Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 June 2021 *

(Reference for a preliminary ruling – Consumer protection – Liability for defective products – Directive 85/374/EEC – Article 2 – Concept of 'defective product' – Copy of a printed newspaper containing inaccurate health advice – Exclusion from the directive's scope)

In Case C-65/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 21 January 2020, received at the Court on 7 February 2020, in the proceedings

VI

v

KRONE – Verlag Gesellschaft mbH & Co KG,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader (Rapporteur), M. Safjan and N. Jääskinen, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– KRONE – Verlag Gesellschaft mbH & Co KG, by S. Korn, Rechtsanwalt,

– the German Government, by J. Möller, M. Hellmann and U. Bartl, acting as Agents,

– the European Commission, by A.C. Becker and G. Gattinara, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 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), as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 (OJ 1999 L 141, p. 20) ('Directive 85/374'), read in the light of Articles 1 and 6 thereof.

2 The request has been made in proceedings between VI, an Austrian citizen, and KRONE – Verlag Gesellschaft mbH & Co KG, a newspaper company established in Austria, concerning a claim by VI for compensation for corporeal damage, which resulted from having followed inaccurate health advice published in a newspaper edited by that company.

Legal context

European Union law

3 The second to fourth, sixth and seventh recitals of Directive 85/374 state:

'Whereas 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;

Whereas [liability] without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; …

…

Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

Whereas a fair apportionment of risk between the injured person and the producer implies that the producer should be able to free himself from liability if he furnishes proof as to the existence of certain exonerating circumstances'.

4 Article 1 of the directive provides:

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

5 Article 2 of that directive reads as follows:

'For the purpose of this Directive, "product" means all movables even if incorporated into another movable or into an immovable. "Product" includes electricity.'

6 Article 3(1) of the directive provides:

'"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.'

7 Article 6(1) of Directive 85/374 provides:

'A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.'

Austrian law

8 The Produkthaftungsgesetz (Product Liability Act, BGBl 99/1988), in the version resulting from the amendment published in BGBl I 98/2001 ('the Product Liability Act'), transposed Directive 85/374 into Austrian law.

9 Paragraph 1(1) of the Product Liability Act provides:

'If due to the defect of a product a person is killed, suffers an injury to his body or health, or if any tangible property other than the product is damaged, the following entities shall be liable to compensate the damage:

1. the undertaking which manufactured the product and put it into circulation;

…'

10 Paragraph 3 of that act provides:

'"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.'

11 Paragraph 4 of that act provides:

'"Product" means all tangible movables, even though incorporated into another movable or into an immovable.'

12 Paragraph 5(1) of that act provides:

‘A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

1. the presentation of the product;

2. the use to which it could reasonably be expected that the product would be put,

3. the time when the product was put into circulation.

…’

The dispute in the main proceedings and the question referred for a preliminary ruling

13 KRONE – Verlag is a media proprietor and the publisher of a regional edition of the *Kronen-Zeitung* newspaper.

14 On 31 December 2016, it published an article in the section entitled ‘Austria’ under the heading ‘Hing’schaut und g’sund g’lebt’ (‘Taking a look and living healthily’), on the benefits of grated horseradish poultices. That article was signed by a member of a religious order, Kräuterpfarrer Benedikt, who, as an expert in the field of herbal medicine, provides free advice in a column published daily by the newspaper.

15 The article read as follows:

‘Alleviating rheumatic pain

Fresh coarsely grated horseradish can help to reduce the pain experienced as a result of rheumatism. First rub a fatty vegetable oil or lard into the affected areas, before applying a layer of grated horseradish to them and applying pressure. You can leave this layer on for two to five hours before then removing it. Its application has a positive draining effect.’

16 The length of time, between two and five hours, specified in the article, for which the substance should be applied, was, however, inaccurate, as the term ‘hours’ had been used instead of ‘minutes’.

17 On 31 December 2016, the applicant in the main proceedings, following the duration of the treatment set out in the article, applied the substance to her ankle joint for approximately three hours and removed it only after experiencing severe pain due to a toxic skin reaction.

18 The applicant in the main proceedings claimed that KRONE – Verlag should be ordered to pay her compensation of EUR 4 400 for the physical harm suffered and that that publisher should be held liable for any current and future harmful consequences of the incident of 31 December 2016.

19 As her claim was dismissed at first instance and on appeal, the applicant in the main proceedings brought an appeal on a point of law before the referring court.

20 That court specifies that the proceedings pending before it raise the question of whether a newspaper publisher or owner can be held liable under Directive 85/374 for the harmful consequences of inaccurate information contained in an article the publication of which it has authorised.

21 That court sets out that some legal literature considers that the scope of liability for defective products, when the product at issue is an information medium, is limited to harm caused by the physical item itself, for example, the poisonous binding of a book or poisonous ink. Liability for defective products should, according to that part of the legal literature, be restricted to liability attached to the danger posed by the object and not the advice given, as intellectual products are not 'products' within the meaning of Article 2 of Directive 85/374. Such a broad interpretation of the concept of 'product' would result in any written expression of any idea coming within the scope of the directive, which provides for strict liability on the part of the producer. Information should fall outside of the scope of that directive, as it would be arbitrary to connect liability for defective products to the fact that the information had been set down in physical form.

22 The referring court states that another part of the legal literature would extend the scope of that liability to circumstances in which the harm results from a defective intellectual product. The publisher, author and printer would be liable as 'producers' for the harm caused by a defect of their product. That part of the legal literature posits that it must be possible for book authors, media proprietors and publishers to be held liable on the basis of Directive 85/374 for the content of a printed work, as the latter had been specifically acquired for its content. Therefore, consumers' expectations of such a product are not restricted to the printed work as an object, but would also cover the content therein.

23 In those circumstances, the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'[Must] Article 2 [of Directive 85/374] together with Article 1 and Article 6 [thereof] be interpreted as meaning that a physical copy of a daily newspaper containing a technically inaccurate health tip which, when followed, causes damage to health can also be regarded as a (defective) product?'

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Article 2 of Directive 85/374, read in the light of Articles 1 and 6 thereof, must be interpreted as meaning that a copy of a printed newspaper that, concerning paramedical matters, gives inaccurate health advice relating to the use of a plant which, when followed, has proved injurious to the health of a reader of that newspaper, constitutes a 'defective product' within the meaning of those provisions.

25 As a preliminary point, it is appropriate to bear in mind that, with regard to the interpretation of a provision of EU law, it is necessary, in accordance with settled case-law, to take into account not only its terms, but also the context in which it is set and the objectives pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements relevant to its interpretation (judgment of 9 October 2019, *BGL BNP Paribas*, C-548/18, EU:C:2019:848, paragraph 25 and the case-law cited).

26 According to Article 2 of Directive 85/374, 'product' means all movables even if incorporated into another movable or into an immovable, and electricity.

27 It is apparent from the wording of that article that services do not come within the scope of that directive.

28 That interpretation of Article 2 of Directive 85/374 is confirmed by the structure of the directive. In that regard, it must be noted that the concept of 'product', within the meaning of that article, is defined within the general context of the producer's liability for the damage caused by their defective products.

29 As reflected in the third recital of that directive, the liability regime it defines can apply only to movables which have been industrially produced or those which are used in the construction of immovables or are installed in immovables.

30 Consumer protection requires, as set out in the fourth recital of the directive, that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective.

31 It is in those circumstances that Article 1 of Directive 85/374, read in the light of the second recital thereof, lays down the principle of strict liability of the 'producer', defined in Article 3 of the directive as 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 their name, trade mark or other distinguishing feature on the product presents itself as its producer, for damage caused by a defect in their product.

32 It is apparent from the foregoing considerations that services do not come within the scope of Directive 85/374. Nonetheless, in order to respond to the referring court's queries, it should be examined whether health advice which, by its nature, constitutes a service, can, when incorporated into a physical item – in this case, a printed newspaper – result, on account of the fact that it proved to be inaccurate, in the newspaper itself being defective in nature.

33 A product is defective within the meaning of Article 6 of the directive when it does not provide the safety which a person is entitled to expect, taking all the circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that it would be put and the time when the product was put into circulation. Moreover, according to the sixth recital of that directive, that assessment must be carried out having regard to the reasonable expectations of the public at large (judgment of 5 March 2015, *Boston Scientific Medizintechnik*, C-503/13 and C-504/13, EU:C:2015:148, paragraph 37).

34 The safety which a person is entitled to expect, in accordance with that provision, must therefore be assessed by taking into account, inter alia, the intended purpose, the objective characteristics and properties of the product in question and the specific requirements of the group of users for whom the product is intended (judgment of 5 March 2015, *Boston Scientific Medizintechnik*, C-503/13 and C-504/13, EU:C:2015:148, paragraph 38).

35 As observed, in essence, by the Advocate General in point 29 of his Opinion, the defective nature of a product is determined on the basis of certain characteristics inherent to the product itself and related to, inter alia, its presentation, its use and the time when it was put into circulation.

36 In the present case, it must be observed that the service in question, namely the provision of inaccurate advice, is unrelated to the printed newspaper, which constitutes its medium. More specifically, that service does not concern either the presentation or the use of the latter. Therefore, that service is not part of the inherent characteristics of the printed newspaper which alone permit an assessment as to whether the product is defective.

37 Moreover, the fact that no provision is made in Directive 85/374 for the possibility of liability for defective products in respect of damage caused by a service, of which the product is merely the medium, reflects the intentions of the EU legislature. The limits set by that legislature to the scope of the directive are the result of a complex balancing of, inter alia, different interests (see, to that effect, judgment of 21 December 2011, *Dutrueux*, C-495/10, EU:C:2011:869, paragraph 22 and the case-law cited).

38 Therefore, the liability of service providers and the liability of manufacturers of finished products constitute two distinct liability regimes, as the activity of service providers cannot be equated with those of producers, importers and suppliers (see, to that effect, judgment of 21 December 2011, *Dutrueux*, C-495/10, EU:C:2011:869, paragraphs 32 and 33). As is also apparent from the Proposal for a Council Directive on the liability of suppliers of services COM(90) 482 final (OJ 1991 C 12, p. 8) submitted by the Commission on 9 November 1990, having regard to the distinct characteristics of services, the liability regime applicable to providers should be governed by separate legislation.

39 Consequently, inaccurate health advice which is published in a printed newspaper and concerns the use of another physical item falls outside the scope of Directive 85/374 and is not such as to render that newspaper defective and the 'producer' strictly liable pursuant to that directive, whether they are the publisher or the printer of that newspaper or even the author of the article.

40 Were such advice to come within the scope of Directive 85/374, this would not only result in the negation of the distinction drawn by the EU legislature between goods and services and the exclusion of the latter from the scope of that directive, but would also make newspaper publishers strictly liable without it being possible for them – or with a limited possibility for them – to avoid that liability. However, such a consequence would be detrimental to the objective of ensuring that risk is fairly apportioned between the injured person and the producer, as recalled in the seventh recital of that directive.

41 It must also be stated, in line with the Commission's submissions, that, although strict liability for defective products, provided for by Directive 85/374, is inapplicable to a case such as that in the main proceedings, other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects, may be applicable (see, by analogy, judgment of 25 April 2002, *González Sánchez*, C-183/00, EU:C:2002:255, paragraph 31).

42 Having regard to all those considerations, the answer to the question referred is that Article 2 of Directive 85/374, read in the light of Articles 1 and 6 thereof, must be interpreted as meaning that a copy of a printed newspaper that, concerning paramedical matters, gives inaccurate health advice relating to the use of a plant which, when followed, has proved injurious to the health of a reader of that newspaper, does not constitute a 'defective product' within the meaning of those provisions.

Costs

43 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:

Article 2 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, as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, read in the light of Articles 1 and 6 thereof, as amended by Directive 1999/34, must be interpreted as meaning that a copy of a printed newspaper that, concerning paramedical matters, gives inaccurate health advice relating to the use of a plant which, when followed, has proved injurious to the health of a reader of that newspaper, does not constitute a 'defective product' within the meaning of those provisions.

[Signatures]