JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2012 (*)

(Free movement of goods — Measures having equivalent effect to a quantitative restriction — National certification procedure — Presumption of compliance with national law — Applicability of Article 28 EC to a private-law certification body)

In Case C-171/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Germany), made by decision of 30 March 2011, received at the Court on 11 April 2011, in the proceedings

Fra.bo SpA

v

Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann (Rapporteur), L. Bay Larsen and E. Jarašiūnas, Judges,

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 15 February 2012,

after considering the observations submitted on behalf of:

– Fra.bo SpA, by A. Saueracker and M. Becker, Rechtsanwälte,

– the Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein, by C. Tellman and F.-E. Hufnagel, Rechtsanwälte,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

– the Netherlands Government, by C. Wissels and B. Koopman, acting as Agents,

– the European Commission, by G. Zavvos, G. Wilms, L. Malferrari and C. Hödlmayr, acting as Agents,

– the ETFA Surveillance Authority, by M. Schneider and X. Lewis, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC, 81 and 86(2) EC.

2 That reference was made in the context of proceedings between Fra.bo SpA ('Fra.bo'), a company governed by Italian law specialised in the production and distribution of copper fittings intended in particular for piping for water or gas, and the German certification body, the Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein ('DVGW') concerning the latter's decision to withdraw or refuse to extend the certificate for copper fittings produced and distributed by Fra.bo.

German legal context

3 It is apparent from the order for reference and the observations of the parties concerned that the Regulation on General Conditions for Water Supply (Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser) of 20 June 1980 (BGBl. 1980 I, p. 750) ('the AVBWasserV'), lays down the general sales conditions for water supply undertakings and their customers, from which the parties are free to depart.

4 On the date of the facts in the main proceedings, Paragraph 12(4) of the AVBWasserV was worded as follows:

'Only materials and devices which comply with the recognised rules of technology may be used. The mark of a recognised inspection body (such as the DIN-DVGW, DVGW or GS mark) shall testify to the fulfilment of those requirements.'

5 The Regulation of 13 January 2010 (BGBl. 2010 I, p. 10) amended Paragraph 12(4) of the ABVWasserV as follows:

'Only products and devices supplied in accordance with the recognised rules of technology may be used. Compliance with the conditions laid down in the first sentence shall be assumed if they have specific CE marking for drinking water use. Where such CE marking is not stipulated, it shall also be assumed if the product or device bears the mark of an accredited certifying body for the industry, in particular the DIN-DVGW or DVGW mark. Products and devices which

1. were lawfully manufactured in another contracting state of the Agreement on the European Economic Area or

2. were lawfully manufactured or marketed in another Member State of the European Union or in Turkey

and do not meet the technical specifications for the mark referred to in the third sentence shall be treated as equivalent, inclusive of the inspections and surveillance carried out in the aforementioned States, if the same level of protection as required in Germany is thereby permanently ensured.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 It is apparent from the order for reference and the observations of the parties concerned that Fra.bo is an undertaking established in Italy which manufactures and sells copper fittings. Copper fittings are connections between two pieces of piping for water or gas, with sealing rings made of malleable material at the ends to make them watertight.

7 The DVGW is a non-profit body governed by private law, set up in 1859, the object of which, according to its articles of association, is to promote the gas and water sector. The DVGW is recognised in Germany as a 'public benefit' body, a status conferred under Paragraph 51 et seq. of the Regulations on Taxes (Abgabenordnung) on bodies whose activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects. Under Paragraph 2(2) of its articles of association, the DVGW does not defend the interests of the manufacturers in that sector.

8 For the water sector, there are approximately 350 standards drawn up by the DVGW. Technical standard W 534 is relevant to the dispute in the main proceedings. It serves as the basis for certification, on a voluntary basis, of products which come into contact with drinking water.

9 In late 1999 Fra.bo applied to the DVGW for certification of the copper fittings at issue in the main proceedings. The DVGW instructed the Materialprüfungsanstalt Darmstadt to carry out the necessary tests. These were in turn sub-contracted to the firm Cerisie Laboratorio, established in Italy, which is approved by the relevant Italian authorities, though not by the DVGW. In November 2000, the DVGW then granted the claimant a water industry certificate for a period of five years.

10 **After complaints by third parties, the DVGW instituted a re-assessment procedure in which Materialprüfungsanstalt Darmstadt was again commissioned to carry out the testing. An ozone test to establish the ozone resistance of the copper fitting's elastomeric waterproof joint was conducted on a sample of material provided by the Italian manufacturer. In June 2005 the DVGW informed Fra.bo that its fitting had not passed the ozone test but it could, as provided for in the DGVW's rules, produce a positive test report within three months. However, the DGVW did not recognise the test report drawn up subsequently by Cerisie Laboratorio, on the ground that it was not one of its approved testing laboratories. In the dispute in the main proceedings, the DGVW also challenges that test report on the ground that the content is insufficient, in that it did not indicate the test specifications or the material-testing conditions.**

11 In the meantime, in a formalised procedure in which Fra.bo was not involved, the DGVW amended technical standard W 534 by introducing the 3 000-hour test, aimed at ensuring longer life for certified products. The DGVW's reply to a written question from the Court indicates that the 3 000-hour test consists in exposing the copper fitting's elastomeric waterproof joint to a temperature of 110 degrees Celsius in boiling water for 3 000 hours. According to the DGVW's rules, certificate holders are required to obtain additional certification within three months of the entry into effect of the amendment to the technical standard, as evidence of compliance with the amended conditions. Fra.bo did not make such an application and did not subject its copper fittings to the 3 000-hour test.

12 In June 2005 the DVGW cancelled Fra.bo's certificate for copper fittings on the ground that it had not submitted a positive test report on the 3 000-hour test. The DVGW also rejected an application for extension of the certificate on the ground that compliance certificates could no longer be extended.

13 Fra.bo brought an action against the DVGW before the Landgericht Köln (Regional Court, Cologne), arguing that the cancellation and/or the refusal to extend the certificate are contrary to European Union law. In Fra.bo's submission, the DVGW is bound by the provisions governing the free movement of goods, namely Article 28 EC et seq., and the cancellation and the refusal to extend the certificate both restrict considerably its access to the German market. Due to the presumption of compliance conferred on products certified by the DVGW under Paragraph 12(4) of the ABVWasserV, it is virtually impossible for Fra.bo to distribute its products in Germany without that certificate. The 3 000-hour test has no objective justification and the DVGW is not entitled to reject outright test reports from laboratories which are accredited by the competent authorities in Member States other than the Federal Republic of Germany, but not by the DGVW. The DVGW ought to be regarded as an association of undertakings which, in drawing up the contested technical standards, also infringes Article 81 EC.

14 As a private-law association, the DVGW considers that it is not bound by the provisions governing the free movement of goods and that only the Federal Republic of Germany is required to answer for any infringements of Article 28 EC in connection with the adoption of Paragraph 12(4) of the ABVWasserV. Consequently, there is nothing preventing the DVGW from drawing up technical standards which go beyond those in place in Member States other than the Federal Republic of Germany and to apply them to its certification activities. It is also free, on quality-related grounds, to take account only of laboratories accredited by it. Moreover, as a standard-setting body, it does not pursue economic activities for the purpose of agreements, with the result that Article 81 EC does not apply in the present case.

15 The Landgericht Köln dismissed Fra.bo's action, holding that the DVGW was free to set out the conditions under which it would issue a compliance certificate. Fra.bo appealed against that decision

before the referring court in order to have, on the same grounds, the DVGW ordered to extend the compliance certificate for the fittings in question and to pay EUR 1 000 000 in damages plus interest.

16 As it had doubts as to the applicability of the provisions governing the free movement of goods and agreements between undertakings to the DVGW's activities, the Oberlandesgericht Düsseldorf decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 28 EC …, if appropriate in conjunction with Article [86(2)] EC …, to be interpreted as meaning that private-law bodies which have been set up for the purpose of drawing up technical standards in a particular field and certifying products on the basis of those technical standards are bound by the aforementioned provisions when drawing up technical standards and in the certification process where the national legislature expressly regards the products in respect of which certificates have been issued as lawful, thus making it at least considerably more difficult in practice to distribute products in respect of which certificates have not been issued?

2. If the answer to the first question is in the negative:

Is Article 81 EC … to be interpreted as meaning that the activity pursued by a private-law body in the field of drawing up technical standards and certifying products on the basis of those technical standards, as described in question 1, is to be regarded as "economic" where the body is controlled by those undertakings?

If the first part of this question is answered in the affirmative:

Is Article 81 EC … to be interpreted as meaning that the drawing-up of technical standards and the certification of products on the basis of those technical standards by an association of undertakings is capable of impeding trade between the Member States if a product lawfully manufactured and distributed in another Member State cannot be distributed in the importing Member State, or can be distributed there only with considerable difficulty, because it does not meet the requirements of the technical standard and, in the light of the predominance of the technical standard on the market and of a legal provision adopted by the national legislature to the effect that a certificate from the association of undertakings must indicate compliance with the requirements laid down by law, distribution without such a certificate is virtually impossible, and if the technical standard would not be applicable if it had been adopted directly by the national legislature because it infringes the principle of the free movement of goods?'

The questions referred for a preliminary ruling

The first question

17 By its first question, the referring court asks, in essence, whether Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

18 As a preliminary point, it is common ground that the copper fittings at issue in the main proceedings are a 'construction product' within the meaning of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ 2003 L 284, p. 1) ('Directive 89/106'), which are not subject to a harmonised standard, a European technical approval or a national technical specification recognised at European Union level, as referred to in Article 4(2) of that directive.

19 In respect of construction products not covered by Article 4(2) of Directive 89/106, Article 6(2) of that directive provides that the Member States are to allow such products to be placed on the market in their territory if they satisfy national provisions consistent with the EC Treaty until the European technical specifications provide otherwise.

20 Thus, national provisions governing the placing on the market of a construction product not covered by technical specifications harmonised or recognised at European Union level must, as provided for by Directive 89/106, comply with obligations under the Treaty, in particular with the principle of the free movement of goods as set out in Articles 28 EC and 30 EC (see, to that effect, judgment of 13 March 2008 in Case C-227/06 *Commission* v *Belgium*, paragraph 34).

21 It must be ascertained, first, whether Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body in circumstances such as those in the main proceedings, as the applicant in the main proceedings claims that it does.

22 According to settled case-law, all rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions, prohibited by Article 28 EC (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 18; and *Commission* v *Belgium*, paragraph 40). Thus, the mere fact that an importer might be dissuaded from introducing or marketing the products in question in the Member State concerned constitutes a restriction on the free movement of goods for the importer (judgment of 24 April 2008 in Case C-286/07 *Commission* v *Luxembourg*, paragraph 27).

23 Similarly, the Court has held that a Member State fails to fulfil its obligations under Articles 28 EC and 30 EC when, without valid justification, it encourages economic operators wishing to market in its territory construction products lawfully manufactured and/or marketed in another Member State to obtain national marks of conformity (see, to that effect, *Commission* v *Belgium*, paragraph 69) or when it refuses to recognise the equivalence of approval certificates issued by another Member State (see, to that effect, Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, paragraphs 41, 49 and 52).

24 It is common ground that the DVGW is a non-profit, private-law body whose activities are not financed by the Federal Republic of Germany. It is, moreover, uncontested that that Member State has no decisive influence over the DVGW's standardisation and certification activities, although some of its members are public bodies.

25 The DVGW contends that, accordingly, Article 28 EC is not applicable to it, as it is a private body. The other parties concerned consider that private-law bodies are, in certain circumstances, bound to observe the free movement of goods as guaranteed by Article 28 EC.

26 It must therefore be determined whether, in the light of inter alia the legislative and regulatory context in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State.

27 In the present case, it should be observed, firstly, that the German legislature has established, in Paragraph 12(4) of the ABVWasserV, that products certified by the DVGW are compliant with national legislation.

28 Secondly, it is not disputed by the parties to the main proceedings that the DVGW is the only body able to certify the copper fittings at issue in the main proceedings for the purposes of Paragraph 12(4) of the ABVWasserV. In other words, the DVGW offers the only possibility for obtaining a compliance certificate for such products.

29 The DVGW and the German Government have referred to there being a procedure other than certification by the DVGW, which consists in entrusting an expert with the task of verifying a product's compliance with the recognised rules of technology within the meaning of Paragraph 12(4) of the ABVWasserV. It is apparent, however, from the answers to the written and oral questions put by the Court that the administrative difficulties associated with the absence of specific rules of procedure governing the work of such experts, on the one hand, combined with the additional costs incurred by having an individual expert report drawn up, on the other, make that other procedure of little or no practical use.

30 Thirdly, the referring court takes the view that, in practice, the lack of certification by the DVGW places a considerable restriction on the marketing of the products concerned on the German market.

Although the ABVWasserV merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it is apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the DVGW.

31 In such circumstances, it is clear that a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings.

32 Accordingly, the answer to the first question is that Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

The second question

33 Since the second question was asked by the referring court only in the event of the first question being answered in the negative, there is no need to answer it.

Costs

34 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.

[Signatures]

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* Language of the case: German.