

Case C-691/21**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

18 November 2021

Referring court:

Cour de cassation (France)

Date of the decision to refer:

10 November 2021

Appellants:

Cafpi SA

Aviva assurances SA

Respondent:

Enedis SA

1 The dispute in the main proceedings

- 1 On 28 July 2010, certain electrical equipment at an agency of the company Cafpi malfunctioned as a result of a voltage surge caused by a break in the neutral circuit of the electricity distribution system.
- 2 Cafpi and its insurer, Aviva assurances, invoke the liability of the electricity distribution system operator, Enedis, and have brought actions against the company for damages.
- 3 Enedis argues that the rules on liability for defective products alone are applicable (Article 1245 to 1245-17 of the Code civil (Civil Code)), which include a three-year limitation period (Article 1245-16 of the Code civil), on which it has relied in opposition to their actions for damages.
- 4 By judgment of 6 July 2018, the Tribunal (Regional Court) rejected the application of Articles 1245 *et seq.* of the Code civil, but dismissed the actions on the substance.

- 5 By judgment of 6 February 2020, the Cour d’appel de Versailles (Court of Appeal, Versailles) set that judgment aside. It first of all pointed out that, under the rules governing liability for defective products, among the producers which may be liable is the manufacturer of a finished product. According to the court, a finished product is a product ready for distribution. In the present case, the electricity produced by Électricité de France, among others, is not a finished product in that it is at high voltage and therefore not fit for the consumer. It is the company Enedis that transforms that electricity for distribution to the final consumer. The court inferred from that that Enedis is the manufacturer of the final product intended for distribution to the consumer, and that it is therefore a producer. The Cour d’appel consequently held that the rules governing liability for defective products were applicable and that the actions brought by Cafpi and Aviva were time-barred.
- 6 Cafpi and Aviva have brought appeals in cassation against that judgment. They maintain that, in finding Enedis to be a producer, the Cour d’appel infringed Articles 1245-2 and 1245-5 of the Code civil, which transpose provisions from Directive 85/374/EEC concerning liability for defective products.

2. Provisions of EU law and national law relied on

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 1999/34/EC of the European Parliament and of the Council of 10 May 1999

- 7 Article 1 provides:

‘The producer shall be liable for damage caused by a defect in his product.’

- 8 Article 2 provides:

‘For the purpose of this directive, “product” means all movables even if incorporated into another movable or into an immovable. “Product” includes electricity.’

- 9 Article 3(1) provides:

“‘Producer” means the manufacturer of a finished product ...’

The Code civil

- 10 Articles 1245-1 to 1245-17 of the Code civil contain provisions which transpose certain provisions of Directive 85/374/EEC.

3. The essential arguments of the parties in the main proceedings

1. Cafpi and Aviva

- 11 Cafpi and Aviva maintain that Enedis is a distributor of electricity, not a producer. They state that Enedis is the operator of an electricity distribution system, which it runs and maintains, and that it is merely responsible for the distribution of electricity produced by various different producers, including in particular Électricité de France. They argue that the unbundling of production and distribution activities was rendered necessary by Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, then by Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.
- 12 In its capacity as electricity system operator, Enedis is responsible for transmitting and distributing electricity from electricity producers, and the mere fact that it alters the voltage of the electricity transmitted does not make it the producer of a new finished product, distributed electricity, distinct from the electricity that is supplied to it.
- 13 Cafpi and Aviva emphasise that electricity, once generated, can be consumed, whatever its voltage, provided that the system receiving it is equipped to deal with the voltage. They argue that the electricity system operator's alteration of the voltage of the electricity transmitted is not sufficient to confer on it the status of producer of a separate new product, since any consumer can use transformers to make low voltage equipment work.

2. Enedis

- 14 Enedis maintains that, under the rules governing liability for defective products, the concept of producer is an autonomous concept, separate from that of electricity producer for the purposes of the legislation relating to the European electricity market.
- 15 Under the rules governing liability for defective products, the producer is the party that offers a product fit for use or consumption to the public. Electricity produced in power stations, at high or very high voltages, is not fit for consumption and it is the work of transforming it into low or medium-voltage electricity, carried out by the distribution system operator, that enables the electricity to become a product fit for use or consumption by customers. It follows that the electricity so transformed by the distribution system operator is the final product, and that it is the producer of that product.

4. Assessment of the Cour de cassation

- 16 The appeal raises the question of whether an electricity distribution system operator which alters the voltage of electricity so that it may be distributed to the final consumer should be regarded as a ‘producer’ of electricity within the meaning of Directive 85/374/EEC.
- 17 The Advocate General considers that the judgment of the Cour d’appel should be set aside. He points out that classifying Enedis as a producer is contrary to the fundamental principles which govern the organisation of the electricity sector as it is now structured following the various directives on the internal electricity market. He adds that classifying Enedis, which is not an electricity producer within the meaning of the Code de l’énergie (Energy Code) or the directives on the internal electricity market, as a producer for the purposes of the Code civil and Directive 85/374/EEC, which it transposes, is hardly compatible with the requirement that the law should be clear and comprehensible. The Advocate General also argues that the Cour d’appel’s analysis distinguishes between two different categories of electricity, that is, electricity as a ‘raw material’ generated and transmitted via the transmission system, and electricity as a ‘finished product’ distributed via the distribution system, whereas Article 1245-2 of the Code civil, which provides that electricity is a product, makes no such distinction. Lastly, he emphasises that the appellate court’s analysis is at odds with the reality of the contractual and economic relationships between the various actors in the sector, since the distribution system operator cannot produce electricity from a raw material which it has not purchased and since it does not sell that electricity, which the consumer purchases from the supplier.
- 18 French courts hearing actions for damages against Enedis following voltage surges have adopted different solutions as regards which liability regime is applicable.
- 19 Courts in other EU Member States have ruled in favour of classification as a producer. The Bundesgerichtshof (Federal Court of Justice, Germany) has held that an electricity distribution system operator should be regarded as a producer if it alters significantly the electricity product by transforming its voltage so that it can be used by the final consumer (judgment of 25 February 2014, VI-ZR 144/13, paragraphs 12 to 17).
- 20 That interpretation, however, is not self-evident and not all courts in the EU are sure to adopt it. Indeed, classing an electricity distribution system operator as a producer might not be compatible with the directives relating to the European electricity market, in particular Directive 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, Directive 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, and Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC. Those directives in fact rendered it necessary for

transmission and distribution system operators to be independent from the activities of the generation and supply of electricity, which are open to competition. It was pursuant to that legislation that Law No 2004-803 of 9 August 2004 was enacted in France to bring about the break-up of the Électricité de France group and the creation on 1 January 2008 of a new company to operate the public distribution system, namely ERDF (Électricité Réseau Distribution France), which subsequently became Enedis.

- 21 The question therefore arises of whether an electricity distribution system operator may be regarded as a 'producer' within the meaning of Article 3 of Directive 85/374/EEC if it alters the voltage of the electricity supplied by the producer so that it can distribute it to the final consumer. In other words, it is necessary to determine whether an electricity 'producer', within the meaning of Article 3 of that directive, is to be apprehended as a distinct concept from that of producer and supplier of electricity within the meaning of the directives on the internal electricity market.
- 22 It is therefore necessary to make a reference to the Court of Justice of the European Union for a preliminary ruling.

5. Question referred for a preliminary ruling:

- 23 The Cour de cassation thus refers the following question:

'Are Articles 2 and 3(1) 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 to be interpreted as meaning that an electricity distribution system operator may be regarded as a 'producer' if it alters the voltage of the electricity from the supplier so that it may be distributed to the final consumer?'