

JUDGMENT OF THE COURT (Grand Chamber)

17 April 2007<sup>\*</sup>

In Case C-470/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tampereen käräjäoikeus (Finland), made by decision of 7 November 2003, received at the Court on 11 November 2003, in the proceedings

**A.G.M.-COS.MET Srl**

v

**Suomen valtio,**

**Tarmo Lehtinen,**

<sup>\*</sup> Language of the case: Finnish.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Makarczyk (Rapporteur), G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 April 2005,

after considering the observations submitted on behalf of:

— A.G.M.-COS.MET Srl, by P. Kyllönen, asianajaja,

— Mr Lehtinen, by S. Kemppinen and K. Harenko, asianajajat,

— the Finnish Government, by T. Pynnä, acting as Agent,

- the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,
  
- the Swedish Government, by A. Kruse, acting as Agent,
  
- the Commission of the European Communities, by M. van Beek and P. Aalto, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Directive 98/37/EC of the European Parliament and of the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery (OJ 1998

L 207, p. 1, 'the Directive') and the conditions under which a Member State and its officials may be liable in the event of a breach of Community law.

- 2 The reference was made in the course of proceedings between A.G.M.-COS.MET Srl ('AGM'), a company established under Italian law, and Suomen valtio (the Finnish State) and Mr Lehtinen, an official of the Sosiaali- ja terveystieteiden ministeriö (Ministry of Social Affairs and Health), concerning compensation for the damage AGM claims to have suffered as a result of breaches of the Directive.

## **Legal context**

### *Community law*

- 3 The Directive defines the essential health and safety requirements relating to the design and construction of machinery and safety components and the rules for the assessment of conformity, declaration of conformity and marking of machinery.
- 4 Article 2 of the Directive provides:

'1. Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service only if they do not endanger the health or safety of persons and, where

appropriate, domestic animals or property, when properly installed and maintained and used for their intended purpose.

2. This Directive shall not affect Member States' entitlement to lay down, in due observance of the Treaty, such requirements as they may deem necessary to ensure that persons and in particular workers are protected when using the machinery or safety components in question, provided that this does not mean that the machinery or safety components are modified in a way not specified in the Directive.

...'

5 Article 3 of the Directive provides:

'Machinery and safety components covered by this Directive shall satisfy the essential health and safety requirements set out in Annex I.'

6 Article 4(1) of the Directive reads as follows:

'Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of machinery and safety components which comply with this Directive.'

7 Under Article 5(1) and (2) of the Directive:

‘1. Member States shall regard the following as conforming to all the provisions of this Directive, including the procedures for checking the conformity provided for in Chapter II:

- machinery bearing the CE marking and accompanied by the EC declaration of conformity referred to in Annex II, point A,
  
- safety components accompanied by the EC declaration of conformity referred to in Annex II, point C.

In the absence of harmonised standards, Member States shall take any steps they deem necessary to bring to the attention of the parties concerned the existing national technical standards and specifications which are regarded as important or relevant to the proper implementation of the essential safety and health requirements in Annex I.

2. Where a national standard transposing a harmonised standard, the reference for which has been published in the *Official Journal of the European Communities*, covers one or more of the essential safety requirements, machinery or safety

components constructed in accordance with this standard shall be presumed to comply with the relevant essential requirements.

...'

8 Article 7(1) of the Directive provides:

‘Where a Member State ascertains that:

- machinery bearing the CE marking, or
  
- safety components accompanied by the EC declaration of conformity,

used in accordance with their intended purpose are liable to endanger the safety of persons, and, where appropriate, domestic animals or property, it shall take all appropriate measures to withdraw such machinery or safety components from the

market, to prohibit the placing on the market, putting into service or use thereof, or to restrict free movement thereof.

Member States shall immediately inform the Commission of any such measure, indicating the reason for its decision and, in particular, whether non-conformity is due to:

- (a) failure to satisfy the essential requirements referred to in Article 3;
- (b) incorrect application of the standards referred to in Article 5(2);
- (c) shortcomings in the standards themselves referred to in Article 5(2).<sup>9</sup>

<sup>9</sup> Under Article 8(2) of the Directive, the manufacturer must, before placing machinery on the market, follow the appropriate conformity assessment procedure. It follows from the first indent of the first subparagraph of Article 5(1) of the Directive that the conformity of machinery with the provisions of the Directive is in principle attested by the EC declaration of conformity and the CE marking.



- 10 However, it is apparent from recital 21 in the preamble to and Article 8(2)(b) and (c) of the Directive that for certain types of machinery having a higher risk factor, listed exhaustively in Annex IV to the Directive, a stricter conformity assessment procedure is laid down.
- 11 Vehicle servicing lifts are mentioned in Annex IV, A, point 15.
- 12 According to recital 17 in the preamble to the Directive, the Directive, or more precisely Annex I, ‘Essential health and safety requirements relating to the design and construction of machinery and safety components’, ‘defines only the essential health and safety requirements of general application, supplemented by a number of more specific requirements for certain categories of machinery’.
- 13 More detailed conditions are defined by means of harmonised standards. In this respect, recital 17 states:

‘... in order to help manufacturers to prove conformity to these essential requirements and in order to allow inspection for conformity to the essential requirements, it is desirable to have standards harmonised at European level for the prevention of risks arising out of the design and construction of machinery; ... these standards harmonised at European level are drawn up by private-law bodies and must retain their non-binding status; ... for this purpose the European Committee for Standardisation (CEN) and the European Committee for Electrotechnical

Standardisation (Cenelec) are the bodies recognised as competent to adopt harmonised standards in accordance with the general guidelines for cooperation between the Commission and these two bodies signed on 13 November 1984; ... within the meaning of this Directive, a harmonised standard is a technical specification (European standard or harmonisation document) adopted by either or both of these bodies, on the basis of a remit from the Commission in accordance with the provisions of [Council] Directive 83/189/EEC [of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Commission Decision 96/139/EC (OJ 1996 L 32, p. 31)] and on the basis of general guidelines referred to above'.

- 14 References to harmonised standards are published in the *Official Journal of the European Union*.
- 15 A harmonised standard at European level exists for vehicle lifts. This is standard EN 1493:1998, the reference to which was first published in 1999 (OJ 1999 C 165, p. 4).
- 16 As it states, '[t]he object of this European Standard is to define rules for safeguarding persons against the risk of accidents associated with the operation of vehicle lifts'.
- 17 Its scope is defined as follows:

'This standard applies to stationary, mobile and movable vehicle lifts, which are not intended to lift persons but which are designed to raise vehicles totally, for the

purpose of examining and working on or under the vehicles whilst in a raised position.

The vehicle lift may consist of one or more lifting-units.’

*National law*

- <sup>18</sup> Government Decision 1314/1994 on the safety of machinery (Valtioneuvoston päätös koneiden turvallisuudesta) transposed the Directive into Finnish law.
- <sup>19</sup> Finnish standard SFS-EN 1493, corresponding to European standard EN 1493:1998, was adopted on 8 March 1999.

**The main proceedings and the reference for a preliminary ruling**

- <sup>20</sup> AGM is an Italian company which manufactures and sells vehicle lifts.

- 21 On 11 May 2000 the Ministry of Social Affairs and Health received a report from the Vaasan työsuojelupiiri (Vaasa health and safety district office) in a 'market supervision case' (markkinavalvonta-asia). According to the report, an examination of the vehicle lift of type G 35 T/E manufactured by AGM had disclosed certain defects, in particular bending of the front lifting arms and weak locking of the lifting arms.
- 22 Following that report, the Ministry of Social Affairs and Health sent the Finnish importer of those lifts, Pörhön Tuontiliike ('the importer'), a letter dated 18 May 2000 stating that there were grounds for suspecting that the G 35 T/E vehicle lifts manufactured by AGM did not meet the requirements of Law 299/1958 on safety at work (Työturvallisuuslaki) and Government Decision 1314/1994 on the safety of machinery.
- 23 In the course of the procedure thus initiated by the Ministry of Social Affairs and Health, Mr Lehtinen drafted a report dated 29 November 2000, in which he stated inter alia that the importer had on 27 November 2000 performed a test of the locking system in order to demonstrate that the structure of the vehicle lifts in question complied with standard SFS-EN 1493. According to the report, the test had disclosed a defect in that system. In Mr Lehtinen's opinion, standard SFS-EN 1493 required that the structure should bear the maximum permitted load even in the least favourable lifting conditions and regardless of the direction in which the vehicle was driven onto the lift. The report concluded by asking the Ministry of Social Affairs and Health to take a decision as quickly as possible to restrict or even prohibit the sale and use of the vehicle lifts in question already in service.
- 24 In a memorandum dated 18 December 2000, Mr Lehtinen repeated his observations, but stated that the new locking system proposed by AGM was better

and that its resistance had been found adequate at a test carried out in Finland on 12 December 2000.

25 At a meeting on 20 December 2000 attended by representatives of the importer and by Mr Kanerva, administrator, and Mr Lehtinen, as an expert, on behalf of the Ministry of Social Affairs and Health, it was accepted that the locking system as redesigned complied with the rules. However, the final position taken by the authorities would have to depend on a certification examination by an authorised body, a procedure which AGM said was then under way. It was also decided on that occasion that the decision to be taken by the Ministry of Social Affairs and Health would not be made public, the importer informing users at the appropriate time.

26 On 20 December 2000 Mr Kanerva submitted the case to Mr Hurmalainen, head of the health and safety division of the Ministry of Social Affairs and Health, for a decision. Mr Kanerva proposed that the placing on the market and putting into service of the vehicle lifts in question should be prohibited, subject to certain qualifications. However, Mr Hurmalainen did not adopt the decision proposed to him, but sent the case back for examination, as he considered that he did not have sufficient evidence.

27 On 17 January 2001 Mr Lehtinen, with the permission of his immediate superior, and a representative of the importer were interviewed for the 20.30 news programme on national television channel TV 1. On that occasion the presenter explained that, according to the Finnish health and safety authorities, the lifts in question, although approved in Italy, did not correspond to the applicable European standards. The presenter also said that, according to those authorities, the structure should bear the weight even if the vehicle was presented in the least favourable

lifting conditions. The importer's representative, for his part, admitted that the locking system was defective, but denied that there were any other problems with the lifting system, and claimed that the lifting arms would bear any weight provided that the vehicle was driven onto the lift in the correct direction. Mr Lehtinen stated that the vehicle lifts could present an immediate danger, in that workers would be working beneath the load. He also said that the notified body used by AGM had misinterpreted the rules then applicable.

28 On 29 January 2001 the Teknisen Kaupan Liitto (Association of Technical Trades) sent a letter to the Ministry of Social Affairs and Health and to the Peruspalveluministeri (Minister of Health and Social Security) reporting serious defects allegedly found in machinery of the AGM range. Before the referring court, Mr Lehtinen admitted that in the course of the procedure he had been present on one occasion at a meeting of that association, at its request.

29 On 8 February 2001 Mr Hurmalainen sent a fax to Mr Kuikko, the representative of the Teollisuuden ja Työnantajien Keskusliitto (Central Association of Industry and Employers), in which he said that he had opposed the ban on sales suggested by Mr Kanerva and Mr Lehtinen, on the ground that it had not seemed reasonable to him to take a measure that could disturb the working of the internal market, since only one accident had occurred in Finland, the cause of which was moreover uncertain.

30 On 16 February 2001 Mr Hurmalainen removed Mr Lehtinen from dealing with cases concerning the vehicle lifts made by AGM, on the ground that in a pending

case he had publicly expressed a point of view differing from the official position of the Ministry of Social Affairs and Health and had thus acted contrary to the ministry's instructions and its communication policy. A subsequent report, drawn up on 20 March 2001 by the health and safety division of the Ministry of Social Affairs and Health, criticised Mr Lehtinen for acting in breach of the principle of sound administration and in a manner injurious to the economic interests of AGM by collaborating with AGM's competitors.

- 31 On 17 February 2001 an article under the headline 'Expert warns against treacherous vehicle lifts' appeared in the regional newspaper *Aamulehti*. According to the order for reference, the article was written on the basis of an interview with Mr Lehtinen and expressly stated that the products concerned were the AGM vehicle lifts. It was also mentioned that 'Mr Hurmalainen, head of the ministry's health and safety division, regards what Mr Lehtinen says as his personal views'.
- 32 On 22 February 2001 Metallityöväen Liitto ry (Metalworkers' Union) sent its branches in the car and machinery repair sectors and the persons responsible for safety in undertakings a memorandum in which it stated that there were problems with vehicle lifts of the G 28, G 32 and G 35 models manufactured by AGM and that 'the lift in question [had] indisputably been shown to be dangerous'. The union annexed to its memorandum a report drawn up by Mr Lehtinen dated 12 February 2001.
- 33 On 13 June 2001 there appeared in the regional newspaper *Etelä-Saimaa* an article with the headline 'Metalworkers' union demands ban on use of dangerous vehicle lifts' and the subheading '150 fitters in danger every day'. According to that article, the senior engineer who had prepared the case, a specialist in machinery of that type,

had proposed restrictions on the use of AGM vehicle lifts manufactured in Italy and a ban on sales of new machines. The article also mentioned that Mr Hurmalainen, head of the ministry's health and safety division, had taken the view in his decision that there was not enough evidence, and stated that the case was still continuing.

34 On 14 June 2001 the health and safety division of the Ministry of Social Affairs and Health took a decision in which it noted in particular that 'in the present case no factors [had] come to light on the basis of which the ministry should adopt market supervision measures against the manufacturer or importer of the AGM vehicle lifts'. That document pointed out that that 'opinion [did] not, however, prevent the ministry from adopting those measures if there [was] occasion to reassess the matter as a result of additional information or for any other reason'. As grounds for its decision, the Ministry of Social Affairs and Health observed that 'the manufacturer [had] corrected, as regards new equipment, and the importer [was] endeavouring to correct, as regards equipment in service, the technical faults identified'.

35 On 1 October 2001 the Ministry of Social Affairs and Health gave Mr Lehtinen a written warning under the Law on State officials (Valtion virkamieslaki), on the ground that he had breached his obligations as an official by continuing, after the case of the AGM vehicle lifts had been withdrawn from him on 16 February 2001, to give a misleading picture of the ministry's point of view in a press release and a memorandum addressed to the health and safety district office, and by acting contrary to the ministry's communications policy. By decision of 6 March 2002, the Virkamieslautakunta (Civil Service Appeals Committee) dismissed Mr Lehtinen's complaint seeking to have the warning annulled. On the other hand, the committee considered in that decision that Mr Lehtinen's conduct in the television interview of 17 January 2001 had not been so incorrect that a written warning was justified. On 10 September 2003 the Korkein hallinto-oikeus (Supreme Administrative Court) upheld the committee's decision.



- 36 At the same time as the disciplinary proceedings against him were in progress, Mr Lehtinen sought the opinion of the Julkisen sanan neuvosto (Council for Mass Media, the self-regulatory media body concerned with journalistic ethics and freedom of expression) on whether, by giving him a warning, the Ministry of Social Affairs and Health had exceeded its powers and thereby infringed the freedom of speech and opinion enjoyed by officials. In its opinion of 20 March 2002 the council found that it was desirable that officials should be allowed to express their views in public in discussion in the media, since their participation in public debate in their field was likely to promote the transmission of important information of public interest. The council considered that Mr Lehtinen's case was a case concerning safety at work, that in that context public debate was highly desirable and important, and that an official such as Mr Lehtinen was entitled to take part in it.
- 37 On the basis of those factors, AGM brought proceedings before the referring court seeking an order that the Finnish State and Mr Lehtinen jointly compensate it for the damage allegedly suffered, in particular a loss of turnover in Finland and elsewhere in Europe.
- 38 The question arises, according to the referring court, of whether in the light of the Court's case-law, in particular Case 8/74 *Dassonville* [1974] ECR 837, trade within the European Community could have been hindered contrary to Article 28 EC when Mr Lehtinen, at that time an official of the competent authority, publicly expressed a negative opinion on the compliance with standards of certain vehicle lifts manufactured by AGM, an opinion which may have led to the fall in sales of that company's products on the Finnish market. Since the potential obstacle to intra-Community trade does not follow from a decision taken by the competent authority on the basis of national provisions but from the conduct of an official belonging to that authority before the authority took its decision in the case in question, the referring court is uncertain whether the criterion defined in *Dassonville* allows the

actual acts of an official to be regarded as measures having equivalent effect to quantitative restrictions, in particular where, in practice, the effect of those acts was the same as if the authority concerned had taken a similar decision under provisions of national law.

39 The referring court also wishes the Court to rule on whether a vehicle lift such as that at issue in the main proceedings complies with the essential safety requirements laid down by the Directive if it is not designed or constructed to bear a load under the least favourable lifting conditions.

40 In those circumstances, the Tampereen käräjäoikeus (Tampere District Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is there a measure having equivalent effect to quantitative restrictions within the meaning of Article 28 EC, or a measure which should be abstained from under the second paragraph of Article 10 EC, if an expert official belonging to the State’s health and safety at work organisation who does not have decision-making power, after a market supervision case has been raised but before the decision in the case, expresses his opinion on the main news programme of a national TV channel and in daily newspapers with wide circulation and also in commercial and labour market associations, in such a way that his statements, direct or repeated by others, on the hazard to health and even to life of the machinery manufactured and marketed by a specified manufacturer which is the subject of the market supervision case may give the machinery negative publicity and affect its marketing?

(2) Is Directive 98/37/EC on machinery to be interpreted as meaning that a vehicle lift is contrary to the essential safety requirements it lays down if it is not

constructed in accordance with standard SFS-EN 1493, in such a way that in designing the structure account is not taken of the placing of the vehicle on the lifting arms in either driving direction and the load calculations of each lifting arm are not done for the least favourable loading situation?

- (3) (a) If Question 1 is answered in the affirmative, are the official's actions described in that question disproportionate having regard to the legitimate aim based on the protection of human health and life and hence contrary to the EC Treaty, even if Question 2 were also to be answered in the affirmative, having regard to the nature of the actions and in particular the fact that possible hazards could have been made known and the occurrence of hazards prevented by methods other than those described in Question 1, that the actions were taken even before the competent authority had made a decision in the market supervision case, and that the actions were likely in particular by being directed to a specified product to damage the marketing of that product?
  
- (b) If the question of proportionality in Question 3(a) is for the national court to decide, is the main weight to be attached to the possible non-compliance with the European or national safety requirements or to the circumstances of the publication of the non-compliance with the requirements?
  
- (4) May the actions of an official described in Question 1 be justified in the conditions described in Question 3(a) on the basis of freedom of speech within

the meaning of Article 10 of the European Convention on Human Rights, even if they are contrary to Articles 28 EC and 30 EC or to Article 10 EC?

- (5) (a) If the actions of an official described in Question 1 are contrary to Articles 28 EC and 30 EC or to Article 10 EC, is the breach so manifest and serious that, if the other conditions of liability are satisfied, the State is obliged under EC law to compensate the damage which may have been incurred by the undertaking marketing the machinery?
  
- (b) Is the breach described in Question 5(a) manifest and serious even in a case where the authority/official with decision-making competence cannot be blamed for any fault or omission and the authority/official has not in any connection approved the measures or helped to bring about their actual consequences?
  
- (c) Can Article 10 EC and in particular its second paragraph create rights for individuals in the circumstances described in Question 1?
  
- (d) Can an official himself, in addition to the State, be similarly liable under EC law, in the circumstances mentioned in Question 1, for compensation for his actions, if they are contrary to EC law?

- (e) Is the obtaining of compensation based on EC law impossible in practice or excessively difficult if in accordance with national provisions compensation for economic damage other than damage to persons and things may be obtained only if the damage has been caused by a criminal offence or in the exercise of public authority or if in other cases there are especially serious grounds for the awarding of damages?

- (6) (a) If compensation is awarded under national law because of a breach of requirements or omission concerning the free movement of goods, does EC law require that the compensation to be awarded is an effective and deterrent sanction, and is it incompatible with the requirements of EC law concerning liability that under national law an official who has committed an infringement or omission is liable for reasonable but not necessarily full compensation and is not liable at all for compensation if he is culpable of only slight negligence, or that an official and the State which is liable for the official's fault or omission may be ordered to pay compensation for economic damage other than damage to persons or things only if the damage has been caused by a criminal offence or in the exercise of public authority or if in other cases there are especially serious grounds for the awarding of compensation?

- (b) If any of the limitations of liability mentioned in Question 6(a) is incompatible with EC law, is the limitation of compensation under national law to be disapplied with respect to the official in question even though the official's liability would be more severe or more extensive than under national law?

## Admissibility

### *Observations submitted to the Court*

41 Mr Lehtinen expressed doubts as to the admissibility of the reference for a preliminary ruling, on the ground that the questions put by the Tampereen käräjäoikeus are not material.

42 Mr Lehtinen submits that the proceedings relating to the dispute brought at first instance before the referring court are only at the preliminary stage. The subject of disagreement between the parties is not precisely defined and the facts have not yet been established. It is not therefore possible at this stage of the proceedings to determine the questions that are legally relevant to the outcome of the case.

### *Findings of the Court*

43 It should be recalled that, according to settled case-law, the procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the Court provides the national courts with the

points of interpretation of Community law which they need in order to decide the disputes before them (see, inter alia, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 30, and Case C-306/03 *Salgado Alonso* [2005] ECR I-705, paragraph 40).

<sup>44</sup> In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and 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 questions concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see to that effect, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31; Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 41; and *Schmidberger*, paragraph 31).

<sup>45</sup> Furthermore, it is clear from the second paragraph of Article 234 EC that it is for the national court to decide at what stage in the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 5; Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 30; and *Schmidberger*, paragraph 39).

<sup>46</sup> In this respect, the national court has set out in detail in its order for reference the factual and legal context of the dispute in the main proceedings and the reasons why it wants an interpretation of the provisions of Community law it mentions, in view

of the doubts that have arisen as to their application in the circumstances of the main proceedings.

<sup>47</sup> It follows that, in the light of the facts as described by the national court, the questions do not appear to have been referred at a stage at which the Court cannot assess their relevance to the outcome of the main proceedings.

<sup>48</sup> The reference for a preliminary ruling is therefore admissible.

### **The questions referred for a preliminary ruling**

#### *Free movement of goods (Questions 1, 3 and 4)*

<sup>49</sup> By Questions 1, 3 and 4 the referring court essentially asks, first, whether in the circumstances of the case at issue in the main proceedings Mr Lehtinen's conduct, characterised by his various public statements, must be regarded as attributable to the Finnish State, second, whether that conduct appears to constitute an obstacle to the free movement of goods for the purposes of Article 28 EC, and, third, to what extent such conduct could be justified on the basis of freedom of expression or the objective of protection of health and safety.



- 50 It should be recalled, as a preliminary point, that where a matter has been the subject of exhaustive harmonisation at Community level any national measure relating to that matter must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (see, to that effect, Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 9; Case C-324/99 *Daimler-Chrysler* [2001] ECR I-9897, paragraph 32; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64; and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 53).
- 51 The Court must therefore determine whether the harmonisation effected by the Directive precludes the compatibility of the conduct at issue in the main proceedings with Article 28 EC from being examined.
- 52 The Directive is intended, according to recitals 2, 6, 7 and 9 in its preamble, to ensure the free movement of machinery in the internal market and to satisfy the imperative and essential health and safety requirements relating to machinery by replacing national certification and conformity certification systems by a harmonised system. To that end, in particular in Article 3 and Annex I, the Directive lists the essential health and safety requirements which must be satisfied by machinery and safety components manufactured in the Member States. Under Article 4 of the Directive, Member States may not restrict the placing on the market of machinery which satisfies those essential requirements, and only if risks subsequently appear are the Member States to take the necessary measures under the conditions laid down in Article 7.
- 53 In view, then, of the nature and objectives of the Directive and the content of Articles 3, 4 and 7, it must be considered that it harmonises exhaustively at

Community level not only the rules relating to the essential safety requirements for machinery and certification of conformity with those requirements but also the rules concerning the action that may be taken by the Member States with regard to machinery that is presumed to comply with those requirements.

- 54 All national measures within the scope of those articles of the Directive must therefore be assessed in the light of the provisions of the Directive and not those of the Treaty, in particular Article 28 EC.

#### Existence of an obstacle attributable to the State (Question 1)

- 55 In the light of paragraph 52 et seq. above, the referring court's first question should be reformulated so that the court essentially asks whether it is possible to classify the opinions expressed publicly by Mr Lehtinen as obstacles to the free movement of goods for the purposes of Article 4(1) of the Directive, attributable to the Finnish State.
- 56 Whether the statements of an official are attributable to the State depends in particular on how those statements may have been perceived by the persons to whom they were addressed.
- 57 The decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose,

in the given context, that they are positions taken by the official with the authority of his office.

58 In this respect, it is for the national court to assess in particular whether:

- the official has authority generally within the sector in question;
- the official sends out his statements in writing under the official letterhead of the competent department;
- the official gives television interviews on his department's premises;
- the official does not indicate that his statements are personal or that they differ from the official position of the competent department; and
- the competent State departments do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official's statements are addressed that they are official positions taken by the State.

- 59 It remains to examine whether the statements at issue in the main proceedings, on the assumption that they are attributable to the Finnish State, infringe Article 4(1) of the Directive.
- 60 Any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be considered as an obstacle (see, to that effect, *Dassonville*, paragraph 5, and Case C-383/97 *Van der Laan* [1999] ECR I-731, paragraph 18). That principle applies also where the interpretation of Article 4(1) of the Directive is concerned.
- 61 As is apparent from the wording of Article 4(1) of the Directive, the prohibition in that provision applies only if the machinery in question complies with the provisions of the Directive. In the present case, the vehicle lifts were presumed to be compliant, in accordance with Article 5(1) of the Directive, since they had been certified as compliant and bore the CE marking of conformity provided for in Article 10 of the Directive.
- 62 However, that presumption of conformity does not mean that the Member States cannot act if risks appear. On the contrary, under the first subparagraph of Article 7(1) of the Directive, a Member State is required to take all appropriate measures to withdraw machinery from the market if it ascertains that the machinery, used in accordance with its intended purpose, is liable to endanger the safety of persons or property. In such an event, in accordance with the second subparagraph of Article 7(1), the Member State must inform the Commission immediately of any such measure and indicate the reasons for its decision.

- 63 As the order for reference shows, the competent authorities neither ascertained that there was a risk, nor took measures to withdraw the lifts at issue in the main proceedings from the market, nor a fortiori did they inform the Commission of any such measures.
- 64 Consequently, since those vehicle lifts were presumed to be in conformity, the State had to observe the prohibition of restrictions on their free movement laid down in Article 4(1) of the Directive.
- 65 Since the statements at issue described the vehicle lifts, in various media and in widely circulated reports, as contrary to standard EN 1493:1998 and dangerous, they are capable of hindering, at least indirectly and potentially, the placing on the market of the machinery.
- 66 In the light of the above considerations, the answer to Question 1 must be that statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State, not personal opinions of the official, are attributable to the State. The decisive factor for the statements of an official to be attributed to the State is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. To the extent that they are attributable to the State, statements by an official describing machinery certified as conforming to the Directive as contrary to the relevant harmonised standard and dangerous thus constitute a breach of Article 4(1) of the Directive.

## Justification (Questions 3 and 4)

<sup>67</sup> The referring court asks essentially whether Mr Lehtinen's conduct, assuming it to be attributable to the Finnish State, may be justified by the objective of protection of health or on the basis of freedom of expression.

— Justification on the ground of the objective of protection of health

<sup>68</sup> The Directive regulates in precise fashion the protection of health, where that is liable to be endangered by the use of machinery presumed to be compliant with the Directive. Article 7(1) thus allows a Member State which ascertains such a risk to take all appropriate measures to withdraw the machinery from the market, prohibit its placing on the market and putting into service, or restricting its free movement. Apart from those measures, the Directive does not authorise any further restrictions connected with the protection of health.

<sup>69</sup> It has already been mentioned in paragraph 63 above that the Finnish ministry did not take any measures under Article 7 of the Directive.

<sup>70</sup> In view of the fact that the safety rules for the placing of machinery on the market which affect the free movement of goods have been harmonised exhaustively, a

Member State cannot rely on a justification on the ground of the protection of health outside the framework created by Article 7 of the Directive.

- 71 Mr Lehtinen's conduct, in so far as it is attributable to the Finnish State, cannot therefore be justified by the objective of the protection of health.

— Justification on the basis of freedom of expression

- 72 Under Article 10(1) of the European Convention on Human Rights, everyone within the jurisdiction of the Member States is guaranteed the right to freedom of expression. That freedom is an essential foundation of any democratic society. Member States, however, cannot rely on their officials' freedom of expression to justify an obstacle and thereby evade their own liability under Community law.

- 73 Accordingly, the answer to Questions 3 and 4 must be that, in circumstances such as those at issue in the main proceedings, a breach of Article 4(1) of the Directive occasioned by the conduct of an official, in so far as it is attributable to the official's Member State, cannot be justified either on the basis of the objective of protection of health or on the basis of the freedom of expression of officials.

*Conformity of the vehicle lifts at issue in the main proceedings with Directive 98/37 (Question 2)*

- 74 It follows from the analysis in paragraphs 60 to 65 above that Question 2 does not need to be answered.

*Liability of the Finnish State and of officials (Questions 5 and 6)*

- 75 By Questions 5 and 6 the referring court seeks essentially to know whether, assuming that there has been a breach of Articles 28 EC and 30 EC or of Article 10 EC, the conditions for the Finnish State to be liable under Community law are satisfied, whether Community law allows or requires the official whose conduct is involved also to be liable, and to what extent the conditions for those liabilities may require an interpretation of Finnish law that is in accordance with Community law.
- 76 However, having regard to the considerations in paragraphs 49 to 53 above, the referring court's questions must be answered with reference to a possible breach of Article 4(1) of the Directive.



## Conditions for the Finnish State to be liable (Question 5(a) to (c))

- 77 By Question 5(a) to (c) the referring court essentially asks whether, in circumstances such as those at issue in the main proceedings, the breaches of Community law are sufficiently serious for the non-contractual liability of the State to be engaged, and whether individuals operating in the market can enforce rights against the Member States.
- 78 It is clear from the case-law of the Court that three conditions must be satisfied for a Member State to be required to make good the loss and damage caused to individuals: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. Those conditions are to be applied according to each type of situation (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 107; and Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 36).
- 79 As to the first condition, it suffices to state that Article 4(1) of the Directive is intended to confer on individuals operating in the market rights which they can enforce against the Member States.
- 80 As to the second condition, the decisive criterion for a breach of Community law to be regarded as sufficiently serious is whether the Member State has manifestly and

gravely disregarded the limits of its discretion (see *Brasserie du Pêcheur and Factortame*, paragraph 55).

81 It should be recalled here that the Court has held that where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be enough to establish the existence of a sufficiently serious breach (see *Norbrook Laboratories*, paragraph 109 and the case-law cited).

82 The obligations set out in Article 4(1) of the Directive give the Member States no discretion. Only Article 7 of the Directive envisages subsequent doubts as to the conformity with the requirements of the Directive of machinery that is presumed to be in conformity and the appropriate measures to deal with those doubts. Consequently, it must be considered that a breach of Article 4(1) of the Directive by statements such as those at issue in the main proceedings, assuming that they can be attributed to the Member State, is sufficiently serious.

83 As to the third condition, it is for the national courts to ascertain whether there is a direct causal link between the breach of the obligation on the State and the damage suffered by the injured parties (see, to that effect, *Brasserie du Pêcheur and Factortame*, paragraph 65, and Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 30).

84 In the present case, subject however to verification by the national court, it appears that the statements at issue in the main proceedings led to a fall in AGM's turnover from 2000 to 2002 and a decrease in its profit margin for 2001 and 2002. Moreover, the effects of the statements on the market were said to have been identified in advance by the ministry itself.

85 The three conditions mentioned above are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, paragraph 66).

86 In the light of the above considerations, the answer must be that Article 4(1) of the Directive must be interpreted as meaning that, first, it confers rights on individuals and, second, it leaves the Member States no discretion in this case as regards machinery that complies with the Directive or is presumed to do so. A failure to comply with that provision as a result of statements made by an official, assuming that they are attributable to the Member State, constitutes a sufficiently serious breach of Community law for the Member State which has committed that infringement to incur liability.

Limitations of liability under the provisions of national law relating to the liability of the Finnish State (Question 5(e) and Question 6(a) in part)

87 The referring court wishes essentially to know whether national law may add special additional conditions concerning compensation for damage caused by the State, or

whether limitations of liability such as those provided for by Finnish law must be regarded as making it extremely difficult or even impossible in practice to obtain compensation for damage resulting from a breach by a Member State of Article 4(1) of the Directive.

88 It should be observed that the purpose of a Member State's liability under Community law is not deterrence or punishment but compensation for the damage suffered by individuals as a result of breaches of Community law by Member States.

89 It is settled case-law that, where the conditions for the right to compensation on the basis of Community law are met, the Member State must compensate the damage caused, within the framework of national law on liability. It must also be observed that the material and formal conditions laid down by the various national laws on compensation for damage cannot be less favourable in such a context than those relating to similar domestic claims and cannot be so framed as to make it in practice impossible or excessively difficult to obtain compensation (see, to that effect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 42 and 43, and *Norbrook Laboratories*, paragraph 111).

90 Community law thus requires effective compensation and does not permit any additional condition deriving from the law of the Member State that would make it excessively difficult to obtain damages or other forms of compensation.

- 91 In this respect, the information provided by the referring court indicates that the provisions of Finnish law on liability applicable in the main proceedings make the right to compensation for damage other than damage to persons or property subject to the condition that either the damage results from a criminal offence or from the exercise of public authority or there are especially serious reasons for awarding compensation. According to the national court, Mr Lehtinen's conduct did not fall within any of those cases, which makes it difficult to compensate AGM for the loss suffered.
- 92 On this hypothesis, a right to obtain redress will therefore arise where it has been established that the rule of law infringed is intended to confer rights on individuals and there is a direct causal link between the sufficiently serious breach of the obligation relied on and the loss or damage sustained by the injured party, since those conditions are necessary and sufficient to found a right for individuals to obtain redress (see, to that effect, Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, paragraphs 44 and 45 and the case-law cited).
- 93 In the present case, the possibility cannot be ruled out that a sufficiently serious breach of Community law such as to engage the liability of the State may result from conduct attributable to the State that falls within categories other than those exhaustively referred to by the relevant national law.
- 94 Furthermore, the compensation which Member States provide for loss or damage which they have caused to individuals by breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of compensation, but those criteria cannot

be less favourable than those applying to similar claims or actions based on domestic law and must in any event not be such as in practice to make it impossible or excessively difficult to obtain redress. National legislation which generally limits the damage for which compensation may be granted to damage done to certain specifically protected individual interests not including loss of profit by individuals is not compatible with Community law (see, to that effect, *Brasserie du Pêcheur and Factortame*, paragraph 90).

95 It must be noted that total exclusion of loss of profit as a head of damage for which compensation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit is liable to make it impossible in practice for damage to be compensated (see *Brasserie du Pêcheur and Factortame*, paragraph 87).

96 Consequently, the answer must be that Community law does not preclude specific conditions from being laid down by the domestic law of a Member State with reference to compensation for damage other than damage to persons or property, provided that those conditions are not framed in such a way as to make it impossible or excessively difficult in practice to obtain compensation for loss or damage resulting from a breach of Community law.

Personal liability of officials (Question 5(d) and Question 6(a) in part and (b))

97 The referring court asks essentially whether Community law allows or even requires provision to be made for personal liability on the part of an official through whom a

breach of Community law has been committed, and if so whether that liability may be subject to particular limitations.

- 98 Community law does not preclude an individual other than a Member State from being held liable, in addition to the Member State itself, for damage caused to individuals by measures which that individual has taken in breach of Community law (see, to that effect, *Haim*, paragraph 32).
- 99 Accordingly, the answer must be that, in the event of a breach of Community law, Community law does not preclude an official from being held liable in addition to the Member State, but does not require this.

## **Costs**

- 100 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 (Grand Chamber) hereby rules:

- 1. Statements which, by reason of their form and circumstances, give the persons to whom they are addressed the impression that they are official positions taken by the State, not personal opinions of the official, are attributable to the State. The decisive factor for the statements of an official to be attributed to the State is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office. To the extent that they are attributable to the State, statements by an official describing machinery certified as conforming to Directive 98/37/EC of the European Parliament and the Council of 22 June 1998 on the approximation of the laws of the Member States relating to machinery as contrary to the relevant harmonised standard and dangerous thus constitute a breach of Article 4(1) of that directive.**
  
- 2. In circumstances such as those at issue in the main proceedings, a breach of Article 4(1) of Directive 98/37 occasioned by the conduct of an official, in so far as it is attributable to the official's Member State, cannot be justified either on the basis of the objective of protection of health or on the basis of the freedom of expression of officials.**
  
- 3. Article 4(1) of Directive 98/37 must be interpreted as meaning that, first, it confers rights on individuals and, second, it leaves the Member States no discretion in this case as regards machinery that complies with the**



**directive or is presumed to do so. A failure to comply with that provision as a result of statements made by an official, assuming that they are attributable to the Member State, constitutes a sufficiently serious breach of Community law for the Member State to incur liability.**

- 4. Community law does not preclude specific conditions from being laid down by the domestic law of a Member State with reference to compensation for damage other than damage to persons or property, provided that those conditions are not framed in such a way as to make it impossible or excessively difficult in practice to obtain compensation for loss or damage resulting from a breach of Community law.**
- 5. In the event of a breach of Community law, Community law does not preclude an official from being held liable in addition to the Member State, but does not require this.**

[Signatures]