

JUDGMENT OF THE COURT (Eighth Chamber)

30 April 2009*

In Case C-132/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Fővárosi Bíróság (Hungary), made by decision of 11 March 2008, received at the Court on 2 April 2008, in the proceedings

Lidl Magyarország Kereskedelmi bt

v

Nemzeti Hírközlési Hatóság Tanácsa,

THE COURT (Eighth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, E. Juhász and G. Arestis, Judges,

* Language of the case: Hungarian.

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Lidl Magyarország Kereskedelmi Bt., by R. Kölcsey-Rieden, ügyvéd,

- the Hungarian Government, by J. Fazekas, R. Somssich and K. Szíjjártó, acting as Agents,

- the Belgian Government, by T. Materne, acting as Agent,

- the Polish Government, by M. Dowgielewicz, acting as Agent,

- the Commission of the European Communities, by W. Wils and A. Sipos, acting as Agents,

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

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (OJ 1999 L 91, p. 10), Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ 2002 L 11, p. 4), and Article 30 EC.

- ² The reference has been made in the course of proceedings between Lidl Magyarország Kereskedelmi bt ('Lidl') and Nemzeti Hírközlési Hatóság Tanácsa (Council of the National Communications Authority) ('the Hatóság'), concerning the latter's objection to the marketing by Lidl of radio equipment in Hungary manufactured by a company with its head office in Belgium.

Legal background

Community law

Directive 1999/5

3 Article 1(1) of Directive 1999/5 defines its scope as follows:

‘This Directive establishes a regulatory framework for the placing on the market, free movement and putting into service in the Community of radio equipment and telecommunications terminal equipment.’

4 Under Article 2 of Directive 1999/5:

‘For the purpose of this Directive the following definitions shall apply:

(a) “apparatus” means any equipment that is either radio equipment or telecommunications terminal equipment or both;

...

(c) “radio equipment” means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication;

(d) “radio waves” means electromagnetic waves of frequencies from 9 kHz to 3 000 GHz, propagated in space without artificial guide;

...’

5 As regards the essential safety requirements which such apparatus must satisfy, Article 3(1) of Directive 1999/5 provides:

‘The following essential requirements are applicable to all apparatus:

(a) the protection of the health and the safety of the user and any other person, including the objectives with respect to safety requirements contained in Directive 73/23/EEC, but with no voltage limit applying;

(b) the protection requirements with respect to electromagnetic compatibility contained in Directive 89/336/EEC.’

6 Article 5 of Directive 1999/5 states:

‘1. Where apparatus meets the relevant harmonised standards or parts thereof whose reference numbers have been published in the *Official Journal of the European Communities*, Member States shall presume compliance with those of the essential requirements referred to in Article 3 as are covered by the said harmonised standards or parts thereof.

2. Where a Member State or the Commission considers that conformity with a harmonised standard does not ensure compliance with the essential requirements referred to in Article 3 which the said standard is intended to cover, the Commission or the Member State concerned shall bring the matter before the [Telecommunication and Conformity Assessment and Market Surveillance Committee].

3. ... after consulting the committee ... the Commission may withdraw harmonised standards by publication of a notice in the *Official Journal of the European Communities*.’

7 Article 6(1) and (4) of Directive 1999/5 provides:

‘1. Member States shall ensure that apparatus is placed on the market only if it complies with the appropriate essential requirements identified in Article 3 and the other relevant provisions of this Directive when it is properly installed and maintained and used for its intended purpose. It shall not be subject to further national provisions in respect of placing on the market.

...

4. In the case of radio equipment using frequency bands whose use is not harmonised throughout the Community, the manufacturer or his authorised representative established within the Community or the person responsible for placing the equipment on the market shall notify the national authority responsible in the relevant Member State for spectrum management of the intention to place such equipment on its national market.

This notification shall be given no less than four weeks in advance of the start of placing on the market and shall provide information about the radio characteristics of the equipment ... and the identification number of the notified body referred to in Annex IV or V.'

8 Under Article 8(1) of Directive 1999/5:

'Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of apparatus bearing the CE marking referred to in Annex VII, which indicates its conformity with all provisions of this Directive,... This shall be without prejudice to Articles 6(4), 7(2) and 9(5).'

- 9 As far as concerns the 'CE' conformity marking, the first subparagraph of Article 12(1) of Directive 1999/5 states:

'Apparatus complying with all relevant essential requirements shall bear the EC conformity marking referred to in Annex VII. It shall be affixed under the responsibility of the manufacturer, his authorised representative within the Community or the person responsible for placing the apparatus on the market.'

Directive 2001/95

- 10 Article 1 of Directive 2001/95 defines its scope as follows:

1. The purpose of this Directive is to ensure that products placed on the market are safe.

2. This Directive shall apply to all the products defined in Article 2(a). Each of its provisions shall apply in so far as there are no specific provisions with the same objective in rules of Community law governing the safety of the products concerned.

Where products are subject to specific safety requirements imposed by Community legislation, this Directive shall apply only to the aspects and risks or categories of risks not covered by those requirements. ...'

11 Article 2(a), (e) and (f) of Directive 2001/95 provides:

‘For the purposes of this Directive:

(a) “product” shall mean any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned.

...

(e) “producer” shall mean:

(i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or the person who reconditions the product;

(ii) the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product;

(iii) other professionals in the supply chain, in so far as their activities may affect the safety properties of a product;

(f) “distributor” shall mean any professional in the supply chain whose activity does not affect the safety properties of a product.’

12 Under Article 6(1) of Directive 2001/95:

‘Member States shall ensure that producers and distributors comply with their obligations under this Directive in such a way that products placed on the market are safe.’

13 The first and second subparagraphs of Article 8(2) of Directive 2001/95 state:

‘When the competent authorities of the Member States take measures such as those provided for in paragraph 1, in particular those referred to in (d) to (f), they shall act in accordance with the Treaty, and in particular Articles 28 and 30 thereof, in such a way as to implement the measures in a manner proportional to the seriousness of the risk, and taking due account of the precautionary principle.

In this context, they shall encourage and promote voluntary action by producers and distributors, in accordance with the obligations incumbent on them under this Directive, and in particular Chapter III thereof, including where applicable by the development of codes of good practice.’

National law

- ¹⁴ Under Article 188, point 32, of Law C of 2003 on electronic communication (2003. évi C. törvény az elektronikus hírközlésről):

‘For the purposes of this Law, the following definitions shall apply:

...

32. “producer”: any economic entity responsible for the planning, production, packaging, labelling and marketing of equipment, regardless of whether it performs those tasks itself or has them carried out by someone else on its behalf. Anyone who, for the purposes of marketing, makes significant modifications or additions to existing equipment, which affect its essential characteristics, or makes new equipment out of it must also be regarded as the producer. If the producer’s head office is not situated in Hungary, the importer of the equipment must be regarded as the producer.’

- ¹⁵ Under Article 1(2) of Decree No 5/2004 (IV.13.) of the Ministry of Information, Technology and Communications (IHM) on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (5/2004. (IV.13.) IHM rendelet a rádióberendezésekről és az elektronikus hírközlő végberendezésekről, valamint megfelelőségük kölcsönös elismeréséről) ‘the scope of this Decree covers in Hungary, in addition to the Hungarian Communications Authority, all natural or legal persons, all entities without legal personality, and all branches or representatives of

undertakings whose head office is established abroad which produce, import, market (jointly, “producers”), distribute, certify, put into service and use equipment referred to in paragraph 1’.

16 According to Article 4(4) of that decree, where radio equipment uses frequencies or frequency bands which are not harmonised in the European Union, the producer must inform the competent authority, in accordance with specific provisions laid down in that regard, of its intention to market the equipment concerned in Hungary.

17 The producer must, in accordance with Article 10(6) of the decree, ‘issue a declaration that the equipment conforms to the essential requirements. For the purposes of the marketing of apparatus manufactured in Hungary, a declaration of conformity must be issued in Hungarian or in other languages, including Hungarian. Where the apparatus was not manufactured in Hungary, the declaration may be issued in an official language of any Member State of the European Union. The substantive requirements relating to the declaration of conformity are set out in Annex 6’.

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

18 Lidl markets, in Hungary, radio equipment of the type ‘UC Babytalker 500’, manufactured by a Belgian company which affixed the ‘CE’ marking and issued a declaration of conformity for that product. That equipment uses a frequency which is not harmonised.

19 Following an inspection in 2007 at one of Lidl’s retail outlets, the Hatóság formed the view that that equipment did not satisfy the declaration of conformity provided for by Hungarian law. It consequently prohibited Lidl from marketing the equipment concerned until such time as a declaration of conformity issued in accordance with Hungarian law had been submitted. The Hatóság argued that Lidl was to be regarded as the manufacturer of the equipment since it placed the equipment on the market in Hungary.

20 Since the Hatóság did not accept the declaration of conformity issued by the Belgian manufacturer, Lidl brought an action against the decision prohibiting the marketing of that equipment, requesting its annulment.

21 Taking the view that the product concerned may, in accordance with the applicable Community directives, be marketed in all the Member States, the Fővárosi Bíróság, in the light of the contrary opinion expressed by the defendant in the main proceedings, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Can Article 8 of Directive [1999/5] be interpreted as meaning that no obligations apart from those concerning the free movement of radio equipment and telecommunications terminal equipment (“equipment”) in the directive may be laid down as regards the marketing of equipment which falls within the scope of the directive and which has had the “CE” marking affixed by its producer, established in another Member State?

2. Can Article 2(e) and (f) of Directive [2001/95] be interpreted, as regards obligations relating to marketing, as meaning that an entity may also be regarded as a producer if it markets equipment in a Member State (without being involved in the

manufacture of the equipment) and is established in a Member State other than the one where the producer is established?

3. Can Article 2(e)(i), (ii) and (iii), and (f) of Directive [2001/95] be interpreted as meaning that the distributor of equipment manufactured in another Member State (who is not the same person as the producer) can be required to issue a declaration of conformity setting out the technical data relating to the equipment?

4. Can Article 2(e)(i), (ii) and (iii), and (f) of Directive [2001/95] be interpreted as meaning that an entity which carries out only distribution in one Member State and is established in that State, must also be regarded as the producer of the distributed equipment where the activity of the distributor does not affect the safety characteristics of the equipment?

5. Can Article 2(f) of Directive [2001/95] be interpreted as meaning that the distributor, as defined in the directive, can be required to fulfil the obligations which under the directive are required only of the producer as defined in Article 2(e), such as the issuing of a declaration of conformity as regards technical conditions?

6. Can Article 30 [EC] and the so-called mandatory requirements justify an exception to the application of the formula [derived from the judgment in Case 8/74 *Dassonville* [1974] ECR 837], having regard to the principles of equivalence and mutual recognition?

7. Can Article 30 [EC] be interpreted as meaning that trade in and import of goods in transit cannot be restricted for any reason other than those listed there?

8. Is the “CE” marking sufficient to satisfy the principle of equivalence or the principle of mutual recognition and the conditions of Article 30 [EC]?

9. Can the “CE” marking be interpreted as meaning that Member States are not justified in applying any other technical provisions or provisions regarding quality to equipment bearing the mark?

10. Can the provisions of Article 6(1) and of the second sentence of Article 8(2) of Directive [2001/95] be interpreted as meaning that, for the purposes of marketing of goods, the producer and the distributor can be considered to be subject to the same obligations, where the producer does not market the products?

The questions referred for a preliminary ruling

The interpretation of Directive 1999/5

- ²² By its first question, the referring court seeks, essentially, to ascertain whether a Member State may, pursuant to Directive 1999/5, require an operator placing radio equipment on the national market to provide a declaration of conformity even though

the manufacturer of that equipment, whose head office is situated in another Member State, has affixed the 'CE' marking on it and has issued a declaration of conformity for that product.

- 23 In that connection, it must be stated that Directive 1999/5, which establishes a legal framework for the placing on the market, free movement and putting into service in the Community of radio equipment contains, in Articles 6, 8 and 12, the rules which are relevant for the resolution of the dispute in the main proceedings.
- 24 Articles 6 and 8 of Directive 1999/5 ensure the free movement of apparatus which satisfy the provisions of that directive (Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 50).
- 25 Although the Member States are required to ensure, in accordance with the first sentence of Article 6(1) of Directive 1999/5, that apparatus is placed on the market only if it complies with the appropriate essential requirements identified in that directive, the second sentence of Article 6(1) provides that they must not subject that apparatus to other national requirements in respect of placing on the market. Furthermore, Article 8(1) of that directive provides that Member States must not impede the placing on the market in their territory of apparatus bearing the 'CE' marking.
- 26 Directive 1999/5 confers a presumption of compliance on apparatus which bears the 'CE' marking. That marking attests the conformity of the apparatus with all the provisions of that directive, including the conformity assessment procedures provided for by that directive (see *ATRAL*, paragraph 51).

- 27 Under that scheme the ‘CE’ marking is, according to the second sentence of the first subparagraph of Article 12(1) of Directive 1999/5, affixed under the responsibility of the manufacturer, his authorised representative within the Community or the person responsible for placing the apparatus on the market.
- 28 Consequently, products bearing the ‘CE’ marking may be placed on the market without having to undergo a prior authorisation procedure (see, to that effect, *ATRAL*, paragraph 52) or any other procedure designed to multiply the number of persons required to affix the conformity marking.
- 29 The Member States are therefore obliged, without prejudice to the provisions of Articles 6(4), 7(2) and 9(5) of Directive 1999/5, to recognise the ‘CE’ marking affixed by one of the persons listed in Article 12(1) of that directive. To require one of those persons to provide a declaration of conformity for radio equipment on which the ‘CE’ marking has already been affixed by one of the other persons identified in Article 12(1) of Directive 1999/5 would be tantamount to impeding the placing of that product on the market by making it subject to requirements other than those laid down by Directive 1999/5.
- 30 It follows that Directive 1999/5 precludes national rules which, in the field harmonised by that directive, require the persons responsible for the placing on the market of a product bearing the ‘CE’ marking and accompanied by a declaration of conformity issued by the producer also to provide a declaration of conformity.
- 31 The fact that the producer who affixed the ‘CE’ marking is based in a Member State other than that in which the product is placed on the market has no bearing on that assessment. Indeed, the contrary is the case: since it concerns the free movement of radio equipment and the mutual recognition of the conformity of such equipment, Directive 1999/5 precisely covers that situation.

32 Furthermore, the fact that the apparatus concerned in the main proceedings uses a frequency which has not been harmonised also cannot, in the light of Article 6(4) of Directive 1999/5, alter that assessment. The procedural rule laid down in that provision merely imposes on the manufacturer, his authorised representative within the Community or the person responsible for placing the apparatus on the market the obligation to notify the national authority responsible for spectrum management of the intention to place such equipment on its national market. Although it is intended to complement the implementation of the mechanisms of Directive 1999/5 in national law, that procedural rule does not in any way confer on the Member States the power to impose additional conditions or limit the scope of the prohibition contained in the second sentence of Article 6(1) of Directive 1999/5 (see Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraph 53).

33 Therefore, the answer to the first question is that Member States cannot, under Directive 1999/5, require a person who places radio equipment on the market to provide a declaration of conformity even though the producer of that equipment, whose head office is situated in another Member State, has affixed the 'CE' marking to that product and issued a declaration of conformity in its regard.

The interpretation of Directive 2001/95

34 By Questions 2 to 5 and 10, which it is appropriate to examine together, the referring court asks essentially whether a distributor of radio equipment may, pursuant to the provisions of Directive 2001/95, be regarded as the producer of that product without having participated in its production and even though its activities do not affect the safety properties of the product, and whether it may be required to issue a declaration of conformity including the technical data relating to the radio equipment concerned, or whether it may be made subject to the obligations imposed on the producer in the case where the latter does not market the relevant products.

35 As a preliminary point, it must be recalled that Directive 2001/95 does not apply, by virtue of Article 1(2) thereof, if there are specific Community rules governing the safety of the products concerned and which are intended to achieve the same objective.

36 As the Belgian Government and the Commission, among others, essentially argue, Directive 1999/5 constitutes such specific rules with regard to the declaration of conformity for radio equipment.

37 Thus, Directive 2001/95 and the definitions of ‘producer’ and ‘distributor’ in Article 2(e) and (f) thereof are not applicable as regards the determination of issues relating to a person’s obligation to provide a declaration of conformity for radio equipment.

38 In so far as the referring court asks whether a Member State may impose on such a distributor obligations normally imposed on producers deriving from Directive 2001/95, it must be stated that the file submitted to the Court does not contain any information relating to any obligations other than the presentation of a declaration of conformity imposed on the distributors of radio equipment in Hungary.

39 In any event, in order to determine the specific obligations arising from Directive 2001/95, it must be held that a person who markets a product may be regarded as being the producer of that product only under the conditions laid down by Article 2(e) thereof, and as being the distributor thereof only under the conditions set

out in Article 2(f). The producer and the distributor may be bound only by obligations which Directive 2001/95 imposes on each of them respectively.

- 40 Accordingly, the answer to Questions 2 to 5 and 10 is that Directive 2001/95 does not apply to the determination of issues concerning the obligation of a person to provide a declaration of conformity of radio equipment. As regards the power of the Member States, in accordance with Directive 2001/95, in connection with the marketing of radio equipment, to impose obligations other than the presentation of a declaration of conformity, a person who markets a product may be regarded as being the producer of that product only under the conditions laid down by Directive 2001/95 itself in Article 2(e), and as being the distributor of that product only under the conditions set out in Article 2(f). The producer and the distributor may be bound only by obligations which Directive 2001/95 imposes on each of them respectively.

The interpretation of Article 30 EC

- 41 Questions 6 to 9, which it is appropriate to deal with together, concern possible justifications which may be relied on by a Member State in support of obstacles to the free movement of radio equipment bearing the 'CE' conformity marking, and the interpretation of Article 30 EC.
- 42 In that regard, it should be borne in mind, as the Commission in particular submits, that, where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not of Articles 28 EC and 30 EC (see Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32 and the case-law cited).

- 43 As regards the obligation to provide a declaration of conformity for radio equipment, Directive 1999/5 contains specific rules. It is clear from the wording and the objective of that directive that it pursues complete harmonisation in its field of application. It follows that, in the fields covered by that directive, the Member States must conform to them in their entirety and cannot maintain national provisions to the contrary (see *ATRAL*, paragraph 44).
- 44 The free movement of the apparatus covered by the scope of Directive 1999/5, which is presumed to conform to the essential requirements and therefore with the safety standards to which it refers, may be impeded only under the conditions laid down by that directive itself. Where a Member State takes the view that the conformity with a harmonised standard does not guarantee compliance with the essential requirements laid down by that directive which that standard is supposed to cover, that Member State may, pursuant to Article 5 thereof, refer the matter to the committee. In the case of shortcomings of harmonised standards with respect to the essential requirements, those standards may be withdrawn only in accordance with the procedure set out in Article 5 of Directive 1999/5. In those circumstances, it must be held that the scheme put in place by Directive 1999/5 ensures compliance with the essential requirements laid down by that directive.
- 45 Furthermore, as the Commission observes, where, in support of a restriction, a Member State invokes grounds external to the field harmonised by Directive 1999/5, it may refer to Article 30 EC. In such a case, the Member State may invoke only one of the public-interest reasons laid down in Article 30 EC or one of the overriding requirements referred to in the judgments of the Court (see, in particular, Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8). In either case, the national provision must be appropriate for securing the attainment of that objective and must not go beyond what is necessary in order to attain it (see *Radiosistemi*, paragraph 42, and *ATRAL*, paragraph 64).
- 46 In the light of the foregoing considerations, the answer to Questions 6 to 9 is that where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in that of Articles 28 EC and 30 EC. In matters coming under Directive 1999/5, Member States must comply in full with the provisions of that

directive and may not maintain in force contrary national provisions. In the case where a Member State takes the view that conformity with a harmonised standard does not guarantee compliance with the essential requirements laid down by that directive which that standard is supposed to cover, that Member State is required to follow the procedure set out in Article 5 of that directive. By contrast, a Member State may, in support of a restriction, invoke grounds external to the field harmonised by Directive 1999/5. In such a case, it may invoke only the reasons laid down in Article 30 EC or mandatory requirements relating to the public interest.

Costs

⁴⁷ 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:

- 1. Member States cannot, under Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity, require a person who places radio equipment on the market to provide a declaration of conformity even though the producer of that equipment, whose head office is situated in another Member State, has affixed the 'CE' marking to that product and issued a declaration of conformity in its regard.**
- 2. Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety does not apply to the determination of questions concerning the obligation of a person to provide**

a declaration of conformity of radio equipment. As regards the power of the Member States, in accordance with Directive 2001/95, in connection with the marketing of radio equipment, to impose obligations other than the presentation of a declaration of conformity, a person who markets a product may be regarded as being the producer of that product only under the conditions laid down by Directive 2001/95 itself in Article 2(e), and as being the distributor of that product only under the conditions set out in Article 2(f). The producer and the distributor may be bound only by obligations which Directive 2001/95 imposes on each of them respectively.

3. Where a matter is regulated in a harmonised manner at Community level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in that of Articles 28 EC and 30 EC. In matters coming under Directive 1999/5, Member States must comply in full with the provisions of that directive and may not maintain in force contrary national provisions. In the case where a Member State takes the view that conformity with a harmonised standard does not guarantee compliance with the essential requirements laid down by Directive 1999/5 which that standard is supposed to cover, that Member State is required to follow the procedure set out in Article 5 of that directive. By contrast, a Member State may, in support of a restriction, invoke grounds external to the field harmonised by Directive 1999/5. In such a case, it may invoke only the reasons laid down in Article 30 EC or mandatory requirements relating to the public interest.

[Signatures]