

## JUDGMENT OF THE COURT (Fifth Chamber)

1 March 2012 (\*)

(Free movement of goods – Quantitative restrictions and measures having equivalent effect – Directive 89/106/EEC – Construction products – Non-harmonised standards – Labels of quality – Requirements relating to certification bodies)

In Case C-484/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Spain), made by decision of 14 September 2010, received at the Court on 7 October 2010, in the proceedings

**Asociación para la Calidad de los Forjados (Ascafor),**

**Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac)**

v

**Administración del Estado,**

**Calidad Siderúrgica SL,**

**Colegio de Ingenieros Técnicos Industriales,**

**Asociación Española de Normalización y Certificación (AENOR),**

**Consejo General de Colegios Oficiales de Aparejadores y Arquitectos Técnicos,**

**Asociación de Investigación de las Industrias de la Construcción (Aidico) Instituto Tecnológico de la Construcción,**

**Asociación Nacional Española de Fabricantes de Hormigón Preparado (Anefhop),**

**Ferrovial Agromán SA,**

**Agrupación de Fabricantes de Cemento de España (Oficemen),**

**Asociación de Aceros Corrugados Reglamentarios y su Tecnología y Calidad (Acerteq),**

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 October 2011,

after considering the observations submitted on behalf of:

- the Asociación para la Calidad de los Forjados (Ascafor) and the Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac), by A. Vázquez Guillén, procurador,

and by J.M. Sala Arquer, abogado,

- Calidad Siderúrgica SL, by M. del Valle Gili Ruiz, procuradora, and C.L. Rubio Soler, abogado,
- the Asociación Española de Normalización y Certificación (AENOR), by L. Cazorla González-Serrano, abogado,
- the Asociación de Investigación de las Industrias de la Construcción (Aidico) Instituto Tecnológico de la Construcción, by M.C. Tejada Marcelino, procuradora, and A. Albert Mora, abogado,
- the Asociación Nacional Española de Fabricantes de Hormigón Preparado (Anefhop), by C. Hidalgo Senén and E. Hidalgo Martínez, procuradores,
- the Asociación de Aceros Corrugados Reglamentarios y su Tecnología y Calidad (Acerteq), by R. Martínez Solís, abogada,
- the Spanish Government, by S. Centeno Huerta and B. Plaza Cruz, acting as Agents,
- the Netherlands Government, by C.M. Wissels, acting as Agent,
- the European Commission, by L. Banciella, G. Zavvos and A. Alcover San Pedro, acting as Agents,

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

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 34 TFEU and 36 TFEU.
- 2 The reference has been made in proceedings between the Asociación para la Calidad de los Forjados (Ascafor) and the Asociación de Importadores y Distribuidores de Acero para la Construcción (Asidac), the applicants in the main proceedings, and the Administración del Estado, Calidad Siderúrgica SL, the Colegio de Ingenieros Técnicos Industriales, the Asociación Española de Normalización y Certificación (AENOR), the Consejo General de Colegios Oficiales de Aparejadores y Arquitectos Técnicos, the Asociación de Investigación de las Industrias de la Construcción (Aidico) Instituto Tecnológico de la Construcción, the Asociación Nacional Española de Fabricantes de Hormigón Preparado (Anefhop), Ferrovial Agromán SA, the Agrupación de Fabricantes de Cemento de España (Oficemen) and the Asociación de Aceros Corrugados Reglamentarios y su Tecnología y Calidad (Acerteq), concerning an application for annulment of Royal Decree No 1247/2008 of 18 July 2008 approving the structural concrete regulations (EHE-08) (BOE No 203, 22 August 2008, p. 35176).

### **Legal context**

#### *European Union law*

- 3 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'), is applicable to 'construction products' in accordance with Article 1(1) thereof.

4 Article 6(2) of that directive provides as follows:

'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. ...'

5 Article 16 of Directive 89/106 is worded as follows:

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.'

6 Article 17 of the Directive 89/106 provides as follows:

'Member States of destination shall attach the same value to reports and attestations of conformity issued in the producing Member State in accordance with the procedure referred to in Article 16, as they do to their own corresponding national documents.'

7 Chapter VII of Directive 89/106, entitled 'Approved bodies', contains Article 18, the second paragraph of which states as follows:

'Certification bodies, inspection bodies and testing laboratories shall comply with the criteria laid down in Annex IV.'

8 Annex IV to Directive 89/106 sets out the minimum conditions which the certification bodies, the inspection bodies and the testing laboratories must fulfil in order to be approved for the purpose of the directive.

#### *National law*

9 The structural concrete regulations (EHE-08), approved by Royal Decree No 1247/2008 ('the concrete regulations') lay down technical specifications which concrete-related products must satisfy in order to be used in Spain in the construction sector.

10 Those regulations also lay down the detailed rules for monitoring the technical specifications to be

satisfied.

11 As regards reinforcing steel, Article 87 of the concrete regulations provides two means by which it may be confirmed that products comply with technical specifications.

12 First, it is demonstrated that reinforcing steel complies with quality and safety standards if it has a label of quality officially recognised under Annex 19 to the regulations.

13 Second, where there is no recognised label of quality available, compliance with those specifications is established through checks and tests carried out prior to acceptance of each batch of reinforcing steel.

14 As regards reinforcing steel originating in a Member State other than the Kingdom of Spain, Article 4.1 of the concrete regulations states as follows:

‘Within the field of application of these regulations, construction products lawfully manufactured or marketed in Member States of the European Union ... may be used, provided that such products comply with the legislation of such States and ensure a level of safety and intended use which is equivalent to that required under these regulations.

That level of equivalence shall be accredited in accordance with Article 4.2 or, where appropriate, Article 16 of Directive 89/106/EEC ...

...

Labels of quality of a voluntary nature which facilitate compliance with the requirements laid down in those regulations may be recognised by the relevant public authorities in the construction sector within any Member State of the European Economic Area and may refer to the structure plan, the products, the processes entailed in the construction thereof or whether account has been taken of environmental criteria.’

15 Article 81 of the concrete regulations, entitled ‘Warranty levels and quality labelling’, is worded as follows:

‘For products and production processes to comply with the basic requirements set out in these regulations they must meet a set of specifications to a sufficient guaranteed level.

[Producing States] may, in respect of their products and processes, introduce a warranty level higher than the minimum requirement, by adopting systems (such as, for example, labels of quality) which guarantee, by means of relevant audits, inspections and tests, that their quality systems and production controls meet the requirements necessary for such labels to be awarded.

Such additional warranty levels which are higher than the legal minimum levels can be demonstrated by any of the following procedures:

(a) by obtaining a label of quality officially recognised in accordance with the procedure set out in Annex 19 to these regulations; or

(b) in the case of products manufactured on site or processes carried out on site, by an equivalent system validated and supervised under the responsibility of the Dirección Facultativa which ensures that warranties equivalent to those required under Annex 19 for officially recognised labels of quality are provided.

These regulations contemplate the application of certain special criteria for acceptance of those products and processes which offer a higher level of warranty vouched for using either of the two procedures referred to in the previous paragraph.

Acceptance control may take into account warranties associated with possession of a quality label, provided that this satisfies certain conditions. Thus, in the case of both production processes and products which do not require the EC mark under Directive 89/106/EEC, these regulations permit certain special criteria to be applied to approval when these bear a label of quality of a voluntary nature which is officially recognised by an authoritative body with competence in the field of construction or public works forming part of the public authorities of any Member State of the European Union or of any State which is a signatory to the Agreement on the European Economic Area.

The provisions of the previous paragraph shall also apply to construction products lawfully manufactured or marketed in a State which has a customs Association Agreement with the European Union provided that the agreement accords such products the same treatment as those manufactured or marketed in a Member State of the European Union. In these cases the level of equivalence shall be determined by applying the procedures set out in the abovementioned Directive.

For the purposes of complying with the basic requirements of these regulations, quality labelling must satisfy the conditions for official recognition set out in Annex 19

...'

16 Annex 19 to the concrete regulations, entitled 'warranty levels and requirements for the official recognition of quality labelling', sets out, inter alia, the rules concerning the organisation and operation of certification bodies and the powers of the relevant authorities in relation to such bodies.

17 Article 1 of Annex 19 provides as follows:

'It shall be possible pursuant to these regulations for the Dirección Facultativa to apply special criteria to certain products and processes when, on a voluntary basis and in accordance with Article 81, they offer additional levels of warranty exceeding the minimum levels required by law.

Generally, such additional warranty levels shall be established by obtaining a quality label officially recognised by an authority which has competence in the field of construction within a Member State of the European Union, a State which is a signatory to the Agreement on the European Economic Area or a State which is party to an agreement for the establishment of a Customs Union with the European Union, in which case the level of equivalence shall be determined by applying the procedures set out in Directive 89/106/EEC.'

18 Article 2 of Annex 19 to the concrete regulations is worded as follows:

'... In the case of products or processes for which there is no EC mark in force, the level of warranty required by law is that set out in these regulations.

In addition, and on a voluntary basis, the manufacturer of any product, the person responsible for any process or the constructor may choose to obtain a label of quality offering a level of warranty which is higher than the minimum level set out in these regulations. In the case of products with an EC mark, such labels of quality must add value with respect to characteristics not covered by the EC mark.

Being voluntary initiatives, labels of quality may be awarded in accordance with different criteria and individual procedures. This Annex lays down the conditions which enable it to be determined whether the labels provide a level of warranty which exceeds the legal minimum and can therefore be the subject of official recognition by the competent authorities.'

19 Article 3 of Annex 19 provides as follows:

‘The relevant authority for official recognition of the label shall check that the requirements for official recognition set out in this Annex are satisfied and shall ensure that this remains the case. In order to achieve this objective, the authority may intervene in any activity it considers relevant to the recognition of the label, while maintaining the necessary confidentiality.

...’

20 Article 4 of Annex 19 to the concrete regulations states as follows:

‘In order to be officially recognised, the label must:

- be of a voluntary nature and awarded by a certifying body fulfilling the requirements of this Annex;
- comply with these regulations and include in the text regulating it an explicit statement of that compliance; and
- be awarded on the basis of governing rules setting out its specific guarantees, its award procedures, its system of operation, its technical requirements and the rules for the decision-making process relating to it.

Those rules shall:

- be publicly available, be expressed in clear and precise terms and provide unambiguous information for both the client of the certifying body and for other interested parties;
- also include specific procedures for both off-site facilities and on-site facilities and processes;
- guarantee the independence and impartiality of the body granting the label and, to this end, amongst other measures, shall prevent persons acting as advisors or consultants in connection with each case from participating in decisions relating to it;
- specify the treatment to be accorded to certified products for which the results of production control tests show non-compliance, in order to ensure that the relevant corrective action is immediately instigated and, where appropriate, that the clients have been informed; also specify the maximum period of time which should elapse between the detection of the non-compliance and the corrective action which must be taken;
- set out the minimum requirements which laboratories involved in certification must satisfy;
- specify as a requirement for the award of the label that data relating to production controls must be available for a period of at least six months in the case of products used or processes carried out in off-site facilities. In the case of on-site facilities, the governing regulations shall lay down criteria to ensure the same level of production information and guarantees for the user;
- in the case of products or processes which are not addressed in this Annex but are addressed in these regulations, provide additional warranties in respect of characteristics other than those required by law which may contribute to satisfying the requirements set out in these regulations.’

### **The facts in the main proceedings and the question referred for a preliminary ruling**

21 The members of Ascafor are undertakings engaged mainly in the manufacture and marketing in Spain of reinforcing steel for concrete. The members of Asidac are Spanish importers of steel for construction.

- 22 Those associations claim that the concrete regulations, in particular Article 81 of and Annex 19 to those regulations, restrict their ability to import reinforcing steel originating in Member States other than the Kingdom of Spain.
- 23 The referring court points out that, in order for reinforcing steel to be used in construction in Spain, it is essential that it meets a number of technical specifications.
- 24 Thus, the concrete regulations provide for two means by which it can be shown that those requirements are satisfied: (i) it is established that the reinforcing steel complies with the technical specifications as a result of checks and tests carried out prior to acceptance of each batch of the product; or (ii) the reinforcing steel has an officially recognised label of quality, that is to say that it is certified that the producer adhered to the constraints laid down in the regulations during the production process.
- 25 The referring court notes that, in the first case, the conformity checks and controls are more costly and are borne by the end user of the steel, not by its producer, which is instead the case as regards the conformity procedure for acquiring an officially recognised label of quality.
- 26 The referring court concludes from this that the users of reinforcing steel have an incentive to use certified products, namely those bearing an officially recognised label of quality, in order to avoid the inconvenience and the costs associated with conformity control prior to acceptance of each batch of reinforcing steel, so that producers from Member States other than Kingdom of Spain also have an incentive to market their products on the Spanish market with a label of quality officially recognised by the Spanish authorities.
- 27 Referring to the recognition procedure for labels of quality of Member States other than the Kingdom of Spain, as provided for in Article 81 of the concrete regulations, read in conjunction with Annex 19 to the regulations, the referring court expresses doubts as regards the compatibility with Articles 34 TFEU and 36 TFEU of the conditions outlined above which the certifying bodies of those Member States must satisfy in order for quality certificates issued by them to be officially recognised in Spain.
- 28 In those circumstances, the Tribunal Supremo decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can the exhaustive provisions contained in Annex 19, in conjunction with Article 81, of Royal Decree No 1247/2008 of 18 July 2008, relating to the granting of official recognition of labels of quality, be considered to be excessive and disproportionate to the objective pursued and to involve an unjustified restriction which renders the recognition of the equivalence of certificates more difficult and to be an obstacle to or a restriction of the marketing of national or imported products contrary to Articles [34 TFEU] and [36 TFEU]?’

### **Consideration of the question referred for a preliminary ruling**

#### *Admissibility*

- 29 Calidad Siderúrgica SL, the Aidico Instituto Tecnológico de la Construcción and Acerteq argue that the reference for a preliminary ruling is inadmissible.
- 30 First, the referring court is in reality asking the Court of Justice to rule on the substance of the case by interpreting national law. Therefore, the Court of Justice should declare that it does not have jurisdiction.
- 31 Second, the question is formulated in hypothetical and fictitious terms, in so far as the referring court does not indicate which requirements laid down by the national legislation at issue are

disproportionate to the objective pursued by that legislation.

- 32 It should be noted from the outset that the procedure laid down in Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice. It is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the question submitted concerns the interpretation of European Union law, the Court is in principle bound to give a ruling (see Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, paragraph 28, and Case C-213/07 *Michaniki* [2008] ECR I-9999, paragraph 32).
- 33 However, it is not the task of the Court of Justice, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with European Union law or to interpret national legislation or regulations (see, inter alia, Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 43; Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 49; order of 17 September 2009 in Joined Cases C-404/08 and C-409/08 *Investitionsbank Sachsen-Anhalt*, paragraph 25, and order of 13 January 2010 in Joined Cases C-292/09 and C-293/09 *Calestani and Lunardi*, paragraph 15).
- 34 The Court has, however, repeatedly held that it is competent to give the referring court full guidance on the interpretation of European Union law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; *Centro Europa 7*, paragraph 50, and the order in *Calestani and Lunardi*, paragraph 16).
- 35 In the present case, first, the question referred for a preliminary ruling expressly concerns the interpretation of Articles 34 TFEU and 36 TFEU, since the referring court is unsure whether the national legislation at issue is compatible with those articles.
- 36 Second, while it is true that the referring court has not indicated which requirements laid down by the national legislation at issue in relation to certifying bodies may go beyond what is necessary to attain the objective pursued, the doubts expressed by that court concern the exhaustive nature of the requirements laid down, and not any one particular requirement.
- 37 Therefore, that is precisely the context in which it is appropriate to provide an answer that will be of use to the referring court.

### *Substance*

#### Preliminary observations

- 38 First, it must be noted that the principal purpose of Directive 89/106 is to remove obstacles to trade by creating conditions which enable construction products to be marketed freely within the European Union. To that end, that directive specifies the essential requirements which construction products must satisfy and which are put into effect by harmonised standards as well as national implementing standards, European technical approvals and national technical specifications recognised at European Union level (see, to that effect, judgment of 13 March 2008 in Case C-227/06 *Commission v Belgium*, paragraph 31).
- 39 It is accepted that reinforcing steel for concrete is a ‘construction product’ within the meaning of Directive 89/106 which is not subject to a harmonised standard, a European technical approval or a national technical specification recognised at European Union level, as referred to in Article 4(2) of that directive.
- 40 However, as regards a construction product 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 a product to be placed on



the market in their territory if it satisfies national provisions consistent with the Treaty until the European technical specifications provide otherwise (see, to that effect, *Commission v Belgium*, paragraph 33).

- 41 As is apparent from the order for reference, there are, under Spanish legislation, two means by which it may be established that reinforcing steel for concrete complies with Spanish industrial quality and safety standards, namely by tests and controls carried out prior to acceptance of batches of steel on site, or by presenting a label of quality from which it can be inferred that the steel manufacturer has complied with higher technical specifications.
- 42 The applicants in the main proceedings, confirming the assessment of the referring court, stated that the first approach involves an increase in control costs, while the Spanish Government made it clear, at the very least, that, under that approach, the controls are tighter and the related costs are borne by the end users.
- 43 Accordingly, particular importance is attached in Spain to the second means of demonstrating the conformity of reinforcing steel, since the end users have an economic incentive to use reinforcing steel certified by a label of quality.
- 44 In that regard, it should be noted that Article 81 of the concrete regulations lays down a procedure for the recognition of labels of quality granted by bodies of Member States other than the Kingdom of Spain to reinforcing steel which is manufactured in such Member States. Article 81 states, in particular, that in order to be officially recognised, a label of quality granted by a Member State must fulfil the conditions laid down by Annex 19 to the regulations.
- 45 That annex contains, first, the substantive conditions which reinforcing steel must satisfy and, second, the procedural and formal requirements relating to the granting of a label of quality.
- 46 In particular, Article 4 of Annex 19 to the concrete regulations lays down the requirements which the certifying bodies of Member States other than the Kingdom of Spain must satisfy in order for the labels of quality granted by them to be officially recognised in Spain.
- 47 In that respect, it must be noted that, under Article 16(1) of Directive 89/106, applicable to construction products whose technical specifications have not been harmonised, the Member State of destination is to consider such products 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.
- 48 Annex IV to that directive lays down the necessary minimum conditions to be fulfilled by the certification bodies, inspection bodies and testing laboratories in order to be approved.
- 49 It is clear that the requirements laid down for certification bodies in Article 4 of Annex 19 to the concrete regulations go beyond those minimum conditions.
- 50 However, it is accepted that a Member State may subject the placing on the market in its territory of a construction product not covered by technical specifications harmonised or recognised at European Union level only to national provisions which comply with its obligations under the Treaty, in particular with the principle of the free movement of goods set out in Articles 34 TFEU and 36 TFEU (see *Commission v Belgium*, paragraph 34).
- 51 It is therefore necessary to ascertain whether, as the applicants in the main proceedings claim, the comprehensive application of those requirements to certifying bodies in a Member State other than the Kingdom of Spain constitutes a restriction on the free movement of goods.

Whether there is a restriction on the free movement of goods

- 52 According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Article 34 TFEU (see, *inter alia*, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, and Case C-108/09 *Ker-Optika* [2010] ECR I-0000, paragraph 47).
- 53 It is also apparent from settled case-law that Article 34 TFEU reflects the obligation to comply with the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of European Union products to national markets (see Case C-110/05 *Commission v Italy* [2009] ECR I-519, paragraph 34, and *Ker-Optika*, paragraph 48).
- 54 In the present case, under Article 4 of Annex 19 to the concrete regulations, bodies of Member States other than the Kingdom of Spain granting quality certificates for reinforcing steel must fulfil all the conditions set out in that provision in order for those certificates to be officially recognised in Spain.
- 55 The imposition of all of those requirements may result in rejection of an application for recognition of quality certificates granted in a Member State other than the Kingdom of Spain when the body granting them does not satisfy those requirements, especially since Article 4 of Annex 19 to the concrete regulations lays down conditions that are more wide-ranging than those of the necessary minimum standards set out in Annex IV to Directive 89/106 which approved bodies must satisfy in accordance with that directive.
- 56 Accordingly, the requirements at issue are capable of restricting access to the Spanish market for reinforcing steel manufactured and certified in a Member State other than the Kingdom of Spain, in so far as they may not necessarily be fulfilled by the certifying body of the producing State.
- 57 Since economic operators based in the Kingdom of Spain are discouraged from importing reinforcing steel produced in another Member State, and notwithstanding the fact that the requirements of Article 4 of Annex 19 to the concrete regulations are imposed on both certifying bodies of Member States other than the Kingdom of Spain and on Spanish certifying bodies, the national legislation at issue must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 34 TFEU.

Whether the restriction on the free movement of goods is justified

- 58 It is established that a restriction on the free movement of goods may be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet overriding requirements. In either case, the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see *Ker-Optika*, paragraph 57).
- 59 In the present case, the Spanish Government states that the national legislation at issue is justified by the objective of the protection of human life and health in so far as it is designed to ensure the safety of users of works of art and buildings.
- 60 In that regard, it is established that, in the absence of harmonising rules, the Member States are free to decide on their intended level of protection of human life and health and on the need to monitor the goods concerned when being used (see, to that effect, Case C-293/94 *Brandsma* [1996] ECR I-3159, paragraph 11, and C-432/03 *Commission v Portugal* [2005] ECR I-9665, paragraph 44).
- 61 Attention should be drawn to the differences identified at the hearing between, on the one hand, the understanding of the system of quality labelling put forward by certain interested parties in their oral submissions and, on the other, the wording itself of the national provisions at issue and the written observations of some of those parties.

- 62 Accordingly, Article 2 of Annex 19 to the concrete regulations provides that ‘in addition, and on a voluntary basis, the manufacturer of any product, the person responsible for any process or the constructor may choose to obtain a label of quality offering a level of warranty which is higher than the minimum level set out in these regulations. ... This Annex lays down conditions which enable it to be determined whether the labels provide a level of warranty which exceeds the legal minimum and can therefore be the subject of official recognition by the competent authorities.’ The Spanish Government and Acerteq claimed in their written observations that officially recognised labels of quality make it possible to demonstrate that the certified product offers a higher level, or indeed a much higher level, of warranty than that generally required by the concrete regulations.
- 63 If the referring court were to adopt that view of the quality labelling system in Spain, the effect would be that the objective of quality labels officially recognised in Spain would be to demonstrate that the certified product satisfied requirements which go beyond the minimum standards laid down by the concrete regulations to ensure industrial safety.
- 64 In those circumstances, the requirements imposed by Annex 19 to the concrete regulations on bodies issuing quality labels and in respect of the procedures to be followed for official recognition of those labels in Spain would go beyond what is necessary for the purpose of demonstrating that reinforcing steel complies with the minimum standards for ensuring the protection of human life and health. Therefore, such an objective could not justify the restriction on the free movement of goods which results from the national legislation at issue.
- 65 Some of the interested parties claimed at the hearing that, on the contrary, the Spanish system of quality labelling may give rise to an assumption that the certified product complies with the minimum standards laid down by the concrete regulations.
- 66 It is for the referring court to determine which of those two interpretations of national law is correct. If it chooses the interpretation advocated by the parties at the hearing before the Court, it will then be necessary to distinguish between, on the one hand, the quality certificates issued in Member States other than the Kingdom of Spain by approved bodies within the meaning of Directive 89/106 and, on the other, those granted by separate entities.
- 67 Accordingly, in the second situation, a Member State would be fully entitled, having regard to the objective of safeguarding human life and health, to ensure that the body which granted a certificate of quality fulfils requirements regarding its control activities, such as those laid down by Annex 19 to the concrete regulations.
- 68 As regards certificates of quality granted in Member States other than the Kingdom of Spain by approved bodies within the meaning of Directive 89/106, the Court has already held that the process of recognition of the equivalence of such certificates requires an active approach on the part of the national body to which an application is made for recognition. Further, such an active approach is also required, where appropriate, of the body which grants the certificate, and it is for the Member States to ensure that the competent approved bodies cooperate with each other with a view to facilitating the procedures to be followed to obtain access to the market of the importing Member State (see, to that effect, *Commission v Portugal*, paragraph 47).
- 69 Indeed, Article 16(2) and (3) of Directive 89/106 draw attention to the importance of such cooperation.
- 70 Accordingly, having regard to the need for such cooperation and the principle of mutual recognition referred to at paragraph 53 above, some of the requirements laid down by Article 4 of Annex 19 to the concrete regulations may go beyond what is necessary to ensure compliance with the minimum standards laid down by the concrete regulations for guaranteeing the protection of human life and health, which is a matter for the referring court to determine in the main proceedings.
- 71 Therefore, the answer to the question referred is that Articles 34 TFEU and 36 TFEU must be

interpreted as meaning that the requirements laid down in Article 81 of the concrete regulations, read in conjunction with Annex 19 to those regulations, for official recognition of certificates demonstrating the quality level of reinforcing steel for concrete granted in a Member State other than the Kingdom of Spain constitute a restriction on the free movement of goods. Such a restriction may be justified by the objective of the protection of human life and health, provided the requirements laid down are not higher than the minimum standards required for the use of reinforcing steel for concrete in Spain. In such a case, it is for the referring court to ascertain – where the entity granting the certificate of quality which must be officially recognised in Spain is an approved body within the meaning of Directive 89/109 – which of those requirements go beyond what is necessary for the purpose of attaining the objective of the protection of human life and health.

### Costs

- 72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Articles 34 TFEU and 36 TFEU must be interpreted as meaning that the requirements laid down in Article 81 of the structural concrete regulations (EHE-08) approved by Royal Decree No 1247/2008 of 18 July 2008, read in conjunction with Annex 19 to those regulations, for official recognition of certificates demonstrating the quality level of reinforcing steel for concrete granted in a Member State other than the Kingdom of Spain constitute a restriction on the free movement of goods. Such a restriction may be justified by the objective of the protection of human life and health, provided the requirements laid down are not higher than the minimum standards required for the use of reinforcing steel for concrete in Spain. In such a case, it is for the referring court to ascertain – where the entity granting the certificate of quality which must be officially recognised in Spain is an approved body within the meaning of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, as amended by Council Directive 93/68/EEC of 22 July 1993 – which of those requirements go beyond what is necessary for the purposes of attaining the objective of the protection of human life and health.**

[Signatures]

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\* Language of the case: Spanish.