OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 28 March 2012 (1)
Case C-171/11 Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch-Wissenschaftlicher Verein

I – Introduction

1. In the current proceedings the Oberlandesgericht (Higher Regional Court) Düsseldorf begins by requesting clarification as to whether a private-law association which inter alia draws up technical standards for products used in the drinking water supply sector and certifies products, or has products certified, on the basis of those technical standards must comply with the principle of the free movement of goods when undertaking those activities, if it is presumed ipso jure that products equipped with such certificates meet the requirements applicable to those products for use in the drinking water supply sector. The referring court thus touches on the question of the horizontal effect of the fundamental freedoms in general and of the free movement of goods in particular. If a horizontal effect of the free movement of goods can be dismissed in a case such as that in the main proceedings, the referring court would like to know, alternatively, whether the activities of the technical and scientific association in question are subject to the prohibition of concerted practices laid down in Article 101 TFEU.

2. In the following I will begin by addressing the question whether the standardisation and certification activities of a private-law association at issue in the main proceedings may be subject to the principle of the free movement of goods. As I consider that the answer to that question as to the horizontal effect of the free movement of goods in a case such as the main proceedings must be, ultimately, in the affirmative, I will not discuss the second question referred as an alternative.

II – National legislation

3. Section 1(1) of the Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser (Regulation on general conditions applicable to the supply of water; 'AVBWasserV') (2) states: 'Where water supply undertakings use, for connections to the public water supply and for the public supply of water, model contracts or contractual conditions which are pre-formulated for a large number of contracts (general conditions of supply), Sections 2 to 34 shall apply. Unless paragraph 3 and Section 35 provide otherwise, those provisions shall form part of the supply contract.'

4. Under the heading 'Customer equipment,' Section 12 AVBWasserV as applicable until 27 January 2010 provided:

'1. The customer shall be responsible for the proper installation, enlargement, alteration and maintenance of equipment on the house-side of the connection, with the exception of the measuring devices belonging to the water supply undertaking. If he has let the equipment or parts thereof to or otherwise authorised their use by a third party, he and the latter shall both be responsible.

2. The installation, enlargement, alteration and maintenance of the equipment shall be subject to compliance with the provisions of this regulation and other statutory or official rules and with the recognised rules of technology. …

4. Only materials and devices which comply with the recognised rules of technology may be

used. The mark of a recognised inspection body (such as the DIN-DVGW, DVGW or GS mark) shall testify to the fulfilment of those requirements.…'

5. Section 12(4) AVBWasserV was amended by the regulation of 13 January 2010 with effect from 28 January 2010 to read as follows:
'Only products and devices supplied in accordance with the generally recognised rules of technology may be used. Compliance with the conditions laid down in the first sentence shall be assumed if they have specific CE marking for drinking water use. Where such CE marking is not stipulated, it shall also be assumed if the product or device bears the mark of an accredited certifying body for the industry, in particular the DIN-DVGW or DVGW mark. Products and devices which
1. were lawfully manufactured in another contracting state of the Agreement on the European Economic Area or
2. were lawfully manufactured or marketed in another Member State of the European Union or in Turkey
and do not meet the technical specifications for the mark referred to in the third sentence shall be treated as equivalent, inclusive of the inspections and surveillance carried out in the aforementioned States, if the same level of protection as required in Germany is thereby permanently ensured.'

III – Main proceedings and questions referred
6. The applicant in the main proceedings is an undertaking established in Italy which manufactures and sells copper fittings. Those copper fittings are connections between two pieces of piping, with sealing rings made of malleable material at the ends to make them watertight.
7. The defendant in the main proceedings is the Deutsche Vereinigung des Gas- und Wasserfaches e.V. ('DVGW'), a registered association under German law, whose goal is, according to its articles of association, the promotion of the gas and water supply industry. In that area DVGW uses a formalised procedure to draw up technical standards for products. DVGW Worksheet W534, drawn up by DVGW, is the technical standard applicable to the use in the drinking water supply sector of the fittings manufactured by the applicant in the main proceedings.
8. In late 1999 the applicant in the main proceedings applied to DVGW for the certification of its copper fittings for the water industry. DVGW commissioned Materialprüfungsanstalt Darmstadt ('MPA Darmstadt'), a materials testing agency approved by DVGW, to carry out the appropriate tests in accordance with DVGW Worksheet W534. MPA Darmstadt subcontracted the work to the Cerisie Laboratorio in Italy, which is approved by the appropriate Italian authorities, though not by DVGW. In November 2000, DVGW then granted the applicant a water industry certificate for a period of five years.
9. After complaints by third parties, DVGW instituted a re-assessment procedure, in which MPA Darmstadt was again commissioned to carry out the inspections. Those inspections included an 'ozone test.' In June 2005 the DGVW informed the applicant in the main proceedings that its fittings had not passed the ozone test, but that it could submit a positive test report within three months. A test report of the Cerisie Laboratorio submitted by the applicant in the main

proceedings was not recognised by DVGW, because it had not approved the Cerisie Laboratorio as an inspection laboratory.

10. In the meantime, DVGW Worksheet W534 had been amended in a formalised procedure in which the applicant in the main proceedings was not involved. In order to guarantee that the products to be certified would have a longer useful life, a 3000-hour test was introduced, the material being exposed to a temperature of 110 degrees Celsius in boiling water for 3 000 hours. According to DVGW's rules, certificate holders are required to apply for additional certification within three months of the entry into force of an amendment to the relevant worksheet, as evidence of compliance with the amended conditions. An application of that kind was not made by the applicant in the main proceedings. It is not disputed in the main proceedings that the fitting manufactured by the applicant in the main proceedings does not meet the requirements of the 3000-hour test.

11. In June 2005, DVGW cancelled the certificate for copper fittings held by the applicant in the main proceedings on the ground that it had not submitted a positive test report on the 3000-hour test. DVGW rejected an application for extension of the certificate on the ground that certificates could no longer be extended.

12. The applicant in the main proceedings brought an action against the cancellation and the refusal to extend the certificate for its copper fittings before the Landgericht Köln (Cologne Regional Court), which dismissed the action. The applicant in the main proceedings appealed to the referring court against that judgment.

13. As the referring court is not certain whether DVGW must comply with provisions of Union law in its standardisation and certification activities and, if so, with which provisions it must comply, it has referred the following questions to the Court of Justice for a preliminary ruling.

'(1) Is Article 28 EC (Article 34 TFEU), if appropriate in conjunction with Article 86(2) EC (Article 106(2) TFEU), to be interpreted as meaning that private-law establishments which have been set up for the purpose of drawing up technical standards in a particular field and certifying products on the basis of those technical standards are bound by the aforementioned provisions when drawing up technical standards and in the certification process if the national legislature expressly regards the products in respect of which certificates have been issued as lawful, thus making it at least considerably more difficult in practice to distribute products in respect of which certificates have not been issued?

(2) If the answer to the first question is in the negative:

Is Article 81 EC (Article 101 TFEU) to be interpreted as meaning that the activity pursued by a private-law establishment in the field of drawing up technical standards and certifying products on the basis of those technical standards, as defined in paragraph 1, is to be regarded as "economic" if the establishment is controlled by undertakings?

If the first part of this question is answered in the affirmative:

Is Article 81 EC to be interpreted as meaning that the drawing-up of technical standards and the certification of products on the basis of those technical standards by an association of undertakings is capable of impeding trade between the Member States if a product lawfully manufactured and distributed in another Member State cannot be distributed in the importing Member State, or can be distributed there only with considerable difficulty, because it does not meet the requirements of the technical standard and, in the light of the predominance of the

technical standard on the market and of a legal provision adopted by the national legislature to the effect that a certificate from the association of undertakings must indicate compliance with the requirements laid down by law, distribution without such a certificate is virtually impossible, and if the technical standard would not be applicable if it had been adopted directly by the national legislature because it infringes the principles of the free movement of goods?'

IV – Proceedings before the Court of Justice

14. The decision to refer dated 30 March 2011 was received by the Registry of the Court of Justice on 11 April 2011. The applicant in the main proceedings, DVGW, the Federal Republic of Germany, the Kingdom of the Netherlands, the Czech Republic, the EFTA Surveillance Authority and the European Commission submitted written observations. The hearing of 15 February 2012 was attended by representatives of the applicant in the main proceedings, DVGW, the Federal Republic of Germany, the Kingdom of the Netherlands, the EFTA Surveillance Authority and the Commission.

V – Arguments of the parties to the proceedings

15. In answer to the first question referred, the applicant in the main proceedings, the Federal Republic of Germany, the Kingdom of the Netherlands, the Czech Republic, the EFTA Surveillance Authority and the Commission agree, in effect, that DVGW is bound by the principle of the free movement of goods in a case like the main proceedings. The German Government emphasises, however, that DVGW may rely on the protection of health within the meaning of Article 36 TFEU to justify a possible restriction of the free movement of goods, in which respect it is to be granted wide discretion. DVGW similarly emphasises in this context the possibility of justifying restrictions of the free movement of goods on grounds of public health.

16. Only the applicant in the main proceedings, DVGW and the Commission have drawn up proposals for an answer to the second question. The applicant in the main proceedings and the Commission arrive at the conclusion in this connection that the elements of the prohibition of concerted practices pursuant to Article 101 TFEU, as referred to in the second question, exist in the present case. DVGW, on the other hand, proposes that the answer to the second question referred should be in the negative.

VI – Legal appraisal

A – The first question referred

17. In its first question, the referring court essentially requests clarification as to whether and, if so, under what conditions a national private-law establishment which draws up technical standards for products used in the drinking water supply sector and inspects and certifies products, or has products certified, on the basis of those standards must meet the requirements of primary law on the free movement of goods when undertaking those activities, if the technical standards drawn up by that establishment not only incorporate purely technical knowledge, but it is also presumed that inspected and certified products comply with statutory requirements if they meet those technical standards, with the result that very few products not equipped with such an inspection certificate are sold.

18. For a better understanding of this question I will begin by considering the technical background to the request for a preliminary ruling. I will then analyse the Court's case-law on the horizontal effect of the fundamental freedoms. On the basis of those deliberations I will answer the question as to the applicability of the principle of the free movement of goods to DVGW in a case such as the main proceedings.

1. Technical background to standardisation

(a) Requirements of Union law in the context of harmonised and national technical construction product standards

19. The introduction of technical product standards applicable throughout the Union, the consistent monitoring of compliance with those standards and the marking of products meeting those technical product standards have made a major contribution to the achievement of a high degree of product safety in the European Union. The replacement of divergent national technical product requirements with technical requirements applicable throughout the Union also promotes the free movement of goods in the European Union. In these circumstances, the harmonisation of technical product standards is an important concern of the Union legislature. To that end, a new approach has been adopted in the areas of technical harmonisation and standardisation since the mid-1980s, with the Union legislature laying down in 'new approach directives' the fundamental requirements to be satisfied by the products to which those directives apply. Those general requirements are framed in more precise terms by private standardisation organisations, which draw up, on behalf of the Commission, technical specifications which can then be published by the Commission as harmonised standards in the Official Journal of the European Union. Manufacturers comply with and apply such harmonised standards voluntarily. There is, however, a rebuttable presumption that products which conform to the harmonised standards also fulfil the essential requirements of the corresponding directives. (3)

20. In the construction products sector the approximation of technical requirements and standards is covered by 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. (4) That directive departs from the 'new approach' in as much as it does not contain any requirements relating directly to construction products, but sets out in Annex I the essential requirements applicable to construction works. (5) Those essential requirements affect construction products in the sense that they must permit the construction works in which they are incorporated to fulfil the essential requirements referred to in Annex I to Directive 89/106.

21. The requirements directly applicable to construction products can be derived from the technical specifications defined in Article 4(1) of Directive 89/106 – and, therefore, principally from the harmonised European standards. (6) This in turn means that the provisions of Directive 89/106 whose applicability presupposes the existence of technical specifications can normally be applied to individual construction products only if and in so far as a harmonised European standard exists for those construction products. (7) That applies, for example, to the prohibition of any obstructive action as laid down in Article 6(1) of Directive 89/106. (8)

22. The absence of harmonised technical specifications for individual construction products or of such technical specifications recognised at Union level does not, however, give the Member

States unlimited discretion to introduce national technical standards in relation to the placing on the market of such products. Rather, a Member State may subject the placing on the market in its territory of a product not covered by technical specifications harmonised or recognised at Community level only to national provisions which comply with obligations under the Treaty, in particular, the principle of the free movement of goods set out in Articles 34 TFEU and 36 TFEU. (9)

(b) Harmonised and national technical construction product standards at issue in the main proceedings

23. In the main proceedings the applicant in the main proceedings argued that the fitting which it manufactures falls under harmonised European Standard EN 681-1 relating to sealing rings made of malleable material, which concerns essential requirements laid down in Directive 89/106. From the facts it has assembled, however, the referring court has come to the conclusion that the fittings at issue do not fall under any harmonised European standard.

24. What is not disputed in the main proceedings is that the use of the fittings at issue in the drinking water supply sector at national level is governed by a technical standard drawn up by DVGW, this being DVGW Worksheet W534.

25. As regards their status in law, DVGW worksheets have a hybrid structure. On the one hand, they lay down technical rules which have been drawn up by a private-law association. Seen from that angle, DVGW worksheets appear as the expression of the specialised knowledge of the gas and water sector accumulated in DVGW. On the other hand, DVGW standards in the drinking water supply sector have not inconsiderable legal force, since, according to Section 12(4) AVBWasserV, products for the installation, enlargement, alteration and maintenance of customers' equipment which is connected to the public water supply are assumed to comply with the recognised rules of technology if they have been certified with a DVGW mark. Furthermore, pursuant to Section 12(4) AVBWasserV, customers give the water supply undertaking – indirectly (10) – a commitment to use for their equipment on the house-side of the connection only products and devices which comply with the generally recognised rules of technology. That being the case, the rules laid down in Section 12(4) AVBWasserV result, according to the referring court, in its being virtually impossible to market pipes and accessories for drinking water supply purposes in Germany without appropriate DVGW certification.

26. DVGW certifies products on the basis of the technical standards which it draws up, having done so itself until mid-2007 and through a wholly owned subsidiary since that time. The certificates remain valid for a limited period of several years and may be withdrawn before they expire if the set standard is no longer met. A re-assessment procedure may also be instituted during that period, which may culminate in the withdrawal of the certificate. Under DVGW's rules, the necessary inspections may be carried out only in testing laboratories which it has approved.

2. Case-law on the horizontal effect of the fundamental freedoms

27. In view of the aforementioned hybrid legal nature of DVGW Worksheet W534, the referring court asks in its first question whether, despite being a private-law association, DVGW was obliged to comply with the provisions of primary legislation concerning the free movement of

goods when drawing up DVGW Worksheet W534 and when certifying products for drinking water supply on the basis of that standard. The referring court is thus asking about the horizontal effect of the free movement of goods in a case such as that in the main proceedings.
28. To answer this question, it seems to me appropriate to begin by reminding ourselves of the Court's case-law on the horizontal effect of the fundamental freedoms and their application.

(a) The horizontal effect of the fundamental freedoms
29. As the fundamental freedoms are addressed principally to the Member States, only action taken by the Member States can in principle be measured against fundamental freedoms. (11) In settled case-law, however, the Court tends to take a broad view of the concept of measures taken by Member States, in that it considers that a person or institution need not be formally classified as exercising official authority or be a public body for the measures taken by that person or institution to be classified as action taken by a Member State, to which the fundamental freedoms apply. The Court thus examines measures taken by professional organisations for their compatibility with the fundamental freedoms where, under national law, those organisations have been granted powers similar to sovereign powers. (12) Measures taken by legal persons established under private law and controlled, directly or indirectly, by the Member State concerned are also deemed to be public measures attributable to that Member State. (13)
30. The Court's case-law also reveals a tendency, following on from that broad view of the concept of measures taken by Member States and the resultant substantive expansion of the definition of interference with fundamental freedoms, to enlarge the scope of the fundamental freedoms indirectly to include, in special circumstances, action taken by private individuals, even though they do not exercise any powers similar to sovereign powers.
31. That is reflected, for example, in case-law of the Court according to which the Member States are, under certain conditions, required by Union law to protect the exercise of the fundamental freedoms against proscribed obstruction by private individuals. Among what are probably the best known judgments in this area of case-law are the judgments in Commission v France (14) and Schmidberger. (15) Those judgments mean, in the final analysis, that the actions of private individuals can, under certain conditions, be measured against an obligation on the Member States to protect the guarantees of the fundamental freedoms and so, indirectly, against those fundamental freedoms. (16)
32. Besides that indirect enlargement of the scope of the fundamental freedoms to include the actions of private individuals, the Court has accepted the direct application of the fundamental freedoms to certain types of collective rules adopted by private individuals. Thus the Court rules in what is now settled case-law that Articles 45 TFEU, 49 TFEU and 56 TFEU apply not only to acts of official bodies, but also to bodies of rules of other kinds intended collectively to govern employment, self-employment and the provision of services. (17)
33. From that case-law it follows inter alia that the rules agreed by parties to a collective agreement and laid down in a collective agreement can be examined for their compatibility with the said fundamental freedoms. (18) Furthermore, the Court ruled in the landmark judgment in Viking Line that individual collective measures taken by a trade union or trade union federation which is not a public-law entity against an undertaking with the aim of forcing that undertaking to conclude a collective agreement the content of which is capable of preventing the undertaking

from exercising the freedom of establishment fall within the scope of the provisions of primary legislation concerning the freedom of establishment. (19)
34. Such direct application of the fundamental freedoms to certain kinds of collective rules of a non-public-law nature ultimately results in organisations which draw up such rules being forced to comply with the fundamental freedoms, despite their non-public-law nature in the context of their rule-making activity, if that activity affects the exercise of the fundamental freedoms. This is generally known as the horizontal effect of the fundamental freedoms. As, however, the horizontal effect concerns private individuals only in the context of a well-defined rule-making activity, it is limited in its impact.
35. In the area of the freedom of movement for workers, however, the Court took an important step towards binding private individuals to the fundamental freedoms, in a context other than the establishment of certain kinds of collective rules, when it delivered its judgment in Angonese, which attracted considerable attention. In that judgment it arrived at the general conclusion that the prohibition of discrimination on the grounds of nationality laid down in Article 45 TFEU also applies to private individuals. (20) So far, however, that judgment has been confirmed only in the judgment in Raccanelli. (21)

(b) Restrictions of fundamental freedoms by private individuals and their justification
36. Where certain kinds of collective rules of a non-public-law nature fall within the scope of the fundamental freedoms, any measure or rule they include which, even though applicable without discrimination, is capable of hindering or rendering less attractive the exercise of the fundamental freedoms guaranteed by the Treaties, must be regarded as a restriction of the fundamental freedom concerned, which is prohibited in principle. (22)
37. To justify such generally prohibited restrictions of the fundamental freedoms caused by collective rules drawn up by private individuals, reference can be made, on the one hand, to the ‘written’ grounds for justification explicitly provided for in the TFEU and, on the other, to the ‘unwritten’ overriding reasons in the public interest within the meaning of the judgment in Cassis de Dijon. What the written grounds and the general line followed by the overriding reasons in the public interest have in common is that they can be brought to bear only if the interventions to be justified pass the proportionality test (23) and therefore appear to be suitable, necessary and reasonable for the achievement of the objectives recognised in the Treaties and in the Court’s case-law as grounds of justification. (24)
38. A question which remains very largely unanswered is whether principles other than the written grounds and the overriding reasons in the public interest can be cited to justify restrictions of the fundamental freedoms caused by collective rules. In this respect, two tendencies are evident in the Court’s case-law. While in most judgments the Court requires evidence of a written ground or of a recognised overriding reason in the public interest to justify restrictions of the fundamental freedoms by certain kinds of collective rules of a non-public-law nature, (25) it has not precluded in other judgments a justification for such restrictions on special grounds in the private interest. (26)
39. The Court went a step farther in its judgment in Angonese, partly compensating for extending the freedom of movement for workers to include private individuals by extending the justifications. According to that judgment, a restriction of the freedom of movement for workers

caused by private individuals may be justified if that restriction is based on objective considerations irrespective of the nationality of the persons concerned and proportional to the objective legitimately pursued. (27) It is not yet clear, however, to what extent 'objective considerations' can also be cited to justify restrictions of the fundamental freedoms due to certain types of collective rules of a non-public-law nature.

3. DVGW's obligation to comply with the principle of the free movement of goods in a case such as the main proceedings

40. In view of the above analysis of the case-law on the horizontal effect of the fundamental freedoms, the referring court's first question as to whether, in a case such as the main proceedings, DVGW is obliged to comply with the principle of the free movement of goods when drawing up its technical standards and certifying products on the basis of those standards can, in effect, be answered in the affirmative.

41. For the answer to the first question referred it must first be emphasised that, through the rules contained in Section 12(4) AVBWasserV, the national legislature has opened the way for DVGW to draw up technical rules with the effect of legal presumption concerning the suitability of products for the installation, enlargement, alteration and maintenance of drinking water equipment on the house-side of the connection. With regard to the fittings at issue in the main proceedings, DVGW has seized that opportunity in DVGW Worksheet W534 and so acquired the de facto competence to determine what fittings can be offered for sale on the market in pipes and accessories for drinking water supply in Germany. For, according to the referring court, the rule of presumption contained in Section 12(4) AVBWasserV, in conjunction with the certification activity of DVGW or its wholly owned subsidiary on the basis of DVGW Worksheet W534, results in its being virtually impossible to market pipes and accessories for drinking water supply in Germany without DVGW certification. (28)

42. Given the de facto competence of DVGW and its wholly owned subsidiary to determine, through their standardisation and certification activity, which products can be successfully offered for sale on the German market for the installation, enlargement, alteration and maintenance of drinking water equipment on the house-side of the connection and are therefore marketable, that standardisation and certification activity of DVGW and its wholly owned subsidiary cannot be excluded from the scope of the free movement of goods.

43. To justify that horizontal effect of the free movement of goods, the argument development by the Court regarding the applicability of Articles 45 TFEU, 49 TFEU and 56 TFEU may be applied per analogiam to rules of a different kind which are intended to govern employment, self-employment and the provision of services collectively.

44. It should first be pointed out that, in its case-law on the limited horizontal effect of the freedom of movement for workers, the freedom of establishment and the freedom to provide services, the Court has yet to take an explicit position on whether the principles of the free movement of goods and capital can also be applied to collective rules of a non-public-law nature. In my view, this question must, however, be answered in the affirmative, since the applicability of the freedom of movement for workers, the freedom of establishment and the freedom to provide services to collective rules of a non-public-law nature which concern employment, self-employment and the provision of services is essentially justified by the Court with a

reference to the effects of those collective rules. Seen from that angle, it would be difficult to understand why the possibility of the direct applicability of the freedom of movement for workers, the freedom of establishment and the freedom to provide services with respect to collective rules of a non-public-law nature should be acceptable under certain conditions, while that direct applicability should be categorically excluded in respect of the free movement of goods and capital. (29)

45. In these circumstances, there are no fundamental objections to the application of the argument developed in case-law on the limited horizontal effect of the freedom of movement for workers, the freedom of establishment and the freedom to provide services to a case such as the present one, in which the applicability of the principle of the free movement of goods to a private-law association with de facto rule-making competence is at issue.

46. As its first main argument justifying the horizontal effect of Articles 45 TFEU, 49 TFEU and 56 TFEU in relation to certain kinds of collective rules of a non-public-law nature, the Court points out in settled case-law that the abolition, as between Member States, of obstacles to the freedom of movement and the freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law. (30)

47. In the context of the present proceedings this consideration, which is based on the effet utile of Union law, can be applied to the standardisation and certification activity of DVGW and its wholly owned subsidiary, since, as is evident from the request for a preliminary ruling, DVGW is able de facto to determine, by issuing standards and certifying products for the installation, enlargement, alteration and maintenance of drinking water equipment on the house-side of the connection, which products gain access to the German market. Consequently, DVGW and its wholly owned subsidiary are quite capable of erecting new barriers to the free movement of goods in the European Union when exercising that de facto power.

48. As its second main argument explaining the horizontal effect of Article 45 TFEU in relation to collective rules governing employment, the Court emphasises in settled case-law that, since conditions of employment in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, a limitation of the application of the prohibitions laid down by Article 45 TFEU to acts of a public authority would risk creating inequality in its application. (31)

49. This consideration, too, can be applied to the standardisation and certification activity of DVGW and its wholly own subsidiary in the drinking water supply sector in a case such as the main proceedings. As I have already said, the absence of a harmonised European standard for the drinking water supply fittings at issue does not give the Member States unlimited discretion to draw up national technical standards for such products. Rather, they are required to fulfil the obligations arising from the principle of the free movement of goods when setting national technical standards. (32) If the Member States could evade that obligation to observe the fundamental freedoms when drawing up and applying technical standards by transferring – de facto – competence to private associations, the result would be a lack of uniformity in the application of Union law. For in Member States where the setting of standards and the certification of products continued to be a public task performed only by the authorities, the

exercise of that competence would be subject to observance of the fundamental freedoms, whereas in Member States where that task was transferred – de facto – to a private-law association, the fundamental freedoms would be ineffective in that respect.
50. In view of these considerations, I come to the conclusion that the answer to the first question referred should be that Article 34 TFEU must be interpreted as meaning that private-law institutions which have been established for the purpose of drawing up technical standards in a certain area and of certifying products on the basis of those technical standards are bound by Article 34 TFEU when undertaking that standardisation and certification activity, if the national legislature explicitly regards the products equipped with a certificate of that private-law institution as complying with the law and the marketing of products not equipped with such a certificate is therefore virtually impossible in practice.

4. Deliberations on the legal consequences for DVGW of being bound by the principle of the free movement of goods

51. Although the referring court has not explicitly requested clarification of the legal consequences, in a case such as the main proceedings, of the obligation on DVGW and its wholly owned subsidiary to comply with the principle of the free movement of goods in the context of drawing up DVGW Worksheet W534 and certifying products on the basis of that technical standard, I will very briefly consider a number of important problems which, with due regard for the referring court's comments, might arise during the future course of the main proceedings.

(a) DVGW's obligation to comply with the principle of the free movement of goods during its standardisation activity

52. From the request for a preliminary ruling it is clear that, after issuing the certificate for the use in the water sector of the fittings manufactured by the applicant in the main proceedings, DVGW amended DVGW Worksheet W534 and introduced the 3000-hour test. As the applicant in the main proceedings did not submit a positive inspection report on the 3000-hour test carried out on its fittings, the certificate was withdrawn in June 2005. (33)
53. As is clear from the example of the fittings manufactured by the applicant in the main proceedings, the addition of the 3000-hour test to DVGW Worksheet W534 is likely to impede the achievement of the free movement of goods in respect of products governed by that technical standard. As the fittings manufactured by the applicant in the main proceedings did not pass that test – or evidence to that effect was not submitted – the certificate for the fittings was withdrawn, resulting in its being de facto virtually impossible for the applicant in the main proceedings, an undertaking established in Italy, to market those fittings in Germany.
54. Seen from that perspective, the addition of the 3000-hour test to DVGW Worksheet W534 must be regarded as a restriction by DVGW of the free movement of goods. A justification for that restriction derived from one of the 'written' grounds given in Article 36 TFEU is not, in the referring court's view, evident, especially as the 3000-hour test is intended not to protect the drinking water consumer's health, but to extend the useful life of pipes.(34)
55. What has yet to be clarified, on the other hand, is whether a justification for that restriction might be found in an unwritten overriding reason in the public interest which is recognised in

case-law and would also pass a proportionality test. As a non-discriminatory restriction, it would in principle be immediately amenable to justification as an overriding reason in the public interest. If DVGW could provide evidence of an unwritten justification which would pass the proportionality test, the addition of the 3000-hour test to DVGW Worksheet W534 would have to be regarded as an acceptable restriction of the free movement of goods.

56. If DVGW was unable to produce evidence of an unwritten justification recognised in case-law, it could attempt to claim justification on a special ground of private interest, emphasising its own private-law nature. (35) Referring to the judgment in Angonese, DVGW might also cite 'objective considerations' to justify the restriction at issue. (36) DVGW might, furthermore, refer to its private-law nature and rely on the protection of the fundamental rights guaranteed in the Charter of Fundamental Rights, (37) such as the freedom to conduct a business guaranteed in Article 16 of the Charter of Fundamental Rights, and endeavour to demonstrate a collision between the free movement of goods and one or more fundamental rights, between which a fair balance would have to be struck in application of the principle of proportionality. (38)

57. If, in the main proceedings, DVGW were convincingly to present special grounds of private interest, 'objective considerations' or a position protected by the Charter of Fundamental Rights to justify the restriction of the free movement of goods caused by the addition of the 3000-hour test to DVGW Worksheet W534, the referring court should address a new request for a preliminary ruling to the Court and submit a substantiated request for information on whether and, if so, under what conditions those arguments advanced by DVGW might be brought to bear in a case such as the main proceedings. For, in the light of the current state of case-law on the horizontal effect of the fundamental freedoms and on the relationship between the fundamental freedoms and the fundamental rights, it is my view that the answer to those questions cannot yet be unequivocally deduced from the Court's case-law.

(b) DVGW's obligation to comply with the principle of the free movement of goods during its certification activity

58. It is also clear from the request for a preliminary ruling that DVGW refused, during the re-assessment procedure relating to the certificate already issued for the fittings in question, to take into account the inspection report of the Italian Cerisie Laboratorio submitted by the applicant in the main proceedings, on the ground that that laboratory had not been approved by DVGW as an inspection laboratory. The referring court also points out that the Cerisie Laboratorio has been approved by the appropriate Italian authorities. (39)

59. As such an absolute refusal by DVGW to take the inspection report of the Italian Cerisie Laboratorio into account seems capable, in a case such as the main proceedings, to impede the achievement of the free movement of goods in respect of the fittings at issue or to render the exercise of that freedom less attractive, it must be classified as a restriction of the free movement of goods, which is prohibited in principle. (40)

60. On the subject of the justification of that restriction, reference should be made to my comments in point 54 et seq. above, although the discriminatory tendency of DVGW's refusal should also be taken into account. That discriminatory tendency would be particularly significant if DVGW was to base its attempt at justification on an overriding reason in the public interest,

since the Court has not yet ruled explicitly whether and, if so, under what conditions discriminatory restrictions of the free movement of goods are amenable to justification as overriding reasons in the public interest. (41) If that question should arise in the future course of the main proceedings, the referring court should address a new request for a preliminary ruling to the Court and also submit a substantiated request for information on that aspect.

B – The second question referred

61. As the second question has been referred only in case the first is answered in the negative, it does not require analysis in view of the answer which I propose should be given to the first question.

VII – Conclusion

62. On the basis of the above considerations, I propose that the Court answer the questions referred as follows:

Private-law institutions established for the purpose of drawing up technical standards in a certain area and of certifying products on the basis of those technical standards are bound by Article 34 TFEU when undertaking that standardisation and certification activity, if the national legislature explicitly regards products equipped with a certificate of that private-law institution as complying with the law and it is therefore virtually impossible in practice to market products which are not equipped with such a certificate.

1 – Original language of the Opinion: German.

– Language of the proceedings: German.

2 – Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser of 20 June 1980 (BGBl. I, p. 750, 1067).

3 – See my Opinion of 28 April 2010 in Case C-185/08 Latchways and Eurosafe Solutions [2010] ECR 0000, paragraph 57 et seq.

4 – OJ 1989 L 40, p. 12, as amended by Council Directive 93/68/EEC of 22 July 1993.

5 – Article 3(1) of Directive 89/106.

6 – See Jarass, H., ‘Probleme des Europäischen Bauproduktenrechts’, NZBau 2008, pp. 145, 146.

7 – Ibid., p. 147 et seq. Where there is no harmonised European standard for a given product, it is still possible, of course, for that product to be made subject to the main requirements of Directive 89/106 through an application for a European technical approval.

8 – The first subparagraph of Article 6(1) of Directive 89/106 requires Member States not to impede the free movement, placing on the market or use in their territory of products which comply with that directive. Pursuant to the second subparagraph of that provision, Member States must ensure that the use of such products, for the purpose for which they were intended, is not be impeded by rules or conditions imposed by public bodies or private bodies acting as a public undertaking or acting as a public body on the basis of a monopoly position.

9 – Judgment in Case C-432/03 Commission v Portugal [2005] ECR I-9665, paragraph 35.

10 – In a letter of 13 January 2012 the Government of the Federal Republic of Germany, replying to a written question from the Court of Justice concerning the targets and legal nature of the

obligation arising from Section 12(4) AVBWasserV, made it clear that that provision would be reflected in a contract concluded with a water supply undertaking concerning connection to the public water supply, unless otherwise agreed by the contracting parties. Section 12(4) AVBWasserV thereby formed the basis of a commitment by the customer to the water supply undertaking.

11 – With respect to the free movement of goods, see only the judgments in Case 311/85 Vereniging van Flaamse Reisbureaus [1987] ECR 3801, paragraph 30 and Case C-159/00 Sapod Audic [2002] ECR I-5031, paragraph 74.

12 – See only the judgment in Joined Cases 266/87 and 267/87 Association of Pharmaceutical Importers and Others [1989] ECR 1295, paragraph 13 et seq., in which the Court concluded that the measures taken by the British society representing pharmacists may, with particular account taken of the powers conferred on it, constitute measures within the meaning of Article 34 TFEU. The Court came to the same conclusion in its judgment in Case C-292/92 Hünermund and Others [1991] ECR I-6787, paragraph 12 et seq., regarding measures taken by the Landesapothekenkammer Baden-Württemberg.

13 – See only the judgments in Case C-325/00 Commission v Germany [2002] ECR I-9977, paragraph 14 et seq., and Case 302/88 Hennen Olie [1990] ECR I-4625, paragraph 13 et seq.

14 – C-265/95 [1997] ECR I-6959. In this judgment it was ruled, for example, that the French Republic had infringed provisions of primary legislation on the free movement of goods by not taking all necessary and appropriate measures to prevent acts of violence which were committed in France by private individuals against agricultural products from other Member States and which impeded intra-Community trade in those products.

15 – C-112/00 [2003] ECR I-5659. The Court ruled in this judgment that the fact that the Republic of Austria had failed to ban a demonstration which resulted in the Brenner motorway being closed to all traffic for a continuous period of almost 30 hours and so seriously impeded the international transport of goods was incompatible with the provisions of primary legislation on the free movement of goods.

16 – Advocate General Kokott interprets that case-law to mean that the conduct of private individuals can be attributed to a Member State where those private individuals act without official guidance, but there is a positive obligation on the Member State to prevent the private conduct in question; see the Opinion of Advocate General Kokott in Case C-470/03 AGM-COS.MET [2007] ECR I-2749, paragraph 78.

17 – In that regard, see the judgment in Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line' [2007] ECR I-10779, paragraph 33. See also the judgments in Case C-379/09 Casteels [2011] ECR 0000, paragraph 19; Case C-325/08 Olympique Lyonnais [2010] ECR I-2177, paragraph 30; Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991, paragraph 24; Case C-309/99 Wouters and Others [2002] ECR I-1577, paragraph 120; Case C-415/93 Bosman [1995] ECR I-4921, paragraph 82; and Case 36/74 Walrave and Koch [1974] ECR 1405, paragraph 16 et seq.

18 – See only the judgment in Casteels (cited above in footnote 17, paragraph 17 et seq.).

19 – Judgment in Viking Line (cited in footnote 17, paragraph 37).

20 – Judgment in Case C-281/98 Angonese [2000] ECR I-4139, paragraph 36.

21 – Judgment in Case C-94/07 Raccanelli [2008] ECR I-5939, paragraph 46.

22 – See only the judgments in Casteels (cited in footnote 17, paragraph 22) and Olympique Lyonnais (cited in footnote 17, paragraph 33 et seq.).
23 – As regards the written grounds set out in Article 36 TFEU, the Court rules in settled case-law that the principle of proportionality is based on the second sentence of Article 36 TFEU; see the judgments in Case C-219/07 Nationale Raad van Dierenwekers en Liefhebbers and Andibel [2008] ECR I-4475, paragraph 30, and Case C-55/99 Commission v France [2000] ECR I-11499, paragraph 29. In addition, the Court has generally ruled that a measure restricting the fundamental freedoms guaranteed by the Treaty may be justified only if it complies with the principle of proportionality. See only the judgments in Case C-185/04 Öberg [2006] ECR I-1453, paragraph 19; Case C-137/04 Rockler [2006] ECR I-1441, paragraph 22; and Case C-100/01 Oteiza Olazabal [2002] ECR I-10981, paragraph 43.
24 – Although, as a general rule, the Court refers only to the suitability and necessity of the measure to be examined as components of the principle of proportionality, the proportionality test must in principle accord with a three-stage test scheme which includes the test of reasonableness. For the three-part structure of the proportionality test see only my Opinion in Case C-10/10 Commission v Austria [2011] ECR 0000, paragraph 67 et seq.
25 – See the judgments in Casteels (cited in footnote 17, paragraph 30 et seq.) and Viking Line (cited in footnote 17, paragraph 75 et seq.).
26 – See, in particular, the judgment in Olympique Lyonnais (cited in footnote 17, paragraph 38 et seq.), in which the Court proceeded from the principle that a rule of the professional football charter of the French football association which restricted the freedom of movement for workers could be justified in principle by its objective of promoting the recruitment and training of young players, provided that the principle of proportionality was observed. See also the judgment in Bosman (cited in footnote 17, paragraph 106 et seq.), in which the Court examined a justification of the restriction of the freedom of movement for workers due to the transfer rules of the football associations at issue in the light of their objective of guaranteeing a balance among the clubs, while preserving a certain equality of opportunity and the uncertainty of results, and of promoting the recruitment and training of young players.
27 – Judgment in Angonese (cited in footnote 20, paragraph 42).
28 – See point 25 of this Opinion.
29 – For apt comments on this aspect see Forthoff, U., in Grabitz/Hilf/Nettesheim, Das Recht in der Europäischen Union, Article 45 TFEU, paragraph 176 (46th supplement, October 2011).

30 – Judgments in Case C-341/05 Laval un Partneri [2007] ECR I-11767, paragraph 98; Viking Line (cited in footnote 17, paragraph 57); Wouters and Others (cited in footnote 17, paragraph 120); Bosman (cited in footnote 17, paragraph 83); and Walrave (cited in footnote 17, paragraph 16 et seq.).
31 – Judgments in Olympique Lyonnais (cited in footnote 17, paragraph 31) and Bosman (cited in footnote 17, paragraph 84).
32 – See point 22 of this Opinion.
33 – See point 8 et seq. of this Opinion.
34 – Order for reference, point 11.
35 – In that regard, see point 38 of this Opinion and the judgments cited in footnote 26.

36 – See point 39 of this Opinion.
37 – In that regard, see, in particular, Forsthoff, loc. cit. (footnote 29), paragraph 181.
38 – For the removal of collisions between fundamental freedoms and fundamental rights see my Opinion in Case C-271/08 Commission v Germany [2010] ECR I-7087, point 178 et seq.
39 – Order for reference, p. 4.
40 – See, in this context, the judgments in Commission v Portugal (cited in footnote 9, paragraphs 41 and 46, and Case C-400/96 Harpegnies [1998] ECR I-5121, paragraph 35.
41 – For this aspect see my Opinion in Case C-28/09 Commission v Austria [2011] ECR 0000, point 81 et seq.