

JUDGMENT OF THE COURT (Fifth Chamber)

25 April 2002 *

In Case C-52/00,

Commission of the European Communities, represented by M. Patakia and B. Mongin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented initially by K. Rispal-Bellanger and R. Loosli-Surrans, and subsequently by the latter and J-F. Dobbelle, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for a declaration that:

- by including damage of less than EUR 500 in Article 3 of Law No 98-389 of 19 May 1998 on liability for defective products (JORF of 21 May 1998, p. 7744);

- by providing in Article 8 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in Article 13 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of 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 (OJ 1985 L 210, p. 29),

the French Republic has failed to fulfil its obligations under Articles 9, 3(3) and 7 of the aforementioned directive,

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, S. von Bahr and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2001,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 17 February 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that:

— by including damage of less than EUR 500 in Article 3 of Law No 98-389 of 19 May 1998 on liability for defective products (JORF of 21 May 1998, p. 7744);

- by providing in Article 8 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in Article 13 thereof that the manufacturer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of 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 (OJ 1985 L 210, p. 29),

the French Republic has failed to fulfil its obligations under Articles 9, 3(3) and 7 of the aforementioned directive.

Legal framework

Community legislation

2 The Directive seeks to approximate the laws of the Member States concerning the liability of producers for damage caused by defective products. According to the first recital in the preamble thereto, approximation is necessary because legislative divergences may 'distort competition and affect the movement of

goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property’.

3 Article 1 of the Directive provides that ‘the producer shall be liable for damage caused by a defect in his product’.

4 Article 3(3) of the Directive is worded as follows:

‘Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.’

5 Under Article 7 of the Directive the producer is not liable under the Directive if he proves:

‘...

(d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities; or

- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;

...'

6 The first paragraph of Article 9 defines 'damage' for the purposes of Article 1 as

'...

- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of [EUR] 500, provided that the item of property:

- (i) is of a type ordinarily intended for private use or consumption,

and

- (ii) was used by the injured person mainly for his own private use or consumption.'

7 Article 13 of the Directive provides:

‘This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.’

8 Article 15(1) of the Directive provides:

‘Each Member State may:

...

(b) by way of derogation from Article 7(e), maintain or, subject to the procedure set out in paragraph 2 of this article, provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.’

9 Under Article 19(1) of the Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 July 1988 at the latest.

National legislation

10 Law No 98-389 inserted the following provisions into the French Civil Code (hereinafter ‘the Civil Code’):

Article 1386-1:

‘The producer shall be liable for the damage caused by a defect in his product, whether or not he is bound to the victim by contract.’

Article 1386-2:

‘The provisions of the... chapter (on liability for defective products) apply to compensation for damage resulting from injury to persons or property other than the defective product itself.’

Article 1386-7, first paragraph:

‘The vendor, hirer, except a lessor under a hire-purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business shall be liable for safety defects in their products on the same basis as the producer.’

Article 1386-11, first paragraph:

‘The producer shall be automatically liable unless he proves:

...

4. that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered;

5. or that the defect is due to compliance of the product with mandatory regulations.’

Article 1386-12, second paragraph:

‘The producer cannot invoke the grounds of exemption from liability under subparagraphs 4 and 5 of Article 1386-11 if, in the event of a defect manifesting itself within a period of ten years after the product was put into circulation, he has failed to take appropriate measures to avert the harmful consequences thereof.’

Pre-litigation procedure

- 11 Taking the view that the Directive had not been correctly transposed into French law within the period prescribed, the Commission initiated proceedings for failure to fulfil obligations. After placing the French Republic on notice to submit its observations, the Commission issued a reasoned opinion on 6 August 1999 requesting that Member State to take the measures necessary to comply with the opinion within two months of its notification. Since the Commission deemed the reply by the French Republic to be unsatisfactory, it brought this action.

Substance

- 12 The Commission puts forward three pleas, which raise the initial question whether in regard to the matters for which the Directive makes provision the result sought by it is complete, or merely a minimum, harmonisation of the laws, regulations and administrative provisions of the Member States.

The degree of harmonisation achieved by the Directive

- 13 In the French Government's view, the Directive must be interpreted in the light of the growing importance of consumer protection within the Community, as reflected in the latest version of Article 153 EC. The wording of Article 13 of the Directive, which uses the term 'rights', shows that it does not seek to prevent

achievement of a higher national level of protection. That analysis is also borne out by the fact that the Directive itself enables the Member States to depart in certain respects from the rules which it lays down.

- 14 In that connection it should be pointed out that the Directive was adopted by the Council by unanimity under Article 100 of the EEC Treaty (amended to Article 100 of the EC Treaty, now Article 94 EC) concerning the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. Unlike Article 100a of the EC Treaty (now, after amendment, Article 95 EC), which was inserted into the Treaty after the adoption of the Directive and allows for certain derogations, that legal basis provides no possibility for the Member States to maintain or establish provisions departing from Community harmonising measures.
- 15 Nor can Article 153 EC, likewise inserted into the Treaty after the adoption of the Directive, be relied on in order to justify interpreting the directive as seeking a minimum harmonisation of the laws of the Member States which could not preclude one of them from retaining or adopting protective measures stricter than the Community measures. In fact, the competence conferred in that respect on the Member States by Article 153(5) EC concerns only the measures mentioned at paragraph 3(b) of that article, that is to say measures supporting, supplementing and monitoring the policy pursued by the Member States. That competence does not extend to the measures referred to in paragraph 3(a) of Article 153 EC, that is to say the measures adopted pursuant to Article 95 EC in the context of attainment of the internal market with which in that respect the measures adopted under Article 94 EC must be equated. Furthermore, as the Advocate General noted at point 43 of his Opinion, Article 153 EC is worded in the form of an instruction addressed to the Community concerning its future policy and cannot permit the Member States, owing to the direct risk that would pose for the *acquis communautaire*, autonomously to adopt measures contrary to the Community law contained in the directives already adopted at the time of entry into force of that law.

16 Accordingly, the margin of discretion available to the Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.

17 In that connection it should be pointed out first that, as is clear from the first recital thereto, the purpose of the Directive in establishing a harmonised system of civil liability on the part of producers in respect of damage caused by defective products is to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection.

18 Secondly, it is important to note that unlike, for example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), the Directive contains no provision expressly authorising the Member States to adopt or to maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection.

19 Thirdly, the fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete.

20 Although Articles 15(1)(a) and (b) and 16 of the Directive permit the Member States to depart from the rules laid down therein, the possibility of derogation applies only in regard to the matters exhaustively specified and it is narrowly defined. Moreover, it is subject *inter alia* to conditions as to assessment with a view to further harmonisation, to which the penultimate recital in the preamble

expressly refers. An illustration of progressive harmonisation of that kind is afforded by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC (OJ 1999 L 141, p. 20), which by bringing agricultural products within the scope of the Directive removes the option afforded by Article 15(1)(a) thereof.

- 21 In those circumstances Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.
- 22 The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.
- 23 Likewise the reference in Article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production.
- 24 It follows that, contrary to the arguments put forward by the French Republic, the Directive seeks to achieve, in the matters regulated by it, complete

harmonisation of the laws, regulations and administrative provisions of the Member States (see the judgments of today in Case C-154/00 *Commission v Greece* [2002] ECR I-3879, paragraphs 10 to 20, and Case C-183/00 *González Sánchez* [2002] ECR I-3901, paragraphs 23 to 32).

25 The Commission's pleas must be examined in the light of those considerations.

First plea: incorrect transposition of Article 9(b) of the Directive

26 The Commission points out that, unlike Article 9(b) of the Directive, Article 1386-2 of the Civil Code covers all damage to private and public property, with no lower threshold of EUR 500.

27 The French Government does not deny that discrepancy but relies on four arguments in order to justify it. First, by depriving the victim of a right of action, the lower threshold infringes the fundamental right of access to the courts guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Secondly, the threshold is also contrary to the principle of equal treatment inasmuch as it creates unfair inequalities between both producers and consumers. Thirdly, it has the same effect as a rule granting total exemption from tortious liability, which under French law is contrary to public policy. Fourthly, those criticisms are borne out by the fact that in its Green Paper of 28 July 1999 on liability for defective products (COM (1999) 396 final) the Commission proposes that the threshold be abolished.

- 28 As regards the first two arguments, which question the legality of the threshold provided for in the Directive, it should be borne in mind in the first place that the system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 226 EC and 227 EC, whereby a declaration that a Member State has failed to fulfil its obligations may be sought, and those provided for in Articles 230 EC and 232 EC, which seek judicial review of the lawfulness of measures adopted by the Community institutions or of the institutions' failure to adopt measures. Those remedies serve different purposes and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision. Nor can it plead the unlawfulness of a directive which the Commission alleges it to have infringed (Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 10).
- 29 Moreover, as the Advocate General noted at points 66 to 68 of his Opinion, the limits set by the Community legislature to the scope of the Directive are the result of a complex balancing of different interests. As is apparent from the first and ninth recitals in the preamble to the Directive, those interests include guaranteeing that competition will not be distorted, facilitating trade within the common market, consumer protection and ensuring the sound administration of justice.
- 30 The consequence of the choice made by the Community legislature is that, in order to avoid an excessive number of disputes, in the event of minor material damage the victims of defective products cannot rely on the rules of liability laid down in the Directive but must bring an action under the ordinary law of contractual or non-contractual liability.
- 31 In those circumstances the threshold provided for in Article 9(b) of the Directive cannot be regarded as affecting victims' rights of access to the courts (*Commission v Greece*, cited above, paragraph 31).

- 32 Similarly, the fact that different systems of liability apply to the producers and victims of defective products does not constitute an infringement of the principle of equal treatment where the differentiation dependent on the nature and amount of the damage suffered is objectively justified (see in particular Case 8/57 *Acéries Belges v High Authority* [1958] ECR 245, at p. 256, and *Commission v Greece*, cited above, paragraph 32).
- 33 As regards the third argument raised by the French Government, alleging that the threshold provided for in Article 9(b) of the Directive is incompatible with French public policy, suffice it to state that under the Court's settled case-law recourse to provisions of domestic law to restrict the scope of the provisions of Community law would have the effect of undermining the unity and efficacy of that law and cannot consequently be accepted (see, *inter alia*, Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207, paragraph 38, and *Commission v Greece*, cited above, paragraph 24).
- 34 With regard to the reference by the French Government to the Commission's Green Paper, suffice it also to recall that the fact that the Commission, with a view to a possible amendment to the Directive, decided to consult the interested parties as to the expediency of abolishing the threshold provided for in Article 9(b) of the Directive cannot dispense the Member States from the obligation to comply with the provision of Community law currently in force (see in particular Case C-236/88 *Commission v France* [1990] ECR I-3163, paragraph 19, and *Commission v Greece*, cited above, paragraph 26).
- 35 It follows that the Commission's first plea is well founded.

Second plea: incorrect transposition of Article 3(3) of the Directive

- 36 The Commission maintains that, unlike Article 3(3) of the Directive, which renders the supplier liable only on an ancillary basis, where the producer is unknown, Article 1386-7 of the Civil Code equates the supplier with the producer.
- 37 The French Government does not deny this discrepancy. It claims that it results from a rule of national procedure which, as such, did not come within the scope of Community competence on the date on which the Directive was adopted and which was therefore not capable of being altered by the Community legislation. Moreover, Article 1386-7 of the Civil Code achieves the result sought by the Directive since the supplier sued by the victim may join the producer as a party, who will then be liable to pay the compensation, precisely as intended by the Directive.
- 38 Inasmuch as the French Government challenges the Council's competence to adopt Article 3(3) of the Directive, it should be noted, first of all, that, as has been pointed out at paragraph 28 hereof, a Member State cannot rely, as a defence to an action for failure to fulfil obligations, on the unlawfulness of the directive which the Commission alleges it to have infringed.
- 39 Moreover, that argument cannot be upheld. Since the Community legislature had competence to harmonise the laws of the Member States in the field of product liability, it was also competent to determine the person who was to bear that liability and the conditions under which that person was to be sued.

40 As to the alleged equivalence of result as between the system of liability provided for in the Directive and that established by Law No 98-389, it should be pointed out that the possibility afforded to the supplier under that law of joining the producer has the effect of multiplying proceedings, a result which the direct action afforded to the victim against the producer under the conditions provided for in Article 3 of the Directive is specifically intended to avoid.

41 It follows that the Commission's second plea must be upheld.

Third plea: incorrect transposition of Article 7 of the Directive

42 The Commission claims that, unlike Article 7(d) and (e) of the Directive, which provides for grounds on which the producer may be exempted from liability which are unconditional, the first paragraph of Article 1386-11 and the second paragraph of Article 1386-12 of the Civil Code make application of those grounds of exemption subject to observance by the producer of an obligation to monitor the product.

43 As a preliminary issue the French Government contests the admissibility of two arguments raised by the Commission in support of the third plea on the ground that they were not included in the reasoned opinion.

44 In that connection it should be observed that, although under the Court's case-law the complaints in the application must be identical to those in the letter of formal notice and in the reasoned opinion, that requirement cannot be carried

so far as to mean that in every case the statement of complaints must be exactly the same, where the subject-matter of the proceedings has not been extended or altered (Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 25). In the present case that condition is satisfied and accordingly the plea of inadmissibility raised by the French Government cannot be upheld.

45 As to the substance, the French Government points out that the third plea relates to a point which in its Green Paper the Commission itself has envisaged amending. It states that Article 15 of the Directive provides the Member States with an option concerning the derogation in connection with the state of scientific and technical knowledge at the time when the product is put into circulation, since it is possible for that derogation to be excluded. It would therefore be logical for such an exclusion to be made subject to a condition such as the requirement to monitor products, which is warranted by the obligations imposed on the Member States by Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24).

46 With regard to the reference to the Commission's Green Paper it is sufficient to refer to paragraph 34 of this judgment.

47 In regard to the arguments based on Article 15 of the Directive, it should be noted that whilst that provision enables the Member States to remove the exemption from liability provided for in Article 7(e) thereof, it does not authorise them to alter the conditions under which that exemption is applied. Nor does Article 15 authorise them to cancel or amend the rules governing derogations provided for in Article 7(d). That interpretation is not negated by Directive 92/59, which does not concern the producer's liability for products which he puts into circulation.

48 Accordingly, the Commission's third plea is also well founded.

49 In those circumstances it must be held that:

- by including damage of less than EUR 500 in Article 1386-2 of the Civil Code;

- by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of the Directive,

the French Republic has failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Commission applied for costs against the French Republic and the latter has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that

— by including damage of less than EUR 500 in Article 1386-2 of the French Civil Code;

— by providing in the first paragraph of Article 1386-7 thereof that the supplier of a defective product is to be liable in all cases and on the same basis as the producer, and

- by providing in the second paragraph of Article 1386-12 thereof that the producer must prove that he has taken appropriate steps to avert the consequences of a defective product in order to be able to rely on the grounds of exemption from liability provided for in Article 7(d) and (e) of 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,

the French Republic has failed to fulfil its obligations under Articles 9(b), 3(3) and 7 of the aforementioned directive;

2. Orders the French Republic to pay the costs.

Jann

von Bahr

Timmermans

Delivered in open court in Luxembourg on 25 April 2002.

R. Grass

P. Jann

Registrar

President of the Fifth Chamber