that went wrong and not a product that was merely a by-product of said service. In subsequent case law, the ECJ tried to navigate back at least partially in this regard.³

Also, since the liquid was produced for this very occasion alone, it was not one item of a line of mass production, which was the original primary scenario underlying the discussions leading to the introduction of the PLD. In fact, for Advocate General Ruiz-Jarabo Colomer, that difference led him to conclude that the PLD would not apply at all in the instant case.⁴ However, the ECJ did not follow his opinion.

2. Köbler⁵

Köbler is a landmark judgment that consolidated the constitutional principle of State liability within EU law. It secured a remedy for individuals harmed by judicial acts of last resort and thus significantly strength-

³ CJEU 21.12.2011, C-495/10, *Centre hospitalier universitaire de Besançon v Thomas Dutruieux, Caisse primaire d'assurance maladie du Jura*, ECLI:EU:C:2011:869.

⁴ ECLI:EU:C:2000:697, no 14 ff.

⁵ ECJ 30.9.2003, C-224/01, *Gerhard Köbler v Republik Österreich*, ECLI:EU:C:2003:513. See *BA Koch*, European Union, in: H Koziol/BC Steininger (eds), *European Tort Law 2003* (2004) 435, nos 41–52.

ened the protection of rights derived from EU law. At the same time, it imposed on national supreme courts an enhanced duty of diligence in the correct application of Union law.

The claimant, a university professor, alleged indirect discrimination after being refused a special length-of-service increment in Austria on the ground that his previous service in Germany had not been counted into the duration of employment required to qualify for such a loyalty payment. When the competent authorities denied the claim, he appealed to the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH). The VwGH initially referred a question to the ECJ but later withdrew the reference and dismissed the claim. The claimant then brought a civil action against the Republic of Austria, seeking damages for the lost increment on the basis that the VwGH's judgment infringed directly applicable provisions of EU law. The referring first-instance court in civil matters asked the ECJ *inter alia* whether the principle of State liability extends to decisions of a court adjudicating at last instance.

The ECJ, relying on its earlier case law,⁶ confirmed that the standards of State liability apply to any breach of EU law by a Member State, irrespective of the branch of government responsible. Because the State constitutes a single entity, liability arises 'irrespective of whether the breach ... is attributable to the legislature, the judiciary or the executive'. Therefore, for the first time, the Court confirmed in principle that State liability also extends to cases where the alleged infringement of EU law stems from a last-instance court decision in a Member State. Denying compensation where such a court causes the harm would undermine the full effectiveness of EU law. Liability attaches to the State, not to individual judges, thereby promoting the quality of justice by ensuring redress for harm resulting from judicial error. However, in the case at hand, the ECJ deemed the breach of EU law complained of not to reach the required degree of seriousness, hence insufficient to trigger liability.

3. *Manfredi*⁷

Manfredi constitutes the cornerstone of modern European competition damages litigation. It transformed private enforcement of competition

⁶ ECJ 19.11.1991, Joined Cases C-6/90 and C-9/90, *Andrea Francovich v Italian Republic, Danila Bonifaci and Others v Italian Republic*, ECLI:EU:C:1991:428; CJEU 5.3.1996, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Germany and Factortame Ltd v UK*, ECLI:EU:C:1996:79.

⁷ ECJ 13.7.2006, Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04)*, *Antonio Cannito v Fondiaria Sai SpA (C-296/04)*

law from a theoretical possibility into a mandatory tort claim grounded directly in primary EU law. The judgment became the principal catalyst for Directive 2014/104/EU (Damages Directive),⁸ which codified and harmonised substantive and procedural rules on antitrust damages across the Union, thereby reshaping national civil litigation practice.

The CJEU in *Manfredi* recognised that the right to claim compensation for a loss caused by infringements of (now) arts 101 and 102 Treaty on the Functioning of the European Union (TFEU) stems directly from EU law and forms an essential element of the effectiveness of the competition rules. The case addressed the diversity of national tort laws that had long obstructed effective enforcement, for instance, by imposing stringent fault requirements, short limitation periods or excluding certain heads of loss. The claimants, consumers overcharged by a cartel, faced prescription barriers under domestic law when seeking compensation years later.

The Court held that national procedural frameworks govern the exercise of the EU-based right to damages, but they must comply with the twin principles of effectiveness and equivalence. The principle of effectiveness requires that national rules must not render the exercise of the right virtually impossible or excessively difficult. The principle of equivalence demands that those rules must not be less favourable than those governing similar domestic actions. By constitutionalising these standards, *Manfredi* elevated private enforcement of competition law to a fundamental element of the EU legal order.

4. *Vnuk*⁹

Vnuk radically extended the territorial and functional scope of compulsory third-party motor liability insurance within the EU.

Mr Vnuk was standing on a ladder in the courtyard of a farm, when a tractor with a trailer struck the ladder while reversing. Vnuk was injured in the subsequent fall. His claim against the insurer of the tractor failed in

and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, ECLI:EU:C:2006:461.

⁸ Directive 2014/104/EU 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 L 349/1. See BA Koch/T Thiede, European Union, in: E Karner/BC Steininger (eds), European Tort Law 2014 (2015) 660, no 1 ff.

⁹ CJEU 4.9.2014, C-162/13, *Damijan Vnuk v Zavarovalnica Triglav d.d.*, ECLI:EU:C:2014:2146. On this case, see Koch/Thiede (fn 8) no 45.

the Slovenian courts, which *inter alia* held that compulsory cover applied only to accidents occurring in public traffic. The Slovenian Supreme Court referred to the CJEU the question whether such use of a tractor nevertheless fell within the notion of ‘the use of a vehicle’ in art 3 para 1 of the First Motor Insurance Directive (MID).¹⁰

The Court first confirmed that the tractor qualified as a ‘vehicle’ within the meaning of the Directive, noting that the definition is ‘unconnected with the use which is made or may be made of the vehicle’. Because language versions diverged – some referring to ‘use’, others to ‘circulation’ or merely to ‘liability in respect of vehicles’ – the Court interpreted the provision in light of its context and objectives. It identified a dual objective: protecting victims of motor vehicle accidents and facilitating free movement. On that basis, the CJEU held that the concept of ‘use of a vehicle’ covers any use consistent with its normal function. Manoeuvring a tractor to position a trailer falls within that normal function, subject to the national court’s verification. The fact that this happened in the courtyard of a farm rather than on some public road was not decisive, as the alternative view would violate the primary purpose of the motor insurance system to protect all victims of accidents caused by vehicles.

The judgment provoked considerable concern in the insurance sector. With its broad test of any use ‘consistent with the normal function of a vehicle’, the Court effectively brought within the Directive’s scope *all* motor vehicles intended for travel on land, regardless of registration or location. Hence, any accident arising from the normal operation of such a vehicle must be covered under compulsory insurance.

In light of *Vnuk*, the MID was subsequently amended to reflect this extended view also in its black-letter text.¹¹

¹⁰ Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L 103/1.

¹¹ Art 1 para 1a of the consolidated MID: Directive 2009/103/EC of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2009] OJ L 263/11, as amended by Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 amending Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability [2021] OJ L 430/1. This provision therefore now defines ‘use of a vehicle’ as meaning ‘any use of a vehicle that is consistent with the vehicle’s function as a means of transport at the time of the accident, irrespective of the vehicle’s characteristics and irrespective of the terrain on which the motor vehicle is used and of whether it is stationary or in motion’.

5. *Österreichische Post*¹²

Österreichische Post is a major landmark as it fundamentally re-defines the concept of compensable non-material damage in the novel context of digital rights, paving the way for a potential increase in mass claims across the EU.

The facts concerned *Österreichische Post*, a company that inter alia collected data on the political affinities of the Austrian population and used this (also) to compile ‘target group addresses’ subsequently sold to third parties, enabling them to target advertising. The claimant, who had not consented to any such processing of information concerning his persona, felt ‘great upset, a loss of confidence, and a feeling of exposure’, but no further harm beyond such adverse emotions, after *Österreichische Post* had statistically inferred his affinity with a certain political party, which he found offensive. The Austrian courts denied compensability of such (purely) immaterial harm for lack of seriousness, leading the Supreme Court to ultimately refer several questions to the CJEU, in particular whether the award of compensation for non-material damage under art 82 GDPR¹³ required the existence of harm that goes beyond the mere upset caused by the infringement, effectively asking for a threshold of seriousness.

The CJEU held that art 82(1) GDPR cannot be interpreted as meaning that the mere infringement of the GDPR’s provisions is sufficient to confer a right to compensation, as the wording speaks of ‘damage’ and ‘infringement’ separately. However, regarding any form or degree of ‘seriousness’ of non-material damage, the Court pointed to the lack of any such reference in art 82(1) GDPR and to recital 146 GDPR, which states that ‘the concept of damage should be broadly interpreted’. The CJEU emphasised that limiting this notion solely to damage of a certain degree of seriousness would be contrary to the broad notion favoured by the EU legislator. Moreover, any threshold of seriousness would risk undermining the coherence of the rules established by the GDPR, as the gradation of such a threshold would fluctuate according to the assessment of the courts seized.

¹² CJEU 4.5.2023, C-300/21, *Österreichische Post AG v Verein für Konsumenteninformation*, ECLI:EU:C:2023:370. See *BA Koch/T Thiede*, European Union, in: E Karner/BC Steininger (eds), *European Tort Law 2023* (2024) 721, no 1 ff.

¹³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

The CJEU conceded that the GDPR is silent on how to specifically compensate such losses, leaving it to the Member States to prescribe the detailed rules governing the criteria for determining the extent of the compensation payable. This freedom allows Member States some leeway on quantification, but the ruling fundamentally establishes that the infringement of the right to data privacy need not necessarily lead to a certain minimum degree of harm.