JUDGMENT OF THE COURT (First Chamber)

6 October 2005 *

In Case C-9/04,

Reference for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 23 December 2003, received at the Court on 12 January 2004, in the criminal proceedings against

Geharo BV,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), N. Colneric, K. Schiemann and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

* Language of the case: Dutch.

after considering the observations submitted on behalf of:

— Geharo BV, by C.J. van Bavel and R. Bosman, advocaten,

— the Greek Government, by M. Apessos, M. Papida and M. Tassopoulou, acting as Agents,

— the Netherlands Government, by J. van Bakel and H.G. Sevenster, acting as Agents,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Swedish Government, by A. Kruse and K. Norman, acting as Agents,

— the Commission of the European Communities, by F. Simonetti and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 July 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Title II, paragraph 3 in Annex II to Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1) and Article 1 of Council Directive 91/338/EEC of 18 June 1991 amending for the 10th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1991 L 186, p. 59).

2 This reference has been made in the course of criminal proceedings brought before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against Geharo BV (hereinafter 'Geharo') for having stocked toys with a cadmium content greater than the maximum content permitted under Netherlands law.

Law

Community legislation

3 Directive 88/378 is intended firstly to remove obstacles to trade between Member States by establishing harmonised standards as to toy safety requirements and secondly to ensure that consumers, in particular children, are effectively protected against the risks involved in using those toys.

4 To that end, the Directive provides in Article 2(1) that '[t]oys may be placed on the market only if they do not jeopardise the safety and/or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children.'

5 Article 3 of the same Directive provides that 'Member States shall take all steps necessary to ensure that toys cannot be placed on the market unless they meet the essential safety requirements set out in Annex II.'

6 Annex II entitled 'Essential safety requirements for toys' provides in Title II, paragraph 3(1):

'Toys must be so designed and constructed that ... they do not present health hazards or risks of physical injury by ingestion, inhalation or contact with the skin, mucous tissues or eyes.

They must in all cases comply with the relevant Community legislation relating to certain categories of products or to the prohibition, restriction of use or labelling of certain dangerous substances and preparations.'

7 Title II, paragraph 3(2) of the same Annex states:

'In particular, for the protection of children's health, bioavailability resulting from the use of toys must not, as an objective, exceed the following levels per day:

...

0,6 μg for cadmium,

...

or such other values as may be laid down for these or other substances in Community legislation based on scientific evidence.

The bioavailability of these substances means the soluble extract having toxicological significance.'

8 Article 1(1) of Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1976 L 262, p. 201) provides:

'Without prejudice to the application of other relevant Community provisions, this Directive is concerned with restricting the marketing and use in the Member States of the Community, of the dangerous substances and preparations listed in the Annex.'

9 Directive 76/769 was amended, inter alia, by Directive 91/338 which aims firstly to harmonise national rules concerning the marketing and use of products containing cadmium and secondly to combat environmental pollution by cadmium and protect the health of the population.

10 Article 1 of Directive 91/338 reads as follows:

'Annex I to Directive 76/769/EEC is hereby amended as set out in the Annex hereto. However, the new provisions shall not apply to products containing cadmium which are already covered by other Community legislation.'

11 The amendment made by Directive 91/338 to Annex 1 to Directive 76/769 consists of inserting a new paragraph 24, which lists, for a certain number of products, three types of application of cadmium and its compounds — as colourants, as stabilisers and for plating — the use of which it regulates.

12 According to paragraph 24.1.1, finished products or components of products manufactured from certain substances and preparations listed in that paragraph and coloured with cadmium may not be placed on the market if their cadmium content exceeds 0.01% by mass of the plastic material.

National legislation

13 The Decree relating to toys (Warenwetbesluit Speelgoed) of 29 May 1991 (Stb. [*Staatsblad* (Netherlands Official Journal)] 1991, No 269), enacted pursuant to the Law relating to goods, was adopted in order to implement Directive 88/378. Paragraph 11 of Annex II to that Decree sets out the requirements as to the safety of toys containing dangerous substances and preparations and restricts cadmium bioavailability to 0.6 micrograms per day.

14 At the time of the offence, Article 2(1) of the Decree relating to cadmium (Cadmiumbesluit Wet Milieugevaarlijke Stoffen) of 12 October 1990 (Stb. 1990, No 538), enacted pursuant to the Law on environmentally hazardous substances in order to implement Directives 76/769 and 91/338, prohibited products containing cadmium from being manufactured, imported into the Netherlands, made available to third parties or held in stock in the course of trade.

15 According to Article 1 of the Decree relating to cadmium, products containing cadmium means, inter alia, 'products in which cadmium is used as a stabiliser, pigment or upper surface layer and products in which artificial materials or dyes with a cadmium content of more than 50 mg/kg are incorporated'.

The main proceedings and the question referred for a preliminary ruling

16 In the course of an inspection by the Inspectie Gezondheidsbescherming Waren en Veterinaire zaken (Inspectorate for health protection in respect of goods and veterinary matters) carried out in February 1999, it came to light that Geharo had in stock toys with a cadmium content of more than 100 mg/kg.

17 At first instance, the undertaking was acquitted of the charges made against it, but on appeal it was found guilty of infringing the Decree relating to cadmium.

18 Geharo appealed in cassation, maintaining that the application of that Decree is contrary to the Community Directives. In that regard it observes that Directive 88/378 contains specific standards concerning cadmium which have been incorporated in the Decree relating to toys and which the toys at issue comply

with. Since by virtue of the second sentence of Article 1 of Directive 91/338 that Directive does not apply to products containing cadmium which are already covered by other Community legislation, that Directive, the provisions of which have been incorporated in the Decree relating to cadmium, does not apply to the toys at issue.

19 Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the second sentence of Article 1 of Directive 91/338 preclude the application of the rules in that Directive regarding the cadmium content of (finished) products and components, as set out in the Annex thereto, to toys within the meaning of Directive 88/378?'

The question referred for a preliminary ruling

20 By its question, the national court is essentially asking whether Article 1 of Directive 91/338 is to be interpreted as meaning that it precludes the prohibition in that Directive of the marketing of products with a cadmium content in excess of an authorised maximum amount from applying to toys covered by Directive 88/378.

21 In that regard it must be stated that both Directive 88/378 and Directive 91/338 lay down standards as to cadmium content. However, those standards are separate and correspond to different objectives.

22 As the Advocate General observed in points 39 to 42 of his Opinion, the maximum content of 0.01% by mass of the plastic material, inserted in Directive 76/769 by Annex I to Directive 91/338 for products with cadmium-based colours, relates to the maximum amount of cadmium which a product may contain, whilst the maximum standard of 0.6 micrograms of bioavailability established in Title II, paragraph 3(2) of Annex II to Directive 88/378, relates to the capacity of a substance, in this instance that of cadmium, to be diffused and absorbed by the body.

23 The fact that the standards laid down by Directives 88/378 and 91/338 are defined by reference to separate reference values is explained by the different objectives of those Directives. Directive 88/378, by establishing a daily limit for cadmium bioavailability, seeks to protect the user of a toy against the risks connected with the chemical properties of the product at the time of use, whereas Directive 91/338, by limiting the amount of cadmium in a product, is part of a policy which seeks to protect the general population against the dispersion of cadmium into the environment.

24 Having regard to the different content and the different objectives of those standards, the application to toys covered by Directive 88/378 of a limit in the amount of cadmium, such as that laid down by Directive 91/338, is not incompatible with the application to the same toys of the limit in bioavailability laid down by Directive 88/378.

25 That conclusion is not affected by Article 1 of Directive 91/338, pursuant to which the provisions thereby inserted are not to apply to products containing cadmium which are already covered by other Community legislation.

26 The provisions inserted by Directive 91/338 cannot be understood as meaning that they preclude any cumulative application of standards governing cadmium content. It must be borne in mind in that regard that the purpose of the Directive is to insert certain standards relating to cadmium into Annex 1 to Directive 76/769. Directive 91/338 did not amend Article 1(1) of Directive 76/769, under which the restrictions in the marketing and use of dangerous substances and preparations listed in that Annex apply without prejudice to the application of other relevant Community provisions.

27 In view of their complementary nature, the application to toys of the limit in cadmium bioavailability laid down by Directive 88/378 does not preclude the application to the same toys of the maximum cadmium content laid down subsequently by Directive 91/338.

28 Directive 88/378 itself anticipated the cumulative application of its own standards and of other relevant standards. Annex II, Title II, paragraph 3(1) provides that in all cases toys must comply with the relevant Community legislation relating to certain categories of products or to the prohibition, restriction of use or labelling of certain dangerous substances and preparations.

29 The answer to the question referred must therefore be that the second sentence of Article 1 of Directive 91/338 is to be interpreted as meaning that it does not preclude the prohibition in that Directive of the marketing of products with a cadmium content in excess of an authorised maximum amount from applying to toys covered by Directive 88/378.

Costs

30 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 (First Chamber) hereby rules:

The second sentence of Article 1 of Council Directive 91/338/EEC of 18 June 1991 amending for the 10th time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations is to be interpreted as meaning that it does not preclude the prohibition in that Directive of the marketing of products with a cadmium content in excess of an authorised maximum amount from applying to toys covered by Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys.

[Signatures]