JUDGMENT OF THE COURT (Sixth Chamber)

20 June 2002 *

In Joined Cases C-388/00 and C-429/00,

REFERENCE to the Court under Article 234 EC by the Giudice di pace di Genoa (Italy) for a preliminary ruling in the proceedings pending before that court between

Radiosistemi Srl

and

Prefetto di Genova,

on the interpretation of Article 28 EC, 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 (OJ 1999 L 91, p. 10), and of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a

* Language of the case: Italian.

procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, J.-P. Puissochet, V. Skouris and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Radiosistemi Srl, by G. Conte and S. Cavanna, avvocati,

— the United Kingdom Government, by R. Magrill, acting as Agent, assisted by C. Lewis, Barrister,

— the Commission of the European Communities, by H. Støvlbæk and R. Amorosi, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Radiosistemi Srl, represented by G. Conte and S. Cavanna, the United Kingdom Government, represented by G. Amodeo, acting as Agent, assisted by C. Lewis, and of the Commission, represented by H. Støvlbæk and R. Amorosi, at the hearing on 28 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

1 By orders of 16 October and 11 November 2000, lodged with the Court on 23 October 2000 and 20 November 2000, respectively, the Giudice di pace di Genova referred four questions for a preliminary ruling pursuant to Article 234 EC on the interpretation 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 (OJ 1999 L 91, p. 10, hereinafter 'the Directive') and Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1, hereinafter 'Decision 3052/95').

2 Those questions were raised in proceedings brought by Radiosistemi Srl (hereinafter 'Radiosistemi') before the Prefetto di Genova (Genoa prefect) concerning the seizure of a certain number of remote control units which Radiosistemi marketed in Italy.

Legal framework

Community legislation

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

4 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'.

5 Article 3(1) of the Directive provides that certain essential requirements are applicable to all apparatus. In addition, Article 3(2) provides that radio equipment is to be so constructed that it effectively uses the spectrum allocated to terrestrial/space radio communication and orbital resources so as to avoid harmful interference.

6 Article 5 of the Directive states that, when apparatus meets the harmonised standards, there is a presumption of compliance with the essential requirements of Article 3.

7 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.'

8 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 than 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.'

9 Article 7(1) and (2) of the Directive provide:

'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. Notwithstanding 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.'

10 Article 8(1) of the Directive 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).'

11 Article 9(1) of the Directive reads as follows:

'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.'

12 Article 9(5) of the Directive provides:

'(a) Notwithstanding the provisions of Article 6, a Member State may, acting in conformity with the Treaty, and in particular Articles 30 and 36 thereof, adopt any appropriate measures with a view to:

(i) prohibiting or restricting the placing on its market,

and/or

(ii) requiring the withdrawal from its market,

of radio equipment, including types of radio equipment, which has caused or which it reasonably considers will cause harmful interference, including

interference with existing or planned services on nationally allocated frequency bands.

(b) Where a Member State takes measures in accordance with subparagraph (a) it shall immediately inform the Commission of the said measures, specifying the reasons for adopting them.'

13 Article 12(1) of the Directive provides:

'Apparatus complying with all relevant essential requirements shall bear the CE conformity marking referred to in Annex VII. ...'

14 Article 19(1) of the Directive provides:

'Member States shall not later than 7 April 2000 adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof. They shall apply these provisions as from 8 April 2000.

...'

15 Article 1 of Decision 3052/95 provides:

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

— a general ban on the goods,

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

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

or

— withdrawal of the goods from the market.'

16 Article 3 of Decision 3052/95 states:

'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.'

The national legislation

17 In Italy, the marketing and use of radio apparatus, including apparatus for non-professionals, is regulated by the Codice postale (hereinafter 'the Postal Regulations') established by Presidential Decree No 156 of 29 March 1973 (*GURI* No 113 of 3 May 1973, p. 2), as amended by Law No 209 of 22 May 1980 (*GURI* No 155 of 7 June 1980, p. 4988).

18 Article 398 of that code lays down rules for the prevention and elimination of interference with the transmission and reception of radio signals. It reads as follows in its amended version:

'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.

Those rules, which also lay down the methods for checking conformity, shall be published by decree of the Minister for Posts and Telecommunications, acting together with the Minister for Industry, Commerce and Crafts, in accordance with the directives of the European Communities.

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, marking or attestation of conformity or upon production of a declaration of conformity 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 conformity certificates as provided for in the preceding paragraph shall be appointed by decree of the Minister for Posts and Telecommunications, acting together with the Minister for Industry, Commerce and Crafts.'

19 The rules laid down in Article 398 of the Postal Regulations were enacted by Ministerial Decree of 15 July 1977 (*GURI* No 226 of 20 August 1977, p. 6104) concerning the frequencies reserved for low-power receiving and transmitting radio apparatus, as amended by Ministerial Decree of 8 November 1996 (*GURI* No 274 of 22 November 1996, p. 9), which provides for the obligation to affix a stamp attesting to type-approval by the postal authorities (now the Ministry of Communications).

20 Article 2 of the Ministerial Decree of 15 July 1977 provides:

'The apparatus referred to in the preceding article must be of a type approved by the authorities based on technical standards set out in Annex 1 to the present decree.

The approval certificate shall indicate for which purposes the apparatus is to be used and the particulars of the approval. Those particulars are to be shown on the stamp provided for in Article 334(2)(c) of the Postal Regulations in accordance with the example given in Annex 2.

The use of the apparatus remains subject to possession of such approval by the owner thereof.'

21 Article 399 of the Postal Regulations, as amended, provides for penalties in the event of non-compliance with Article 398 thereof. It reads as follows:

'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.'

22 The Italian Government has not implemented the directive in its national law within the period it precribes. However, circular No GM/123709/4517 DL/CR of 17 April 2000 of the Ministry of Communications (*GURI* No 101 of 3 May 2000, p. 67) provides:

'1. For the purposes of placing on the market and putting into service of telecommunications terminal equipment and radio equipment, the services of the Ministry of Communications shall comply with the provisions of Directive 1999/5/EC of the European Parliament and the Council of 9 March 1999, within the limits set out in Article 1(4) of the Directive.

2. The Ministry of Communications shall take the necessary measures to prohibit the placing on the market and the putting into service, to withdraw from the market or from service, or to limit the free movement of apparatus which does not comply with the prescribed conditions.'

The main dispute and the questions referred for a preliminary ruling

Case C-388/00

23 Radiosistemi is an Italian undertaking which manufactures small-scale models of high-speed cars, powered by combustion or electric motors and steered using remote control devices. It makes the small-scale model cars but not the remote control units, which are imported because of the lack of manufacturers on the national market.

24 On 2 and 8 February 2000, officers of the Ligurian postal police visited retail sales establishments in Genoa (Italy) and seized a number of remote control units marketed in Italy by Radiosistemi, which had purchased them in other Member States, on the grounds that they did not bear the type-approval stamp required by Article 398 of the Postal Regulations.

25 In a statement of 18 February 2000, the postal police alleged that Radiosistemi, as the company which sold the apparatus seized, had infringed Articles 398 and 399 of the Postal Regulations, and imposed an administrative fine of ITL 100 000 for each infringement.

26 Radiosistemi brought an action against those decisions before the Prefetto di Genova, as well as an application for the return of the remote control units seized, arguing that the technical report, ordered by the administrative authority which made the seizures, showed that the apparatus in question was technically in conformity with the national rules in force, since it functions only on the frequencies authorised and bears the required CE marking.

27 By order of 20 April 2000, the Prefetto di Genova dismissed the action, as well as the application for the return of the goods, and ordered Radiosistemi to pay ITL 330 000 by way of fine for the infringements. It based its decision in particular on the grounds that the failure to affix the national type-approval stamp in itself constituted an infringement of Article 398 of the Postal Regulations, and that that article is consistent with the Community legislation.

28 On 14 June 2000, Radiosistemi contested the prefectoral order before the Guidice di pace di Genova, arguing that the Prefetto di Genova had ordered the confiscation of goods already seized, which were thus liable to be destroyed, and

asking, as an urgent preventive measure, that the operation of the contested measure be suspended. The Giudice di pace allowed that application by order of 15 June 2000.

29 On the substance, after reiterating that the apparatus in question met the requirements of both the national and Community rules in force, Radiosistemi argued that the fine and the seizure, followed by the confiscation and destruction of the apparatus, were measures which breached the principle of proportionality guaranteed by the Community legal order, and contended, moreover, that the prefectoral order had been adopted on 20 April 2000, that is, after expiry of the period prescribed for implementation of the Directive, that is to say 8 April 2000, so that it also infringed the Directive.

30 The Prefetto di Genova, as a party to the case, filed before the national court notes from the Ministry of Communications of 24 March and 14 July 2000. The note of 24 March 2000 states 'the report of the inspector confirms that the remote control units [which were seized] operate on the frequencies reserved for them, but [that] cannot be a substitute for the approval which the general directorate for spectrum planning and management of the Ministry of Communications has authority to grant'. The note of 14 July 2000 indicates that the notification provided for in Article 6(4) of the Directive for the placing on the market of equipment such as that seized was not given until 26 May 2000, that is, after the contested prefectoral order was issued.

31 The national court notes that Radiosistemi was alleged to have infringed Article 398 of the Postal Regulations not because it imported and placed on the market apparatus which did not objectively meet the technical standards prescribed to prevent and eliminate interference in the reception and transmission of radio signals (compliance with frequencies and electromagnetic compatibility), but only because it failed to affix the national type-approval on the apparatus

marketed. The expert's report ordered by the Ministry of Communications established that the apparatus does operate on frequencies authorised by the provisions in force and does meet the harmonised standards on electromagnetic compatibility, as shown by the CE marking.

32 The national court, taking the view that the resolution of the dispute requires an interpretation of rules of Community law, stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Does Community law, in the light also of its fundamental principles for which there is no primary textual source, preclude legislation and/or national administrative practice which — in the context of a system where matters concerning conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided merely at their discretion — prevents economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove 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 period prescribed for such implementation has already expired? If that question is answered in the affirmative, is it compatible with Article 7(2) of Directive 1999/5/EC 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 No 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) Are penalties such as those provided for under Article 399 of the Codice Postale Italiano (Italian Postal Regulations set out in Presidential Decree No 156 of 1973) compatible with Community law, in the light of the principles of non-discrimination and proportionality?'

Case C-429/00

33 By order of 11 November 2000, delivered in a dispute involving the same parties as Case C-388/00, the Giudice di pace di Genova referred four questions to the Court for a preliminary ruling which were identical in substance to those in the present case.

34 The file lodged with the Registry of the Court shows that these proceedings have arisen following the seizure of goods similar to those at issue in Case C-388/00. By order of 14 December 2000 of the President of the Court, the two cases were joined for the purposes of the written and oral procedure and judgment.

35 In those conditions, it is appropriate to give the same answers to the two questions referred for preliminary rulings.

The first question

36 By its first question, the national court is essentially asking whether Community law precludes legislation and/or national administrative practice which — in the context of a system where matters concerning conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided at their discretion — prevents economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorised under national law.

37 Since the facts giving rise to the main proceedings occurred, at least in part, before 7 April 2000, when the period prescribed for implementation of the Directive in national law expired and the Italian Republic had still not implemented the Directive by then, it should be considered that the first question concerns Community law as it was in force at that date, that is, without having regard to the possible effect of the Directive.

38 The compatibility of legislation such as that at issue in the main proceedings must, therefore, be examined in the light of Article 28 EC.

39 Under Article 28 EC, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Moreover, according to settled case-law of the Court, any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be

deemed to be a measure having equivalent effect to quantitative restrictions (see, in particular, Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Case C-379/98 *PreussenElektra* [2001] I-2099, paragraph 69).

40 However, under Article 30 EC, Article 28 EC does not preclude prohibitions or restrictions on imports justified on grounds such as public security, provided that those prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

41 It should, moreover, be remembered that, according to equally settled case-law (see, in particular, Case 120/78 *Rewe-Zentral* [1979] ECR 649, known as 'Cassis de Dijon', paragraph 8), in the absence of common rules applying to the products concerned, the obstacles to free movement within the Community resulting from disparities between national provisions must be accepted in so far as those national provisions, which are applicable without distinction to national products and to imported products, can be justified as being necessary in order to satisfy imperative requirements of Community law, such as those relating to the protection of users and the proper functioning of the public telecommunications network (see Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraphs 30 and 31).

42 Whether they are based on the situations explicitly provided for in Article 30 EC or on imperative requirements recognised by the case-law, national provisions which derogate from Article 28 EC can only be justified if they are necessary in order to attain an authorised objective which cannot be achieved by means which place less of a restriction on the free movement of goods within the Community (see, in particular, Case 155/82 *Commission* v *Belgium* [1983] ECR 531, paragraph 12; *GB-Inno-BM*, cited above, paragraph 33).

43 In that connection, the Court has held that provisions of a Member State which prohibit the import, marketing or holding in stock, with a view to selling, of radio equipment that has not undergone national type-approval, such as the provisions at issue in the main proceedings, constitute a measure equivalent to a quantitative restriction within the meaning of Article 28 EC (see Case C-80/92 *Commission* v *Belgium* [1994] ECR I-1019, paragraph 21).

44 It is true that the national type-approval for radio equipment is of such a nature as to be justified by considerations of public security and imperative requirements relating to the proper functioning of the public telecommunications network. It is not disputed, however, that equipment such as that at issue in the main proceedings does in fact comply with the national provisions concerning the proper use of radio frequencies in the Member State of import.

45 It is none the less clear from the order for reference that the national provisions only allow traders to establish the compliance of their equipment by affixing the national type-approval stamp. Moreover, such a requirement is manifestly not proportionate to the objective contemplated, because it does not allow a trader to establish, in a less burdensome manner, that the equipment meets the national requirements, and because it duplicates checks already carried out in another Member State.

46 It follows from the foregoing that national provisions such as those at issue in the main proceedings cannot be justified under either Article 30 EC or by mandatory requirements recognised by the case-law.

47 Consequently, the first question should be answered as follows: Article 28 EC precludes legislation and/or national administrative practice which — in the context of a system where matters concerning conformity assessment procedures

for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided at their discretion — prevents economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorised under national law.

The second question

48 By the first part of the second question, the national court asks whether the Directive confers on individuals rights upon which they may rely before the national courts, where the Directive itself has not been formally implemented in national law within the period prescribed for implementation.

49 According to settled case-law, wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive (see Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case C-134/99 *IGI* [2000] ECR I-7717, paragraph 36).

50 Thus it should be examined whether some of the provisions of the Directive are of an unconditional nature and sufficiently precise as required by the case-law referred to in the preceding paragraph (*Becker*, cited above, paragraph 29).

51 Articles 6(1), 7(1) and 8(1) of the Directive appear to be particularly relevant for the resolution of the main proceedings. Articles 6(1) and 7(1), respectively, deal with the placing on the market and the putting into service of apparatus in general. Article 8(1), however, deals specifically with the placing on the market and the putting into service of apparatus bearing the CE marking provided for by the Directive. The wording and the general scheme of the Directive do not suggest that those provisions are mutually exclusive. Since, according to the order for reference, the apparatus at issue in the main proceedings bears the CE marking, the dispute potentially falls within both Article 8(1) and Articles 6(1) and 7(1) of the Directive.

52 The first sentence of Article 6(1) requires Member States to 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 the Directive. The second sentence provides that the apparatus is not to be subject to further national provisions in respect of placing on the market.

53 The prohibition laid down in the second sentence of Article 6(1) of the Directive is clear and precise. As regards its unconditional character, it is true that, in the case of radio equipment which uses non-harmonised frequencies, Article 6(4) of the Directive requires the party responsible for placing the apparatus on the market to notify the national authority responsible for spectrum management of the intention to place such equipment on its national market. That procedural rule is intended to complement the implementation of the mechanisms of the Directive in national law, but it does not in any way confer on the Member States the power to impose additional conditions or limit the scope of the prohibition contained in the second sentence of Article 6(1) of the Directive.

54 It follows that the prohibition laid down in the second sentence of Article 6(1) of the Directive is formulated in terms which are unconditional and sufficiently precise to be able to be relied upon by individuals before national courts.

55 Article 7(1) of the Directive requires Member States to authorise the putting into service of apparatus where it complies with the appropriate essential requirements set out in Article 3 and the other relevant provisions of the Directive. That provision clearly presupposes that the individual concerned has the opportunity to prove that the apparatus in question meets the requirements of the relevant provisions of the Directive, which implies an equally clear obligation on the part of the national authorities to examine the evidence submitted in that connection.

56 Article 7(2) of the Directive provides that, '[n]otwithstanding paragraph 1', Member States may restrict the putting into service of radio equipment for reasons relating to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health. That derogation presupposes that the Member State concerned has examined the facts, and does not exempt it from the obligation under Article 7(1) to examine all evidence relating to conformity of the apparatus in question. Thus it is not intended to cover national provisions which require the affixing of an approval stamp without allowing for the possibility of monitoring the conformity of apparatus with the substantive conditions for its use.

57 It follows that Article 7(1) of the Directive is unconditional and sufficiently precise to be able to be relied upon by individuals before national courts, in the absence of implementation within the prescribed period.

58 Article 8(1) of the Directive requires Member States not to prohibit, restrict or impede the placing on the market and putting into service in their territory of apparatus bearing the CE marking provided for by the Directive. The presence of the marking establishes a presumption that the apparatus in question complies with all the provisions of the Directive. Thus the provision lays down a clear and

precise obligation on the part of the Member States to allow the placing on the market and putting into service in their territory of apparatus bearing the CE marking.

59 Of course, this obligation is 'without prejudice to Articles 6(4), 7(2) and 9(5)' of the Directive. Against that background, the question arises whether this proviso has the effect of making the obligation provided for in the first part of Article 8(1) of the Directive conditional.

60 First of all, as is clear from paragraph 53 of the present judgment, Article 6(4) of the Directive is a procedural rule intended to complement its implementation in national law. In the absence of such implementation within the prescribed period, that provision does not operate to allow Member States to derogate from the principle of free movement for apparatus bearing the CE marking provided for by Article 8(1).

61 Next, it follows from paragraph 56 of the present judgment that Article 7(2) of the Directive allows Member States to restrict the freedom to put radio equipment into service for certain reasons, which are listed exhaustively and do not include the requirement of a national type-approval stamp without substantive monitoring of the conformity of the apparatus in question.

62 Lastly, Article 9(5) of the Directive allows Member States to prohibit or restrict the placing on its market of radio equipment which they reasonably consider will cause harmful interference. Like Article 7(2) of the Directive, this provision contemplates a situation unlike that in the main proceedings, where there has been no allegation that the apparatus in question would be likely to cause harmful interference, and, on the contrary, it is established that the apparatus

does comply with the national provisions concerning the proper use of radio frequency bands. In such a situation, Article 9(5) does not allow Member States to prohibit or restrict the free movement of the apparatus provided for in Article 8(1) of the Directive.

63 It follows that the proviso regarding Articles 6(4), 7(2) and 9(5) of the Directive does not have the effect of making the obligation provided for in the first part of Article 8(1) of the Directive conditional. Accordingly, the provision is unconditional and sufficiently precise to be able to be relied upon by individuals before national courts in situations where the Directive has not been transposed within the period prescribed therein.

64 By the second part of the second question, the national court asks whether Article 7(2) of the Directive allows for the maintenance in force of 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.

65 For the reasons set out in paragraphs 56 and 61 of the present judgment, this question must be answered in the negative.

66 Consequently, the second question should be answered as follows: the provisions of the second sentence of Article 6(1), Article 7(1) and Article 8(1) of the Directive confer on individuals rights which may be relied upon before national courts even though the Directive itself has not been formally implemented in national law within the period prescribed, and Article 7(2) of the Directive does not allow for the maintenance in force of 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.

The third question

67 By its third question, the national court enquires about the scope of the term 'measure' within the meaning of Article 1 of Decision 3052/95. More specifically, it asks whether the term covers 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 a check has been carried out by the national authorities responsible for technical checks to ascertain 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.

68 Article 1 of Decision 3052/95 contemplates the measures used by a Member State to prevent the free movement of products lawfully produced or marketed in another Member State. According to the last indent of Article 2 of the Decision, the term 'measure' is defined as 'any measure other than a judicial decision'. Thus the term includes any measure taken by a Member State, except for judicial decisions, which has the effect of restricting the free movement of goods lawfully produced or marketed in another Member State, regardless of its form or the authority from which it emanates.

69 Under Article 1 of Decision 3052/95, such a measure must be notified to the Commission where the direct or indirect effect of the measure includes a general ban on the goods, a refusal to allow the goods to be placed on the market, or

withdrawal of the goods from the market. Since it prohibits the importation or marketing of goods which do not bear the national type-approval stamp, a provision of national law such as Article 398 of the Postal Regulations is subject to this obligation to notify.

70 As regards seizure measures employed under such a provision, it should be noted that the fourth indent of Article 3(2) of Decision 3052/95 provides that Article 1 does not apply to measures, such as preventive measures or investigations, which prepare or lead up to the main measure referred to in Article 1.

71 It follows that a seizure measure the duration of which is limited to the time necessary to check the conformity of the goods in question, as a preventive measure or investigation, is exempted from the application of Article 1 of Decision 3052/95. When, however, the seizure extends beyond that, as in the main proceedings here, it does not fall within the exception provided for by the fourth indent of Article 3(2) of that decision, and must be notified to the Commission under Article 1 of that decision.

72 If such a seizure were to be followed by other similar measures, such as a decision to confiscate the goods indefinitely, it would not be necessary to notify them to the Commission. Under the second paragraph of Article 3(1) of Decision 3052/95, where a particular 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.

73 Consequently, the third question should be answered as follows: the term 'measure' within the meaning of Article 1 of Decision 3052/95 includes any measures, other than judicial decisions, taken by a Member State having the effect of restricting the free movement of goods lawfully produced or marketed in

another Member State. 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 a check has been carried out by the public authorities responsible for technical checks to ascertain that the product in question is in conformity with both national and Community legislation, that is a 'measure' which must be notified to the Commission within the meaning of that provision.

The fourth question

74 By its fourth question, the national court essentially asks whether Community law, and the principles of non-discrimination and proportionality in particular, preclude penalties such as those provided for under Article 399 of the Postal Regulations.

75 Article 399 of the Postal Regulations provides, in cases of infringement of Article 398, for the imposition of fines and the confiscation of equipment which does not meet the requirements for the approval certificate provided for by Article 398.

76 It should be borne in mind that the present case involves a situation where the national provisions in force require the affixing of a national type-approval stamp, without allowing for proof of product conformity by other means.

77 As held in reply to the first and second questions, such provisions are contrary to Article 28 EC as regards the time prior to the expiry of the period prescribed for implementation of the Directive and, after that date, since the Directive has not been implemented in national law, they are contrary to several provisions of the Directive which have direct effect.

78 According to the case-law of the Court, penalties, be they criminal or otherwise, involving national restrictive measures which have been recognised as being contrary to Community law are as incompatible with Community law as the restrictions themselves (see Case 179/78 *Rivoira and Others* [1979] ECR 1147, paragraph 14; Case 269/80 *Tymen* [1981] ECR 3079, paragraphs 16 and 17).

79 For this reason, a system of penalties intended to ensure compliance with national provisions which are contrary to Community provisions must be held to be contrary to Community law, without there being any need to examine whether or not it meets the tests of non-discrimination and proportionality.

80 Consequently, the fourth question should be answered as follows: where national provisions have been recognised as being contrary to Community law, the imposition of fines or other coercive measures for infringements of those provisions is also incompatible with Community law.

Costs

81 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Giudice di pace di Genova by orders of 16 October and 11 November 2000, hereby rules:

(1) Article 28 EC precludes legislation and national administrative practice which — in the context of a system where matters concerning conformity assessment procedures for the purposes of placing radio equipment on the market and putting such equipment into service have been delegated to the administrative authorities, to be decided at their discretion — prevents economic operators from importing, marketing or holding in stock, with a view to selling, radio equipment that has not undergone national type-approval, and which does not admit other forms of evidence, equally reliable but less burdensome to obtain, to prove that such equipment is in conformity with requirements concerning the proper use of the radio frequencies authorised under national law.

(2) The provisions of the second sentence of Article 6(1), Article 7(1) and 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 confer on individuals rights which may be relied upon before national courts even though the Directive itself has not been formally implemented in national law within the period prescribed. Article 7(2) of the Directive does not allow for the maintenance in force of legislation or administrative practice which, after 8 April 2000, prohibits the marketing 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) The term 'measure' within the meaning of 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 includes any measures, other than judicial decisions, taken by a Member State having the effect of restricting the free movement of goods lawfully produced or marketed in another Member State. 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 a check has been carried out by the public authorities responsible for technical checks to ascertain that the product in question is in conformity with both national and Community legislation, that is a 'measure' which must be notified to the Commission within the meaning of that provision.

(4) Where national provisions have been recognised as being contrary to Community law, the imposition of fines or other coercive measures for infringements of those provisions is also incompatible with Community law.

Macken Colneric Puissochet

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 20 June 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber