Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

14 December 2017*

[Text rectified by order of 20 March 2018]

(Reference for a preliminary ruling — Harmonised conditions for the marketing of construction products — Harmonised standard EN 1090-1:2009+A1:2011 — Criteria for determining the scope of a standard adopted by the European Committee for Standardisation (CEN) in accordance with a mandate of the European Commission — Anchors to be fixed into concrete before it sets and used for fastening facade elements and masonry supports to the building frame)

In Case C-630/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), made by decision of 1 December 2016, received at the Court on 7 December 2016, in the proceedings brought by

**Anstar Oy,**

other party:

**Turvallisuus- ja kemikaalivirasto (Tukes),**

THE COURT (Eighth Chamber),

composed of J. Malenovský, President of the Chamber, D. Šváby (Rapporteur) and M. Vilaras, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2017,

after considering the observations submitted on behalf of:

– Turvallisuus- ja kemikaalivirasto (Tukes), by P. Kulmala and K. Siponen, acting as Agents,

– the Finnish Government, by S. Hartikainen, acting as Agent,

– the European Commission, by G. Zavvos, P. Aalto and M. Huttunen, acting as Agents,

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

* Language of the case: Finnish.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation 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) and of harmonised standard EN 1090-1:2009+A1:2011, 'Execution of steel structures and aluminium structures — Part 1: Requirements for conformity assessment of structural components' ('standard EN 1090-1:2009+A1:2011').

2 The request has been made in proceedings brought before the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) by Anstar Oy, a company incorporated under Finnish law, concerning a decision of the Turvallisuus- ja kemikaalivirasto (Tukes) (Safety and Chemicals Office, Finland) ('the Office') essentially prohibiting Anstar from using the CE marking under standard EN 1090-1:2009+A1:2011 for four categories of products manufactured by it.

### Legal context

#### *Regulation No 305/2011*

3 Recitals 6 and 10 of Regulation No 305/2011 state that the aim of the regulation is to remove technical barriers to trade in construction products by establishing harmonised technical specifications for the purposes of assessing the performance of construction products, in order to enhance their free movement in the market.

4 In accordance with Article 2 of Regulation No 305/2011, 'Definitions':

'10. "harmonised technical specifications" means harmonised standards and European Assessment Documents;

11. "harmonised standard" means a standard adopted by one of 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 a request issued by the Commission, in accordance with Article 6 of that Directive;

…'

5 Article 4 of that regulation, on 'Declaration of performance', provides in paragraph 1:

'When a construction product is covered by a harmonised standard or conforms to a European Technical Assessment which has been issued for it, the manufacturer shall draw up a declaration of performance when such a product is placed on the market.'

6 Article 17 of the regulation, on 'Harmonised standards', provides in paragraphs 1, 3 and 5:

'1. Harmonised standards shall be established by the European standardisation bodies listed in Annex I to Directive 98/34/EC 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 mandates.

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.'

7 Article 19 of the regulation, on the 'European Assessment Document', provides in part:

'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:

(a) the product does not fall within the scope of any existing harmonised standard;

(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.'

8 Article 21 of the regulation, on the 'Obligations of the [Technical Assessment Body (TAB)] receiving a request for a European Technical Assessment', provides inter alia:

'1. The TAB receiving a request for a European Technical Assessment shall inform the manufacturer if the construction product is covered, fully or partially, by a harmonised technical specification as follows:

(a) where the product is fully covered by a harmonised standard, the TAB shall inform the manufacturer that, in accordance with Article 19(1), a European Technical Assessment cannot be issued;

(b) where the product is fully covered by a European Assessment Document, the TAB shall inform the manufacturer that such a document will be used as the basis for the European Technical Assessment to be issued;

(c) where the product is not covered, or not fully covered, by any harmonised technical specification, the TAB shall apply the procedures set out in Annex II or those established in accordance with Article 19(3).'

9 Article 59 of the regulation, on ‘Formal non-compliance’, reads as follows:

‘1. Without prejudice to Article 56, where a Member State makes one of the following findings, it shall require the relevant economic operator to put an end to the non-compliance concerned:

(a) the CE marking has been affixed in breach of Article 8 or 9;

(b) the CE marking has not been affixed, when required, in accordance with Article 8(2);

(c) without prejudice to Article 5, the declaration of performance has not been drawn up, when required, in accordance with Article 4;

(d) the declaration of performance has not been drawn up in accordance with Articles 4, 6 and 7;

(e) the technical documentation is either not available or not complete.

2. Where the non-compliance referred to in paragraph 1 continues, the Member State shall take all appropriate measures to restrict or prohibit the making available on the market of the construction product or ensure that it is recalled or withdrawn from the market.’

***Standard EN 1090-1:2009+A1:2011***

10 Standard EN 1090-1:2009+A1:2011 was originally adopted in the shape of standard EN 1090-1:2009 by the European Committee for Standardisation (CEN) on 15 June 2008, in accordance with a Commission mandate of 11 March 1998 (M 120 — Mandate to CEN/Cenelec concerning the execution of standardisation work for harmonised standards on structural metallic products and ancillaries) (‘Mandate M 120’) adopted on the basis 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).

11 Standard EN 1090-1:2009+A1:2011 was the subject of publication, under reference EN 1090-1:2009, in the *Official Journal of the European Union* of 17 December 2010 (OJ 2010 C 344, p. 1).

12 After the adoption by the CEN on 3 October 2011 of amendment 1 to standard EN 1090-1:2009+A1:2011, the standard was the subject of new publication in the *Official Journal of the European Union* of 19 June 2012 (OJ 2012 C 176, p. 1).

13 Point 1 of that standard, which defines its ‘Scope’, states:

‘This European Standard specifies requirements for conformity assessment of performance characteristics for structural steel and aluminium components as well as for kits placed on the market as construction products. The conformity assessment covers the manufacturing characteristics, and where appropriate the structural design characteristics.

This European Standard covers also the conformity assessment of steel components used in composite steel and concrete structures.

…

This European Standard does not cover conformity assessment of components for suspended ceilings, rails or sleepers for use in railway systems.

…’

14 Point 3.1.9 of the standard defines 'Structural components' as follows:

'components to be used as load-bearing parts of works designed to provide mechanical resistance and stability to the works and/or fire resistance, including aspects of durability and serviceability which can be used directly as delivered or can be incorporated into a construction work'.

15 Point 4.5 of the standard, relating to 'Structural characteristics', includes point 4.5.1, 'General', which provides inter alia:

'Structural characteristics of a component covered in this European Standard refer to its load bearing capacity, deformation at serviceability limit state, fatigue strength and resistance to fire.'

### *Harmonised standard EN 845-1:2013*

16 Harmonised standard EN 845-1:2013, entitled 'Specification for ancillary components for masonry — Part 1: Wall ties, tension straps, hangers and brackets' ('standard EN 845-1:2013') was adopted by the CEN on 21 March 2013, in accordance with a Commission mandate of 28 May 1997 (M 116 — Mandate to CEN/Cenelec concerning the execution of standardisation work for harmonised standards on masonry and related products) ('Mandate M 116'), adopted on the basis of Directive 89/106.

17 The references of standard EN 845-1:2013 were published in the *Official Journal of the European Union* of 13 February 2015 (OJ 2015 C 54, p. 80).

18 Standard EN 845-1:2013 states in point 1, headed 'Scope':

'This European Standard specifies requirements for wall ties, tension straps, hangers and brackets for interconnecting masonry and for connecting masonry to other parts of works and buildings including walls, floors, beams, and columns. Where anchors or fasteners are supplied or specified as part of an ancillary component, the requirements including performance requirements apply to the complete product.

This European Standard is not applicable to:

(a) anchors and fasteners other than as part of an ancillary component;

(b) shelf angles;

…'

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

19 By decision of 18 February 2014, the Office instructed Anstar, on the basis of Article 59 of Regulation No 305/2011, to cease supplying and selling four categories of products bearing the CE marking on the basis of standard EN 1090-1:2009+A1:2011 and, from 4 March 2014, to cease using the CE marking and the declaration of performance referred to in Article 4 of Regulation No 305/2011 in all contexts connected with those four categories of products ('the contested decision').

20 The decision described the four categories of products concerned as follows:

'1. Suspension system products used for fastening facade panels and masonry supports to the building frame; …

2. Anchor bolts …;

   Fastening plates and standard steel parts …;

   Bracing connections; …

3. Column shoes and wall shoes; …

4. Balcony connections.'

21 According to the decision, those categories of products are not mentioned in mandate M 120 and do not therefore fall within the scope of standard EN 1090-1:2009+A1:2011.

22 In the Office's view, anchor bolts, fastening plates, standard steel parts, bracing connections and column shoes intended for uses identical or similar to those of the products manufactured by Anstar were the subject of European technical assessments ETA-02/0006 and ETA-04/0056. In so far as those assessments, issued on the basis of Directive 89/106 and corresponding to European assessment documents within the meaning of Article 19(1) of Regulation No 305/2011, are still valid, and such assessments or documents can be obtained only for a product that is not covered or not fully covered by a harmonised standard, standard EN 1090-1:2009+A1:2011 does not apply to those products.

23 As regards suspension system products used for fastening facade panels and masonry supports to the building frame, they fall within the scope of mandate M 116. Consequently, according to the Office, the CE marking of those system products could only be justified if the harmonised standard drawn up on the basis of mandate M 116 were complied with.

24 Since it took the view that the products it manufactures are covered by standard EN 1090-1:2009+A1:2011 and mandate M 120, Anstar brought an action before the referring court, the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland), seeking annulment of the contested decision.

25 In support of its action, Anstar argues that the categories of products mentioned in the contested decision are not covered by standard EN 845-1:2013 or by European technical assessments ETA-02/0006 and ETA-04/0056.

26 The referring court notes that the scope of mandate M 120 and standard EN 1090-1:2009+A1:2011 is described in broad, general terms which do not necessarily exclude, or in any case do not wholly exclude, the products manufactured by Anstar, referred to by the contested decision, provided that they are used in accordance with the declaration of performance mentioned in Article 4 of Regulation No 305/2011.

27 The referring court observes, however, that the same could be said with respect to the scope of mandate M 116 and standard EN 845-1:2013. If the products manufactured by Anstar fell within the scope of this mandate and standard, they could not be covered by mandate M 120 and standard EN 1090-1:2009+A1:2011.

28 Finally, the referring court does not rule out the possibility that all or some of the products manufactured by Anstar might be covered by European technical assessments ETA-02/0006 and ETA-04/0056.

29 The referring court finds it necessary to ask the Court for a preliminary ruling, in that the scope of standard EN 1090-1:2009+A1:2011 appears to be assessed differently in the Member States. In its view, those differences of assessment are liable to affect the free movement of construction products, and hence to impede one of the express objectives pursued by Regulation No 305/2011, set out in particular in recitals 6 and 10 of the regulation.

30 In those circumstances, the Helsingin hallinto-oikeus (Adminsitrative Court, Helsinki) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are mandate M 120 and … standard EN 1090-1:2009+A1:2011 drawn up on the basis of that mandate to be interpreted as meaning that the products to be fixed into concrete before it sets, listed in points 1 to 4 of the [contested] decision … (suspension system products used for fastening facade elements and masonry supports to the building frame, and certain anchor bolts, fastening plates and standard steel parts, bracing conections, column shoes and wall shoes, and balcony connections) do not fall within their scope?

(2) Do [Regulation No 305/2011], the Commission mandates mentioned in the present case, or EU law otherwise, preclude [the Office's] interpretation that the aforesaid products are outside the scope of mandate M 120 and standard [EN 1090-1:2009+A1:2011]?'

## Consideration of the questions referred

31 By its questions, which should be considered together, the referring court essentially asks whether standard EN 1090-1:2009+A1:2011 must be interpreted as meaning that products, such as those at issue in the main proceedings, intended to be fixed into concrete before it sets fall within its scope.

32 As a preliminary point, it must be recalled that the Court has jurisdiction to give a preliminary ruling on the interpretation of a harmonised standard within the meaning of Article 2(11) of Regulation No 305/2011, the references of which have been published by the Commission in the *Official Journal of the European Union*, Series C (see, to that effect, judgment of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraph 47).

33 That said, when the Court is asked to give a preliminary ruling on the interpretation of such a harmonised standard, it is for the national court, on the basis of the Court's interpretation and in the light of the facts available to it, to determine the technical standard applicable to a particular product (see, by analogy, with reference to tariff classification, judgments of 7 November 2002, *Lohmann and Medi Bayreuth*, C-260/00 to C-263/00, EU:C:2002:637, paragraph 26, and of 28 April 2016, *Oniors Bio*, C-233/15, EU:C:2016:305, paragraph 28).

34 To that end, in order to interpret standard EN 1090-1:2009+A1:2011, it is necessary, first, to refer to the content of that standard, including its annexes, as regards its scope.

35 It is necessary, second, to interpret a harmonised standard in the light of the mandate from which it originates. In accordance with Article 17(1) of Regulation No 305/2011, harmonised standards are to be established by the European standardisation bodies listed in Annex I to Directive 98/34 on the basis of requests issued by the Commission. Under Article 17(5) of that regulation, the Commission must assess the conformity of harmonised standards established by the European standardisation bodies with the relevant mandates.

36 It follows that the scope of a harmonised standard cannot be interpreted more broadly than that of the mandate on which it is based.

37 In the present case, standard EN 1090–1:2009+A1:2011 must therefore be interpreted in the light of mandate M 120.

38 Third, where, as in the context of the main proceedings, a product may fall within the scope of several harmonised technical specifications, it is necessary in the first place to examine whether the most recent standard had the effect of repealing the earlier one.

39 In accordance with point (a) of the third indent of Article 17(5) of Regulation No 305/2011, each harmonised standard included in the list, published in the *Official Journal of the European Union*, of references of harmonised standards which are in conformity with the relevant mandates must mention the references of 'superseded harmonised technical specifications', which, having regard to Article 2(10) of that regulation, means both harmonised standards and European assessment documents.

40 Where, therefore, a harmonised standard does not indicate expressly that it is intended to replace another harmonised standard or one or more European technical assessments, those harmonised technical specifications remain in force and constitute special derogating rules. In accordance with Article 19(1) of Regulation No 305/2011, a European assessment document may be adopted only for a 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.

41 That interpretation of Article 19(1) of Regulation No 305/2011 is, moreover, borne out by Article 21(1)(a) of the regulation, under which, where a TAB receives a request for a European technical assessment concerning a product fully covered by a harmonised standard, the TAB must inform the manufacturer that, in accordance with Article 19(1), a European technical assessment cannot be issued.

42 Furthermore, while European assessment documents within the meaning of Article 19(1) of Regulation No 305/2011, like European technical assessments within the meaning of Article 8 of Directive 89/106 which that regulation repealed, can indeed be drawn up only for construction products that are, wholly or partly, not covered by a harmonised standard, the fact remains that, as stated in paragraph 32 above, the interpretation of those standards is finally a matter for the Court, not for the authors of such documents or assessments. Consequently, when the Court has to interpret a harmonised standard, it can take account, as one factor among others, of the existence of a European assessment document or a European technical assessment as an indication that the products covered by it, and similar products, are not covered by any harmonised standard, but without such a factor being determinative or preventing the Court, if appropriate, from arriving at an interpretation of the harmonised standard in question that differs from that adopted by the author of the document or assessment.

43 In the present case, however, while the referring court has mentioned European technical assessments ETA-02/0006 and ETA-04/0056 in its request, they do not appear in the documents submitted to the Court, so that the Court cannot take them into consideration for the purposes of interpreting standard EN 1090-1:2009+A1:2011.

44 Fourth, as regards guidelines published by national or international standardisation bodies, it must be noted that, even if such documents are intended to explain the scope of the harmonised standards whose references are published by the Commission, the fact remains that they cannot constitute legally binding instruments in the EU legal order. It follows that those documents are of no relevance for the interpretation of a harmonised standard, nor do they bind the national courts, even though they may be a useful guide for the implementation of the standard.

45 In the present case, as regards the products referred to in the contested decision, it follows from point 1 of standard EN 1090-1:2009+A1:2011, which defines its 'scope', that that harmonised standard specifies the requirements for conformity assessment of performance characteristics for structural steel and aluminium components as well as for kits placed on the market as construction products, and also covers the conformity assessment of steel components used in composite steel and concrete structures.

46 In addition, as stated in point 3.1.9 of that standard, 'structural components' are components to be used as load-bearing parts of works designed to provide mechanical resistance and stability to the works and/or fire resistance.

47 Furthermore, point 4.5.1 of the standard states that the structural characteristics of a component covered by the standard refer inter alia to its load-bearing capacity.

48 In those circumstances, it must be considered that standard EN 1090-1:2009+A1:2011 applies to construction products which have a structural function, that is, products whose removal from a structure would immediately reduce its resistance. The function of the load-bearing component in the overall structure of the construction work must thus be essential.

49 In the light of all the above considerations, the answer to the referring court's questions is that standard EN 1090-1:2009+A1:2011 must be interpreted as meaning that products, such as those at issue in the main proceedings, intended to be fixed into concrete before it sets fall within its scope if they have a structural function, in the sense that their removal from a structure would immediately reduce its resistance.

## [As rectified by order of 20 March 2018] Costs

50 [As rectified by order of 20 March 2018] Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Harmonised standard EN 1090-1:2009+A1:2011, 'Execution of steel structures and aluminium structures — Part 1: Requirements for conformity assessment of structural components', must be interpreted as meaning that products, such as those at issue in the main proceedings, intended to be fixed into concrete before it sets fall within its scope if they have a structural function, in the sense that their removal from a structure would immediately reduce its resistance.**

[Signatures]