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The Cauliflower Directive

By John Peter Andersen

The people of the small island of Cauliflower in the Western end of the British Channel, almost midway between Falmouth in Cornwall and the French île-de Batz, and about 60 miles west of Guernsey, has finally ended years of hesitation and decided to join the European Community. The population of Cauliflower Island is about 28.000 souls, most of them hardworking and sage peasants faithfully honouring the name of their old island by growing cauliflowers in the fertile soil left behind after the ice ages.

Now they sincerely hope that the European Community with its abundant finances will bestow its grace upon their island with generous subsidies to keep the island's vegetable economy afloat and prevent the young people from migrating to the continent to work in shady bars in the harbour cities and get caught up in bad habits of urban life style.

Years of patient work from the persistent island lobbyists pays off when the membership is announced and when the EC Council adopts a forthcoming directive to help the diligent vegetable growers. It is named "The Cauliflower Directive". Its brief provisions read:

"The Cauliflower Directive (Council Directive on financial aid to the growing of cauliflowers in The Independent Republic of The Island of Cauliflower.)

Article 1

Cauliflower growers are eligible to receive economic support from The European Agricultural Fund in the amount of 10.000 Euro per year to promote cauliflower growing, provided that the growing takes place on land owned by the grower, and the grower is at least 25 years of age at the time of application.

Article 2

This Directive shall not affect any rights which a vegetable grower may have according to other rules of economic support of The Independent Republic of The Island of Cauliflower or according to the island's specific rules of economic support existing at the moment when this Directive is notified."

During the process that led to the adoption of Cauliflower Directive it was thoroughly debated in the EC organs if carrot growers ought to have the same economic support as cauliflower growers. Carrots are well-suited for the soil on Cauliflower Island, and if carrots were included the yield of the fields of the island would be much bigger. But then, you have to stop somewhere, or things will become vastly too expensive. Instead, the people of Cauliflower Island is placated with a solemn assurance that is written into the very meeting minutes of the Council of Ministers:

"With regard to the interpretation of Articles 1 and 2 of the Cauliflower Directive, the Council and the Commission are in agreement that there is nothing to prevent The Independent Republic of The Island of Cauliflower from laying down in its national legislation rules regarding economic support to carrot growers, since economic support to them is not covered by the Directive."

Time passes, and cauliflowers and carrots thrive peacefully side by side on Cauliflower Island. Then something happens. Fifteen years after the adoption of the Cauliflower Directive the mail plane lands with an indignant letter from The EC Commission. The letter states that the Commission, by almost sheer coincidence, has become aware that vegetable growers on Cauliflower Island for many years have been able to obtain economic support from the Island's Treasury to grow carrots. Furthermore, the Commission has discovered that this executive practice that goes back decades before the Cauliflower Directive has been boldly written into the very law by which the legislators of the island implemented the Cauliflower Directive into the law books of the island.

The implementation law is a straight copy of the Cauliflower Directive, but with an extra article added:

"Article 3

Carrot growers are eligible to receive economic support from the Treasury of The Independent Republic of The Island of Cauliflower in the amount of 10.000 Euro per year to promote carrot growing, provided that the growing takes place on land owned by the grower, and the grower is at least 25 of age years at the time of application."

The Commission is strongly displeased with the carrot provision. The provision is in conflict with the Cauliflower Directive, the Commission claims. The reason is that the Cauliflower Directive is a maximum harmonization directive, not a minimum harmonization directive. A minimum harmonization directive obliges the Member State to enact a minimum regulation within the legal area in question, but does not preclude the Member State from maintaining or introducing wider measures if so desired, e.g. by allowing carrot growers also to receive economic support from the government.

With a maximum harmonisation directive the road is blocked, states the Commission. A maximum harmonisation directive obliges the Member State to enact the exact contents of the maximum harmonization directive, without detracting or adding anything. The regulation cannot be limited or expanded.

The Cauliflower Directive, says the Commission, is a maximum harmonisation directive that exhaustively regulates all economic support to vegetable growers on Cauliflower Island. If the carrot growers want money, they should grow cauliflowers.

The politicians of Cauliflower island, astonished and somewhat angered by the Commission's message, explain that the economic support to carrot growers is a purely national regime that only concerns the island itself and has been in use for decades before the island even contemplated becoming a member of the European Community, way before the Cauliflower Directive was ever conceived.

It may be, say the spokesmen of the island, that the Cauliflower Directive is a maximum harmonisation directive, but if so it can only harmonise its subject-matter which is cauliflowers and not a completely different vegetable -carrots! If it could that would mean negative harmonization, a regulation emanating not from the directive itself but from questionable assumptions about things not dealt with in the directive.

The few legal minds of the island have now come to aid the politicians. Although, they are not familiar with such overseas lofty and sophisticated legal riddles, they do feel themselves capable of reading even directives from the big European Community. After a bit of scrutiny they kindly and unassumingly point out that the very title of the directive clearly states that it deals with cauliflowers, and that article one unambiguously states that the economic support has to do with cauliflowers and not other types of vegetables that are not mentioned in the directive.

But no, this is a complete oversimplification, the Commission replies. The fact that only cauliflowers are named in the directive only reflects that the authors of the directive have expressed themselves with brevity. It does not follow from the provisions in the directive that other types of vegetables are not affected by its regulation.

The lawyers of Cauliflower Island shake their heads in disbelief and find it difficult to fathom how the honourable Commission with its army of highly educated civil servants can allow itself to rely on such a feeble argument. It seems to them that the Commission has completely overlooked the plain contents of article 2 of the Cauliflower Directive stating that the directive "...shall not affect any rights which a vegetable grower may have according to other rules of economic support of The Independent Republic of The Island of Cauliflower or according to the island's specific rules of economic support existing at the moment when this Directive is notified."

The decade old executive practice, they maintain, confirmed by its inclusion into the implementation law, on economic support to carrot growers is exactly such a pre-existing right as shall not be affected by the directive. Even assuming that the Cauliflower Directive is a maximum harmonization directive for cauliflowers, article 2 still promises that other regimes of economic support to vegetable growers in existence before the directive shall be preserved and can continue without being disturbed by the directive.

No again! The Commission is fierce in its opposition to this interpretation of article 2. The Cauliflower Directive is a complete harmonisation of all growing of vegetables on Cauliflower Island. Article 2 is not intended to be a loophole empowering The Independent Republic of The Island of Cauliflower to maintain or adopt an economic support system also for carrot growers thereby expanding the support opportunities beyond those cauliflowers selected for a complete harmonized economic support regulation through the directive.

The Commission's reasoning looks like a true enigma to the inhabitants, lawyers, politicians and plain vegetable growers of Cauliflower Island, now all following the battle with the fullest of attention. They cannot rid themselves of the impression that the Commission reads article 2 to cover rights that vegetable growers may invoke - but only rights pertaining to something else than vegetable growing, whatever that might be.

The island lawyers, however, bred with centuries of patience as solid as the cliffs of their beloved island, keep their nerve. They have a trump card up their sleeves that will make the Commission turn around and see the true light. With polished courtesy they remind the Commission about the fact that the Commission in connection with the adoption of the Cauliflower Directive made itself party to an agreement - the elderly among the lawyers prefer to speak of a Magna Carta Deed - with the Council of Ministers with regard to the interpretation of Articles 1 and 2 of the Cauliflower Directive. The island lawyers cite the meeting minutes of the Council of Ministers, putting notable emphasis on the key words "...the Council and the Commission are in agreement that there is nothing to prevent The Independent Republic of The Island of Cauliflower from laying down in its national legislation rules regarding economic support to carrot growers, since economic support to them is not covered by the Directive."

The mail plane flies the lawyers' letter to the Commission. The whole of Cauliflower island glows with expectation and is anxious to hear the urbane excuses to be offered by a humiliated and defeated Commission that has to face its own obliviousness and compose a diplomatic letter of surrender spiced with an appropriate number of humble apologies.

Surprisingly, and despite usual process time in the vast European Community bureaucracy, the waiting time proves to be a rather short one. The Commission announces in a stiff language that it is of the opinion that the meeting minutes of the Council of Ministers, as quoted, does not in the slightest alter the Commission's position. The statement in the minutes, the Commission says, is not in conflict with the complete harmonization brought about by the Cauliflower Directive, and the complete harmonization means that there is no legal room for government economic support to carrot growers on Cauliflower Island. A statement recorded in Council minutes that is not referred to in the directive, cannot be used for the purpose of interpreting the directive, the Commission teaches.

The islanders are baffled and frustrated and their disaffection for everything continental is surging high. The temperate appeals of the legal profession seem against the wall. But a last attempt is launched by the adamant island lawyers. They

say that whatever the legal status of Council minutes then the Commission as evidenced by the statement the authenticity of which was never in dispute as a matter of fact did declare its explicit agreement with the Council that Cauliflower island had free hands to "...laying down in its national legislation rules regarding economic support to carrot growers, since economic support to them is not covered by the Directive." The lawyers tell that on their island it has been good style in the civil service for a great number of years that a government office cannot go back on its word and deprive a citizen of such rights as the office has promised him. Especially, it has been a rule for long time that if a government office has been acquiescent for a long time in a matter settled earlier it cannot just change its attitude and reverse its earlier decision to the detriment of the citizen who in good faith trusted the word of the officials.

Alas, these pious petitions, inspired by the good-hearted common law fairness of Cauliflower Island, also fail to impress the honourable Commission on the other side of the unruly channel waters.

By now, the islanders, cauliflower and carrot growers alike, have had enough of all things that have to do with the Commission, its reading of directives and its doctrines on maximum harmonization and minimum harmonization. The case goes to court. After a prolonged, costly and exacting process at the estimable European Court of Justice in Luxembourg, the Court hands down its verdict. It goes straight against the islanders and vindicates the Commission on all counts.

Cauliflower growers and carrot growers travel home to their green fields, shaken of their erstwhile belief in the European Community, offended in their common sense, but with unfaltering pride in their just cause. The politicians and lawyers of Cauliflower Islands embark on the inescapable task of repairing the island legislation on cauliflowers and carrots in order to avoid any future clashes with the European Community and its grandiose legal culture.

Here ends the drama of Cauliflower Island. For those trustful readers that may not yet have become suspicious it should be said that the island and its confrontation with the European Community is entirely a fiction. What is not fictitious, however, is the fact that the fiction corresponds in all essential key points to the very fate that has befallen the Danish Product Liability Act in recent times as a result of an identical dispute with the EC Commission.

It all started as a relatively straightforward product liability case in the city court of Aalborg, Denmark. A young married couple was having their evening meal, a freshly made omelette made from eggs bought from a major Danish convenience store. Both

spouses became ill from a severe poisoning with salmonella enteritidis, a bacteria type associated with eggs and regularly occurring in Danish eggs. The wife recovered after hospitalisation, but her husband was partly disabled as a result of the salmonella infection.

The injured couple sued the convenience store in the city court. They claimed that the store had acted negligently by selling the poisonous eggs without giving any warning against the risk of salmonella infection. They also claimed that the convenience store as a supplier was liable on a strict basis under the Danish Product Liability Act, paragraph 10. It reads:

"A supplier is responsible for product liability directly towards the injured party and subsequent suppliers in the chain of supply."

They won their case. During the appeal case in High Court West, a new angle was thrown into the case. Based on three EC court decisions from 2002 (Gonzales Sanchez v. Medicinia Asturiana SA, case C-183/00; Commission v. France, case C-52-00, and Commission v. Greece, case C-154/00), the supplier claimed that paragraph 10 was in conflict with the underlying EC product liability directive (Council Directive EC/85/374 on Liability for Defective Products).

The principle of holding a supplier of a defective product liable on a strict basis in cases of injury or damage caused by the defective product has been part of Danish tort law for several decades. The principle was developed in case law. When the EC product liability was adopted in 1985 Denmark used the opportunity to write this supplier rule into the implementation law by which the product liability directive was transposed into national law.

During the proceedings spurred by the challenge of paragraph 10 (some fifteen years after its enactment) the Commission took the position that the product liability directive was a maximum harmonization directive that had harmonized all product liability in the EC. Consequently, maintaining or adopting separate national rules on strict product liability for suppliers was impermissible.

In line with the people of Cauliflower Island the advocates in favour of strict supplier product liability explained that the rule was an old one in Danish law dating way back before the product liability directive. Since the product liability directive was without prejudice to pre-existing law, the supplier rule could not conflict with the directive, even if the liability was imposed on a strict basis. The preservation of pre-existing law seems to concord with article 13 of the product liability directive that states:

"This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified."

In the international literature is was likewise assumed that the EC based product liability system did not replace, but supplement the pre-existing product liability law, cf. f.x. "European Product Liabilities", by Patrick Kelly and Rebecca Attree (2nd edition 1997), page 11: "The new system introduced by the Directive supplemented the then prevailing systems of consumer protection for defective products. It was designed to afford additional protection, co-existing with other consumer rights, whether based upon contract or tort law. Consumer rights which went beyond its scope were not precluded by the new law. Hence the national laws of member states may indeed in some cases continue to provide consumer rights whereby the producer of the products is strictly liable for defects without limit. The Directive therefore sought to introduce a system under which there were prescribed minimum consumer rights, upon which consumers throughout the European Community could rely and according to which producers would be responsible."

Obviously the general assumption was that the directive was a minimum harmonization directive. This assumption was refuted by the three cases from 2002. They all state that the directive represents a complete harmonisation, leaving no room for the Member States to maintain or adopt a parallel product liability system based on the same strict liability principles as in the directive. Article 13, therefore, could not save the Danish supplier rule any more than article 2 of the Cauliflower Directive could help the carrot growers.

The more profound reasoning, though, offered by the Danish injured couple was that even if the product liability directive was a maximum harmonization directive (or rather, perhaps, had been transformed into one after the three 2002-decisions) this did still not preclude the Danish supplier rule. The harmonization effect could only apply to the regulation area of the directive and not expand beyond its borders. And the directive did only regulate the producer's product liability, not the supplier's or intermediary's product liability - unless such middlemen themselves were equated with producers as in the few special cases described exhaustively in the directive's article 3 (e.g. a supplier who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer). The Cauliflower Directive was on cauliflowers and could completely harmonize those, but not other vegetables outside the scope of the directive. This line of reasoning seemed to accord quite well with central statements in the 2002-decisions.

In the French case paragraph 18 makes it clear that "...the Directive contains no provision expressly authorising the Member States to adopt or to maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection". In parallel with this, paragraph 24 states "...the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States...". The Spanish and Greek cases contain similar statements.

The key terms, the Danes said, are the phrases "in matters in respect of which it makes provision" and "in the matters regulated by it". The matters regulated by the Directive is the producer's product liability, not anyone else's. They pointed to the explicit wording of article 1 and article 3 in the directive that only speak of the producer.

The Commission's attitude to this common sense argument was not favourable. The reason why only the producer's product liability was mentioned in the directive reflected nothing but the desire for brevity. The express dealing with the producer did not support the view that other participants in the supply chain were outside the regulation area of the directive.

The view of the Commission was that by virtue of an et contrario inference the matter on how to legislate on product liability, or uphold pre-existing law on product liability, was simply taken out of the hands of the Member States as a result of the product liability directive having completely harmonized the subject-matter. No margin for individual enterprises.

In line with the optimistic lawyers of Cauliflower Island the Danish couple believed themselves in possession of a decisive trump card.

There was a Council statement that proclaims:

"With regard to the interpretation of Article 3 and Article 13 (as corrected from 12) the Council and the Commission are in agreement that there is nothing to prevent individual Member States from laying down in their national legislation rules regarding the liability of intermediaries, since intermediary liability is not covered by the Directive..." (The Council of Minister minutes in BEUC-News, Legal Supplement 12, November/December 1985, page 20-21).

Nurturing the same hopes as the Cauliflower Island lawyers it was believed that this statement represented positive proof that suppliers were outside the range of the directive thereby entitling Denmark to maintain its old supplier rule and also to write

it into the implementation law of the product liability directive. But Denmark did not fare better than Cauliflower Island. The European Court of Justice decided in case C-401/03 on the 10th of January 2006 that paragraph 10 in the Danish products liability act was in conflict with the directive. The directive was a maximum harmonization directive leaving no possibility for the Member States to uphold old rules or introduce new ones based on strict product liability like those in the directive, even if such rules afforded greater protection to the injured party than the directive. Imposing strict liability on the supplier along similar lines as on the producer under the directive was precluded by the directive. The Court did not attach any significance to the Council statement as it was not referred to in the wording of the directive. The thought that such a reference may be pointless and for that reason excluded when a directive from its birth is tailored on a prior agreement as to which subjects are to be regulated by the directive was not discussed by the court.

With its decision the Court made it impossible to hold a supplier liable on a strict basis for injuries caused by a defective product, with what seems to be two exceptions.

The first exception is if the producer can be held responsible on the basis of negligence, i.e. fault-based liability. If so, it is still permissible to hold the supplier answerable for the producer's fault-based liability.

The second exception has to do with product liability in contract. If there is privity of contract between the supplier and the injured purchaser then there appears to be no conflict with the product liability directive, notwithstanding the fact that such a contractual liability is strict and does not require fault on the part of the seller.

Section 14 in the British Sales of Goods Act enables a plaintiff to sue for compensation for personal injury and property damage caused by the product purchased. The British rule is a contractual rule that confers rights to the purchaser for non-conformity of the products purchased; but the rule has a wider range and also covers product liability claims arising from damage caused by the product purchased.

On questions from the Judges' Bench during the oral argument in the Danish case the Commission's lawyers declared that they did not consider the British rule to be in conflict with the Directive because it is founded on a contractual liability basis. This is in harmony with the doctrines of the three 2002 decisions.

The story of the Danish Product Liability Act, now duly revised, and its unfortunate clash with the EC law is a drama (flavoured with elements of farce) that reflects the inherent tension between national legislation and community law. Community law is

not a stable matter but is constantly mutating in the course of case law from the European Court of Justice, opening new frontiers, but also generating new fronts with national legal systems and their traditions. As a result surprise effects and capricious legal traps may emerge that may tamper with and sometimes deplete existing rights in highly unexpected and unforeseeable ways. The injured persons in the 2002 Spanish case and the French 2002 case relied on existing laws in their home countries giving them rights that were suddenly swept away from under their feet because of the maximum harmonization interpretation of the product liability directive - contrary to the then prevailing perception of the directive. The Danish case is at present still pending in the Danish High Court West. However, fifteen years of cases based in good faith on the old Danish supplier rule, many decided, many still not, leave the legal community with challenges that may cause just as much headache as the cauliflower and carrot growers on the Cauliflower Island had to battle with.

Note:

Jens Rostock Jensen in U 2006 B.211 (Danish Law Reports Weekly) "Mellemhandlerens hæftelse for produktskade" (the supplier's responsibility for product damage), John Peter Andersen "A case of bad eggs. How the Danish supplier product liability rule came in conflict with the EC Product Liability Directive", published at www.johnpeterandersen.dk. See also Georg Lett in U 2002 B.398, Vibe Ulfbech in U 2003 B.1 and Martin Habersaat in U 2003 B.122.