JUDGMENT OF THE COURT (Fourth Chamber)

7 June 2007 *

In Case C-254/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 June 2005,

Commission of the European Communities, represented by B. Stromsky, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by M. Wimmer, acting as Agent,

defendant,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: French.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by requiring that automatic fire detection systems with point detectors which were lawfully manufactured or marketed in another Member State but which do not have the CE marking:

— comply with Belgian standard NBN S 21-100 relating to the design of general automatic fire detection systems with point detectors, of September 1986, as modified by Addendum No 2 thereto of August 1996 ('standard NBN S 21-100'),

— be subject to approval by BOSEC (Belgian Organisation for Security Certification), an obstacle made worse by the disproportionate costs which that approval incurs, and

— undergo tests and checks in connection with that type approval which, essentially, duplicate the controls which have already been carried out under other procedures in another Member State,

the Kingdom of Belgium has failed to fulfil its obligations under Article 28 EC.

Legal context

2 Article 2 of the Order of the Executive of the French Community of 24 December 1990 laying down the detailed rules and procedure for obtaining a safety certificate for establishments providing accommodation in existence on 1 January 1991 and laying down safety standards on fire protection specific to establishments providing accommodation (*Moniteur belge* of 21 June 1991, p. 13999; 'the Order of 24 December 1990') provides:

'Before an establishment providing accommodation may be put into use it must be issued with a safety certificate.'

3 According to Article 3 of that order, issue of the certificate is subject to meeting the safety standards on fire protection which are specific to establishments providing accommodation, as provided for in Annex 1 to that order.

4 According to point 7.4.4 of that annex, generalised installation of equipment for automatic fire detection by point detectors is to be undertaken and checked in accordance with standard NBN S 21-100 and the equipment is to be the subject of a certificate of conformity to that standard.

5 Article 158 of the Decree of the Walloon Region of 18 December 2003 relating to establishments providing tourist accommodation (*Moniteur belge* of 11 March 2004, p. 13669) repealed the Order of 24 December 1990 in so far as it concerned the Walloon Region. The provisions of that order still apply in relation to the Brussels Region.

6 Article 27 of the Order of the Walloon Government of 3 December 1998 implementing the Decree of 5 June 1997 relating to convalescent homes, serviced residences and day-care centres for the elderly and creating the Walloon Council for Retirement ('the Order of 3 December 1998') provides:

'The standards relating to protection against fire and panic laid down in Annex I shall apply to convalescent homes, serviced residences and day-care centres for the elderly.

...'

7 According to point 0.5 of Annex I to the Order of 3 December 1998:

'where documentary evidence establishes that a product satisfies the requirements of the present order according to the equivalent testing and classification methods in

force in another Member State of the European Economic Community, that product shall be considered to satisfy the technical specifications laid down in this annex'.

8 Point 7.7.1 of that annex states:

'Generalised automatic detection systems shall be checked in accordance with Belgian standard NBN S 21-100 "Design of systems for automatic fire detection by point detectors". However, the controls must be applied to all parts of the system (detectors, exchanges, repeater signal panels, servo devices, etc. ...).'

9 Standard NBN S 21-100 lays down the rules for the design of generalised systems for automatic fire detection by point detectors.

10 Point 4.2 of that standard, headed 'Description', is worded as follows:

'An automatic fire detection system shall comprise mainly:

— sensors, sensitive to one of the characteristics specific to combustion, called detectors,

— a network of wires and electric cables,

— a control panel, designed to give the alarm and indicate the detection zone and the nature of the problem,

— power supplies.

Such equipment shall be of a type which conforms to the specifications of the European CEN or Belgian standards and both the fitter and the system must be certified by BOSEC. All the components in one and the same system must be compatible.

Repeaters, manual warning devices or any other servo device may be added to the system, provided that they meet the requirements of this standard.

The detector-base assembly or connector shall be equipped with an optical alert signal.'

11 Under point 4.3.1 of that standard, headed 'Types of detectors':

'Every type of detector shall conform to the specifications of the Belgian standards.'

12 Points 4.4.6 and 4.4.8.2 of standard NBN S 21-100, headed, respectively, 'Power Supplies' and 'Cabling', lay down the required features for, first, the back-up of power supply and, secondly, the cables for systems for automatic fire detection by point detectors.

Facts and pre-litigation procedure

13 Having been informed of the difficulties which a United Kingdom economic operator had encountered in marketing fire detection equipment in Belgium, the Commission, by letter of 21 January 2003, formally requested the Kingdom of Belgium to submit its observations in respect of the rules on importation and marketing in Belgium of automatic fire detection systems with point detectors.

14 The Belgian authorities submitted their observations by letter of 9 September 2003.

15 Taking the view that the Kingdom of Belgium had failed to fulfil its obligations under Article 28 EC, the Commission issued a reasoned opinion on 9 July 2004, in which it invited the Kingdom of Belgium to take the measures necessary to comply with that opinion within two months of its notification.

16 The Belgian authorities replied to that opinion by letter of 9 September 2004.

17 As the Commission was not satisfied with the answer provided by the Belgian authorities, it decided to bring the present action.

The action

Arguments of the parties

18 The Commission submits that the Orders of 24 December 1990 and 3 December 1998 restrict the free movement of automatic fire detection systems with point detectors which were lawfully manufactured or marketed in another Member State but which do not have the CE marking.

19 By requiring compliance with standard NBN S 21-100, the Belgian regulations in effect preclude from a part of the Belgian market the use by establishments providing accommodation and retirement homes of the systems in question which do not conform to that standard. Thus, economic operators manufacturing or marketing those products might refrain from putting their products onto the Belgian market or be forced to adapt them in order to have access to that market.

20 The same applies to the municipal rules relating to fire protection which, according to the information provided by the Belgian authorities, require that fire detectors conform to standard NBN S 21-100 and also to the administrative practice of the fire services which refer to that standard when establishing fire prevention measures.

21 The Commission further submits that the requirement of conformity to standard NBN S 21-100 laid down in the Belgian rules has the effect that those systems are subject to approval by BOSEC.

22 Not only does such an approval procedure constitute in itself a measure having an effect equivalent to a quantative restriction prohibited by Article 28 EC but, in addition, that obstacle is made worse by the disproportionate time-limits and costs generated by that procedure and by BOSEC's refusal to take into account the tests and checks which have already been carried out in other procedures in another Member State.

23 The Kingdom of Belgium does not dispute the fact that compliance with standard NBN S 21-100 is required both by the rules referred to by the Commission and by the practice of the fire services, but contends that, in the light of the proposals for amendments, which were the subject of a public inquiry between 30 March 2005 and 30 September 2005 and, in particular, of the proposal relating to the deletion of the reference to BOSEC as a certification body, standard NBN S 21-100 does comply with Article 28 EC and no longer constitutes a barrier to the free movement of automatic fire detection systems with point detectors which were lawfully manufactured or marketed in another Member State but which do not have the CE marking.

24 Furthermore, the Belgian authorities submit that that standard conforms to European standards and does not contain any additional requirements necessitating the adaptation of modification of the products comprising the automatic fire detection systems. In fact, the control imposed by that standard concerns not the components of those systems but only the functioning of those systems as a whole.

25 In any event, such a control is justified on grounds of public security and the protection of health and life of humans and animals.

26 In that regard, the Belgian authorities contend that the provisions of standard NBN S 21-100 are applicable without distinction and that the control which they impose on fire detection installations and systems is necessary and proportionate to the objective pursued.

Findings of the Court

27 As regards, in the first place, the requirement of conformity to standard NBN S 21-100 imposed by the Belgian rules and by the administrative practice of certain Belgian public services, it must be borne in mind that, according to settled case-law, all commercial rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantative restrictions prohibited by Article 28 EC (Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 18).

28 Accordingly, in the absence of harmonisation of laws, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply without distinction to all products, constitute measures of equivalent effect prohibited by Article 28 EC (Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 15, and Case C-217/99 *Commission* v *Belgium* [2000] ECR I-10251, paragraph 16).

29 In the present case, however, it is clear from the wording of points 4.2, 4.3.1, 4.4.6 and 4.4.8.2 of standard NBN S 21-100 that that standard contains not only rules on control of the overall functioning of automatic fire detection systems with point detectors, but also technical requirements to be met by certain components of those systems.

30 It follows that, as regards the marketing in one Member State of products or components lawfully manufactured and marketed in another Member State, and in the absence of Community harmonisation, the requirement of conformity to standard NBN S 21-100 imposed by the Belgian regulations may have the effect of forcing economic operators of other Member States to adapt their apparatus and equipment to the requirements of standards or technical regulations of the Member State of importation and to bear the additional costs associated with such adaptation (*Commission* v *Belgium*, paragraph 17; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 63; and *Commission* v *Italy*, paragraph 19), or of deterring them from marketing the products concerned in Belgium (Case 45/87 *Commission* v *Ireland* [1988] ECR I-4929, paragraph 19, and *Commission* v *Belgium*, paragraph 18).

31 In that regard, it is not possible to accept the Kingdom of Belgium's argument that there is no need to adapt products lawfully manufactured or marketed in other Member States to the Belgian market on the ground that standard NBN S 21-100 merely reproduces technical requirements contained in the EN-54 series of European standards, since, as is clear both from the reasoned opinion and from the Commission's application, the present action concerns only automatic fire detection systems with point detectors which do not have the CE marking.

32 Consequently, even though it is applicable without distinction to all products, the requirement of conformity to a national standard such as standard NBN S 21-100 hinders intra-Community trade and constitutes a measure having an effect equivalent to a quantitative restriction on imports prohibited by Article 28 EC.

33 Such a measure may be justified only by one of the public-interest reasons laid down in Article 30 EC or by one of the overriding requirements referred to in the case-law of the Court, provided that, in either case, that measure is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (*ATRAL*, paragraph 64, and Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, paragraph 42).

34 The Kingdom of Belgium contends that the requirement of conformity to standard NBN S 21-100 is justified on grounds of public security and the protection of health and life of humans and animals.

35 However, although it cannot be denied that such grounds are among those which, under Article 30 EC, may be relied on by a Member State in order to justify such an obligation, and that, in the absence of harmonising rules, the Member States are free to decide on their intended level of protection of health and life of humans (Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11, and *Commission* v *Portugal*, paragraph 44), the fact remains that an exception to the principle of the free movement of goods may be justified under that article only if the national authorities show that it is necessary in order to attain one or more objectives mentioned in that article and that it is in conformity with the principle of proportionality (Case 227/82 *Van Bennekom* [1983] ECR 3883, paragraph 40; Case C-358/95 *Morellato* [1997] ECR I-1431, paragraph 14; *ATRAL*, paragraph 67; and *Commission* v *Italy*, paragraph 22).

36 In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 25; Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63; Case C-137/04 *Rockler* [2006] ECR I-1441, paragraph 25; and Case C-185/04 *Öberg* [2006] ECR I-1453, paragraph 22).

37 In the present case, it should be pointed out that such evidence is lacking. In fact, the Belgian authorities do no more than assert that the obligation in question is applicable without distinction to national and imported products and that it satisfies the requirements of necessity and proportionality referred to above, and submit that the objective of standard NBN S 21-100 is to verify that the design of the system is sound and to ensure that the system functions properly.

38 As regards, in the second place, the requirement that automatic fire detection systems with point detectors be subject to approval by BOSEC, the Kingdom of Belgium relies on a proposal for the amendment of standard NBN S 21-100 with the aim of deleting the reference to that body.

39 In this regard it is sufficient to observe that according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-423/00 *Commission* v *Belgium* [2002] ECR I-593, paragraph 14, and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 32).

40 However, in the present case it is common ground that, on expiry of the period prescribed in the reasoned opinion, the Kingdom of Belgium had not adopted the proposal for the amendment of standard NBN S 21-100 entailing the deletion of the reference to BOSEC as a certification body for automatic fire detection systems with point detectors.

41 Furthermore, the Court has already held that the requirement of prior approval attesting to a product's fitness for a given use restricts access to the market of the importing Member State and must therefore be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC (*Commission* v *Portugal*, paragraph 41).

42 As regards the disproportionate nature of that requirement, it must held that during the pre-litigation procedure the Kingdom of Belgium accepted that, at least at the time to which the present action relates, in the context of the approval issued by reference to standard NBN S 21-100, in the absence of a bilateral agreement with the certification body of the Member State of origin of a product, BOSEC did not take into account the controls carried out in that other Member State. As the Commission observes, the Kingdom of Belgium has not furnished evidence to demonstrate that that practice has been abandoned.

43 As regards the costs which that approval procedure incurs, it is sufficient to observe that, inasmuch as such a procedure does not preclude the imposition of tests and checks which have already been carried out in the Member State of origin of the product concerned, the costs associated with such tests and checks must be regarded as disproportionate.

44 Accordingly, the action brought by the Commission must be considered to be founded.

45 Consequently, it must be held that, by requiring that automatic fire detection systems with point detectors which were lawfully manufactured or marketed in another Member State but which do not have the CE marking:

— conform with Belgian standard NBN S 21-100,

— be subject to approval by BOSEC, an obstacle made worse by the disproportionate costs which that approval incurs, and

— undergo tests and checks in connection with that type approval which, essentially, duplicate the controls which have already been carried out under other procedures in another Member State,

the Kingdom of Belgium has failed to fulfil its obligations under Article 28 EC.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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

1. **Declares that, by requiring that automatic fire detection systems with point detectors which were lawfully manufactured or marketed in another Member State but which do not have the CE marking:**

   — **conform with Belgian standard NBN S 21-100 relating to the design of general automatic fire detection systems with point detectors, of September 1986, as modified by Addendum No 2 thereto of August 1996,**

   — **be subject to approval by BOSEC (Belgian Organisation for Security Certification), an obstacle made worse by the disproportionate costs which that approval incurs, and**

   — **undergo tests and checks in connection with that type approval which, essentially, duplicate the controls which have already been carried out under other procedures in another Member State,**

   the Kingdom of Belgium has failed to fulfil its obligations under Article 28 EC;

2. Orders the Kingdom of Belgium to pay the costs.

[Signatures]