OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 8 September 2005 [1]

I — Introduction

1. The main issue raised in this case is whether a national procedure on the approval of construction products which does not take account of certificates of approval issued by certification bodies in other Member States must be regarded as a measure which gives effect to the obligation imposed on Member States by Article 2(1) of Directive 89/106 on construction products [2] to ensure that such products are fit for their intended use or, on the contrary, whether it constitutes an import restriction prohibited by Article 28 EC.

1 — Original language: English.

2 — Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products OJ 1989 L 40, p. 12, as amended by Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) OJ 1993 L 220, p. 1 (hereinafter: Directive 89/106)

II — Relevant provisions

A — *Community law*

2. Directive 89/106 establishes the legislative framework necessary to permit the free movement of construction products within the Community. The term 'construction products' is defined in Article 1(2) of the directive as meaning 'any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works'.

3. Under Article 2(1) of Directive 89/106, Member States shall take all necessary measures to ensure that construction products may be placed on the market only if they are fit for their intended use in works, that is to say that they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3. These essential requirements, which may influence the technical characteristics of construction products, are set out in terms of

objectives in Annex I to the directive. For the purposes of the present case, it is sufficient to refer to the requirement that the construction work must be designed and built in such a way that it will not be a threat to the hygiene or health of the occupants or neighbours, in particular as a result of pollution or poisoning of the water. [3]

4. According to Article 4(1) of directive 89/106 standards and technical approvals shall, for the purposes of this Directive, be referred to as 'technical specifications'. Article 4(2) of the directive provides that Member States shall presume that products are fit for use if they enable works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements referred to in Article 3 where such products bear the CE marking indicating that they comply with the relevant national standards transposing the harmonised standards, with a European technical approval or with the national technical specifications referred to in paragraph 3 of this same provision in as much as harmonised specifications do not exist. The latter paragraph 3 gives Member States the possibility to communicate to the Commission the texts of their national technical specifications which they regard as complying with the essential requirements referred to in Article 3. The Commission notifies the Member States of those national technical specifications in respect of which there is presumption of conformity with the essential requirements referred to in Article 3.

5. Article 6(1) and (2) of Directive 89/106 provide:

'1. Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this Directive.

Member States shall ensure that the use of such products, for the purpose for which they were intended, shall 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.

2. Member States shall, however, allow products not covered by Article 4(2) to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until the European technical specifications referred to in Chapters II and III provide otherwise. The Commission and the committee referred to in Article 19 will

3 — The essential requirements for works concern the following aspects: mechanical resistance and stability; safety in case of fire; hygiene, health and the environment; safety in use; protection against noise; energy economy and heat retention.

monitor and review the development of the European technical specifications on a regular basis.' ...

6. Article 16 of Directive 89/106 contains the following special procedure for situations in which no technical specifications for a construction product exist:

'1. In the absence of technical specifications, as defined in Article 4, for any given product, the Member State of destination shall, on request in individual cases, consider the product to be in conformity with the national provisions in force if they have satisfied tests and inspections carried out by an approved body in the producing Member State according to the methods in force in the Member State of destination or recognised as equivalent by that Member State.

2. The producing Member State shall inform the Member State of destination, in accordance with whose provisions the tests and inspections are to be carried out, of the body it intends to approve for this purpose. The Member State of destination and the producing Member State shall provide each other with all necessary information. On conclusion of this exchange of information the producing Member State shall approve the body thus designated. If a Member State has misgivings, it shall substantiate its position and inform the Commission.

3. Member States shall ensure that the designated bodies afford one another all necessary assistance.

4. Where a Member State establishes that an approved body is not carrying out the tests and inspections properly in conformity with its national provisions, it shall notify the Member State in which the body is approved thereof. That Member State shall inform the notifying Member State within a reasonable time-limit of what action has been taken. If the notifying Member State does not consider the action taken to be sufficient, it may prohibit the placing on the market and use of the product in question or make it subject to special conditions. It shall inform the other Member State and the Commission thereof.'

7. According to Article 17 of Directive 89/106:

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

8. Decision 3052/95 contains an information procedure in respect of measures adopted by the Member States which restrict the free

movement of goods within the Community. [4] Article 1 of this decision provides:

'Where a Member State takes steps to prevent the free movement or placing on the market of a particular model or type of product lawfully produced or marketed in another Member State, it shall notify the Commission accordingly where the direct or indirect effect of the measure is:

— a general ban on the goods,

— a refusal to allow the goods to be placed on the market,

— the modification of the model or type of product concerned before it can be placed or kept on the market, or

— withdrawal of the goods from the market.'

4 — Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community, OJ 1995 L 321, p 1 (hereinafter: Decision 3052/95)

9. Article 3(2) of Decision 3052/95 provides that this obligation to notify the Commission does not apply to, inter alia, measures taken solely in pursuance of Community harmonisation measures and measures notified to the Commission under specific provisions.

10. Article 4(1) and (2) of Decision 3052/95 lay down that the notification referred to in Article 1 shall be made in sufficient detail and in clear and comprehensible form and that the relevant information shall be communicated within 45 days of the date on which the measure concerned is taken.

B — *National law*

11. Under Article 17 of the Portuguese General Law on Urban Construction (Regulamento Geral das Edificações Urbanas; hereinafter: Decree-Law N° 38/382), adopted by Decree-Law N° 38/382 of 7 August 1951, the use of new materials or building methods in respect of which neither official specifications apply nor sufficient practical experience exists, is subject to the prior favourable opinion or approval of the National Laboratory of Civil Engineering (Laboratório Nacional de Engenharia Civil; hereinafter: LNEC).

12. Pursuant to two ministerial decrees, of 2 November 1970 and of 7 April 1971 (hereinafter: the ministerial decrees), only plastic materials which have been approved by LNEC may be used in the water distribution network.

III — Facts and procedure

13. In April 2000, the Commission received a complaint from a Portuguese company which had been refused the required authorisation by the supervising body, Empresa Pública de Águas de Lisboa (hereinafter: EPAL), for the installation of polyethylene tubes, imported from Italy and Spain, in the plumbing system of a building, on the grounds that the tubes had not been approved by LNEC. According to the complainant the tubes had already been approved in both these Member States and were accompanied by certificates of conformity, issued by the Istituto Italiano dei Plastici (hereinafter: IIP) and the Asociación Española de Normalización y Certificación (hereinafter: AENOR) respectively. It therefore applied to LNEC to obtain an attestation of the equivalence of these certificates. However, by letter of 26 May 2000, LNEC informed the applicant that its request must be rejected, as IIP was not a member of the European Association for Technical Approval in Construction (hereinafter: UEATC), nor did it belong to the other institutes with which LNEC had concluded a cooperation agreement in this area. [5]

14. By formal notice of 12 September 2000 and subsequently by reasoned opinion of 16 May 2001, the Commission informed the Portuguese authorities that by subjecting polyethylene tubes imported from other Member States to an approval procedure under Article 17 of Decree-Law No 38/382, without taking account of certificates issued by certification bodies in other Member States, it had breached its obligations under Articles 28 EC and 30 EC. In addition, by failing to notify the Commission of this measure, it had also breached its obligations under Articles 1 and 4(2) of Decision 3052/95. Considering the explanations on the compatibility of this procedure with its Community obligations to be unsatisfactory, the Commission introduced the present proceedings under Article 226 EC by application of 2 October 2003.

15. The Commission requests the Court:

(1) to declare that by making tubes of polyethylene imported from other Member States subject to an approval

5 — The LNEC apparently did not refer to the certificate issued by AENOR. According to the Portuguese Government this certificate was not submitted to LNEC.

procedure, pursuant to Article 17 of Decree-Law No 38/382 of 7 August 1951, without taking account of approval certificates issued by those States, and by omitting to inform the Commission of that measure, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC, and also under Articles 1 and 4(2) of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community;

(2) to order the Portuguese Republic to pay the costs.

16. The Commission and the Portuguese Government further elucidated their positions at the oral hearing of 9 June 2005.

IV — Assessment

17. The first question to be examined in this case is whether the approval procedure for polyethylene tubes to be used in water piping systems or networks laid down in Article 17 Decree-Law No 38/382 in conjunction with the ministerial decrees is covered by the provisions of Directive 89/106. If the answer to this question is negative, it must next be considered whether or not the procedure is compatible with Articles 28 EC and 30 EC. The question as to the compliance with the information procedure of Decision 3052/95 will be dealt with thereafter.

A — *Directive 89/106*

18. On this point, the Commission observes that although the polyethylene tubes concerned are 'construction products' within the meaning of Article 1(2) of Directive 89/106, they are not covered by harmonised standards within the meaning of Article 4 of that directive. As these products are not subject to any standards or technical specifications in Portugal and the certification carried out by LNEC concerns the water piping system as a whole and not the tubes as such, the conditions for applying the special procedure provided for in Article 16 of Directive 89/106 have not been fulfilled. The procedural requirement imposed by Article 17 Decree-Law No 38/382 and the ministerial decrees

in respect of the tubes concerned must therefore be reviewed in the light of Articles 28 EC and 30 EC.

19. The Portuguese Government maintains that the national provisions at issue in this case are aimed at giving effect to the objectives laid down in Article 2 of Directive 89/106. As the tubes in question are neither subject to a harmonised standard or European technical approval, nor to a national technical specification recognised at European level, the Portuguese Republic is entitled to subject them to an approval procedure, such as that laid down in Article 17 Decree-Law No 38/382 and the ministerial decrees.

20. Where according to the Court's case-law a Member State may not demand analyses or tests if these have already been carried out in other Member States and the results are available to it, the Portuguese Government submits that, as regards construction products, these principles have been expressed in the special procedure provided for in Article 16 of Directive 89/106. However, in this case, the Italian Republic, as the Member State of production, did not apply the procedure of Article 16. It did not request information on the methods and criteria applied in Portugal for approving polyethylene tubes and piping systems, nor did it inform the Portuguese Government of which Italian body was competent to certify the conformity of these products with the Portuguese rules. In these circumstances LNEC was not in a position to cooperate with IIP. To hold that the tubes in question should be approved solely on the basis of the certificate issued by IIP would be tantamount to obliging the Portuguese Republic to accept any certificate issued by any body, independently of any guarantees in respect of adequacy of the products concerned. This is precisely what Directive 89/106 seeks to avoid.

21. Nevertheless it does claim that it has the right under Article 16 of the directive to oppose the placing on the market of construction products which are not covered by national technical specifications, if these have not been approved in accordance with the procedure laid down in that provision.

22. The Portuguese Government adds that, under Article 17 of Directive 89/106, it is not obliged to accept reports and attestations issued by other Member States, unless they have been issued by competent bodies in these Member States and have been recognised by it as the Member State of destination and were prepared in accordance with its national provisions in force or provisions recognised by it as being equivalent.

23. It is first necessary to address the Portuguese Government's claim that the approval procedure is aimed at giving effect to Article 2 of Directive 89/106 which obliges the Member States to take all necessary measures to ensure that construction products may be placed on the market only if they are fit for their intended use in works, that is to say that they have such characteristics that the works in which they are to be incorporated, assembled, applied or installed, can, if properly designed and built, satisfy the essential requirements referred to in Article 3 of the directive. In its view, this constitutes the principal objective of Directive 89/106, although it recognises that it also seeks to reconcile securing observance of the essential requirements in respect of buildings and construction works with the free movement of goods.

24. I do not find this argument convincing and, indeed, I would consider that the primary objective of Directive 89/106 is to create the necessary framework to liberate trade in construction products within the Community.

25. Directive 89/106 was adopted on the basis of Article 100A of the EC Treaty (now Article 95 EC), explicitly as part of the programme aimed at completing the internal market by the year 1992. [6] As is set out in the preamble to the directive, requirements imposed in the Member States in respect of buildings and civil engineering works on aspects such as safety, durability and energy economy, directly influence the characteristics of construction products and are reflected in national product standards. Differences in the standards applicable in the Member States hinder intra-Community trade in these products. [7]

26. The main objective of Directive 89/106 is to eliminate these restrictions by creating conditions enabling construction products to be traded freely within the Community. The method for doing this is to create a common Community base in respect of the essential requirements applicable to buildings and works in which the construction products are to be used. These requirements are laid down in Article 3 in conjunction with Annex I to the directive. Drafted in general terms, the essential requirements are operationalised through technical specifications for construction products. These include (a) harmonised standards and national standards transposing them, (b) European technical approvals and (c) national technical specifications recognised at Community

6 — Cf. the fourth recital of the preamble to the Directive: 'Whereas paragraph 71 of the White Paper on completing the internal market, approved by the European Council in June 1985, states that, within the general policy, particular emphasis will be placed on certain sectors, including construction; whereas the removal of technical barriers in the construction field, to the extent that they cannot be removed by mutual recognition of equivalence among all the Member States, should follow the new approach set out in the Council resolution of 7 May 1985 which calls for the definition of essential requirements on safety and other aspects which are important for the general well-being, without reducing the existing and justified levels of protection in the Member States'.

7 — See the second and third recitals of the preamble to the Directive.

level (hereinafter: technical specifications) as being in conformity with the essential requirements (Article 4 of Directive 89/106). Member States shall presume that construction products which comply with these technical specifications and, consequently, may bear the CE marking, will enable works in which they are employed to satisfy the essential requirements, provided that these works are properly designed. According to Article 6(1) of Directive 89/106, the Member States shall not impede the free movement, placing on the market or use in their territory of products which satisfy the provisions of this directive.

27. As to products which fall outside the scope of this system because they do not comply with the technical specifications referred to in Article 4(2) of Directive 89/106, Article 6(2) of the directive provides that the Member States shall allow them to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until the European technical specifications provide otherwise. In addition, Article 16 of the directive provides for a special procedure for these products, stating the conditions under which the Member State of destination shall consider such products originating in another Member State to be in conformity with the national provisions in force.

28. This description of the mechanism laid down in Directive 89/106 is intended to demonstrate that the directive is not primarily aimed at ensuring compliance with the essential requirements of Article 3 as such. Rather the function of laying down these requirements for buildings and works is to create a common base in respect of the interests to be protected, thus eliminating restrictions to trade in construction products which otherwise may arise from differences in the level of protection in the various Member States. The need to ensure that the essential requirements are complied with cannot in itself be invoked to justify national measures which restrict the importation and use of construction products which fall outside the mechanism described in paragraph 26. Such measures, including the approval procedure for polyethylene tubes applied in Portugal, must therefore be examined under Articles 6(2) and 16 of Directive 89/106.

29. Being the more specific provision, Article 16 of Directive 89/106 should be discussed first. The special procedure contained in this provision for products not covered by technical specifications obliges the Member State of destination to consider a product to be in conformity with the national provisions in force, if they have satisfied tests and inspections carried out by an approved body in the producing Member State according to the methods in force in the Member State of destination or recognised as equivalent by that Member State. The producing Member State shall inform the Member State of destination, in accor-

dance with whose provisions the tests and inspections are to be carried out, of the body it intends to approve for this purpose. Both Member States must provide each other with the necessary information for the purposes of this procedure.

30. In the circumstances of the present case, both the Commission and the Portuguese Republic appear to agree that this special procedure is not relevant, either because it is not applicable or because, quite simply, it was not applied. The Commission points out that no specifications exist in Portugal in respect of the polyethylene tubes in question which could have served as a point of reference for the tests which could have been carried out in Italy and Spain. The Portuguese Government, too, acknowledges this fact and remarks that the certificate submitted for recognition concerned only the tubes and not the water piping system. It also observes that where it is for the producing Member State to inform the Member State of destination of the bodies approved to carry out the relevant tests and inspections, no such contacts were established between the national authorities concerned.

31. For the reasons given by both parties, I do not consider it necessary to dwell further on the relevance of Article 16 of Directive 89/106 for assessing the compatibility with Community law of the refusal by the Portuguese authorities to permit the use of the polyethylene tubes in question.

32. Although it was not invoked by the Commission in its application to the Court, the question was raised at the oral hearing whether the Portuguese authorities were not obliged under Article 6(2) of Directive 89/106 to permit the use of the polyethylene tubes approved in both Italy and Spain. As indicated above, this Article provides that 'Member States shall ... allow products not covered by Article 4(2) to be placed on the market in their territory if they satisfy national provisions consistent with the Treaty until the European technical specifications ... provide otherwise'.

33. On closer scrutiny this provision appears to be rather ambiguous, as it is not entirely clear to which 'national provisions consistent with the Treaty' it refers. Does this concept refer to the provisions of the Member State of production (Italy and Spain), to those of the Member State of destination (Portugal) or, indeed, to both?

34. If only the provisions of the Member State of production are intended, this would result in a more liberal regime for non-regulated products than for products which are in conformity with technical specifications and bear the CE marking. This reading would also create an inconsistency with the special procedure of Article 16 of the directive which provides for tests and inspections to be carried out in the Member State of production according to the methods in force in the Member State of destination.

35. If, on the other hand, the provisions of the Member State of destination are intended, this would amount to a statement of the obvious, in that products which are in conformity with the national provisions in force will be permitted to be placed on the national market.

36. I, therefore, conclude that the concept 'national provisions consistent with the Treaty' in Article 6(2) of Directive 89/106 must be understood as referring to any national provisions to which a product may be subject. These include provisions in the national law of the Member State of production in respect of its production and its being placed on the market in that Member State and the provisions in the national law of the Member State of destination in respect of the marketing and use of the product concerned in that Member State. Such provisions may be applied to products not covered by technical specifications on condition that they are consistent with the obligations under Articles 28 EC and 30 EC.

B — *Articles 28 EC and 30 EC*

37. The Commission maintains that the requirement of prior approval constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC. In seeking to justify the measure, the Portuguese authorities have not explained convincingly why using the tubes in question would pose a danger to the health and life of humans. They only indicate that additives used in the plastics of which the tubes are composed could be released into the water being transported through the tubes.

38. Although the Member States may subject products which have been certified in another Member State to a fresh approval procedure, the Commission points out that they are obliged to contribute to the relaxation of the controls on intra-Community trade. This implies that national authorities are not entitled unnecessarily to require technical or chemical analyses or laboratory tests where those have already been carried out in another Member State and their results are available to them or may, at their request, be placed at their disposal. [8] In line with the Court's case-law, national authorities are under an obligation to take account of certificates issued by certification bodies recognised in other Member States, even though these are not affiliated to UEATC and, where they consider that they do not have sufficient information to appreciate such certificates, to contact such bodies.

8 — Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277, at paragraph 14.

39. In addition, the Commission states that it is disproportionate to refuse to approve the tubes in question on the grounds that the national provisions only provide for the approval of piping systems as opposed to individual tubes. An approval procedure applicable only to tubes would equally enable any danger of contamination caused by the composition of the tubes to be detected. Finally, the procedure applied by the Portuguese authorities does not comply with the conditions laid down in the Court's case-law that in order to justify a prior administrative authorisation scheme which derogates from a fundamental freedom, such as the free movement of goods, it must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. [9]

40. The Portuguese Government is aware of the Court's case-law that, in the absence of harmonisation of national laws, obstacles to free movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements, such as the protection of public health, consumer protection and the protection of the environment. However, Directive 89/106 not only provides for the necessary harmonisation in this field, it also imposes extra obligations on the Member States to guarantee the safety of buildings by supervising the suitability of materials to be used in these buildings. The directive therefore is the concrete expression of the general principle under Articles 28 EC and 30 EC that Member States may not adopt measures restricting the free movement of goods produced lawfully in another Member State, unless these are necessary and adequate to protect certain mandatory requirements in an appropriate manner. The requirements laid down in Portuguese law in respect of the use of polyethylene tubes are not disproportionate nor do they constitute a disguised discrimination of construction products from other Member States.

41. What is essentially at issue in this case is that the Portuguese approval body LNEC refused to attest to the equivalence of the certificate issued by, at least, IIP in respect of the polyethylene tubes at issue. This refusal was based mainly on the fact that IIP was not affiliated to the UEATC and that it did not otherwise have a cooperation agreement with LNEC. The Commission's application is not concerned with the methods applied by LNEC for approving the products in question, nor with the standards this body applies in this context. Indeed there is no indication in the case file that these standards exist.

9 — Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, at paragraph 35.

42. It is useful to recall that the products concerned in this case fall outside the regulatory framework provided for in Article 4 of Directive 89/106, so that by way of Article 6(2) of the directive, the general principles developed under Articles 28 EC and 30 EC on the free movement of goods apply to the national measures taken in respect of these products. These principles are well established and are summarised in the above rendition of the submissions of the Commission and the Portuguese Government.

43. The basic presumption underlying Article 28 EC is that goods which are lawfully produced and marketed in a Member State must, in principle, be admitted to the markets of all Member States. However, it is also recognised that the Member States are entitled under certain conditions to adopt and apply measures to protect fundamental public interests which may be restrictive of intra-Community trade. It is for the competent national authorities to show, in each case, that such rules or administrative practices are necessary to effectively protect the interests envisaged by Article 30 EC or to meet imperative requirements and, where appropriate, that the marketing of the products in question poses a risk to public health. [10]

44. It is clear that the requirement of prior approval of a given product and of the recognition of the equivalence of certificates issued in another Member State testifying to the quality of that product or its suitability for a given use restrict access to the market of the importing Member State. Eo ipso this is the case when applications for approval or recognition of the equivalence are rejected. Such requirements are therefore measures with equivalent effect to a quantitative import restriction within the meaning of Article 28 EC. [11]

45. The approval procedure laid down in Article 17 of Decree-Law No 38/382 is intended to guarantee the safety of materials used in buildings and construction works and, therefore, it also serves the interest of the protection of public health. As such, it can be accepted that the requirement of approval for new or untested construction materials and construction methods can be justified under Article 30 EC.

46. However, such a national measure must also satisfy the conditions of necessity and proportionality. The Commission has referred to the Court's case-law according to which Member States are required to contribute to bringing about a relaxation of the controls existing in intra-Community trade. [12] This obligation, which is also implicit in Article 10 EC, entails that national

10 — Case C-420/01 *Commission* v *Italy* [2003] ECR I-6445, at paragraph 30

11 — Cf. Case C-14/02 *ATRAL* [2003] ECR I-4431, at paragraphs 62 and 63.

12 — See point 38 above.

authorities may not require the duplication of tests or analyses and that they must take account of the results of approval procedures carried out by recognised and approved bodies in other Member States. Proper compliance with this obligation requires an active attitude both on the part of the national body to which an application for approval of a product or the recognition of the equivalence of a certificate has been submitted and of the approval body which already approved the product and issued a certificate for that product. These bodies, after all, are better placed than individual applicants wishing to trade in the products concerned or to use them to obtain the necessary information. Not only are they better equipped to establish appropriate contacts with comparable bodies in other Member States, it is for them to determine what information they need concerning the status of the approval body which approved the product concerned and issued a certificate, and its methods and the standards which it applies.

47. In other words, approval bodies must cooperate with each other constructively with a view to easing procedures which must be followed to gain access to the national market of the importing Member State, irrespective of the affiliation to overarching organisations or the existence of formal cooperation agreements. In a situation in which a product has already been approved by a recognized body in a Member States, the burden of proof cannot be placed on market operators to demonstrate the equivalence of methods used and standards applied.

48. In the present case, it appears from the case file that LNEC refused to recognise the equivalence of the certificate issued by IIP on purely formal grounds. It referred to the fact that IIP was not a member of UEATC, to which it is affiliated, and that LNEC had no cooperation agreement with IIP. At any rate LNEC did not of its own motion approach the Italian institution in order to acquire the information which would have enabled it to assess the nature of the certificate submitted to it by the applicant company. This in itself may be regarded as a breach of the cooperation obligation described above.

49. To this it may be added that the fact that the national provisions at issue only permit the approval of entire piping systems and not of individual tubes goes beyond what is necessary for realising the objectives of safety of buildings and public health. Although it may be accepted that there is a need to ensure that a whole water piping system operates properly and safely, this must be dissociated from the possibility of ascertaining that the component parts are suitable for their intended use. This latter aspect cannot be dependent on their being approved within the context of a system.

50. Finally, as the Commission has pointed out, the Court has frequently held that 'if a prior administrative authorisation scheme is to be justified even though it derogates from the fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily'. [13] Article 17 of Decree-Law No 38/382 which only provides that new and untested construction materials and methods are subject to approval by LNEC manifestly does not comply with those procedural requirements.

51. For the reasons set out in the three preceding paragraphs I conclude that Article 17 of Decree-Law No 38/382 infringes the principle of proportionality and that it is therefore incompatible with Article 28 EC.

C — *The information procedure contained in Decision 3052/95*

52. The Commission submits that the refusal by EPAL to approve the piping system without a certificate from LNEC and the refusal of the latter to recognise the equivalence of the certificate issued by IIP constitute 'measures' within the meaning of Article 1 of Decision 3052/95 and, consequently, should have been notified to the Commission within 45 days of them being taken.

53. The Portuguese Government retorts that as this measure was taken to give effect to its obligations under Directive 89/106, it follows from Article 3(2) of Decision 3052/95 that the notification procedure did not apply to it.

54. According to Article 1 of Decision 3052/95, 'where a Member State takes steps to prevent the free movement or placing on the market of a particular model or type of product lawfully produced or marketed in another Member State, it shall notify the Commission accordingly where the direct or indirect effect of the measure is a general ban on the goods, a refusal to allow the goods to be placed on the market, the modification of the model or type of product concerned before it can be placed or kept on the market, or withdrawal of the goods from the market'. In a description given by the Court 'the term includes any measure taken by a Member State, except for judicial decisions, which has the effect of restricting the free movement of goods lawfully produced or marketed in another Member State, regardless of its form or the authority from which it emanates'. [14]

13 — Cited in footnote 9, at paragraph 35 of the judgment.

14 — Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845, at paragraph 68.

55. In the present case, the decisions taken by EPAL and LNEC together effectively prohibited the use of the polyethylene tubes in question and must be regarded as constituting a measure within the meaning of Article 1 of Decision 3052/95. As this cannot be considered to be a measure which was adopted in pursuance of Directive 89/106, it was not exempt from the notification obligation.

56. Consequently, by failing to notify the Commission of the measure taken in respect of the polyethylene tubes in question within 45 days the Portuguese Republic infringed its obligations under Article 1 of Decision 3052/95.

V — Costs

57. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for costs. The Portuguese Government must, therefore, be ordered to pay the costs.

VI — Conclusion

58. I therefore conclude that the Court should:

(1) declare that by making tubes of polyethylene imported from other Member States subject to an approval procedure, pursuant to Article 17 of Decree-Law No 38/382 of 7 August 1951, without taking account of approval certificates issued by those States, and by omitting to inform the Commission of that measure, the Portuguese Republic has failed to fulfil its obligations under Articles 28 EC and 30 EC, and also under Articles 1 and 4(2) of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community;

(2) order the Portuguese Republic to pay the costs.