

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 20 January 2005¹

I — Introduction

1. This reference for a preliminary ruling from the Vestre Landsret (Western Regional Court) (Denmark) concerns the interpretation 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 products² ('the Directive'). In essence, it concerns whether the Directive, which imposes liability for a defective product primarily on the producer and only secondarily on the supplier, authorises Member States to alter that apportionment of liability, and, if so, to what extent.

2. The national court has referred to the Court five questions on the interpretation of the Directive. They relate to an issue which has already formed the subject-matter of

Case C-52/00 *Commission v France*,³ Case C-154/00 *Commission v Greece*⁴ and Case C-183/00 *González Sánchez*,⁵ and in particular to whether the Directive authorises liability for defective products to be extended to economic operators other than those defined therein.

II — Legal framework

A — Community law

3. Article 1 of the Directive provides that the 'producer' is to be liable for 'damage caused by a defect in his product'. For the purposes of the Directive, the term 'producer' includes the manufacturer (Article 3(1)) and the importer of the product into the Community (Article 3(2)).

1 — Original language: French.

2 — OJ 1985 L 210, p. 29.

3 — Case C-52/00 *Commission v France* [2002] ECR I-3827.

4 — Case C-154/00 *Commission v Greece* [2002] ECR I-3879.

5 — Case C-183/00 *González Sánchez* [2002] ECR I-3901.

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. Article 13 provides as follows:

'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'.

B — *National law*

6. In Denmark, the Directive was transposed by Law No 371 of 7 June 1989 ('the Danish law').

7. The relevant provisions of that law are worded as follows:

Paragraph 4:

'1. A person who produces a finished product, a component part or a raw material, who produces or collects a natural product, or who by putting his name, trade mark or other distinguishing sign on the product holds himself out as its producer, shall be regarded as a producer.

2. A person who in the course of his business imports a product into the EC with a view to resale, hire, leasing or other form of distribution shall also be regarded as a producer.

3. A person who in the course of business puts a product into circulation without being regarded as a producer shall be regarded as an intermediary.

4. If a person injured by a product manufactured in the EC is unable to establish who manufactured it, or if a person injured by a product manufactured outside the EC is unable to establish who imported it into the EC, any intermediary supplying the product shall be regarded as the producer.

5. The provisions of subparagraph 4 shall not apply where the intermediary provides the injured person, within a reasonable time, with information on the producer's or importer's name and address or the name and address of the person who supplied the product to the intermediary. The intermediary cannot refer the injured person to a liable person established outside the EC.'

injured person's claim against the previous links in the production and distribution chain ...'.

III — Facts and procedure

Paragraph 10:

'An intermediary shall be directly liable for product liability to injured persons and subsequent intermediaries in the distribution chain'.

8. On 24 April 1998 Jette Mikkelsen and Michael Due Nielsen purchased a tray of 30 eggs from the shop Bilka Lavprisvarehus A/S ('Bilka').

9. On 15 May 1998 those eggs were used to make an omelette which Jette Mikkelsen and Michael Due Nielsen ate together.

Paragraph 11:

'1. If two or more persons are liable under this law for the same damage, they shall be jointly and severally liable.

10. On 16 May 1998 both Jette Mikkelsen and Michael Due Nielsen became ill. Tests which were subsequently conducted at the hospital showed that they were both suffering from salmonella poisoning.

...

3. A person who, as intermediary or producer under Paragraph 4(2) or (4), has paid compensation to an injured person or a subsequent intermediary shall enter into the

11. The injured persons brought proceedings against the supplier, Bilka, who joined the producer Skov (from whom the eggs had been bought) in the proceedings.

12. In its judgment, the first instance court held that Bilka, as intermediary, was liable for the damage suffered by Jette Mikkelsen and Michael Due Nielsen and that it could have recourse against Skov, since Skov was liable as producer of the eggs containing salmonella.

which the intermediary bears, in accordance with case-law, unlimited responsibility for the producer's fault-based liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers' property?

13. Bilka and Skov appealed, maintaining that Paragraph 10 of the Danish law was incompatible with the Directive. By order of 26 September 2003 the Vestre Landsret decided to refer the following questions to the Court of Justice for a preliminary ruling:

(3) Question 3:

With reference to:

'(1) Question 1:

Does 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 preclude a statutory system under which an intermediary bears unlimited responsibility for the producer's liability under the Directive?

1. the Council of Ministers minutes in BEUC-News, Legal Supplement 12 November/December 1985, pages 20 and 21, point 2 of which states:

"Statements on Articles 3 and 12: With regard to the interpretation of Articles 2 and 10 the Council and the Commission are in agreement that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding liability for intermediaries, since intermediary liability is not covered by the Directive. There is further agreement that under the Directive the Member States may determine rules on the final mutual apportionment of liability among several liable producers (see Article 3) and intermediaries" and

(2) Question 2:

Does the abovementioned Council Directive preclude a system under

2. Article 13 of the Directive, which provides that:

“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”,

does the Directive preclude a Member State from regulating by statute the intermediary’s liability for defective products, provided that the intermediary is defined, as was done in Paragraph [4(3)] of the Danish law, as a person who in the course of business puts a product into circulation without being regarded as a producer under the producer under the definitions in Article 3 of the Directive on liability for defective products?

(4) Question 4:

Does the Directive (Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States con-

cerning liability for defective products) preclude a Member State from introducing a statutory rule on liability for defective products under which the intermediary — without himself being a producer or treated as the producer under Article 3 of the Directive — is responsible for:

- the producer’s liability for defective products under the Directive,

- the producer’s fault-based liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers’ property?

The statutory rule in question presumes that:

- (a) the intermediary is defined as a person who in the course of business puts a product into circulation without being regarded as a producer (Paragraph [4(3)] of the Danish law);

(b) the producer can be held liable, and the intermediary therefore does not bear responsibility where this is not the case (Paragraph 10 of the Danish law);

resulting in personal injury or damage to consumers' property?

(c) the intermediary has a right of recourse against the producer (Paragraph 11(3) of the Danish law).

The case-law-based rule in question presumes that:

(5) Question 5

Does the Directive (Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products) preclude a Member State from maintaining a non-statutory but case-law-based rule, which existed before the Directive, relating to liability for defective products under which the intermediary — without himself being a producer or regarded as a producer under Article 3 of the Directive — is responsible for:

(a) the intermediary is defined as a person who in the course of business puts a product into circulation without being regarded as a producer (Paragraph [4(3)] of the Danish law);

(b) the producer can be held liable and the intermediary therefore does not bear responsibility where the producer is not held liable (Paragraph 10 of the Danish law);

— the producer's liability for defective products under the Directive,

— the producer's fault-based liability established in case-law in respect of liability for defective products

(c) the intermediary has a right of recourse against the producer (Paragraph 11(3) of the Danish law).'

IV — Observations

14. The written and oral observations in this case can be divided into two categories. First, the observations made by the respondents in the main proceedings — the injured parties — and by the Danish Government, who contend that the Directive has achieved complete harmonisation only of the producer's liability for defective products and that, consequently, Member States have retained competence for maintaining or adopting specific rules in respect of strict liability of suppliers. Second, the observations made by the appellants in the main proceedings — Bilka and Skov — and the Spanish Government and the Commission, who submit that the Directive has indeed provided for complete harmonisation of liability for defective products by attributing that liability solely to producers and to economic operators treated as producers.

15. The Danish Government puts forward two different arguments in support of its contention. It maintains first that Article 3 of the Directive contains a definition only of the producer and the economic operators treated as producers. It follows a contrario that the Directive has not laid down rules for the liability of intermediaries, such as suppliers, in the production and distribution chain. That interpretation is borne out by Article 13

of the Directive and by two statements — the second and the 16th statements — contained in the minutes of Session 1025 of the Council, 25 July 1985.

16. In the alternative, the Danish Government states that under Danish legislation the liability of an intermediary is not independent, since under Paragraphs 10 and 11(3) of the Danish law the intermediary bears responsibility vis-à-vis the injured persons only in so far as the producer may be liable. The situation of the intermediary is thus similar to that of a joint and several surety. Thus, the Danish rules differ from the French rule which was declared incompatible with the Directive in *Commission v France*.⁶ The Danish Government infers from this that that decision is not applicable to the Danish legislation.

17. If that interpretation is not accepted, the Danish Government asks the Court to re-examine its case-law, at least as regards the supplier's liability, on account of the negative consequences of that case-law for the protection of consumer interests. If the Court rules that the Danish law is incompatible with the Directive, the Danish Government requests that the temporal effect of the forthcoming judgment be limited to the date of its delivery.

⁶ — Cited in point 2 of this Opinion.

18. Skov, Bilka, the Spanish Government and the Commission refer in their arguments mainly to *Commission v France*.⁷ They take the view that it must be concluded from that judgment that the rules in Paragraphs 4(3), 10 and 11 of the Danish law are contrary to the Directive.

19. In their view, the second statement contained in the Council minutes should be interpreted in such a way that Member States may determine their own rules concerning the supplier's liability but may not transfer to the supplier the strict liability for defective products which the Directive has attributed to the producer.

20. Skov also claims that Paragraph 10 of the Danish law should be interpreted in conformity with the Directive, which in its view is directly applicable. Therefore, Paragraph 10 of the Danish law cannot impose on the supplier obligations which are greater than those in Article 3 of the Directive. To substantiate that view, reference is made to the case-law of the Court in *Von Colson and Karmann*, *Marleasing*, *Wagner Miret* and *Faccini Dori*.⁸

⁷ — Cited in point 2.

⁸ — Case 14/83 *Von Colson and Karmann* [1984] ECR 1891; Case C-106/89 *Marleasing* [1990] ECR I-4135; Case C-334/92 *Wagner Miret* [1993] ECR I-6911; and Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

V — Assessment

A — Preliminary observations

21. In this case the main question is whether the Directive precludes an application under which the supplier (or other intermediary person) bears unlimited responsibility for the producer's liability under the Directive.

22. The Directive provides for a system of strict liability for defective products. Under Article 1 the injured parties may seek compensation for damage where they suffer damage as a result of a defective product and on condition that they prove the causal relationship between defect and damage (Article 4). In Article 1 the producer of the defective product has been designated as liable.

23. Article 3 of the Directive contains the legal definition of the term 'producer' — that is to say, the liable person — within the meaning of the Directive. This includes, inter alia:

- the manufacturer of a finished product, the producer of any raw material and

any person who by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer (Paragraph 1);

intermediary within the meaning of Paragraph 10 is any person who in the course of business puts a product into circulation without being regarded as a producer.

- the importer of a finished product into the Community for sale, hire, leasing or any form of distribution in the course of his business (Paragraph 2);

25. In essence, the national court is asking the Court of Justice to clarify whether the harmonisation by the Directive of liability for defective products is to be regarded as complete harmonisation, affording Member States no margin of discretion where the definition of the class of liable persons is concerned.

- the supplier, where the producer or the importer cannot be identified, unless he informs the injured person within a reasonable time of the identity of the producer or the importer or of the person who supplied him with the product (Paragraph 3).

26. The Court has examined that fundamental question in a number of recent judgments, *Commission v France*, *González Sánchez* and *Commission v Greece*.⁹ On the basis of an analysis of its wording, structure and its objectives as stated in its preamble, I found in my Opinions in those cases that the Directive envisages complete harmonisation of strict liability for defective products. It would follow that the margin of discretion available to Member States when transposing the Directive into their national legal systems has been entirely determined by the wording of the Directive. Using a similar line of argument, the Court reached the same finding in those judgments, as emerges clearly from paragraphs 16 to 19 of *Commission v France*.

24. That provision was transposed into Danish law by Paragraph 4(1), (2), (4) and (5) of the Danish law on liability for defective products. However, the Danish legislature added a separate category to the list of liable persons provided for in the Directive. Under Paragraph 10 of the Danish law, an intermediary is to be responsible for defective products directly vis-à-vis the injured person and other intermediaries at a later stage in the distribution chain. According to the definition contained in Paragraph 4(3) of the aforementioned law, an

9 — Cited in point 2 of this Opinion.

27. In paragraph 16, the Court held *inter alia* that the margin of discretion available to the Member States is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.

28. The Court then held, in paragraph 17, that 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 economic operators, to facilitate the free movement of goods and to avoid differences in levels of consumer protection.

29. The Court further held, in paragraph 18, that 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.

30. Finally, in paragraph 19, the Court pointed out that 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.

31. Accordingly, the Court reached the conclusion that Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of strict liability for defective products different from that provided for in the Directive.

32. In paragraph 22 of *Commission v France* and paragraphs 31 to 33 of *González Sánchez*, the Court then stated that the system of rules put in place by the Directive 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.

33. Before replying to the questions submitted, I will first examine the issue of whether the arguments put forward by the Danish Government and the respondents in the main proceedings contain any elements not contained in the aforementioned arguments and whether they are capable of bringing about a revision of that case-law.

34. The Danish Government has put forward detailed submissions in support of the view that the Directive provides only for harmonisation of the liability of the producer. Apart from the partial regulation of the subsidiary liability of the supplier provided for in Article 3(3) of the Directive, in the

event that the producer of a defective product cannot be identified, in the Government's view the Directive is not concerned with regulating the liability of the supplier and other intermediaries in general. Consequently, it concludes that Member States have retained their legislative powers in that regard.

35. I am unable to concur with that view or with the arguments on which it is based. It follows from the case-law already cited several times that the Directive concerns complete harmonisation of strict liability for defective products. Such rules contain at least a definition of the subject-matter of the liability, that is to say the damage caused by a defective product, the group of persons who are protected and, finally, the class of persons who are liable. But, if it is accepted that the Directive envisages complete harmonisation, it follows that the definition of the class of liable persons likewise is exhaustive.

36. On that ground, it is no longer possible for Member States to extend the class of liable persons to include suppliers or other intermediaries, other than in the cases expressly provided for in Article 3(3) of the Directive.

37. To support its view, the Danish Government also relied on two statements, one by

the Council and the other by the Council and the Commission, which, with reference to the Directive, were inserted in the minutes of Session 1025 of the Council of 25 July 1985.¹⁰ Although they were not relied on in the cases cited above, the Danish Government takes the view that they are relevant in interpreting the Directive.

38. In anticipation of my examination of Question 3, where I will comment on the abovementioned statements in more detail, I wish to state here that neither their legal nature nor their factual content can affect the wording, structure or purpose of the Directive.

39. Both in their written observations and at the hearing the appellants in the main proceedings and the Danish Government drew attention to the differences which, in their view, exist between the Danish rules on strict liability of intermediaries and Article 1386-7 of the French Civil Code, which the Court declared contrary to the Directive in *Commission v France*.¹¹

40. I wish to point out in that regard that this case primarily concerns whether or not a

10 — Second statement of the Council and the Commission and 16th statement contained in the minutes of the Council session of 25 July 1985 (No 8631/85, Brussels, 15 October 1985).

11 — Cited in point 2 of this Opinion.

statutory provision such as the Danish law is compatible with the Directive. No compelling arguments can be drawn from the purported differences between those two provisions to support the answer to that question.

41. In the event that the Court does not share its opinion that the Danish rules on strict liability of intermediaries for defective products are compatible with the Directive, as interpreted in *Commission v France*, the Danish Government requests that the Court revise that case-law.

42. In my view, a revision of such recent case-law is inappropriate. In the judgments in question and in my Opinions in those cases it was determined, based on a grammatical, systematic and historical analysis, that the Directive does indeed envisage complete harmonisation. The arguments put forward by the Danish Government — which in essence amount to maintaining that the Court's interpretation results in insufficient protection for consumers — cannot lead to an outcome which would be contrary to the clear intention of the Community legislature as expressed in the Directive.

43. Where a directive which relates to an area as sensitive and delicate as liability for

defective products goes against the preferences of one or more Member States, it is necessary to try to resolve such a divergence in the Community constitutional order not by means of an interpretation *contra legem* but rather through the initiative of the Community legislature. Furthermore, it is apparent from the actions undertaken by the Danish Government in its capacity as President of the Council that it is aware of such constitutional logic.¹²

44. For the record I also note that if the Court chose to adopt the interpretation advocated by the Danish Government, it would inevitably lead to a reversal of the recent case-law as contained in *Commission v France* and *González Sánchez*.¹³ Such an interpretation would in fact result in the primary liability of producers expressly sought by the Directive being extended to other links in the production chain, such as intermediaries (suppliers).

45. Such a shift in the case-law would also mean that the arguments formulated by the Court — the wording, structure and history of the Directive — in favour of complete

12 — Council Resolution of 19 December 2002 on amendment of the liability for defective products Directive, OJ 2003 C 26, p. 2.

13 — Cited in point 2 of this Opinion.

harmonisation, under which strict liability for defective products is attributed exclusively to the producer, would be untenable.

48. A comparison between Article 1386-7 of the French Civil Code and Paragraph 10 of the Danish law reveals that the two provisions are to a large extent similar.

B — Question 1

46. Question 1 concerns economic operators other than producers as defined in Article 3(3) of the Directive. By this question the national court is seeking to establish whether that provision precludes a national legal rule under which intermediaries bear unlimited responsibility for producers' liability under the Directive.

49. Article 1386-7 of the Civil Code provides that 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 is to be liable for safety defects in a product on the same basis as the producer. Where appropriate, the intermediary person has a right of recourse against the producer.

50. Paragraph 10 of the Danish law provides that the intermediary is to be responsible for liability for defective products vis-à-vis the injured person and other intermediaries at a later stage in the distribution chain. Under Paragraph 11(3) of that law, any intermediary who has paid compensation to an injured person is entitled to recourse against the producer.

47. The reply to that question can be easily inferred from *Commission v France*. That case concerned a provision of the French Civil Code (Article 1386-7) which equated suppliers with producers in terms of liability. The Court held that such complete equation was contrary to the Directive, since Article 3(3) of the Directive provides for subsidiary liability only where the producer's identity is not known.

51. Although the two provisions contain certain differences regarding the definition of the class of liable persons, it should be stated that they both extend the class of liable persons to suppliers and other intermediaries in a manner which is much more extensive than that provided for in Article 3(3) of the Directive. Moreover, Article 1386-

7 of the French Civil Code and Paragraphs 10 and 11(3) of the Danish law contain, for obvious reasons, a right of recourse, whereas the Directive seeks specifically to avoid such an accumulation of proceedings by restricting the class of liable persons to producers.

against whom the injured person may bring an action for defective products is wider than that in Article 3 of the Directive. It follows from *Commission v France* that that factor alone is sufficient to establish that those rules are not in conformity with the Directive. Moreover, application of the Danish legislation almost inevitably involves an accumulation of proceedings, a result the Community legislature specifically intended to avoid.¹⁴

52. Both the respondents in the main proceedings and the Danish Government relied on the differences between the French provision and the Danish rules. They claim that the French provision contains an actual liability clause whereas the Danish rules concern merely a conditional liability. Under the French system the injured person may hold the supplier liable for any defective product sold to him, that is to say, both for products which were already defective when they were put into circulation and for products which became defective at later stages in the marketing process. By contrast, under the Danish rules the injured person may bring liability proceedings against an intermediary only where products are defective at the time that they are put into circulation.

C — Question 2

54. By Question 2, the national court is seeking the view of the Court of Justice on whether Danish case-law, under which the intermediary bears unlimited responsibility for the producer's fault-based liability established in case-law in respect of liability for defective products resulting in personal injury or damage to consumers' property, is compatible with the Directive.

53. Whatever the differences may be, in my view they do not appear to be relevant in determining whether the scope *ratione personarum* of Paragraphs 10 and 11(3) of the Danish law is in conformity with Article 3 of the Directive. It should be noted in that regard that the definition the Danish rules give with regard to the class of liable persons

55. It is apparent from the documents before the Court that liability for defective products

¹⁴ — *Commission v France*, cited in footnote 3 above, paragraph 40.

— both that of the producer and that of the intermediary — had been governed by case-law in Denmark prior to the adoption of the Directive.

56. Under such case-law-based rules, liability for defective products is first of all assessed under one of the general rules of Danish law governing civil liability based on the notion of fault. The development of case-law and legal literature has however led to the producer being regarded as liable on the basis of liability for gross negligence and, in certain circumstances, on the basis of liability without fault.

57. In that case-law-based system, the intermediary bore responsibility for the liability of economic operators at an earlier stage in the production and distribution chain for damage caused by the product. That liability was — and still is — liability without fault.

58. Transposition of the Directive into Danish law by Law No 371 has meant that, where strict liability of the producer for defective products is concerned, the rules laid down by the Directive have been fully adopted. The existing case-law-based system is still applicable where fault-based liability is concerned.

59. Paragraph 10 of the aforementioned law codified the previous case-law on strict liability of the intermediary. It is apparent from the *travaux préparatoires* for the law that the Danish legislature intended to confirm that case-law by the above provision and that, when adopting the law, the Danish Government was convinced that the intermediary's liability was not regulated by the Directive.

60. The aggregate of statutory rules and case-law relating to liability for defective products can be broken down into three components:

— strict liability of the producer,

— the obligation of the intermediary to bear responsibility for the liability of the producer ('subsidiary liability of the intermediary'),

— fault-based liability or liability for gross negligence of the producer.

61. As regards strict liability of the producer, the definitions contained in Article 3 of the Directive have been reproduced in Paragraph 4(1), (2), (4) and (5) of the Danish law, while the principle of strict liability has been set out in Paragraph 6 of that law. It follows that, since it is in conformity with the Directive, this component requires no further comment.

paragraphs 21 to 23, where the Court held that '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'. It follows that the Danish rules relating to the intermediary's subsidiary strict liability find no justification in Article 13 of the Directive.

62. As regards the second component — subsidiary liability of the intermediary — I have already stated in my examination of Question 1 that the rules contained in Paragraphs 10 and 11(3) of the Danish law go against the Directive, which restricted strict liability to producers.

65. However, national rules governing fault-based liability on the part of the producer such as those which stem from Danish case-law must be regarded as compatible with the Directive, as is apparent from paragraph 22 of *Commission v France*, cited above, where the Court held that '... the system of rules put in place by the Directive ... 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'.

63. It is apparent from the order for reference that the Danish court also raises the question whether Article 13 of the Directive might not provide the legal base for extending liability for defective products to intermediaries.

66. I therefore propose that the Court should answer Question 2 as follows: 'Article 13 of the Directive precludes national rules which extend the system of strict liability provided for by the Directive to suppliers of defective products. However, that provision does not preclude the application to suppliers of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects'.

64. The same question was raised in *Commission v France*.¹⁵ In that judgment the Court's answer was in the negative. I refer to

¹⁵ — Cited in point 2 of this Opinion.

D — Question 3

67. By its third question, the national court is asking the Court whether, with reference to the statement of the Council and the Commission on Articles 3 and 12 contained in the minutes of Session 1025 of the Council, 25 July 1985,¹⁶ and to Article 13 of the Directive, the Directive precludes a Member State from laying down legal rules on the intermediary's liability for defective products where the intermediary is, as occurred in Paragraph [4(3)] of the Danish law, defined as any person who in the course of business puts a product into circulation without being regarded as a producer under the definition in Article 3 of the Directive.

68. In the wording of Question 3, the national court reproduced in its entirety the second statement contained in the minutes. I refer the Court to that statement.

69. In its written observations the Danish Government also relied on the 16th statement of the Council, contained in the minutes, which reads as follows: 'The Council expresses the wish that Member

States which currently apply provisions relating to consumer protection which are more favourable than those under the Directive may not rely on the options afforded by the Directive to reduce that level of protection'.

70. The Danish Government infers from those two statements that maintaining in force rules which existed before the Directive and grant consumers a better legal position is fully compatible with the Directive. The two statements are fully consistent with, and confirm the content of, Articles 3 and 13 of the Directive.

71. It contends that the two statements should be accorded the highest level of importance when interpreting the Directive, in view of their conformity with the Directive and the fact that they originate from the Council and the Commission, that is to say from the Community legislature itself.

72. As regards the legal scope of the Council statements referred to in its minutes, the settled case-law of the Court can be summarised as follows:

¹⁶ — In its written observations the Danish Government rightly pointed out that a typing error had crept into the title of that statement: it should read 'Articles 3 and 13' instead of 'Articles 3 and 12'.

— where no reference is made to the content of a declaration in the wording

of the provision in question, such a declaration cannot be used for the purpose of interpreting that provision of secondary legislation.¹⁷ The true meaning of provisions of Community law can be derived only from the wording of those provisions themselves, having regard to their context;¹⁸

that the Directive does not preclude maintaining, or even adopting, rules on the liability of suppliers provided that such rules relate to fault-based liability and contractual liability.

- however, such a declaration may serve as a reference for the purpose of interpreting provisions of secondary legislation the drafting or adoption of which gave rise to that declaration, if it is necessary to clarify the meaning of such provisions, which are by definition ambiguous and equivocal. Furthermore, such a declaration cannot be the only reference, it must be used in conjunction with others.¹⁹

73. If the two statements referred to in this case are used as references for the purpose of interpreting Article 13 of the Directive, they will confirm the interpretation of that provision, as I have set out above when considering what answer should be given to Question 2. The reason for this is that they clarify the meaning of that provision in that they state

74. On the other hand, in accordance with the case-law cited in point 72 above, it is not possible to rely on those statements to establish that the Directive does not preclude extending strict liability for defective products to intermediaries other than in the circumstances expressly provided for in Article 3(3) of the Directive. Such a reference for the purpose of interpretation would conflict directly with the wording and structure of the Directive and, in accordance with the case-law of the Court, is inadmissible. It follows from that reasoning that the arguments put forward by the Danish Government must be rejected.

75. I therefore conclude that the two statements relied on by the Danish Government cannot serve as a reference to support an interpretation of the Directive under which a Member State is entitled to extend strict liability for defective products to intermediaries in circumstances other than those exhaustively defined in Article 3(3) of the Directive.

17 — Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18.

18 — Case 237/84 *Commission v Belgium* [1986] ECR 1247.

19 — Case 136/78 *Auer* [1979] ECR 437, paragraph 25.

E — *Questions 4 and 5*

76. By Questions 4 and 5 the national court is reiterating Questions 1 and 2, referring more specifically to Paragraphs [4(3)], 10 and 11(3) of the Danish law and to the case-law-based rule which existed before the Directive under which the intermediary — without himself being the producer under Article 3 of the Directive — bears responsibility for the producer's liability for defective products under the Directive and for the producer's fault-based liability.

77. In accordance with the settled case-law of the Court, which dates from the judgment in *Costa v Enel*,²⁰ the Court may not, under Article 234 EC, decide upon the validity of a provision of domestic law. It nevertheless considers that it has jurisdiction to supply the national court with an interpretation of Community law on all such points as may enable that court to determine that issue of compatibility for the purposes of the case before it.²¹

78. Since the answers I have just proposed to Questions 1 and 2 already contain all the

points needed by the national court to decide on the compatibility with Community law of the provisions of national law in question and of the relevant national case-law, it is unnecessary to reply to Questions 4 and 5.

F — *Limitation of the temporal effect of the judgment*

79. It is apparent from the order for reference that the respondents in the main proceedings — the injured persons — have asked the Court to declare that its ruling will have effect only from the date of its delivery, should the Court's answers not be in their favour. The Danish Government supports that request, pointing out the serious consequences for legal certainty that the Court's judgment may entail by its effects on cases already finally decided since the Directive came into force.

80. I note in that regard that the judgments in which the Court rules upon the interpretation of Community law generally have effect *ex tunc*. However, in exceptional circumstances the Court may, in application

20 — Case 6/64 *Costa v Enel* [1964] ECR 585.

21 — Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 36.

of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith.²² However, such a limitation is subject to certain conditions which may vary according to the factual and legal situation forming the basis of the main proceedings, namely that those concerned should have acted in good faith, there should be a risk of serious difficulties²³ and retro-active effect should be capable of having serious financial consequences.²⁴

81. This reference for a preliminary ruling concerns the issue of which category of economic operators must be held liable for defective products. In all probability, the effect of the Court's decision in the national legal order will merely be to transfer such liability from suppliers to producers. However, neither the nature of the liability nor its extent will be affected by the decision. Also, given that Paragraph 11(3) of the Danish law affords the supplier a right of recourse against the producer, I take the view that such a transfer of primary liability will not,

22 — Cases C-437/97 *EKW and Wem & Co.* [2000] ECR I-1157, paragraph 57; C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39; and C-372/98 *Cooke* [2000] ECR I-8683, paragraph 42.

23 — *Cooke*, cited above, paragraph 42.

24 — *EKW and Wem & Co.*, cited above, paragraph 59.

from the point of view of legal certainty, give rise to risks capable of justifying an exceptional limitation of the temporal effect of the judgment.

82. Moreover, I observe that in the earlier cases of *Commission v France*, *Commission v Greece* and *González Sánchez*²⁵ none of the parties sought to limit the effects of the judgments and that, consequently, the Court did not rule to that effect. I do not wish to rule out the possibility that those judgments may have given rise to consequences in the national legal orders concerned which are comparable to those referred to by the Danish Government.

83. Finally, since the delivery of the aforementioned judgments, those concerned in Denmark could be expected to have anticipated that the Danish legislation and case-law were probably incompatible.

84. In the light of the above, I conclude that there is no need to grant the request for limitation of the temporal effect of the judgment.

25 — Cited in point 2 of this Opinion.

VI — Conclusion

85. On the basis of the abovementioned considerations, I propose that the Court should answer the questions referred by the Vestre Landsret as follows:

- (1) 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 precludes a system under which a supplier bears unlimited responsibility for the producer's liability under the Directive, irrespective of whether that system results from legislation or from case-law.

- (2) Article 13 of the Directive precludes national rules which extend the system of strict liability provided for by the Directive to suppliers of defective products. However, that provision does not preclude the application to suppliers of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.

- (3) The second and 16th statements in the minutes of Session 1025 of the Council of 25 July 1985 cannot serve as references to support an interpretation of the Directive under which a Member State is entitled to extend strict liability for defective products to suppliers in circumstances other than those exhaustively defined in Article 3(3) of Directive 85/384.