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CASE NOTES

Newspaper Advice That Causes Damage Is Not Covered by the Product Liability Directive: The Court of Justice of the European Union's Clarification in *Krone*

Vadim Mantrov

University of Latvia, Faculty of Law, Riga, Latvia. Email: vadims.mantrovs@lu.lv

Case C-65/20, *VI v Krone-Verlag Gesellschaft mbH & Co KG, not yet published*

If the contents of a medium (eg a newspaper) are liable for causing damage to the consumer, the medium itself is not considered as a defective product and, therefore, no liability is imposed for the producer of that medium under the Product Liability Directive (author's summary).

The Product Liability Directive,[1] which was adopted more than thirty-five years ago, deals with liability for defective products and is one of the most important European Union (EU) legal acts in the field of consumer protection law. Similarly, it is one of the rare EU legal acts that deals with fundamental issues of civil law such as liability for the damage caused.[2] Despite the fact that the Directive has been in in force for almost four decades, it has been subject only to one amendment in 1994. This amendment dealt with the legal definition of the term "product", which led to revised wording of Article 2 in addition to the amendment of Article 15.[3] The Directive has been interpreted several times by the Court of Justice of the European Union (CJEU), especially based on preliminary rulings commencing with the CJEU's judgment in *Veedfald* of 10 May 2001.[4] One of the most significant aspects for the application of the Directive concerns the differentiation between a service and the medium (being a movable) through which that service is provided.[5] Resolution of this issue determines whether damage caused by that service is also covered by the Directive (there is a common ground that the damage caused by the medium itself falls within the scope of the Directive). This issue recently came before the CJEU in Case C-65/20 *Krone* – advice published in a newspaper was followed by a consumer, who suffered harm as a result. The question referred to the CJEU by the national court concerned whether this claim for damages arising from "defective" newspaper advice (ie a health service provided

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29 (Product Liability Directive).

[2] Some other legal acts could also be mentioned, with the Codifying Motor Insurance Directive (Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Codified version) [2009] OJ L263/11) being one of such notable examples.

[3] Art 1 of Directive 99/34/EC (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 [1999] OJ L141/20).

[4] Case C-203/99, *Henning Veedfald v Århus Amtskommune* [2001] ECR I-03569.

[5] This issue was also analysed in the legal literature; see Section III below for more details.

through the newspaper as a medium) could fall within the scope of the Product Liability Directive.

This Case Note is structured as follows: first, a brief overview of the facts is provided; second, a summary of the CJEU's reasoning is given; finally, the importance of this reasoning for the correct understanding of the Product Liability Directive is discussed.

I. Facts

An Austrian newspaper published by Krone-Verlag contained an article concerning the benefits of the use of grated horseradish poultices. The author of the article was not one of the newspaper's own journalists but a member of a religious order who, as an expert in the field of herbal medicine, provided free advice in a column published in that newspaper. The article contained health advice: it mentioned that grated horseradish poultices can help to reduce pain resulting from rheumatism if applied to a particular part of the body for between two and five hours. However, the article incorrectly gave the length of time in hours rather than minutes. A consumer followed the advice and applied the substance to her body for three hours, only removing it after experiencing severe pain due to a toxic skin reaction.

Afterwards, the consumer brought a claim against the publisher for compensation for the physical harm suffered on the basis that the product (ie the newspaper itself) was defective. The Austrian Supreme Court (Oberster Gerichtshof), hearing an appeal from the lower courts, had doubts as to whether the physical copy of the newspaper read by the consumer could be considered a defective product in this circumstance. As mentioned by the Supreme Court in its request for preliminary ruling, there is uncertainty in the legal literature as to whether a newspaper solely in its capacity as a medium for the transfer of information could be covered by the term "defective product" within the meaning of the Product Liability Directive.

Germany and the European Commission also submitted written observations to the CJEU, followed by the Opinion of Advocate General Hogan (Opinion) delivered on 15 April 2021.[6]

II. Judgment

The Court generally agreed with the Opinion of the Advocate General. It began by analysing the legal definition of the term "product" contained in Article 2 of the Product Liability Directive.[7] The Court first noted that the term "product" does not cover services and applies only to "movables".[8] Similarly, the Court emphasised that the Directive is based on the strict liability of the "producer" of a product.[9] The Court then turned to discussion of whether health advice given in a newspaper article may be considered a defective product. By referring to its previous judgment in *Boston Scientific Medizintechnik*[10] and the Opinion of the Advocate General, the Court observed that in the present case health advice is "unrelated to the printed newspaper, which

[6] Facts are summarised in paras 13–23 of the Judgment (Case C-65/20, *VI v Krone-Verlag Gesellschaft mbH & Co KG*, not yet published) and paras 1, 9–21 of the Opinion (Case C-65/20, *VI v Krone-Verlag Gesellschaft mbH & Co KG*, not yet published, Opinion of AG Hogan).

[7] Please note that this Article was rephrased in 1999; therefore, the Court interpreted the amended Article based on the *ratione temporis* consideration.

[8] Paras 26–29 of the Judgment.

[9] ibid, paras 30–31.

[10] Joined Cases C-503/13 and C-504/13, *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* Courts Reports – General (*Boston Scientific Medizintechnik*).

constitutes its medium".[11] The Court then referred to *Dutrueux*[12] and *González Sánchez*[13] and emphasised that the liabilities of service providers and manufacturers are based on two distinct liability regimes. The Product Liability Directive covers only the latter; the former may still be subject to "other systems of contractual or non-contractual liability" based on other EU and/or national regimes.[14]

These considerations led the Court to the answer that "a copy of a printed newspaper" containing "inaccurate health advice ... does not constitute a 'defective product' ...".[15]

III. Comment

The discussed judgment deals with the distinction between a manufactured good that is a medium through which a service is provided and a service itself. Evaluation of this issue leads us to decide as to whether damage caused by a service (in this case, health advice) provided through that medium also falls within the scope of the Product Liability Directive. In the result, the discussed distinction between a service and the medium through which it is provided is important not only for the purpose of determining liability for damage caused to the consumer, but also for defining the scope of the Product Liability Directive: should it deal only with manufactured goods in their ordinary capacity or be extended to cover their capacity as a medium for service provision?

The Advocate General characterised this issue as "novel",[16] although such a terminology was not used by the Court itself. The issue has not been directly discussed by the Court, but previous court practice does indicate how it should be resolved. These cases identify the line between a defective product that can fall within the scope of the Directive and the mere medium for a service that is defective.

In *Veedfald* (not referred to in the judgment), the Court established that a perfusion fluid used during the preparation of a kidney for transplantation was defective but not the medical service as such during which this fluid was used.[17] Conversely, in *González Sánchez* (referred to in the judgment), the Court established that the blood transfusion during which a consumer was infected with the hepatitis C virus shall be considered a "service" but not a "product" falling outside of the application scope of the Directive.[18] There are several cases in which the Court has established defective products that might be used as part of a service (but not in particular cases), such as: eggs that led to poisoning[19]; a vaccine causing severe injury[20]; defective generator parts[21]; a heated mattress that caused burns[22]; and a pharmaceutical product that led to negative health consequences.[23] Any of these defective products could also be used during provision of a service. For instance, defective

[11] ibid, paras 33–36.

[12] Case C-495/10, *Centre hospitalier universitaire de Besançon v Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura* [2011] ECR 00000 (*Dutrueux*).

[13] Case C-183/00 *María Victoria González Sánchez v Medicina Asturiana SA* [2002] ECR I-03901 (*González Sánchez*).

[14] ibid, paras 37–41.

[15] ibid, para 42.

[16] Opinion, para 1.

[17] *Veedfald*, para 2.

[18] See, in particular, paras 29–34 of the judgment in *González Sánchez* in conjuncture with para 10 of that judgment.

[19] Case C-402/03, *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006] ECR I-00199 (*Skov*).

[20] Case C-127/04, *Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA* [2006] I-01313; Case C-358/08, *Aventis Pasteur SA v OB* [2009] ECR I-11305.

[21] Case C-285/08, *Moteurs Leroy Somer v Dalkia France and Ace Europe* [2009] ECR I-04733.

[22] Case C-495/10, *Centre hospitalier universitaire de Besançon v Thomas Dutrueux* [2011] ECR I-14174.

[23] Case C-310/13, *Novo Nordisk Pharma GmbH v S* Court Reports – General.

eggs that led to poisoning could be used for the preparation of food served during the provision of a catering service. In this situation, based on the discussed Court's practice, the cause of a poisoning should be the defective eggs but not the catering service as such; therefore, the damage caused due to the poisoning would be covered by the Product Liability Directive.

Regarding vaccines in particular, it was explicitly admitted by the Court in *Sanofi Pasteur*[24] that they are considered products within the meaning of the Product Liability Directive. Similarly, in *Boston Scientific Medizintechnik*, the Court also held that an implantable cardioverter defibrillator (as well as other medical devices that are obviously "movables") is also a product, despite the fact that it was implanted during a medical service.[25]

The Court's reasoning in *Krone* is consistent with the objectives of the Directive and the Court's previous jurisprudence. The Court justly differentiates between a defective product that is covered by the Directive and a defective service in which a product happens to be used, which is not covered by the Directive. The cases cited in the previous paragraphs provide examples of the former, whereas *Krone* was correctly decided to relate to the latter. A newspaper itself is clearly a product, yet the physical newspaper itself was not defective in this instance; rather, the intellectual contents of the newspaper were the cause of the damage. A newspaper could be physically defective (eg if the ink or paper used in its printing was defective and caused skin reactions). In these circumstances, the publisher of the newspaper might be held liable under the Directive. In the circumstances of *Krone*, however, the intellectual contents of the newspaper, written by an independent party, caused the damage. The Court correctly considered that the Directive cannot cover this situation but rather can only cover a situation in which the physical properties of the product caused damage to the consumer. This Court's view was also supported by other commentators of the present case,[26] yet there certain critical reservations were also made concerning the Opinion and the Judgment.[27]

The Court's approach in the discussed case leads to a rather far-reaching conclusion, since it applies to all similar situations involving printed media (eg books, journals, etc.). Similarly, there is an interesting question as to whether the Court's approach in the modern digital world would also extend to movables containing digital content (eg smartphones, computers, vehicles with navigation systems, etc.). However, this issue is outside of the scope of this Case Note and therefore should be left for separate studies concerning further effects of the discussed judgment.

In addition, it is clear from the Court's approach that it is irrelevant whether the producer (ie the publisher) of the newspaper had any control (eg editorial control) over the text containing the particular health advice published in the newspaper or not. The main issue under discussion in such a situation is whether the damage was caused by a newspaper being a medium or not.

The Court's approach is generally consistent with the literature that has considered this question[28] – for example, "dangerous information in a book … would not be

[24] Case C-621/15, *N. W and Others v Sanofi Pasteur MSD SNC and Others* Court Reports – General.

[25] See especially paras 50 and 53.

[26] See, for instance, C Twigg-Flesner, "The Tale of the Grating Horseradish: Case Note on *VI v KRONE-Verlag* (Case C-65/20 VI)" (2021) 6 Journal of European Consumer and Market Law 262; Piotr Machnikowski, "Product Liability for Information Products?: The CJEU Judgment in *VI/KRONE-Verlag Gesellschaft mbH & Co KG*, 10 June 2021 [C-65/20]" (2022) 1 European Review of Private Law 191.

[27] See Machnikowski, supra, note 26, 196–99.

[28] See, for instance, G Howells and S Weatherill, *Consumer Protection Law*, 2nd edition (Farnham, Ashgate 2005) p 236; H-W Micklitz, "Liability for Defective Products and Services" in N Reich, H-W Micklitz, P Rott and K Tonner (eds), *European Consumer Law* (Cambridge, Intersentia 2014) pp 246–53 (whilst not mentioned explicitly, this conclusion is based on the overall discussion in this chapter); M Nietsch, "§ 23 Produkthaftung" in M Tamm, K Tonner and T Brönneke (eds), *Verbraucherrecht*, 3rd edition (Baden-Baden, Nomos 2019) p 1302.

covered".[29] The referring national court and the Advocate General did refer to opinions expressed in this literature concerning an extension of the scope of the Directive to "circumstances in which the harm results from a defective intellectual product"[30]; however, the Court explicitly refused this. It should be noted that Advocate General Hogan referred to "[s]ome legal writers" who suggested that "a product does not have to be tangible" within the meaning of Article 2 of the Product Liability Directive.[31] Yet only one publication,[32] published over twenty years ago, was cited.[33] This suggested that the contents of a publication medium could be considered as a product within the meaning of Article 2 of the Directive, yet it was simultaneously admitted that this view is not shared by majority.[34] The Court justly did not follow this opinion, as it would be contrary to the very wording of the Directive discussed above.

For the sake of completeness, it should be mentioned that a revision of the Product Liability Directive is currently under consideration.[35] Although this Case Note, due to its character, is limited to the present case and the current legal regime under the Product Liability Directive, it could be useful to address the situation again if the proposed directive would be adopted in its current form. According to the Proposal, the proposed directive should not apply to services as such,[36] similarly as the current Directive. At the same time, the term "product" in the proposed directive covers certain related digital services being components of the product to which they are interconnected.[37] The proposed directive generally differentiates between a medium and a service, but related digital services are covered as long as they cause a defect in the product as such. Therefore, if the proposed directive would be adopted in its current form, the result of its application in the given case would be the same as in the case of the current Directive, irrespective of whether the newspaper is published in printed or electronic form.

IV. Conclusion

The judgment in *Krone* contributes to a line of jurisprudence that clarifies the scope of the Product Liability Directive. The Court justly excluded from the scope of the Directive the circumstance in which a manufactured good (in this case, a newspaper) is merely a medium for a service (in this case, health advice) that is the real cause of damage to the consumer. Only if a medium for service provision is itself physically defective and, as a consequence, causes damage to the consumer will it fall within the scope of the Directive.

This distinction could be usefully applied in similar disputes involving a medium (being a product within the meaning of the Product Liability Directive) and its contents. Two situations could be mentioned in this regard. The first situation covers all printed media (eg newspapers, journals, books, etc.), in whose case their publisher is not liable under the Directive for damage caused by the contents of these media (eg an opinion or advice expressed in an article published in that medium). The second situation refers to a

[29] Howells and Weatherill, supra, note 28, 236.

[30] Judgment, para 22.

[31] Opinion, para 25.

[32] But there are also other publications with a similar view; for instance, one such publications was analysed in an earlier case note concerning the discussed case (see Twigg-Flesner, supra, note 26, 264–65).

[33] G Spindler, "Verschuldensunabhängige Produkthaftung im Internet" (1998) 3 Multimedia und Recht 119.

[34] ibid, 122–23.

[35] Commission, "Proposal for a Directive of the European Parliament and of the Council on liability for defective products" COM/2022/495 final.

[36] Preamble, Recital 15.

[37] ibid. See also the legal definition of the term "product" in Art 4(1) in conjuncture with Art 10(2) of the proposed directive.

computer or any other electronic appliance ("hardware") and the programs used on that appliance ("software"), in whose situation the producer of the appliance under the Product Liability Directive is not liable if a program causes damage. This uncovered damage relates both to damage caused to the appliance itself and to other property things – for example, a defect in a program used in a home heating appliance being a cause of a fire in a home, damaging the appliance itself and other movables as well as the house itself. Similarly, liability of the developer of that program is completely outside of the scope of application of the Product Liability Directive because the program is not considered as a product in the meaning of the Directive as it is not a movable.

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