Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

15 July 2015*

(Approximation of laws — Directive 2006/42/EC — Machinery bearing the 'CE' marking — Essential safety requirements — Risks to the safety of persons — Safeguard clause — Commission decision declaring a national measure prohibiting the placing on the market to be justified — Conditions governing the implementation of the safeguard clause — Manifest error of assessment — Equal treatment)

In Case T-337/13,

CSF Srl, established in Grumolo delle Abbadesse (Italy), represented by R. Santoro, S. Armellini and R. Bugaro, lawyers,

applicant,

v

European Commission, represented by G. Zavvos, acting as Agent, assisted by M. Pappalardo, lawyer,

defendant,

supported by

Kingdom of Denmark, represented initially by V. Pasternak Jørgensen and M. Wolff, and subsequently by M. Wolff, C. Thorning, U. Melgaard and, N. Lyshøj, acting as Agents,

intervener,

APPLICATION for annulment of Commission Decision 2013/173/EU of 8 April 2013, on a measure taken by Denmark pursuant to Article 11 of Directive 2006/42/EC of the European Parliament and of the Council prohibiting a type of multi-purpose earthmoving machinery (OJ 2013 L 101, p. 29)

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas, President, N.J. Forwood (Rapporteur) and E. Bieliūnas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 April 2015,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 The applicant, CSF Srl, is an undertaking established in Italy and operating in the machinery manufacturing sector. It produces, inter alia, a machine called the Multione S630 ('the Multione S630'). The essential characteristic of this machine is that it can be used for different purposes in various spheres of activity, owing to 58 attachments that can be fitted to it. These attachments, also designed by the applicant, allow the machine to be transformed, for example, into a dumper, a snow-plough, a fork, a lifting pole, a hydraulic hammer, a clamp, a rotavator or a lawnmower and, consequently, to be used in areas such as gardening, agriculture, construction, road maintenance and forestry work. The machine at issue has been placed on the market in various Member States of the European Union. 10 individual machines of the type at issue have been marketed since 2009 in Denmark, where they are used for feed distribution and cage-cleaning in mink farming.

2 On 31 January 2012, the Danish authorities adopted measures in relation to the Multione S630 pursuant to Article 11(1) of Directive 2006/42/EC of the European Parliament and the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (OJ 2006 L 157, p. 24). Those measures consisted, firstly, of prohibiting the placing on the Danish market of any new Multione S630 machine not fitted with an appropriate falling object protective structure and, secondly, of ordering the applicant to take corrective action with respect to all machines of that type already in service in Denmark.

3 The reasons given by the Danish authorities for the adoption of those measures were the non-compliance of the Multione S630 with some of the essential safety requirements under Directive 2006/42. The Danish authorities claimed that the Multione S630 machines placed on the Danish market did not have an appropriate protective structure even though several of the intended functions of the machine exposed the ride-on operator to risks due to falling objects or material. According to the Danish authorities, this was non-compliant with Section 3.4.4 of Annex I to Directive 2006/42. That section provides that, where, in the case of self-propelled machinery with a ride-on driver, there is a risk due to falling objects or material, the machinery must be designed and constructed in such a way as to take account of this risk and fitted, if its size allows, with an appropriate protective structure.

4 In accordance with Article 11(2) of Directive 2006/42, the Commission was informed of the measures taken by the Danish authorities. By Decision 2013/173/EU of 8 April 2013 on a measure taken by Denmark according to Article 11 of Directive 2006/42 prohibiting a type of multi-purpose earthmoving machinery (OJ 2013 L 101, p. 29, 'the contested decision'), the Commission held that the measures were justified under Article 11(3) of Directive 2006/42.

Procedure and forms of order sought

5 The applicant brought the present action by application lodged at the Court Registry on 19 June 2013.

6 By a document lodged at the Court Registry on 30 August 2013, the applicant also submitted an application for interim measures. By order of 11 November 2013, the President of the General Court rejected that application as unfounded, on the grounds that the applicant had not established any urgency for a ruling. Costs were reserved.

7 By a document lodged at the Court Registry on 1 October 2013, the Kingdom of Denmark applied for leave to intervene in support of the form of order sought by the Commission. By order of 13 November 2013, the President of the First Chamber of the General Court granted leave to intervene.

8 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure.

9 The parties presented oral argument and answered the questions put by the Court at the hearing on 28 April 2015.

10 The applicant claims that the Court should:

— annul the contested decision;

— undertake an expert's report, as necessary;

— Order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

12 The Kingdom of Denmark contends that the Court should dismiss the action.

Law

13 Without expressly raising an objection of inadmissibility, the Commission queries the admissibility of the action. As to the substance, the applicant adduces two pleas in law in support of its claim for annulment of the contested decision. It also raises a complaint about the damage allegedly caused to it by the contested decision but without formulating any submissions in that regard.

Admissibility of the action

14 The Commission claims, in essence, that the contested decision does not directly concern the applicant for the purposes of the fourth paragraph of Article 263 TFEU. Although it considers the measures adopted by the Danish authorities against the applicant to be justified, it is of the opinion that it is those authorities that directly affect the applicant's legal situation, in accordance with the division of competences set out in Directive 2006/42. In addition, although the decision was notified to Member States other than the Kingdom of Denmark, it is none the less down to the competent national authorities to verify to what extent the machines placed on the Danish market by the applicant do or do not comply with the directive and to draw the appropriate conclusions.

15 The applicant challenges that argument.

16 It should be noted that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is of direct and individual concern to them.

17 It is settled case-law that a natural or legal person is directly concerned by an act that directly affects the legal situation of that person and that leaves no discretion to its addressees, its implementation being purely automatic and resulting from EU rules without the application of other intermediate rules (judgments of 5 May 1998 in *Dreyfus* v *Commission*, C-386/96 P, ECR, EU:C:1998:193, paragraph 43, and 13 March 2008 in *Commission* v *Infront WM*, C-125/06 P, ECR, EU:C:2008:159, paragraph 47).

18 In the present case, the action brought by the applicant seeks the annulment of a decision by the Commission that found that the measures adopted by the Danish authorities were justified in relation to the conditions under which the Multione S630 was placed on the Danish market.

19 The measures adopted by the Danish authorities are based on provisions of Danish law implementing Directive 2006/42, in particular Article 11(1) of that directive. Under Article 11(1), where a Member State ascertains that machinery covered by the directive, bearing the 'CE' marking, accompanied by the EC declaration of conformity and used in accordance with its intended purpose or under conditions which can reasonably be foreseen, is liable to compromise the safety of persons, it shall take all appropriate measures to withdraw such machinery from the market, to prohibit the placing on the market or putting into service of such machinery or to restrict free movement thereof.

20 The contested decision itself is based on Article 11(3) of Directive 2006/42. Article 11(3) provides that, when a Member State informs the Commission that measures have been adopted pursuant to Article 11(1) of the directive, the Commission shall enter into consultation with the parties concerned and shall then consider whether or not the measures are justified, before communicating its decision to the Member State which took the initiative, the other Member States, and the manufacturer of the machine at issue or his authorised representative.

21 As the Commission rightly points out, it is clear from reading the letter sent by the Danish authorities to the applicant on 31 January 2012 that the aim of the measures adopted by the Danish authorities was to directly affect the legal situation of the applicant. Having determined that the Multione S630 did not comply with some of the essential safety requirements laid down by Directive 2006/42, to the extent that it was not fitted with a protective structure against falling objects or materials, the Danish authorities firstly prohibited the Multione S630 from being placed on the Danish market; secondly, ordered the applicant to modify its design and construction to provide it with such a structure; and thirdly, obliged the applicant to make all Multione S630 machines already in service in Denmark compliant with the requirements under the directive or to withdraw them from the Danish market.

22 The Commission was, however, wrong to conclude that the contested decision did not directly concern the applicant.

23 On the contrary, it is, in the first place, appropriate to regard the contested decision as producing direct effects on the applicant's legal situation that differ from the effects of the measures adopted by the Danish authorities.

24 First, it should be noted that the contested decision was addressed to all EU Member States and not only to the Kingdom of Denmark, in compliance with the communication and information requirements imposed on the Commission by Article 11(3) and Article 11(6) of Directive 2006/42. The contested decision is therefore binding in its entirety on all Member States, pursuant to Article 288 TFEU.

25 Secondly, Directive 2006/42 was adopted on the basis of Article 95 EC (now Article 114 TFEU) which enables the European Parliament and the Council of the European Union to adopt measures which have as their object the abolition of barriers to trade arising from differences between the provisions laid down by law, regulation or administrative action in Member States (see judgments of 17 May 1997 in *France* v *Commission*, C-41/93, ECR, EU:C:1994:196, paragraph 22, and of 9 August 1994 in *Germany* v *Council*, C-359/92, ECR, EU:C:1994:306, paragraph 22, in relation to Article 100a EC). Directive 2006/42 aims to harmonise the conditions under which machinery bearing the 'CE' marking and the EC declaration of conformity is placed on the internal market and to ensure its free movement within the European Union, whilst also guaranteeing compliance with a set of requirements designed to protect the health and safety of persons from risks arising from use of the machinery (see, to that effect, judgments of 8 September 2005 in *Yonemoto*, C-40/04, ECR, EU:C:2005:519, paragraphs 31 and 45, and of 17 April 2007 in *AGM-COS.MET*, C-470/03, ECR, EU:C:2007:213, paragraphs 52

and 53), as did Council Directive 89/392/EEC of 14 June 1989 on the approximation of the laws of the Member States relating to machinery (OJ 1989 L 183, p. 9) and Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998 L 207, p. 1), which preceded it.

26 To that end, Directive 2006/42 prohibits Member States from, inter alia, impairing the free movement of machinery within the European Union, if the machinery meets conditions permitting the assumption to be made that it complies with the essential health and safety requirements set out (Articles 6 and 7 of Directive 2006/42). The directive also imposes an obligation on the competent national authorities to ensure surveillance of their respective markets, in particular by taking all appropriate measures to ensure that machinery may be placed on the market and/or put into service only if it satisfies the relevant provisions of the directive and does not endanger the health and safety of persons (Article 4 of Directive 2006/42). Finally, the directive obliges Member States to take all appropriate measures to withdraw from the market, to prohibit the placing on the market and/or the putting into service, or to restrict the free movement, of machinery that is liable to compromise the health and safety of persons (Article 11 of Directive 2006/42).

27 Thirdly, as a result of Article 14(7) and Article 19 of Directive 2006/42, when read in the light of recitals 9 and 10 in the preamble to the directive, Member States are obliged, in the course of the market surveillance referred to in the directive, and, more particularly, in the implementation of the safeguard clause in Article 11 of the directive, to guarantee the proper and uniform application of the directive, by coordinating and by taking account of guidelines developed by the Commission.

28 Bearing in mind the purpose, the general scheme and the content of the provisions referred to in paragraphs 26 and 27 above, it must be concluded that the effect of the contested decision is to oblige all Member States other than the Kingdom of Denmark to take appropriate measures in relation to placing the Multione S630 on their respective markets, or to retaining it on the market, and, in so doing, to guarantee the proper and uniform application of Directive 2006/42, in the light of the measures adopted by the Danish authorities and found to be justified by the Commission, as the applicant essentially submits. In other words, as a result of the contested decision, each of the Member States other than the Kingdom of Denmark is obliged to determine, for its own part, whether or not the individual Multione S630 machines that could have been placed on its particular market by the applicant are fitted with an appropriate protective structure against falling objects or materials, and, consequently, whether or not those machines may remain on that market. To that extent, the direct consequence of the contested decision is to trigger national procedures that have an impact on the right that the applicant had, until then, enjoyed within the whole of the European Union, to market machinery that benefited from the presumption of conformity under Article 7 of that directive, since it bore the 'CE' marking and was accompanied by the EC declaration of conformity (see, by analogy, *Commission* v *Infront WM*, cited in paragraph 17 above, EU:C:2008:159, paragraphs 50 to 52).

29 In the present case, the Commission does not dispute the fact that, on finding the contested decision addressed to them, the Finnish and Lithuanian authorities have already taken steps accordingly.

30 In second place, the contested decision leaves no discretion to its addressees as to the result to be achieved, its implementation being entirely automatic and resulting from EU rules without the need for the application of other intermediate rules.

31 It is certainly true, as the Commission maintains, that in order to determine whether the applicant has placed or intends to place Multione S630 machines into circulation in their territories, and whether any of those machines is lacking a protective structure against falling objects or materials, the competent national authorities are likely to need to undertake a review procedure first. Nevertheless, if that does turn out to be the case, the authorities must conclude that the safety of persons is liable to be compromised and must take appropriate measures to address that risk, ensuring the proper and

uniform application of Directive 2006/42, in the light of the contested decision and the Danish measures found to be justified by that decision, and ordering the prohibition, withdrawal or modification of the machine at issue or adopting equivalent measures. It is therefore the Commission's decision finding the measures adopted by the Danish authorities to be justified that determines the result that the other national authorities must achieve, those authorities having no margin of discretion in the matter (see, to that effect, order of 7 June 2007 in *IMS* v *Commission*, T-346/06 R, ECR, EU:T:2007:164, paragraphs 51 to 54; see also, by analogy, judgment in *Commission* v *Infront WM*, cited in paragraph 17 above, EU:C:2008:159, paragraphs 59 to 63).

32 In addition, in the present case, the Commission does not effectively dispute the applicant's arguments that the steps taken by the Finnish and Lithuanian authorities, in the light of the contested decision being notified to them, show that they were in no doubt as to the scope of that decision or the conclusions they must draw from it; neither does the Commission contest the documents produced in that regard.

33 The above considerations are unaffected by Article 9 of Directive 2006/42. That article, which introduces '[s]pecific measures to deal with potentially hazardous machinery', provides, inter alia, that when, in accordance with the procedure referred to in Article 11 of the directive, the Commission considers that a measure taken by a Member State is justified, it may take measures requiring Member States to prohibit or restrict the placing on the market of machinery presenting the same risk as that covered by national measures by virtue of its technical characteristics or to make such machinery subject to special conditions. In addition, recital 13 of the directive states that such measures, adopted at EU level, are not directly applicable to economic operators and must be implemented by Member States.

34 It should be noted that, even though Member States must ensure the proper and uniform application of Directive 2006/42 by drawing the conclusions from a national measure taken in relation to a certain machine and found to be justified by the Commission, and they do not have any margin of discretion as to the result to be achieved, they clearly cannot step beyond the procedural and material framework provided for by Article 11(1) by unilaterally choosing to extend the scope of that measure to other machines on the grounds that they too present the same risk, as to do so would constitute a breach of the principle of free movement set out in Article 6(1) of the directive and of the presumption of conformity provided for by Article 7 of that directive (see, to that effect, judgment of 25 March 1999 in *Commission* v *Italy*, C-112/97, ECR, EU:C:1999:168, paragraph 54, and judgment in *AGM-COS.MET*, cited in paragraph 25 above, EU:C:2007:213, paragraphs 61 to 64 and 68 to 70). That is why the EU legislature made such an extension conditional on a specific procedure being followed, involving the adoption of both an express decision to that effect by the Commission and national measures implementing that decision. However, such steps are neither provided for, nor are they necessary, for the purposes of Article 11 of the directive at issue, bearing in mind the scope of that article (see paragraphs 28 and 31 above).

35 It follows from all of the foregoing that the Commission is not justified in disputing the admissibility of the action on the grounds that the contested decision does not directly concern the applicant.

Application for annulment of the contested decision

36 In support of its application for the contested decision to be annulled, the applicant relies on two pleas in law: the first alleging breach of Directive 2006/42 and the second alleging breach of the principle of equal treatment.

First plea in law, alleging breach of Directive 2006/42

37 The applicant submits, in essence, that the contested decision is based on a misinterpretation and a misapplication of the provisions of Directive 2006/42 in relation to the essential safety requirements that must be followed by manufacturers of machinery intended to be placed on the market within the European Union.

38 The applicant's first argument is that the contested decision found the measures adopted by the Danish authorities in relation to the Multione S630 to be justified, even though they require the applicant to comply with obligations exceeding those provided for in Article 5(1)(a) of, and sections 1.1.2 and 3.4.4 of Annex I to, Directive 2006/42.

39 The applicant's second argument is that the scope wrongly attributed to those provisions by the Danish authorities, and subsequently by the Commission, led to the contested decision upholding national measures that were taken in breach of the conditions for implementation of the safeguard clause contained in Article 11 of Directive 2006/42, of the prohibition on impairing the free movement of machinery imposed on Member States by Article 6(1) of the directive and of the presumption of conformity from which the Multione S630 benefited under Article 7(1) of the directive.

40 The applicant's third argument is that the Commission accepted the position of the Danish authorities without taking any account of the objections raised by the applicant before the authorities and then during the consultation held under Article 11(3) of Directive 2006/42.

41 As its fourth and final argument, the applicant claims that, quite apart from the misinterpretation of Directive 2006/42 on which the contested decision was based, the assessments of fact made by the Danish authorities and found by the Commission to be justified were themselves erroneous.

42 The Commission, supported by the Kingdom of Denmark, disputes these various complaints.

43 In the light of the parties' arguments, a sequential examination needs to be made, first of the validity of the present plea, then of the two complaints made by the applicant in that context, alleging errors of law, and lastly of the applicant's final two complaints, which in essence allege that the Commission committed errors of assessment.

– Validity of the plea

44 In the first place, it must be recalled that, whilst obliging Member States to take all appropriate measures to restrict the free movement on their national market of machinery that they ascertain to be liable to compromise the health and safety of persons, Article 11 of Directive 2006/42, entitled 'Safeguard clause', provides that the Commission should 'consider … whether or not [those measures] are justified' (see paragraphs 19 and 20 above).

45 As the Commission itself notes, the legal basis for Directive 2006/42 is Article 95 EC (now Article 114 TFEU), paragraph 10 of which provides that the harmonisation measures adopted on that basis shall, in appropriate cases, include a safeguard clause authorising Member States to take, for one or more of the non-economic reasons referred to in Article 36 TFEU, 'provisional measures subject to a Union control procedure'.

46 As a result, even though it is effectively down to the Member States to correctly implement Directive 2006/42 and to ensure that machinery placed on the market or put into service in their territory complies with those provisions, if necessary by taking measures such as those envisaged in Article 11, as the Commission points out, it is still for the Commission to review whether those measures are justified, by satisfying itself in particular of the merits of the legal and factual grounds for the

adoption of the measures (see, by analogy, judgment in *France* v *Commission*, cited in paragraph 25 above, EU:C:1994:196, paragraphs 27 and 28; see also, to that effect and by analogy, judgments of 14 June 2007 in *Medipac-Kazantzidis*, C-6/05, ECR, EU:C:2007:337, paragraph 46, and 22 April 2015 in *Klein* v *Commission*, C-120/14 P, EU:C:2015:252, paragraphs 64 and 76). The result of that review determines definitively whether the national measure at issue may be retained, meaning that the Member State may only retain it if the Commission declares it to be justified and must remove it if that is not the case.

47 It follows that, contrary to the Commission's position, any person entitled to apply for the annulment of a decision finding such measures to be justified is entitled to assert, in support of its pleadings, that the decision is based on a misinterpretation of the provisions of Directive 2006/42, even if such an interpretation, which must be duly taken into account by all Member States (see paragraphs 28, 30 and 31 above) was first made by the competent national authorities and then upheld by the Commission. In such a case, the error of law capable of invalidating the decision in which the Commission found the national measures at issue to be justified must be capable of being challenged before the EU courts, so as not to restrict the scope of Article 263 TFEU and the principle of effective legal protection.

48 In addition, a judicial review of the merits of the legal grounds leading to the Commission's finding that the national measures at issue were justified must be a complete review, since it concerns a question of law.

49 In the present case, the applicant is therefore entirely within its rights in saying that it may allege errors of law in the contested decision, namely that the Commission upheld the misinterpretation given to Directive 2006/42 by the Danish authorities and also found national measures to be justified when they were adopted in breach of, inter alia, Article 6, Article 7(1) and Article 11 of, and Annex I to the directive.

– The complaints alleging errors of law

50 In the second place, it is therefore appropriate to examine the merits of those complaints. In essence, the applicant disputes the interpretation given by the Danish authorities to some of the conditions governing implementation of the safeguard clause contained in Article 11(1) of Directive 2006/42 and found by the Commission to be justified in the contested decision. It is common ground between the parties that the Multione S630 is a machine to which Directive 2006/42 applies, that Multione S630 machines placed by the applicant on the Danish market bear the 'CE' marking, and that they are accompanied by the EC declaration of conformity. However, the applicant and the Commission differ in their view of the ambit, in the present case, of the condition requiring the competent Member State to ascertain that, 'used in accordance with its intended purpose or under conditions which can reasonably be foreseen, [the machinery in question] is liable to compromise the … safety of persons …', before being entitled to restrict free movement of the machinery in its territory. In particular, the parties differ with regard to the means of evaluating the risk that a machine might pose to the safety of its users and the extent and also the relationship of the various obligations placed on manufacturers to address those risks.

51 In that regard, it is clear from Article 11(1) of Directive 2006/42 that, when a Member State ascertains that 'machinery' to which the directive applies, 'used in accordance with its intended purpose or under conditions which can reasonably be foreseen, is liable to compromise the … safety of persons …', it is obliged to take all appropriate measures to withdraw 'such machinery' from the market, to prohibit the placing on the market or putting into service of 'such machinery' or to restrict free movement 'thereof'.

52 The first indent of point (a) in the second paragraph of Article 2 of Directive 2006/42 defines 'machinery' as 'an assembly, fitted with or intended to be fitted with a drive system other than directly applied human or animal effort, consisting of linked parts or components, at least one of which moves, and which are joined together for a specific application'. Some of the definitions set out in the other indents of that provision refer to the definition in the first indent; others do not refer to it but they, too, characterise machinery by the fact, among other criteria, that it consists of elements which 'achieve the same end' or which are 'joined together, intended' for a given purpose. In addition, Article 1(1)(g) and Article 2(g) compare machinery with 'partly completed machinery', which is defined as being unable in itself to perform a specific application and only intended to be incorporated into or assembled with other machinery or equipment, thereby forming machinery per se.

53 Finally, Article 1(1) and the first paragraph of Article 2 of Directive 2006/42 make it clear that the term 'machinery' should be taken to designate not only machinery in the sense of the provisions cited in the paragraph above, but also an assembly of other products, including interchangeable equipment. Article 2(b) of the directive defines 'interchangeable equipment' as a 'device which, after the putting into service of machinery or of a tractor, is assembled with that machinery or tractor by the operator himself in order to change its function or attribute a new function, in so far as this equipment is not a tool'. The second edition of the '*Guide to application of the Machinery Directive 2006/42*', published by the Commission in June 2010 and included in the Court file, specifies in paragraph 41 that, unlike tools, 'which do not change or attribute a new function to the basic machinery', and which are not covered by the directive, 'examples of interchangeable equipment include equipment assembled with agricultural or forestry tractors for functions such as ploughing, harvesting, lifting or loading, and equipment assembled with earth-moving equipment, for functions such as drilling or demolition'.

54 In the light of those provisions and definitions, it is appropriate first to consider that it is in relation to specific machinery or interchangeable equipment, intended for one or more specified purposes, that a Member State is able to invoke the safeguard clause in Article 11 of Directive 2006/42 and that it must, in this context, assess the risk to the health and safety of persons governing the implementation of such a clause (see, to that effect, judgment in *Commission* v *Italy*, cited in paragraph 34 above, EU:C:1999:168, paragraphs 10 and 39). The ensuing assessment and national measure must therefore be justified in relation to that machinery as it was marketed and, where applicable, the interchangeable equipment with which it was equipped at the time it was placed on the market or put into service. Otherwise, it would be possible for a Member State to impair the principle of free movement without there being an existence of an actual risk to the health and safety of persons to justify this (see paragraph 57 below).

55 In the present case, the applicant's argument is, essentially, that the risk assessment that the Danish authorities had to carry out to determine the applicability of the safeguard clause and the implementing provisions under Danish law related to the Multione S630 as it was actually placed on the Danish market. The applicant submitted, and was not contradicted in this by either the Commission or the Kingdom of Denmark, that all Multione S630 machines on the Danish market had been purchased in conjunction with equipment making them suitable for use in mink farming, the normal use of which did not entail any risk of falling objects or material.

56 Secondly, the applicant maintains that the risk assessment that must be carried out by the relevant national authorities, subject to review by the Commission, should nevertheless not be limited to the risk involved when the machine is used 'in accordance with its intended purpose' or 'under the conditions foreseen by the manufacturer'. On the contrary, several provisions of Directive 2006/42, such as Article 4(1), Article 11(1), the 'General principles' appearing at the start of Annex I, and section 1.1.2 of Annex I, entitled 'Principles of safety integration', require a broader account to be taken of risks existing 'under conditions which can reasonably be foreseen' or connected with 'any

reasonably foreseeable misuse thereof', which itself is defined in section 1.1.1 of Annex I as 'the use of machinery in a way not intended in the instructions for use, but which may result from readily predictable human behaviour'.

57 In addition, in the light of the actual wording of section 1.1.2(a) of Annex I to Directive 2006/42, it must be held that 'any risk' connected with the installation, maintenance or operation of the machinery in question, whether through the intended use or any reasonably foreseeable misuse, could justify invoking the safeguard clause under Article 11 of the directive. However, that article requires that the risk in question is 'ascertained' and therefore that the Member State relying on it proves to the requisite legal standard that such a risk is real. If that cannot be shown, impairment of the principle of free movement caused by the national measure adopted pursuant to the safeguard clause contained in that provision cannot be considered as 'justified' for the purposes of that clause (see, to that effect and by analogy, judgment of 5 March 2009 in *Commission* v *Spain*, C-88/07, ECR, EU:C:2009:123, paragraph 89 and the case-law cited).

58 Finally, it must be noted that the existence of a risk to the health and safety of persons for the purposes of Article 11(1) of Directive 2006/42 can be assessed, among other criteria, in the light of the essential health and safety requirements imposed on machinery manufacturers by Article 5(1)(a) of and Annex I to that directive (see, by analogy, judgment in *Klein* v *Commission*, cited in paragraph 46 above, EU:C:2015:252, paragraph 71). Compliance with the requirements, the aim of which is to ensure that the design and construction of the machinery takes into account the associated risks ('General principles' appearing at the start of Annex I to the directive, and section 1.1.2 of Annex I), is a precondition for the machinery being placed on the market (Article 4(1) and Article 5(1) of the directive). Meanwhile, non-compliance can be used to justify a withdrawal or prohibition measure (Article 11(2) of the directive).

59 In the present case, the Commission did therefore not err in law by upholding the Danish authorities' finding that the risk assessment in relation to the Multione S630 should take into account not only the intended use of the machine but also any reasonably foreseeable misuse. Neither did the Commission err in law in finding that the assessment could be undertaken in the light of the essential health and safety requirements set out in sections 1.1.2 and 3.4.4 of Annex I to Directive 2006/42 (recitals 3, 6 and 7 of the contested decision).

60 In particular, even if that assessment had to be carried out specifically in connection with the Multione S630 as equipped and placed on the Danish market by the applicant (see paragraphs 54 and 55 above), that did not prevent the competent authorities from taking into account the risks arising from the possibility of the machine, which had been marketed without an appropriate protective structure against falling objects or materials, later being fitted with other equipment that would make such a structure necessary. It was indeed permissible to take that into account on condition that it could be shown that that was a reasonably foreseeable misuse which entailed an actual risk for the safety of persons (see paragraphs 56 and 57 above).

61 Thirdly, the parties disagree on the scope of the essential health and safety requirement appearing in section 3.4.4 of Annex I to Directive 2006/42.

62 Point 3 of Annex I to Directive 2006/42 sets out a series of essential health and safety requirements specific to machinery presenting hazards due to its mobility. Those requirements are in addition to the general requirements in section 1 of Annex I. It is apparent from points 3 and 4 of the 'General principles' appearing at the start of Annex I that such machinery must in principle meet all of the general and the specific requirements.

63 Section 3.4.4 of Annex I to Directive 2006/42 provides as follows: '[w]here, in the case of self-propelled machinery with a ride-on driver, operator(s) or other person(s), there is a risk due to falling objects or material, the machinery must be designed and constructed in such a way as to take account of this risk and fitted, if its size allows, with an appropriate protective structure'.

64 As the Commission rightly maintains, the scope of that specific requirement must be interpreted in the light of the general requirements under Directive 2006/42, and in particular point 1 of the 'General principles' appearing at the start of Annex I and the 'Principles of safety integration' set out in section 1.1.2 of the same annex. It clearly follows from those provisions, first, that the design and construction of machinery intended to be placed on the market in the European Union must ensure that the machinery can function 'without putting persons at risk … under the conditions foreseen but also taking into account any reasonably foreseeable misuse thereof' and, more broadly, 'prevent abnormal use if such use would engender a risk'. Other provisions within that annex, such as section 1.1.7, entitled 'Operating positions', point in the same direction. The aim of measures taken to that effect 'must be to eliminate any risk'. Finally, although the manufacturer has the ability to '[select] the most appropriate methods', in order to fulfil the obligation it must still follow an order of priority, the highest priority being to 'eliminate or reduce risks as far as possible (inherently safe machinery design and construction)'; then to 'take the necessary protective measures in relation to risks that cannot be eliminated'; and, lastly, to 'inform users of the residual risks due to any shortcomings of the protective measures adopted'.

65 Bearing in mind the priority given to the aim to 'eliminate or reduce … as far as possible' the risks associated with the 'intended use' or any 'reasonably foreseeable misuse', from the time of 'machinery design and construction' onwards, to 'prevent abnormal use' and 'take the necessary protective measures in relation to risks that cannot be eliminated', it must be held that when, as in the present case, machinery is intended to serve many different purposes, owing to the various interchangeable equipment that can be joined to it, it must be fitted with an appropriate protective structure before being placed on the market or put into service, when it is ascertained that, even if the intended use to which the buyer wishes to put it in a given case does not in itself give rise to a risk of falling objects or materials, one of the other reasonably foreseeable uses to which it could be put does entail such a risk. Such a measure falls under measures taken to 'eliminate or reduce risks as far as possible' by means of 'inherently safe machinery design and construction'.

66 Nothing contained in any of the applicant's arguments other than those already examined affects that conclusion.

67 In particular, there is no justification for the applicant to base an argument on the wording of Article 2(1)(b) of Council Directive 86/296/EEC of 26 May 1986 on the approximation of the laws of the Member States relating to falling-object protective structures (FOPS) for certain construction plant (OJ 1986 L 186, p. 10), which provides that 'the construction plant referred to in Article 1 cannot be placed on the market unless it is designed to be fitted with an [EC] protective structure. Plant shall be considered to be designed to be fitted with an [EC] protective structure if it is provided with a roll-over protective structure (ROPS) to which the aforesaid [EC] protective structure can be fitted.' First, this measure is in fact no longer in force. Secondly, even though, initially, the original wording of that provision was referred to in section 3.4.4 of Annex I to Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998, L 207 p. 1), it was none the less amended in the course of the drafting leading to the adoption of Directive 2006/42, which, from that point onwards, provided for a protective structure against falling objects or materials to be installed (see paragraphs 63 to 65 above).

68 Neither is the applicant justified in invoking the information requirements stipulated in Directive 2006/42.

69 It is indeed the case that the essential health and safety requirements imposed by Directive 2006/42 on machinery manufacturers include, in particular in sections 1.7.4.1 and 1.7.4.2 of Annex I to the directive, an obligation for the machinery to be accompanied by instructions describing the intended use of the machinery, taking into account reasonably foreseeable misuse, warning the operator about ways in which the machinery must not be used but that experience has shown might occur, and instructing users on the protective measures to be taken by the user. In the particular case of machinery presenting hazards due to its mobility, section 3.6.3.2 of Annex I states in addition that '[t]he instructions for machinery allowing several uses depending on the equipment used and the instructions for the interchangeable equipment must contain the information necessary for safe assembly and use of the basic machinery and the interchangeable equipment that can be fitted'. In the present case, the applicant sets out in detail the reasons why it considers that it fulfilled this obligation and the Commission does not contest the applicant's arguments in this regard or the supporting evidence produced by the applicant.

70 However, compliance with that requirement is subject always to the overriding obligation on manufacturers of machinery to integrate safety into its design and construction, by eliminating or reducing as far as possible the risks associated with its intended use or any reasonably foreseeable misuse, as is clear from section 1.7.4.2 (l) of Annex I to Directive 2006/42, and as observed by the Kingdom of Denmark. In other words, the directive does not merely impose an obligation on manufacturers to warn their customers against the risks associated with reasonably foreseeable misuse of the machinery that they are selling, as the applicant claims to have done. It also obliges them to eliminate or reduce those risks as far as possible at the time of design and construction of the machinery, as noted by the Commission.

71 In view of this, it must be concluded that the Commission did not err in law by upholding the Danish authorities' finding that the aim of the measures taken by machinery manufacturers must be to remove all risk that could arise from the intended use or reasonably foreseeable misuse of the machinery, at the time of its design and construction. Neither did the Commission err in law in taking the view, in essence, that, when it is ascertained that a multi-purpose machine, such as the one in the present case, exposes its operator to a risk of falling objects or materials in the context of one of its intended uses or one of the reasonably foreseeable misuses to which it could be put, that risk must be taken into account by supplying the machine with a protective structure prior to it being placed on the market or put into service (recitals 3, 4, 6 and 7 of the contested decision).

72 As a result, in basing the contested decision on such an analysis, the Commission did not infringe the conditions for implementing the safeguard clause under Article 11 of Directive 2006/42, nor the prohibition on impairing the free movement of machinery placed on Member States by Article 6(1) of the directive. Neither did it breach the presumption of conformity from which the Multione S630 benefited under Article 7(1) of the directive, since it is clear from the general scheme of the directive that that presumption is subject always to the recognised ability of the Member States to invoke the safeguard clause in Article 11 of the directive when the relevant conditions set out in that article are met (see, to that effect and by analogy, judgments in *Medipac-Kazantzidis*, cited in paragraph 46 above, EU:C:2007:337, paragraphs 44 and 46, and 19 November 2009 in *Nordiska Dental*, C-288/08, ECR, EU:C:2009:718, paragraphs 23 and 24).

– The complaints alleging errors in the assessment of fact

73 Therefore, in the third place, it is necessary to examine the applicant's complaints relating to the merits of the Commission's assessment that the measures adopted by the Danish authorities were justified by the risk associated with the machinery.

74 The contested decision held that the Danish authorities were justified in finding that, even though the Multione S630 was initially designed to operate under conditions that did not entail any risk of falling objects or materials, it was likely that the machine would be used under other conditions that did expose its operator to such a risk (recitals 4 and 7). The Commission then went on to hold that the existence of such a risk was confirmed by examining the observations made by the applicant (recital 8).

75 It should first be noted that, as the applicant states in essence, that reasoning, succinct as it is, must be interpreted within the context of the procedure that was terminated by the contested decision, and should be taken to mean that the Commission approved the analysis previously carried out by the Danish authorities, after examining that analysis in the light of the observations made by the applicant under Article 11(3) of Directive 2006/42 and summarised in recital 5 of the contested decision.

76 The Commission cannot, therefore, justifiably claim that the arguments by which the applicant challenges the assessments that constituted the grounds for the measures taken in relation to the Multione S630 are, in essence, ineffective on the grounds that they relate not to the contested decision but to the position adopted previously by the Danish authorities. To allow such an argument would in fact mean assessing the legality of that decision whilst ignoring the context which allows it to be understood, and leading to an automatic finding that, due to the reasoning referred to in paragraph 74 above, the Court was unable to review the merits of that act which would therefore have to be annulled on the ground of failure to state reasons.

77 Secondly, the contested decision clearly indicates that the Commission did not omit to take into consideration the observations presented by the applicant, the wording of which it correctly summarised. The contested decision also shows that the Commission did not accept the Danish authorities' position without reflection, but explained, in a succinct yet comprehensible way and taking account of the context in which it formed its opinion, the principal reasons of law and fact which led it to conclude that the measures taken by the Danish authorities were justified. The applicant's arguments on this point must therefore be rejected.

78 Thirdly, in view of the arguments given by the Commission and the Kingdom of Denmark in relation to the degree of the judicial review the Court should exercise in relation to the merits of the assessments of fact in the contested decision, and in view of the applicant's objections in that regard, it must be recalled first of all that the aim of Directive 2006/42 is to harmonise the conditions under which machinery to which the directive applies is placed on the internal market and to ensure its free movement within the European Union, whilst also guaranteeing compliance with a set of requirements designed to protect the health and safety of persons from risks arising from use of that machinery (paragraph 25 above).

79 To that end, Directive 2006/42 establishes a system of surveillance and regulation of the internal market, under which it is primarily the role of the competent national authorities to determine whether machinery is liable to compromise the health and safety of persons (see paragraphs 19, 26 and 27 above) and, in the affirmative, to take the requisite withdrawal or prohibition measures. The safeguard clause provided for that purpose by Article 11 of Directive 2006/42 must itself be viewed in the light of Article 114(10) TFEU, which authorises Member States to take such measures for one or more of the non-economic reasons referred to in Article 36 TFEU (see paragraph 45 above), which include the protection of health and life of humans. Such an exercise may entail complex technical and scientific assessments (see, by analogy, judgment of 21 January 1999 in *Upjohn*, C-120/97, ECR, EU:C:1999:14, paragraphs 33 and 35).

80 Meanwhile, the Commission is bound, within the context of that framework, to determine whether or not the measures adopted by the Member States are justified, in law and in fact (see paragraphs 20 and 46 above). As the EU courts have already held, in the context of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1),

which establishes an institutional and procedural framework which is admittedly different from that under Directive 2006/42 but which pursues a similar goal, in order to be able to effectively pursue the objective assigned to it, bearing in mind the complex technical assessments which it must undertake, the Commission must be recognised as enjoying a broad discretion (judgments of 18 July 2007 in *Industrias Químicas del Vallés* v *Commission*, C-326/05 P, ECR, EU:C:2007:443, paragraph 75, and of 9 September 2011 and *Dow AgroSciences and Others* v *Commission*, T-475/07, ECR, EU:T:2011:445, paragraphs 86 and 150). The courts have also recognised that the Commission has such a power when it is called upon to review measures taken by a Member State in the context not of a directive containing a safeguard clause within the meaning of Article 114(10) TFEU, as in the present case, but in the context of the framework provided under Article 114(4) to Article 114(6) TFEU (judgment of 6 November 2008 in *Netherlands* v *Commission*, C-405/07 P, ECR, EU:C:2008:613, paragraph 54).

81 When it is called upon to review the exercise of a broad power of discretion, the EU judicature must verify whether, on the basis of the pleas in law before it, the relevant procedural rules have been complied with, whether the facts admitted by the Commission have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (judgments in *Industrias Químicas del Vallés* v *Commission*, cited in paragraph 80 above, EU:C:2007:443, paragraph 76, and in *Dow AgroSciences and Others* v *Commission*, cited in paragraph 80 above, EU:T:2011:445, paragraph 151).

82 In particular, the EU judicature must establish whether, in the light of the arguments put forward by the parties, the evidence adduced in support of the contested act is factually accurate, reliable and consistent and must determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see judgments in *Netherlands* v *Commission*, cited in paragraph 80 above, EU:T:2008:613, paragraph 55, and *Dow AgroSciences and Others* v *Commission*, cited in paragraph 80 above, EU:T:2011:445, paragraph 153).

83 Turning next to the risk assessment which the Member State concerned must undertake before resorting to the measures under Article 11 of Directive 2006/42, subject to review by the Commission, the applicant rightly asserts that this must be carried out from the point of view of an average user who is reasonably attentive and well-informed, an argument that the Commission does not specifically contest. The power conferred by Article 11 on the national authorities amounts to a derogation from the principle of free movement set out in the directive and can only be justified where there is a risk associated with the 'intended' use or 'reasonably foreseeable' misuse of the machinery in question, this being defined in section 1.1.1 (i) of Annex I to the directive as a use 'which may result from readily predictable human behaviour'. In that respect, the fact that the national authorities evaluate such a risk from the point of view of an average and reasonably diligent user, and not in an abstract way, helps to ensure that there is no unjustified impairment of the free movement of machinery, for the purposes of Article 11(1) of the directive (see paragraphs 54 and 57 above).

84 However, when the reality of such a risk is ascertained to the requisite legal standard, by reference to an average and reasonably diligent user, the fact that the user has received prior notice of the existence of the risk is in itself irrelevant, despite the applicant's assertion to the contrary, given both the hierarchy of the prevention and information requirements imposed on machinery manufacturers by Directive 2006/42 (see paragraphs 64 and 71 above) and also the consequences of non-compliance with those requirements (see paragraph 58 above).

85 It is therefore by reference to an average and reasonably diligent user that it must ultimately be determined whether, in the present case, the Commission committed no manifest error of assessment in holding that the Danish authorities had justified the measures taken in respect of the Multione S630 by the existence of a risk to the safety of its users, associated with the lack of an appropriate protective structure against falling objects or materials.

86 The Danish authorities found, in essence, that even in situations where the Multione S630 had been purchased in conjunction with equipment which would not make its intended use one exposing users to a risk of falling objects or materials, such a risk nevertheless existed, for three reasons. The first reason is that it would be reasonably foreseeable for the parties concerned to acquire second-hand equipment at some later date without passing through the intermediary of the applicant. The second reason is that it would be reasonably foreseeable for one of the applicant's clients to own several of the machines, to put them to both risky and non-risky uses and to use them indiscriminately so that the applicant was not in a position to prevent this. The third reason is that, even in situations where the intended use of the machine does not in itself entail any risk, some of the environments in which it is used, such as in agricultural or earthmoving works, none the less expose the user to a reasonably foreseeable risk of falling objects or materials.

87 The Commission found, in essence, that all of those assessments were justified.

88 It must be noted that the applicant does not effectively dispute the first of these assessments. In essence, the applicant merely claims that the first assessment 'does not appear decisive' for two reasons. The first is that the instructions accompanying the Multione S630 tell the owner to fit an appropriate protective structure if it should separately acquire equipment that involves a risk of falling objects or materials, and to contact an approved retailer or workshop for that purpose. The second is that, as with any product involving a certain level of technology, this machine presents certain risks when it is not used in accordance with the conditions described in the relevant instructions, which it is down to the user to follow. Aside from the fact that these arguments seem to rely on the premise that the risk noted by the Danish authorities does in fact exist, the arguments must fail, as the Commission held, in view of the hierarchy of the prevention and information requirements imposed on machinery manufacturers by Directive 2006/42 (see paragraph 84 above).

89 Neither does the applicant dispute the second assessment made by the Danish authorities and approved by the Commission, merely raising the same arguments against it.

90 Since those arguments do not bring to light any manifest error of assessment, it is not necessary to examine the arguments relating to the third assessment on which the measures taken by the Danish authorities and found by the Commission to be justified were based. Even if the arguments were justified, the contested decision would not be any less justified, for the reasons that have just been given. Consequently, there is no need to commission an expert's report in this regard as called for by the applicant.

91 It follows from all of the foregoing considerations that this plea must be rejected in its entirety.

Second plea in law, alleging breach of the principle of equal treatment

92 The applicant submits, in essence, that the contested decision is vitiated by a breach of the principle of equal treatment, to the extent that the contested decision held the measures adopted by the Danish authorities to be justified, whereas the measures targeted only Multione S630 machines placed on the Danish market, excluding thousands of similar multi-purpose machines also in service on that market.

93 The Commission, supported by the Kingdom of Denmark, opposes those arguments.

94 It is settled case-law that the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified (judgments of 13 December 1984 in *Sermide*, 106/83, ECR, EU:C:1984:394, paragraph 28; of 11 July 2006 in *Franz Egenberger*, C-313/04, ECR, EU:C:2006:454, paragraph 33; and of 3 September 2009 in *Cheminova and Others* v *Commission*, T-326/07, ECR, EU:T:2009:299, paragraph 214).

95 In the present case, the breach of the principle of equal treatment that the applicant alleges against the Commission essentially stems from the fact that the Commission declared the measures taken by the Danish authorities in relation to the Multione S630 to be justified without first ensuring that those measures were not discriminatory, even though they targeted only that machine and not the thousands of similar machines placed in service on the Danish market.

96 The Commission, supported on the point by the Kingdom of Denmark, set out the factual reasons that led to its finding that the machines covered by the investigation carried out by the Danish authorities prior to the adoption of the measures against the Multione S630 fell into different situations, each one calling for a different treatment by the authorities. The applicant did not dispute those facts in its reply but claimed that they did not affect the merits of its arguments. As a result, it is not established that the Commission breached the principle of equal treatment in the context of that investigation.

97 On the other hand, as the applicant observes, neither the Commission in its defence or its rejoinder, nor the Kingdom of Denmark in its statement in intervention, disputed the fact that thousands of machines similar to the Multione S630, and marketed by manufacturers other than those covered by the inquiry undertaken by the Danish authorities, had been in service on the Danish market for a long time. This can also be held as an established fact, without any need to undertake an expert's report as requested by the applicant in the event of any dispute, the Commission's view being merely that it is irrelevant since it was not obliged to carry out the verification that the applicant complains was not undertaken. The scope of the examination which the Commission was obliged to carry out must therefore be determined.

98 In that regard, it should be recalled, first, that it is settled case-law that where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating to that matter must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (judgments of 12 October 1993 in *Vanacker and Lesage*, C-37/92, ECR, EU:C:1993:836, paragraph 9, and of 16 October 2014 in *Commission* v *Germany*, C-100/13, EU:C:2014:2293, paragraph 62). That case-law applies, in particular, in a situation where the measure at issue is not one adopted by Member States by law or regulation but one affecting individuals (see, to that effect, judgment in *AGM-COS.MET*, cited in paragraph 25 above, EU:C:2007:213, paragraphs 49 to 51), as in the present case.

99 Secondly, Directive 2006/42 led to an exhaustive harmonisation at EU level of the rules relating not only to the essential safety requirements applicable to machinery and the certification of conformity of the machinery with the requirements, but also to the conduct that Member States must adopt with regard to machinery presumed to be compliant with those requirements (judgment in *AGM-COS.MET*, cited in paragraph 25 above, EU:C:2007:213, paragraph 53). Therefore, it is with regard to the provisions of Directive 2006/42 that it must be determined whether the Commission failed in its obligations by not verifying whether the measures adopted by the Danish authorities in the present case had been adopted in compliance with the principle of equal treatment, as the applicant essentially submits, or whether it did not fall within the role of the Commission to carry out such a review, as the Commission maintains.

100 Thirdly, the objective of Article 11 of Directive 2006/42 is not to entrust the Commission with the task of reviewing every aspect of the legality of the measures taken by the national authorities when they ascertain that machinery is liable to compromise the health and safety of persons. It is in fact to the national courts that this review falls, under recital 25 and Article 20 of the directive.

101 Fourthly, although Article 11(3) provides only that the Commission shall consider whether or not the measures taken by the Member States are 'justified', the general scheme of Article 11 implies that that obligation should be understood in the light of the obligations already imposed on the national authorities by Article 11(1) and Article 11(2). In that context, the examination that the Commission is to carry out depends primarily on whether it is justifiable from a legal and factual point of view, and in

the light of the reasons provided by the Member State which took the initiative for a measure at the time of notification to the Commission — which reasons may result from 'failure to satisfy the essential requirements' laid down by the directive (Article 11(2)) — to find that machinery is 'liable to compromise the health and safety of persons' (Article 11(1)).

102 In addition, it is evident from Article 114(10) TFEU, which authorises the EU legislature to provide for safeguard clauses such as the one established by Article 11 of Directive 2006/42, that such clauses authorise Member States to take, 'for one or more of the non-economic reasons referred to in Article 36 [TFEU]', provisional measures subject to a Union control procedure (see paragraphs 45 and 79 above).

103 Whilst it refers to the 'reasons' given in the first sentence of Article 36 TFEU, Article 114(10) does not, however, mention the second sentence of Article 36, which provides that the prohibitions or restrictions that could be justified for such reasons 'shall not … constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'. It therefore differs from Article 114(4) to 114(6) which concern the provisions that a Member State may introduce or maintain after adoption of a harmonisation measure under Article 114(1). Only these latter paragraphs entrust the Commission with the task of reviewing, independently from the question of whether the measures taken by the Member State concerned are justified, or not, as the case may be, on 'grounds of major needs referred to in Article 36' or for 'reasons' relating to 'the protection of the environment or the working environment', whether, in addition, those measures do not constitute 'means of arbitrary discrimination or a disguised restriction on trade between Member States' (judgments of 20 March 2003 in *Denmark* v *Commission*, C-3/00, ECR, EU:C:2003:167, paragraphs 57, 118 and 123 to 126, and of 9 December 2010 in *Poland* v *Commission*, T-69/08, ECR, EU:T:2010:504, paragraph 59, in relation to Article 95 EC; judgments in *France* v *Commission*, cited in paragraph 25 above, EU:C:1994:196, paragraph 27, and of 21 January 2003 in *Germany* v *Commission*, C-512/99, ECR, EU:C:2003:40, paragraphs 38 to 41, 44, 86 and 89, in relation to Article 100a EC).

104 In view of this, and as asserted by the Commission, it is appropriate to consider that Article 11 of Directive 2006/42 does not oblige the Commission, specifically when examining whether or not the measures notified to it by Member States are justified, to determine in addition whether or not those measures comply with the principle of equal treatment.

105 When such a measure is justified for the purposes of that article, which, in the present case, follows from the examination of the first plea advanced by the applicant, the decision in which the Commission acknowledges that it is justified can therefore not be challenged on the ground that similar machines to that covered by the measure are present on the national market in question but have not been the subject of similar measures, in breach of the principle of equal treatment (see, by analogy, judgment of 11 September 2002 in *Pfizer Animal Health* v *Council*, T-13/99, ECR, EU:T:2002:209, paragraph 479).

106 Moreover, the Court has held that, to the extent that a substance has not, at the time of the adoption of a directive, been subject to an evaluation on the part of the competent authorities in accordance with the criteria set out in that directive, and where each substance has its own characteristics, a substance which has not yet been evaluated in accordance with those criteria is not in the same situation, with regard to the principle of equal treatment, as one that has already been evaluated (judgment of 12 July 2005 in *Alliance for Natural Health and Others*, C-154/04 and C-155/04, ECR, EU:C:2005:449, paragraphs 116 and 117). Although the context behind the contested decision differs from the context behind the case leading to the latter judgment, it can be considered, in the light of that case, that because the Multione S630 had been subject to an evaluation and subject to a measure taken by the Danish authorities on the basis of Article 11(1) of Directive 2006/42, it fell, for the purposes of the review to be conducted by the Commission pursuant to Article 11(3), into a different situation from that of similar multi-purpose machines present on the Danish market.

107 In fifth and final place, however, it does not follow that, when several machines marketed in the territory of the same Member State and with similar technical characteristics present the same risk to the health and safety of persons, the competent national authorities may arbitrarily decide to subject only some of those machines to a measure prohibiting them from being placed on the market, withdrawing them from the market or restricting their free movement.

108 On the contrary, as both the applicant and the Commission itself submit in essence, all acts of the European Union must be interpreted in accordance with primary law as a whole, including the principle of equal treatment (judgments of 19 November 2009 in *Sturgeon and Others*, C-402/07 and C-432/07, ECR, EU:C:2009:716, paragraph 48, and of 16 September 2010 in *Chatzi*, C-149/10, ECR, EU:C:2010:534, paragraph 43). In addition, it is settled case-law that, in interpreting an EU act, it is necessary to consider not only the wording of its provisions but also its general scheme, the context in which it occurs and the objects of the rules of which it forms part (see judgment of 23 November 2006 in *Lidl Italia*, C-315/05, ECR, EU:C:2006:736, paragraph 42 and the case-law cited). Finally, it should be recalled that Member States, which are required to implement the directive at issue in the present case, do not only have the ability to invoke the safeguard clause in Article 11 of the directive but also have an obligation to do so when the machines are liable to endanger the health and safety of persons (see judgment in *AGM-COS.MET*, cited in paragraph 25 above, EU:C:2007:213, paragraph 62; see also, by analogy, judgment in *Klein* v *Commission*, cited in paragraph 46 above, EU:C:2015:252, paragraph 63 and the case-law cited).

109 It would be contrary not only to the principle of equal treatment but also to the objective of Directive 2006/42, which aims to harmonise the conditions under which machinery is placed on the internal market and moves freely on that market, whilst protecting the health and safety of persons from risks arising from use of that machinery (see paragraphs 25 and 78 above), and indeed to the general scheme of the wording established to guarantee the proper and uniform application of the directive by the national authorities (see paragraphs 26 to 28 and 79 above) subject to review by the Commission (see paragraphs 46 and 80 above), if a Member State were able to invoke the safeguard clause in Article 11 of the directive in relation to one machine liable to endanger the health and safety of persons, while failing to treat similar machines in a similar way, with no objective justification for this.

110 It was in fact with the aim of ensuring the uniform application of Directive 2006/42 and, in that same context, of ensuring equal protection of the health and safety of persons in relation to machinery marketed in the European Union that in the second paragraph of Article 9(1) of the directive, entitled ‘Specific measures to deal with potentially hazardous machinery’, the legislature established a specific procedure allowing the Commission to take, by way of decision, measures requiring Member States to prohibit or restrict the placing on the market of all machinery presenting the same risk by virtue of its technical characteristics as machinery that is already subject to a national measure that has been found to be justified (see paragraph 33 above). Article 9 allows the Commission to require not only the Member State that adopted the measure but also all of the other Member States to treat equally all machinery in service on the internal market and presenting the same risk by virtue of its technical characteristics as the machine covered by the measure in question, as necessary and in accordance with the principle of proportionality.

111 As both the Commission and the applicant in essence point out, that specific procedure is itself subject, first, to the ability of the manufacturer of the machine in question to invite the Member State that has restricted free movement of the machine to take similar measures in relation to similar machines on the market and, secondly, to the ability of the Commission to make use of the procedure provided by Article 258 TFEU.

112 It is in such a context that the applicant may properly assert that, as it stated in its submissions and as the Commission acknowledges, the Danish authorities implemented the safeguard clause in Article 11 of Directive 2006/42 in relation to two manufacturers of multi-purpose machines from Italy and Finland who were new arrivals on the Danish market, whilst failing to take the same action in relation to other manufacturers who were long-established on that market.

113 It follows from all of the foregoing considerations, and in particular the fact that the contested decision was sufficiently justified in law and in fact for the purposes of Article 11 of Directive 2006/42, that the second plea must be rejected.

114 Consequently, the action to annul the contested decision made by the applicant must be dismissed without there being any need to rule on its request for an expert's report to be undertaken as necessary.

Complaint alleging damage caused by the contested decision

115 The applicant claims that the contested decision caused it various material damage, as well as damage to reputation. However, it is clear that the complaint made by the applicant is used only in support of a declaration by which the party concerned reserves the ability to make a new application for interim measures before the Court.

116 In that regard, it must be recalled that the European Union's non-contractual liability is dependent on the coincidence of a series of conditions: the unlawfulness of the conduct alleged by the applicant against the defendant institution, the existence of actual and certain damage and the existence of a causal link between the conduct alleged and the damage complained of. Therefore, since one of these three cumulative conditions is missing, the claim for compensation in this regard must be dismissed in its entirety without it being necessary to examine whether the other preconditions are satisfied (see judgment of 10 May 2006 in *Galileo International Technology and Others* v *Commission*, T-279/03, ECR, EU:T:2006:121, paragraphs 76 and 77 and the case-law cited).

117 In the present case, there is no need to rule on the admissibility of this complaint under Article 76 of the Rules of Procedure of the Court, it being sufficient to find that, as is clear from all of the above, the applicant has not shown the condition relating to the unlawfulness of the contested decision to be satisfied. This complaint must therefore be rejected.

118 It follows that this action must be dismissed in its entirety.

Costs

119 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

120 In addition, under Article 138(1) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs.

121 In the present case, since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Commission in the context of the present action and also in the proceedings for interim relief (see paragraph 6 above), as applied for in the Commission's pleadings. The Kingdom of Denmark must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders CSF Srl to bear its own costs and those incurred by the European Commission in the context of the present action and the proceedings for interim relief;**

3. **Orders the Kingdom of Denmark to bear its own costs.**

Papasavvas Forwood Bieliūnas

Delivered in open court in Luxembourg on 15 July 2015.

[Signatures]