Market supervision: two Finnish cases in the ECJ

On 17 November 1998, Raine Pentti Pöyry suffered a serious work injury while working on a press brake. He was helping a workmate change the blades on a machine that had been stopped with the emergency stop button. During the operation, Mr Pöyry inadvertently pressed a foot pedal which caused a rapid compressing movement, severing all eight fingers. The press brake was produced by the French firm Amada, part of a multinational group producing hi-tech sheet metal working equipment.

On 22 March 2000, a mobile home fell off a car lift when the interlocking guard on the loading arms gave way under a sideways shift. The vehicle weighed less than the maximum permitted load for the car lift. Fortunately, no-one was injured. The car lift had been made by an Italian firm, AGM-COS.MET.

These two accidents which occurred in Finland have a certain number of points in common. They were also behind the first references for preliminary rulings made to the Court of Justice of the European Communities on key aspects of the Machinery Directive[1].

CE-marked, but still dangerous

The facts common to both are firstly, that both items of work equipment were CE-marked, which is meant to certify that they satisfy the Machinery Directive's essential safety requirements. In both cases, the equipment had been imported from other countries within the European single market. In both cases, the CE marking was affixed after certification by a notified body. In the Yonemoto case – named from the manager of Ama Prom[2] – the notified body which certified the machine was AIF/S (Association des industriels de France/services[3]); in the AGM-COS.MET case, it was an Italian notified body, ICEPI (Istituto Certificazione Europea Prodotti Industriali[4]). In both cases, the after-the-event investigations found that the equipment concerned did not satisfy the essential safety requirements and could cause serious accidents.

In the press brake case, the Finnish authorities took action after the accident, bringing prosecutions against both the employer and the importer, Mr Yonemoto. In the car lift incident, the Finnish authorities investigated the incident. A labour inspector, Mr Lehtinen, found the equipment not to be compliant with the Machinery Directive's essential requirements. The producer, AGM-COS.MET, admitted the fact and took steps to avoid a repetition of the incident, in particular by advising Finnish purchasers to apply a much lower maximum permitted load. Mr Lehtinen commented on the affair on several occasions at public meetings, on television and in the press. His superiors disowned his views and took him off the case.

What the two cases have in common in law is that the rules on free movement of goods were relied on to restrict the steps a State can take to supervise the market in work equipment. In the first case, Mr Yonemoto argued that a criminal conviction would breach the principle of free movement of goods as implemented by the Machinery Directive. In the second case, the car lift producer claimed substantial damages on the grounds that the Finnish State and Mr Lehtinen were responsible for its lost sales in Finland in the period after the incident.

This article cannot go into all aspects of both cases. The second in particular is complicated by the dispute between Mr Lehtinen and his superiors. The allocation of potential liability between Mr Lehtinen personally and the Finnish State raises big issues that are not directly relevant to the Machinery Directive. A more detailed look will be taken at these in a future issue of the *Newsletter* when the Court of Justice has handed down its ruling in the AGM-COS.MET case.

Contradictions within the Machinery Directive

The political import of these two cases is not to be under-rated. In both, the issue is what national public authorities do to supervise the market and impose penalties for breaches of the rules. An understanding of this issue needs a brief recap of what the Machinery Directive says and does[5].

The Machinery Directive aims to create a single market for work equipment in the European Union. It lays down essential safety requirements so that workers' safety does not pay for the free movement of equipment. All equipment put on the market must be CE-marked to certify its conformity to the directive's requirements. In most cases, the CE mark means that the machinery has self-certified by the manufacturer. The potentially most dangerous equipment must be certified by a notified body before it can be CE-marked.

The Machinery Directive harmonises the rules on the level of safety required, but leaves States responsibility for supervising and if need be enforcing compliance with those rules. The only harmonization measure laid down is on the procedure for prohibiting machinery. Other than that, States are required

[1] Originally adopted in 1989, repeatedly amended and eventually replaced by directive 98/37. It is currently undergoing a further revision. See the article by Stefano Boy in this *Newsletter*.

[2] There are close links between the Amada group which produced the machine and Ama Prom, which seems to be a marketing branch in Finland and certain neighbouring countries (Lithuania and Latvia).

[3] In 2002, AIFF/S became Norisko Equipements.

[4] ICEPI's certification had previously been questioned when France banned certain presses for the cold working of metals (order of 9 June 1999, French Official Gazette, 16 September 1999).

[5] For a detailed analysis of the Machinery Directive, see: Stefano Boy and Sandra Limou, *The implementation of the Machinery Directive. A delicate balance between market and safety*, Brussels, TUTB, 2003.

to enforce compliance with the directive, but are free to determine how to achieve it.

Looked at critically, contradictory forces can be seen at work in the practical implementation of the directive. It removes borders inside the Union to create a single market for work equipment, but its effectiveness depends on the national market supervision policies put in place. Nationally-based market supervision to some extent places obstacles and restrictions on that freedom of movement. In a way, the non-uniform, national character of supervision restores borders not for protectionist purposes, but to ensure workers' safety.

The directive also vests private players (manufacturers for self-certification, notified bodies for certification) with a key role: that of certifying compliance with the essential safety requirements. The notified bodies themselves form a competitive market: any manufacturer can apply to whichever body he chooses, so notified bodies may be inclined to be more accommodating in order not to lose custom. So far, there is only one known case of notified body having lost its status for certifying equipment that was not compliant with the directive's requirements, although market supervision reveals this to be a fairly common occurrence.

If successful, the proceedings brought in the Court of Justice by manufacturers and importers could upset the delicate balance in the system. A one-sided, purely free-trade interpretation of the directive could weaken State intervention to ensure workers' safety.

The Yonemoto case: an ambiguous ruling

The Court has already given its ruling in the Yonemoto case. The judgement delivered on 8 September 2005 is not completely clear-cut. For one thing, it holds that the importer has no duty to ensure that the equipment complies with the essential safety requirements (paragraph 46 of the judgement). If "ensure" means the importer having to take all the steps that the manufacturer should have taken (risk assessment, reference to a notified body if need be, etc), the Court's interpretation can be broadly endorsed. But it is also in the nature of things that Member States should be able to determine what responsibility an importer may have for placing dangerous equipment on the market and impose criminal penalties for it. The Court accepts this only to a very small extent. The concrete examples it gives go no further than checking the instructions for use and for the presence of CE-marking. The Court also recognises that States may require co-operation from importers in carrying out market surveillance. Finally, the judgement does not specify what can reasonably be expected from an importer before specific surveillance measures are taken.

I would argue that there is an obligation to ensure that machinery complies with the safety requirements, having regard to the responsibilities of a professional distributor in the supply chain. In the practical instance of the Yonemoto case, the investigation revealed that the control panel pictured in the instructions for use was not the same as the actual control panel on the machine. It is normally a professional distributor's job to check this kind of thing. On the other hand, the failings with the emergency stop button were probably more difficult to detect in the normal course of a distributor's activity.

Advocate General Geelhoed's Opinion was much more clearly worded than the Court's judgement in this respect. In paragraph 40 of his Opinion, he argued that the smooth functioning of the system laid down by directive 98/37 entails a general duty of care[6], not only by the machinery manufacturers whose specific obligations were spelled out in the directive and its annexes, but also for the downstream economic operators in the distribution chain, such as the importers, distributors and end-users of the machinery. They, he said, must ascertain that the upstream operators in the chain have properly discharged the obligations that the directive imposes on them. Should they fail in that duty of care, the consequences of the defects or errors committed upstream may be passed on down to the final stage of use of the machinery with all the resulting risks for employees' health and safety. On this point, he opined, specific obligations may be imposed in the national legal system on those who import CE-marked machinery into national territory and the other operators in the distribution chain. A professional distributor's duty of care goes much further that the simple examples cited in the Court's judgement (existence of translated instructions for use).

It is still too early to gauge the effects of this judgement. Most Member States' legal systems provide penalties for all operators in the distribution chain, from the machinery producer to the employer. In practise, most States do not go as far back as the producer, if he is established in the territory of another Member State for a variety of reasons, including the difficulty of establishing sound administrative and legal co-operation; insufficient attention to the necessary transnational aspect of market surveillance; under-resourcing of market surveillance bodies, etc.

The AGM-COS.MET case: a serious threat to labour inspectors

AGM-COS.MET could have been a fairly straightforward, landmark case. It has taken a complicated and disturbing turn, mainly from the attitude of senior Finnish Social Affairs and Health Ministry officials.

That the car lift produced by AGM-COS.MET and certified by ICEPI was a dangerous piece of equipment that was not in conformity with the Machinery

[6] The Advocate General's analysis reflects that advanced by the Commission in its written observations on the case submitted in May 2004.

Directive's essential safety requirements is not disputed. The measures taken by the labour inspector, Mr Lehtinen, were arguably proportionate to the danger and characteristics of the market. These car lifts are used in garages and are likely to be sold on from one garage to another. Using information channels is both the quickest way to reach the many potential users, and to make business aware of the need to be more watchful over the safety of machinery.

The claim for damages brought by AGM-COS.MET for lost earnings in Finland and injury to reputation is somewhat grotesque. For AGM-COS.MET to win would set a precedent with which to browbeat labour inspectors. How can market supervision be properly conducted under the cosh of potential liability for hundreds of thousands of euros in damages wielded by firms who may have lost business?

There are two complicating factors:

- Mr Lehtinen's superiors in the Finnish Social Affairs and Health Ministry disowned him and took him off the case. Notwithstanding this treatment, the Ministry rightly stuck to the assessment that the machine was not in conformity with the safety requirements at the time of Mr Lehtinen's investigation.
- The Finnish authorities did not play fair by other States or the Commission. Despite having found that non-compliant machinery was moving around the Community market, they merely took corrective measures for the Finnish market. Such blinkered nationalism is a dangerous approach to the role of market surveillance, which forces each country to re-do checks already performed elsewhere. Given the parlous under-resourcing of market supervision, the result of national authorities failing to co-operate would be to allow different degrees of movement for dangerous equipment depending on the level of supervision exercised by each country.

A rule-bound and irresponsible interpretation of the directive

Without getting bogged down in the various issues that this case gives rise to, one thing to note is the very free-market interpretation placed on the directive in Advocate General Kokott's Opinion.

While rightly noting that the car lift concerned did not fulfil the directive's safety requirements, she goes on to argue that such equipment should continue to benefit from the presumption of conformity while ever no formal prohibition proceedings have been commenced. This "by the book" approach completely ignores the real world of market supervision. Banning a machine is regarded in all Member States as an extreme measure, and involves a fairly slow-moving procedure. In all cases where less extreme measures can be taken, they are preferred. Generally, the national authorities contact the producer, propose changes to the machine or possibly a downgrading (e.g., reducing the maximum load). They inform users and act to see that corrective measures are taken. Machinery is prohibited only in very exceptional circumstances, when market supervision activities daily turn up large numbers of equipment that do not fulfill all the essential requirements.

The Advocate General's big mistake is to see the Machinery Directive as an "exhaustive harmonization" measure in the matter (paragraph 71 of the Opinion), when there are in fact two levels of harmonization in the directive. Certainly, there is total harmonization of the safety requirements that work equipment must meet: the Member States cannot impose other rules than those in the directive. But where market supervision measures are concerned, there is only "mini-harmonization" of the procedures for banning machinery; no other aspect of market supervision is subjected to any for of harmonization measure (information provided to purchasers and public opinion, types of check performed, requirements for corrective action, downgrading, penalties, etc.). Both the legal rules and practical carrying out of market supervision remain very largely national matters. Regrettable, but true.

The Court has yet to deliver its ruling. Concurring with Advocate General's Kokott's Opinion could well strip the single market in work equipment of most of the surveillance mechanisms it currently has. ■

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Case references:
Yonemoto, Case C-40/04, Advocate General's Opinion delivered on 10 March 2005, Court Judgement of 8 September 2005.
AGM-COS.MET, Case C-470/03, Advocate General's Opinion delivered on 17 November 2005.