From Status to Impact, and the Role of National Legislation: The Application of Article 34 TFEU to a Private Certification Organisation in *Fra.bo*

*Barend van Leeuwen**

Case C-171/11, Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein (Judgment of 12th July 2012, nyr)

In Fra.bo, it was held by the Court of Justice of the European Union ("CJEU") that "Article 28 EC[1] must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body"[2] (author's headnote).

I. Facts

Fra.bo SpA ("Fra.bo") is an Italian business which manufactures and sells copper fittings. These copper fittings are used to connect two pieces of piping for water or gas. They have sealing rings made of malleable material at the ends to make them watertight.

In Germany, the Deutsche Vereinigung des Gas- und Wasserfaches eV ("DVGW") makes standards which lay down the technical requirements with which such copper fittings have to comply. It is an association established under private law. German legislation has provided that products in connection with the supply of water can be lawfully brought on the German market if they have a CE mark. If they do not have a CE mark, the alternative is for products to be certified by DVGW. In fact, DVGW uses a sub-contractor for its certification activities, for which its own technical standards are used.

Fra.bo applied for certification of its copper fittings by DVGW in 1999. In 2000, Fra.bo was awarded a certificate for the duration of five years. The certification assessment itself had been subcontracted by the German laboratory which was normally used and approved by DVGW to a non-approved Italian laboratory. During the five-year period in which the certificate was valid DVGW received complaints by third parties which resulted in a re-assessment procedure, directly undertaken by the approved German laboratory. In 2005, DVGW informed Fra.bo that its fittings had not passed the ozone test, but that it was free to submit its own assessment report within three months. Fra.bo then had another assessment done by a non-approved Italian laboratory, which found that its fittings did pass the ozone test. However, DVGW refused to recognise this report because it had not been undertaken by one of its approved laboratories. As a consequence, it cancelled Fra.bo's certificate in June 2005. Therefore, Fra.bo was no longer able to place its copper fittings on the German market.

After the cancellation of the certificate, Fra.bo brought an action against the cancellation before the Landgericht Köln, which dismissed its claim. It then appealed to the Oberlandesgericht Düsseldorf, which decided to stay the proceedings to make a preliminary reference to the Court of Justice of the European Union ("CJEU"). Its main question was whether Article 34 TFEU (ex Article 28 EC), which provides for

* PhD Researcher in Law, European University Institute (Florence), <barend.vanleeuwen@eui.eu>.

1 Now Article 34 TFEU

2 Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) – TechnischWissenschaftlicher Verein* (Judgment of 12th July 2012), para 34.

the right to free movement of goods, was applicable to the standardisation and certification activities of DVGW. If the answer to this question was negative, its alternative question was whether DVGW's standardisation and certification activities constituted "economic activity" for the purposes of Article 101 TFEU (ex Article 81 EC).

II. Judgment

It is appropriate to start with the Opinion of Advocate General (AG) Trstenjak. She argued that it was already clear from the CJEU's case law on the applicability of the free movement provisions to private parties that it had moved to an approach based on the *effects* of the rules created by collective regulators. Although the previous cases had not expressly dealt with the free movement of goods, and it had been argued that horizontal direct effect of the free movement of goods had been excluded by the CJEU, as a matter of principle it would not be right to take a different approach to free movement of goods vis-à-vis the other fundamental freedoms.[3] Given that DVGW had obtained a position of significant power in the certification market as a result of the German legislation, it was virtually impossible to bring the fittings on the market without a certificate awarded by DVGW. This effect was reinforced by the fact that the referring Court had found that the copper fittings were not covered by a harmonised European technical standard, which meant that this was not a case in which Fra.bo could obtain a CE mark. Certification by DVGW was then the only alternative. AG Trstenjak argued that given this *de facto* competence to decide which products could be lawfully brought on the market, which had been granted to DVGW by the German legislation, its activities had to be caught by the provision on free movement of goods.[4]

The CJEU more or less followed the arguments of AG Trstenjak. In a relatively short judgment it, first of all, found that the copper fittings in question were not covered by a harmonised European technical standard. As such, Member States were free to adopt their own technical standards, which would still have to comply with the free movement of goods.[5]

The CJEU then focussed exclusively on the applicability of Article 34 TFEU. Although DVGW was a private law association over which the German State did not exercise any decisive influence, this in itself did not constitute a reason not to apply the free movement provisions to its activities. Therefore, the question for the CJEU to answer was whether the activities of DVGW could have "the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State".[6]

The CJEU answered this question in the affirmative and, in reaching its conclusion, used three key arguments.[7] First of all, German legislation had provided that goods certified by DVGW would be compliant with national law and could be lawfully brought on the market. Secondly, DVGW was the only body which certified copper fittings in Germany. As a result, the only possibility for business to obtain a certificate of compliance was through certification by DVGW. Thirdly, a lack of certification by DVGW would result in serious difficulties to place products on the German market. Almost all German consumers bought copper fittings which had been certified by DVGW.

On the basis of these three arguments, the CJEU held that "a body such as the DVGW, by virtue of its authority to certify the products, in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings"[8] and that, consequently, Article 34 TFEU was applicable to its standardisation and certification activities. This meant that it was not necessary to answer the question on the applicability of Article 101 TFEU.

III. Comment

It should not come as a surprise that the CJEU held that DVGW's activities were caught by the provision on the free movement of goods. In the past decade, the CJEU has gradually moved from deciding the applicability of the free movement provisions on the basis of the public or private *status* of the regulator to the actual *impact* of the regulatory actions on the

3 Opinion of AG Trstenjak in Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) – TechnischWissenschaftlicher Verein*, paras 43-45.
4 *Ibid.*, paras 49-50.
5 Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) – TechnischWissenschaftlicher Verein* (Judgment of 12th July 2012), paras. 18-20.
6 *Ibid.*, para 26.
7 *Ibid.*, paras 27-30.
8 *Ibid.*, para 31.

internal market. This approach has been taken to improve the effectiveness and uniformity of EU law.[9] Public and private regulators act in the same internal market and while some of the Member States still have public regulators, others have delegated powers to private regulators. If Member States could escape the application of EU law by delegating regulatory powers to private parties, this would be highly detrimental to the effectiveness of the free movement provisions.

This rationale was clearly recognised by AG Trstenjak and can also be seen in the judgment itself. The move towards an effects-based application of the free movement provisions is very clear from the structure of the judgment. The CJEU justified the application of the provision on the free movement of goods to DVGW by reference to three main arguments outlined above. These arguments were provided *after* the CJEU referred to the definition of a restriction of the right to free movement of goods based on the *Dassonville* formula.[10] Traditionally, the determination of the applicability of the free movement provisions preceded the determination of a restriction. In this case, the issue of applicability is determined on the basis of the identification of a restriction. To put it in simple terms, Article 34 TFEU was held applicable to DVGW *because* its actions constituted a restriction of the free moment of goods. Therefore, it is clear that the free movement of goods provision was applied to DVGW's activities because of the impact its activities had on the internal market, not because of its public or private status as regulator. It is not entirely clear how this effects-based application can be reconciled with the CJEU's own statement in *Fra.bo* that the measures must give rise to restrictions to the free movement of goods imposed "in the same manner as do measures imposed by the State".[11] This would appear to be a somewhat formalistic return to a distinction based on whether or not measures can be attributed to the State or are similar to measures taken by the State.

If it is not really surprising that the free movement provisions were held applicable to DVGW's activities, why is *Fra.bo* still such an interesting case? This is because many EU lawyers were interested to find out whether the application of the free movement provisions to DVGW was considered to be horizontal or vertical direct effect by the CJEU. However, the CJEU was very careful not to touch on that issue in its judgment. One could argue that it no longer makes sense to distinguish between horizontal and vertical direct effect, since all what matters is the impact of the regulatory conduct on the internal market. This was the position taken by AG Maduro in his Opinion in *Viking*.[12] While it is correct that it does not make any difference when deciding on the applicability of the free movement provisions, the horizontal or vertical nature of the proceedings might still have an impact of the issue of responsibility or liability. If the Oberlandesgericht Düsseldorf were to find that the activities of DVGW constituted an obstacle to Fra.bo's right to free movement, would DVGW be required to compensate Fra.bo itself, or would it be able to forward the bill directly to the German State? After all, the effect of the German legislation was a decisive factor in the CJEU's decision to apply the free movement provisions to DVGW.

In that respect, the *Fra.bo* case is illustrative of a recent series of cases in which the private regulator to which the free movement provisions were applied had a clear link to the State and to national legislation. Although the German State had no direct influence on the activities of DVGW, DVGW's activities would not have had an important regulatory impact if the German legislation had not singled out DVGW as the main certification body in the market. As such, this case in a way challenges the CJEU's previous rationale for extending the application of the free movement provisions to private parties. In the traditional series of cases based on *Walrave en Koch*,[13] the CJEU focussed on two functional criteria. The first was that the private party had to be engaged in collective regulation; the second was that it was exercising legal autonomy. In *Fra.bo*, there appears to be a tension between these two criteria. They did not cause any difficulties in cases like *Walrave en Koch* or *Bosman*,[14] in which the private regulators in question, the UCI and the UEFA, were clearly powerful

9 Stefaan van den Bogaert, "Horizontality: the Court Attacks?", in Catherine Barnard and Joanne Scott, (eds.), *The Law of the Single European Market: Unpacking the Premises*, (Oxford: Hart Publishing, 2002), pp. 123–152.

10 Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) – TechnischWissenschaftlicher Verein* (Judgment of 12th July 2012), para 22.

11 *Ibid.*, para 26.

12 Opinion of AG Maduro in *Viking*, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's UnionvViking Line ABP et al.*, [2007] ECR I-10779, paras 38-40.

13 Case C-36/74, *Walrave and Koch v Association Union cycliste internationale and others*, [1974] ECR 1405.

14 Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman and others*, [1995] ECR I-4921.

private regulators which were entirely independent from the State. There was no link to national legislation. In *Fra.bo*, the collective regulation element of DVGW's activities derived from the German legislation. The collective impact of DVGW's certification activities would not have occurred but for the decision of the German legislature to refer to DVGW in the legislation. Therefore, it can be concluded that the collective regulation aspect of DVGW's activities was much more vertical than horizontal.

However, when we look at the criterion of legal autonomy the situation is quite different. DVGW was acting autonomously in its adoption of the rules which gave rise to the dispute in *Fra.bo*. The specific rules on the ozone testing had been adopted by DVGW itself without any State input. The same applied to its rules which provided that it would not accept reports from non-approved laboratories. In fact, the German legislation had given something of a "carte blanche" to DVGW to regulate according to its own standards and rules. It did not in any way prescribe *how* DVGW should exercise its standardisation and certification activities. Although the German legislation had placed DVGW in a position of regulatory power, the exercise of that regulatory power was not controlled by the legislation. From that perspective then, the application of the free movement provision would seem to be more horizontal than vertical.

This discussion is not purely theoretical, since it will have a real impact on the question of liability. If private regulators are increasingly going to be held liable under free movement law, the impact of the relationship between private regulators and the State on the issue of liability should be further clarified by the CJEU. This is not something which can simply be left to national courts, as it is a matter of EU law when the free movement provisions should be applied to private parties and when they should be held liable. Further clarification of some of the concepts used by the CJEU is required. For example, in *Fra.bo*, if legal autonomy was to be the key criterion, it would be just to hold DVGW individually and solely liable for any breaches of free movement law. However, if the application of the free movement provisions was more based on the collective regulation aspect, then it would be just to hold the German State liable. This is a question of legal certainty for national private regulators which remains to be answered by the CJEU. It was not adequately dealt with in *Laval*,[15] in which the CJEU failed to apply its discussion of the interaction between the trade union's actions and the Swedish legislation to the question of liability. As a consequence, the Swedish Labour Court was left to decide the issue of liability with very limited guidance.[16] The outcome cannot be described as a success.[17] Therefore, the CJEU should not simply continue to extend the application of the free movement provisions to private parties without providing more guidance on this issue.

15 Case C-341/05, *Laval un Partneri Ltd v Svenska Byggandsarbetareförbundet et al.*, [2007] ECR I-11767.

16 *Arbetsdomstolensdomar* (Judgments by the Labour Court) 2009 No. 89 of 2 Dec. 2009. Unofficial English translation by Jur. Dr Laura Carlson, available on the Internet at <http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf> (last accessed on 6 August 2013).

17 Barend van Leeuwen, "An illusion of protection and an assumption of responsibility: the possibility of Swedish State liability after *Laval*", in Catherine Barnard and Marcus Gehring (eds.), *The Cambridge Yearbook of European Legal Studies 2011-2012*, Volume 14, (Oxford: Hart Publishing, 2013), pp. 453–473. Others are more positive: Ulf Bernitz and Norbert Reich, "Case comment: The Labour Court Judgment in the Case Laval et Partneri", 48 *CML Rev* (2011), pp. 603–623.