A Service or a Product? When Does Strict Liability Apply?

Comment of the ECJ Judgment of 10 June 2021 (C-65/21)

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The facts are a bit strange. The injurious outcome unexpected. The legal finding reasonable. The implications somewhat troubling. They are also relevant in the current EU Parliamentary discussion regarding the two 2022 proposed Directives on product liability.

I. Case Summary

Let's begin at the beginning. A priest, expert in the use of herbs, publishes a daily column in the Austrian Krone newspaper. A mistake is made in his December 2016 article: instead of stating that the recommended poultice of horseradish must be kept for up to 5 minutes, it states that it should be retained up to 5 hours. The same day, a woman reading this recommendation prepares the endorsed remedy, applies it as advised for her rheumatism and suffers severe pain. Indeed, horseradish should never be left on the skin for more than a few minutes. Horseradish is toxic: "used topically [it] can cause irritation, blistering or allergic reaction."[1] Even though not relevant here, its efficacy against rheumatism is also doubtful.[2]

Our injured reader sues the Krone newspaper (in all likelihood, the deeper pocket) – not the column's author. She bases her lawsuit on the EU Directive on Product Liability (Directive 85/374/EEC, which entered into force on July 30, 1985[3]), claiming an indemnity of € 4'400 for harm and suffering.

The legal issue is whether the wrong recommendation can be held to be a *defective product*, therefore *within* the scope of the Directive.[4] Or is just a badly delivered *service outside* the scope of the Directive?

The European Court of the European Union, consulted by the Austrian Court through a reference for a preliminary ruling, has no problem reaching its C-65/20 judgment: the word "product" is used repetitively throughout Directive 85/374 and should be given its plain meaning,[5] i. e. a moveable item.[6] In other words, there must be a *tangible* object which is – itself[7] – defective. The context, the objective and the legal history of the Directive point toward the same interpretation of the word "product".[8]

In our present case, the printed newspaper is of course a product,[9] but it is not defective as such. Of course, it would be different if the ink of the paper had been toxic and had thus burned the hands of its readers.[10] However, here, it is only the *intellectual content* of one article (i. e., the horseradish advice) which was medically erroneous. This intellectual content is a *service*

1 https://www.rexall.ca/articles/view/3776/Horseradish.

2 Stuart Alan Walters, Horseradish: A Neglected and Underutilized Plant Species for Improving Human Health, Horticulturae 2021, 7(7), 167.

3 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").

4 Article 2 of the Directive defines product as a tangible movable, whereas electricity is held to be a product too. Whereas nº 3 adds that the liability "without fault should apply only to movables which have been *industrially produced*" (my emphasis).

5 See para. 27.

6 The definition of « product » is to be found in Article 2 of Directive 85/374: "'For the purpose of this Directive, 'product' means all movables even if incorporated into another movable or into an immovable. 'Product' includes electricity.'" Compare with Art. 3 LRFP.

7 As is well known, the defect can be related to the design (conception) of the product, its manufacture, or more remotely the various explanations provided by the producer (or under its authority) to the attention of the potential users of the product (e. g., notice of use). See para. 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").

8 According to para. 25, "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".

9 Para. 32 of the judgment. Compare with judgment C-495/10, which held that "[t]he liability of a service provider which, in the course of providing services such as treatment given in a hospital, uses defective equipment or products of which it is not the producer [...] does not fall within the scope of the directive".

10 See para. 21 of the C-65/20 judgment.

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unrelated to the product[11]; it is *outside* the scope of the Directive. The Court wrote:

> *"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. [...] 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."*[12]

The Court notes that reaching the opposite conclusion would have adverse consequences on newspapers generally and would lead to an unfair apportionment of risks.[13]

The consequence is straightforward: the injured reader is *not* entitled to sue the newspaper based on Directive 85/374. The publisher is not a producer of a defective product[14]. The victim could probably sue the author, the priest, based on Austrian tort law, but this is a different question not addressed by the ECJ.[15] Likewise, to which extent a newspaper can be held civilly liable for the wrong content it has let third parties publish remains an open question.

II. Comments

The outcome would certainly have been the same under the Swiss Product Liability Act (PLA of June 18, 1993; RS 221.112.944). Indeed, our Swiss law is mirrored on the EU Directive. In all likelihood, the Federal Tribunal would seek to maintain compatibility with the EU legislation.

The legal finding is reasonable based on the text of the Directive. As mentioned by the ECJ, the Directive and the limits therein *"are the result of a complex balancing of, inter alia, different interests"*. Moreover, neither the Directive (in force since 1985) nor the Swiss Federal law (in effect since 1994) have ever been applied to newspaper recommendations, or more generally, to services.

Nonetheless, this outcome leaves room for clarification. Assume a product that is acquired only for its intellectual content. Imagine for example a GPS device that gives wrong and dangerous directions (i.e. take this road, even though it is actually unsafe for car travel). Or a thermometer that reads an inaccurate temperature. Or even a medical booklet to treat back pain that dispenses an objectively incorrect advice. When the product's intended benefit resides chiefly in the information or recommendation that it provides, should it be viewed as *defective* if this *intellectual content is wrong*? It would indeed appear somewhat inconsistent if a consumer was banned from relying on product liability rules when the thermometer reads 38°, when in fact the baby is running a 40° fever.

Therefore, in my view, the C-65/20 ruling should not apply when the product is bought to rely on the recommendations it is meant to provide. That is the case in all three of the above examples (i.e., thermometer, GPS, medical booklet). However, this requirement is not met for a newspaper, because the main purpose of this product is not to recommend a certain course of action when facing a very specific situation. Newspapers are bought to provide objective information and subjective viewpoints on a variety of subjects. They are not bought by those looking for a specific recommendation. This is what the ECJ may have meant when making a distinction between services which are an "inherent" characteristic of a product[16] and services "of which the product is merely a medium".[17]

Second, this case must be distinguished from situations where a producer is selling a product and is accompanying its product with false recommendation, possibly in articles or books. In that case, the product put in circulation by the producer becomes itself defective by reason of the erroneous or misleading advice. Product liability rules apply normally. This is often the case with therapeutic products, where notices of use (patient information or professional information) are very important to determine whether the product is indeed defective.

Third, the case has implications for the IT sector, notably AI-powered medical services. When a software or an app recommends a certain medical approach, the issue is also whether the party producing the said item can be held liable under the EU or Swiss product

11 The Court wrote: "the service in question, namely the provision of inaccurate advice, is unrelated to the printed newspaper"; "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". Para. 36 of the C-65/20 judgment.

13 A different conclusion "would [...] make newspaper publishers strictly liable without it being possible for them – or with limited possibility for them – to avoid that liability". Para. 40 of the judgment at issue.

14 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.

15 The Court wrote : "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, para. 31)." Para. 41.

16 Para. 36 cited above of the C-65/20 judgment.

17 Para. 37 of the said judgment.

liability regime, if the advice is false and causes an injury. For example, a physician uses an on-line diagnostic tool to diagnose a cancer patient. The software is wrongly programmed with the consequence that the answer provided is wrong. Because the cancer patient was not diagnosed in time or because the healthy patient was wrongly diagnosed, she incurs corporal and financial damages. Based on the C-65/20 judgment, it is unclear whether the individual would be able to (successfully) sue the "producer" of the on-line tool. The emphasis put by the Court on *tangible* product suggests a negative answer, even though this is not desirable in my view.

III. Implications

More generally, the ECJ ruling is raising problems in connection with the increased *dematerialization* of products. We no longer need to buy music, software, storage on CDs or disks. We usually buy these goods online and never receive a tangible product. But does it make sense to consider a virus-tainted software CD as defective because it has a tangible support, but to exclude the application of the Directive when the virus is transferred along with a purely on-line software?

In my view, the scope of the 1999/34 Directive should be expanded to encompass digital standardized services which replace (or serve the same function as) goods previously offered as physical objects. Alternatively, an equivalent liability regime should be created for such services. Consumers' need for protection are the same in both situations. It makes little sense to have a significantly different legal regime for goods and services. The legal criteria of objective defect[18] constitutes a proper threshold to decide when someone should be found liable.

Of course, one could counterargue that the EU Product Liability Directive is meant for *industrial* production (see para. 29 of the judgment) – and thus not adequate for individually tailored services. However, more and more services are mass-proposed (e. g., travel[19] or insurance services). In the future, a unified legal approach should therefore be considered, at least for this subtype of services. This would also foster a level-playing field for firms. Companies can better organize their activities and minimize the risks if the legal regime is the same throughout large regions.

The C-65/20 judgment does mention (para. 38) a 1990 proposal by the Commission for a Directive on the liability of suppliers of services.[20] In this document, the Commission had put forward a regime based on a presumption of fault. Under its Article 1, *"[t]he supplier of a service [would have been] liable for damage to the health and physical integrity of persons or the physical integrity of movable or immovable property, including the persons or property which were the object of the service, caused by a fault committed by him in the performance of the service"*, whereas *"[t]he burden of proving the absence of fault [would have fallen] upon the supplier of the service"*. As per Article 1, para. 3, fault would have been derived from a standard of reasonable safety.[21]

However, in June 1994, the EU Commission withdrew its proposal, noting *inter alia* that severe criticisms from many sectors meant that the proposal stood *"no chance of being adopted without sweeping changes which would risk voiding it of much of its substance"*.[22]

More than 25 years lapsed when, in October 2020, the European Parliament issued a resolution inviting the Commission to enact a civil liability regime for artificial intelligence.[23] It wrote:

> *"the Product Liability Directive (PLD) has, for over 30 years, proven to be an effective means of getting compensation for harm triggered by a defective product, but* should nevertheless be revised to adapt it to the digital world *and to address the challenges posed by emerging digital technologies."*[24]

The Commission was asked *"to clarify the definition of 'products' by determining whether digital content and digital services fall under its scope"*.[25] In September 2022, it issued its proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence.[26] This Directive, not yet adopted by the Parliament and the Council, would introduce a very complex regime, for AI systems defined as "high-risk". In certain narrow circumstances, the Directive would lower the evidentiary threshold for consumers, in particular with respect to the causality requirement.[27] It would empower national courts to force producers to disclose evidence regarding their high-risk AI systems.[28] Yet, the proposed Directive would retain the requirement of fault, instead of a strict or objective liability – this has been criticized.[29] The road ahead for this proposal is likely to be uphill...

18 See para. 33–34 of the judgment at issue.
19 For certain travel services, the Directive EU 2015/2302 on package travel and linked travel arrangements applies.
20 COM(90) 482 final, OJ 1991 C 12, p. 8.
21 Under this paragraph, "[i]n assessing the fault, account shall be taken of the behaviour of the supplier of the service, who, in normal and reasonably foreseeable conditions, shall ensure the safety which may reasonably be expected."
22 Communication from the Commission on New Directions on the Liability of Suppliers of Services, COM/94/260FINAL. For more information on the legislative procedure, see https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:51990PC0482.
23 See 2020/2014(INL), P9_TA(2020)0276.
24 Point 8 of the Resolution, my emphasis.
25 Id.
26 Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), reference COM(2022) 496 final, 2022/0303 (COD), https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf.
27 See proposed Article 4.
28 See proposed Article 3.
29 EU Briefing, EU Legislation in Progress, Artificial intelligence liability directive, 2023.

Also in September 2022, the Commission issued another proposal, this time to revise our now-classic EU Product Liability Directive.[30] According to this text, "products" would be defined more broadly to also include "digital manufacturing files and software"[31]. The notion of defect would be retained, but broadened to our more modern circumstances (e.g., "safety-relevant cybersecurity requirements"[32]). Proposed Article 9 would sometimes lower the burden of proof, by introducing a rebuttable presumption of defectiveness.[33] The "development risk" exemption from liability is retained.[34]

Yet, the present Krone case shows that harm can also flow from traditional – if not medieval – source of advice. Therefore, the EU proposed revisions should extend beyond IT and AI. As the proverb goes: "To a worm in horseradish, the world is horseradish."

30 Proposal for a Directive of the European Parliament and of the Council on liability for defective products, reference COM(2022) 495 final, 2022/0302 (COD).

31 See proposed Article 4(1).

32 See proposed Article 6.

33 The Proposal introduces five different fact situations where the Court *must or can* lower the burden of proof.

34 See proposed Article 10 ("An economic operator referred to in Article 7 shall not be liable for damage caused by a defective product if that economic operator proves any of the following: (e) in the case of a manufacturer, that the objective state of scientific and technical knowledge at the time when the product was placed on the market, put into service or in the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered").