

JUDGMENT OF THE COURT (First Chamber)

10 November 2005^{*}

In Case C-432/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on
10 October 2003,

Commission of the European Communities, represented by A. Caeiros, acting as
Agent, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent, and by N. Ruiz,
advogado, with an address for service in Luxembourg,

defendant,

^{*} Language of the case: Portuguese.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann, N. Colneric, K. Lenaerts (Rapporteur) and E. Juhász, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to take account of approval certificates issued by other Member States in a procedure, under Article 17 of the General Law on Urban Construction (Regulamento Geral das Edificações Urbanas), adopted by Decree-Law No 38/382 of 7 August 1951 (*Diário do Governo*, Series I, No 166 of 7 August 1951, p. 715) ('the Decree-Law'), for approval of polyethylene pipes imported from those other Member States, and by failing to inform the Commission of such a measure,

the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 1 and 4(2) of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1).

Legal background

Community legislation

- 2 Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products (OJ 1989 L 40, p. 12), as amended by Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1) ('Directive 89/106'), applies, pursuant to Article 1(1) thereof, to construction products in so far as the essential requirements in respect of construction works under Article 3(1) of that directive relate to them.
- 3 Under Article 1(2) of Directive 89/106, for the purposes of that directive 'construction product' means 'any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works.'
- 4 Under Article 2(1) of that directive, Member States are to take all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for this intended use,

that is to say they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3 when and where such works are subject to regulations containing such requirements.

- 5 Article 3(1) of the same directive provides that those essential requirements are set out in terms of objectives in Annex I thereto. Those requirements concern certain characteristics of the works in relation to mechanical resistance and stability, safety in case of fire, hygiene, health and the environment, safety in use, protection against noise, energy economy and heat retention.
- 6 Under Article 4(1) of Directive 89/106, standards and technical approvals are to be referred to, for the purposes of that directive, as 'technical specifications'.
- 7 Article 4(2) of that directive provides that Member States are to presume that products are fit for use if they enable works in which they are employed to satisfy those essential requirements, where such products bear the CE marking indicating that they comply with the relevant national standards transposing the harmonised standards, with a European technical approval or with the national technical specifications referred to in Article 4(3) inasmuch as harmonised specifications do not exist.
- 8 Article 4(3) gives Member States the possibility to communicate to the Commission the texts of their national technical specifications which they regard as complying

with the essential requirements. The Commission is to notify the Member States of those national technical specifications in respect of which there is presumption of conformity with the essential requirements.

9 Article 6(1) and (2) of Directive 89/106 provide:

‘1. Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this Directive.

Member States shall ensure that the use of such products, for the purpose for which they were intended, shall not be impeded by rules or conditions imposed by public bodies or private bodies acting as a public undertaking or acting as a public body on the basis of a monopoly position.

2. Member States shall, however, allow products not covered by Article 4(2) to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until the European technical specifications referred to in Chapters II and III provide otherwise. ...’

10 Article 16 of that directive states:

'1. In the absence of technical specifications, as defined in Article 4, for any given product, the Member State of destination shall, on request in individual cases, consider the product to be in conformity with the national provisions in force if they have satisfied tests and inspections carried out by an approved body in the producing Member State according to the methods in force in the Member State of destination or recognised as equivalent by that Member State.

2. The producing Member State shall inform the Member State of destination, in accordance with whose provisions the tests and inspections are to be carried out, of the body it intends to approve for this purpose. The Member State of destination and the producing Member State shall provide each other with all necessary information. On conclusion of this exchange of information the producing Member State shall approve the body thus designated. If a Member State has misgivings, it shall substantiate its position and inform the Commission.

3. Member States shall ensure that the designated bodies afford one another all necessary assistance.

4. Where a Member State establishes that an approved body is not carrying out the tests and inspections properly in conformity with its national provisions, it shall notify the Member State in which the body is approved thereof. That Member State shall inform the notifying Member State within a reasonable time-limit of what action has been taken. If the notifying Member State does not consider the action taken to be sufficient, it may prohibit the placing on the market and use of the product in question or make it subject to special conditions. It shall inform the other Member State and the Commission thereof.'

11 Article 1 of Decision No 3052/95 provides:

‘Where a Member State takes steps to prevent the free movement or placing on the market of a particular model or type of product lawfully produced or marketed in another Member State, it shall notify the Commission accordingly where the direct or indirect effect of the measure is:

— a general ban on the goods,

— a refusal to allow the goods to be placed on the market,

— the modification of the model or type of product concerned before it can be placed or kept on the market, or

— withdrawal of the goods from the market.’

12 Article 3(2) of Decision No 3052/95 provides that that obligation to notify the Commission does not apply to, inter alia, measures taken solely in pursuance of Community harmonisation measures and measures notified to the Commission under specific provisions.

- 13 Article 4(1) and (2) of that decision lay down that the notification referred to in Article 1 is to be made in sufficient detail and in clear and comprehensible form and that the relevant information is to be communicated within 45 days of the date on which the measure concerned is taken.

National legislation

- 14 Under Article 17 of the Decree-Law, the use of new construction materials or methods in respect of which there are no official specifications and no sufficient practical experience is subject to a prior opinion being given by the National Laboratory of Civil Engineering of the Ministry of Public Works (Laboratório Nacional de Engenharia Civil; 'the LNEC').
- 15 Pursuant to two decrees of the Ministry of Public Works, of 2 November 1970 (*Diário do Governo*, Series II, No 261 of 10 November 1970, p. 7834), and 7 April 1971 (*Diário do Governo*, Series II, No 91 of 19 April 1971, p. 2357), only plastic materials which have been approved by the LNEC may be used in the water distribution network.

Pre-litigation procedure

- 16 In April 2000, the Commission received a complaint from a Portuguese undertaking which had been refused the required authorisation by the supervising body, Empresa Pública de Águas de Lisboa SA ('EPAL'), for the installation of PEX polyethylene pipes imported from Italy and Spain in the pipe system of a building, on the grounds that such pipes had not been approved by the LNEC. The complainant then applied

to the LNEC to obtain an attestation of the equivalence of the foreign certificates which it held.

- 17 By letter of 26 May 2000, the LNEC informed the complainant that its request for an attestation of equivalence of the certificate issued by the Italian Institute of Plastics ('IIP') had been rejected, on the ground that IIP was not a member of the European Union of Agrément ('UEAtc'), nor was it one of the other bodies with which the LNEC had concluded a cooperation agreement in the area in question.
- 18 By letter of formal notice of 12 September 2000, the Commission informed the Portuguese Republic that, by making polyethylene pipes imported from other Member States subject to an approval procedure under Article 17 of the Decree-Law, without taking account of approval certificates issued by those other Member States, and by failing to notify the Commission of that measure, it had failed to fulfil its obligations under Articles 28 EC and 30 EC and Articles 1 and 4(2) of Decision No 3052/95.
- 19 Considering the reply given by the Portuguese authorities to be unsatisfactory, the Commission sent those authorities a reasoned opinion on 16 May 2001 calling on them to adopt the measures necessary to comply with that opinion within two months of its notification.
- 20 Since it was not satisfied with the reply of the Portuguese authorities, the Commission brought the present proceedings.

The action

The first complaint: infringement of Articles 28 EC and 30 EC

Arguments of the parties

- ²¹ The Commission observes, first, that although the pipes in question are 'construction products' within the meaning of Directive 89/106, they are not subject to harmonised standards within the meaning of Article 4 of that directive. As for the special procedure provided for in Article 16 of that directive, it did not apply to the case on the grounds, first, that there are no technical specifications in Portugal in respect of the pipes in question, and, secondly, the methods of certification and grant of approval in force in the two Member States concerned are not the same or equivalent. The rules to which the pipes are subject in Portugal should therefore be examined in the light of Articles 28 EC and 30 EC.
- ²² The approval procedure to which the use of polyethylene pipes imported from other Member States is subject under Article 17 of the Decree-Law constitutes a measure having an effect equivalent to a quantitative restriction on imports. The Portuguese authorities did not state the reasons why the pipes in question do not ensure a level of protection of health and life of humans equivalent to that which the Portuguese rules seek to ensure.

23 According to the case-law on the free movement of goods, the Portuguese authorities are required to take account of certificates issued by the certification bodies of other Member States which, although not members of UEATC, are recognised by the other Member States as being authorised to certify the products in question. In so far as the Portuguese authorities did not have sufficient information about the legal context in which IIP issued its certificate, it could have obtained that information from the Italian authorities.

24 In relation to the objective of protection of health and life of humans, it is moreover disproportionate to refuse approval of the pipes on the ground that the LNEC approves only pipe systems.

25 In any event, for a prior administrative authorisation scheme to be justified even though it derogates from fundamental freedoms it should be based on criteria that are objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.

26 The Portuguese Government maintains that the national provisions at issue serve only to implement Article 2 of Directive 89/106, which imposes the obligation on Member States to ensure that construction products may be placed on the market only if their use in the works for which they are intended enables the latter to satisfy the essential requirements set out in Annex I to that directive.

- 27 Given that the pipes in question are not subject to a harmonised standard, a European technical approval, or a national technical specification recognised at Community level, the Portuguese Republic is entitled to make them subject to an approval procedure such as that laid down in Article 17 of the Decree-Law.
- 28 In respect of the products falling within the scope of Directive 89/106, the principle that a Member State cannot require analyses or tests when these have already been carried out in another Member State is indeed embodied in the special procedure for control of conformity provided for in Article 16 of that directive. In this case, the Italian Republic, as producing State, did not follow that procedure.
- 29 Since the LNEC was not in a position to cooperate with IIP, it could not, if it were not to infringe Article 16 of Directive 89/106, approve the pipes on the sole basis of the certificate issued by IIP. Recognition of a certificate under those circumstances would be tantamount to accepting the principle of recognition of any certificate, issued by any body, irrespective of any guarantees in respect of the adequacy of the products concerned and of whether sufficient control mechanisms have been carried out, if at all.
- 30 Finally, a scheme based on control of the conformity of pipe systems does not necessarily create greater restrictions on trade in pipes between Portugal and the other Member States than an approval scheme in respect of individual pipes. The safety of buildings cannot be guaranteed by the mere control of individual pipes.

Findings of the Court

- 31 Before examining whether the approval procedure applicable under Article 17 of the Decree-Law is consistent with Articles 28 EC and 30 EC, it must be ascertained whether, as its Government submits, the Portuguese Republic, in applying that procedure, acted only in compliance with its obligations under Directive 89/106.
- 32 Directive 89/106 is intended principally to eliminate obstacles to trade by creating conditions which enable construction products to be marketed freely within the Community. To that end, it specifies the essential requirements which buildings and works in which construction products are to be used must satisfy and which are put into effect by harmonised standards and national implementing standards, European technical approvals and national technical specifications recognised at Community level. Under Article 6(1) of Directive 89/106, the Member States are not to impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of that directive.
- 33 The parties agree that the pipes in question, although ‘construction products’ within the meaning of Directive 89/106, are not subject to a harmonised standard, a European technical approval or a national technical specification recognised at Community level as provided for in Article 4(2) of that directive.
- 34 However, in respect of construction products not covered by Article 4(2) of Directive 89/106, Article 6(2) of that directive provides that the Member States are to allow such products to be placed on the market in their territory if they satisfy national provisions consistent with the EC Treaty until the European technical specifications provide otherwise.

- 35 Accordingly, Directive 89/106 confirms that a Member State may only subject the placing on the market in its territory of a construction product not covered by technical specifications harmonised or recognised at Community level to national provisions which comply with obligations under the Treaty, in particular, the principle of the free movement of goods set out in Articles 28 EC and 30 EC.
- 36 It is true that Article 16 of Directive 89/106 provides for a special procedure under which a construction product originating in a Member State and for which there are no technical specifications harmonised or recognised at Community level must be considered by the Member State of destination as being in conformity with the provisions in force in that State, if they have satisfied tests and inspections carried out by an approved body in the producing Member State according to the methods in force in the Member State of destination or recognised as equivalent by that State.
- 37 Under that special procedure, the Member State of destination and the producing Member State are to provide each other with all necessary information in order to enable the latter to approve a body for that purpose. If a Member State has misgivings, it must substantiate its position and inform the Commission thereof under Article 16(2) of Directive 89/106.
- 38 However, Article 16(2) of Directive 89/106 does not deal with the situation of an economic operator who has imported a construction product for which there are no technical specifications harmonised or recognised at Community level, where the producing Member State has not informed the Member State of destination of the body it has approved or intends to approve for that purpose.

39 Further, the failure to act by one of the Member States concerned by that procedure cannot, in itself, justify the existence of a restriction on the free movement of goods which would confront an economic operator when using the product in question in another Member State.

40 It follows that, contrary to the contentions of the Portuguese Government, the special procedure provided for in Article 16 of the directive does not preclude from being evaluated in the light of Articles 28 EC and 30 EC the refusal by an approval body such as the LNEC, in an approval procedure such as that under Article 17 of the Decree-Law and the ministerial decrees of 1970 and 1971, to give an attestation of the equivalence of a certificate issued by an approval body of another Member State.

41 It should be noted that the requirement of prior approval attesting to a product's fitness for a given use, like refusal, in that context, to recognise the equivalence of certificates issued by another Member State, restrict access to the market of the importing Member State and must therefore be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 28 EC (see, to that effect, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraphs 62 and 63).

42 According to settled case-law, such a measure may be justified only on one of the grounds of public interest listed in Article 30 EC or by one of the overriding requirements referred to in the case-law of the Court, provided in particular that that measure is appropriate for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it (see Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 33; Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, paragraphs 40 to 42; and Case C-40/04 *Yonemoto* [2005] ECR I-7755, paragraph 55).

- 43 The aim of the approval procedure laid down in Article 17 of the Decree-Law is to guarantee the safety of materials used in buildings and construction works and therefore also serves the objective of protection of health and life of humans.
- 44 It is settled case-law that, in the absence of harmonising rules, the Member States are free to decide on their intended level of protection of health and life of humans and on whether to require prior authorisation for the marketing of the products concerned (see Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11).
- 45 However, a measure introduced by a Member State cannot be regarded as not going beyond what is necessary to attain the objective pursued if it duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State (see, to that effect, *Canal Satélite Digital*, cited above, paragraph 36).
- 46 As the Court has already held, whilst a Member State is free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, the authorities of the Member States are nevertheless required to assist in bringing about a relaxation of the controls existing in intra-Community trade. It follows that they are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those analyses and tests have already been carried out in another Member State and their results are available to those authorities, or may at their request be placed at their disposal (Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277, paragraph 14, *Brandsma*, cited above, paragraph 12, and Case C-400/96 *Harpeggies* [1998] ECR I-5121, paragraph 35).

47 Strict compliance with that obligation requires an active approach on the part of the national body to which an application is made for approval of a product or recognition, in that context, of the equivalence of a certificate issued by an approval body of another Member State. Further, such an active approach is also required, where appropriate, of the latter body, and in this respect it is for the Member States to ensure that the competent approval bodies cooperate with each other with a view to facilitating the procedures to be followed to obtain access to the national market of the importing Member State.

48 In this case, the LNEC refused to recognise the equivalence of a certificate issued by IIP on the ground that IIP was not a member of UEATC, to which the LNEC is affiliated, and had not entered into any cooperation agreement with it in the field concerned. According to the case-file, the LNEC neither sought from the undertaking making the application the information in its possession, which would have enabled the LNEC to evaluate the nature of the certificate issued by IIP, nor contacted IIP to obtain such information.

49 By making use of the product in question subject to an approval procedure under Article 17 of the Decree-Law, without taking account, in that procedure, of a certificate issued by an approval body in another Member State and without seeking the necessary information from the applicant undertaking or that body, the Portuguese authorities have failed in their duty of cooperation which arises, in the context of an application for approval of a product imported from another Member State, from Articles 28 EC and 30 EC.

50 In respect of the specific requirements to which approval of the pipes in question is subject in Portugal, and which, according to the Portuguese authorities, go beyond the technical requirements accepted by IIP, it must be noted that, if a prior

administrative authorisation scheme is to be justified even though it derogates from fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Canal Satélite Digital*, cited above, paragraph 35).

51 However, in so far as Article 17 of the Decree-Law provides solely that the use of new construction materials or methods in respect of which there are no official specifications and no sufficient practical experience is subject to a prior opinion being given by the LNEC, that provision does not fulfil those requirements.

52 By making the pipes in question subject to an approval procedure such as that provided for in Article 17 of the Decree-Law, the Portuguese rules do not therefore comply with the principle of proportionality and, accordingly, are contrary to Articles 28 EC and 30 EC.

53 It follows that the first complaint raised by the Commission is well founded.

The second complaint: infringement of Articles 1 and 4(2) of Decision No 3052/95

Arguments of the parties

54 The Commission submits that EPAL's refusal to approve the products in question in the absence of a certificate from the LNEC and the LNEC's refusal to recognise the equivalence of the certificate issued by IIP together constitute a 'measure' within the meaning of Decision No 3052/95, which should therefore have been communicated to it within 45 days of its adoption.

- 55 The Portuguese Government replies that, under Article 3(2) of Decision No 3052/95, that obligation to notify the Commission does not apply to measures taken solely in pursuance of Community harmonisation measures. By refusing to recognise as equivalent to national approval the certificate issued by IIP, the Portuguese Republic was merely giving effect to its obligations under Directive 89/106.

Findings of the Court

- 56 Article 1 of Decision No 3052/95 relates to measures by which a Member State prevents the free movement of products lawfully produced or marketed in another Member State.

- 57 Decision No 3052/95 defines ‘measure’ as any measure taken by a Member State, except for judicial decisions, which has the effect of restricting the free movement of goods lawfully produced or marketed in another Member State, regardless of its form or the authority from which it emanates (*Radiosistemi*, cited above, paragraph 68).

- 58 In so far as the decisions taken by EPAL and the LNEC, under the Decree-Law and the ministerial decrees of 2 November 1970 and 7 April 1971, have the effect, as a whole, of effectively prohibiting the use of the pipes in question, they must be regarded as ‘measures’ within the meaning of Article 1 of Decision No 3052/95.

- 59 As pointed out in paragraphs 31 to 35 above, this does not involve a measure prescribed by Directive 89/106. Contrary to the contention of the Portuguese

Republic, the measure in question does not therefore enjoy the exemption from notification provided for in Article 3(2) of Decision No 3052/95.

⁶⁰ By failing to communicate such a measure to the Commission within 45 days, the Portuguese Republic is therefore in breach of its obligations under Decision No 3052/95.

⁶¹ Consequently, the Commission's second complaint is also well founded.

⁶² In the light of all of the foregoing considerations, it must be declared that, by failing to take account of approval certificates issued by other Member States in a procedure, under Article 17 of the Decree-Law, for approval of polyethylene pipes imported from those other Member States, and by not informing the Commission of such a measure, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 1 and 4(2) of Decision No 3052/95.

Costs

⁶³ Under Article 69(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that, by failing to take account of approval certificates issued by other Member States in a procedure, under Article 17 of the General Law on Urban Construction, adopted by Decree-Law No 38/382 of 7 August 1951, for approval of polyethylene pipes imported from those other Member States, and by not informing the Commission of such a measure, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC and under Articles 1 and 4(2) of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community;**
- 2. Orders the Portuguese Republic to pay the costs.**

[Signatures]