

Property Law Division  
Our ref.: 2006-702-0033  
Doc.: JTS40747

## Memorandum

### **by the Danish Government on the judgment of the European Court of Justice in Case C-402/03 *Skov Æg* and the consequences of the judgment for the Product Liability Directive**

The objective of the Product Liability Directive (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, as amended by Directive No. 99/34/EC of the European Parliament and of the Council of 10 May 1999) is to approximate the national rules on product liability, partly to further the freedom of movement of goods, and partly to ensure the protection of consumers who suffer damage or loss as a result of defective products. The Danish Government supports this objective, but finds that the rules of the Product Liability Directive as interpreted most recently by the judgment of the European Court of Justice prevent this objective from being realised to its full extent.

As is well-known, the judgment of 10 January 2006 passed by the European Court of Justice in Case C-402/03 *Skov Æg* established that the Product Liability Directive does not preclude the Member States from introducing or maintaining a national rule under which the intermediary is answerable for the producer's fault-based liability; however, the Directive precludes a national rule under which an intermediary is answerable for the no-fault liability which the directive establishes and imposes on the producer.

Under the Danish Product Liability Act an intermediary was answerable for the producer's no-fault liability under the Directive. The judgment therefore implied that the Danish Product Liability Act had to be amended, and the Danish Parliament has recently passed a bill to amend the Product Liability Act in accordance with the judgment.

The judgment implies a restriction of the consumers' possibilities of claiming compensation from intermediaries, including the retailer. Although it will still be possible to claim compensation on a no-fault liability basis from the producer or EU importer of a defective product which has caused damage, it is of substantial importance to the consumers in their everyday lives that they can also claim compensation from the retailer of the product, who will,

of course, be a local operator far more often than is the case for the producer. In the Government's opinion, many consumers will unfortunately abandon their claims if they can only approach the producer, who may not operate locally.

It is to be expected that the judgment will give rise to both a higher number of and more complicated legal disputes than so far because the standard of liability for producers and suppliers has to be different: The producer *has to* be subject to no-fault product liability, whereas the intermediary *may not* be subject to a similar no-fault liability, *nor may* he be answerable for the producer's no-fault product liability. As mentioned above, producers and intermediaries in Denmark have so far been liable to the consumers in accordance with completely the same standard of liability. This has provided a simple and transparent scheme under which the consumer has normally, in practice, been able to rely on any one of the parties for compensation. To the extent that the retailer is instead held liable on the basis of, for example, his own or the producer's fault, as set out in the judgment, it will be necessary also to join the producer in proceedings regarding claims for compensation against the retailer because either the consumer or the retailer will need to obtain clarification of the extent to which the defect is caused by the producer's fault.

Technically, the problems described can probably be solved in various ways. However, the Danish Government would point out that Denmark has had extremely good experience in practice with a rule stipulating that the intermediary is answerable for the producer's no-fault liability under the Directive. As mentioned above, such a rule implies the obvious simplification for the parties involved that claims for compensation in this field can be determined on the basis of a uniform standard of liability. This also makes it easier to settle cases amicably without involving the courts.

As the Commission is aware, the European Council stated in its resolution of 19 December 2002 (2003/C 26/02) on amendment of the liability for defective products Directive that there was a need to assess whether the Directive should be modified in such a way as to allow for national rules on the liability of suppliers based on the same ground as the liability system in the Directive concerning the liability of producers. According to the Council the possibility of laying down rules on the liability of suppliers could involve benefits to the consumers. In that connection the Council emphasises that one of the general objectives of the Community is to promote consumer interests and ensure a high level of consumer protection, cf. Article 153 of the EC Treaty. Unfortunately, no specific initiatives have yet been taken on the basis of this resolution.

The Danish Government finds that the judgment of the European Court of Justice now makes topical the need to reconsider the contents of the Product Liability Directive as concerns the

liability of intermediaries in order to ensure a high level of consumer protection at Community level in product liability cases without thereby imposing unreasonable burdens on trade and industry.

The Government has discussed the consequences of the judgment of the European Court of Justice with the organisations of Danish consumers and of trade and industry. It is widely agreed that it is in the interests of both consumers and trade and industry that the rules on the product liability of intermediaries be drafted so clearly and transparently that they do not, in an overall view, lead to unnecessary burdens for those involved. It is also widely agreed that the best way of obtaining such clarity and transparency is to amend the Product Liability Directive.

Against that background, the Danish Government urges the Commission to propose an amendment to the Product Liability Directive. The Government would be pleased to provide the Commission with further information on the Danish experience so far with the intermediary being answerable for the no-fault liability of the producer.