OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 28 April 2010[1]

Table of contents

I — Introduction ..... I - 9993

II — Legal context ..... I - 9994

A — Directive 89/106 ..... I - 9994

B — Directive 89/686 ..... I - 9996

C — Decision 93/465 ..... I - 9997

III — European Standard 795 ..... I - 9997

IV — Facts and the questions referred for a preliminary ruling ..... I - 10000

V — Procedure before the Court ..... I - 10002

VI — The parties' arguments ..... I - 10003

A — First question ..... I - 10003

B — Second question ..... I - 10004

C — Third question ..... I - 10005

D — Fourth question ..... I - 10006

E — Fifth question ..... I - 10006

F — Sixth question ..... I - 10007

G — Seventh and eighth questions ..... I - 10008

1 — Original language: German.

VII — Legal assessment ..... I - 10009

A — General ..... I - 10009

B — First question ..... I - 10010

C — Second question ..... I - 10014

D — Third question ..... I - 10016

E — Fourth question ..... I - 10018

F — Fifth question ..... I - 10021

G — Sixth question ..... I - 10021

H — Seventh and eighth questions ..... I - 10022

VIII — Conclusion ..... I - 10023

I — Introduction

1. In the present preliminary-ruling proceeding under Article 234 EC, [2] the Rechtbank's-Gravenhage ('the referring court') has submitted to the Court eight questions concerning the interpretation of 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 [3] and Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment. [4]

2. In essence, the questions from the referring court seek clarification as to whether anchor devices for protection against falls from a height when working on flat roofs,

2 — In accordance with the Treaty of Lisbon, of 13 December 2007, amending the Treaty on European Union and the Treaty establishing the European Community (OJ 2007 C 306, p. 1), preliminary-ruling proceedings are now governed by Article 267 TFEU.

3 — OJ 1989 L 40, p. 12, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty (OJ 2003 L 284, p. 1).

4 — OJ 1989 L 399, p. 18, as amended by Regulation (EC) No 1882/2003, cited in footnote 3.

which include an anchor firmly attached to the roof, may fall within the scope of Directive 89/106 and/or that of Directive 89/686. In that connection, the referring court also wishes to know whether, and under what conditions, such anchor devices may bear the CE marking.

II — Legal context

A — *Directive 89/106*

3. Article 1 of Directive 89/106 reads as follows:

'(1) This Directive shall apply to construction products in so far as the essential requirements in respect of construction works under Article 3(1) relate to them.

(2) For the purposes of this Directive, "construction product" means any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works.

"Construction Products" are hereinafter referred to as "products"; construction works including both buildings and civil engineering works are hereinafter referred to as "works".'

4. Article 2 of Directive 89/106 provides as follows:

'(1) Member States shall take all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for this intended use, that is to say 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 when and where such works are subject to regulations containing such requirements.

(2) (a) When products are subject to other Directives with regard to other aspects and which also provide for the affixing of the CE conformity marking, referred to in Article 4(2), the latter shall indicate that the products are also presumed to conform to the provisions of those other Directives.

...'

5. Article 3 of Directive 89/106 reads as follows:

‘(1) The essential requirements applicable to works which may influence the technical characteristics of a product are set out in terms of objectives in Annex I.

…

(3) The essential requirements shall be given concrete form in documents (interpretative documents) for the creation of the necessary links between the essential requirements laid down in paragraph 1 and the standardisation mandates, mandates for guidelines for European technical approval or the recognition of other technical specifications within the meaning of Articles 4 and 5.’

6. Article 4 of Directive 89/106 provides as follows:

‘(1) Standards and technical approvals shall, for the purposes of this Directive, be referred to as “technical specifications”.

For the purposes of this Directive, harmonised standards shall be the technical specifications adopted by CEN, Cenelec or both, on mandates given by the Commission in conformity with Directive 83/189/EEC on the basis of an opinion given by the Committee referred to in Article 19 and in accordance with the general provisions concerning cooperation between the Commission and these two bodies signed on 13 November 1984.

(2) 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 satisfy all the provisions of this Directive, including the conformity assessment procedures laid down in Chapter V and the procedure laid down in Chapter III. …’

7. Article 7 of Directive 89/106 reads as follows:

‘(1) In order to ensure the quality of harmonised standards for products, the standards shall be established by the European standards organisations on the basis of mandates given by the Commission in accordance with the procedure laid down in Directive 83/189/EEC and, after consulting the committee referred to in Article 19, in accordance with the general provisions concerning cooperation between the Commission and these bodies signed on 13 November 1984.

(2) The resulting standards shall be expressed as far as practicable in product performance terms, having regard to the interpretative documents.

(3) Once the standards have been established by the European standards organisations, the Commission shall publish the references of the standards in the "C" series of the *Official Journal of the European Communities*.'

B — *Directive 89/686*

8. Article 1 of Directive 89/686 reads as follows:

'(1) This Directive applies to personal protective equipment, hereinafter referred to as "PPE".

It lays down the conditions governing its placing on the market and free movement within the Community and the basic safety requirements which PPE must satisfy in order to ensure the health protection and safety of users.

(2) For the purposes of this Directive, PPE shall mean any device or appliance designed to be worn or held by an individual for protection against one or more health and safety hazards.

PPE shall also cover:

(a) a unit constituted by several devices or appliances which have been integrally combined by the manufacturer for the protection of an individual against one or more potentially simultaneous risks;

(b) a protective device or appliance combined, separably or inseparably, with personal non-protective equipment worn or held by an individual for the execution of a specific activity;

(c) interchangeable PPE components which are essential to its satisfactory functioning and used exclusively for such equipment.

(3) Any system placed on the market in conjunction with PPE for its connection to another external, additional device shall be regarded as an integral part of that equipment even if the system is not intended to be worn or held permanently by the user for the entire period of risk exposure.

...'

9. Under Article 3 of Directive 89/686 the PPE referred to in Article 1 must satisfy the basic health and safety requirements laid down in Annex II.

10. Under Article 4(1) of Directive 89/686 Member States may not prohibit, restrict or hinder the placing on the market of PPE or PPE components which comply with the provisions of that directive and which bear the CE marking attesting their conformity to all the provisions of that directive, including the certification procedures in Chapter II.

C — *Decision 93/465*

11. Article 1 of Council Decision 93/465/EEC [5] of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedures and the rules for the affixing and use of the CE conformity marking, which are intended to be used in the technical harmonisation directives reads as follows:

'(1) The procedures for conformity assessment which are to be used in the technical harmonisation directives relating to the marketing of industrial products will be chosen from among the modules listed in the Annex and in accordance with the criteria set out in this Decision and in the general guidelines in the Annex.

…

(2) This Decision lays down rules for affixing the CE conformity marking provided for in Community legislation concerning the design, manufacture, placing on the market, entry into service or use of industrial products.

…'

III — European Standard 795

12. European Standard 795 ('EN 795') was approved by the European Committee for Standardisation on 29 March 1996 and published by the Commission on 12 February 2000 in the framework of the implementation

5 — OJ 1993 L 220, p. 23.

of Directive 89/686 as a harmonised standard within the meaning of that directive. [6]

13. EN 795 reads as follows:

‘1. Scope

This standard specifies requirements, test methods and instructions for use and marking for anchor devices designed exclusively for use with personal protective equipment against falls from a height.

This standard does not apply to hooks designed to EN 517 or walkways to EN 516, nor to fixed anchor points forming part of the original structure.

…

3. Definitions

For the purposes of this standard the following definitions apply.

3.1 Anchor device: An element or series of elements or components which incorporates an anchor point or anchor points.

3.2 Element: A part of a component or a sub-system. Ropes, webbing, attachment elements, fittings and anchor lines are examples of elements.

…

3.4 Anchor point: An element to which personal protective equipment can be attached after installation of the anchor device.

3.5 Structural anchor: An element, or elements, permanently secured to a structure, to which an anchor device or personal protective equipment can be attached.

…

6 — Commission Communication of 12 February 2000 in the framework of the implementation of Council Directive 89/686/EEC of 21 December 1989 in relation to personal protective equipment, as amended by Directives 93/68/EEC, 93/95/EEC and 96/58/EC (OJ 2000 C 40, p. 7). It is expressly stated, however, that this publication does not concern the equipment described in classes A (structural anchors), C (anchor devices employing horizontal flexible lines) and D (anchor devices employing horizontal rigid anchor rails); see point 121 of the present Opinion.

3.13 Classes

4.3 Specific requirements for anchor devices

3.13.1 Class A

4.3.1 Class A

3.13.1.1 Class A1

4.3.1.1 Class A1 – Type tests for anchor devices designed to be secured to vertical, horizontal and inclined surfaces

Class A1 comprises structural anchors designed to be secured to vertical, horizontal and inclined surfaces – e.g. walls, columns, lintels (see figure 1).

A static test shall be carried out as described in 5.2.1 with a force of 10 kN applied in the direction in which the force can be applied in service. The force shall be maintained for 3 min. The anchor device shall hold the force.

3.13.1.2 Class A2

Class A2 comprises structural anchors designed to be secured to inclined roofs (see figure 2).

A dynamic strength test shall be carried out as described in 5.3.2. The drop mass shall be arrested.

…

…

5.2 Static strength test procedures

5.2.1 Class A1 – Anchor devices

Install the anchor device according to its installation instructions in a sample of the type of construction in which it is intended for use …

Install the 4.1.1 static strength test apparatus to apply the test force in the direction or directions of use in service and submit the anchor point to the static test force specified in 4.3.1.1. Observe that the anchor device holds the force.

…'

IV — Facts and the questions referred for a preliminary ruling

14. The main proceedings concern a dispute between two manufacturers of anchor devices for protection against falls from a height when working on flat roofs. The fundamental question is whether the anchor device of the other manufacturer is safe and whether the respective anchor devices may or must bear the CE marking.

15. The first applicant in the main proceedings, Latchways plc, manufactures the anchor device 'Mansafe Constant Force Post'. The second applicant, EuroSafe Solutions BV, is the Dutch distributor of that device. The first defendant in the main proceedings, Kedge Safety Systems BV, is the manufacturer of the anchor device 'Kedge Safety', which is sold by the second defendant, Consolidated Nederland BV.

16. The essential component of the anchor devices at issue is an anchor which must be firmly attached to a roof. A lanyard can be attached to this anchor; the lanyard, in turn, can be attached to a harness worn by the roofer.

17. From a technical viewpoint, the anchor device Mansafe Constant Force Post is characterised by the fact that the anchor is secured to the roof by means of screws. The Kedge Safety anchor, by contrast, is attached to the roof by causing its rosette component to adhere to the bituminous roof cladding. Consequently, both devices must be classified as Class A1 anchor devices within the meaning of EN 795.

18. In 2004 a German test and certification organisation tested the Kedge Safety device on behalf of the defendants in the main proceedings as a class A1 anchor device in accordance with points 5.2.1 and 5.3.2 of EN 795:1996. On 6 October 2004, on the basis of that test, a confirmation and test certificate were issued, stating that the Kedge Safety device satisfied the standard in those respects which had been tested.

19. In 2005 the applicants in the main proceedings had the Kedge Safety device tested twice by another test organisation, which concluded that, under certain climatic conditions, the device did not have sufficient weight-bearing strength and therefore, under those conditions, did not satisfy EN 795.

20. On the basis of those tests, the applicants in the main proceedings called upon the defendants to discontinue the sale of the Kedge Safety device because it was unsafe and to recall from customers the anchor devices of that type already sold. The defendants refused to do so.

21. Against the background of the dispute concerning the safety of the Kedge Safety device, the applicants in the main proceedings seek, inter alia, a finding that the Kedge Safety device may be sold only with the CE marking. Alternatively, they seek, inter alia, a finding that the defendants should refrain from any communication to the effect that the Kedge Safety device complies with EN 795.

22. The defendants in the main proceedings lodged a counterclaim, seeking, inter alia, a finding that the applicants have wrongly affixed a CE marking to the Mansafe Constant Force Post device.

23. The question before the referring court is, therefore, whether the anchor devices at issue may fall within the scope of Directive 89/106 and/or Directive 89/686. The referring court must also decide whether, and under what conditions, such anchor devices may or must bear a CE marking.

24. As the referring court is uncertain as to the interpretation of the relevant provisions of Directives 89/106 and 89/686, it has referred the following questions to the Court of Justice for a preliminary ruling:

1. Do Class A1 anchor devices within the meaning of European standard EN 795 (which are intended to remain in position permanently) fall exclusively within the scope of Directive 89/106?

2. If the answer to Question 1 is in the negative, do these anchor devices – possibly, in that case, as an item of personal protective equipment – fall within the scope of Directive 89/686?

3. If the answers to Questions 1 and 2 are in the negative, is it necessary, in the light of Annex II to Directive 89/686, in particular point 3.1.2.2 thereof, to assess whether personal protective equipment that is covered by that directive by itself fulfils the basic requirements of that directive, or is it necessary also to consider whether the anchor device to which the protective equipment concerned is connected is safe in the foreseeable conditions of use, as defined in Annex II?

4. Does Community law and, in particular, Decision 93/465[7] allow for the option of applying a CE marking to an anchor device as referred to in Question 1 as evidence of compliance with Directive 89/686 and/or Directive 89/106?

5. If the answer to Question 4 is either wholly or partly in the affirmative, what procedure(s) should be followed in determining compliance in respect of Directive 89/686 and/or Directive 89/106?

6. Is European standard EN 795 to be regarded – in respect of anchor devices as referred to in Question 1 – as Community law to be interpreted by the Court of Justice of the European Communities?

7. If the answer to Question 6 is in the affirmative, is European standard EN 795 to be interpreted as meaning that the anchor device referred to in Question 1 must be tested (by a Notified Body) under foreseeable conditions of use (such as external temperatures, weather conditions, ageing of the anchor device itself and/or of the materials by which it is attached, or the roof construction)?

8. If the answer to Question 7 is in the affirmative, must the tests be carried out in accordance with user restrictions (referred to in the instructions for use)?

V — Procedure before the Court

25. The order for reference dated 23 April 2008 was lodged at the Court Registry on 29 April 2008. The applicants and the defendants in the main proceedings, the

7 — The order for reference erroneously refers to Directive 93/465/EEC.

Governments of the Kingdom of the Netherlands and of the Kingdom of Belgium and the Commission submitted observations in the written procedure. The representatives of the applicants and the defendants in the main proceedings and the Commission were heard at the sitting on 25 February 2010.

VI — The parties' arguments

A — *First question*

26. The first question, whether Class A1 anchor devices within the meaning of EN 795 fall exclusively within the scope of Directive 89/106, is answered in the affirmative by the defendants in the main proceedings. The applicants, the Commission and the Netherlands and Belgian Governments reply in the negative.

27. The defendants in the main proceedings refer to Article 1(2) of Directive 89/106, which defines 'construction product' as any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works. As the anchor devices at issue are intended to be permanently attached to a roof, they should be classified as construction products to which Directive 89/106 applies, in accordance with Article 1(1) of that directive. The defendants find support for their argument in the fact that the European Commission's Directorate-General for Enterprise and Industry has been considering the grant of a European technical approval in accordance with Article 8 et seq. of Directive 89/106 for the Kedge Safety anchor device since 2007. [8]

28. By contrast, the applicants in the main proceedings take the view that the anchor devices at issue are not made in order to be incorporated in a permanent manner in construction works within the meaning of Directive 89/106, which applies only to products that are necessary for construction works such as, for example, walls, ceilings, heating, etc. The anchor devices at issue, however, must be classified as buildings accessories which, after the completion of construction works, can be attached and subsequently dismantled without affecting the fabric of the construction.

8 — In that connection the defendants in the main proceedings have produced, as Annex 12 to their written observations of 11 August 2008, a letter from the European Commission's Directorate-General for Enterprise and Industry dated 15 March 2007. The letter is, in substance, confirmation by the Commission that the Kedge Safety device was admitted to the test procedure for the grant of a European technical approval in accordance with Article 9(2) of Directive 89/106.

29. The Commission points out that Directive 89/106 does not in itself refer to any essential requirements for construction products, but concerns primarily the safety of construction works. As the anchor devices at issue are not affected by the essential requirements for construction works set out in Annex I to the Directive, the devices do not, in principle, fall within the scope of Directive 89/106.

30. In the course of the hearing the Commission discussed the contradiction between that position and the steps taken by the European Commission's Directorate-General for Enterprise and Industry, which has been considering the grant of a European technical approval for the Kedge Safety anchor device in accordance with Article 8 et seq. of Directive 89/106 since 2007. In essence, the Commission stated that the competent Commission services were now in agreement that Class A1 anchor devices within the meaning of EN 795 do not fall within the scope of Directive 89/106. Consequently, the admission by the Directorate-General for Enterprise and Industry of the Kedge Safety device to the test procedure for the grant of a European technical approval pursuant to Article 9(2) of Directive 89/106 must be deemed a mistake.

31. The Netherlands Government, referring to the essential requirements for construction works set out in Annex I to Directive 89/106, argues that only products which, in the light of those requirements, contribute to the proper functionality of buildings can be classified as construction products within the meaning of Directive 89/106. In the opinion of the Netherlands Government, the anchor devices at issue do not make any such contribution.

B — *Second question*

32. The second question, whether Class A1 anchor devices within the meaning of EN 795 may fall within the scope of Directive 89/686, is answered in the affirmative by the applicants in the main proceedings and the Belgian Government. The defendants, the Netherlands Government and the Commission reply in the negative.

33. The applicants in the main proceedings take the view, in essence, that the anchor devices at issue should be classified as connection systems for the purposes of Article 1(3) of Directive 89/686 and therefore fall within the scope of that directive. In particular, a lanyard, which must be described as personal protective equipment ('PPE'), can be attached to a construction by means of these anchor devices.

34. In the opinion of the Belgian Government also, Class A1 anchor devices must be

classified as PPE within the scope of Directive 89/686. The Belgian Government states in particular that, under Article 2(1) of Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace, [9] any addition or accessory to PPE is to be regarded as PPE within the meaning of that directive. As Class A1 anchor devices must be deemed an addition or accessory to PPE, they must, by analogy, also be classified as PPE within the framework of Directive 89/686.

35. The Commission, by contrast, takes the view that Class A1 anchor devices do not fall within the scope of Directive 89/686. With regard to the devices at issue, which provide protection against falls from a height, a distinction must be made between the harness, the lanyard and the anchor. The harness must be deemed to be PPE within the meaning of Article 1(2) of Directive 89/686, while the lanyard must be regarded as a connection system for the purposes of Article 1(3). Consequently, those two components fall within the scope of Directive 89/686. The anchor, however, must be classified as an external device within the meaning of Article 1(3) of Directive 89/686 and therefore does not fall within its scope. A similar view was expressed by the defendants in the main proceedings and the Netherlands Government.

C — *Third question*

36. The referring court requires a reply to the third question in the event that Class A1 anchor devices within the meaning of EN 795 do not fall within the scope of Directives 89/106 and 89/686. In that context, the referring court asks, in particular, whether, in assessing whether PPE which is covered by Directive 89/686 and which is to be attached to a Class A1 anchor device meets the safety requirements of Directive 89/686, it is necessary also to consider whether the aforementioned anchor device is safe under the foreseeable conditions of use within the meaning of Annex II to Directive 89/686.

37. This third question is answered in the affirmative by the applicants in the main proceedings. The defendants, the Netherlands Government and the Commission reply in the negative.

38. The applicants submit that anchorage points within the meaning of point 3.1.2.2 of

9 — OJ 1989 L 393, p. 18.

Annex II to Directive 89/686 are safe only if they meet the requirements of EN 795.

39. In the Commission's opinion, it is obvious that the safety of PPE which is designed to prevent falls from a height or their effect, depends also on the safety of the anchorage point to which the body harness is attached by the connection system. Nevertheless, the basic safety requirements according to Directive 89/686 apply only to PPE and not to anchor devices which do not fall within the scope of that directive. A similar view was expressed by the Netherlands Government and the defendants in the main proceedings.

D — *Fourth question*

40. By the fourth question the referring court asks whether a CE marking may be affixed on an optional basis to Class A1 anchor devices within the meaning of EN 795 as evidence of compliance with Directive 89/106 and/or Directive 89/686.

41. The reply given to this fourth question by the defendants in the main proceedings, the Netherlands Government, the Belgian Government and the Commission is in the negative.

42. In the Commission's opinion, neither of the abovementioned directives nor Decision 93/465 provides for the possibility of optional use of the CE marking. As the anchor devices at issue do not fall within the scope of Directives 89/106 and 89/686, they cannot bear a CE marking as evidence of compliance with those directives.

43. The defendants in the main proceedings also proceed from the principle that optional use of the CE marking is excluded. However, as the anchor devices at issue fall within the scope *ratione materiae* of Directive 89/106, a CE marking is possible pursuant to that directive, provided that the devices have received a European technical approval in accordance with Chapter III of Directive 89/106.

E — *Fifth question*

44. The referring court requires a reply to the fifth question in the event that Class A1 anchor devices within the meaning of EN 795 can, on an optional basis, bear a CE marking as evidence of conformity with Directive 89/686 and/or Directive 89/106. In that context it asks, in particular, what procedure or procedures should be followed in

determining whether there is compliance in respect of Directive 89/686 and/or Directive 89/106.

45. In view of the parties' replies to the fourth question, the fifth question is answered by the defendants alone. In essence, they repeat their argument that a CE marking may be affixed to the devices at issue under Directive 89/106, provided that they have been granted a European technical approval in accordance with Chapter III of Directive 89/106.

F — *Sixth question*

46. By its sixth question the referring court asks whether EN 795 is to be regarded, in respect of the Class A1 anchor devices referred to therein, as Community law which can be interpreted by the Court of Justice.

47. The applicants in the main proceedings and the Belgian Government reply to that question in the affirmative. The defendants in the main proceedings, the Netherlands Government and the Commission reply in the negative.

48. The applicants submit that EN 795 was drawn up on the basis of a mandate given by the Commission and is therefore to be regarded as an act of the Commission within the meaning of Article 234 EC which may be reviewed by the Court.

49. The Belgian Government observes that harmonised standards are developed by private-law institutions on behalf of the Commission. Furthermore, it is the Commission that publishes the references of harmonised standards in the Official Journal pursuant to Article 5(4) of Directive 89/686. As that directive refers to the harmonised standards in that respect, they must be classified as part of Community law.

50. The defendants in the main proceedings take the view that EN 795 does not include a harmonised standard for the anchor devices at issue. Consequently, EN 795 cannot be classified as Community law with regard to those devices.

51. The Netherlands Government also takes the view that EN 795 cannot be classified as Community law in relation to Class A1 anchor devices because EN 795 is not deemed to be a harmonised standard in relation to such devices.

52. The Commission observes, first, that EN 795 was published in the Official Journal

as a harmonised standard with a warning that that publication did not concern the equipment described in Classes A, C and D and consequently there could be no presumption of conformity with the provisions of Directive 89/686.[10] Therefore, EN 795 must, with regard to the anchor devices specified therein, be classified as a voluntary technical specification without any particular connection to Community-law requirements. Alternatively, the Commission submits that the Court gives preliminary rulings, in accordance with Article 234 EC, on the validity and interpretation of acts of the institutions of the Community and of the ECB. Since a European standard cannot be classified as an act of a Community institution within the meaning of Article 234 EC, the Court has no jurisdiction in respect of the interpretation of such standards.

G — *Seventh and eighth questions*

53. Should the Court find that it has jurisdiction to interpret EN 795 in relation to Class A1 anchor devices within the meaning of that standard, the referring court asks, by the seventh and eighth questions, for clarification concerning the static and dynamic strength test procedures laid down in EN 795 for those devices. In particular, the referring court asks whether the tests must be carried out under the foreseeable conditions of use (seventh question) and in accordance with the user restrictions laid down by the manufacturer (eighth question).

54. The defendants in the main proceedings, the Netherlands Government and the Commission regard the seventh and eighth questions as irrelevant in view of their proposed replies to the sixth question. Should the Court nevertheless answer those questions, the defendants submit in the alternative that the answer to the seventh question should be in the negative and the answer to the eighth in the affirmative.

55. The applicants in the main proceedings and the Belgian Government answer both questions in the affirmative. However, the applicants observe that a test can be carried out in accordance with user restrictions only if the notified test body agrees to do so.

10 — Commission Communication of 12 February 2000, cited in footnote 6.

VII — Legal assessment

A — *General*

56. Directives 89/106 and 89/686 aim to harmonise technical rules and standards in the field of construction products and PPE. Those directives are among the 'new approach' directives introducing a new method of harmonisation in respect of technical rules and standards in the field of European product legislation. [11]

57. The new approach to the harmonisation of technical rules aimed, on the one hand, to lay down uniform technical rules and standards for products by way of full harmonisation in order to ensure the free movement of goods in relation to those products. On the other hand, the aim was to avoid the need for harmonisation measures to be constantly adapted in the light of technical progress and to avoid obstacles to the placing on the market of innovative technical solutions.

11 — The political decision to pursue this new method of harmonisation in the field of technical harmonisation was taken by the Council by its Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (OJ 1985 C 136, p. 1).

58. In order to reconcile those two main aims, the new approach to the harmonisation of technical rules is based on the following fundamental principles:

1. The legislature lays down the essential requirements to be fulfilled by the products covered by the directives.

2. The Commission instructs private standards organisations to draw up the technical specifications putting the general requirements of the directives into concrete terms.

3. The Commission publishes the technical specifications drawn up by those standards organisations as harmonised standards in the *Official Journal of the European Union*.

4. Manufacturers may voluntarily comply with and apply the harmonised standards, which are not mandatory.

5. There is a rebuttable presumption that products which conform to the harmonised standards also fulfil the essential requirements of the corresponding directives.

59. The basic product requirements laid down in the new approach directives generally relate to safety and the protection of health, of the environment and of consumers. Those requirements are set out in Annex II to Directive 89/686.

60. Directive 89/106 departs from that 'new approach' in so far as it contains no direct requirements with regard to construction products, but sets out in Annex I the essential requirements applicable to construction works [12] and which affect construction products in so far as those products must enable the works in which they are incorporated to fulfil the essential requirements referred to in Annex I to Directive 89/106.

61. The private standards organisations which may be instructed to draw up technical specifications are the European Committee for Standardisation (CEN [13]), the European Committee for Electrotechnical Standardisation (CENELEC [14]) and the European Telecommunications Standards Institute (ETSI [15]).

62. As a rule, the new approach directives also provide for a CE marking which confirms that the marked product fulfils the requirements of all new approach directives relevant to the product. [16] If a product falls within the scope of Directive 89/106, the CE marking confirms that the product enables the construction works in which it is incorporated to satisfy the essential requirements of that directive. [17]

63. In addition, most new approach directives require the manufacturer to provide an EC declaration of conformity when the product is placed on the market. The declaration is, in essence, an accompanying document which constitutes confirmation for the market surveillance authorities that the product complies with the essential requirements of the applicable directives. The exact content of the declaration is laid down by the relevant directive.

B — *First question*

64. By its first question the referring court asks whether Class A1 anchor devices for protection against falls from a height when

12 — Article 3(1) of Directive 89/106.

13 — The abbreviation stands for 'Comité Européen de Normalisation'.

14 — The abbreviation stands for 'Comité Européen de Normalisation Electrotechnique'.

15 — Footnote not relevant to the English translation.

16 — See point IB(a) of the Annex to Decision 93/465.

17 — Therefore, according to Article 4(2) of Directive 89/106, the significance of the CE marking is that it certifies that the product complies with the technical specifications. See, in that respect, Langner, D., in Dauses, M., *Handbuch des EU-Wirtschaftsrechts*, C. VI. Technische Vorschriften und Normen, paragraph 72 (24th Supplement, 2009).

working on flat roofs within the meaning of EN 795 fall exclusively within the scope of Directive 89/106.

65. The question has two parts. The referring court asks, first, whether Class A1 anchor devices within the meaning of EN 795 fall within the scope of Directive 89/106. If that part is answered in the affirmative, the referring court asks, second, whether such anchor devices are therefore necessarily outside the scope of other new approach directives.

66. The second part of the question, as to whether inclusion within the scope of Directive 89/106 in principle precludes the application of other product safety directives, can be answered without hesitation in the negative. The legislature's overall approach in respect of the harmonisation of technical rules and standards in the field of European product legislation is based precisely on the assumption that a product may at one and the same time be subject to more than one of the new approach directives with regard to different aspects of the same product. [18]

67. The answer to the first part of the question – whether Class A1 anchor devices within the meaning of EN 795 fall within the scope of Directive 89/106 – must take into account the special regulatory method and system of Directive 89/106.

68. According to Article l of Directive 89/106, any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works, and to which the essential requirements in respect of those construction works relate falls within the scope of Directive 89/106. The essential requirements are listed in Annex I to that directive and relate to (1) the mechanical resistance and stability of construction works, (2) safety in case of fire, (3) hygiene, health and the environment, (4) safety in use, (5) protection against noise and (6) energy economy and heat retention.

18 — See Article 2(2)(a) of Directive 89/106, which governs the meaning of the CE marking where products are subject to other directives with regard to other aspects. Where two new approach directives deal with the same aspects of the same product, it is perfectly possible, however, that the applicability of one directive renders the other inapplicable. Such a rule is laid down, for example, in Article 1(4) of Directive 89/686. See point 94 of the present Opinion.

69. The regulatory method of Directive 89/106 is characterised by the fact that its scope is defined according to function since, according to Article 1 thereof, Directive 89/106 applies to products intended for incorporation in a permanent manner in construction works and which are useful or necessary for the fulfilment of one or more of the essential requirements, described in Annex I, applicable to those works.

70. Therefore, in order to answer the question whether the anchor devices for protection against falls are within the scope of Directive 89/106, it is necessary to ascertain whether they are, as a rule, permanently incorporated in the construction works in question and whether they are intended to contribute to the fulfilment of the requirements described in Annex I.

71. In order to determine whether the devices at issue were produced for permanent attachment to construction works, it is necessary to assess the facts, which is a matter for the referring court.

72. In particular, the referring court must consider whether the dismantling or replacement of the relevant Class A1 anchor devices within the meaning of EN 795 are operations which involve building work.[19] If, in the course of normal installation, those devices are attached to the construction work in such a way that their removal involves building work, it is to be presumed that they were produced for permanent attachment to a construction work.

73. Although ultimately it is for the referring court to ascertain whether building work is necessary for the dismantling or replacement of Class A1 anchor devices within the meaning of EN 795, the description of those devices in standard EN 795 clearly indicates that that is usually the case, since it is apparent from EN 795 that a Class A1 device comprises a 'structural anchor' designed to be secured to vertical, horizontal and inclined surfaces.[20] For the purpose of EN 795, 'structural anchors' are elements, permanently secured to a structure, to which an anchor device or personal protective equipment can be attached.[21] Since the dismantling of such

19 — See point 1.3.2 of interpretative document No 4: Safety in use, published with the Commission Communication with regard to the interpretative documents of Council Directive 89/106/EEC (OJ 1994 C 62, p. 106 et seq.). It must be clarified, at this point, in particular, that incorporation of a product in a permanent manner in construction works means that its removal reduces the performance capabilities of the work and that the dismantling or replacement of the product are operations which involve building work. However, the reference to reduced performance of the work is of little significance in that connection because it does not in itself concern the permanent incorporation of the product in the work, but rather its functional suitability for fulfilling the requirements described in Annex I to Directive 89/106 in relation to the works.

20 — Point 3.13.1.1 of EN 795.

21 — Point 3.5 of EN 795.

anchors by nature usually involves building work, the anchor devices of which they form part must, as a rule, be classified as devices for the purposes of Article 1 of Directive 89/106 which have been produced for incorporation in a permanent manner in construction works.

74. The wording of Annex I to Directive 89/106 offers little guidance for the purpose of answering the question whether, by virtue of their function, Class A1 anchor devices within the meaning of EN 795 contribute to the fulfilment of the essential requirements in relation to construction works described in Annex I to Directive 89/106. However, it is clear that the 'safety in use' requirements described in point 4 of Annex I in relation to construction works are a useful starting point for determining whether the anchor devices at issue may fall within the scope of Directive 89/106.

75. Under the heading 'Safety in use', it is stated in point 4 of Annex I to Directive 89/106 that the construction work must be designed and built in such a way that it does not present unacceptable risks of accidents in service or in operation such as slipping, falling, collision, burns, electrocution or injury from explosion.

76. In that connection it is clear from the file that the anchor devices at issue are intended to provide protection for workers who have to carry out repairs or maintenance work on a roof or on equipment situated on a roof, such as the external unit of an air-conditioning system. In the present case, therefore, the question arises whether the requirements laid down in Annex I to Directive 89/106 concerning the safety in use of construction works include safety on roof access.

77. There is no indication in the wording of Annex I to Directive 89/106 as to whether the requirements concerning 'safety in use' referred to therein are intended to include the safety of workers during works on/to the outside of a construction work.

78. However, it is clear from interpretative document No 4, 'Safety in use', relating to Directive 89/106, [22] that 'safety in use' within the meaning of Annex I to Directive 89/106 must be construed broadly. Under the heading 'Note on the essential requirement "Safety in use"', point 2 of interpretative document No 4 makes it clear that safety in use within the meaning of Annex I to Directive 89/106

22 — Interpretative document No 4: Safety in use (cited in footnote 19, p. 106 et seq.). According to Article 3(3) of Directive 89/106, the essential requirements laid down in Annex I are given concrete form in 'interpretative documents' for the creation of the necessary links between those essential requirements and the standardisation mandates, mandates for guidelines for European technical approval or the recognition of other technical specifications within the meaning of Articles 4 and 5 of that directive. In that connection, Article 12 of Directive 89/106 states, inter alia, that the interpretative documents give concrete form to the essential requirements laid down in Article 3 and in Annex I by harmonising the terminology and the technical bases and indicating classes or levels for each requirement where necessary and where the state of scientific and technical knowledge so permits.

relates to the risk that a person who is in or near construction works may suffer violent and immediate bodily injury.

79. Although it emerges from further statements in interpretative document No 4 that the risks of accidents which the essential requirements concerning safety in use aim to prevent entail, primarily, risks arising in the course of 'normal' use of construction works, [23] the (non-exhaustive) list of relevant risks includes types of risk which are not directly related to the use of construction works by the endangered persons and may even affect persons outside the construction works in question. Risks of the latter kind include, for example, the risk of injury or accidental death caused by the impact of falling objects forming part of the construction works, described in point 3.3.2.1.

80. Taking into account the diverse list of risks and types of risk to which 'safety in use' within the meaning of Annex I to Directive 89/106 refers, the phrase must be construed broadly. Consequently it may, in my view, include the safety of workers during works on/to the outside of a construction work. [24]

81. I therefore conclude that Class A1 anchor devices within the meaning of EN 795 may, by virtue of their function, contribute to the fulfilment of the essential requirements set out in Annex I to Directive 89/106.

82. Consequently, the answer to the first question from the national court should be that Class A1 anchor devices within the meaning of EN 795 fall within the scope of Directive 89/106 if they have been produced to be permanently secured to a construction work. Their inclusion within the scope of Directive 89/106 does not, in principle, preclude the application of other product safety directives.

C — *Second question*

83. By its second question the referring court asks whether Class A1 anchor devices within

23 — Examples of such risks are 'falling after slipping', 'falling after stumbling or tripping' and 'falling due to changes in level and sudden drops', which are referred to in point 3.3.1.2 of interpretative document No 4 (cited in footnote 19).

24 — In that connection it should be noted that it is apparent from the publication of titles and references of harmonised standards within the meaning of Directive 89/106 that, since 1 November 2006, the harmonised standard EN 516/2006 applies, inter alia, to installations for roof access, walkways, treads and steps; see Commission communication in the framework of the implementation of 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 2009 C 309, p. 1 et seq.).

the meaning of EN 795 may fall within the scope of Directive 89/686.

84. According to point 3.13.1.1 of EN 795, Class A1 devices comprise a 'structural anchor' designed to be secured to vertical, horizontal and inclined surfaces. 'Structural anchors' within the meaning of EN 795 are elements, permanently secured to a structure, to which an anchor device or personal protective equipment can be attached. [25] Consequently, the essential component of Class A1 anchor devices is a structural anchor which is secured to a structure.

85. The first subparagraph of Article 1(2) of Directive 89/686 defines PPE for the purpose of that directive as devices designed to be worn or held by an individual. Since Class A1 anchor devices within the meaning of EN 795 are not, by nature, designed to be worn or held by an individual, they cannot in principle be classified as PPE under the first subparagraph of Article 1(2) of Directive 89/686.

86. Nor, in my view, can such anchor devices be classified as PPE under points (a) to (c) of the second subparagraph of Article 1(2), because PPE is designed to be worn or held by an individual.

25 — Point 3.5 of EN 795.

87. In my opinion, anchor devices cannot, in principle, be classified as PPE under Article 1(3) of Directive 89/686 for the same reason.

88. According to Article 1(3) of Directive 89/686, any system placed on the market in conjunction with PPE for its connection to another external, additional device is to be regarded as an integral part of that equipment even if the system is not intended to be worn or held permanently by the user for the entire period of risk exposure.

89. On that point the applicants in the main proceedings submit, in particular, that the anchors constituting the essential component of Class A1 anchor devices within the meaning of EN 795 should be classified as a system within the meaning of that provision by which the PPE is to be connected to a construction work.

90. I am not persuaded by that argument.

91. In the light of the general requirements of the first subparagraph of Article 1(2) of Directive 89/686, the category of 'connection systems' for the purposes of Article 1(3) covers only movable objects which can be worn or held by users. This is confirmed by the wording of Article 1(3), which states that it is not necessary for the connection system

to be intended to be worn or held *permanently* by the user for the entire period of risk exposure, which at least implicitly confirms that such systems can generally be worn or held by the user, and must, in principle, therefore be movable objects.

92. In that connection reference may also be made to point 3.1.2.2 of Annex II to Directive 89/686, which lays down basic requirements for PPE for the prevention of falls from a height. According to that provision, PPE designed to prevent falls from a height or their effects must incorporate a body harness and an attachment system which can be connected to a reliable anchorage point.

93. Since Class A1 anchor devices must in that context be deemed to be 'reliable anchorage points', whereas, according to point 3.1.2.2 of Annex II to Directive 89/686, 'reliable anchorage points' do not form part of PPE, that provision further confirms the finding that Class A1 anchor devices within the meaning of EN 795 do not fall within the scope of Directive 89/686.

94. In conclusion, reference may also be made to Article 1(4) of Directive 89/686, which states that the directive does not apply to PPE covered by another directive designed to achieve the same objectives as Directive 89/686 with regard to placing on the market, free movement of goods and safety. As I have already shown in relation to the answer to the first question, Class A1 anchor devices within the meaning of EN 795 fall within the scope of Directive 89/106 if they have been produced to be permanently secured to a construction work. [26] If, in the opinion of the referring court, the devices at issue have been produced to be permanently secured to a construction work, they would fall within the scope of Directive 89/106 and, consequently, would be outside the scope of Directive 89/686 in accordance with the first indent of Article 1(4) thereof.

95. Therefore, the answer to the second question should be that Class A1 anchor devices within the meaning of EN 795 do not fall within the scope of Directive 89/686.

D — *Third question*

96. By its third question the referring court asks, in essence, whether an anchor device which does not, as such, fall within the scope of Directive 89/686 is nevertheless to be covered by that directive if it is designed to be

26 — See point 82 of the present Opinion.

connected to PPE which is covered by Directive 89/686.

97. In that connection the referring court refers, in particular, to point 3.1.2.2 of Annex II to Directive 89/686, the first paragraph of which states that PPE designed to prevent falls from a height must incorporate a body harness and an attachment system which can be connected to a *reliable anchorage point*. According to the third paragraph of point 3.1.2.2, the manufacturer's notes must specify all relevant information relating to the *characteristics required for the reliable anchorage point*.

98. Therefore, it may reasonably be presumed that the third question aims to establish whether the use of the phrase 'reliable anchorage point' in point 3.1.2.2 of Annex II to Directive 89/686 means that the safety of such anchorage points is to be assessed on the basis of Directive 89/686.

99. That question must be answered in the negative.

100. First, it must be observed that the wording of point 3.1.2.2 of Annex II to Directive 89/686 does not unambiguously indicate that the anchorage points to which PPE can be secured should be included within the scope of Directive 89/686. The first paragraph of point 3.1.2.2 merely states that PPE which is designed to prevent falls from a height or their effects must be constructed in such a way that it can be secured to a reliable anchorage point. The last paragraph sets out the information to be given in the manufacturer's notes, which may include the characteristics required for a reliable anchorage point.

101. In my view, point 3.1.2.2 of Annex II to Directive 89/686 therefore provides no convincing support for the presumption that the safety of anchorage points which are designed to be secured to PPE covered by Directive 89/686 should also now be assessed on the basis of Directive 89/686.

102. That conclusion is confirmed by a systematic interpretation of Directive 89/686. Annex II to that directive merely sets out the basic safety requirements which must be satisfied by PPE under Article 3 of the directive in order to ensure the health protection and safety of users. Annex II is therefore not concerned with the question of which products fall within the scope of Directive 89/686, but with the question of the requirements that the products covered by Directive 89/686 must satisfy. Consequently Annex II is not, in

principle, concerned with the scope *ratione materiae* of Directive 89/686.

103. Therefore, the answer to the third question should be that, in determining whether personal protective equipment falling within the scope of Directive 89/686 satisfies the basic requirements of that directive, the question whether the anchor device to which the protective equipment concerned can be connected is safe in the foreseeable conditions of use is not relevant.

E — *Fourth question*

104. By its fourth question the referring court asks whether a CE marking can be applied on an optional basis to a Class A1 anchor device within the meaning of EN 795 as evidence of compliance with Directive 89/686 and/or Directive 89/106 if the Court reaches the conclusion that such devices do not fall within the scope of those directives at all.

105. First of all, it must be recalled that, in my opinion, the answer to the first question referred by the national court should be that Class A1 anchor devices within the meaning of EN 795 fall within the scope of Directive 89/106 if they have been produced to be permanently secured to a construction work. [27]

106. In replying to the fourth question, I must point out that it follows both from a systematic and from a purposive interpretation of the relevant provisions that a CE marking under Directives 89/686 and 89/106 cannot be applied to products which are not within the scope of those directives.

107. In that connection, reference may be made first to Decision 93/465, point IB of the Annex to which sets out the principal guidelines for affixing and using the CE marking. [28] According to those guidelines:

— the CE marking symbolises conformity to all the obligations incumbent on manufacturers for the product by virtue

27 — See point 82 of the present Opinion.

28 — Decision 93/465 in essence sets out what is required of the legislature for preparing the new approach directives. The general guidelines for the affixing and use of the CE marking, in point IB of the Annex, have therefore been applied in the new approach directives adopted after that decision took effect. In addition, new approach directives previously adopted were amended by Council Directive 93/68/EEC of 22 July 1993 (OJ 1993 L 220, p. 1) and adapted on the basis of Decision 93/465.

of the Community directives providing for its affixing (point IB(a));

— the CE marking affixed to industrial products symbolises the fact that the natural or legal person having affixed or been responsible for the affixing of the said marking has verified that the product conforms to all the Community total harmonisation provisions which apply to it and has been the subject of the appropriate conformity evaluation procedures (point IB(b));

— any industrial product covered by the new approach directives must bear the CE marking save where those directives provide otherwise (point IB(e));

— Member States must take all the provisions of national law necessary to exclude any possibility of confusion and to prevent abuse of the CE marking (point IB(l)).

108. In my view it is clear from the systematic interaction of those guidelines that the CE marking may be applied to products only in so far as they are within the scope of one of the new approach directives and satisfy its requirements. [29]

109. A purposive interpretation of the relevant provisions leads to the same conclusion.

110. The meaning and purpose of the CE marking is to ensure the free movement of goods in relation to marked products. [30] Accordingly both Directive 89/106 and Directive 89/686 clearly require the Member States, in principle, not to prohibit, restrict or hinder the placing on the market of products which are covered by and comply with those directives and which bear the CE marking. [31]

111. The CE marking gives the competent national authorities notice that, in the opinion of the person placing the product on the market, the product satisfies the requirements of the relevant new approach directives. Therefore, according to its function,

29 — See Wagner, G., 'Das neue Produktsicherheitsgesetz: Öffentlich-rechtliche Produktverantwortung und zivilrechtliche Folgen (Teil I)', *BB* 1997, p. 2489, 2497.

30 — See point 57 of the present Opinion.

31 — Article 4(1) of Directive 89/686 and Article 4(2) in conjunction with Article 6 of Directive 89/106.

the CE marking is primarily intended for the national authorities. [32]

112. Taking into account that general aim of the CE marking, it would make no sense at all if products which do not fall within the scope of the new approach directives were allowed to bear the CE marking. As regards products which are not covered by those directives, the affixing of the CE marking would obviously not give rise to any obligation on the part of the Member States to recognise that those products conform to a fully harmonised level of protection. A CE marking on such products could not, therefore, in any way contribute to ensuring freedom of movement in relation to those products.

113. Furthermore, the affixing of the CE marking to products which are not covered by the new approach directives would lead to considerable confusion, because it would be impossible, in those circumstances, to determine what the CE marking on a particular product certified. Ultimately that would also be detrimental to consumer protection. [33]

114. Therefore, Article 30(2) of Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Council Regulation (EEC) No 339/93, [34] which applies from 1 January 2010, expressly states that the CE marking is to be affixed only to products to which its affixing is provided for by specific Community harmonisation legislation, and is not to be affixed to any other product. [35]

115. Consequently, the answer to the fourth question should be that a CE marking may not be applied to a Class A1 anchor device

32 — Klindt, T., 'Das Recht der Produktsicherheit: ein Überblick', *VersR*. 2004, p. 296, 298. See also van Rienen, W./Wasser, U., *EG-Recht der Gas- und Wasserversorgungstechnik*, Bonn 1999, paragraph 139, who point out that the significance of the CE marking is simply to give the national market surveillance authorities notice that the procedure for assessing whether the product complies with the essential requirements of the relevant directive has been carried out and that the product is therefore entitled, under EC law, in the absence of evidence to the contrary, to unobstructed access to the market and to be used in all Member States. See also Strübbe, K., *Die Neuordnung des deutschen Konformitätsbewertungssystems*, Regensburg 2006, p. 120 et seq.; Kapoor, A./Klindt, T., '"New Legislative Framework" im EU-Produktsicherheitsrecht – Neue Marktüberwachung in Europa?', *EuZW* 2008, p. 649, 651.

33 — The concept of consumer protection is now to be taken into account in this area of the law, as shown, inter alia, in recital 30 in the preamble to Decision No 768/2008 of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (OJ 2008 L 218, p. 82), which indicates that although, in principle, the CE marking should be the only marking of conformity, other markings may be used as long as they contribute to the improvement of consumer protection and are not covered by Community harmonisation legislation. See also Lenz, C./Scherer, J., 'Ist die Anbringung von Qualitätszeichen nationaler Prüfungsorganisationen neben CE-Kennzeichnungen zulässig?', *EWS* 2001, supplement 3 to issue 11, p. 4 et seq., who described consumers' and users' protection from confusion as a secondary aim of the CE marking even when Decision 93/465 applied.

34 — OJ 2008 L 218, p. 30.

35 — In that connection Article R11 of Annex I to Decision 768/2008 also states that the CE marking is to be subject to the general principles set out in Article 30 of Regulation No 765/2008.

within the meaning of EN 795 as evidence of compliance with a directive which is not applicable to it.

F — *Fifth question*

116. The referring court requires a reply to the fifth question in the event that, in answering the preceding questions, the Court of Justice reaches the conclusion that, although the anchor devices at issue do not fall within the scope of Directives 89/686 and 89/106, a CE marking may nevertheless be affixed to them on an optional basis pursuant to those directives.

117. In that case, the referring court asks what procedure should be followed, for the purposes of an optional CE marking, in order to determine whether anchor devices to which the abovementioned directives do not apply satisfy the requirements of those directives.

118. As I have already shown, there can be no question of any optional use of the CE marking. The fifth question is therefore devoid of purpose and requires no further discussion.

G — *Sixth question*

119. By its sixth question the referring court asks, in essence, whether the provisions and requirements of EN 795 relating to Class A1 anchor devices are to be regarded as Community law which can be interpreted by the Court.

120. To understand that question correctly, it must be observed that EN 795 lays down the requirements and test methods for five different classes of anchor device, designated by the letters A to E. Structural anchors are classified in Class A, movable anchor devices in Class B, anchor devices employing horizontal flexible lines in Class C, anchor devices employing horizontal anchor rails in Class D and deadweight anchor devices in Class E.

121. EN 795 was approved by CEN on 29 March 1996 and published by the Commission on 12 February 2000 in the framework of the implementation of Directive 89/686 as a harmonised standard within the meaning of that directive. [36] However, publication was subject to the express proviso that it did not concern the equipment described

36 — Commission Communication of 12 February 2000, cited in footnote 6.

in classes A (structural anchors), C (anchor devices employing horizontal flexible lines) and D (anchor devices employing horizontal rigid anchor rails), in respect of which there was to be no presumption of conformity with the provisions of Directive 89/686.

122. In view of the particular circumstance that the Commission has not accepted the requirements and test procedures for Class A1 anchor devices in EN 795 as a harmonised standard within the meaning of Directive 89/686 or published it as such in the Official Journal, EN 795 cannot be regarded as a harmonised standard within the meaning of Directive 89/686 in relation to Class A1 anchor devices. [37]

123. This means that EN 795 can be regarded as a harmonised standard within the meaning of Directive 89/686 only in relation to Class B and E anchor devices. In relation to Class A, C and D anchor devices, however, it must be classified as a non-harmonised standard of a technical nature, laid down by a private standards organisation. [38] For that reason alone, the question from the referring court as to whether the provisions and requirements in EN 795 in respect of Class A1 anchor devices are to be regarded as Community law must be answered in the negative.

124. Therefore the answer to the sixth question should be that EN 795 cannot, in relation to Class A1 anchor devices within the meaning of that standard, be regarded as Community law to be interpreted by the Court of Justice of the European Union.

H — *Seventh and eighth questions*

125. In the event that the Court finds that it has jurisdiction to interpret EN 795 in relation to Class A1 anchor devices within the meaning of that standard, the seventh and eighth questions from the referring court concern the manner in which the static and dynamic strength tests laid down by EN 795

37 — See Gambelli, F., *Aspects juridiques de la normalisation et de la réglementation technique européenne*, Paris 1994, p. 17 et seq., who points out that a harmonised standard is a European standard laid down by CEN and which has certain characteristics, one of which is that the European standard laid down by CEN should be adopted by the Commission and subsequently published in the Official Journal.

38 — See Jarass, H., 'Probleme des Europäischen Bauproduktenrechts', *NZBau* 2008, p. 145, 146, who describes as non-harmonised European standards, constituting specialist know-how, those standards which are laid down by the European standards organisations but which have not been commissioned and/or approved by the Commission.

in respect of those devices are to be carried out. In particular, the referring court asks whether those tests are to be carried out under foreseeable conditions of use (seventh question) and taking into account the user restrictions specified by the manufacturer (eighth question).

126. Since, in my view, EN 795 cannot – in relation to Class A1 anchor devices – be regarded as Community law to be interpreted by the Court of Justice of the European Union, the seventh and eighth questions are devoid of purpose and therefore require no further discussion.

VIII — Conclusion

127. I therefore propose that the following answers be given to the questions referred for a preliminary ruling by the Rechtbank's-Gravenhage:

(1) Class A1 anchor devices within the meaning of EN 795 fall within the scope of 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 if they have been produced to be permanently secured to a construction work. Their inclusion within the scope of Directive 89/106 does not, in principle, preclude the application of other product safety directives.

(2) Class A1 anchor devices within the meaning of EN 795 do not fall within the scope of Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment.

(3) In determining whether personal protective equipment falling within the scope of Council Directive 89/686/EEC of 21 December 1989 on the approximation of the laws of the Member States relating to personal protective equipment satisfies the basic requirements of that directive, the question whether the anchor device to which the protective equipment concerned can be connected is safe in the foreseeable conditions of use is not relevant.

(4) A CE marking may not be applied to a Class A1 anchor device within the meaning of EN 795 as evidence of compliance with a directive which is not applicable to it.

(5) EN 795 cannot, in relation to Class A1 anchor devices within the meaning of that standard, be regarded as Community law to be interpreted by the Court of Justice of the European Union.