

DEVELOPMENT RISK DEFENCE UNDER ARTICLE 7 (E) OF THE PRODUCT LIABILITY DIRECTIVE³² – THE INEVITABLE CLASH OF NEGLIGENCE AND STRICT LIABILITY THEORIES

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Abstract: Article 7 (e) of the Directive introduces the so-called development risk defence by providing that the producer can be exempted from liability for the damage caused by his defective product if he proves that he did not know and could not have known the existence of the defect at the time when he put the product into circulation. The defence in question implies a breach of duty of care on the producer's part typical for fault-based liability. On the other hand, strict liability by definition does not include fault as its constituent element. Thus, the mere existence of the development risk defence distorts the coherence of the institution of strict liability under the Directive. *De lege ferenda* Bulgaria should take advantage of the possibility under Article 15 § 1 (b) of the Directive by removing it from the Consumer Protection Act or at least limiting its application to certain groups of products.

Keywords: development risk defence, state-of-the-art defence, strict liability, fault-based liability, negligence, Directive 85/374/EEC

INTRODUCTION

Enhanced consumer protection is one of the fundamental principles of Community legislation. It is provided for in a number of provisions of the EU primary law, including Articles 4 § 2 (f), 12, 114 § 3 and 169 of the Treaty on the Functioning of the EU and Article 38 of the Charter of Fundamental Rights of the EU. One of the specific objectives of the EU policies in this area, stipulated in Article 169 of the TFEU, is the protection of health, safety and economic interests of consumers. The principles of enhanced consumer protection and protection of citizens' health and property are also constitutionally enshrined in Articles 19 § 2, 52 § 3 and 17 §§ 1 and 3 of the Constitution of Republic of Bulgaria. As far as the safety of the consumer products is concerned, the realization of these objectives requires both the taking of *ex ante* measures aimed at the elimination or at least capable of reducing the risk of harm and the existence of an *ex post* mechanism by which the damage caused to consumers and their property can be remedied. The preventive measures emanate from producer's general obligation to place only safe products on the market³³. However, if the dangerous (defective) products nevertheless reach the market and cause damage to the consumers, the economic operators in the relevant production and commercial chain, namely the producer and, under certain conditions, the supplier must compensate the injured consumer. Their civil liability, strict and tortious in its legal nature, is governed by Directive 85/374/EEC. The Council of Europe's Convention of 27 January 1977³⁴ regulates the producer/supplier's liability in a similar way although it is still not in force and is highly unlikely that it will ever come into force. With the adoption of the Consumer Protection Act (hereinafter the CPA) and its entry in force on 10 June 2006 and in accordance with the express provision of § 13a (8) of the additional provisions of the same act the rules of Directive 85/374/EEC were transposed

³² 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 (hereinafter the Directive)

³³ See Article 3 § 1 of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

³⁴ European Convention on Products Liability in regard to Personal Injury and Death, ETS No.091

in the Bulgarian legislation. On national level, similar liability rules for damages caused by defective products were also contained in the repealed Consumer Protection and Trading Rules Act.

The purpose of the present paper is to examine briefly one of the most controversial features of the strict liability introduced by the Directive, namely the possibility under Article 7 (e), respectively Article 137 § 1 (5) of the CPA, for the producer to exempt himself of liability by proving that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable him to discover the existence of the product's defect. In the legal literature this defence is known as the development risk defence, sometimes confused with the state-of-the-art defence, the latter linked rather to negligence than to strict liability. On conceptual level, this possibility apparently does not correspond to fact that the producer's liability is not founded on fault. This even motivates some authors to deny its objective (strict) character at all³⁵. Indeed, although there are some convincing economic grounds for admitting such a defence in favour of the producer (its availability is deemed to encourage radical innovations and product variety³⁶), it contradicts the mere nature of strict liability since it is based on the lack of fault on the producer's part whereas fault is not a constituent element of this liability. After examining the defence in question, the present paper suggests that *de lege ferenda* Bulgaria should follow the lead of some Member States, for example Finland and Luxemburg, whose legislation does not admit the development risk defence in relation to any product, or at least should limit the its application to certain products like in Germany, France and Spain.

EXPOSITION

Article 7 (e) of the Directive explicitly provides for that the producer shall not be liable 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 the defect to be discovered. The defence arguably attempts to strike a fair balance between the interests of the consumer, on one hand, and the producer, on the other. From the point of view of the producer, the lack of such defence would discourage scientific and technical research and the placing on the market of new products. From the point of view of the consumer, it is not fair that he has to bear the full risk of scientific development. After all, the producer is the one who benefits from the production and marketing of the defective goods that caused the damage. Hence, the latter should bear the risk according the principle *qui habet commoda ferre debet onera*. Account should also be taken of the fact that scientific researches are often funded and/or carried out by the producers. This is why, unlike consumers, producers often have access to the latest achievements of scientific and technical knowledge. It is obvious that it is not in their interest to disclose such cutting edge information as they could arguably be held liable on the basis of it. Therefore, it would be extremely difficult, if not impossible, for the injured person to get access to such information in order to counter successfully the producer's assertions by proving that the latter actually knew or could have known that the product is defective at the relevant time. The aim of the liability under the Directive, as stated in second and seventh recitals of its preamble, is to achieve "*a fair apportionment of risk between the injured person and the producer*". The question arises as to who should bear the risk of damage occurring from the time the product was put into circulation until the product's defect was discovered or could have been discovered in the light of developments in scientific and technical knowledge. Who should bear the risk of that late knowledge - the consumer or the producer? Is it fair to transfer the risk to the consumer simply because the producer was unaware of the defect? In the light of the present considerations, it is doubtful whether the risk apportionment achieved by means of introduction of the development risk defence can be regarded as fair.

According to Article 6 § 1 (c) of the Directive, the time at which the existence of defect in the product is to be judged is when it was put into circulation and not the time of the occurrence of the

³⁵ Kalaydzhiev, A., (2007) *Obligatsionno pravo. Obshta chast*. Sofia, izdatelstvo "Sibi", p.351

³⁶ Fondazione Rosselli, *Analysis of the Economic Impact of the Development Risk Clause as provided by Directive 85/374/EEC on Liability for Defective Products*. Final Report. Study for the European Commission, Contract No. ETD/2002/B5

damage. Therefore, we should distinguish between defects that were present at the time the product was put into circulation but could not have been detected and “defects” which appeared only later when the product was compared against safer products, which were result of a subsequent development of the technology. Article 6 § 2 of the Directive expressly stipulates that a product shall not be considered defective for the sole reason that a better product is subsequently put into circulation. The Council of Europe Convention of 27 January 1977 lacks a rule similar to Article 6 § 1 (c) of the Directive precisely because, in its drafters’ opinion, it would implicitly admit the development risk defence they were trying to avoid. Strong words against the introduction of the defence in question were used in § 40 of the Explanatory Report. It states that such a defence “*would make the convention nugatory since it would reintroduce into the system of liability established by the convention the possibility for the producer to prove the absence of any fault on his part. Exclusion of liability in cases of "development risk" would also invite the use of the consumer as a "guinea pig"*”.

Next, the introduction of the development risk defence in the Directive undermines the coherence of the regime of strict liability. It shifts the focus from the objective properties of the product itself (the defect), which is typical for strict liability, on the producer’s conduct which constitutes a main feature of the fault-based liability. The producer will not be held liable if he proves that he did not know and could not have known the defect although the defect objectively existed at the time the product was put in circulation and there was a causal link between it and the damage, which otherwise would suffice under Article 4 of the Directive. The dubious effect of introducing such a defence has motivated the EU legislator to allow Member States not to introduce it into their legislation - Article 15 § 1 (b) of the Directive. Bulgaria did not take advantage of this possibility of derogation although, in the words of the sixteenth recital in the Directive’s preamble, the introduction of the defence in question “*may be felt to restrict unduly the protection of the consumer*”.

In both civil and common law legal systems fault is an important element of the fault-based delictual (tort) liability. Fault in negligence is a breach of duty of care towards others, including the injured claimant, a breach of the principle of *neminem laedere*. It pertains to the conduct of the tortfeasor who has behaved wrongfully and has thus caused the damages. Under Article 45 § 2 of the Bulgarian Obligations and Contracts Act, in all cases of fault-based liability fault is presumed until this presumption is rebutted by the tortfeasor. However, in its case law the Supreme Court of Cassation held that this legal presumption concerns only plain negligence (*culpa levis*). If there is a higher degree of fault, for example if the tort was committed intentionally or through gross negligence, it is for the injured party to prove it. In the contemporary civil law there is a clear tendency towards objectifying the notion of fault. Fault is defined as the breach of duty of care, not as the mental attitude of the tortfeasor towards the consequences of his conduct³⁷. In the context of general tort liability, the Supreme Court drew clear line between fault-based liability (negligence) and strict liability. It held³⁸ that where breaches of prescribed or generally accepted safety rules have been committed in the use of an object, the liability for damages is under Article 45 or Article 49 of the Obligations and Contracts Act (i.e. fault-based liability), and where such breaches were not committed but the damages are caused by the object’s properties, the liability is under Article 50 of the same act (i.e. strict liability for damages stemming from an object). The Supreme Court also held that compensation is due on the latter legal grounds where the damage was caused by machines, machinery, tools and other items even when they were handed over by the producer to another person as safe or when there was no technical possibility to completely eliminate the risk of harm.

Strict liability by definition does not include fault as its constituent element. Consequently, if the claimant has had recourse to a claim based on strict liability, the existence or absence of fault on the part of the tortfeasor would be wholly irrelevant. The second recital in the preamble to the Directive enshrines the EU legislator's view that “*liability without fault on the part of the producer*

³⁷ Kalaydzhiev, A., (2007) *Obligatsionno pravo. Obshta chast*. Sofia, izdatelstvo “Sibi” , p.416,417 and p.420

³⁸ Point 3 of the Decree No 4 of 30.X.1975, Plenary of the Supreme Court

is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production". In line with this understanding, Article 4 of the Directive does not include the producer's fault as a prerequisite for his liability. Article 133 § 1 of the CPA even explicitly provides for that the producer shall bear liability for the damages caused by the defect of his product whether the defect is due to his fault or not. Yet, Article 7 (e) of the Directive, respectively Article 137 § 1 (5) of the CPA, enables the producer to evade liability for the damage stemming from the product's defect if he can show that he could not have known about it. The defence hinges on the assessment of the producer's efforts to get access to and examine the relevant scientific and technical knowledge against a certain standard, namely the behaviour of a reasonable and careful producer. The producer can be absolved of liability on that ground if he proves that the defect was undetectable at the time he put it into circulation. According to the binding interpretation given by the Court of Justice of the EU³⁹, the product is put into circulation "when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed". In other words, the product is put in circulation when the producer voluntarily loses his effective control over it. As the second sentence of Article 130 § 4 of the CPA emphasises, the product is put into circulation when the producer has voluntarily disposed himself of it. However, the producer cannot absolve himself of liability even when he proves compliance with all existing safety standards (the so-called state-of-the-art defence)⁴⁰. The Bulgarian legislator explicitly excluded the said defence in Article 133 § 2 of the CPA. The provision in questions provides for that the producer is liable for the damages caused by the product's defect even when the product has been manufactured in compliance with all existing standards and good practices or is put into circulation as a result of an authorization issued by an administrative body. Indeed, the state-of-the-art defence has more to do with fault-based liability than with strict liability. The product can be defective even if the producer has taken due care in the production and complied with all safety standards and good manufacturing practices. Their observance does not exclude the existence of defect *per se* but only of the producer's fault. Similarly, Section 402A § 2 (b) of the American Second Restatement of Torts⁴¹ expressly states that the producer is liable even when he "has exercised all possible care in the preparation and sale of his product". Therefore, conformity to the state of the art is not in principle a defence to a claim for damages based on strict liability⁴².

As the CJEU held⁴³, the state of scientific and technical knowledge within the meaning of Article 7 (e) of the Directive is not limited to the particular practices and safety standards in use in the industrial sector in which the producer is operating. It includes the most advanced level of such knowledge available at the time when the product in question was put into circulation. The test used in the said provision is objective as it refers to a state of knowledge and not to the capacity of the particular producer or to that of another producer of a product of the same description, to discover the defect. However, as the CJEU pointed out, the relevant scientific and technical knowledge must have been *accessible* at the time when the product in question was put into circulation. In that judgment, the CJEU does not define the concept of accessibility of the information enabling the producer to discover the defect as factual findings are within the powers of national courts. It should, however, be assumed that the information will be accessible if it is objectively expressed in such a way that it is made available to the public. For example, it could be published in specialized literature in a widely used language, announced publicly at a scientific conference or uploaded on an Internet website, etc. Conversely, although the information objectively exists, if it has never been publicly disclosed, it would be inaccessible. This would be the case if it was obtained through a secret research or kept on a scientist's personal computer, etc. Of course, there would be some cases

³⁹ Judgment of 9 February 2006 in case C-127/04, *Declan O'Byrne v. Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA*

⁴⁰ Taschner, H. C. (1999). *Harmonization of Product Liability Law in the European Community*, Texas International Law Journal, p.25 and further

⁴¹ The American Law Institute (1965), *Restatement (Second) of Torts*

⁴² James T. Murray Jr. (1974). *The State of the Art Defense in Strict Products Liability*. Available at: <http://scholarship.law.marquette.edu/mulr/vol57/iss4/5>

⁴³ Judgment of 29 May 1997 in case C-300/95, *Commission v. United Kingdom*

where the information is objectively available but the access to it is difficult, for example if it was published but in a language that is not so widely spoken. Is the producer obliged to look for literature in foreign languages in the relevant scientific or technical field in order to show due diligence in searching for information? Assessment of the producer's conduct the national courts are ought to perform is typical, as already mentioned above, for the fault-based liability (negligence). The producer, who otherwise does not dispute the fact that his product caused the damage because of its defectiveness, is relieved of liability because the lack of knowledge of the defect cannot be attributed to his fault. This conclusion follows from the very text of the provision of Article 7 (e) of the Directive. It consists of two distinct parts. The first one is the knowledge (information) which is objective in nature. The second is the discoverability of that knowledge which refers to the producer's intellectual capacity to assemble the pieces of puzzle in order to, in the words of the said provision, "enable the existence of the defect to be discovered"⁴⁴. The mere wording of Article 7 (e) of the Directive, which uses the verb "enable", meaning permit, clearly introduces a subjective element in the evaluation of the development risk defence⁴⁵. From this point of view, the development risk defence resembles the state-of-the-art defence a lot. However, the latter, as we have already seen, is not a defence at all under the Bulgarian law in strict liability cases.

CONCLUSION

The policy behind the imposition of strict liability for damages caused by defective products is to relieve the consumer of the burden of proving that the producer did not meet a certain standard of care in the production process. In the modern world, the production of goods is often too complicated for the average consumer to fully understand, let alone proving producer's fault. Allowing latter to be relieved of liability by proving that he did not know and could not have known the defect seriously compromises consumers' protection. The introduction of the development risk defence distorts the coherence of the institution of strict liability. As the Explanatory Report correctly noted, innovations should not come at the cost of turning consumers into "guinea-pigs". *De lege ferenda* Bulgaria should take advantage of the opportunity under Article 15 § 1 (b) of the Directive, providing in its 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.

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⁴⁴ Arbour, Marie-Ève. *Portrait of Development Risk as a Young Defence*. McGill Law Journal. Available at: <https://www.erudit.org/en/journals/mlj/2014-v59-n4-mlj01492/1026133ar.pdf>

⁴⁵ *Ibid.*