Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 October 2012*

(Free movement of goods — Quantitative restrictions and measures having equivalent effect — Internal liners in flues and chimney pipes — Lack of CE conformity marking — Marketing precluded)

In Case C-385/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 27 April 2010, received at the Court on 30 July 2010, in the proceedings

Elenca Srl

v

Ministero dell'Interno,

THE COURT (Fifth Chamber)

composed of M. Ilešič, acting as President of the Fifth Chamber, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri,

having regard to the written procedure and further to the hearing on 28 September 2011,

after considering the observations submitted on behalf of:

— Elenca Srl, by E. Pasquinelli and G. Saltini, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by C. Colelli, avvocato dello Stato,

— the Czech Government, by M. Smolek and T. Müller, acting as Agents,

— the Hungarian Government, by K. Szíjjártó and Z. Tóth, and by G. Koós, acting as Agents,

— the European Commission, by C. Zadra and G. Zavvos, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Italian.

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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') and also the interpretation of the provisions of the FEU Treaty relating to the free movement of goods.

2 The reference has been made in the course of proceedings between the company Elenca Srl ('Elenca'), which markets inflatable liners for flues and chimney pipes, and the Ministero dell'Interno concerning national rules governing the placing on the market of those liners in Italy.

Legal context

European Union legislation

3 Article 2(1) of Directive 89/106 states:

'Member States shall take all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for this intended use, that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3 when and where such works are subject to regulations containing such requirements.'

4 Article 4(2) of that directive provides:

'Member States shall presume that products are fit for use if they enable works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements referred to in Article 3 where such products bear the CE marking indicating that they satisfy all the provisions of this Directive, including the conformity assessment procedures laid down in Chapter V and the procedure laid down in Chapter III. The CE marking shall indicate:

(a) that they comply with the relevant national standards transposing the harmonised standards, references to which have been published in the *Official Journal of the European [Communities*]. Member States shall publish the references of these national standards;

(b) that they comply with a European technical approval, delivered according to the procedure of Chapter III, or

(c) that they comply with the national technical specifications referred to in paragraph 3 inasmuch as harmonised specifications do not exist; a list of these national specifications shall be drawn up according to the procedure in Article 5(2).'

5 Article 6 of that directive provides:

'1. Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this Directive.

Member States shall ensure that the use of such products, for the purpose for which they were intended, shall not be impeded by rules or conditions imposed by public bodies or private bodies acting as a public undertaking or acting as a public body on the basis of a monopoly position.

2. Member States shall, however, allow products not covered by Article 4(2) to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until the European technical specifications referred to in Chapters II and III provide otherwise. The Commission and the committee referred to in Article 19 will monitor and review the development of the European technical specifications on a regular basis.

…'

Italian legislation

6 Legislative Decree No 152 of 2 April 2006 provides in paragraph (1) of Article 285, entitled 'Technical features':

'Civil heating installations with a nominal power greater than the minimum threshold value must comply with the technical requirements laid down in Part II of Annex IX to Part V of the present Decree according to the type of fuel used.'

7 Annex IX to that decree, entitled 'Civil heating installations', in Part II, entitled 'Technical and construction conditions', provides:

'2. Features of flues:

…

2.7 Installations … must be equipped with flues made with products bearing the CE marking. Those flues must, in particular:

— be made from non-combustible materials;

…'

8 Circular No 4853/2009 of the Ministero dell'Interno (Ministry of the Interior) – fire, public rescue and civil defence department – central prevention and technical safety directorate ('the contested circular'), is worded as follows:

'… Plastic chimney pipe lining systems fall within the scope of Directive 89/106/EEC. There is at present no specific harmonised standard available. The only standard developed by the [European Committee for Standardisation (Comité Européen de Normalisation (CEN))] applicable to plastic chimney pipes [is] Standard EN 1447/2005, which expressly rules out such solutions used with the aim of modifying the properties of the surface in contact with the combustion products. Such systems may therefore only display CE marking which indicates European technical approval (ETA) issued by an EOTA [European Organisation for Technical Approvals] body.

— the use of the flue liners in question is not to be permitted in civil heating installations with a nominal power greater than 35 kW;

— for installations below 35 kW … [the competent Ministry which issued the circular in any event takes the view that] only those products which bear the CE marking indicating European technical approval may be used, in accordance with the use intended by the manufacturer.'

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

9 Elenca imports and distributes on the Italian market inflatable thermosetting liners for flues and chimney pipes manufactured in Hungary. Those liners are used to restore old flues and old chimney pipes without having to do masonry work. The technology was introduced onto a number of European markets, including the Italian market, by way of replacement for the traditional systems used previously, which consisted in installing chimney pipes, usually made of stainless steel or ceramics, or rigid pipes inside buildings.

10 According to Elenca, the contested circular, based on Legislative Decree No 152/2006, infringes inter alia Articles 34 TFEU to 37 TFEU because it makes the marketing of a product originating from another Member State of the European Union (in this case the Republic of Hungary) subject to a technical condition, namely the affixing of the CE marking, a requirement that is impossible to fulfil because there is no corresponding harmonised standard in Hungary, which makes it impossible in practice to import and distribute the product in question.

11 The Tribunale amministrativo regionale per il Lazio (Lazio Regional Administrative Court) ruled that Elenca's application for annulment of the contested circular was inadmissible, on the ground that it was not a legislative measure and could not be challenged through legal proceedings.

12 Elenca appealed against that judgment before the Consiglio di Stato (Council of State). That court, the referring court in the present case, upheld Elenca's action, holding that the contested circular affected that company's legal position. It also shared Elenca's doubts as to the validity of the national legislation under European Union law.

13 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the circular contested at first instance and the national rules referred to therein compatible with Community law and with the rules specifically referred to? In particular, do the circular and the national rules infringe the principles and rules laid down by Directive 89/106/EEC relating to construction products, which does not in any way make CE marking mandatory, but, on the contrary, provides (at Article 6(1) and (2) [of Directive 89/106]) that Member States "shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions" of that directive, and are to ensure that "the use of such products, for the purpose for which they were intended, shall not be impeded by rules or conditions imposed by public bodies or private bodies acting as a public undertaking or acting as a public body on the basis of a monopoly position" and are to allow "products not covered by Article 4(2) [of Directive 89/106] to be placed on the market in their territory if they satisfy national provisions consistent with the [FEU] Treaty until the European technical specifications referred to in Chapters II and III [of that directive] provide otherwise"?

2. Do the contested circular and the national rules referred to therein infringe Articles [34 to 37 TFEU] in particular, which prohibit restrictions on imports and measures having equivalent effect, in so far as making the marketing of a product originating in another Member State of the [European Union] subject, as in the present case, to a technical requirement, namely the affixing of the CE mark – which would be possible and lawful only if there were a corresponding harmonised standard – in fact prevents the import and distribution of the product in question in Italy, in breach of the principles laid down by the provisions of the EC Treaty referred to and Community law, which ensure freedom of competition, requiring [rules] capable of ensuring equal non-discriminatory treatment, as well as transparency, proportionality and respect for the rights of individual undertakings?

3. Under Community rules on workable competition in the sector involving the present dispute, ought the national legislature and administrative authorities to have avoided adopting the legislative measures referred to in the [contested] circular and in Legislative Decree No 152/2006?

4. Lastly, is pluralism and competition in the sector in question, which is guaranteed by European law, secured by national rules – such as Legislative Decree No 152/2006 (in particular Article 285 and paragraphs 2.7 and 3.4 of [Part II to Annex IX]) – which introduce and impose the restrictions referred to?'

The questions referred for a preliminary ruling

The first question

14 By its first question, the referring court asks, in essence, whether Directive 89/106 must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.

15 First, it must be noted that the principal purpose of Directive 89/106 is to remove obstacles to trade by creating conditions which enable construction products to be marketed freely within the European Union. To that end, that directive specifies the essential requirements which construction products must satisfy and which are put into effect by harmonised standards as well as national implementing standards, European technical approvals and national technical specifications recognised at European Union level (see, to that effect, judgment of 13 March 2008 in Case C-227/06 *Commission* v *Belgium*, paragraph 31).

16 It is common ground that the inflatable liners for flues and chimney pipes at issue are 'construction products' for the purposes of Directive 89/106.

17 Moreover, at the hearing it became apparent that those construction products are not covered either by a harmonised standard or by a European technical approval or national technical specification recognised at European Union level for the purposes of Article 4(2) of Directive 89/106.

18 However, as regards a construction product 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 a product to be placed on the market in their territory if it satisfies national provisions consistent with the Treaty until the European technical specifications provide otherwise (see, to that effect, *Commission* v *Belgium*, paragraph 33, and Case C-484/10 *Ascafor and Asidac* [2012] ECR, paragraph 40).

19 It follows that a Member State may not require the affixing of CE marking on a construction product not covered by Article 4(2) of Directive 89/106, originating from another Member State, in order for that product to be marketed on its territory. That Member State may subject the placing on the market of that construction product only to national provisions which comply with its obligations under the Treaty, in particular with the principle of the free movement of goods set out in Articles 34 TFEU and 36 TFEU (see *Commission* v *Belgium*, paragraph 34, and *Ascafor and Asidac*, paragraph 50).

20 Therefore, the answer to the first question is that Directive 89/106 must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.

The second question

21 By its second question, the referring court asks, in essence, whether Articles 34 TFEU to 37 TFEU must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.

Whether there is a restriction on the free movement of goods

22 According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 34 TFEU (see, inter alia, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-108/09 *Ker-Optika* [2010] ECR I-12213, paragraph 47). 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 (Case C-171/11 *Fra.bo* [2012] ECR, paragraph 22 and the case-law cited).

23 It is also apparent from settled case-law that Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of EU products to national markets (see Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 34, and *Ker-Optika*, paragraph 48).

24 In the present case, the requirement of CE marking, provided for by the relevant national provisions, although applicable without distinction, prohibits the marketing in Italy of the construction products in dispute, which are marketed lawfully in other Member States.

25 In those circumstances, the requirement of CE marking must be regarded as having an equivalent effect to a quantitative restriction on imports for the purposes of Article 34 TFEU and is, therefore, a restriction on the free movement of goods.

Whether the restriction on the free movement of goods may be justified

26 It is established that a restriction on the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet overriding requirements. In either case, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see *Ker-Optika*, paragraph 57, and *Ascafor and Asidac*, paragraph 58).

27 In the present case, the Italian Government states that the national legislation in dispute is justified by the objective of the protection of public safety and human life and health inasmuch as it aims to ensure that products such as those at issue here meet the required safety standards.

28 Although, in that regard, it is established that, in the absence of harmonising rules, the Member States are free to decide on their intended level of protection of human life and health and on the need to monitor the goods concerned when being used (see, to that effect, Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11, and Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, paragraph 44), it must be observed that legislation which prohibits, absolutely and automatically, the marketing on national territory of products lawfully marketed in other Member States because those products do not have CE marking is not compatible with the requirement of proportionality imposed by European Union law.

29 As observed inter alia by the Hungarian Government and the Commission, such a strict requirement of CE marking, which prevents at the outset the very application of the principle of mutual recognition of products for which the European legislature has not effected full harmonisation or drawn up European technical approvals, by prohibiting compliance by the products in dispute with the required safety standards on the basis of approval and certification procedures conducted in the Member State of origin, goes beyond what is necessary to attain the safety objective pursued.

30 In the light of the foregoing, the answer to the second question is that Articles 34 TFEU to 37 TFEU must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.

The third and fourth questions

31 As regards the third and fourth questions, it is apparent that the provisions of Community law relating to competition of which the referring court seeks an interpretation are manifestly inapplicable in a context such as that of the main proceedings.

32 Consequently, the third and fourth questions put by the referring court are inadmissible (see, to that effect, Case C-393/08 *Sbarigia* [2010] ECR I-6337, paragraphs 29 and 38).

Costs

33 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 (Fifth Chamber) hereby rules:

1. **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, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003, must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.**

2. **Articles 34 TFEU to 37 TFEU must be interpreted as precluding national provisions which automatically make the marketing of construction products, such as those at issue in the main proceedings, originating from another Member State, subject to the affixing of CE marking.**

[Signatures]