Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 December 2020*

(Appeal – Approximation of laws – Regulation (EU) No 305/2011 – Harmonised conditions for the marketing of construction products – Harmonised standards and technical regulations – Harmonised standards EN 14342:2013, EN 14904:2006, EN 13341:2005 + A1:2011 and EN 12285-2:2005 – Action for annulment)

In Joined Cases C-475/19 P and C-688/19 P,

APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 20 June and 18 September 2019,

Federal Republic of Germany, represented by J. Möller and R. Kanitz, acting as Agents, and by M. Kottmann, M. Winkelmüller and F. van Schewick, Rechtsanwälte,

appellant (C-475/19 P and C-688/19 P),

the other parties to the proceedings being:

European Commission, represented by C. Hermes, M. Huttunen and A. Sipos, acting as Agents,

defendant at first instance (C-475/19 P and C-688/19 P),

Republic of Finland, represented by S. Hartikainen and A. Laine, acting as Agents,

intervener at first instance (C-475/19 P),

THE COURT (First Chamber),

composed of J.C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader (Rapporteur), M. Safjan and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

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

* Language of the case: German.

gives the following

Judgment

1 By its appeal in case C-475/19 P, the Federal Republic of Germany seeks to have set aside the judgment of the General Court of the European Union of 10 April 2019, *Germany* v *Commission* (T-229/17, not published , EU:T:2019:236; 'the first judgment under appeal'), by which that court dismissed its action for annulment of (1) Commission Decision (EU) 2017/133 of 25 January 2017 on the maintenance with a restriction in the *Official Journal of the European Union* of the reference of harmonised standard EN 14342:2013 'Wood flooring and parquet: Characteristics, evaluation of conformity and marking' in accordance with Regulation (EU) No 305/2011 of the European Parliament and of the Council (OJ 2017 L 21, p. 113), (2) Commission Decision (EU) 2017/145 of 25 January 2017 on the maintenance with a restriction in the *Official Journal of the European Union* of the reference of harmonised standard EN 14904:2006 'Surfaces for sport areas – Indoor surfaces for multi-sports use: Specification' in accordance with Regulation (EU) No 305/2011 of the European Parliament and of the Council (OJ 2017 L 22, p. 62) (together; 'the first contested decisions'), (3) the Commission communication of 10 March 2017 in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2017 C 76, p. 32; 'the "implementation" communication'), in so far as it refers to harmonised standards EN 14342:2013 and EN 14904:2006, (4) the Commission communication of 11 August 2017 in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2017 C 267, p. 16), in so far as it refers to harmonised standards EN 14342:2013 and EN 14904:2006, (5) the Commission communication of 15 December 2017 in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2017 C 435, p. 41), in so far as it relates to harmonised standards EN 14342:2013 and EN 14904:2006, and (6) the Commission communication of 9 March 2018 in the framework of the implementation of Regulation (EU) No 305/2011 of the European Parliament and of the Council laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2018 C 92, p. 139), in so far as it refers to harmonised standards EN 14342:2013 and EN 14904:2006 (together; 'the three other contested communications').

2 By its appeal in Case C-688/19 P, the Federal Republic of Germany seeks to have set aside the judgment of the Court of 9 July 2019, *Germany* v *Commission* (T-53/18, not published, EU:T:2019:490; 'the second judgment under appeal'), by which that court dismissed its action for annulment of (1) Commission Decision (EU) 2017/1995 of 6 November 2017 to maintain in the *Official Journal of the European Union* the reference of harmonised standard EN 13341:2005 + A1:2011 on static thermoplastic tanks for above-ground storage of domestic heating oils, kerosene and diesel fuels in accordance with Regulation (EU) No 305/2011 of the European Parliament and of the Council (OJ 2017 L 288, p. 36) and (2) Commission Decision (EU) 2017/1996 of 6 November 2017 to maintain in the *Official Journal of the European Union* the reference of harmonised standard EN 12285-2:2005 on Workshop fabricated steel tanks in accordance with Regulation (EU) No 305/2011 of the European Parliament and of the Council (OJ 2017 L 288, p. 39) (together; 'the second contested decisions').

Legal context

3 Recitals 1 to 3 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC (OJ 2011 L 88, p. 5), state:

'(1) The rules of Member States require that construction works be designed and executed so as not to endanger the safety of persons, domestic animals or property nor damage the environment.

(2) Those rules have a direct influence on the requirements of construction products. Those requirements are consequently reflected in national product standards, national technical approvals and other national technical specifications and provisions related to construction products. Due to their disparity, those requirements hinder trade within the Union.

(3) This Regulation should not affect the right of Member States to specify the requirements they deem necessary to ensure the protection of health, the environment and workers when using construction products.'

4 Article 1 of that regulation, headed 'Subject matter', provides:

'This Regulation lays down conditions for the placing or making available on the market of construction products by establishing harmonised rules on how to express the performance of construction products in relation to their essential characteristics and on the use of CE marking on those products.'

5 Article 2 of that regulation, headed 'Definitions', provides:

'For the purposes of this Regulation the following definitions shall apply:

…

4. "essential characteristics" means those characteristics of the construction product which relate to the basic requirements for construction works;

…'

6 Article 3 of Regulation No 305/2011, headed 'Basic requirements for construction works and essential characteristics of construction products', provides, in paragraphs 1 and 2:

'1. The basic requirements for construction works set out in Annex I shall constitute the basis for the preparation of standardisation mandates and harmonised technical specifications.

2. The essential characteristics of construction products shall be laid down in harmonised technical specifications in relation to the basic requirements for construction works.'

7 Article 8 of that regulation, headed ‘General principles and use of CE marking’, provides, in paragraph 4:

‘A Member State shall not prohibit or impede, within its territory or under its responsibility, the making available on the market or the use of construction products bearing the CE marking, when the declared performances correspond to the requirements for such use in that Member State.’

8 Article 17 of that regulation, headed ‘Harmonised standards’, provides:

‘1. Harmonised standards shall be established by the European standardisation bodies listed in Annex I to Directive 98/34/EC [of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37)] on the basis of requests (hereinafter referred to as “mandates”) issued by the Commission in accordance with Article 6 of that Directive after having consulted the Standing Committee on Construction referred to in Article 64 of this Regulation (hereinafter referred to as “Standing Committee on Construction”).

…

3. Harmonised standards shall provide the methods and the criteria for assessing the performance of the construction products in relation to their essential characteristics.

When provided for in the relevant mandate, a harmonised standard shall refer to an intended use of products to be covered by it.

Harmonised standards shall, where appropriate and without endangering the accuracy, reliability or stability of the results, provide methods less onerous than testing for assessing the performance of the construction products in relation to their essential characteristics.

…

5. The Commission shall assess the conformity of harmonised standards established by the European standardisation bodies with the relevant mandate.

The Commission shall publish in the *Official Journal of the European Union* the list of references of harmonised standards which are in conformity with the relevant mandates.

The following shall be indicated for each harmonised standard in the list:

(a) references of superseded harmonised technical specifications, if any;

(b) date of the beginning of the coexistence period;

(c) date of the end of the coexistence period.

The Commission shall publish any updates to that list.

From the date of the beginning of the coexistence period it shall be possible to use a harmonised standard to make a declaration of performance for a construction product covered by it. National

standardisation bodies are under the obligation to transpose the harmonised standards in conformity with Directive 98/34/EC.

Without prejudice to Articles 36 to 38, from the date of the end of the coexistence period, the harmonised standard shall be the only means used for drawing up a declaration of performance for a construction product covered by it.

At the end of the coexistence period, conflicting national standards shall be withdrawn and Member States shall terminate the validity of all conflicting national provisions.'

9 Article 18 of Regulation No 305/2011, headed 'Formal objection against harmonised standards', provides:

'1. When a Member State or the Commission considers that a harmonised standard does not entirely satisfy the requirements set out in the relevant mandate, the Member State concerned or the Commission, after having consulted the Standing Committee on Construction, shall bring the matter before the Committee set up pursuant to Article 5 of Directive 98/34/EC, giving its arguments. That Committee shall, after having consulted the relevant European standardisation bodies deliver its opinion without delay.

2. In the light of the opinion of the Committee set up pursuant to Article 5 of Directive 98/34/EC, the Commission shall decide to publish, not to publish, to publish with restriction, to maintain, to maintain with restriction or to withdraw the references to the harmonised standard concerned in the *Official Journal of the European Union*.

3. The Commission shall inform the European standardisation body concerned of its decision and, if necessary, request the revision of the harmonised standard concerned.'

10 Article 19 of that regulation, headed 'European Assessment Document', provides, in paragraph 1:

'Following a request for a European Technical Assessment by a manufacturer, a European Assessment Document shall be drawn up and adopted by the organisation of [Technical Assessment Bodies] for any construction product not covered or not fully covered by a harmonised standard, for which the performance in relation to its essential characteristics cannot be entirely assessed according to an existing harmonised standard, because, inter alia:

…

(b) for at least one essential characteristic of that product, the assessment method provided for in the harmonised standard is not appropriate; or

(c) the harmonised standard does not provide for any assessment method in relation to at least one essential characteristic of that product.'

11 Annex I to the regulation specifies the 'Basic requirements for construction works'. point 3 of that annex, headed 'Hygiene, health and the environment', provides:

'The construction works must be designed and built in such a way that they will, throughout their life cycle, not be a threat to the hygiene or health and safety of workers, occupants or neighbours, nor have an exceedingly high impact, over their entire life cycle, on the environmental quality or on the climate during their construction, use and demolition, in particular as a result of any of the following:

…

(b) the emissions of dangerous substances, volatile organic compounds (VOC), greenhouse gases or dangerous particles into indoor or out door air;

…'

12 Directive 98/34 has been replaced by Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

13 The committee instituted by Article 5 of Directive 98/34 has been replaced by that provided for in Article 22 of Regulation No 1025/2012, as originally enacted.

Background to the disputes

Case C-475/19 P

14 The background to the dispute is set out in paragraphs 5 to 13 of the first judgment under appeal, in the following terms:

'5 On 12 November 1997, the European Commission gave a mandate to the European Committee for Standardisation [(CEN)], under reference M/119, concerning the development of harmonised standards on floorings. Those standards were to include a series of essential characteristics, such as reaction to fire, water tightness, breaking strength, and emission of asbestos, formaldehyde and pentachlorophenol. Mandate M/119 was issued pursuant to [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)] and amended by mandate M/137 of 25 July 2000 and by mandate M/119 rev. 1 of 22 June 2010, so as to include the emission of a series of other dangerous substances such as volatile organic compounds (VOCs).

6 Among those standards, harmonised standard EN 14342:2013 "Wood flooring and parquet – Characteristics, evaluation of conformity and marking" contained methods and criteria for assessing performance in relation to a series of essential characteristics. As regards the release of other dangerous substances such as VOCs, Clause 4.4 of harmonised standard EN 14342:2013 provided as follows:

"National regulations on dangerous substances may require verification and declaration on release, and sometimes content, of other dangerous substances, in addition to those dealt with in other clauses, when construction products covered by this standard are placed on those markets.

In the absence of European harmonised test methods, verification and declaration on release/content should be done taking into account national provisions in the place of use …"

7 Harmonised standard EN 14904:2006 "Indoor surfaces for multi-sports use – Specification" also related to a series of essential characteristics such as friction, durability, reaction to fire, emission of formaldehyde and pentachlorophenol content. In relation to other dangerous substances, Note 1 of Annex ZA.1 to that harmonised standard stated:

"In addition to any specific clauses relating to dangerous substances contained in this standard, there may be other requirements applicable to the products falling within its scope. In order to meet the provisions of the EU Construction Products Directive, these requirements need also to be complied with, when and where they apply."

8 On 21 August 2015, the Federal Republic of Germany raised formal objections with the Commission, pursuant to Article 18 of Regulation No 305/2011, in respect of harmonised standards EN 14342:2013 and EN 14904:2006.

9 The Federal Republic of Germany asserted that the two standards at issue did not entirely satisfy the mandate issued by the Commission, and that the essential characteristics of the construction products had not been laid down in accordance with Article 3(2) of Regulation No 305/2011. It stated that the two standards infringed Article 17(3) of Regulation No 305/2011 and mandate M/119, in that they did not contain harmonised evaluation procedures in relation to the release of other dangerous substances such as VOCs.

10 The Federal Republic of Germany went on to claim that, pending the introduction of harmonised methods of verification concerning the release of other dangerous substances and the emission or content of such substances, the references of the standards should be withdrawn from the *Official Journal of the European Union* or, in the alternative, should be published with a restriction, such that the disputed clauses of the standards, relating to the release of other dangerous substances, would not be regarded as having been harmonised, and it would be open to Member States to adopt national provisions concerning methods of verification, in the interests of compliance with the basic requirements for construction works as they pertain to health.

11 On 25 January 2017, the Commission adopted [the first contested decisions].

12 Article 1 of Decision 2017/133 provides:

"The reference of harmonised standard EN 14342:2013 'Wood flooring and parquet: Characteristics, evaluation of conformity and marking' shall be maintained with a restriction.

The Commission shall add the following restriction in the list of references of harmonised standards published in the *Official Journal of the European Union*: 'Clause 4.4 of standard EN 14342:2013 is excluded from the scope of the reference published'".

13 Article 1 of Decision 2017/145 provides:

"The reference of harmonised standard EN 14904:2006 'Surfaces for sport areas – Indoor surfaces for multi-sports use: Specification' shall be maintained with a restriction.

The Commission shall add the following restriction in the list of references of harmonised standards published in the *Official Journal of the European Union*: 'Note 1 of Annex ZA.1 to standard EN 14904:2006 is excluded from the scope of the reference published'".

15 On 10 March 2017, the Commission published the 'implementation' communication, which restated the list of all harmonised standards falling within the scope of Regulation No 305/2011. As regards the two standards EN 14342:2013 and EN 14904:2006, this communication essentially set out the restrictions which had already been stated in the first contested decisions.

16 On 11 August 2017, 15 December 2017 and 9 March 2018, the Commission published the three other contested communications.

Case C-688/19 P

17 The background to the dispute is set out in paragraphs 1 to 12 of the judgment under appeal, as follows:

'1 On 26 February 1999, the [Commission] gave a mandate to [CEN], under reference M/131, to develop harmonised standards for pipes, tanks and ancillaries not in contact with water intended for human consumption. Those standards were to include a series of essential characteristics, such as mechanical resistance and stability, crushing resistance, load bearing capacity and tightness (gas and liquid).

2 In 2004, CEN adopted harmonised standard EN 12285-2:2005 concerning steel tanks. As to the performance characteristic "mechanical resistance and stability" referred to in mandate M/131, this is addressed in the tables in section ZA, which provide that the products must comply, as regards wall thickness, with the requirements of Clause 4.3.6.1 and table 3 of the harmonised standard. That clause and that table set out the minimum wall thickness values for the tanks in question.

3 In 2005 and 2010, CEN adopted harmonised standard EN 13341:2005 + A1:2011 concerning static thermoplastic tanks. That standard contained methods and criteria for assessing performance in relation to a series of essential characteristics. As to the performance characteristic "mechanical resistance and stability" referred to in mandate M/131, this is addressed in the tables in section ZA.1 of Annex ZA, which provide that the products must comply with tables 4 to 6 of the harmonised standard as regards wall thickness. Tables 4 to 6 set out the minimum wall thickness values for the tanks in question.

4 The harmonised standards do not contain specific requirements or evaluation methods addressing the potential use of such tanks in areas subject to seismic activity or flooding. Similarly, they do not contain requirements concerning ground anchoring of tanks intended for construction.

5 The same is true of the performance characteristics "crushing resistance" and "load bearing capacity", in respect of which the harmonised norms do not contain any method or criterion for assessing performance.

6 On 21 August 2015, pursuant to Article 18 of Regulation [No 305/2011], the Federal Republic of Germany raised formal objections with the Commission in relation to harmonised standards EN 13341:2005 + A1:2011 and EN 12285-2:2005.

7 The Federal Republic of Germany considered that the two standards at issue did not entirely satisfy the mandate issued by the Commission under reference M/131, and that the essential characteristics of the construction products had not been laid down in accordance with Article 3(2) of Regulation No 305/2011. It stated that the two standards infringed Article 17(3) of Regulation No 305/2011 and mandate M/131, in that they did not contain methods for determining performance in relation to mechanical resistance and stability, crushing resistance or load bearing capacity or, in particular, in the event that the products were used in areas subject to seismic activity or flooding.

8 The Federal Republic of Germany went on to claim, in relation to harmonised standards EN 13341:2005 + A1:2011 and EN 12285-2:2005 that, pending the introduction of harmonised methods of verification concerning mechanical resistance and stability, crushing resistance and load bearing capacity in the event of use in areas subject to seismic activity or flooding, the references of the standards should be published with restriction in the *Official Journal of the European Union*, or in the alternative, that they should be withdrawn from the *Official Journal of the European Union* as regards static thermoplastic tanks and workshop fabricated steel tanks.

9 After consulting the Standing Committee on Construction instituted by Article 64 of Regulation No 305/2011, the Commission referred the matter to the committee established by Article 22 of Regulation [No 1025/2012]. The latter committee delivered an opinion on the formal objections.

10 On 6 November 2017, the Commission adopted [the second contested decisions].

11 Article 1 of Decision 2017/1995 provides:

"The reference of harmonised standard EN 13341:2005 + A1:2011 'Static thermoplastic tanks for above ground storage of domestic heating oils, kerosene and diesel fuels – Blow moulded and rotationally moulded polyethylene tanks and rotationally moulded tanks made of anionically polymerized polyamide 6 – Requirements and test methods' shall be maintained in the Official Journal of the European Union."

12 Article 1 of Decision 2017/1996 provides:

"The reference of harmonised standard EN 12285-2:2005 'Workshop fabricated steel tanks – Part 2: Horizontal cylindrical single skin and double skin tanks for the aboveground storage of flammable and non-flammable water polluting liquids' shall be maintained in the Official Journal of the European Union."'

The actions before the General Court and the judgments under appeal

Case T-229/17

18 By an application lodged at the General Court Registry on 19 April 2017, the Federal Republic of Germany brought an action for annulment of the first contested decisions and of the 'implementation' communication.

19 By document lodged at the Court Registry on 4 August 2017, the Republic of Finland sought leave to intervene in support of Federal Republic of Germany's claims. By decision of 1 September 2017, the President of the First Chamber of the General Court granted leave to intervene.

20 In accordance with Article 86(3) of the Rules of Procedure of the General Court, the Federal Republic of Germany lodged three statements of modification at the Court Registry, on 9 October 2017, 2 March 2018 and 20 May 2018, seeking annulment of the three other contested communications.

21 In support of its action, the Federal Republic of Germany advanced three pleas, based essentially on failure to comply with the essential procedural requirements flowing from Article 18 of Regulation No 305/2011 (first plea), failure to comply with the obligation to state reasons (second plea), and breach of the substantive provisions of that regulation (third plea).

22 By the first judgment under appeal, the Court dismissed the action as partly inadmissible, as regards the 'implementation' communication and the three other contested communications, and partly unfounded, as regards the first contested decisions.

Case T-53/18

23 By application lodged at the Court Registry on 31 January 2018, the Federal Republic of Germany brought an action for annulment of the second contested decisions.

24 In support of its action, the Federal Republic of Germany advanced two pleas, based essentially on failure to comply with the obligation to state reasons (first plea), and breach of the substantive provisions of Regulation No 305/2011 (second plea).

25 By the second judgment under appeal, the General Court dismissed the action in its entirety.

Procedure before the Court of Justice and forms of order sought

26 By its appeal in Case C-475/19 P, the Federal Republic of Germany asks the Court:

– to set aside the first judgment under appeal;

– to annul the first contested decisions;

– to annul the 'implementation' communication and the three other contested communications;

– in the alternative, to remit the matter to the General Court as regards the claims for annulment of the first contested decisions, the 'implementation' communication and the other three contested communications;

– to order the Commission to pay the costs.

27 The Republic of Finland asks the Court to grant the orders sought by the Republic of Germany in its appeal in Case C-475/19 P.

28 By its appeal in Case C-688/19 P, the Federal Republic of Germany asks the Court:

– to set aside the second judgment under appeal;

– to annul the second contested decisions;

– in the alternative, to remit the case to the General Court as regards the claims for annulment of the second contested decisions;

– to order the Commission to pay the costs.

29 The Commission contends that the Court should:

– dismiss the appeals in their entirety;

– order the appellant to pay the costs.

30 By decision of the President of the First Chamber of 15 September 2020, Cases C-475/19 P and C-688/19 P were joined for the purposes of the judgment.

The appeals

The plea of inadmissibility

Arguments of the parties

31 The Commission argues that the appeals are inadmissible in that they merely repeat the arguments advanced before the Court and do not identify the contested paragraphs of the judgments under appeal.

32 The Federal Republic of Germany submits that the plea of inadmissibility should be rejected.

Findings of the Court

33 It follows from Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice that an appeal must identify precisely the contested points in the grounds of the judgment which the appellant seeks to have set aside and indicate precisely the legal arguments specifically advanced in support of the appeal, failing which the appeal or ground of appeal concerned is

inadmissible. Accordingly, an appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court does not satisfy the requirements to state reasons under those provisions. However, the points of law examined at first instance may be argued again in the course of an appeal, provided that the appellant challenges the interpretation or application of EU law by the General Court (order of 5 September 2019, *Iceland Foods* v *EUIPO*, C-162/19 P, not published, EU:C:2019:686, paragraph 5 (Opinion of Advocate General, point 6 and the case-law cited).

34 In the present case, the appeals, taken as a whole, do identify with sufficient precision the disputed paragraphs of the judgment under appeal that are disputed, as well as the grounds on which those paragraphs are, in the appellants' submission, vitiated by errors of law, and thus do not simply repeat or reproduce the arguments advanced before the General Court, as the Commission has suggested. The Court of Justice is therefore in a position to carry out its review of legality.

35 Accordingly, the appellant has satisfied the requirement to state reasons referred to in paragraph 33 of this judgment, and the Commission's plea of inadmissibility must be rejected.

Substance

36 In support of its appeal in Case C-475/19 P, the Federal Republic of Germany advances three grounds of appeal. The first ground alleges infringement of the first paragraph of Article 263 TFEU, essentially on the basis that, in the first judgment under appeal, the Court failed to recognise that the 'implementation' communication and the three other contested communications produced legal effects distinct from those produced by the first contested decisions. By its second ground, it submits that that judgment infringes Article 18(2) of Regulation No 305/2011, read in conjunction with Article 17(5) thereof, on the basis that those provisions do not merely enable but also oblige the Commission to take one of the measures proposed by the Federal Republic of Germany. The third ground alleges infringement of Article 18(2) of that regulation, read in conjunction with Article 3(1) and (2) and Article 17(3) thereof, on the basis that those provisions oblige the Commission to consider whether the standards to which the first contested decisions relate undermine compliance with the basic requirements for construction works.

37 The Republic of Finland intervenes in support of the second and third grounds of appeal in Case C-475/19 P.

38 In Case C-688/19 P, the Federal Republic of Germany advances two grounds of appeal. The first ground alleges infringement of Article 18(2) of Regulation No 305/2011, read in conjunction with Article 17(5) thereof, on the basis that the General Court failed to recognise that those provisions do not merely enable but also oblige the Commission to take one of the measures suggested by the Federal Republic of Germany. By its second ground, it submits that the second judgment under appeal infringes Article 18(2) of that regulation, read in conjunction with Article 3(1) and (2) and Article 17(3) thereof, on the basis that the Court failed to recognise that those provisions oblige the Commission to consider whether the standards to which the second contested decisions relate undermine compliance with the basic requirements for construction works.

The first plea in Case C-475/19 P, based on the claimed legal effect of the contested communications

– *Arguments of the parties*

39 The Federal Republic of Germany's first ground of appeal is made up of two branches.

40 Under the first branch, the appellant argues that, contrary to what the Court held, the 'implementation' communication and the three other contested communications produce mandatory legal effects. Under Article 17(5) of Regulation No 305/2011, it submits, the effect of the Commission publishing the list of references of harmonised standards in the *Official Journal of the European Union* was that, from the date of the beginning of the coexistence period, it was possible – and from the date of the end of the coexistence period, it was obligatory – to use a harmonised standard to make a declaration of performance for a construction product covered by that standard. Thus, it argues, the Court was wrong to hold that the communications in question did not produce any new legal effects, considered in relation to the first contested decisions.

41 Under the second branch, the appellant criticises the Court for holding that it was obliged to establish that the communications in question had affected its interests or brought about a distinct change in its legal position, given that a Member State is not required to demonstrate that the act produces legal effects which relate to it personally or affect its interests.

42 The Commission contends that both branches of this ground of appeal should be rejected.

– *Assessment of the Court*

43 As regards the first branch of the first plea, it should be observed that, as is apparent, essentially, from paragraphs 42, 43 and 64 of the first judgment under appeal, the first contested decisions produced legal effects in relation to the appellant, both in that its main claim was rejected, and in that its alternative claim was partially upheld. It was the fact that the alternative claim was partially upheld that led the Commission to adopt, for implementation purposes, the four contested communications.

44 Accordingly, and as the Court rightly held in paragraph 49 of the first judgment under appeal, the communications issued by the Commission in the context of implementation of Regulation No 305/2011, where they relate simply to an update of the list of references of all harmonised standards, following the partial upholding of a restriction formulated by a Member State on the basis of Article 18(1) of that regulation, are limited, in reality, as regards the harmonised standards at issue, to a reference thereto, and do not produce legal effects distinct from those already produced, in relation to that Member State, by the decisions adopted by that institution on the basis of Article 18(2) of that regulation.

45 To the extent that, as is apparent from paragraphs 43 to 45 of the first judgment under appeal, it can be seen from the subject matter, the content and the context of the 'implementation' communication and the three other contested communications, and thus from a detailed analysis of those communications, that they essentially seek to restate the restrictions already contained in the first contested decisions, the General Court was justified in holding that those communications could not produce autonomous legal effects.

46 It follows that this branch must be rejected.

47 As to the second branch of the first ground, this must be rejected as ineffective, as it could only have succeeded if it had been held that the communications issued by the Commission, in the context of the implementation of Regulation No 305/2011, produced autonomous legal effects.

48 In those circumstances, the first ground of appeal in Case C-475/19 P must be dismissed.

The second and third grounds of appeal in Case C-475/19 P and the first and second grounds in Case C-688/19 P, concerning the interpretation of Article 18(2) of Regulation No 305/2011

– *Arguments of the parties*

49 The Federal Republic of Germany submits, essentially, under the second ground of appeal in Case C-475/19 P and the first ground in Case C-688/19 P, that the Court misinterpreted Article 18(2) of Regulation No 305/2011. It should be observed, as regards the second ground in case C-475/19 P and the first ground in Case C-688/19 P, that these grounds, each made up of three branches, are formulated similarly.

50 Under the first and second branches, the appellant observes that the Commission is entitled to formulate a restriction in relation to a particular harmonised standard, as the appellant suggested it should do in the present case. Thus, it submits, the Commission is not merely empowered, but also obliged, to see that the legal effects contemplated by that regulation are produced only in part, as regards a standard which does not entirely satisfy the requirements set out in the relevant mandate – this, the appellant contends, is clear from the wording of Article 18(2) of Regulation No 305/2011.

51 Thus, the appellant argues, it follows from the second subparagraph of Article 17(5) of that regulation that, when the Commission publishes the harmonised standards conforming to the mandates received, it must limit itself to publishing the references of those standards which are entirely in conformity with the mandates.

52 Furthermore, given that the procedure provided for in Article 18 of Regulation No 305/2011 is a counterpart to that envisaged by the second subparagraph of Article 17(5) of that regulation, what is prohibited by the latter provision cannot be permitted by Article 18(2) of the regulation.

53 Under the third branch, the appellant criticises the 'broad discretion' attributed by the Court, in the first and second judgments under appeal, to the Commission. As the Court held in paragraph 43 of its judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), while the development of a harmonised standard is entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure which is strictly governed by the essential requirements defined by EU law, initiated, managed and monitored by the Commission. Against that background, it is incumbent on the Commission to perform its function of verifying the formal and substantive aspects.

54 As regards the third ground of appeal in Case C-475/19 P and the second ground in Case C-688/19 P, these are also formulated in a similar manner.

55 The appellant submits that the Court failed to recognise that, under Article 18(2) of Regulation No 305/2011, read in conjunction with Article 3(1) and (2) and Article 17(3) of that regulation, the Commission is required to consider whether the harmonised standards enable Member States to ensure compliance with the basic requirements for construction works. It contends that the harmonised standards must enable the performance of a construction product to be assessed in relation to the essential characteristics of that product, in order to meet the basic requirements for construction works.

56 The Republic of Finland, intervening in support of the second and third grounds of appeal in Case C-475/19 P, submits essentially that the Court failed to recognise that the Commission is required, pursuant to Regulation No 305/2011, to verify whether a harmonised standard is apt to comply with the basic requirements for construction works, as regards all the requirements of the mandate on which it is based. Thus, it argues, if a standard proves to be incomplete in any way, the Commission must acknowledge that, in so far as the standard does not cover the assessment criteria for the basic requirements specified by the mandate, it remains open to the Member States to establish national requirements as regards those essential characteristics.

57 The Commission contends that the second and third grounds of appeal in Case C-475/19 P, and the first and second grounds in Case C-688/19 P, should be rejected.

– *Assessment of the Court*

58 In the first place, it is apparent from the wording of Article 18(1) of Regulation No 305/2011 that the formal objection procedure is available where a Member State or the Commission considers that a harmonised standard does not 'entirely' satisfy the requirements set out in the relevant mandate, which covers both the situation where the standard is incomplete in relation to the mandate, and the situation where it implements the mandate incorrectly in certain respects.

59 Under the same provision, where an objection is made, it is incumbent on the Commission, after having consulted the Standing Committee on Construction and the committee set up pursuant to Article 22 of Regulation No 1025/2012, to assess whether the standard satisfies, at least in part, the requirements set out in the mandate. If it does, the Commission must then decide whether the standard, or the part of it which satisfies those requirements, should be published or maintained in the *Official Journal of the European Union* in whole or in part, or whether it should be withdrawn from that publication.

60 However, Article 18(2) of Regulation No 305/2011 does not provide for the Commission to add restrictions such as those sought by the appellant to the reference of a harmonised standard, other than restrictions under which the standard is published or maintained in part.

61 It is true that the term 'partiellement' which appears in certain language versions of Article 18(2) of Regulation No 305/2011, including the French and Italian versions, corresponds to the expression 'with restrictions' or 'with caveats' in other language versions, including the German, English, Spanish and Polish versions. Nonetheless, in the context of the procedure provided for in Article 18 of that regulation, the Commission cannot permit Member States, by means of a restriction, to supplement the content of a standard which has not been entirely harmonised, as in doing so it would encroach on the powers of European standardisation bodies recognised in both Article 17 and Article 18(3) of that regulation, those bodies having sole power to determine or revise the content of the standard in the light of the relevant mandate.

62 Furthermore, in this regard, the non-publication, publication or maintenance, whether with or without restriction, and the withdrawal of references to a harmonised standard which is entirely or partly in conformity with the relevant mandate, remains a power which it is open to the Commission to exercise, in the light of the opinion of the committee provided for by Article 22 of Regulation No 1025/2012, and not an obligation incumbent on that institution.

63 In the present case, in paragraph 94 of the first judgment under appeal, the Court correctly held that the appellant's argument that the Commission had not assessed the conformity of the harmonised standards at issue with the relevant mandate failed on the facts, in so far as, in recitals 9, 11, 14 and 15 of the first contested decisions, that institution had accepted, in relation to the clauses in question, that the criteria and methods required to assess the performance of other dangerous substances were lacking, and consequently that those clauses, being inapplicable, should be expressly excluded from the scope of the references of the harmonised standards at issue. In taking that course, in the first contested decisions, the Commission was exercising its power to maintain references of harmonised standards with restriction.

64 Furthermore, in paragraphs 42 and 44 of the second judgment under appeal, the Court correctly observed that, while 'the harmonised standards at issue do not entirely correspond to the relevant mandate, and [while] performance characteristics such as crushing resistance, load bearing capacity and watertightness are not covered by the performance assessment methods and criteria of the harmonised standards at issue', this could not 'result in the annulment of the [second contested] decisions, given that there is no indication in the mandate as to the establishment of performance criteria relating to the installation or use of tanks in areas subject to seismic activity or flooding'.

65 Secondly, it is important to observe that, as is apparent from recitals 1 and 2 of Regulation No 305/2011, while the rules of Member States require that 'construction works' be designed and executed so as not to endanger the safety of persons, domestic animals or property, nor damage the environment, those rules have a direct influence on the requirements of 'construction products' which, in turn, due to their disparity, hinder trade in such products within the Union.

66 In order to facilitate their free movement, Regulation No 305/2011 thus has the object, as Article 1 of that regulation provides, of laying down conditions for the placing or making available on the market of 'construction products' by establishing harmonised rules on how to express the performance of construction products in relation to their essential characteristics and on the use of CE marking on those products.

67 Under Article 8(4) of Regulation No 305/2011, a Member State must not prohibit or impede, within its territory or under its responsibility, the making available on the market or the use of 'construction products' bearing the CE marking, 'when the declared performances correspond to the requirements for such use in that Member State'.

68 Within that framework, the power of the Member States to adopt national provisions regulating their own methods of assessment of 'construction products' in relation to aspects not covered by a harmonised standard might limit, in such a way as to undermine the objective of Regulation No 305/2011, the free movement of construction products corresponding to the harmonised standard, in so far as manufacturers of 'construction products' might be faced with national procedures and criteria which diverged to such an extent as to hinder effective access to the market for their products. Where a 'construction product' is not covered or not fully covered by a harmonised standard, with the result that its performance in relation to its essential

characteristics cannot be entirely assessed according to an existing harmonised standard, it is for the manufacturer, where appropriate, to make a request for a European technical assessment pursuant to Article 19 of that regulation.

69 However, as stated in recital 3 of Regulation No 305/2011, that regulation should not affect the right of Member States to specify the requirements they deem necessary to ensure the protection of health, the environment and workers when using construction products.

70 It follows that a Member State may impose specific rules concerning the installation and use of 'construction products', provided that they do not include requirements diverging from the harmonised standards as regards the evaluation or CE marking of such products.

71 In the present case, the Court did not make any error of law when it held, in paragraph 102 of the first judgment under appeal, that it was not open to the Commission to adopt a restriction stipulating that Member States were authorised to enact national legislation concerning testing methods and verification as regards the release of other dangerous substances.

72 Furthermore, the Court correctly observed, in paragraphs 51 and 55 of the second judgment under appeal, that the use of tanks in areas subject to seismic activity or flooding did not fall within the scope of the harmonised standards at issue, and accordingly that it was not possible to supplement those standards through the procedure set out in Article 18(2) of Regulation No 305/2011 by means of a restriction on that point.

73 As stated in paragraph 70 of that judgment, it is nonetheless open to Member States to impose specific rules concerning the installation and use of 'construction products', provided that they do not include requirements diverging from the harmonised standards resulting from Regulation No 305/2011.

74 Thirdly, while, by virtue of Article 2(4), Article 3(1) and (2) and Article 17(3) of Regulation No 305/2011, read together, the harmonised standards relate to the essential characteristics of 'construction products' and the basic requirements for 'construction works', nevertheless that regulation does not aim to harmonise the requirements applicable to such works, but only the arrangements for assessing and declaring the performance of 'construction products'. Given that the methods and criteria for assessing the performance of 'construction products' defined in the harmonised standards need only make it possible to ensure that the performance of those products conforms to the essential characteristics corresponding to the basic requirements for 'construction works', those standards do not, in themselves, aim to guarantee compliance with the basic requirements.

75 In the present case, it must be observed that in the first judgment under appeal, the Court correctly applied those principles in holding, in paragraph 95 of that judgment, that the objective of the harmonised standards is not to guarantee compliance with the basic requirements for 'construction works', which are determined by the Member States, but that, in their provisions relating to 'construction products' and ensuring compliance with the basic requirements, they are required, in order to guarantee the free movement of such products, to use the harmonised standards in relation to the assessment of the performance of such products.

76 Similarly, in paragraph 96 of that judgment, the Court correctly held that it was not for the Commission to verify whether the harmonised standards at issue guaranteed compliance with the basic requirements for 'construction works' as regards the release of other dangerous substances, given that the objective of the harmonised standards is to enable the performance of 'construction products' to be assessed.

77 As to the second judgment under appeal, General Court stated, in paragraph 49 of that judgment, that the request for a restriction in the scope of the references of the harmonised standards at issue could not, in any case, be granted on the basis of Article 18(2) of Regulation No 305/2011, because 'it [was seeking] to add an additional requirement to those standards concerning the installation or use of tanks in areas subject to seismic activity or flooding', when there is no provision, in Article 18(2) of that regulation, for such an addition to be made.

78 The Court was thus fully entitled to review the conformity of the standards at issue with the relevant mandates, and to set out the reasons why the Commission was not obliged to verify compliance with the basic requirements.

79 Fourthly (and finally), it should be observed that in paragraph 105 of the first judgment under appeal and paragraph 58 of the second judgment under appeal, the Court went no further than to state that the Commission had not made a manifest error of assessment.

80 It follows that the second and third grounds of appeal in Case C-475/19 P, and the first and second grounds in Case C-688/19 P, must be dismissed.

81 In the light of all of the foregoing, the appeals must be dismissed in their entirety.

Costs

82 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to the costs. Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

83 In the present case, as the Federal Republic of Germany has been unsuccessful and the Commission had applied for costs, the Federal Republic of Germany must be ordered to pay the Commission's costs relating to the present appeals and the proceedings before the General Court.

84 In accordance with Article 140(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

85 The Republic of Finland, having intervened in the action before the General Court and participated in the proceedings before the Court of Justice, must bear its own costs.

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

1. Dismisses the appeals.

2. Orders the Federal Republic of Germany to bear, in addition to its own costs, those incurred by the European Commission in relation to the present appeals and to the proceedings before the General Court of the European Union.

3. Orders the Republic of Finland to bear its own costs.

[Signatures]