# OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 18 September 2001 [1]

## I — Introduction

1. Both these cases concern 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 [2] ('the Directive').

Case C-183/00 is a reference for a preliminary ruling on a question concerning Article 13 of the Directive, while Case C-52/00 is an action for failure to fulfil obligations brought by the Commission against the French Republic under Article 226 EC on the ground that the French legislation implementing the Directive does not comply with Articles 3(3), 7 and 9 thereof. The French Government has defended the action by relying, among other grounds, on the wording of Article 13 of the Directive. The fundamental issue in both cases is whether the Directive is aimed at achieving total or minimum harmonisation of liability for damage caused by defective products within the Community.

First of all, I shall outline the legal framework and summarise the facts relevant to each case.

## II — Provisions of Community law

2. Under Article 1 of the Directive, producers are liable for damage caused by defects in their products. Article 3(3) provides that, where the producer of a product cannot be identified, each supplier of the product is to be treated as its producer unless he informs the injured person of the identity of the producer, or of the person who supplied him with the product, within a reasonable time. The situation is the same in the case of imported products where the name of the importer, referred to in Article 3(2), does not appear on the product, even if the producer's name does appear.

1 — Original language: Dutch.
2 — OJ 1985 L 210, p. 29.

3. Article 7 provides that the producer is not liable under the Directive if he proves:

'...

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

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

(f) ...'

4. Article 9 defines 'damage' for the purpose of Article 1 of the Directive in the following terms:

'...

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

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

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

...'

5. Article 13 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.'

6. Article 15(1) stipulates that each Member State may:

'...

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

## III — National legislation and facts

### A — *Case C-52/00*

#### 1. National legislation

7. Under the French legislation transposing the Directive into national law, that is to say Law No 98-389 of 19 May 1998, the following provisions, *inter alia*, on liability for damage caused by defective products were incorporated into the French Civil Code:

— Article 1386-1 provides that producers are liable for damage caused by defective products.

— Article 1386-2 states that the provisions of this title govern compensation for loss and damage caused by personal injury or damage to any item of property other than the defective product itself.

— Article 1386-7(1) provides that the vendor or hirer, except a lessor under a hire-purchase agreement or a hirer assimilable thereto, or any other supplier in the course of business, are liable for safety defects in their products on the same basis as the producer.

— Article 1386-11(1) provides that a producer is automatically liable unless he proves:

'...

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

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

...'

— Article 1386-12, second paragraph, stipulates as follows:

'The producer cannot invoke the grounds of exemption from liability under paragraphs 4 and 5 of Article 1386-11 and if, in the event of a defect occurring within a period of 10 years after the product was put into circulation, he has failed to take appropriate measures to avert the harmful consequences thereof.'

2. The facts

8. Under Article 19 of the Directive, Member States were required to transpose the Directive into national law by 30 July 1988. Since the French Republic had not effected implementation within the time-limit stipulated, the Court of Justice delivered a judgment to that effect on 13 January 1993.[3] Finally, after a delay of almost 10 years, the French Republic on 19 May 1998 enacted legislation transposing the Directive into national law. That law introduced into France a system of liability without fault, under which there was no maximum limit.

9. Following an exchange of letters in March 1998 between the Commission's services and France's Permanent Representative, the Commission decided to commence proceedings under Article 226 EC for failure by France to fulfil its obligations, and on 6 November 1998 issued a letter of formal notice. The French Government replied by letter of 12 January 1999. The reasoned opinion was issued on 6 August 1999. The French Government replied on 6 October 1999.

10. In this action, the Commission seeks a declaration from the Court of Justice that the French Republic has failed to fulfil its obligations under Articles 9, 3(3) and 7 of the Directive:

— by providing in Article 1386-2 of the Civil Code that the provisions concern-

3 — Case C-293/91 *Commission* v *France* [1993] ECR I-1.

ing liability for damage caused by defective products also apply where the damage is less than EUR 500;

— by providing in Article 1386-7 of the Civil Code that the supplier of a defective product is liable on the same basis as the producer;

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

B — *Case C-183/00*

1. National legislation

11. The Directive was transposed into Spanish law by Law 22/1994 of 6 July 1994. The last of the final provisions of that law provides as follows:

'Articles 25 and 28 of the General Law for the Protection of Consumers and Users shall not apply to civil liability for damage caused by defective products included in Article 2 of this Law.'

Article 2 of the aforementioned Spanish law is similar to Article 2 of the Directive which defines what is meant by 'product' for the purposes of the Directive.

2. The facts and the question referred for a preliminary ruling

12. Ms González Sánchez received a blood transfusion at the hospital, 'Centro Médico de Asturias', following which she became infected with the hepatitis C virus. As a result of that, Ms González Sánchez brought an action for compensation for damage against Medicina Asturiana SA, the proprietor of the abovementioned hospital.

13. Ms González Sánchez based her claim on the general provisions concerning liability contained in the Spanish Civil Code and on Articles 25, 26 and 28 of Law 26/84.

Medicina Asturiana SA denied all liability, alleging, among other grounds, that, under Law 22/94, Articles 25, 26 and 28 of Law 26/84 no longer applied.

14. The referring court states in the order for reference that blood and blood products are products within the meaning of Law 26/84 and of Law 22/94, and that, accordingly, in principle, both laws are applicable, both at the time when the transfusion was carried out (as regards Law 26/84) and at the time when the product was put into circulation (as regards Law 22/94), but that, under Law 22/94, Article 25 et seq. of Law 26/84 could no longer be applied.

15. The Spanish court considered that, before delivering judgment, it was necessary to submit a question for a preliminary ruling, in view of the consequences of applying one law or the other for the purposes of assessing the burden of proof, on account of the different systems of liability established by each law, and in order to identify the persons liable.

16. The national court has also indicated that Law 26/84 lays down a system of liability without fault, whereby the plaintiff needs only to prove the damage and the causal relationship, whereas the defendant will only escape liability by proving that the victim was exclusively at fault or, alternatively, that the cause was *force majeure* or pure chance.

17. The Directive, and, consequently, Law 22/94, require the injured party to prove not only the damage and the causal relationship, but also the defect in the product (Article 4 of the Directive; Article 5 of Law 22/94); however, under the Directive and the abovementioned law, the defendant may avail himself of other grounds of exemption from liability (Article 7 of the Directive and Article 6 of the Law).

18. Another difference between the two laws is that, under Law 26/84, the plaintiff may sue the manufacturer, importer, supplier or seller, who are jointly liable to the consumer; whereas under the Directive and, in turn, Law 22/94, Ms González Sánchez would not be able to establish liability on the part of Medicina Asturiana SA, since the latter is classed as the supplier due to the fact that the 'manufacturer' or 'producer' of the units of blood has been identified as the Centro Comunitario de Transfusión del Principado de Asturias, a body which has not been made a defendant to the action.

19. The referring court points out that Law 26/84 affords greater protection to consumers than Law 22/94. That also emerges from a consideration of factors such as the inclusion of a lower threshold in the case of

damage caused by the product to an item of property (Article 9(b) of the Directive), or the provision for the extinction of liability 10 years after the product was put into circulation (Article 11 of the Directive), although those factors have no bearing on this case.

20. The national court goes on to state that transposition of the Directive by Law 22/94 has led to a reduction in the rights which consumers enjoyed in Spain at the time when the Directive was notified. That therefore gives rise to the question whether transposition of the Directive into national law infringed Article 13 of the Directive, in conjunction with the reference in the preamble to the Directive and with Article 3(1)(t) EC.

21. Those considerations led the national court to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 13 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 be interpreted as precluding the restriction or limitation, as a result of transposition of the Directive, of rights granted to consumers by the legislation of the Member State?'

## IV — The legal nature of Directive 85/374/EEC

### A — *Introduction*

22. In both cases the central question is whether the Directive provides for a minimum level of harmonisation, or, alternatively, for complete harmonisation. In the former case, the national legislature would retain the power to provide consumers with greater protection, in relation to liability for damage caused by defective products, than that which is provided for by the Directive. In that case, national legislation which preceded the Directive, and which provided consumers with greater protection than the Directive, could be retained, as in Case C-183/00. In addition, the national legislature would be entitled to enact a system which had greater scope, either when it transposed the Directive into national law — as in Case C-52/00 — or subsequently. In the latter situation, when the national legislature transposed the Directive into national law, it would be bound absolutely by the provisions which the Community legislature had laid down in the Directive. In that instance, prior and subsequent national legislation which provided for greater protection would only be lawful if it was expressly envisaged by the Directive.

23. Written observations in Case C-183/00 were submitted by the plaintiff in the main proceedings, Ms González Sánchez, and also by the Spanish, Greek, French and Austrian Governments, and by the Com-

mission. Those observations deal exclusively with the question set out above.

In Case C-52/00, the dispute between the Commission and the French Government goes further. In those proceedings, in addition to the question set out here, the parties have also expressed their views on the three pleas in law which are set out in the Commission's application.

24. In this section of my Opinion, I will first of all state and analyse the main arguments relating to the substantive issue in both cases. In section (V) I will summarise the arguments in Case C-52/00 concerning the specific pleas in law put forward by the Commission, and will then go on to analyse them.

B — *Arguments*

25. In Case C-183/00, the plaintiff in the main proceedings, together with the French, Greek and Austrian Governments, argue that the Directive should be interpreted as providing for a minimum level of harmonisation. That would indicate that the answer to the question submitted for a preliminary ruling by the Spanish court should be in the affirmative. The Spanish Government and the Commission, on the other hand, submit that the Directive envisages complete harmonisation, by which national legislatures are fully bound. That would imply that the question referred should be answered in the negative.

26. In Case C-52/00, as in Case C-183/00, the French Government takes the view that the Directive envisages only a minimum level of harmonisation, which does not preclude national legislatures from providing consumers with greater protection than the Directive. The Commission takes the opposite view. In Case C-52/00, the French Government's stance implies that the disputed legislation which gives effect to the Directive is entirely lawful. Consequently, the specific pleas in law put forward by the Commission challenging that legislation are claimed to be wholly groundless. The Commission's stance also implies that the French legislation must be precisely examined by reference to the Directive, which must entail analysing each plea in law in turn to determine whether the relevant parts of the legislation in question remain within the purview of the Directive.

27. In Case C-183/00, the plaintiff in the main proceedings, the Greek and Austrian Governments, and the French Government (in Case C-183/00 and Case C-52/00) submit that the wording of the 13th recital, together with Article 13 of the Directive, support the view that the Directive envisages only a minimum level of harmonisation of liability without fault or liability for risks.

28. In the 13th recital in the preamble to the Directive, the Community legislature appears to state expressly that the Directive does not seek to attain total harmonisation, and nor would it be able to do so.

'Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible.'

29. Interpreting Article 13 of the Directive in the light of that recital reveals that the Directive does not require amendments to the provisions on which victims may rely, provided that: (a) the provisions are aimed at achieving effective protection of consumers, and (b) the basic premiss of the provisions is contractual or non-contractual liability, or a special liability system. Where, and only where, there is a liability system for specific products, there is also a third requirement, namely that the system must have existed before the Directive was notified.

30. As regards Case C-183/00, the plaintiff in the main proceedings and the above-mentioned Governments conclude from the foregoing that, as a result of Article 13 of the Directive, an affirmative reply may be given to the question referred by the national court. As regards Case C-52/00, the French Government infers from the points set out above that national legislatures retain the power to provide for a greater level of protection under national legislation than that which is provided for by the Directive.

31. In support of their arguments, the French, Greek and Austrian Governments refer to Article 153 EC (formerly Article 129a of the EC Treaty), which was inserted into the EC Treaty by the Treaty of Maastricht. That article attaches increased importance to consumer protection, which is demonstrated by the power of the Member States to adopt or to retain measures which afford consumers greater protection than that afforded under Community legislation. That change in the law also supports the view that the system under the Directive, which preceded Article 153 EC, must be regarded as the absolute minimum necessary to protect consumers. That would lead, in both cases, to selecting the system which is most favourable to consumers.

32. In Case C-52/00, the French Government goes on to add that the aims of the uniformity and correct functioning of the common market, pursued by the Directive, must not prevail over the increasingly pressing aim of consumer protection.

33. The Commission, supported by the Spanish Government, points out that in order to interpret Article 13 of the Directive correctly, a distinction must be drawn between the 'ordinary' contractual and non-contractual liability which producers may have under the national legal systems of the Member States, and the system of liability which applies to producers who sell defective products. As a result of Article 13, the Member States are certainly entitled to amend, either by making more stringent or more lenient, the basis of liability for a product in accordance with the rules of contractual or non-contractual liability. However, they cannot change the system envisaged by the Directive, under which producers are liable for defective products, unless and in so far as the Directive provides that they may do so. When the Directive was drafted, the Community legislature undoubtedly opted for total harmonisation, as a result of which national legislatures may only lay down alternative provisions in a limited number of circumstances. Those circumstances are set out fully in Articles 15(1) and 16 of the Directive. However, the Directive does not permit Member States unilaterally to introduce more stringent rules of liability for defective products, since that would endanger the uniformity and correct functioning of the common market which the Directive seeks to achieve. Since the Directive provides for total harmonisation, any subsequent developments in the field of consumer protection must likewise be harmonised.

34. The Commission also states that the expression 'special liability system', which is used in the second phrase of Article 13 of the Directive, refers to a special system for a specific sector, such as, for example, the system relating to medicinal products which was in force in Germany at the time when the Directive was notified. However, Spanish Law 26/84 did not contain a special system for a specific sector of products. Accordingly, an amendment to that law would have been necessary when the Directive was transposed into Spanish law. The Spanish Government supports the Commission's interpretation, which, in its opinion, is confirmed by the 13th recital in the preamble to the Directive.

C — *Analysis*

35. The legislative process leading to adoption of Directive 85/374/EEC was a very lengthy one. It was necessary to balance the interests of consumers and producers in a manner acceptable to all the Member States. Since, at the outset, the Member States differed widely in their approach to the question where precisely that balance should be struck in relation to the system of liability for defective products, negotiations

on that question took a long time. That laborious drafting process has undoubtedly left its mark on the recitals and on the provisions of the Directive.

36. Nor did the subsequent transposition of the Directive into the national law of the Member States pass without incident. As stated in paragraph 8 above, proceedings were earlier initiated against the French Republic, and the Court found that France had failed to comply with the Directive within the required time-limit. [4] The Kingdom of Spain was also threatened with proceedings for failure to fulfil its obligations. Proceedings between the Commission and the United Kingdom were initiated before the Court of Justice. In its judgment, the Court of Justice held that the Directive had been transposed by the United Kingdom in such a way as to allow the national courts sufficient margin to interpret the domestic legislation in question in accordance with the Directive. [5] Currently, in addition to the two cases now before the Court, proceedings are also pending in an action brought against the Hellenic Republic for failure to fulfil its obligations. [6] Very recently, the Court gave judgment in a reference for a preliminary ruling on the interpretation of Articles 7(a) and (c) and 9(a) and (b) of the Directive. [7]

37. The French Government, in Case C-52/00, and the Greek Government, in Case C-183/00, have suggested that there is a conflict between the objectives of Article 100 of the Treaty (now Article 94 EC) — on the establishment and functioning of the common market — and consumer protection as one of the objectives of the Directive.

38. The preamble to the Directive states that the Directive is aimed at removing the obstacles to a uniform common market, which are caused by the coexistence of national legal systems with different traditions, by the adoption of a system of liability for defective products. In addition, a uniform system would be able to remove the distortion of competition caused by the existing divergences between the legal systems of the Member States. As a result of those two concerns, it would appear to be desirable to opt for wider uniformity within the common market in relation to the applicable legislation.

39. I wish to emphasise that the choice of uniformity of legislation is wholly compatible with the choice of a particular level — be it greater or lesser — of consumer protection. Reliance on Article 94 EC in no way prejudges the Community legislature's decision when striking a balance between the interests of consumers and producers. If, when the Directive was adopted, the Member States had wished to opt for a higher level of protection, that would have been possible. If they had wished to do so subsequently, they would have had the opportunity to do so under Article 94 EC.

4 — Case cited in footnote 3 above.

5 — Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649.

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

7 — Case C-203/99 *Henning Veedfald* [2001] ECR I-3569.

40. The fact that Article 94 EC is the legal basis for the disputed Directive does, however, have a bearing on the freedom to act retained by national legislatures following the adoption of the Directive. That freedom to act only exists within the scope of the Directive, and in so far as the Directive expressly provides for it. Unlike Article 95 EC (formerly, before amendment, Article 100a of the EC Treaty), Article 94 EC does not grant the Member States the power, albeit strictly regulated, to retain or to introduce national provisions which depart from Community harmonisation measures.

41. The French, Greek and Austrian Governments have submitted that, since the Directive was adopted, views on the liability of producers for damage caused by defective products have changed considerably. According to those Governments, that change is reflected in Article 153 EC, which was inserted into the Treaty after the Directive had been adopted. In their opinion, the fresh legal approach of that article supports the view that the Directive should be interpreted as aiming to achieve a minimum level of harmonisation which does not affect national measures providing greater protection to consumers.

42. In my view, that position is untenable. First of all, it overlooks the fact that the power of the Member States to adopt or retain measures which offer greater protection applies only to the measures cited in Article 153(3)(b) EC. Those measures are different from the ones which are necessary in order to complete the internal market. In the case of the latter measures, it can be inferred from Article 153(3)(a) EC that the provisions of Article 95 EC continue to apply. Although Article 153 EC makes no mention in this regard, it must be assumed that the provisions of that article continue to apply, *mutatis mutandis*, to the harmonisation measures in the field of consumer protection which must be adopted in accordance with Article 94 EC.

43. Secondly, it ignores the fact that Article 153 EC is worded as a valid instruction to the Community with regard to future policies. Under that provision, the Community legislature would be entitled to undertake initiatives to shift, in favour of consumers, the current balance between the interests of producers and those of consumers which is laid down in the Directive. However, Article 153 EC does not, under any circumstances, grant Member States the power unilaterally to adopt measures which would infringe the rules of Community law laid down in directives to date. Any other interpretation would endanger the *acquis communautaire* of the uniformity and correct functioning of the common market. The wording and structure of Article 153 EC make it clear that that was a risk which the framers of the Treaty did not wish to incur.

44. I therefore conclude that the Directive determines the full extent of the margin of

discretion enjoyed by the Member States in regulating systems of liability for damage caused by defective products. That margin is determined by the wording and structure of the Directive. The relevant French and Spanish legislation in these cases must be examined against that yardstick.

45. The arguments in support of the view that the Directive envisages total harmonisation of liability for damage caused by defective products are persuasive.

46. Unlike, for example, Directive 93/13/EEC on unfair terms in consumer contracts, [8] Article 8 of which specifically provides that Member States may adopt or retain more stringent provisions in the area covered by that directive, the Directive contains no specific provision which suggests that only a minimum level of harmonisation is intended.

47. While it is true that Articles 15(1) and 16 of the Directive permit the Member States to derogate from the fundamental rules of the Directive in a number of circumstances which are closely circumscribed, the mere fact that those derogations exist, in addition to the precision with which they are defined, support the view that the Directive is aimed at complete harmonisation, rather than the opposite view.

48. Had the implicit aim of the Directive been a minimum level of harmonisation, there would have been no need to set out so precisely the specific powers of the Member States to derogate from the general rules. Nor would there have been any need to provide, in Article 15(2) and (3), that the exercise of the power to derogate under Article 15(1)(b) is subject to special rules concerning procedure and assessment.

49. The first and the two last recitals in the preamble to the Directive also militate against the assumption that the Directive is aimed at a minimum level of harmonisation. The first of the last two recitals states that harmonisation cannot be total at the present stage and that, therefore, the Commission is to submit to the Council reports assessing the application of the Directive. It is followed by the last recital which is in these terms:

'Whereas it is particularly important in this respect that a re-examination be carried out of those parts of the Directive relating to the derogations open to the Member States,

8 — OJ 1993 L 95, p. 29.

at the expiry of a period of sufficient length to gather practical experience on the effects of these derogations on the protection of consumers and on the functioning of the common market'.

50. The objective of the unity and functioning of the common market, which is set out in the first and last recitals, does not accord with the view that the Directive only provides for minimum harmonisation. It can be deduced from the wording of the last two recitals that the Community legislature considered that harmonisation was incomplete because there were still derogations open to the Member States. [9]

51. In view of the foregoing, I find the French Government's argument, that the first part of Article 13, in conjunction with the 13th recital in the preamble, supports its view that the Directive is aimed at minimum harmonisation, to be untenable.

52. The wording of Article 13, which provides that the Directive will not affect any rights which an injured person may have under the rules of the law of contractual or non-contractual liability, is intended to make it clear that harmonisation of liability for damage caused by defective products, which is the aim of the Directive, does not affect any additional rights which an injured person may have under the terms of a contract which he or she has entered into, or under the ordinary law of his or her Member State concerning liability for wrongful acts. The Directive contains no provisions relating to the ordinary law of liability for wrongful acts; nor does it restrict the powers of national legislatures in that regard. However, the wording of Article 13 cannot be construed as reserving to national legislatures a residual competence concerning liability damage caused by defective products. The Directive totally harmonises that liability, save for the derogations provided for in Articles 15(1) and 16.

53. In addition, the interpretation advocated by the French Government is incompatible with the structure of the Directive. If the first part of Article 13 were to be construed as conferring on national legislatures a general residual competence concerning liability for damage caused by defective products, the special derogations provided for in Articles 15(1) and 16 would be meaningless.

54. In order to answer the question raised in Case C-183/00, it is also necessary to analyse the scope of the derogation contained in the last part of Article 13. That derogation relates to national systems of

9 — As a result of the Commission's first report on the application of the Directive, Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1999 L 141, p. 20) deleted Article 15(1)(a) of the Directive.

liability which apply to a specific sector of production for special categories of products, and which were in existence at the time when the Directive was notified. Any rights which an injured person may have under such a national special liability system, which preceded the Directive, are not affected. It may be inferred from the 13th recital in the preamble to the Directive, and from the origin of the provision, that what was involved was, in fact, a German special liability system for pharmaceutical products. This constituted a limited exemption from the general obligations under the Directive.

55. Spanish General Law 26/86 on the protection of consumers and users applies, *ratione materiae*, to all goods and services offered to individuals. In so far as that law provided for a system of product liability at variance with the Directive, it would have been necessary to amend that law when the Directive was transposed into national law, even if that meant that thenceforth less favourable provisions from the point of view of a consumer protection system would be applicable. [10] As the Spanish Government has also rightly pointed out, neither the first nor the last part of Article 13 can be relied on by the Spanish legislature to nullify those consequences. In the area of liability for defective products, it is for the Community legislature to determine the balance to be struck between the interests of consumers, suppliers and producers.

10 — In this regard, it is appropriate to note that, although the Treaty requires the Community legislature to start from the premiss that there must be a high level of protection, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which exists in a particular Member State. See, for example, Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405.

56. The foregoing leads me to the following conclusion:

— Directive 85/374/EEC is aimed at total harmonisation in the area of liability for damage caused by defective products.

— National legislatures may only derogate from the Directive if, and in so far as, the Directive itself so provides, and they must comply with the relevant rules and conditions set out in the Directive.

— The first part of Article 13 of the Directive does not permit national legislatures to adopt systems of liability for damage caused by defective products which derogate from the Directive.

— The second part of Article 13 of the Directive does not affect any rights which an injured person may have under national systems which existed at the time when the Directive was notified, and which govern liability for

damage caused by defective products in a specific sector of production for special categories of products.

— In view of all of the above, a negative answer must be given to the question referred by the national court.

## V — The specific pleas in law in Case C-52/00

### A — *First plea in law: incorrect transposition of Article 9 of the Directive into national law, inasmuch as Article 1386-2 of the Civil Code stipulates that the provisions concerning liability for damage caused by defective products also apply to cases where the damage to property is less than EUR 500*

#### 1. Arguments of the parties

57. The French Government does not dispute that Article 1386-2 of the French Civil Code departs from Article 9 of the Directive by not providing for a lower threshold of EUR 500. The French Government did not wish to introduce such a restriction of liability for damage caused by defective products because, in its opinion, a provision of that kind would be contrary to Article 6(1) of the European Convention for the Protection of Human Rights and Individual Freedoms, would be incompatible with French public policy, and, finally, would upset the balance between the interests of consumers, on the one hand, and those of producers, on the other.

58. In support of its first argument, the French Government submits that the threshold stipulated by the Directive would, in fact, prevent access to the courts by injured persons if the damage caused to their property by defective products were less than EUR 500. Such a denial of justice is contrary to Article 6(1) of the abovementioned European Convention. The French Government also cites the judgment of the Court of Justice in *Krombach*, [11] in which the Court held that a contracting party may rely on the public-policy clause contained in Article 27(1) of the Brussels Convention [12] where the court of the Member State of origin has held that there was a manifest infringement of the right to present a defence. As to the second argument, the French Government submits that French civil law does not allow for any lower threshold.

59. In support of its third argument, the French Government states that the threshold amounts to unequal treatment of con-

11 — Case C-7/98 *Krombach* [2000] ECR I-1935.

12 — The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (JO 1972 L 299, p. 32), as subsequently amended.

sumers and producers. The consumers of products in which defects are liable to cause only slight damage would be discriminated against in relation to consumers of products in which possible defects are liable to cause serious damage to property. The same applies, *mutatis mutandis*, to manufacturers whose products ordinarily cause only slight damage as a result of their defects, and to manufacturers whose products are liable to cause serious damage to property.

60. The Commission states that the threshold of EUR 500 in cases of damage to property does not amount to a denial of justice where there is liability, because an injured person will, in any event, still be able to bring an action under the 'ordinary' rules of non-contractual liability. The Commission also points out that the provisions of the Directive concerning liability for damage caused by defective products have strengthened the rights of consumers *vis-à-vis* any rights that they may have had previously under the law of their Member States concerning non-contractual liability for wrongful acts. The Commission considers that the reference to *Krombach* is irrelevant, since that case dealt with the notion of public policy under the Brussels Convention and with a dispute over the right to a defence. Finally, the Commission states that the case-law of the European Court of Human Rights contains a principle of proportionality under which certain restrictions on the right of access to the courts may be laid down, provided that they are based on legitimate grounds. [13] In this case, the ground in question is the desire to avoid a proliferation of litigation. In that regard, the Commission refers to the eighth recital in the preamble to the Directive.

61. As to the French Government's second ground of defence, the Commission recalls the settled case-law of the Court of Justice according to which a Member State cannot rely on provisions of its national legal system to justify a failure to fulfil its obligations under a directive. In addition, during the preparatory work leading to the unanimous adoption of the Directive the French Government could have ensured in advance that the Directive would be compatible with its national legal system. [14]

62. Finally, the Commission believes that this is not the right time to embark on the discussion sought by the French Government concerning the balance of interests established in the Directive. That discussion could have taken place when the Directive was being drafted and could have continued during the revision process. However, where a directive's transposition into national law is at issue, it is not appropriate to discuss the choice made by the Community legislature in seeking to balance the different interests at issue.

13 — *Stubbings and others* v *United Kingdom*, judgment of 2 October 1996, Report of Judgments and Decisions 1996-IV, No 18, p. 1487.

14 — In this regard, the Commission cites Case 102/79 *Commission* v *Belgium* [1980] ECR 1473.

2. Analysis

63. A review of Article 1386-2 of the French Civil Code in the light of Article 9 of the Directive reveals that the provision of national law does not provide for the lower threshold of EUR 500 for damage to property caused by defective products which is envisaged by the Directive. The Directive does not provide that Member States may abolish that threshold, either wholly or partially. Since, as I concluded in paragraph 56, the Directive envisages total harmonisation, with the exception of certain specific derogations laid down therein, such a review of itself allows the conclusion to be drawn that the French Government has incorrectly transposed that part of Article 9 of the Directive into national law.

64. To my mind, the arguments put forward by the French Government in defence of this plea in law are not sufficient to justify the incorrect transposition of Article 9.

65. The weightiest argument set out in the defence is the first one, which can be summarised in the following question: does the lower threshold laid down in Article 9 of the Directive amount to a denial of justice and, in the event of an affirmative answer, does it therefore amount to an infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms?

66. In determining the answer to the first part of that question, regard must be had to the changes which have occurred in the legal systems of Western Europe over the last 50 years. Those changes are characterised by the almost continual attention which legislatures have paid to protecting interests which in social terms have been shown to be vulnerable. That led, firstly, to special laws on collective agreements granting special private-law protection to employees. Subsequently, in the majority of the Member States, it also led to special protection for tenants and lessors. In recent decades, legislatures have also paid special attention to the position of consumers.

67. The aforementioned legislation, which is tailored to the specific needs of the individual — employee, tenant, consumer, etc. — is characterised by the precision with which it defines its scope, *ratione materiae*, *ratione personae*, and, sometimes, *ratione loci*. Individuals and interests not included in the scope of the legislation may not rely on the special protection provided by it. Therefore, they must rely on general rules of private law, such as *ius commune*.

68. The subtle distinctions introduced into this 'special' legislation by legislatures are the result of a process which is, for the most

part, highly complicated and involves the balancing of numerous, often conflicting, interests, such as the weighing of the actual legal interest against the sound administration of justice. When the Community legislature adopted the Directive, it had to weigh consumer protection in cases of minor damage to property against the risk of overburdening the courts. The effect of its policy decision is that, in cases of minor damage to property, consumers are not entitled, as regards the burden of proof, to claim liability without fault on the part of producers for damage caused by defective products. They must instead rely on the relevant ordinary rules of non-contractual liability for wrongful acts.

69. In addition, justice has not been denied in this case, in the sense that individuals cannot have access to the ordinary courts. Accordingly, there has been no infringement of Article 6(1) of the European Convention on Human Rights. The judgment of the European Court of Human Rights in the case of *Stubbings*, which was cited by the Commission, also confirms that the Strasbourg court is well aware of the difference, brought about by legal developments in the welfare State based on the rule of law, between judicial remedies and legal rights. I therefore see no justification for the French Government's reliance on Article 6(1) of the European Convention on Human Rights in defence of its failure to transpose Article 9 of the Directive into national law.

70. Nor does the second defence argument carry conviction. Here, the French Government pleads 'internal public policy' in French private law. It is settled case-law of the Court that Member States cannot rely on their national legal systems in order to justify a failure to fulfil their obligations under provisions of Community law. [15]

71. Nor it is clear whether the French Government, in relying on that defence, is also claiming a conflict with the concept of public policy set out in Articles 30 EC and 46 EC. If the French Government did have those provisions in mind in this case, they would not have lent any weight to its argument. First, it is not apparent how the lower threshold laid down in the Directive might have prejudiced the legal interests which are listed exhaustively in those articles. Secondly, it is clear that, if the French Government had feared that any of the interests contained in the abovementioned provisions were at risk, it ought to have raised that concern at the time when the Directive was being drafted.

72. The third defence argument, as to uneven treatment of the interests of consumers, on the one hand, and those of producers, on the other, relates to a

15 — See, *inter alia*, the judgment cited in footnote 13.

decision which was taken by the Community legislature and was then translated into one of the provisions of the Directive. The validity of that provision has not, however, been called in question. In proceedings to determine whether or not a national legislature has complied with that provision, a defence of this nature is of no avail, as is the argument that in the future the Community legislature may be faced with balancing interests in the same way as the disputed national legislation. [16] In accordance with the powers granted to the Community legislature by the EC Treaty, the Court is required to refrain from giving judgments which anticipate, or might anticipate, the formation of a view by the legislature.

B — *Second plea in law: incorrect transposition of Article 3(3) of the Directive into national law*

1. Pleas in law and arguments of the parties

73. Unlike Article 3(3) of the Directive, which provides that the supplier will be liable only where the identity of the producer is unknown, Article 1386-7 of the French Civil Code provides that the supplier will be liable on the same basis as the producer.

74. The Commission acknowledges that, under the French legal system, a supplier may take action against a producer to enforce a guarantee. However, the Commission is of the opinion that a situation where an injured person sues a supplier, who must in turn take action against the producer to enforce the guarantee, is not the same as one where an injured person may sue the producer directly. The purpose of Article 3(3) of the Directive is precisely to avoid a proliferation of legal actions.

75. The French Government states that Article 1386-7 of the Civil Code in fact achieves the aim of the Directive because the end result is that the producer must pay compensation. Moreover, Article 1386-7 merely confirms a national rule of liability which was already in existence at the time when the Directive was notified, and it therefore complies with Article 13 of the Directive. In any event, the rule in question is a national rule of civil procedure over which the Community legislature had no jurisdiction at the time when the Directive was adopted.

16 — See Case C-236/88 *Commission* v *France* [1990] ECR I-3163.

2. Analysis

76. A review of Article 1386-7 of the French Civil Code in light of Article 3(3) of the Directive reveals that the former, which establishes liability on the part of the producer, is drafted in wider terms than the Directive. The Commission's plea in law is therefore well founded.

77. The defence arguments submitted by the French Government do not alter that conclusion. If the disputed article merely confirmed a rule already in existence in the French law of non-contractual liability, the French legislature remained in breach of its obligations by failing to transpose the system of liability for damage caused by defective products laid down in the Directive.

78. As the Commission rightly points out, the claim that the Community legislature had no authority to adopt rules of procedure on the establishment of liability is inadmissible. In *Commission* v *Germany*, [17] an action to determine whether or not there had been a failure to fulfil obligations under a provision of Community law, the Court ruled inadmissible a claim that the provision in question was unlawful.

79. Furthermore, I should like to point out that the above argument would also fail on the substance. Since there is no question that the Community has the power to harmonise Community law on liability for damage caused by defective products, it must also have the power to harmonise the procedure for establishing liability. Moreover, the balancing of the different interests which must be taken into consideration is, in fact, also being called in question.

C — *Third plea in law: incorrect transposition of Article 7 of the Directive into national law*

1. Pleas in law and arguments of the parties

80. Unlike Article 7(d) and (e) of the Directive, which sets out the cases where a producer will be exonerated uncon-

17 — Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437. See also the judgment in Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraphs 13 and 14.

ditionally from liability, Articles 1386-11 and the second paragraph of 1386-12 of the Civil Code provide for producers to be exempt from liability provided that they have taken the steps necessary to avert any damage which may arise as a result of a defect.

81. The French Government states that the Commission included in the application two arguments which were not set out in the reasoned opinion. The first argument concerns the notification that the Commission did not intend to submit a proposed amendment to Article 7(e); the second concerns the transposition into national law of another directive, namely Council Directive 92/59/EEC of 29 June 1992 on general product safety. [18] The French Government concludes from the foregoing that this plea in law must be dismissed.

82. The Commission responds that although, pursuant to the case-law of the Court, the pleas in law set out in the application must be identical to those set out in the letter of formal notice and the reasoned opinion, that requirement does not mean that they must always be totally identical, provided that the subject-matter of the proceedings has not been extended or altered. In that regard, the Commission cites *Commission* v *Italy*. [19]

83. On the substantive issue, the French Government states that the third plea in law concerns a matter in respect of which the Commission is itself considering an amendment. In addition, the Directive allows Member States a certain amount of freedom in relation to the exemption from liability for development risks. The French Government submits that, as a result, that exemption may be excluded in the case of certain products. The French Government finds it incomprehensible that the exemption should not be subject to the obligation to monitor products which are sold, since that would be a logical complement to the safety principle. The French Government concludes that such an obligation is explicitly laid down in Directive 92/59 and that it also entails an obligation to ensure that products are traceable, an obligation to keep up to date with new scientific developments, and an obligation to inform those individuals who are exposed to them of new risks which have come to light.

84. In response to those claims, the Commission states that the exemptions laid down in Article 7(d) and (e) of the Directive are not incompatible with Directive 92/59, which does not govern the liability of producers for the products which they sell, but rather concerns the general obligations of producers to ensure the safety of their products. The Commission goes on to note that an action for a failure to fulfil obligations cannot be decided on the basis of the progress in discussions on possible future amendments to the Directive as it stood when the action was brought.

18 — OJ 1992 L 228, p. 24.

19 — Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773.

2. Analysis

85. I will be brief on the question of admissibility. A comparison of the reasoned opinion and the application reveals that the subject-matter of the plea in law, that is the nature of the complaint against the French Government, is exactly the same. The fact that the arguments put forward by the Commission in support of the plea in law are not completely identical in the two documents does not prevent the French Government from understanding precisely the Commission's complaint, which is that Article 7(d) and (e) of the Directive was incorrectly transposed into national law. The Commission has thus fully met the Court's requirement of consistency between the reasoned opinion and the application. [20] Therefore, in my view, the plea of inadmissibility must be dismissed.

86. On the substantive issue, I conclude that, as with the first and second pleas in law, the French Government has failed to comply fully with the relevant provisions of the Directive, in that it has stipulated that producers will only be exempt from liability for development risks if they fulfil an additional condition which is not envisaged by the Directive. The French Republic has thus failed to comply fully with the Directive.

87. The French Government's defence is unconvincing. It is settled case-law of the Court that a Member State's obligations under Community law must be determined by reference to the state of Community law on the date when the action was brought. [21] Expectations regarding amendments to the disputed legislation cannot be used to justify the defects complained of. Nor is it possible to rely on Community provisions other than those which it is alleged were incorrectly transposed. In the event that there are unintentional discrepancies between the said provisions, it is for the Community legislature to remedy them. Such a situation does not, however, grant the Member States a discretionary power to act as they see fit when transposing directives into national law.

88. Under Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs. Since the Commission applied for an order for costs against the French Government, and since the pleas in law submitted by the latter have been unsuccessful, the French Government must be ordered to pay the costs.

20 — See footnote 19.

21 — See Case C-147/00 *Commission* v *France* [2001] ECR I-2387 and Case C-447/99 *Commission* v *Italy* [2001] ECR I-5203.

## VI — Conclusion

89. In light of the foregoing I propose:

In Case C-183/00, that the Court should reply to the question referred for a preliminary ruling by the Juzgado de Primera Instancia e Instrucción No 5 de Oviedo as follows:

Article 13 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 must be interpreted as meaning that it does not preclude the restriction or limitation, as a result of transposition of the Directive, of rights which had been granted to consumers by the legislation of the Member State.

In Case C-52/00, that the Court should:

(a) declare that the French Republic has failed to fulfil its obligations under Articles 3(3), 7 and 9 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;

(b) order the French Republic to pay the costs, pursuant to Article 69(2) of the Rules of Procedure.