

JUDGMENT OF THE COURT (Grand Chamber)

10 January 2006^{*}

In Case C-402/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Vestre Landsret (Denmark), made by decision of 26 September 2003, received at the Court on 29 September 2003, in the proceedings

Skov Æg

v

Bilka Lavprisvarehus A/S

and

Bilka Lavprisvarehus A/S

v

Jette Mikkelsen,

Michael Due Nielsen,

^{*} Language of the case: Danish.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, A. Rosas, K. Schiemann and J. Makarczyk, Presidents of Chambers, C. Gulmann, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász and G. Arestis, Judges,

Advocate General: L.A. Geelhoed,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 17 November 2004,

after considering the observations submitted on behalf of:

— Skov Æg, by G. Lett and U. Christrup, advokater,

— Bilka Lavprisvarehus A/S, by J. Rostock-Jensen, advokat,

— Ms Mikkelsen and Mr Due Nielsen, by J. Andersen, advokat,

— the Danish Government, by J. Molde, acting as Agent, and by P. Biering, advokat,

- the Spanish Government, by L. Fraguas Gadea and E. Braquehais Conesa, acting as Agents,

- the Commission of the European Communities, by N.B. Rasmussen and G. Valero Jordana, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2005,

gives the following

Judgment

- 1 This reference for a preliminary ruling 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 products (OJ 1985 L 210, p. 29; 'the Directive').

- 2 The reference was made in the course of proceedings between Ms Mikkelsen and Mr Due Nielsen ('the injured persons') and Bilka Lavprisvarehus A/S ('Bilka') and between Bilka and Skov Æg ('Skov') concerning compensation for the damage suffered by the injured persons as a result of eating eggs sold by Bilka and produced by Skov.

Legal context

Community legislation

- 3 As the first recital in its preamble indicates, the idea behind the adoption of the Directive was that ‘approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer’.
- 4 The second recital in the preamble shows that the system of liability established by the Directive rests on the proposition that ‘liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production’.
- 5 Article 1 of the Directive provides:

‘The producer shall be liable for damage caused by a defect in his product.’

- 6 Article 3 of the Directive provides:

‘1. “Producer” means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.

3. 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.'

7 As regards enforcement of the producer's liability, Article 4 of the Directive states that '[t]he injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage'. Article 7 lists the cases in which the producer is not liable. These include in particular where the producer did not place the product into circulation, where the defect did not exist at the time when the product was put into circulation, where the product was not manufactured for distribution, where the defect is due to compliance of the product with mandatory regulations issued by the public authorities, and where the state of knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered.

8 As regards the relationship between the system of liability introduced by the Directive and national laws on liability, 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.'

National legislation

9 According to the information provided by the Danish Government, before the adoption of the Directive liability for defective products on the part of both the producer and the supplier was governed in Denmark by case-law. Under that case-law, liability for defective products was assessed by reference to the general rules of civil liability, based on the concept of fault. Developments in the case-law had had the result, however, that in certain cases the producer was held liable even in the absence of fault. The supplier was answerable for the liability of the economic operators further up the production and distribution chain.

10 The Directive was transposed in Denmark by Law No 371 of 7 June 1989 on product liability, amended by Law No 1041 of 28 November 2000 ('Law No 371'). The Danish Government explains that Law No 371 imposed on the producer the system of product liability laid down by the Directive, while taking over the existing case-law under which the supplier is answerable for the liability of economic operators who have successively intervened further up the chain. In other respects, the previous case-law remained applicable.

11 Paragraph 4 of Law No 371 defines the terms 'producer' and 'intermediary' as follows:

'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.

...'

- 12 Paragraph 6 of Law No 371 states the principle that the producer is liable for a defect in a product. Paragraph 10 of the law provides:

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

- 13 Under Paragraph 11(3) of Law No 371, an intermediary who has paid compensation to an injured person for damage caused by a defective product steps into the injured person's rights against operators higher up the production and distribution chain.

The main proceedings and the questions referred for a preliminary ruling

- 14 After eating eggs they had bought at a shop belonging to Bilka, which had in turn obtained them from the producer Skov, the injured persons fell ill with salmonella poisoning.

15 They brought proceedings against the supplier Bilka, which joined the producer Skov in the proceedings.

16 By judgment of 22 January 2002, the Aalborg Byret (Aalborg District Court) found that the eggs had been defective, there was a causal link between the defect and the damage suffered, and no fault on the part of the injured parties had been shown. Bilka was ordered to pay compensation to the injured persons, and Skov was ordered to reimburse Bilka for that compensation.

17 Those were the circumstances in which the Vestre Landsret (Western Regional Court), on appeal by Bilka and Skov, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Does [the Directive] preclude a statutory system under which an intermediary bears unlimited responsibility for the producer’s liability under the Directive?

2. Does the ... Directive preclude a system under 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?

3. With reference to:

- the [minutes of the 1025th meeting of the] Council of Ministers [of 25 July 1985], point 2 of which states:

“... With regard to the interpretation of Articles [3] and [13], 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;”

- Article 13 of the Directive ...,

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 [Law No 371], as a person who in the course of business puts a product into circulation without being regarded as a producer under the definitions in Article 3 of the Directive?

4. Does the Directive ... 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 a 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 [Law No 371]);
 - (b) the producer can be held liable, and the intermediary therefore does not bear responsibility where this is not the case (Paragraph 10 of [Law No 371]);
 - (c) the intermediary has a right of recourse against the producer (Paragraph 11 (3) of [Law No 371]).
5. Does the Directive ... 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:

- 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 case-law-based 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 the producer ([Paragraph 4(3)] of [Law No 371]);
- (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 [Law No 371]);
- (c) the intermediary has a right of recourse against the producer (Paragraph 11 (3) of [Law No 371]).'

The questions

- ¹⁸ By its questions, which should be examined together, the national court essentially asks whether the Directive precludes a Member State from regulating the liability of the supplier by laying down that he is to be answerable for the liability of the producer.

- 19 In this connection, it should be noted that the liability introduced by the Directive and imposed on the producer by Article 1 is a no-fault liability. That is expressly stated in the second recital in the preamble to the Directive, and is also apparent from the enumeration in Article 4 of the Directive of the matters to be proved by the injured person and from the cases referred to in Article 7 in which the producer's liability is excluded.
- 20 The national court asks whether the Directive precludes, first, a national rule transferring to the supplier the no-fault liability which the Directive introduces and imposes on the producer and, second, a national rule transferring to the supplier the producer's fault-based liability.
- 21 To answer those questions, the extent of the harmonisation brought about by the Directive must first be determined.

Extent of the harmonisation brought about by the Directive

- 22 In Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 16, Case C-154/00 *Commission v Greece* [2002] ECR I-3879, paragraph 12, and Case C-183/00 *González Sánchez* [2002] ECR I-3901, paragraph 25, the Court held that the margin of discretion available to the Member States to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure.
- 23 The Court considered those criteria and concluded that the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States (*Commission v France*, paragraph 24, and *Commission v Greece*, paragraph 20).

- 24 In the context of the present proceedings, the injured persons and the Danish Government submit that the Directive does not operate a complete harmonisation of liability for defective products but only of the producer's liability for defective products. Relying on the wording of Articles 1 and 3 of the Directive, they argue that it does not regulate the supplier's liability and leaves the Member States a margin of discretion as regards the definition of the class of persons liable.
- 25 Article 1 of the Directive lays down liability for damage caused by a defect in a product and imposes that liability on the producer of the product in question.
- 26 The terms 'damage', 'defective' and 'product' are defined in Articles 9, 6 and 2 of the Directive respectively. The term 'producer' is defined in Article 3 of the Directive. Under Article 3(1), it denotes the manufacturer of the product. Article 3(2) includes under 'producer' the importer of the product into the Community. Under Article 3(3), if the producer cannot be identified, the supplier is treated as the producer unless he informs the injured person within a reasonable time of the identity of his own supplier.
- 27 The reasons why it appeared appropriate to hold the producer liable are explained in Article 1(e) of the statement of reasons in the proposal for a directive (document COM(76) 372 final; OJ 1976 C 241, p. 9), to which the Danish Government refers. Those reasons, which refer to Articles 1 and 2 of the proposal, which without substantive changes became Articles 1 and 3 of the Directive, may be summarised as follows.
- 28 While acknowledging that the possibility of holding the supplier of a defective product liable in accordance with the provisions of the Directive would make it simpler for an injured person to bring proceedings, there would — it was observed — be a high price to pay for that simplicity, inasmuch as, by obliging all suppliers to

insure against such liability, it would result in products becoming significantly more expensive. Moreover, it would lead to a multiplicity of actions, with the supplier seeking recourse in turn against his own supplier, back up the chain as far as the producer. Since, in the great majority of cases, the supplier does no more than sell the product in the state in which he bought it and only the producer is able to influence its quality, it was thought appropriate to concentrate liability for defective products on the producer.

29 It follows that it was after weighing up the parts played by the various economic operators involved in the production and distribution chain that the choice was made to allocate liability for damage caused by defective products in principle to producers, and only in certain defined cases to importers and suppliers, in the legal system established by the Directive.

30 Contrary to the view put forward by the injured persons and the Danish Government, Articles 1 and 3 of the Directive are not thus confined to regulating the liability of the producer of a defective product, but determine which of the operators who have taken part in the manufacture and marketing processes will have to assume the liability established by the Directive.

Transfer to the supplier of the producer's no-fault liability under the Directive

31 By its first group of questions, the national court asks whether the Directive is to be interpreted as precluding a national rule under which the supplier is answerable without restriction for the no-fault liability which the Directive establishes and imposes on the producer.

- 32 On this point, it must be observed that the class of persons liable against whom an injured person is entitled to bring an action under the system of liability laid down by the Directive is defined in Articles 1 and 3 of the Directive (see paragraphs 29 and 30 above).
- 33 Since the Directive, as pointed out in paragraph 23 above, seeks to achieve complete harmonisation in the matters regulated by it, its determination in Articles 1 and 3 of the class of persons liable must be regarded as exhaustive.
- 34 Article 3(3) of the Directive provides for the supplier to be liable only in the case where the producer cannot be identified. By laying down in Paragraph 10 of Law No 371 that the supplier is to be answerable directly to injured persons for defects in a product, the Danish legislature therefore extended the class of persons liable against whom the injured person is entitled to bring proceedings under the system of liability laid down by the Directive beyond the limits fixed by the Directive.
- 35 The Danish Government submits that the national legislation does not impose an autonomous liability on the supplier; because he is liable to the injured persons only to the extent that the producer, against whom he has a right of recourse, may be liable. It argues that the position of the supplier is thus similar to that of a surety with joint and several liability.
- 36 That factor is not decisive. Beside the fact that the system established by the national legislation imposes on the supplier a burden considered by the Community legislature to be unjustified (see paragraph 28 above), it entails a multiplicity of actions, which is precisely what the direct action against the producer available to

the injured person under the conditions laid down in Article 3 of the Directive is intended to avoid (see *Commission v France*, paragraph 40, and paragraph 28 above).

37 It follows that the Directive must be interpreted as precluding a national rule under which the supplier is answerable without restriction for the liability of the producer under the Directive.

38 However, the Danish Government submits that Article 13 of the Directive, which provides that the Directive is not to affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability, can provide a legal basis for extending to the supplier the liability which, in the system of the Directive, falls on the producer.

39 On this point, it should be recalled that in *Commission v France*, paragraph 21, *Commission v Greece*, paragraph 17, and *González Sánchez*, paragraph 30, the Court held, after analysing the wording, purpose and structure of the Directive, that Article 13 could not be interpreted as leaving it open to the Member States to maintain a general system of product liability different from that provided for in the Directive.

40 The Danish Government wants that case-law to be reconsidered in the light of the statement on Articles 3 and 13 in point 2 of the minutes of the meeting of the Council of Ministers of 25 July 1985, according to which those articles do not

prevent each Member State from laying down in its national legislation rules regarding liability for intermediaries.

- 41 To defend maintaining the national rule that the supplier is answerable for the liability of the producer, which was developed by the case-law before the Directive entered into force and was merely confirmed by the law transposing the Directive, the Danish Government also relies on the statement in point 16 of those minutes, in which the Council expressed ‘the wish that Member States which currently apply provisions relating to consumer protection which are more favourable than those under the Directive [might] not rely on the options afforded by the Directive to reduce that level of protection’.
- 42 On this point, first, it must be recalled that, where a statement recorded in Council minutes is not referred to in the wording of a provision of secondary legislation, it cannot be used for the purpose of interpreting that provision (see, in particular, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraph 26).
- 43 Second, the two statements referred to by the Danish Government cannot justify altering, in contradiction of the wording and structure of the measure, the class of persons liable defined by the Directive. In particular, they cannot be relied on to allow the Member States to transfer to the supplier, beyond the cases listed exhaustively in Article 3(3), the burden of the liability established by the Directive and imposed by it on the producer.

- 44 As regards the Danish Government's argument that that interpretation of the Directive is liable to lower the level of consumer protection in Denmark, it must be stated that any extension to suppliers of the liability established by the Directive falls within the competence of the Community legislature, for whom it is to amend, if appropriate, the provisions concerned.
- 45 In those circumstances, the answer to the national court's first group of questions must be that the Directive must be interpreted as precluding a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the Directive, for the no-fault liability which the Directive establishes and imposes on the producer.

Transfer to the supplier of the producer's fault-based liability

- 46 By its second group of questions, the national court essentially asks whether the Directive precludes a national rule under which the supplier is answerable without restriction for the fault-based liability of the producer where damage is caused by a defective product.
- 47 On this point, it must be recalled that in *Commission v France*, paragraph 22, *Commission v Greece*, paragraph 18, and *González Sánchez*, paragraph 31, the Court held that Article 13 of the Directive must be interpreted as meaning 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.

- 48 In those circumstances, the answer to the national court's second group of questions must be that the Directive must be interpreted as not precluding a national rule under which the supplier is answerable without restriction for the producer's fault-based liability.

Limitation of the temporal effects of the judgment

- 49 In the event that the Court did not accept their interpretation of the Directive, the injured persons and the Danish Government asked the Court to limit the temporal effects of its judgment. In support of their request, they relied in particular on the serious consequences for legal certainty and the financial implications which the judgment could entail for injured persons in a large number of actions relating to product liability which have been decided since the entry into force of the Directive.
- 50 According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 234 EC, gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment

ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (see, *inter alia*, Case 24/86 *Blaizot* [1988] ECR 379, paragraph 27, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 141).

- 51 It is only exceptionally that the Court may, in application 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. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see, *inter alia*, Case C-57/93 *Vroege* [1994] ECR I-4541, paragraph 21, and Case C-372/98 *Cooke* [2000] ECR I-8683, paragraph 42).
- 52 It should be noted that in Paragraph 11(3) of Law No 371 the Danish legislature made use of the mechanism of the right of recourse familiar to most legal systems, and laid down that a supplier who has compensated an injured person for damage caused by a defective product steps into his rights against the producer. Consequently, a supplier who is held liable as against the injured person can generally be indemnified by the producer under conditions which ensure legal certainty.
- 53 In those circumstances, without there being any need to consider whether or not a supplier could be able to bring proceedings against an injured person previously awarded compensation or to examine whether those concerned acted in good faith, the request of the injured parties and the Danish Government should not be acceded to, as they have not put forward any other factors capable of supporting their

argument that the present judgment could entail serious difficulties if its temporal effects were not limited.

Costs

- 54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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 must be interpreted as:

- **precluding a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the Directive, for the no-fault liability which the Directive establishes and imposes on the producer;**

- **not precluding a national rule under which the supplier is answerable without restriction for the producer's fault-based liability.**

[Signatures]