# ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
28 November 2003 *

In Case T-264/03 R,

**Jürgen Schmoldt**, resident at Dallgow-Döberitz (Germany),

**Kaefer Isoliertechnik GmbH & Co. KG**, established at Bremen (Germany),

**Hauptverband der Deutschen Bauindustrie eV**, established at Berlin (Germany),

represented by Professor H.-P. Schneider,

applicants,

v

**Commission of the European Communities**, represented by K. Wiedner, acting as Agent, and by A. Böhlke, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for interim measures pursuant to Article 243 EC seeking an extension of the period of coexistence of the national rules and the European rules EN 13162:2001 to 13171:2001 laid down by the Commission communication of 22 May 2003 in the framework of the implementation of Council Directive 89/106/EEC (OJ 2003 C 120, p. 17),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

**Order**

## Legal background

1 Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), as amended by Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid

or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) (OJ 1993 L 220, p. 1), is designed *inter alia* to remove obstacles to the free movement of construction products.

2 Article 1(2) of Directive 89/106 provides that, for the purposes of that directive, '"construction product" means any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works'.

3 Article 2(1) of Directive 89/106 provides that construction products may be placed on the market only if they are fit for this intended use, that is to say, they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy certain essential requirements ('the essential requirements'), when such works are subject to regulations containing such requirements.

4 These essential requirements are set out in the form of objectives in Annex I to Directive 89/106 and relate to certain characteristics of the works in the sphere of 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.

5 Directive 89/106 also provides for the adoption of 'technical specifications' at Community level. The second subparagraph of Article 4(1) of Directive 89/106 thus provides that the European Committee for Standardisation ('the CEN') or the European Committee for Electrotechnical Standardisation may adopt 'standards' and 'technical approvals' applicable to construction products. These standards and technical approvals are together referred to as 'harmonised standards'.

6 The CEN/TC 88 is the branch of the CEN with responsibility for thermal insulation products.

7 Harmonised standards are adopted on mandates given by the Commission in accordance with 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), and on the basis of an opinion given by the Standing Committee on Construction.

8 Once such harmonised standards have been adopted by the European standardisation organisations, in accordance with Article 7(3) of Directive 89/106, the Commission publishes their references in the *Official Journal of the European Union*.

9 Products which comply with the national standards transposing the harmonised standards are presumed to satisfy the essential requirements. Thus, under Article 4(2) of Directive 89/106, construction products must be presumed fit for use if they enable works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements, and those products bear the 'EC' mark. The 'EC' mark indicates *inter alia* that construction products comply with the national standards transposing the harmonised standards, the references of which have been published in the *Official Journal of the European Union*.

10 Finally, Article 5(1) of Directive 89/106 provides that a Member State may challenge harmonised standards, where it considers that they do not satisfy the essential requirements. In such a case, the Member State concerned notifies the Standing Committee on Construction setting out the reasons for its objection. The Standing Committee on Construction then issues an urgent opinion in the

light of which, after consultation with the Standing Committee established by Directive 98/34 ('the 98/34 Committee'), the Commission informs the Member States whether or not the standards concerned should be withdrawn from the *Official Journal of the European Union*.

## Facts and procedure

11 On 23 May 2001, the CEN adopted 10 standards relating to thermal insulation products, numbers EN 13162:2001 to EN 13171:2001 ('the contested standards').

12 On 15 December 2001, the contested standards were published in the *Official Journal of the European Communities* by means of a Commission communication within the framework of the implementation of Directive 89/106 (OJ 2001 C 358, p. 9). The communication provided that the contested standards would come into force as harmonised standards from 1 March 2002. However, it also provided for a period of 'coexistence of harmonised standards and national technical specifications' until 1 March 2003.

13 That communication also stated, in its second footnote, that, when that period of coexistence expired, the presumption that construction products satisfy the essential requirements must be based on the harmonised standards and also that the date of expiry of that period coincided with the date on which the conflicting national technical specifications must be withdrawn.

14 By letter of 9 August 2002, the Federal Republic of Germany raised a formal objection pursuant to Article 5(1) of Directive 89/106 in respect *inter alia* of the contested standards. In that objection, the Federal Republic of Germany maintained, in particular, that the contested standards did not justify the presumption that the works in which the products are installed fully satisfy the essential requirements.

15 On 22 November 2002, an *ad hoc* group of the Standing Committee on Construction issued a report stating that it had studied, *inter alia*, the contested standards and made certain recommendations. The *ad hoc* group of the Standing Committee on Construction maintained that the contested standards could probably be improved but that there was no reason to suspend them for the purposes of the use of the EC mark.

16 On 28 and 29 January 2003, the 98/34 Committee met and gave a favourable opinion on the Commission's draft decision rejecting the Federal Republic of Germany's objection.

17 On 9 April 2003, the Commission adopted Decision 2003/312/EC on the publication of the reference of standards relating to thermal installation products, geotextiles, fixed fire-fighting equipment and gypsum blocks in accordance with Council Directive 89/106/EEC (OJ 2003 L 114, p. 50), in which it rejected the objection lodged by the Federal Republic of Germany, pursuant to Article 5(1) of Directive 89/106 ('the contested decision').

18 In the contested decision the Commission states *inter alia* that the information received in the course of the consultations with the CEN and the national authorities, with the Standing Committee on Construction and the 98/34

Committee disclosed no evidence to substantiate the risk alleged by the Federal Republic of Germany. In Article 1 of the contested decision, the Commission accordingly decides that the contested standards are not to be withdrawn from the list of standards published in the *Official Journal of the European Union*.

19 On 8 May 2003, the contested decision was published in the *Official Journal of the European Union*.

20 On a date not specified in the file, the Federal Republic of Germany asked the Standing Committee on Construction to extend the coexistence period of the contested standards and the national standards until 31 December 2003.

21 On 13 and 14 May 2003, at the 57th meeting of the Standing Committee on Construction, the Federal Republic of Germany's request for an extension until 31 December 2003 was rejected. However, it was decided at the same meeting that the coexistence period of the contested standards and the national standards would be extended retrospectively until 30 May 2003.

22 On 22 May 2003, the contested standards were again published in the *Official Journal of the European Union* in a Commission communication in connection with the implementation of Directive 89/106 (OJ 2003 C 120, p. 17), at the same time as the new expiry date of the period of coexistence of the contested standards and the national standards.

23 On 28 July 2003, Mr J. Schmoldt, Kaefer Isoliertechnik GmbH & Co. KG and Hauptverband der Deutschen Bauindustrie eV ('the applicants') lodged an action for annulment of the contested decision.

24 On the same day, by separate document, the applicants lodged an application for interim relief pursuant to Article 243 EC seeking an order from the President of the Court that the defendant should extend the period of coexistence of the national standards and the contested standards until judgment should have been given by the Court of First Instance.

25 On 25 August 2003, the Commission lodged its observations on the application for interim relief. In its observations, the Commission maintains *inter alia* that the applicants' main action is manifestly inadmissible.

26 By separate document lodged at the Court Registry on 27 August 2003, the Commission raised the plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

27 On 9 September 2003, the applicants lodged a reply to the Commission's observations of 25 August 2003. On the decision of the President of Court, that reply was put in evidence, and the Commission answered it on 23 September 2003.

28 The applicants and the Commission presented oral argument at a hearing held on 14 October 2003.

**Forms of order sought by the parties**

29 The applicants claim that the President of the Court should:

— require the Commission to extend the period of coexistence of the national standards and the contested standards;

— order the Commission to pay the costs.

30 The Commission contends that the President of the Court should:

— dismiss the application for interim relief;

— reserve costs.

## Law

31 Article 104(2) of the Rules of Procedure provides that an application for interim measures is to state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is not met (order of the President of the Court in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing such an application must also weigh up the competing interests (order of the President of the Court in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

*Arguments of the parties*

On the admissibility of the application for interim measures

32 The Commission considers that the main action is manifestly inadmissible in two respects.

33 First, the Commission considers that the application was lodged out of time.

34 Accordingly, the Commission points out that, according to the case-law, the criterion of the day on which a measure came to the knowledge of the applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35). That is the case, in particular, if it is consistent practice for a measure to be published, since the applicant is therefore legitimately entitled to assume that the measure will be published (*Germany* v *Council*, cited above, paragraph 37).

35 However, in the present case, the criterion of the day on which the contested decision came to the applicants' knowledge is not subsidiary, since its publication in the *Official Journal of the European Union* was not required. The time-limit for bringing an action against that decision therefore began to run, formally, on the day on which it came to the knowledge of the applicants, not on the day on which it was published. That fact therefore prevents application of Article 102(1)

of the Rules of Procedure, which provides that, where the period of time allowed for commencing proceedings against a measure adopted by an institution begins to run from the publication of the measure, that period shall run from the end of the 14th day following the date of publication of the measure in the *Official Journal of the European Union*.

36 Consequently, according to the Commission, since the contested decision, which was adopted on 9 April 2003, was published in the *Official Journal of the European Union* on 8 May 2003, it was on that date at the latest that it came to the knowledge of the applicants. Accordingly, the main action, which was lodged on 28 July 2003, was lodged 10 days too late, even taking account of the extension of time-limit on account of distance provided for in the Rules of Procedure.

37 Secondly, the Commission maintains that the applicants are not individually concerned by the contested decision. Mr Schmoldt, first, did not lodge his application as the official representative of the CEN/TC 88, but only in his own name. The Commission states that Kaefer Isoliertechnik, also, even though it is doubtless concerned by the contested decision to a large extent, is in no way, however, individually concerned. Hauptverband der Deutschen Bauindustrie, finally, cannot base its standing to bring proceedings either on that of Kaefer Isoliertechnik, which is not individually concerned by the contested decision, or on its mere participation in the preparation of the application lodged by the Federal Republic of Germany pursuant to Article 5(1) of Directive 89/106.

38 The applicants, for their part, consider, first, that their action is not out of time. Indeed, the Commission does not dispute that the contested decision was not notified to the applicants. Furthermore, the applicants were informed of the decision in question only when it was published in the *Official Journal of the European Union*. Consequently, their action was in fact lodged within the prescribed time-limit.

39 The applicants consider, secondly, that they are directly and individually concerned by the contested decision.

40 Mr Schmoldt, the first applicant, thus points out that, first, since he was chairman of the CEN/TC 88, his participation in the decisions of the Commission and of the Standing Committee on Construction regarding the contested standards was not requested and that, second, his participation in the report of the *ad hoc* group of the Standing Committee on Construction had been a pretence. Mr Schmoldt therefore considers that he has standing to bring proceedings against the contested decision since the reference to the CEN/TC 88 and the supposed consultation of the CEN are clearly attributed to him. Mr Schmoldt also points out that he is the manager of Hauptverband der Deutschen Bauindustrie, the third applicant. At the hearing, he said, finally, that he 'played an active part in the activities of Kaefer Isoliertechnik'.

41 Kaefer Isoliertechnik, the second applicant, states for its part that it is a major user of thermal insulation products and that it finds itself in a situation of conflict between German law and Community law, which means an unbearable financial burden for it and considerable discrimination in relation to producers in other Member States. Furthermore, as a member of the Bundesfachabteilung Wärme-, Kälte-, Schall- und Brandschutz (the German federal department responsible for protection against heat, cold, noise and fire) of Hauptverband der Deutschen Bauindustrie, Kaefer Isoliertechnik played a decisive role in the decision of the Vorbereitender Ausschuss EG-Harmonisierung (German committee of preparation for Community harmonisation) to lodge an objection pursuant to Article 5(1) of Directive 89/106 against the contested standards.

42 Last, the third applicant, Hauptverband der Deutschen Bauindustrie, states that, on account of the contested decision, it loses the opportunity to participate, in the interest of the undertakings it represents, in formulating a new design for, or at least improving, the Community standards concerning thermal insulation products.

On the *prima facie* case

43 The applicants consider that the contested standards are neither clear nor precise and that they are incomplete on essential points. Consequently, they do not make it possible to establish that the products concerned are fit for use or that they conform to the essential requirements.

44 According to the applicants, there has therefore been an infringement of Articles 2 and 3 of Directive 89/106 and a breach of the principles of legal certainty and proportionality.

45 The applicants also maintain that the contested decision infringes the principle of harmonisation of laws in the interest of a high level of environmental and consumer protection, as established in Article 95(3) EC.

46 Finally, the contested decision contains formal defects in that it both infringes the obligation to state reasons laid down in Article 253 EC and also contravenes essential procedural requirements, inasmuch as the Standing Committee on Construction did not issue the formal opinion required by Article 5(1) of Directive 89/106. Furthermore, although several references are made to the CEN/TC 88 in the report of the *ad hoc* group of the Standing Committee on Construction, the fact of the matter is that that body did not participate in the procedure to adopt the contested decision.

47 The Commission considers in essence that these pleas are not well founded.

Concerning urgency

48 In their application, the applicants maintained that there was an urgent need to order the interim measures because of the significant change in their activity, owing to the contested decision, a change which it would be very difficult to reverse subsequently if the main action were upheld (orders of the President of the Court in Joined Cases 76/89, 77/89 and 91/89 R *RTE and Others* v *Commission* [1989] ECR 1141, paragraphs 15 and 18, and Case C-56/89 R *Publishers Association* v *Commission* [1989] ECR 1693, paragraphs 34 and 35). The expiry of the withdrawn German standards for thermal insulation products ('the withdrawn German standards') would bring about a radical and lasting change in the construction products market.

49 When asked at the hearing to explain their arguments in respect of urgency, the applicants stated that they did not plead the risk of serious and irreparable harm so far as Mr Schmoldt and Hauptverband der Deutschen Bauindustrie itself were concerned, but only urgency so far as Kaefer Isoliertechnik and the members of Hauptverband der Deutschen Bauindustrie were concerned.

50 More particularly, Kaefer Isoliertechnik maintains that, if the period of coexistence were not extended, it would be unable, before the contested decision was annulled, to find on the market products complying with the withdrawn German standards, which are safer than the contested standards. Consequently, if the contested decision were to be annulled and the withdrawn German standards were to be restored, the users of construction products would be faced with considerable problems, relating to the need to alter or destroy constructions built with products complying with the contested standards.

51 Furthermore, Kaefer Isoliertechnik stated at the hearing that, if the German standards were not or could not be restored after annulment of the contested decision, it would be all the more obvious that the grant of interim measures was a matter of urgency.

52 The Commission, for its part, considers that the applicants have not established that to order the interim relief sought was a matter of urgency.

The weighing-up of interests

53 In respect of the weighing-up of interests, the applicants point out that the interim relief sought, namely, an extension of the period of coexistence of the contested standards and the national standards, would preserve the interests of the Community, since the contested standards would continue to apply together with the national standards. Member States which consider that they could transpose and apply without alteration the contested standards would thus in no way be compelled to reintroduce the withdrawn national standards.

54 The Commission considers, for its part, that the interests claimed by the applicants cannot prevail over the Community's interest in completing the harmonisation of the standards relating to thermal insulation products throughout the Community. The Commission adds that, even though the measures sought were restricted to the Federal Republic of Germany, they would create distortions of competition and would risk blocking the access of non-German products to the market.

*Findings of the President of the Court*

55 It is settled case-law that in principle the issue of the admissibility of the main action should not be examined in relation to an application for interim measures so as not to prejudge the substance of the case. Nevertheless, where, as in this case, it is contended that the main action to which the application for interim measures relates is manifestly inadmissible, it may prove necessary to establish whether there are any grounds for concluding *prima facie* that the main action is admissible (orders of the President of the Court in Case T-1/00 R *Hölzl and Others* v *Commission* [2000] ECR II-251, paragraph 21, and Case T-155/02 R *VVG International and Others* v *Commission* [2002] ECR II-3239, paragraph 18).

56 The Commission maintains, in the present case, that the main action is manifestly inadmissible in that, first, it was lodged out of time and, second, the applicants are not individually concerned by the contested decision.

57 It is therefore necessary to consider whether there are any grounds for concluding *prima facie* that their action is admissible and, in particular, whether those grounds establish *prima facie* that the applicants are individually concerned by the contested decision.

58 Under the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

59 According to settled case-law, the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the measure in question (orders in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 28; Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 33; Case T-114/96 *Biscuiterie confiserie LOR and Confiserie du Tech* v *Commission* [1999] ECR II-913, paragraph 26; and Case T-45/02 *DOW AgroSciences and Dow AgroSciences* v *Parliament and Council* [2003] ECR II-1973, paragraph 31).

60 A measure is of general application if it applies to objectively determined situations and produces its legal effects with respect to categories of persons envisaged in the abstract (Case T-482/93 *Weber* v *Commission* [1996] ECR II-609, paragraph 55, and the case-law cited therein).

61 In the present case, the contested decision is addressed to the Member States and rejects a request that certain harmonised standards adopted in implementation of Directive 89/106 should be withdrawn from the list of standards published in the *Official Journal of the European Union.*

62 However, under Article 4(2) of Directive 89/106, it is, in particular, by reference to the relevant national standards transposing the harmonised standards, references to which have been published in the *Official Journal of the European Union*, that the construction products must be presumed fit for use and may, in consequence, be put on the market in the European Union.

63 The aim of the harmonised standards adopted pursuant to Directive 89/106 is therefore to define the characteristics of the products which those economic operators may respectively market and buy. They therefore affect, *inter alia*, all producers and users of construction products in the European Union.

64 Consequently, the contested decision, which has the effect of refusing to withdraw harmonised standards, itself applies to objectively determined situations and produces its legal effects with respect to categories of persons envisaged in the abstract, namely all the producers and users of construction products in the European Union. Consequently, by nature and by virtue of its scope of application, the contested decision is *prima facie* general in nature.

65 However, a provision which is, by nature and by virtue of its scope of application, a general measure may concern a natural or legal person individually if it affects that person by reason of certain attributes peculiar to it or by reason of a factual situation which differentiates it from all other persons and distinguishes it individually in the same way as the addressee (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 19; and Case C-451/98 *Antillean Rice Mills* v *Council* [2001] ECR I-8949, paragraph 49).

66 It is therefore necessary to establish whether, in the circumstances, the documents in the case permit the inference that the applicants might conceivably be concerned by the contested decision by reason of certain attributes peculiar to them or whether there is a factual situation which differentiates them, with regard to that decision, from any other person.

On the *prima facie* admissibility of the main action brought by Mr Schmoldt

67 In order to show that he is individually concerned by the contested decision, Mr Schmoldt refers to his position as chairman of the CEN/TC 88 and the fact that he was to chair the *ad hoc* group of the Standing Committee on Construction.

68 In that regard, it is to be pointed out first of all that, in a letter addressed to the Commission on 11 August 2003, the Secretary-General of the CEN informed the Commission that Mr Schmoldt was not authorised to represent that body in connection with the main action, which Mr Schmoldt has not disputed. Consequently, without its being necessary to order — as Mr Schmoldt requests — disclosure of the letter to which the letter of 11 August 2003 replies, it appears that Mr Schmoldt lodged that action in a purely personal capacity, and that it is in the light only of his personal status that it is necessary to consider whether he does indeed have *prima facie* standing to bring proceedings against the contested decision.

69 It should be pointed out that the fact that a person participates in one way or another in the process leading to the adoption of a Community act does not distinguish that person individually in relation to the act in question, unless the relevant Community legislation has laid down specific procedural guarantees for such a person (orders in Case T-60/96 *Merck and Others* v *Commission* [1997] ECR II-849, paragraph 73; Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel* v *Commission* [1998] ECR II-3533, paragraphs 67 and 68; and Case T-339/00 *Bactria* v *Commission* [2002] ECR II-2287, paragraph 51).

70 In the present case, the guarantees provided by Article 5(1) of Directive 89/106 are for the benefit of the CEN and of the Standing Committee on Construction and not for the benefit of some of their members or of their president in a personal capacity. It appears that Mr Schmoldt is therefore unable to invoke, in a personal capacity, any procedural guarantee or provision in Directive 89/106 infringement of which might *prima facie* individualise or distinguish him in his capacity as chairman of the CEN/TC 88 at the time the contested decision was adopted and as a member of the *ad hoc* group of the Standing Committee on Construction.

71 It therefore does not appear *prima facie* that Mr Schmoldt may be individually concerned by the contested decision.

72 Secondly, Mr Schmoldt maintains that he has a legal interest in bringing proceedings in his capacity as manager of Hauptverband der Deutschen Bauindustrie, and as a person who 'played an active part in the activities of Kaefer Isoliertechnik'.

73 Since, even if it were established, that *locus standi* would be indissociable from that of Hauptverband der Deutschen Bauindustrie and Kaefer Isoliertechnik, it is only if these two entities are themselves individually concerned by the contested decision that Mr Schmoldt might be able to claim that he too is individually concerned by the decision. His arguments will therefore be taken into account in connection with the examination of the *locus standi* of Kaefer Isoliertechnik and Hauptverband der Deutschen Bauindustrie.

74 Consequently, subject to the examination of the *locus standi* of Kaefer Isoliertechnik and Hauptverband der Deutschen Bauindustrie, it does not appear, at this stage, that there are grounds for concluding *prima facie* that the main action brought by Mr Schmoldt is admissible.

On the *prima facie* admissibility of the main action brought by Kaefer Isoliertechnik

75 Kaefer Isoliertechnik maintains, first, that it is individually concerned by the contested decision by reason of its position as a major user of construction products and its ranking as the second largest European undertaking in the insulation works sector.

76 Here, it is to be pointed out, first of all, that the fact that a general measure may have specific effects which differ according to the various persons to whom it applies is not such as to differentiate them in relation to all the other operators concerned, where that measure is applied on the basis of an objectively determined situation (see, in particular, Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 66 and the case-law cited therein). In the present case, it is indeed by reason of its objective position as a user of construction products that Kaefer Isoliertechnik is concerned by the contested decision.

77 The documents in the case do not therefore reveal grounds for concluding *prima facie* that Kaefer Isoliertechnik is individually concerned by the contested decision by reason of its position as a major user of construction products.

78 Secondly, Kaefer Isoliertechnik maintains that it is individually concerned by the contested decision by reason of the decisive role it played in the adoption, by the Federal Republic of Germany, of the decision to lodged an objection in respect of the contested standards, pursuant to Article 5(1) of Directive 89/106, through Hauptverband der Deutschen Bauindustrie.

79 In that regard, as has already been held in paragraph 69 above, the fact that a person participates in one way or another in the process leading to the adoption of a Community act does not distinguish that person individually in relation to the act in question, unless the relevant Community legislation has laid down specific procedural guarantees for such a person (order in *Merck and Others* v *Commission*, cited in paragraph 69 above, paragraph 73).

80 In the present case, Directive 89/106 does not in any way provide that, before adopting a decision pursuant to Article 5(1) of that directive, the Commission must comply with a procedure in which undertakings such as Kaefer Isoliertechnik are entitled to assert possible rights or even to be heard.

81 *Prima facie* the argument put forward by Kaefer Isoliertechnik must therefore be rejected.

82 It is apparent from these considerations that the documents in the case do not provide grounds for concluding *prima facie* that the main action brought by Kaefer Isoliertechnik is admissible.

On the *prima facie* admissibility of the main action brought by Hauptverband der Deutschen Bauindustrie

83 Hauptverband der Deutschen Bauindustrie has claimed that it represented the construction industry in Germany and that its standing to bring proceedings against the contested decision stemmed from the *locus standi* of Kaefer Isoliertechnik, one of its members, and from its participation in the procedure which led to the adoption of the contested decision.

84 As regards, first, the *locus standi* of Hauptverband der Deutschen Bauindustrie by reason of its members' own *locus standi*, it should be remembered that an association is regarded as individually concerned by a decision if it represents the

interests of undertakings which are themselves entitled to bring proceedings against that decision (see to that effect Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 62).

85 In that regard, it should be pointed out, first, that, at this stage, there are no *prima facie* grounds for concluding that the main action lodged by Kaefer Isoliertechnik is admissible.

86 Secondly, Hauptverband der Deutschen Bauindustrie likewise has not adduced any evidence to show that others of its members are individually concerned by the contested decision.

87 It must therefore be concluded that Hauptverband der Deutschen Bauindustrie cannot reasonably maintain, *prima facie*, that it is individually concerned by the contested decision on the basis that its members are themselves entitled to bring an action for annulment against that decision.

88 With regard, secondly, to the participation of Hauptverband der Deutschen Bauindustrie in the process of formulating the contested decision, it is true that the existence of particular circumstances, such as the role played by an association in a procedure leading to the adoption of a measure within the meaning of Article 230 EC, may support the admissibility of an action brought by an association whose members are not directly or individually concerned by the

contested measure, particularly if its position as negotiator has been affected by the measure (see to that effect Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, paragraphs 21 to 24, and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 28 to 30).

89 In those circumstances, it is necessary to establish whether the participation of Hauptverband der Deutschen Bauindustrie in the preparation of the objection raised by the Federal Republic of Germany constitutes *prima facie* a particular circumstance conferring on that association *locus standi* as a professional association representing the interests of its members, within the meaning of the case-law cited.

90 In that regard, as has already been held in paragraph 80 above, it is clear that Directive 89/106 does not in any way provide that, before adopting a decision pursuant to Article 5(1) of the directive, the Commission must comply with a procedure in which associations such as Hauptverband der Deutschen Bauindustrie are entitled to assert possible rights or even to be heard.

91 At this stage, the documents in the case do not provide grounds for concluding *prima facie* that the main action brought by Hauptverband der Deutschen Bauindustrie is admissible.

92 In the light of all the foregoing considerations, it cannot be inferred *prima facie* from the documents in the case that the applicants are individually concerned by the contested decision. Consequently, without its being necessary to consider whether or not the applicants' main action was lodged out of time, it must be

concluded that, at this stage, the documents in the case do not permit the inference that their main action is *prima facie* admissible.

93 It must also be stated that the applicants have not established that there was an urgent need to grant the interim relief sought.

94 According to settled case-law, the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting relief in order to prevent serious and irreparable damage to the party requesting the interim measure (order of the President of the Court in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 95, and the case-law cited therein).

95 It is for the party who pleads serious and irreparable damage to prove its existence (order of the President of the Court in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14). It does not have to be established with absolute certainty that the harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of the number of factors, should be foreseeable with a sufficient degree of probability (orders of the President of the Court in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 38; and Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 38).

96 In the present case, the applicants have pleaded urgency so far as Kaefer Isoliertechnik and the members of Hauptverband der Deutschen Bauindustrie are concerned. It should be pointed out, however, that Hauptverband der Deutschen Bauindustrie submitted evidence only to show that, amongst its members, the

users of construction products might suffer serious and irreparable harm. Therefore, the likelihood that such harm might be suffered by its other members, in particular, manufacturers of construction products, will not be taken into account.

97 As regards the nature of the urgency invoked, the applicants maintain that if the contested decision were annulled and if the withdrawn German standards were restored, the users of construction products would face considerable problems due to the need to alter or destroy the constructions built with products complying with the contested standards.

98 It should be pointed out at the outset that such damage depends on the restoration of the withdrawn German standards by the Federal Republic of Germany if the contested decision were to be annulled. It is only if standards applicable to thermal insulation products were to be restored that the applicants would have to alter or destroy the buildings constructed before the annulment of the contested decision. The applicants have not adduced any evidence to make it possible to assess the likelihood that those standards would actually be restored by the Federal Republic of Germany if the contested decision were annulled.

99 Furthermore, even assuming that the Federal Republic of Germany did restore the withdrawn German standards, it remains to be determined whether, as Kaefer Isoliertechnik and the other users of construction products which are members of Hauptverband der Deutschen Bauindustrie maintain, the need to alter constructions built with products complying with the contested standards would cause them serious and irreparable damage.

100 In that regard, it appears that it could be established that they had suffered harm only if the undertakings using construction products were unable to call on their suppliers to continue marketing products meeting the requirements of the withdrawn German standards. However, it is not apparent from the file at this stage that, following the withdrawal of those standards, it would be legally impossible for the users of construction products to require their suppliers to continue to market products which, while making it possible to meet the essential requirements of Directive 89/106, would also satisfy the requirements of the withdrawn German standards.

101 It is true that, at the hearing, Kaefer Isoliertechnik pointed out that, even if such a possibility existed from a legal point of view, it was, however, very theoretical, since manufacturers of construction products would very probably choose to market only products satisfying the contested standards.

102 However, even if, owing to certain market constraints, the users of construction products were not actually able to call on their suppliers to continue manufacturing products meeting the withdrawn German standards, the fact none the less remains that the harm invoked would relate to the need to alter buildings constructed with products satisfying the contested standards and would therefore constitute purely financial harm.

103 It has consistently been held that damage of a purely financial nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being irreparable only with difficulty, if it can ultimately be the subject of financial compensation. Damage of a financial nature that is not eliminated by the implementation of the judgment in the main proceedings constitutes an economic loss which may be made good by the means of redress provided for in the Treaty, in particular Articles 235 EC and 288 EC (order of the President of the Court in

Case T-184/01 R *IMS Health* v *Commission* [2001] ECR II-3193, paragraph 119, and the case-law cited therein).

104 In such a situation, the interim measure could be justified only if it appeared that, in the absence of such relief, the applicant would be placed in a situation which could endanger its very existence or irremediably affect its market share (orders of the President of the Court in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 138, and Case T-392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II-4555, paragraph 107).

105 In the present case, Kaefer Isoliertechnik has not adduced any evidence to show either that the absence of interim relief would endanger its existence or that the contested decision would irremediably affect its market share.

106 It must therefore be concluded that Kaefer Isoliertechnik has not established that it was a matter of urgency to grant the interim relief sought on the assumption that the Federal Republic of Germany would restore the withdrawn German standards if the contested decision were to be annulled.

107 Furthermore, with regard to the possibility that the withdrawn German standards might not be restored by the Federal Republic of Germany if the contested decision were to be annulled, it should be pointed out that that possibility was referred to only very generally and hypothetically at the hearing, and it was not specified in what respect it would cause Kaefer Isoliertechnik serious and irreparable harm.

108 Consequently, it must be held that it has not been established that it is a matter of urgency to grant the interim relief applied for.

109 In the light of all the foregoing observations, the application for interim relief must be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim relief is dismissed.**

2. **The costs are reserved.**

Luxembourg, 28 November 2003.

H. Jung
Registrar

B. Vesterdorf
President