OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 21 February 2002 [1]

I — Introduction

1. In these two joined cases, the Giudice di Pace di Genova (Italy) refers four questions regarding the seizure of remote control units which did not bear the national type-approval stamp. The questions concern the interpretation of Community law immediately prior to and immediately after the expiry of the period fixed for the transposition of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (hereinafter 'the directive'). [2]

II — Legal framework

A — *Community law*

2. Article 1 of the directive establishes a regulatory framework for the placing on the market, the free movement and the putting into service in the Community of radio equipment and telecommunications terminal equipment.

3. Article 2(c) of the directive defines radio equipment as 'a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication'.

4. Article 3 provides that certain essential requirements are applicable to all apparatus. In addition, radio equipment is to be so constructed that it effectively uses the spectrum allocated to terrestrial/spatial communication and orbital resources so as to avoid harmful interference.

5. Article 5 of the directive provides that apparatus which meets the harmonised standards is presumed to meet the essential requirements set out in Article 3.

1 — Original language: Dutch.
2 — OJ 1999 L 91, p. 10.

6. Article 6(1) of the directive provides:

'Member States shall ensure that apparatus is placed on the market only if it complies with the appropriate essential requirements identified in Article 3 and the other relevant provisions of this directive when it is properly installed and maintained and used for its intended purpose. It shall not be subject to further national provisions in respect of placing on the market'.

7. Article 6(4) of the directive provides:

'In the case of radio equipment using frequency bands whose use is not harmonised throughout the Community, the manufacturer or his authorised representative established within the Community or the person responsible for placing the equipment on the market shall notify the national authority responsible in the relevant Member State for spectrum management of the intention to place such equipment on its national market.

This notification shall be given no less then four weeks in advance of the start of placing on the market and shall provide information about the radio characteristics of the equipment (in particular frequency bands, channel spacing, type of modulation and RF-power) and the identification number of the notified body referred to in Annex IV or V'.

8. Article 7 of the directive provides:

'1. Member States shall allow the putting into service of apparatus for its intended purpose where it complies with the appropriate essential requirements identified in Article 3 and the other relevant provisions of this directive.

2. Not withstanding paragraph 1, and without prejudice to conditions attached to authorisations for the provision of the service concerned in conformity with Community law, Member States may restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health.

...'.

9. Article 8(1) provides:

'Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of apparatus bearing the CE marking referred to in Annex VII, which indicates its conformity with all provisions of this directive, including the conformity assessment procedures set out in Chapter II. This shall be without prejudice to Articles 6(4), 7(2) and 9(5)'.

10. Article 9(1) of the directive provides:

'Where a Member State ascertains that apparatus within the scope of this directive does not comply with the requirements of this directive, it shall take all appropriate measures in its territory to withdraw the apparatus from the market or from service, prohibit its placing on the market or putting into service or restrict its free movement'.

11. Pursuant to Article 12(1) of the directive apparatus complying with all relevant essential requirements are to bear the CE conformity marking referred to in Annex VII.

12. Article 19 of the directive provides that Member States must no later than 7 April 2000 adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive and forthwith inform the Commission thereof. They must apply the provisions as from 8 April 2000.

13. Further, Article 1 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 [3] (hereinafter 'the 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,

3 — OJ 1995 L 321, p. 1.

— 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'.

14. Article 3 of the decision provides:

'1. The notification requirement laid down in Article 1 shall apply to measures taken by the competent authorities of the Member States so authorised, with the exception of judicial decisions.

Where a particular model or type of product is the subject of several measures, adopted under identical substantive conditions and procedures, only the first of those measures shall be subject to the notification requirement.

2. Article 1 shall not apply to:

— measures taken solely in pursuance of Community harmonisation measures,

— measures notified to the Commission under specific provisions,

— draft measures notified to the Commission under specific Community provisions,

— measures preparing or leading up to the main measure referred to in Article 1, such as preventive measures or investigations,

— measures relating solely to the protection of public morality or public order,

— measures relating to second-hand goods which, with time or use, have become unsuitable for being placed or kept on the market.

3. The initiation of proceedings for judicial review of such a main measure shall under no circumstances result in suspension of the application of Article 1'.

B — *National law*

15. In Italy the regulations governing the marketing and use of radio equipment, including non-professional use, are contained in the Codice Postale (Postal Regulations) (Presidential Decree No 156 of 29 March 1973),[4] as subsequently amended by Law No 209 of 22 May 1980.[5]

16. Article 398 of the Codice Postale provides: 'It is forbidden to build or to import into the national territory, for commercial purposes, to use or to operate, in any capacity, electrical or radio-electrical equipment or systems or networks, which do not comply with the standards established for the prevention and elimination of interference with the transmission and reception of radio signals ...'.

17. Pursuant to Article 398(2) the competent authorities are required to adopt, in conformity with Community legislation, appropriate measures to ensure compliance with those provisions. That led to the adoption of the Ministerial Decree of 8 November 1996[6] which governs the use of frequencies set aside for the use of low-power radio-electrical equipment and the Ministerial Decree of 17 July 1977[7] which provides for the affixing of a stamp attesting to type-approval by the Ministry of Posts and Telecommunications (now the Ministry of Posts and Communications).

18. The provisions of Article 398(3) and (4) read:

'The placing on the market and the importation for commercial purposes of the equipment referred to in the first paragraph are conditional upon the issue of a certificate attesting to compliance or upon production of a declaration of compliance in accordance with rules to be established by decree as referred to in the second paragraph.

The bodies and persons authorised to endorse type-approval stamps or issue compliance certificates as provided for in the preceding paragraph shall be appointed by decree of the Minister for Posts and Telecommunications, acting together with

4 — GURI No 113, 3 May 1973.
5 — GURI No 155, 7 June 1980.
6 — GURI No 274, 22 November 1996.
7 — GURI No 226, 20 August 1977.

the Minister for Industry, Commerce and Crafts'.

19. Further, Article 399 of the Codice Postale provides: 'Any person who infringes the provisions of Article 398 shall be fined in an amount between ITL 15 000 and ITL 300 000 by way of administrative penalty. Where such a person may be classified as a manufacturer or importer of electrical or radio-electrical equipment or systems, the fine to be imposed by way of administrative penalty shall be in an amount between ITL 50 000 and ITL 1 000 000 and, in addition, products or equipment which are not certified as being in conformity in accordance with the provisions of Article 398 shall be subject to confiscation'.

20. The Italian authorities did not transpose the directive into domestic law within the time-limit. However, the Ministry of Posts and Communications, pending approval of the draft law designed to transpose the directive, issued a circular on 17 April 2000 [8] instructing its services to abide by the provisions of the directive as regards the placing on the market and the putting into service of radio equipment. It includes further provisions as regards equipment which does not comply with the requirements, which may be prohibited, removed from the market or banned from use, or the free movement of which may be restricted.

8 — GURI No 101, 3 May 2000.

III — Facts and procedure

21. Radiosistemi Srl (hereinafter 'Radiosistemi') is an Italian company which produces motorised units operated by remote control. It imports the remote controls required for such units.

22. On 2 and 8 February 2000, officers of the Polizia Postale seised certain remote control units, which Radiosistemi had sold to a number of retail outlets, because they did not bear the national type-approval stamp provided for under Article 398 of the Codice Postale.

23. On 18 February 2000, a charge was drawn up alleging that Radiosistemi had infringed Articles 398 and 399(2) of the Codice Postale.

24. Radiosistemi contested the charge before the Prefect of Genoa, requesting the release of the equipment. Radiosistemi contended, *inter alia*, that the technical report provided by the administrative authority which had ordered the seizure showed that the equipment was technically in

conformity with the national legislation in force in that it operated only on the frequencies authorised for such use and that it bore the requisite CE marking.

25. On 20 April 2000, the Prefect of Genoa dismissed the action and ordered Radiosistemi to pay a fine of ITL 330 000 for the contested infringements. The Prefect argued that the failure to affix the type-approval stamp constituted *per se* an infringement of Article 398 of the Codice Postale even where equipment is shown to operate on the lawfully approved frequencies. Further, that provision did not appear to conflict with Community law; nor did the Italian judicial authorities appear to have considered that it did.

26. On 14 June 2000, Radiosistemi lodged an appeal against the decision of the Prefect before the Giudice di Pace. As the Prefect had, in the meantime, ordered the confiscation of the goods already seised with the risk that they would be destroyed, Radiosistemi applied for interim relief in the form of suspension of operation of the contested measure.

27. By order of 15 June 2000, the Giudice di Pace provisionally suspended operation of the contested measure, in view of the urgency of the matter.

28. At the hearing, Radiosistemi reiterated that the equipment in question was in conformity with both national and Community legislation in force and contended that the fine, the seizure and the subsequent confiscation and destruction of the equipment were measures contrary to the principle of proportionality guaranteed by Community law and that the prefectoral decision had been made on 20 April 2000, that is to say, after the deadline (8 April 2000) for the transposition of the directive, and therefore infringed that directive.

29. The Prefect of Genoa produced at the hearing copies of the documents resulting from the preliminary investigation of the contested order; he also produced the memoranda of the Ministry of Posts and Communications of 24 March 2000 and 14 July 2000. It appears, *inter alia*, from the memorandum of 24 March 2000 that while the report of the inspectorate confirms that the remote control units (the goods seised) operate on the frequencies assigned to them, it cannot arrogate to itself authority in the matter of type approvals, which rests with the Direzione Generale di Pianificazione e Gestione Frequenze (department responsible for frequency planning and management) of the Ministry of Posts and Communications. That report states that approval and the type-approval stamp are obligatory. The memorandum of 14 July 2000 notes *inter alia* that the notification required by the directive for the placing on the market of the type of equipment seized was not made until 26 May 2000, that is to say, after the contested prefectoral decision was taken.

30. The Giudice di Pace noted that Radiosistemi was alleged to have infringed Article 398 of the Codice Postale, not because it had imported and sold equipment which objectively failed to meet the technical standards established for the prevention of interference with the reception and transmission of radio signals (use of designated frequencies and electromagnetic compatibility), but simply because the equipment sold did not bear the national type-approval stamp. The investigation carried out by the Ministry had confirmed that the equipment operated on the frequencies authorised under the legislation in force and complied with the harmonised rules on electromagnetic compatibility, as attested to by the CE marking.

31. Given that there were doubts concerning the compatibility of that administrative practice with Community law, the Giudice di Pace di Genova, by order of 16 October 2000, received at the Registry of the Court on 23 October 2000, referred four questions for a preliminary ruling.

Case C-429/00

32. Following a similar seizure and in light of a similar subsequent case between the same parties, the Giudice di Pace di Genova referred the same questions. The order for reference of 11 November 2000 was received at the Registry of the Court on 20 November 2000.

Proceedings before the Court

33. By order of the President of the Court of 14 December 2000, Cases C-388/00 and C-429/00 were joined. Radiosistemi, the Commission and the Government of the United Kingdom submitted written observations, which were amplified at the hearing of 28 November 2001.

IV — The questions referred

34. The orders for reference in both cases contain the following questions:

'1. Is Community law, including its unwritten fundamental principles, compatible with national administrative provisions and/or practices which — by delegating conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service to the sole discretion of the administration — prevent economic

operators from importing, marketing or holding with a view to sale radio equipment without national type-approval, and which does not admit other means, equally reliable but less burdensome, of demonstrating that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorised under national law?

2. Does Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 confer on individuals rights upon which they may rely before the national courts, where the Directive itself has not been formally implemented in national law and the deadline for such implementation has already expired? If that question is answered in the affirmative, is it compatible with Article 7(2) of the Directive to maintain in force legislation and/or administrative practice which, after 8 April 2000, prohibits the marketing and/or the putting into service of radio equipment which does not bear the national type-approval stamp, where it has been confirmed that such equipment makes efficient and proper use of the radio frequencies authorised under national law, or where it is easy to verify that this is the case?

3. On a proper construction of Article 1 of Decision 3052/95/EC of the European Parliament and of the Council of 13 December 1995, how is the term "measure" to be interpreted and does that term cover the situation where the administrative authorities, having seized a particular model or a particular type of product which is lawfully marketed in another Member State, continue to withhold that model or product after it has been ascertained by the public authorities responsible for technical checks that the product in question is in conformity with both national and Community legislation, that is to say, after the evidential purposes justifying the initial seizure have been served?

4. Is Community law, in the light of the principles of non-discrimination and proprotionality, compatible with penalties such as those provided for under Article 399 of the Codice Postale Italiano Presidential Decree No 156/1973?'

V — Assessment

The first question

35. By the first question the national court seeks to ascertain whether Italian administrative provisions and/or practices are compatible with Community law. The case concerns a provision which precludes economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment which does not hear the national type-approval, and which does not admit other means, equally reliable but less burdensome, of demonstrating that such

equipment is in conformity with Italian legislation concerning the proper use of radio frequencies.

36. The first question, in contrast to the second, refers to the period prior to the date by which the directive should have been transposed into domestic law.

37. It should be noted at the outset that until a specific sector is governed by Community legislation Member States are free to maintain or adopt national measures provided that the free movement of goods is not restricted. Thus, quantitative restrictions on imports and all measures having equivalent effect are prohibited. According to the Court's settled case-law, measures enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered to be measures having an effect equivalent to quantitative restrictions within the meaning of Article 28 EC. [9] Derogations from that provision are possible either where the exception provided for under Article 30 applies or where there are overriding requirements of the public interest. [10] However, for either exception to apply, the requirements of necessity and proportionality must be satisfied.

38. This case concerns a national type-approval stamp. The underlying purpose of the Italian requirement of a national type-approval stamp is to check whether radio equipment satisfies national regulations designed to prevent interference with the reception and transmission of radio signals. In the absence of harmonisation and in the interests of proper use of frequencies, such rules on conformity may be justified. However, where the absence of a national type-approval stamp is systematically interpreted as meaning that the goods in question are not in conformity, such a requirement is disproportionate. That seems to be the case here. Whilst Article 398 of the Codice Postale is neutral as regards the verification of conformity, which means that in addition to the type-approval stamp issued by the Ministry other means of verification are also possible, such as certificates, statements and/or declarations of compliance or other such proof issued by the authorities designated for the purpose, that possibility is limited by the ministerial decrees implementing Article 398 of the Codice Postale making the type-approval stamp issued by the Ministry of Posts and Communications the sole proof of conformity. The result, which is that economic operators are not permitted to employ any other means to prove that the equipment satisfies the requirements concerning the proper use of frequencies authorised by domestic law, entails a restriction which goes beyond what is necessary. Thus, the effect given by the ministerial decrees to Article 398 of the Codice Postale is disproportionate.

39. Since the way in which that provision of Article 398 of the Codice Postale, albeit

9 — Case 8/74 *Dassonville* [1974] ECR 837.
10 — Case 120/78 *Rewe* [1979] ECR 649.

justified as to its purpose, has been implemented and applied is disproportionate, it is incompatible with Article 28 EC.

The second question

40. As already indicated in paragraph 36, this question refers to the period in which the directive should have been transposed into domestic law. It is also not disputed that by 8 April 2000 the Italian Government had still not fulfilled its obligation to transpose the directive as required under that directive. Accordingly, the national court asks whether the directive confers rights on individuals and, if so, whether the Italian practice of prohibiting the marketing or putting into service of radio equipment which does not bear the national type-approval stamp is compatible with Article 7(2) of the directive.

41. According to the Commission, Article 8(1) of the directive has in any case direct effect. The United Kingdom Government takes the view that that also applies to the second sentence of Article 6(1), which in its opinion is the relevant provision in this case, and to Article 7(1) of the directive, whilst Radiosistemi contends that the whole directive has direct effect. All the parties contend that the Italian Government, by failing to transpose the directive within the time-limit, cannot rely on the exception provided for in Article 7(2) of the directive.

42. For the purpose of resolving this question I will first consider which provision or provisions of the directive apply to the facts of the case in the main proceedings and whether such provision or provisions have direct effect. Finally, I will consider whether the Italian authorities may in respect of the contested measures rely on the derogation in Article 7(2) of the directive.

43. Article 6 of the directive refers to placing on the market, whilst Article 8 deals with free movement. Under Article 6 of the directive Member States from where the equipment originates are obliged to check that the equipment satisfies the requirements of the directive. Further, that provision stipulates that no further national provisions be adopted in respect of placing on the market. Article 8 of the directive requires the country importing the equipment not to restrict or impede the marketing of equipment lawfully placed on the market elsewhere in the Community.

44. Together with the Commission and unlike the United Kingdom Government, I consider that in this case Article 8 of the directive and not Article 6 applies.

45. Article 6(1) of the directive cannot have any bearing on this case in so far as no remote control units operating on radio frequencies are currently produced in Italy. [11]

46. As indicated above, Article 8(1) of the directive imposes an obligation on the importing State: it provides that Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of apparatus bearing the CE marking.

47. Together with the United Kingdom and the Commission, I consider that the wording of that provision, which imposes an unconditional obligation on Member States to authorise apparatus bearing the CE marking, indicates that it has direct effect. That provision is sufficiently clear, precise and unconditional to be relied upon by an individual before a national court. [12]

48. It remains therefore to answer the question as to the degree of manœuvre the directive leaves to the Member States. From Article 8(1) it follows that Italy is obliged to authorise equipment that satisfies the directive and is placed on the market elsewhere in the Community. However, under Article 7(2) of the directive Member States have conditional powers to restrict the putting into service of radio equipment. Such restrictions may be enforced solely for reasons related to the effective use of the radio spectrum, avoidance of harmful interference or matters relating to public health. Thus, such a case is an exception which owing to its nature must be interpreted strictly.

49. I would point out that as long as the Italian Government has not transposed the directive into domestic law it cannot rely on the derogation provided for under Article 7(2) of the directive.

50. In view of its failure to transpose the directive within the time-limit, even if the Italian Government were able to rely on Article 7(2) of the directive in respect of economic operators, it would find it to be of no use. As already indicated, the case concerns an exception, which must be interpreted strictly. The requirement for a national type-approval stamp under Article 398 of the Codice Postale has no connection whatsoever with the grounds for a derogation set out in Article 7(2) of the directive. Consequently, the Italian

11 — Article 6(4) of the directive contains a procedural rule for the manufacturer or his authorised representative established within the Community or the person responsible for placing the equipment on the market in the case of radio equipment using frequency bands whose use is not harmonised throughout the Community. In this case, Radiosistemi took note of that provision and of the provisions based on other relevant directives, Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility (OJ 1989 L 139, p. 19), as amended.

12 — Case 148/78 *Ratti* [1979] ECR 1629.

Government cannot under any circumstances justify the application of that provision by reference to Article 7(2) of the directive.

The third question

51. The third question concerns the meaning of 'measure' for the purposes of Article 1 of the decision. More specifically, it refers to the question whether continuing to withhold a certain model or product lawfully marketed in another Member State, even after it has been ascertained by the national authorities responsible for technical checks that the product is in conformity with both national and Community legislation, that is to say, after the evidential purposes justifying the initial seizure have been served, constitutes a measure within the meaning of the said decision.

52. The Decision makes provision for a notification procedure. The purpose of that procedure is to ensure that the Commission is aware of whether any distortion actually exists, particularly in sectors of intra-Community trade not yet harmonised, caused by national legislation or practices. Possible problems may thereby be identified and suitable solutions found. Accordingly, national authorities must notify at the earliest opportunity the Commission and the other Member States of any measure which restricts the free movement of goods lawfully marketed in another Member State.

53. As the Commission has rightly pointed out, that procedure is a sort of safety net. It applies only when there is no other specific obligation under Community legislation to give notification. Consequently, after the entry into force of the directive, and more particularly following the transposition of the directive into domestic law, it is no longer the notification procedure provided for in the decision which applies, but the procedure provided for under Article 9 of the directive.

54. In any event, the purpose of the decision implies in my opinion that the Italian authorities should in any case have notified the Commission that they had seized and removed from the market equipment which did not bear the national type-approval stamp. Further, I share the Commission's view that notification once is sufficient and every individual seizure need not be reported. What matters is that that decision should be given and continue to receive practical effect. That means that notification must accordingly be given where distortions in intra-Community trade occur or are likely to occur as a result of national legislation, in this case Article 398 of the Codice Postale, and its application.

55. However, under Article 3 of the decision not all measures are required to be notified. Such is the case with preventive measures or investigations designed to prepare for the adoption of the main measure provided for under Article 1. In other words, 'intermediate' measures need not be notified, but any subsequent main measure must be notified.

56. The question therefore is whether the exception provided for under Article 3 may apply to the administrative measure of seizure. It is not disputed that the aim of the seizure carried out by the agents of the Polizia Postale was to remove from the Italian market goods which had already been lawfully marketed in the Community. Further, it appears that the goods were not released after it had been ascertained that they objectively satisfied the technical standards for the prevention of interference with the reception and transmission of radio signals. Thus, the aforementioned measures were not adopted on the ground that there was doubt as to whether the goods were in conformity with the legislation in force, and the seizure must be regarded as a penalty applied because the goods did not bear the national type-approval stamp.

57. In this case, the measure is neither a preventive measure nor an investigation, but a measure within the meaning of Article 1 of the decision. It should therefore have been notified.

Fourth question

58. By the last question, the national court seeks to ascertain whether the penalty provided for under Article 399 of the Codice Postale Italiano is compatible with Community law, particularly in relation to the prohibition on discrimination and the principle of proportionality.

59. That provision contains a stricter penalty for manufacturers or importers of electrical or radio-electrical equipment. In addition to confiscation, they are subject to an administrative fine ranging from ITL 50 000 to ITL 1 000 000 in the event of an infringement of Article 398. Any other person who contravenes those provisions is subject to a lesser penalty, namely an administrative fine ranging from ITL 15 000 to ITL 300 000.

60. Radiosistemi has argued that, in view of the fact that all remote control units are imported, that penalty discriminates against importers. However, the Commission and the United Kingdom Government have argued that a difference in the size of the fine can be justified.

61. The second part of the question refers to the proportionality of the penalties. Radiosistemi contends that in this case a financial penalty exists in that the type-approval procedure, as provided for in the

Italian legislation, is linked to the affixing of a stamp. The United Kingdom Government observes in that respect that it is a penalty for failure of the goods to bear the national type-approval stamp. Since the Italian legislation is incompatible with Community law, the penalty is also incompatible with Community law. However, the United Kingdom claims that the situation would be different if the penalties were intended to ensure compliance with the directive. In that regard, Member States have powers under the provisions set out in Article 9 of the directive. The Commission considers that the penalties (fines and confiscation) for manufacturers or importers are for the most part incompatible with Article 28 EC because they are disproportionate to the object pursued by the relevant Italian legislation.

62. That Italian practice is *per se* incompatible with Article 28 EC. I therefore share the view of the United Kingdom Government. In the present case, the penalty is imposed for failure to bear the national type-approval stamp. In the answer to the first question I have already pointed out that the requirement for a national type-approval stamp, which does not admit of other forms of equally reliable evidence as to conformity, does not satisfy the requirement of proportionality. Thus, it is incompatible with Article 28 EC. It follows that, *a fortiori*, to impose a penalty for failure to bear a national type-approval stamp is incompatible with Community law. [13]

63. Even now that the time-limit for the transposition of the directive has expired, the situation is not substantially different. Since then only harmonised type-approval procedures and the CE marking have been in force. That is in no way affected by the fact that the Italian Government has not transposed the directive in due time. As the Court has already held, a Member State which has not yet adapted its domestic law to the directive — even if that law provides for penal sanctions — cannot apply that domestic law to persons who have acted in compliance with the provisions of the directive after the expiry of the period fixed for its implementation. [14]

64. I therefore come to the conclusion that the penalty is incompatible with Community law in that it is a penalty based on a regulation that is itself incompatible with Community law.

65. If I take the question in broader terms, namely as asking whether a system of sanctions such as that provided for under Article 399 of the Codice Postale is generally compatible with Community law and particularly with the prohibition against

13 — Cases 88/77 *Schonenberg* [1978] ECR 473; Case 179/78 *Rivoira and Others* [1979] ECR 1147 and Case 269/80 *Tymen* [1981] ECR 3079.

14 — *Ratti*, cited above in footnote 12.

discrimination and the principle of proportionality, I reach the following conclusions.

66. The directive leaves the national authorities a degree of manœuvre. It applies in respect of implementing both the directive itself and the national provisions not yet harmonised, for example those concerning the use of frequencies. However, even such implementing measures must satisfy the criteria laid down by case-law. They must be, *inter alia*, effective, proportional and dissuasive. [15]

67. As regards the prohibition on discrimination, I share the view of the Commission and the United Kingdom Government. A difference in the size of the penalty may be justified in so far as there are differences in the obligations and responsibilities between, on the one hand, manufacturers and importers and, on the other hand, other economic operators such as retailers. The fact that the penalty applies in practice solely to imported products, given that currently no remote control units are produced in Italy, may be regarded as a 'purely fortuitous factual circumstance, which may, moreover, change with the passage of time'. [16] That may not be linked to the conclusion that the penalty in question is discriminatory.

68. The penalties give rise to more serious cause for concern when they are examined from the point of view of the principle of proportionality. The Court is strict with regard to penalties linked to administrative provisions, which are otherwise allowed, when such penalties are disproportionate. I refer, *inter alia*, to *Cayrol*. [17] In that case, the Court held that any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods covered by specific measures of commercial policy must be regarded as having an effect equivalent to a quantitative restriction prohibited by the Treaty.

69. Thus, there must be justification and the penalty must be proportionate. Consequently, although there can be penalties for failure to comply with national provisions concerning the proper use of frequencies, the automatic seizure of goods for not bearing the required stamp is without justification. That is sufficient to make it incompatible with the principle of proportionality.

15 — See, for example, Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

16 — Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621.

17 — Case 52/77 *Cayrol* [1977] ECR 2261.

70. Where it is established that the goods have been lawfully placed on the market elsewhere in the Community and that they also satisfy all the conditions laid down both by the harmonised regulations and by the Italian legislation on the use of radio frequencies, a penalty based on the mere infringement of a procedural regulation must be restricted in scope. In such a case, it is excessive to seize the goods and/or impose a heavy fine. At most, the view may be taken, as the Commission also suggested, that seizure may be justified for a limited period, namely in cases where the equipment in question does not have the proper documentation needed to verify conformity. Otherwise, it is sufficient to impose an administrative fine, provided that its size is proportionate to the gravity of the offence.

71. In light of the above arguments, I conclude that seizure and/or a heavy fine for infringement of a procedural regulation is not compatible with the purpose of Article 28 EC or with that of the directive.

VI — Conclusion

72. In light of the above, I propose that the Court answer the questions referred for a preliminary ruling by the Giudice di Pace di Genova as follows:

(1) Community law, particularly Article 28 EC, precludes national rules which prevent economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment without national type-approval where such persons do not have the opportunity to prove that such equipment satisfies national requirements concerning the use of radio frequencies.

(2) Article 8(1) of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity confers rights upon individuals on which they may rely before the national courts where the Member State has not yet transposed that directive into domestic law after the expiry of the time-limit fixed for its implementation — 8 April 2000. Since by 8 April 2000 the Italian Republic had still not transposed the directive into domestic law, it may not rely on the derogation provided for in Article 7(2) of the directive. Moreover, that provision does not permit, after 8 April 2000, the application of legislative provisions or administrative practices which impede the placing on the market or the putting into service of equipment which does not bear the national type-approval stamp, where it has been confirmed that such equipment makes efficient and proper use of the radio frequencies authorised under national law, or where it is easy to verify that this is the case.

(3) A 'measure' within the meaning of Article 1 of Decision 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 covers all the provisions adopted by a Member State, with the exception of judicial decisions, which have the effect of restricting the free movement of goods lawfully produced or placed on the market elsewhere in the Community.

Such is the case in respect of the systematic seizure and confiscation of radio equipment which is lawfully placed on the market elsewhere in the Community and in respect of which it has been ascertained by the public authorities that it is in conformity with both national and Community legislation, on the sole grounds that such equipment does not bear a national type-approval stamp. Such a measure restricts the free movement of goods lawfully placed on the market elsewhere in the Community and therefore comes within the meaning of 'measure' under Article 1 of Decision 3052/95.

(4) Community law does not preclude a system of penalties as provided for under Article 399 of the Codice Postale, provided that the size of the fines is proportionate to the legal interest safeguarded by the regulation infringed. However, Community law does preclude the systematic seizure and confiscation of the goods connected with the infringement, as provided for in that article.