JUDGMENT OF THE COURT (Fourth Chamber)

10 September 2009*

In Case C-457/07,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 9 October 2007,

Commission of the European Communities, represented by S. Pardo Quintillán and P. Guerra e Andrade, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Inês Fernandes, acting as Agent, assisted by N. Ruiz and C. Farinhas, advogados,

defendant,

* Language of the case: Portuguese.

THE COURT (Fourth Chamber),

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

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 May 2009,

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

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to:

— declare that, by failing to take the necessary measures to comply with the judgment in Case C-432/03 *Commission* v *Portugal* [2005] ECR I-9665, the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC;

— order the Portuguese Republic to pay it a penalty payment of EUR 34 542 per day of delay in complying with the judgment in Case C-432/03 *Commission* v *Portugal*, as from the date of delivery of judgment by the Court of Justice in the present case until compliance with the judgment in Case C-432/03 *Commission* v *Portugal*;

— order the Portuguese Republic to make a lump sum payment to it of EUR 6 060, multiplied by the number of days between the date of delivery of the judgment in Case C-432/03 *Commission* v *Portugal*, and the date on which that Member State complies with that judgment or the date of delivery of judgment in the present case;

— order the Portuguese Republic to pay the costs.

Legal context

Community legislation

2 Under Article 2(1) 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 Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1) ('Directive 89/106'), the Member States are to take all necessary measures to ensure that 'construction products' within the meaning of Directive 89/106 may be placed on the market only if they are fit for their 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 of that directive when and where such works are subject to regulations containing such requirements.

3 Article 3(1) of Directive 89/106 provides that those essential requirements are set out in the form of objectives in Annex I thereto. Those requirements concern certain characteristics of the construction works as regards mechanical resistance and stability, safety in case of fire, hygiene, health and the environment, safety in use, protection against noise, energy economy and heat retention.

4 Article 4(2) of that directive provides that Member States are to presume that products are fit for use if they enable works in which they are employed to satisfy those same essential requirements where such products bear the CE marking, which indicates that they comply with the relevant national standards transposing the harmonised standards, with a European technical approval or with national technical specifications in respect of which there is a presumption of conformity with those essential requirements.

5 Article 16(1) of that directive provides:

'In the absence of technical specifications, as defined in Article 4, for any given product, the Member State of destination shall, on request in individual cases, consider the product to be in conformity with the national provisions in force if they have satisfied tests and inspections carried out by an approved body in the producing Member State according to the methods in force in the Member State of destination or recognised as equivalent by that Member State.'

6 Under Article 1 of Decision No 3052/95/EC of the European Parliament and the Council of 13 December 1995, establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1), Member States are to notify the Commission of any measure preventing the free movement or placing on the market of a particular model or type of product lawfully produced or marketed in another Member State where the direct or indirect effect of the measure is a general ban, a refusal to allow the goods to be placed on the market, a modification of the model or type of product concerned before it can be placed or kept on the market, or a withdrawal

of the goods from the market. Under Article 4(2) of Decision No 3052/95, that notification must occur within 45 days of the date on which that measure is taken.

7 In February 2004, a number of European standards relating to the technical specifications applicable to PEX polyethylene pipes were adopted.

National legislation

8 Under Article 17 of the General Rules on Urban Construction (Regulamento Geral das Edificações Urbanas), adopted by Decree-Law No 38/382 of 7 August 1951 (*Diário do Governo,* Series I, No 166 of 7 August 1951) ('the RGEU'), in the version applicable before the delivery of the judgment in Case C-432/03 *Commission* v *Portugal*, the use of new construction materials or methods in respect of which there are no official specifications and no sufficient practical experience is subject to a prior opinion being given by the Laboratório Nacional de Engenharia Civil (National Laboratory of Civil Engineering) ('the LNEC').

9 Pursuant to the decrees of the Ministry of Public Works of 2 November 1970 (*Diário do Governo,* Series II, No 261 of 10 November 1970) and 7 April 1971 (*Diário do Governo,* Series II, No 91 of 19 April 1971), only plastic materials which have been approved by the LNEC may be used in the water distribution network.

10 Directive 89/106 was transposed into Portuguese law by Decree-Law No 113/93 of 10 April 1993 (*Diário da República* I, Series A, No 84 of 10 April 1993).

11 Article 9(2) of Decree-Law No 113/93, as amended by Decree-Law No 139/95 of 14 June 1995 (*Diário da República* I, Series A, No 136 of 14 June 1995), and by Decree-Law No 374/98 of 24 November 1998 (*Diário da República* I, Series A, No 272 of 24 November 1998), provided that, on request by a manufacturer established in a Member State or its agent, in individual cases and in the absence of technical specifications, products are considered to be in conformity with the national provisions taken pursuant to the EC Treaty if they have satisfied tests and inspections carried out by an approved body in the Member State of manufacture according to the methods in force in Portugal or recognised as equivalent by the Instituto Português da Qualidade (Portuguese Institute of Quality).

Case C-432/03 *Commission* v *Portugal* and the background to that case

12 In 2000, the Commission received a complaint from a Portuguese undertaking which had been refused the authorisation necessary for the installation in a building of PEX polyethylene pipes imported from Italy and Spain, on the ground that those pipes had not been approved by the LNEC. When that undertaking applied to the LNEC for an attestation of the equivalence of the foreign certificates it held, that body informed it that its request for an attestation of equivalence of the certificate issued by the Istituto Italiano dei Plastici (Italian Institute of Plastics) ('the IIP') had to be rejected on the ground that the IIP was not a member of the European Union of Agrément ('UEAtc'), nor was it one of the other bodies with which the LNEC had concluded a cooperation agreement.

13 Having sent a letter of formal notice, then a reasoned opinion, to the Portuguese Republic, the Commission brought proceedings for failure to fulfil obligations in which it claimed that, under Article 17 of the RGEU, by subjecting polyethylene pipes imported from other Member States to an approval procedure without taking into account approval certificates issued by other Member States, and by failing to inform the Commission of such a measure, that Member State had failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 1 and 4(2) of Decision No 3052/95.

14 In paragraph 33 of the judgment in Case C-432/03 *Commission* v *Portugal*, the Court began by observing that the pipes in question were not subject to a harmonised standard, a European technical approval or a national technical specification recognised at Community level as provided for in Article 4(2) of Directive 89/106.

15 The Court then inferred from Article 6(2) of Directive 89/106, under which 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 Treaty, that that directive confirms that a Member State may only subject the placing on the market in its territory of a construction product not covered by technical specifications harmonised or recognised at Community level, to national provisions which comply with its obligations under the Treaty, in particular, the principle of the free movement of goods set out in Articles 28 EC and 30 EC (Case C-432/03 *Commission* v *Portugal*, paragraphs 34 and 35).

16 The Court observed in that regard that the requirement of prior approval attesting to a product's fitness for a given use, like refusal, in that context, to recognise the equivalence of certificates issued by another Member State, restrict 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 (see Case C-432/03 *Commission* v *Portugal*, paragraph 41).

17 As regards the issue of whether a measure such as Article 17 of the RGEU is proportional in relation to the objective of protection of human health and life which it seeks to attain, the Court noted that, whilst a Member State is free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, the authorities of the Member States are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade. It follows that they are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal (Case C-432/03 *Commission* v *Portugal*, paragraph 46).

18 After noting that strict compliance with that obligation requires an active approach on the part of the national body to which an application is made for approval of a product or recognition, in that context, of the equivalence of a certificate issued by an approval body of another Member State, the Court held that, in that case, the LNEC had refused to recognise the equivalence of a certificate issued by IIP without seeking from the undertaking making the application the information in its possession which would have enabled it to evaluate the nature of the certificate issued by IIP, and without contacting IIP to obtain such information (Case C-432/03 *Commission* v *Portugal*, paragraphs 47 and 48).

19 In those circumstances, the Court concluded that, by making the use of the product in question subject to an approval procedure under Article 17 of the RGEU, without taking account, in that procedure, of a certificate issued by an approval body in another Member State and without seeking the necessary information from the applicant undertaking or that body, the Portuguese authorities had failed in their duty of cooperation which arises, in the context of an application for approval of a product imported from another Member State, from Articles 28 EC and 30 EC (Case C-432/03 *Commission* v *Portugal*, paragraph 49).

20 In respect of the specific requirements to which approval of the pipes in question is subject in Portugal, the Court noted that, if a prior administrative authorisation scheme is to be justified even though it derogates from fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (Case C-432/03 *Commission* v *Portugal*, paragraph 50).

21 In the case before it, the Court held that Article 17 of the RGEU did not fulfil those requirements in so far as it provided solely that the use of new construction materials or methods in respect of which there were no official specifications and no sufficient practical experience was subject to a prior opinion being given by the LNEC (Case C-432/03 *Commission* v *Portugal*, paragraph 51).

22 The Court concluded that, by making the pipes in question subject to an approval procedure such as that provided for in Article 17 of the RGEU, the Portuguese rules did not comply with the principle of proportionality and, accordingly, were contrary to Articles 28 EC and 30 EC (Case C-432/03 *Commission* v *Portugal*, paragraph 52).

23 In so far as the decisions taken by the Portuguese authorities under the RGEU and the ministerial decrees of 2 November 1970 and 7 April 1971 effectively prohibited the use of the pipes in question, and thus were to be regarded as falling under Article 1 of Decision No 3052/95 but had nevertheless not been notified to the Commission, the Court held that the Portuguese Republic had also infringed its obligations under that decision (see Case C-432/03 *Commission* v *Portugal*, paragraphs 58 and 60).

24 Consequently, the Court declared, in the operative part of Case C-432/03 *Commission* v *Portugal*, that, by failing to take account of approval certificates issued by other Member States in a procedure under Article 17 of the RGEU for approval of polyethylene pipes imported from those other Member States, and by not informing the Commission of such a measure, the Portuguese Republic had failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 1 and 4(2) of Decision No 3052/95.

Background to the present case

25 On 10 January 2006, the Portuguese authorities notified the Commission of the adoption by the Minister for Public Works, Transport and Communications on 23 December 2005 of Decree No 1726/2006, repealing the Decrees of 2 November 1970 and 7 April 1971 (*Diário da República,* Series II, No 16 of 23 January 2006).

26 Decree No 1726/2006 provided, in paragraphs 2 and 3 thereof, that plastic pipe systems for the distribution of water intended for human consumption, covered by European standards adopted in Portugal, had to be certified by authorised bodies as meeting the essential requirements. Pursuant to paragraph 3 of that decree, the recognition of certificates of conformity issued in another Member State was to be carried out in accordance with Article 9(2) of Decree-Law No 113/93. Under paragraphs 4 and 5 of that decree, in the absence of any European standards adopted in Portugal, the products had to be approved by the LNEC, in which case account might be taken, on application of the party requesting the approval and in accordance with Article 9(2) of Decree-Law No 113/93, of tests and inspections performed in another Member State.

27 By a letter of formal notice of 4 July 2006, the Commission informed the Portuguese authorities that Decree No 1726/2006 did not ensure full compliance with the judgment in Case C-432/03 *Commission* v *Portugal*. First, since a decree is situated below a decree-law in the hierarchy of norms, Decree No 1726/2006 had not repealed Article 17 of the RGEU, under which the use of certain materials continued to be subject to the prior opinion of the LNEC, without providing for tests and inspections carried out in other Member States to be taken into consideration. Moreover, that decree did not make any reference to Article 17 of the RGEU. Secondly, that decree referred only to pipe systems for water distribution subject to European standards, and did not refer to individual pipes. In addition, as regards the approval procedure for distribution systems not subject to European standards, Decree No 1726/2006 provided that tests and inspections carried out in another Member State could be taken into consideration, without any obligation being imposed in that regard. Thirdly, the Portuguese authorities had not notified the measures taken with regard to traders affected by the national legislation which the Court had held to be contrary to Articles 28 EC and 30 EC.

28 On 18 October 2006, considering that the complaints set out in the letter of formal notice remained valid, the Commission sent the Portuguese Republic a reasoned opinion in which it called on the latter to take the measures necessary to ensure compliance with the judgment in Case C-432/03 *Commission* v *Portugal* by 18 December 2006 at the latest.

29 By letter of 12 January 2007, the Portuguese Republic replied to that reasoned opinion, informing the Commission that it had since clarified the applicable provisions.

30 First, Decree No 1726/2006 was repealed by Decree No 19563/2006 of the Minister for Public Works, Transport and Communications of 4 September 2006 (*Diário da República,* Series II, No 185 of 25 September 2006) which, while it covered not only the approval of pipe systems, but also the approval of pipes and accessories, clearly refers to Article 17 of the RGEU and provides expressly for the obligation to take into account tests and inspections performed in other Member States.

31 Next, Decree-Law No 4/2007 of 8 January 2007 (*Diário da Republica,* Series I, No 5 of 8 January 2007) amended Article 9 of Decree-Law No 113/93, so that mutual recognition of certificates of conformity, tests and inspections, in particular for the purposes of approval, was ensured between Member States.

32 In respect of Article 17 of the RGEU, the Portuguese authorities explained that that provision was, in any event, to be interpreted in accordance with Decree No 19563/2006 and the principle of mutual recognition laid down in Article 9(2) of Decree-Law No 113/93, which guarantees full cooperation between national bodies. Those authorities added that, the necessary research having been carried out, there had been no instance detected of irregular application of Article 17 of the RGEU by the LNEC. Lastly, inasmuch as, since the adoption of European standards in February 2004, there was now a need to approve polyethylene pipes and accessories only in exceptional cases, the LNEC had cancelled all the approval documents relating to plastic pipe systems covered by those standards.

33 By letter of 17 August 2007, the Portuguese authorities notified the Commission of the adoption of Decree-Law No 290/2007 of the same date (*Diário da Republica,* Series I,

No 128 of 17 August 2007), in force as from 18 August 2007, which amended Article 17 of the RGEU by adding a paragraph providing that approval by the LNEC must take into consideration the tests and inspections performed in another Member State.

34 Not being satisfied with the reply of the Portuguese authorities to the reasoned opinion, the Commission brought the present action.

Developments in the case during the proceedings before the Court

35 In March 2008, the Portuguese Republic notified the Court of the adoption of Decree-Law No 50/2008 of 19 March 2008 (*Diário da Republica,* Series I, No 56 of 19 March 2008), in force as from 20 March 2008, which amended Article 17 of the RGEU in the following terms:

'1. Buildings must be constructed and renovated in such a manner as to guarantee that they meet the essential requirements of mechanical resistance and stability, safety in their use and in case of fire, hygiene, health and environmental protection, protection against noise, energy economy and heat retention and the other requirements set out in this regulation or in specific legislation, inter alia, of functionality, durability and others.

2. The quality, nature and method of use of the materials used in the construction of new buildings and in renovations must comply with the rules of construction and the applicable legislation, guaranteeing that the buildings meet the conditions and requirements referred to in paragraph 1 in accordance with the technical specifications of the construction plan.

3. The use of construction products in new buildings or in renovations is subject, under the applicable legislation, to the relevant 'CE' marking or, in the absence of any marking, unless there is mutual recognition, to certification of their conformity with the technical specifications in force in Portugal.

4. Certification of conformity with the technical specifications in force in Portugal may be requested by any interested party, and account must always be taken for that purpose of certificates of conformity with the technical specifications in force in any Member State of the European Union, in Turkey or in a State party to the Agreement on the European Economic Area, and of positive results of checks and tests performed in the Member State of manufacture, under the conditions set out in Article 9(2) of Decree-Law No 113/93 of 10 April 1993.

5. In those cases where the construction products do not meet any of the conditions provided for in paragraph 3, and in so far as their use in new buildings or renovations entails a risk of not meeting the essential requirements set out in paragraph 1, that use shall be subject to their approval by the [LNEC], which shall dispense those products from having to be approved where they possess certificates of conformity issued by a body authorised by a Member State of the European Union, in Turkey or in a State party to the Agreement on the European Economic Area which demonstrates adequately that those requirements have been met.

6. The approval provided for in the previous paragraph may be requested by any interested party, the [LNEC] being obliged always to take into consideration, under the conditions set out in Article 9(2) of Decree-Law No 113/93 of 10 April 1993, the certificates of conformity issued and the tests and inspections performed by an authorised body in a Member State of the European Union, in Turkey or in a State party to the Agreement on the European Economic Area, and to cooperate with those bodies for the purpose of obtaining and analysing their respective results.

7. The [LNEC] shall provide a sufficient statement of reasons for the necessity of repeating any of the tests or inspections referred to in paragraphs 4 and 6.

8. Approvals shall be granted where the conditions set out in Annex I to Decree-Law No 113/93 of 10 April 1993 have been satisfied.'

36 At the hearing, the Commission stated to the Court that it considered that that decree-law, as from its entry into force, ensured full compliance with the judgment in Case C-432/03 *Commission* v *Portugal*.

37 Consequently, the Commission withdrew its claim for a penalty payment. However, it maintained its application for payment of a lump sum.

The action

38 Although Article 228 EC does not specify the period within which a judgment of the Court establishing that a Member State has failed to fulfil its obligations must be complied with, it follows from settled case-law that the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (see, inter alia, Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 21 and the case-law cited).

39 In addition, the reference date for assessing whether there has been a failure to fulfil obligations under Article 228 EC is the date of expiry of the period prescribed in the

reasoned opinion issued under that provision (see, inter alia, Case C-109/08 *Commission* v *Greece* [2009] ECR I-4657, paragraph 15 and the case-law cited).

40 It must therefore be examined whether, as the Commission claims, the Portuguese Republic had not yet complied with the judgment in Case C-432/03 *Commission* v *Portugal* by the date on which the two-month period laid down in the reasoned opinion expired, namely 18 December 2006.

41 The Commission takes the view that, until the adoption of Decree-Law No 50/2008, the Portuguese Republic had not taken the measures necessary to comply with the judgment in Case C-432/03 *Commission* v *Portugal*.

42 In that connection, the Commission puts forward an initial plea according to which, before that date, the combined provisions of Articles 17 of the RGEU and 9(2) of Decree-Law No 113/93 did not remove the barrier to the free movement of goods established by the requirement for approval of products in respect of which there were no technical specifications. The Commission also relies on four more specific complaints relating to the compatibility of the Portuguese legislation with the requirements stemming from the judgment in Case C-432/03 *Commission* v *Portugal*.

The complaint relating to the barrier to the free movement of goods established by the approval procedure laid down in Articles 17 of the RGEU and Article 9(2) of Decree-Law No 113/93

43 First, the Commission claims that, before the adoption of Decree-Law No 50/2008, the requirement for approval laid down in the combined provisions of Articles 17 of the RGEU and Article 9(2) of Decree-Law No 113/93 in respect of products not covered by technical specifications was a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC.

44 In response to that complaint, the Portuguese Republic observes that in Case C-432/03 *Commission* v *Portugal* the Court did not call into question the fact that a Member State should provide for a system of approval such as that resulting from Article 17 of the RGEU in respect of products for which there are no technical specifications or mutual recognition of certificates. In fact, if it did not provide for such a system, that Member State would not fulfil its obligation under Directive 89/106 to ensure that only construction products fit for their intended use are employed.

45 It is of course worth remembering in that regard that, in Case C-432/03 *Commission* v *Portugal*, the Court held that the refusal by an approval body to recognise, in an approval procedure such as that resulting from Article 17 of the RGEU, the equivalence of a certificate issued by an approval body in another Member State constitutes a restriction on the free movement of goods. However, after having considered whether such a measure could be justified on the basis of reasons in the public interest it found, in paragraphs 49 to 52 of that judgment, a failure to fulfil the obligations under Articles 28 and 30 EC only inasmuch as, first, the Portuguese authorities, when applying the approval procedure in question, had not taken into account certificates issued in other Member States nor requested from the applicant undertaking or the other body the necessary information and that, secondly, that approval procedure, as laid down in the Portuguese legislation, was not based on objective, non-discriminatory criteria which were known in advance.

46 There is therefore nothing in that judgment to indicate that, merely because a Member State provides for an approval procedure for products for which there are neither technical specifications nor mutual recognition of certificates of compliance, it has failed to fulfil its obligations under Community law.

47 Since the procedure laid down in Article 228(2) EC must be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of

enforcement (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 92) only a failure of a Member State to fulfil its obligations under the Treaty which the Court has declared, on the basis of Article 226 EC, to be well founded may be dealt with under that procedure.

48 The first complaint must therefore be dismissed as inadmissible.

The complaint relating to the restriction of the right to request the recognition of certificates issued in other Member States to solely the manufacturer and its agent

Arguments of the parties

49 By its second complaint, the Commission criticises the fact that, where there were no technical specifications, solely the manufacturer of the product concerned or its agent could request recognition of certificates issued by approval bodies established in other Member States, which implies that any other economic operator wishing to benefit from the provisions of Article 28 EC was required to request the approval of that product.

50 According to the Portuguese Republic, that complaint must be considered to be inadmissible, in so far as that rule was already included in the initial version of Article 9 of Decree-Law No 113/93 and, before the present proceedings were brought, the Commission had never raised any objection to the fact that it was for the manufacturer or its agent to request a certificate of conformity in respect of products for which there were no technical specifications.

51 On the substance of the case, the Portuguese Republic observes that, by restricting to the manufacturer or its agent the option of requesting a certificate of conformity, the

national legislation merely put the system for certification of CE conformity of products covered by technical specifications which, pursuant to Directive 89/106 and the relevant Portuguese implementing provisions, provided for the intervention of only those interested parties, on an equal footing with the system for certification of conformity with the national provisions where there were no technical specifications. In any event, that restriction on the right to request recognition of approval certificates was removed by the amendment to Decree-Law No 113/93 by Decree-Law No 50/2008.

Findings of the Court

52 Having regard to the line of arguments developed by the Portuguese Republic regarding the inadmissibility of that second complaint, it is appropriate to clarify the principles in the light of which complaints put forward by the Commission in an action brought under Article 228(2) EC are to be examined.

53 Under that provision, where the Court has found that a Member State has failed to fulfil an obligation under the Treaty and the Commission subsequently considers that the Member State has not taken the necessary measures to comply with the judgment of the Court of Justice declaring that failure to fulfil obligations, the Commission, after having given that Member State the opportunity to submit its observations, issues a reasoned opinion specifying the points on which the Member State has not complied with the judgment. If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit fixed by the Commission, the latter may bring a case before the Court of Justice.

54 It follows that even though, as observed in paragraph 47 of this judgment, the procedure laid down in Article 228(2) EC must be regarded as a special judicial procedure for the enforcement of judgments of the Court of Justice, that procedure, like the procedure laid down in Article 226 EC, requires a pre-litigation procedure to be followed.

55 It is settled case-law in that connection that, in an action under Article 226 EC, the letter of formal notice sent by the Commission to a Member State and the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure (see, in particular, Case C-422/05 *Commission* v *Belgium* [2007] ECR I-4749, paragraph 25, and Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15).

56 The same is true of proceedings brought under Article 228(2) EC, the subject-matter of which is circumscribed by the pre-litigation procedure provided for by that provision, meaning that the Commission, in its application, cannot extend the subject-matter of the dispute by putting forward new complaints which were not in the reasoned opinion in which the Commission specified the points on which the Member State concerned had not complied with the judgment of the Court finding a failure to fulfil obligations (see, to that effect, Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraphs 37 to 39).

57 Admittedly, the requirement that the subject-matter of proceedings brought under Articles 226 EC and 228(2) EC be circumscribed by the pre-litigation procedure provided for by those provisions cannot be stretched so far as to mean that in every case the complaints set out in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered (see, inter alia, regarding the application of Article 226 EC, Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 24, and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 37; and, as regards the application of Article 228(2) EC, Case C-177/04 *Commission* v *France*, paragraph 37).

58 Thus, the Court has held that, where legislation is altered during the pre-litigation procedure, the action may relate to provisions of national law which are not the same as

those referred to in the reasoned opinion (see, inter alia, Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 29, and Case C-177/04 *Commission* v *France*, paragraph 38). That is true in particular where, after the reasoned opinion is issued, a Member State amends the national provisions referred to in the reasoned opinion in order to address the complaints relating to the failure to comply with the judgment establishing the failure to fulfil obligations.

59 However, in proceedings brought under Article 228(2) EC, the Commission cannot criticise national provisions which, although applicable during the earlier pre-litigation procedure, were not referred to in that procedure, either expressly or, where those provisions relate directly to the aspects of the national legislation criticised in the reasoned opinion, implicitly.

60 Since the Commission is required, in the reasoned opinion issued under Article 228(2)-EC, to specify the points on which the Member State concerned has not complied with the Court's judgment finding a failure to fulfil obligations, the subject-matter of the proceedings cannot be extended to obligations not referred to in the reasoned opinion; otherwise essential procedural requirements intended to guarantee proper conduct of the proceedings would be infringed.

61 In the present case it is clear that, although the Commission indeed stated in the letter of formal notice and in the reasoned opinion relating to this case that, in its view, the amendments made by the Portuguese Republic to its legislation did not ensure full compliance with the judgment in Case C-432/03 *Commission* v *Portugal*, it did not, either in that letter of formal notice or in the reasoned opinion, criticise the rule that the right to request recognition of certificates of compliance could be exercised only by the manufacturer of the product or its agent.

62 As observed by the Portuguese Republic, upon expiry of the time-limit set in the reasoned opinion that rule was contained, in respect of construction products for which there are no technical specifications, in Article 9(2) of Decree-Law No 113/93, which implies that it was applicable not only during the pre-litigation procedure relating to this case but also during that which led to the judgment in Case C-432/03 *Commission* v *Portugal*, without having been referred to in either of those procedures.

63 Contrary to the Commission's submission, the complaint regarding that rule cannot be considered to be admissible on the ground that it in fact relates to the Court's criticism of the Portuguese legislation in Case C-432/03 *Commission* v *Portugal*, to the effect that that legislation was a restriction on the free movement of goods imposed on any trader wishing to use the products at issue in Portugal.

64 It must be pointed out in that regard that, in the case which gave rise to the judgment in Case C-432/03 *Commission* v *Portugal*, the issue before the Court was not the restriction of the right to request recognition of certificates issued in other Member States contained in Article 9(2) of Decree-Law No 113/93.

65 Moreover, when, during the pre-litigation procedure which led to the present proceedings, the Commission specified the points on which the Portuguese Republic had not complied with that judgment, it did not address the issue of the possible incompatibility of the Portuguese legislation with Articles 28 EC and 30 EC resulting from the fact that that legislation required, with respect to construction products not covered by technical specifications, that a request for recognition of certificates issued in other Member States originate from either the manufacturer of the product in question or its agent.

66 Accordingly, by criticising that aspect of the Portuguese legislation in its application, the Commission did not limit itself to the points on which, having regard to Case C-432/03 *Commission* v *Portugal* and according to its reasoned opinion, the Portuguese Republic had not complied with that judgment.

67 The purpose of the procedure under Article 228(2) EC, like that of the pre-litigation procedure under Article 226 EC, is to give the Member State concerned the opportunity to comply with its obligations under Community law or to put its case properly against the complaints set out by the Commission as regards its continued failure to fulfil its obligations (see, inter alia, by analogy, judgment of 23 April 2009 in Case C-331/07 *Commission* v *Greece*, paragraph 26)..

68 The reasoned opinion and the action provided for in Article 228(2) EC must set out the Commission's complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the extent to which the judgment finding a failure to fulfil obligations has been complied with, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a continued failure to fulfil obligations (see, by analogy, Case C-199/04 *Commission* v *United Kingdom* [2007] ECR I-1221, paragraph 21).

69 It follows that the second plea must be regarded as inadmissible.

The complaint relating to the lack of precision as regards the criteria which must be taken into account during approval of products for which there are no technical specifications

Arguments of the parties

70 By its third complaint, the Commission takes the view that the Portuguese legislation still infringes the principle of proportionality in so far as it has not specified the criteria which must be taken into account for the purposes of approval of products for which there are no technical specifications. In fact, even as amended by Decree-Law No 290/2007, Article 17(2) of the RGEU merely states that approvals must take into account the tests and inspections performed in other Member States, without specifying any of the other criteria which must be met.

71 In addition, on the basis of the wording of Article 17 of the RGEU, as it follows from that amendment, it is impossible to find out which body is competent to give such approval, since that amended version no longer refers to the prior opinion of the LNEC.

72 According to the Portuguese Republic, that complaint is inadmissible since it was not raised either in the course of the case which gave rise to the judgment in Case C-432/03 *Commission* v *Portugal*, or during the pre-litigation procedure relating to the present proceedings.

73 In any event, the Portuguese Republic maintains that both Decree No 1726/2006 and Decree No 19563/2006 have ensured that the judgment in Case C-432/03 *Commission* v *Portugal* has been complied with in Case C-432/03 *Commission* v *Portugal* in that, during a procedure for the approval of products for which there are no technical specifications, the competent national body must take into account the tests and inspections performed in a Member State. For polyethylene pipes, since the adoption of European standards, it is only exceptionally, where those pipes do not comply with those standards, that it is necessary to certify, in an approval procedure, that those pipes

are safe and fit for their intended use. That examination is performed in the light of the essential requirements set out in Annex I to Directive 89/106 and implemented in Portugal in Annex I to Decree-Law No 113/93, in exceptional cases, in respect of which it is difficult to define approval criteria in addition to those essential requirements. In that regard, the only effect of the amendment to point 8 of Article 17 of the RGEU by Decree-Law No 50/2008 was to clarify the fact that the approval procedure is followed in the light of those essential requirements.

74 As regards the failure to define the competent body for the approval of construction products for which there are no technical specifications, the Portuguese Republic observes that, even if, at a certain date, Article 17 of the RGEU did not expressly designate the LNEC as the competent body, the competence of that body follows clearly from the national legislation read as a whole.

Findings of the Court

75 As regards, first, the complaint relating to the lack of precision as to the criteria to be taken into account during an approval procedure performed by the LNEC under Article 17 of the RGEU, it must be stated that the Commission did not refer to that complaint either in its letter of formal notice or in its reasoned opinion relating to this case, which, in respect of that approval procedure, merely criticised the Portuguese Republic for having amended the legislative framework by means of the adoption of a decree, namely Decree No 1726/2006, instead of having amended Article 17 of the RGEU itself and, as regards that decree, for adopting a text which, first, does not make any reference to Article 17, secondly, does not refer to individual pipes and, thirdly, does not provide for the obligation to take into account certificates issued in other Member States.

76 When, subsequently, the Commission in its application went on to criticise the approval procedure provided for in Article 17 of the RGEU, it did not reiterate the criticisms expressed in the pre-litigation procedure but only the complaint relating to a

lack of precision concerning the criteria to be taken into account during that approval procedure, which had not been dealt with in the pre-litigation procedure.

77 The Commission cannot submit for the first time at the application stage a complaint which it did not put forward during the pre-litigation procedure without extending the subject-matter of the proceedings and, consequently, without infringing the rights of the defence.

78 The Commission's complaint about the lack of precision as to the criteria to be taken into account in the approval procedure provided for in Article 17 of the RGEU also cannot be considered to be admissible simply because it relates to the criticism made by the Court in paragraph 50 of the judgment in Case C-432/03 *Commission* v *Portugal*, concerning the lack of objective, non-discriminatory criteria known in advance to which the pipes were subject during that approval procedure.

79 When, during the pre-litigation procedure which led to this case, the Commission stated on which points the Portuguese Republic had not complied with that judgment, it did not address the possible infringement of Articles 28 EC and 30 EC stemming from the fact that the Portuguese legislation, even after it had been amended in the meantime, did not adequately define the criteria to be taken into account during that approval procedure.

80 Furthermore, the Commission did not consider either in its letter of formal notice or in its reasoned opinion the provisions of Decree-Law No 113/93, to which both Decree No 1726/2006 and Decree No 19563/2006 refer, as regards the LNEC's methods of taking into account tests and inspections performed in other Member States during the procedure for the approval of pipes.

81 Since, by criticising that aspect of the Portuguese legislation in its application, the Commission did not limit itself to the points on which it had stated in its reasoned opinion that the Portuguese Republic had failed to comply with the judgment in Case C-432/03 *Commission* v *Portugal*, that complaint must therefore be held to be inadmissible.

82 Secondly, as regards the lack of precision in Article 17 of the RGEU, as amended by Decree-Law No 290/2007, concerning the competent body to approve products for which there are no technical specifications, the Court notes that, although the Commission did not refer to that lack of precision during the pre-litigation procedure either, that can be explained by the fact that the Commission's complaint relates to a provision inserted by the Portuguese authorities in order to address the criticisms made by that institution during the pre-litigation procedure.

83 However, as the Portuguese Republic maintains, that complaint is unfounded in so far as, even after the adoption of Decree-Law No 290/2007, Article 17 of the RGEU should be read in combination with other relevant national provisions, such as those defining the tasks attributed to the LNEC, particularly Article 3(2)(d) of Decree-Law No 304/2007 of 24 August 2007 (*Diário da República*, Series I, No 163 of 24 August 2007), from which it is apparent that the LNEC is the competent body.

84 The third plea must therefore be rejected as in part inadmissible and in part unfounded.

The complaint relating to the application of discriminatory criteria in the recognition of certificates issued in other Member States

Arguments of the parties

85 By its fourth complaint, the Commission alleges that Article 9(2) of Decree-Law No 113/93 subjects the recognition, in Portugal, of certificates issued in other Member States to 'triple nationality' criteria, according to which the relevant tests and inspections had to be performed in the State of manufacture according to the methods applicable in Portugal or recognised as equivalent by a Portuguese public body within the framework of the Portuguese quality system. According to the Commission, it follows that, contrary to what the Court had required at paragraphs 50 and 51 of Case C-432/03 *Commission* v *Portugal*, the decisions recognising those certificates were not taken on the basis of objective and non-discriminatory criteria.

86 According to the Portuguese Republic, that complaint is inadmissible in so far as the so-called 'triple nationality' criteria were already included in the original version of Article 9(2) of Decree-Law No 113/93 and the Commission had not made any objection in that regard, either during the pre-litigation procedure giving rise to this case or in the pre-litigation procedure for the case which gave rise to the judgment in Case C-432/03 *Commission* v *Portugal*, or in the proceedings before the Court in that case.

87 In any event, the rule that, where there were no technical specifications, the competent Portuguese body recognised tests and inspections performed in other Member States only if they were performed according to methods applicable in Portugal or considered by that body to be equivalent to those methods, was simply a transposition of Article 16(1) of Directive 89/106 intended to ensure the safety of construction products in respect of which there were no technical specifications. The fact that that rule applied to approval procedures introduced pursuant to Article 17 of the RGEU was intended specifically to facilitate the taking into account of tests and inspections performed in another Member State.

Findings of the Court

88 The Court notes that the Commission did not, either in its letter of formal notice or in its reasoned opinion, criticise the fact that that legislation made the declaration of conformity of products originating from other Member States in respect of which there were no technical specifications, like the recognition of certificates of conformity issued in other Member States for such products, subject to the requirement that those products had passed tests and inspections performed by an authorised body established in the Member State of manufacture according to the methods applicable in Portugal or recognised as equivalent by the Instituto Português da Qualidade.

89 As pointed out by the Portuguese Republic, upon expiry of the time-limit set in the reasoned opinion, that requirement was contained, as regards construction products in respect of which there were no technical specifications, in Article 9(2) of Decree-Law No 113/93, the purpose of which was to transpose Article 16(1) of Directive 89/106 into Portuguese law. Although that requirement was applicable not only during the pre-litigation procedure leading to the present proceedings, but also during that which led to the judgment in Case C-432/03 *Commission* v *Portugal*, that requirement was not referred to in any of those procedures. The latter judgment does not make any mention of the incompatibility of Decree-Law No 113/93, in particular Article 9(2) thereof, with Articles 28 EC and 30 EC.

90 Accordingly, the Commission's complaint relating to the criteria which must be satisfied by the tests and inspections in other Member States cannot be regarded as admissible on the ground that it in fact relates to the criticism expressed by the Court in paragraph 51 of Case C-432/03 *Commission* v *Portugal*, concerning the fact that the pipes at issue were not subject to objective and non-discriminatory criteria known in advance during the approval procedure provided for in Article 17 of the RGEU.

91 Since, by criticising in its application the conditions for recognition provided for in Article 9(2) of Decree-Law No 113/93, the Commission did not restrict its arguments to

the points on which the Court accepted, in Case C-432/03 *Commission* v *Portugal*, that the Portuguese Republic had failed to fulfil its obligations under the Treaty, the fourth complaint must also be held to be inadmissible.

The complaint alleging a failure to adopt measures with regard to traders affected by the national legislation at issue

Arguments of the parties

92 By its fifth complaint, the Commission submits that the Portuguese Republic has not complied with the judgment in Case C-432/03 *Commission* v *Portugal*, in so far as it has failed to adopt measures with regard to traders affected by the national legislation at issue. In spite of the Court's findings of fact in paragraph 48 of Case C-432/03 *Commission* v *Portugal*, the Portuguese Republic merely stated that there had been no case recently registered in which tiles were refused approval under provisions which did not comply with Articles 28 EC and 30 EC. Noting the powers of investigation of the Portuguese administrative bodies, according to the Portuguese Republic's own submissions, the Commission argues that the Portuguese Republic should not merely have stated that, because the complainant undertaking had requested not approval of its products but only the recognition of a certificate issued in Italy, that undertaking did not in fact seek such an approval.

93 In that regard, the Portuguese Republic observes, first, that it was only in its application that the Commission referred to the facts discussed by the Court in paragraph 48 of Case C-432/03 *Commission* v *Portugal*.

94 Secondly, the Portuguese Republic explains that it is evident from the correspondence exchanged between the LNEC and the complainant undertaking that the latter never intended to initiate a procedure for approval of polyethylene pipes which it sought to

sell in Portugal, but that it was seeking only to have the foreign certificates in its possession considered as sufficient and for itself to be excused from the approval procedure. Since the LNEC had not received either a request for approval from that undertaking or even a request for information about the approval procedure, it would have been unreasonable to require the LNEC to draw that undertaking's attention to the conditions under which the certificate issued by the IIP or any other certificate might be used to obtain a certificate of conformity and, if necessary, the approval of the pipes at issue. To avoid any doubt, the LNEC nevertheless informed the complainant undertaking on 12 February 2008 that, for some time, it had been able to put the products at issue on the national market without any prior approval requirement.

95 Lastly, the Portuguese Republic submits that there had been no incident detected of a failure to comply with the judgment in Case C-432/03 *Commission* v *Portugal*, concerning the approval procedures for pipes or their components. It adds that the complainant undertaking could have submitted an application to the national courts for compensation for any loss suffered in 2000 as a result of a misapplication of Article 17 of the RGEU, which it did not do.

Findings of the Court

96 First, it must be observed that, since the Commission, already during the pre-litigation procedure, complained that the Portuguese Republic had not taken measures with regard to traders affected by the legislation at issue in Case C-432/03 *Commission* v *Portugal*, the admissibility of this complaint cannot be called into question.

97 As regards, secondly, the examination of the merits of this complaint, it must be stated that the Commission merely reiterated the factual background to that judgment, without providing the Court with the information necessary to determine the extent to

which the Member State had complied with the judgment establishing the failure to fulfil obligations (see, to that effect, Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 73, and Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraph 74).

98 Thus, the Commission has not adduced any information liable to refute the Portuguese Republic's assertion that, apart from the situation of the undertaking whose complaint led to the judgment in Case C-432/03 *Commission* v *Portugal*, there has been no incident detected of an undertaking's having encountered difficulties in obtaining approval for products or recognition of certificates issued by other Member States, as regards construction products in respect of which there were no technical specifications.

99 Lastly, as regards the complainant undertaking behind the case which led to the judgment in Case C-432/03 *Commission* v *Portugal*, as the Portuguese Republic has pointed out, without being contradicted by the Commission, first, that undertaking has not taken any other steps to obtain approval for its products or recognition of certificates issued in other Member States and, secondly, since the adoption of European standards for the products at issue in Case C-432/03 *Commission* v *Portugal* and the entry into force of Decree No 1726/2006, approval of those products has no longer been necessary where they were covered by those standards.

100 Accordingly, the Court finds that the Commission has not established that, by failing to take measures with regard to traders affected by the national legislation at issue, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and, in so doing, failed to comply with the judgment in Case C-432/03 *Commission* v *Portugal*.

101 The fifth complaint must therefore be dismissed as inadmissible.

102 Consequently, the Commission's application must be dismissed in so far as it seeks a declaration that, by failing to take the measures necessary to comply with the judgment in Case C-432/03 *Commission* v *Portugal*, the Portuguese Republic has failed to fulfil its obligations under Article 228(1) EC.

103 Consequently, that application must also be dismissed in so far as it seeks an order that the Portuguese Republic make a lump sum payment on account of that failure to fulfil obligations.

Costs

104 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 been unsuccessful and the Portuguese Republic has applied for costs, the Commission must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]