

OPINION OF ADVOCATE GENERAL  
GEELHOED

delivered on 12 December 2002 <sup>1</sup>

I — Introduction

II — Legal background

A — *Community law*

1. Directive 73/23

1. In this case, the Belgian Conseil d'État (Council of State) has raised a number of questions concerning the interpretation of Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits<sup>2</sup> (hereinafter 'Directive 73/23'), Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility<sup>3</sup> (hereinafter 'Directive 89/336'), 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<sup>4</sup> (hereinafter 'Directive 1999/5') and Articles 28 and 30 EC.

2. Pursuant to Article 1 thereof, Directive 73/23 applies to electrical equipment designed for use with a voltage rating of between 50 and 1 000 V for alternating current and between 75 and 1 500 V for direct current, other than the equipment listed in Annex II.

3. Article 2 of Directive 73/23 provides that:

'1. The Member States shall take all appropriate measures to ensure that electrical equipment may be placed on the market only if, having been constructed in accordance with good engineering practice in safety matters in force in the Community, it does not endanger the safety of persons,

1 — Original language: Dutch.

2 — OJ 1973 L 77, p. 29.

3 — OJ 1989 L 139, p. 19.

4 — OJ 1999 L 91, p. 10.

domestic animals or property when properly installed and maintained and used in applications for which it was made.

follows:

2. The principal elements of the safety objectives referred to in paragraph 1 are listed in Annex I.'

'1. Before being placed on the market, the electrical equipment referred to in Article 1 must have affixed to it the CE marking provided for in Article 10 attesting to its conformity to the provisions of this directive, including the conformity assessment procedure described in Annex IV.'

4. Article 3 of that directive provides that:

2. Directive 89/336

'The Member States shall take all appropriate measures to ensure that if electrical equipment is of such a nature as to comply with the provisions of Article 2, subject to the conditions laid down in Articles 5, 6, 7 and 8, the free movement thereof within the Community shall not be impeded for reasons of safety.'

6. Article 1(1) of Directive 89/336 defines 'apparatus' as all electrical and electronic appliances together with equipment and installations containing electrical and/or electronic components.

5. Article 8(1) of Directive 73/23 as amended by Directive 93/68<sup>5</sup> reads as

7. The first paragraph of Article 2(1) of that directive provides that:

5 — Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equipment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medical devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits) OJ 1993 L 220, p. 1.

'1. This directive applies to apparatus liable to cause electromagnetic disturbance or the performance of which is liable to be affected by such disturbance.'

8. Article 3 of that directive, as amended by Directive 93/68, provides that:

radio equipment and telecommunications terminal equipment.

‘Member States shall take all appropriate measures to ensure that the apparatus referred to in Article 2 may be placed on the market or taken into service only if it bears the CE marking provided for in Article 10 indicating its conformity to all the provisions of this directive, including the conformity assessment procedures laid down in Article 10, when it is properly installed and maintained and when it is used for the purposes for which it is intended.’

9. Article 5 of that directive reads as follows:

‘Member States shall not impede for reasons relating to electromagnetic compatibility the placing on the market and the taking into service on their territory of apparatus covered by this directive which satisfies the requirements thereof.’

3. Directive 1999/5

10. Article 1 of Directive 1999/5 establishes a regulatory framework for the placing on the market, free movement and putting into service in the Community of

11. Article 2(c) of that 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 radio-communication.

12. Article 3 provides that certain essential requirements are applicable to all apparatus. In addition, it stipulates that radio equipment must be so constructed that it effectively uses the spectrum allocated to communication so as to avoid harmful interference.

13. Article 5 of that directive provides that, where apparatus meets the harmonised standards, compliance with those of the essential requirements referred to in Article 3 is to be presumed.

14. Article 6(1) of Directive 1999/5 reads as follows:

‘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.'

17. Under the first paragraph of Article 19(1) of that directive:

15. Article 7(1) provides that:

'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.'

'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.'

#### B — *National law*

16. Article 8(1) reads as follows:

'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).'

18. Article 12 of the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services<sup>6</sup> (hereinafter the 'Law of 10 April 1990') provides that the alarm systems and networks referred to in Article 1(4) and their components may be marketed or otherwise made available to users only after prior approval has been granted under a procedure to be laid down by the King. The King also determines the conditions governing installation, maintenance and use of the alarm systems and networks referred to in Article 1(4) and their components.

<sup>6</sup> — *Monteur belge*, 29 May 1990, p. 10963.

19. Article 12 was replaced following the Law of 9 June 1999,<sup>7</sup> which entered into force on 1 November 1999. The new Article 12 reads as follows:

‘The alarm systems and networks referred to in Article 1(4) and their components may be marketed or otherwise made available to users only after prior approval has been granted under a procedure to be laid down by the King.

The alarm systems and networks referred to in Article 1(4) and their components, marketed or otherwise made available to users, must always conform to the prototype approved under the procedure to be laid down by the King referred to in paragraph 1.

The King shall also determine the conditions governing installation, maintenance and use of the alarm systems and networks referred to in Article 1(4) and their components.’

20. As provided for in the first paragraph of Article 19(1) of the Law of 10 April

1990, an administrative fine of between BEF 1 000 and 1 000 000 may be imposed upon any natural or legal person who infringes that law or its implementing decrees, except for the infringements referred to in Article 18.

21. On the basis of the first paragraph of Article 12 of the Law of 10 April 1990, a royal decree laying down the procedure for approving the alarm systems and networks referred to in the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services<sup>8</sup> was adopted on 23 April 1999 (hereinafter ‘the Royal Decree of 23 April 1999’). The royal decree entered into force on 19 June 1999.

22. Under Article 1(2) of the Royal Decree of 23 April 1999, ‘equipment’ means ‘the alarm systems and networks and their components intended to prevent or record crimes against persons or property’.

23. Article 2 of that royal decree reads as follows:

‘1. No manufacturer, importer, wholesaler or any other natural or legal person may

<sup>7</sup> — Law amending the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services, *Moniteur belge*, 29 July 1999, p. 28316.

<sup>8</sup> — *Moniteur belge*, 19 June 1999, p. 23217.

market equipment or make it available to users in Belgium if it has not been previously approved by a committee established for that purpose (the "equipment committee").

The costs of those checks shall be borne by the person who requested the approval tests leading to approval.'

2. For each equipment prototype approved, the equipment committee shall issue a certificate of approval, using the model set out in Annex 1 of this decree, which certificate shall be retained by the applicant.

24. Article 4(1) of the Royal Decree of 23 April 1999 provides that:

The applicant shall provide a conformity label, at his own expense, for equipment which conforms to the prototype and which is marketed or made available to users.

'After the equipment committee has delivered its opinion, the Interior Minister shall draw up a list of bodies specialising in carrying out the tests which precede approval of the equipment, if appropriate, or verifying the reports referred to in Article 9 of this decree.

...

Requests for approval of equipment shall be made directly to one of those bodies. Only those bodies shall be competent to carry out the tests.'

The departments responsible for overseeing the implementation of the abovementioned Law of 10 April 1990 and its implementing decrees may ask one of the bodies referred to in Article 4(1) of this decree to check the conformity of equipment which is marketed or made available to users. That body shall forward a report on those checks to the equipment committee, which, on the basis of that report, shall state whether or not the equipment conforms.

25. According to Article 5 of the Royal Decree:

'Before beginning the tests proper, the laboratories shall examine the equipment.

That examination shall consist of:

3. mechanical and/or electronic reliability;

1. identifying the equipment;

4. sensitivity to false alarms;

2. checking electrical circuits against the documents submitted by the manufacturer;

5. protection against fraud or attempts to neutralise the equipment;

3. checking the minimum required functions, as described in Annex 3 to this decree.

For that purpose, equipment shall be subjected to the tests listed in Annexes 3 and 5 to this decree. Those tests shall be applicable to the different types of component.

...'

26. Article 6 provides that:

Equipment using radio channels shall also be subjected to the tests referred to in Annex 6.'

'The tests carried out on the equipment shall concern:

27. Article 7 of the decree reads as follows:

1. functional adequacy;

'The laboratories of the bodies referred to in Article 4(1) shall check whether the equipment presented meets the requirements listed in Annex 7.

2. mechanical aspects;

To that end, the applicant must provide the abovementioned laboratories with all the documents relevant to that examination.'

Equipment to which alterations are made must be re-submitted to one of the bodies referred to in Article 4(1), which shall decide whether supplementary tests are necessary.'

28. Article 9 of the royal decree provides that:

'For the purposes of approval of the alarm systems and networks imported from other Member States of the European Union and from Member States of the European Free Trade Association, contracting parties to the Agreement on the European Economic Area, certificates and reports of tests drawn up by an approved or accredited body in those States shall be accepted in so far as they attest to the conformity of those systems and networks to technical standards or regulations which ensure a level of protection equivalent to that which is provided by this decree.'

29. Article 11 of the Royal Decree of 23 April 1999 provides that:

'Approvals shall be valid for a period of three years and may be extended, each time for the same period, on application. Applications for extension shall be submitted to one of the bodies referred to in Article 4(1) and shall be processed and examined in accordance with the abovementioned Articles 4 to 9.

30. Article 12 provides that the administration and operation costs involved in the application procedure, the tests and the conformity check are to be borne by the applicant.

### III — Main proceedings and course of the procedure

#### A — *Main proceedings*

31. ATRAL, a public limited company incorporated under French law, having its registered office in France (hereinafter 'ATRAL'), manufactures and markets alarm systems and networks using radio transmission (commonly referred to as 'wireless' alarm systems). Since 1996, ATRAL has been marketing its alarm systems and networks in Belgium, primarily via large-scale retailers.

32. Until the Royal Decree of 23 April 1999 entered into force, the sale of

ATRAL's products was not regulated, as the regulations then in force (the Royal Decree of 31 March 1994 laying down the procedure for approval of the alarm systems and networks referred to in the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services) applied only to 'wired-link' alarm systems and networks.

33. Since the entry into force of the royal decree, which now applies also to 'wireless' alarm systems and networks, ATRAL has been unable to market its products without first obtaining approval for them from the 'equipment committee'.

34. On 16 August 1999, ATRAL asked the Conseil d'État to annul the Royal Decree of 23 April 1999.

35. In addition, on 31 August 1999, ATRAL lodged a complaint with the European Commission alleging that the import of alarm systems and networks into Belgium was being obstructed. As a result of that complaint, the Commission gave the Kingdom of Belgium formal notice to submit comments on the matter. Those proceedings are still pending. ATRAL also brought an action before the Tribunal de Première Instance de Bruxelles (Court of First Instance, Brussels) with a view to obtaining an order prohibiting the Belgian State from making the sale of its products in Belgium subject to prior approval. Those proceedings are still pending.

36. ATRAL argued before the Conseil d'État that the Royal Decree of 23 April 1999 infringes Article 28 EC. It contended that, for the most part, the royal decree regulates areas harmonised at Community level by Directive 73/23, Directive 89/336 and Directive 1999/5. ATRAL considers that the Belgian legislature should not therefore have adopted rules more restrictive than those contained in the harmonised legislation. ATRAL infers from this that the Belgian State cannot impose precautionary checks to verify the conformity of alarm systems and networks. The directives authorise only subsequent checks. Conformity with the essential technical and qualitative requirements laid down by those directives is attested by the CE marking, to be affixed by the undertaking where the products in question satisfy a conformity assessment procedure defined in the relevant articles of, and annexes to, Directives 73/23, 89/336 and 1999/5.

37. ATRAL also argued that the Belgian State could regulate only the non-harmonised area of the field in question, and even then must do so in compliance with the Treaty and in particular Article 28 EC. In that respect, ATRAL takes the view that the Royal Decree of 23 April 1999, in particular Article 9 thereof, is not compatible with the principle of mutual recognition, under which any product imported from a Member State must be admitted into the territory of the importing Member State if it has been lawfully manufactured and marketed in the State of origin, even if that product was manufactured in accordance with technical or qualitative specifications different from those applicable to

products from the importing State, unless overriding reasons or imperative requirements in the public interest are relied on, and even then the principles of necessity and proportionality must be observed. Article 9 of the contested royal decree concerns only mutual recognition of the tests required for prior approval and does not therefore relate to mutual recognition of the products themselves. Such limited mutual recognition, it contends, is permissible only if it is justified by an essential requirement not already taken into account by the harmonised legislation and if it is demonstrated that that restriction on trade between Member States is necessary and proportionate, which it is not. As regards any essential requirements not yet the subject of harmonised legislation at Community level, regulations which restrict trade must, if they are to comply with Articles 28 and 30 EC, be justified by an overriding reason or an imperative requirement in the public interest and must be proportionate to the objectives pursued. ATRAL considers that, in the present case, the Belgian State has failed to show precisely which essential requirements in the interests of consumer protection, other than those already taken into account by the aforementioned directives, justify a system of prior approval such as that provided for in the contested decree. Public policy, essentially the prevention of 'false alarms', which was a further ground raised by the Belgian State, likewise does not provide justification. The Belgian State is, moreover, the only State to have introduced such a system.

38. The Belgian State disputes first of all the assertion that Directives 73/23/EEC and 89/336/EEC relate to the subject-matter regulated by the Royal Decree of 23 April

1999. As far as Directive 1999/5 is concerned, the Belgian State considers that it is irrelevant in the present case on the ground that, on the date which the Conseil d'État must take into account for the purposes of assessing the validity of the contested decree, that is 23 April 1999, the period given to Member States to transpose that directive into their national law had not yet expired. It is therefore incumbent on the Conseil d'État to disregard the directive in assessing the legality of the contested decree, including its compatibility with Community law. Such compatibility must be assessed only in the light of Articles 28 to 30 EC. A derogation from the general prohibition on measures having equivalent effect is justified in the present case on grounds of both consumer protection and public policy. The derogation is necessary and proportionate to the objectives pursued.

39. Before giving judgment on the action brought by ATRAL, the Conseil d'État considered it necessary to refer a number of questions to the Court of Justice for a preliminary ruling.

#### B — *The questions referred*

40. By order of 8 January 2002, the Conseil d'État referred the following questions to the Court:

'(1) Should Council Directive 73/23/EEC of 19 February 1973 on the harmon-

isation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility and Directive 1999/5/EC of 9 March 1999 of the European Parliament and of the Council on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity be interpreted:

(a) as applicable to alarm systems and networks, in particular to products of that type which use radio transmission, commonly known as wireless alarm systems,

(b) and, if the answer thereto is in the affirmative, as producing sufficiently significant harmonisation in that field that national provisions governing the same field, such as Article 12 of the Law of 10 April 1990 on caretaking firms, security firms and internal caretaking services and the Royal Decree of 23 April 1999 laying down the procedure for approving the alarm systems and networks referred to in the Law of 10 April 1990, must necessarily conform to them?

(2) In the event that the reply to the first question is in the affirmative:

— Should Article 3 of Council Directive 73/23/EEC of 19 February 1973, Article 5 of Council Directive 89/336/EEC of 3 May 1989 and Article 6(1) of Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 be interpreted as prohibiting national provisions which, as do Article 12 of the Law of 10 April 1990 and the Royal Decree of 23 April 1999, make the placing on the market in a Member State of all alarm systems and networks lawfully produced and/or marketed in another Member State... subject to a prior authorisation procedure relating to components of those alarm systems and networks which satisfy the requirements of the directives referred to?

— Should Council Directive 73/23/EEC of 19 February 1973, Council Directive 89/336/EEC of 3 May 1989 and Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 be interpreted as establishing the essential requirements, in relation to alarm systems and networks, for electrical safety, electromagnetic compatibility and radio equipment and, consequently, as precluding national provisions, such as the Royal Decree of 23 April 1999, which

make the placing on the market in Belgium of all alarm systems and networks subject to requirements other than those established in those directives?

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as the Royal Decree of 23 April 1999, which require components of alarm systems and networks not covered by Community harmonisation measures to undergo the same tests in an authorised laboratory as equipment placed on the market for the first time?

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect allows a Member State to adopt national provisions, such as the Royal Decree of 23 April 1999, which makes the placing on the market in a Member State of all alarm systems and networks lawfully manufactured and/or marketed in another Member State subject to prior approval and to tests and specific technical requirements, merely relying in the abstract on an overriding reason or a compelling requirement, such as consumer protection and/or public policy, which the State considers the Com-

munity harmonisation measures do not take into account or, in other words, without specifically demonstrating either that the overriding reason or compelling requirement relied on actually exists or that the Community harmonisation measures do not already take that overriding reason or compelling requirement into account or that the restrictive measure is proportionate to the aim pursued?

- (3) In the event that the reply to the first question is negative:

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as Article 9 of the Royal Decree of 23 April 1999, which, rather than applying the requirement of mutual recognition to the alarm systems and networks themselves, confine the requirement of mutual recognition to the tests which alarm systems and networks lawfully manufactured and/or marketed in another Member State must undergo in order to obtain authorisation to be placed on the market of a Member State?

- Should Articles 28 to 30 EC be interpreted as meaning that the

prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as Article 12 of the Law of 10 April 1990 and the Royal Decree of 23 April 1999, which impose a prior approval procedure for the placing on the market of a Member State of all alarm systems and networks lawfully manufactured and/or marketed in another Member State?

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as the second paragraph of Article 2 of the Royal Decree of 23 April 1999, which require alarm systems and networks lawfully manufactured and/or marketed in another Member State to carry a national conformity mark?

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as Article 9 of the Royal Decree of 23 April 1999, which require components of alarm systems and networks to undergo the same tests in an authorised laboratory as equipment being placed on the market for the first time?

- Should Articles 28 to 30 EC be interpreted as meaning that the prohibition on quantitative restrictions on imports and on measures having equivalent effect applies to national provisions, such as Article 9 of the Royal Decree of 23 April 1999, which make the placing on the market in a Member State of all alarm systems and networks lawfully manufactured and/or marketed in another Member State subject to prior approval and to tests and specific technical requirements, merely relying in the abstract on an overriding reason or a compelling requirement, such as consumer protection and/or public policy, or, in other words, without specifically demonstrating either that the overriding reason or compelling requirement relied on actually exists or that the restrictive measure is proportionate to the aim pursued?’

#### C — *Proceedings before the Court*

41. In the proceedings before the Court, written observations were submitted by ATRAL, the Belgian Government and the Commission. They expanded on their views at the hearing of 3 October 2002. The French Government also put forward its views at that hearing.

#### IV — Assessment

##### *A — The first set of questions — Question 1(a) and 1(b)*

42. The first set of questions relates to Directives 73/23, 89/336 and 1999/5. By those questions, the national court is in essence asking whether the three directives apply to alarm systems and networks, in particular wireless alarm systems, and, if so, whether the degree of harmonisation is such that national provisions governing that field must necessarily conform to them.

43. There is in essence no difference of opinion on those questions between the parties which have submitted written or oral observations. They all agree that the three directives apply to the products at issue and that the degree of harmonisation is such that national regulations must conform to them.

44. I concur with that view. Alarm systems and networks consist of various components which fall within the scope of the three directives. Thus, Directive 73/23 applies to electrical equipment within the voltage limits laid down in the directive. The components of systems and networks

which operate at a low voltage are therefore covered by that directive. Moreover, Directive 89/336 applies to any apparatus which is liable to cause electromagnetic disturbance or the performance of which is liable to be affected by such disturbances. Those systems and networks fall within the definition of apparatus set out in Article 1 of that directive. Finally, Directive 1999/5 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. Wireless alarm systems and networks also fall within the definition of radio equipment as set out in Article 2(c) of that directive.

45. It follows that the three directives apply to alarm systems and networks which use radio transmission. They concern any aspects of the performance of such apparatus, or its components, which involve the use of low voltage current, the prevention of electromagnetic disturbance and the emission and reception of radio signals.

46. The Commission, the French Government and the parties to the main proceedings agree that each of the three directives referred to is intended to achieve complete harmonisation within the field to which it applies. I share that view, which follows without any doubt from the letter and spirit

of those directives. The Belgian legislation and regulations must therefore comply with the directives in full where they extend to the matters covered by the directives. I need hardly add that that legislation and those regulations cannot impose on economic transactions relating to the apparatus in question restrictions which go beyond what the abovementioned directives expressly allow.

47. Nevertheless, the directives do not govern all aspects of the performance of alarm systems and networks. For example, depending on how it is to be used, such apparatus must comply with certain requirements as regards its functionality, such as reliability, sensitivity to false alarms, and durability. These points are addressed in the second question.

*B — Second set of questions referred (Question 2)*

48. Question 2 is made up of four questions. The first two relate to the components of alarm systems and networks to which Directives 73/23, 98/336 and 1999/5 apply. I shall address those two questions

together below. The questions on the interpretation of Articles 28 and 30 EC will then each be addressed in turn.

49. Article 3 of Directive 73/23, Article 5 of Directive 89/336 and Articles 6 and 8 of Directive 1999/5 guarantee the free movement of goods, both apparatus and its components, which satisfy the requirements laid down therein.

50. As the Commission explained in greater detail in its written observations, the harmonisation achieved by those directives confers a presumption of conformity on apparatus bearing the CE marking. That marking indicates the conformity of the product in question to all the provisions of the relevant directives, including the procedures for assessment of conformity to standard, as provided for in the directives. The directives contain a number of derogations from that basic rule but these are of no relevance in this case.

51. The rules described above enable manufacturers to place products bearing the CE marking on the market without first having to use an approved or accredited approval body. Furthermore, in the case of products bearing the CE marking, there is no need to produce test certificates or reports from approved or accredited approval bodies.

52. It follows that Article 12 of the Belgian Law of 10 April 1990, as amended by the Law of 9 June 1999, infringes the directive. After all, under that provision, products bearing the CE marking or otherwise shown to conform to the directives are subject to a prior approval procedure before they may be marketed in Belgium.<sup>9</sup> That procedure also requires that the products in question undergo tests and checks.

54. More generally, it follows from the Community directives at issue here that the Member States cannot make the marketing of components and finished products subject to requirements other than those which are expressly provided for in those directives in the fields which they cover. National provisions laid down by law or administrative action which have the aim or effect of imposing such requirements are therefore incompatible with those directives.

55. In my view, Questions 2(a) and (b) should be answered to that effect.

53. Article 9 of the Royal Decree of 23 April 1999 also infringes the rules contained in the directives. That provision states that, for the purposes of approval of the alarm systems and networks imported from other Member States of the European Union and Member States of the European Free Trade Association, contracting parties to the Agreement on the European Economic Area, 'test certificates and reports drawn up by an approved or accredited body in those States shall be accepted in so far as they attest to the conformity of those systems and networks to technical standards or regulations which ensure a level of protection equivalent to that which is provided by this decree'. The directives, on the other hand, provide for a presumption of conformity in the case of products bearing the CE marking or otherwise shown to conform to the directives. Article 9 of the royal decree is clearly incompatible with those rules.

56. Questions 2(c) and (d) relate to the components or characteristics of alarm systems and networks which are not covered by Community harmonisation measures.

57. Question 2(c) relates to the requirement under the Belgian legislation that the components of alarm systems and networks which are not covered by Community harmonisation measures undergo the same tests in an approved laboratory as equipment placed on the market for the first time.

<sup>9</sup> — This is also true of the old version of Article 12 of the Law of 10 April 1990, which included a similar prior approval requirement.

58. In the absence of Community rules, it is open to the Member States to retain or adopt national measures provided that they are compatible with the free movement of goods. This means that quantitative restrictions on imports and any measures having equivalent effect are prohibited. It is settled case-law of the Court that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having an effect equivalent to quantitative restrictions.<sup>10</sup> Pursuant to Article 30 EC, Article 28 EC does not preclude prohibitions or restrictions on imports which can be justified on the grounds set out in that article provided that such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Moreover, obstacles to movement within the Community resulting from disparities between the national laws must be accepted in so far as they are necessary in order to satisfy mandatory requirements.<sup>11</sup> Nevertheless, whether it is covered by the situations referred to in Article 30 EC or whether it is based on imperative requirements in the public interest established by case-law, national legislation which derogates from Article 28 EC can be justified only if it is consistent with the principles of necessity and proportionality.<sup>12</sup>

59. Firstly, I would point out, as the Commission has, that a national measure which imposes tests which are the same as those already carried out in the country of origin is a measure having equivalent effect within the meaning of Article 28 EC even if the field in question is not harmonised.

60. The same applies to a provision which, for the purposes of approval of alarm systems and networks imported from another Member State, accepts test certificates and reports drawn up by an approved or accredited body in that Member State only in so far as they attest to the conformity of those systems and networks to technical standards and regulations guaranteeing the same level of protection as in the country of importation. After all, a consequence of such an approval system is that a producer who wishes to export his systems and networks to Belgium must have that equipment tested and approved in his own country in order to satisfy the requirements of the Belgian legislature, even if the equipment can be marketed in his own country without the intervention of an approval body.

61. A condition requiring conformity to the same technical standards and level of protection as those obtaining in the country of importation has by definition the consequence of obliging producers from other Member States to adapt their products to the specific requirements of that country. Such a technical obstacle to trade by

10 — Judgments in Case 8/74 *Dassonville* [1974] ECR 837 and Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

11 — Judgment in Case 120/78 *REWE* ('*Cassis de Dijon*') [1979] ECR 649.

12 — Recently reaffirmed in the judgment in Joined Cases C-388/00 and C-429/00 *Radiosistemi* [2002] ECR I-5845.

definition constitutes an infringement of Article 28 EC. It is in breach of the principle of mutual recognition.

62. As I stated in point 58, such a provision can be justified on one of the public interest grounds defined in Article 30 EC or on the basis of one of the imperative requirements in the public interest established by case-law. The provision must also be necessary and proportionate.

63. The Commission has rightly pointed out that, even if an obstacle to the freedom of movement could be justified on the grounds relied on by the Belgian Government, it is for the national court to assess whether the requirement of a prior approval procedure is necessary to attain the objective pursued and whether it is proportionate. The necessity and proportionality of the test certificate or report required under Article 9 of the royal decree must also be assessed in this context. As the Commission also points out, the national court does not ask whether the grounds of justification relied on by the Belgian Government satisfy the conditions laid down by Article 30 EC or by case-law. The fourth question is, in essence, concerned exclusively with the burden of proof.

64. The question is whether it is sufficient for a Member State to rely on an abstract reference to an imperative requirement or

an overriding reason, such as consumer protection or public policy, which the State considers is not, or not sufficiently, taken into account in Community harmonisation measures, or whether a Member State is in fact required to provide tangible evidence that the imperative requirement or overriding reason relied on actually exists, that it has not already been taken into account by the Community harmonisation measures, and that the restrictive measure is proportionate to the objective pursued.

65. The dispute in the main proceedings concerns a question of European law raised before a national court. It is subject in principle to national rules of procedure, including rules of evidence. The case-law of the Court lays down a number of requirements in that regard. To wit, rules of evidence cannot render virtually impossible or excessively difficult the implementation of Community legislation.<sup>13</sup> Moreover, the rules of evidence laid down in the relevant national law cannot be less favourable than those governing similar domestic procedures.<sup>14</sup>

66. It is settled case-law that a derogation from the principle of free movement of goods set out in Article 30 EC can be justified only where thenational authorities

<sup>13</sup> — Judgment in Case 199/82 *San Giorgio* [1983] ECR 3595.

<sup>14</sup> — Judgment in Case C-212/94 *FMC and Others* [1996] ECR I-389.

demonstrate that that derogation is necessary to achieve one or several objectives which are set out therein and that the derogation is consistent with the principle of proportionality.<sup>15</sup> That also applies to preliminary ruling proceedings brought before the Court in the context of Article 28 EC in which a Member State relies on an imperative requirement to justify an obstacle to the free movement of goods. In such circumstances, the Court examines the ground relied on by the Member State and analyses whether there is any tangible evidence that it actually exists, is necessary and is proportionate. Where necessary, the Court advises the national court of all the factors it must take into consideration in its assessment. The rule that a national authority must demonstrate that the derogation in question is permitted under Community law cannot be different under national rules of procedure.

68. Such an assessment would have to take into account the fact that many characteristics of alarm systems and networks — and of their components — have already been harmonised by the three directives referred to above. In other words, the Belgian legislation and regulations now apply to only a few outstanding characteristics. None the less, application of the Belgian legislation and regulations means that the apparatus as a whole is subject to mandatory prior approval, which completely undermines the free movement of those goods achieved by the directives. National legislation which has such a consequence is readily classifiable as disproportionate since the protection of a limited public interest in a few outstanding non-harmonised characteristics makes the result sought through harmonisation of most of the other characteristics — freedom of movement — unachievable.

67. This means that the imperative requirements or overriding reasons must be defined so specifically as to make it possible to assess whether the measure taken by the Member State is justified as such. This degree of definition is also necessary because it would otherwise be impossible to assess whether the national rules at issue are effective and proportionate, that is to say whether or not they go beyond what is strictly necessary as regards the interest to be protected.

69. To prevent that consequence, which I consider to be unacceptable, it is the responsibility of the national legislature, when laying down the rules governing

15 — Judgment in Case 227/82 *van Bennekom* [1983] ECR 3883.

certain outstanding characteristics of systems and apparatus, to take into account all the existing harmonisation rules applicable to other characteristics of that apparatus. The principle of Community solidarity contained in Article 10 EC imposes an obligation on legislatures to draw up their national legislation by reference to the requirements and procedures to which Community law subjects those products — both components and apparatus. That means here that the national legislature should have confined itself either to recognising that apparatus lawfully marketed elsewhere in the Community conforms to standard or to setting up a system

of subsequent checks as the relevant directives in this instance permit.

*C — The third set of questions referred (Question 3)*

70. In the light of the answer to Question 1, it is not necessary to answer Question 3.

## V — Conclusion

71. On those grounds, I suggest that the Court answer the questions referred by the Belgian Conseil d'État as follows:

72. Question 1

- (a) Council Directive 73/23/EEC of 19 February 1973 on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility and Directive 1999/5/EC of 9 March 1999 of the European Parliament and of the Council on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity must be interpreted as being applicable to alarm systems and

networks, in particular to products of that type which use radio transmission, commonly known as wireless alarm systems.

- (b) It follows from Directives 73/23/EEC, 89/336/EEC and 1999/5/EC that, in the fields covered by those directives, the Member States cannot make marketing of components and finished products subject to requirements other than those which are expressly provided for in those directives. It follows that provisions laid down by law or administrative action which have the purpose or effect of imposing such excessive requirements are incompatible with those directives.

### 73. Question 2

- The harmonisation achieved by Directives 73/23/EEC, 89/336/EEC and 1999/5/EC entails a presumption of conformity to standard, which includes the procedures for assessment of conformity to standard, in relation to apparatus bearing the CE marking. Article 3 of Directive 73/23/EEC, Article 5 of Directive 89/336/EEC and Article 6(1) and Article 8(1) of Directive 1999/5/EC therefore preclude national provisions such as Article 12 of the Law of 10 April 1990 and Article 9 of the Royal Decree of 23 April 1999, which make the placing on the market in a Member State of all alarm systems and networks lawfully produced and/or marketed in another Member State subject to a prior approval procedure relating to components of those alarm systems and networks which satisfy the requirements of the directives referred to.

- Articles 28 to 30 EC must be interpreted as meaning that, even in the absence of Community harmonisation rules, products lawfully produced and marketed in a Member State can in principle be sold in any other Member State without being subject to further checks. National rules making the placing on the market of alarm systems and networks subject, in respect of outstanding characteristics and functions not covered by harmonisation measures, to checks and tests concerning the prior approval or to the ability to produce certificates establishing that the apparatus in question satisfies the same requirements as are imposed by the national rules, therefore hinder the free movement of goods. Such rules must satisfy the conditions for derogation laid down in Article 30 EC or another imperative requirement in the public interest established by Community law. They must be necessary to attain the objective pursued and must not go beyond what is strictly necessary for that purpose.
  
- The adducing of evidence is governed by national rules of procedure. None the less, the national court must ensure the effective application of Community law. The effective application of Articles 28 and 30 EC therefore requires that, in the event of a restriction of a fundamental freedom, the national court must be able to ascertain whether the ground of justification relied on is compatible with Community law. This means that a national authority which relies on a ground justifying a restriction of the free movement of goods must provide tangible evidence that there is a public interest to be protected, that the measure is necessary and that it is proportionate to the objective to be attained. When assessing the proportionality of the national measure, the national court must also determine what impact it has on the effectiveness of the existing harmonisation measures and whether it is compatible with them.