

OPINION OF ADVOCATE GENERAL

TRSTENJAK

delivered on 21 March 2007¹

I — Introduction

1. This case concerns three questions for a preliminary ruling referred by an Italian court of first instance, the Tribunale ordinario di Novara (District Court, Novara). The questions relate to the interpretation of Articles 2 and 3 of Commission Decision 1999/93/EC of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware, and Annexes II and III thereto, as well as to the application of the horizontal effects of those provisions as between individuals, and their validity.²

2. The questions at issue have been raised in the context of the dispute pending before the Tribunale ordinario di Novara between the plaintiff Carp Snc di L. Moleri ('Carp') and the defendant Ecorad Srl ('Ecorad') in which

the plaintiff is seeking a declaration that the defendant is in breach of contract as regards the supply of doors intended to be fitted with panic bars.

II — Legislative background

A — Community legislation

1. Directive 89/106/EEC

3. Article 1(2) of Council Directive 89/106/EEC of 28 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products, as amended by Council Directive 93/68/EEC of 22 July 1993 amending Directives 87/404/EEC (simple pressure vessels), 88/378/EEC (safety of toys), 89/106/EEC (construction products), 89/336/EEC (electromagnetic compatibility), 89/392/EEC (machinery), 89/686/EEC (personal protective equip-

1 — Original language: Slovene.

2 — OJ 1999 L 29, p. 51.

ment), 90/384/EEC (non-automatic weighing instruments), 90/385/EEC (active implantable medicinal devices), 90/396/EEC (appliances burning gaseous fuels), 91/263/EEC (telecommunications terminal equipment), 92/42/EEC (new hot-water boilers fired with liquid or gaseous fuels) and 73/23/EEC (electrical equipment designed for use within certain voltage limits),³ and by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC⁴ the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty ('Directive 89/106' or 'the Directive') provides that, for the purposes of the Directive, 'construction product' means any product which is produced for incorporation in a permanent manner in construction works, including both buildings and civil engineering works.

4. Article 2(1) of Directive 89/106 provides that Member States are to take all necessary measures to ensure that the products referred to in Article 1, which are intended for use in works, may be placed on the market only if they are fit for that intended use, that is to say, only if they have such

characteristics that the works in which they are to be incorporated, assembled, applied or installed can, if properly designed and built, satisfy the essential requirements referred to in Article 3 when and where such works are subject to regulations containing such requirements.

5. Article 3(1) of Directive 89/106 states that the essential requirements applicable to works which may influence the technical characteristics of a product are set out in terms of objectives in Annex I to the Directive. Those requirements relate to mechanical resistance and stability, safety in the event of fire, hygiene, health and the environment, safety in use, protection against noise, energy economy and heat retention.

6. Under Article 4(1) of Directive 89/106: 'Standards and technical approvals shall, for the purposes of this Directive, be referred to as "technical specifications".'

7. Article 4(2) of Directive 89/106 provides that: 'Member States shall presume that products are fit for use if they enable works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements referred to in Article 3 where such products bear the CE

3 — OJ 1993 L 220, p. 1.

4 — OJ 2003 L 284, p. 1.

marking indicating that they satisfy all the provisions of this Directive, including the conformity assessment procedures laid down in Chapter V and the procedure laid down in Chapter III.'

attestation of conformity are to benefit from the presumption of conformity with technical specifications within the meaning of Article 4. Conformity is to be established by means of testing or other evidence on the basis of the technical specifications in accordance with Annex III.

8. Article 4(6) of Directive 89/106 provides that: 'The CE marking signifies that products satisfy the requirements of paragraphs 2 and 4 of this Article. It is for the manufacturer or his authorised representative established within the Community to take responsibility for affixing the CE marking on the product itself, on a label attached to it, on its packaging, or on the accompanying commercial documents.'

11. Under Article 13(3) of Directive 89/106, the attestation of conformity of a product is dependent on:

(a) the manufacturer having a factory production control system to ensure that production conforms with the relevant technical specifications; or

9. Under Article 13(1) of Directive 89/106, the manufacturer, or his agent established in the Community, is to be responsible for the attestation that products are in conformity with the requirements of a technical specification within the meaning of Article 4.

(b) for particular products indicated in the relevant technical specifications, in addition to a factory production control system, an approved certification body being involved in assessment and surveillance of the production control or of the product itself.

10. Article 13(2) of Directive 89/106 provides that products that are the subject of an

12. Article 13(4) of Directive 89/106 provides that: 'The choice of the procedure within the meaning of paragraph 3 for a given product or family of products shall be

specified by the Commission, after consultation of the committee referred to in Article 19, according to:

- (a) the importance of the part played by the product with respect to the essential requirements, in particular those relating to health and safety;
- (b) the nature of the product;
- (c) the effect of the variability of the product's characteristics on its serviceability;
- (d) the susceptibility to defects in the product manufacture;

in accordance with the particulars set out in Annex III.

In each case, the least onerous possible procedure consistent with safety shall be chosen.

The procedure thus determined shall be indicated in the mandates and in the technical specifications or in the publication thereof.'

13. Article 16 of Directive 89/106 provides that:

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

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

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

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

2. Decision 1999/93/EC

14. Article 2 of Commission Decision 1999/93/EC of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware ('Decision 1999/93')⁵ provides that the products set out in Annex II are to have their conformity attested by a procedure whereby, in addition to a factory-production control system operated by the manufacturer, an approved certification body is involved in assessment and surveillance of the production control or of the product itself.

15. Under Article 3 of Decision 1999/93: 'The procedure for attesting conformity as set out in Annex III shall be indicated in mandates for guidelines for European technical approvals.'

16. Article 4 of Decision 1999/93 states: 'This Directive is addressed to the Member States.'

17. Annex II to Decision 1999/93 refers to the following products:

'Doors and gates (with or without related building hardware):

- for use in fire/smoke compartmentation and on escape routes ...'

18. As regards the systems of attestation of conformity for doors, gates and related building hardware, Annex III to Decision 1999/93 confers responsibility on CEN/CENELEC and provides that for the products and uses listed, the latter must specify the systems of attestation of conformity in the relevant harmonised standards. For doors and gates, Annex III provides that, in accordance with point 2(i) of Annex III to Directive 89/106, the system of attestation of conformity consisting in certification of the product by an approved certification body is to be applied (referred to as 'system 1').

5 — OJ 1999 L 29, p. 51.

B — *The national legislation*

19. In Italy, so far as ensuring safety in the event of fire is concerned, the installation and maintenance of devices for opening doors installed along exit routes is governed by the Decree of the Ministry of the Interior of 3 November 2004.⁶

III — Facts, the main proceedings and the questions referred for a preliminary ruling

20. In May 2005, on the basis of a contract with Ecorad for the supply of three aluminium doors intended to be fitted with panic bars, Carp installed the first of the doors at Ecorad's premises.

21. A door intended to be fitted with panic bars is a product made up of two components — the door itself and the panic bar — which are fitted together during the manufacturing process.

22. An inspection carried out, after installation, by technical experts at Ecorad's premises revealed that the door in question failed to meet the essential requirements laid down in Articles 2 and 3 of Decision 1999/93 and in Directive 89/106. As a result, Ecorad took the view that the contract had not been properly performed and refused to pay for the door which had already been installed. Furthermore, Ecorad asked Carp to provide proof of compliance with the requirements under system 1 for the installation of doors. The risk for Ecorad was that, if the installation had in fact been carried out in a manner which did not comply with the system of conformity, the competent authorities would impose penalties and require it to replace the door which had been installed.

23. Since Ecorad had refused payment, Carp brought an action before the Tribunale Ordinario di Novara (District Court, Novara) ('the national court') on 1 August 2005, seeking a declaration that Ecorad was in breach of contract. During the proceedings before that court, Ecorad contended that one of the clauses in the contract provided that, as well as being supplied and installed, 'the doors shall comply with all the applicable Community legislation and with national law', and asked the national court to annul the contract for the supply of the doors on grounds of non-performance.

24. On the view that the decision on the merits required an interpretation of Com-

⁶ — Decree of the Ministry of the Interior of 3 November 2004, Provisions concerning the installation and maintenance of devices for opening doors installed along exit routes to ensure safety in the event of fire (*Gazzetta Ufficiale della Repubblica italiana* No 271 of 18.11.2004).

munity legislation, the national court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

they require all producers to comply with the attestation of conformity procedure No 1 in order to be able to mark doors fitted with panic bars they have themselves manufactured with the CE conformity marking (the mandate to adopt the relevant technical standards being given to the CEN)?'

(1) Are Articles 2 and 3 of Decision 1999/93/EC and Annexes II and III thereto to be interpreted as meaning that it is not possible for doors intended to be fitted with panic bars to be manufactured by operators (door fitters) who do not comply with the requirements of the system of attestation of conformity No 1?

25. Carp, Ecorad, the Austrian Government and the Commission have submitted written observations during the course of the proceedings.

(2) If the answer to Question 1 is yes: regardless of whether technical standards have been adopted by the European Committee for Standardisation (CEN), are the requirements under Articles 2 and 3 of Decision 1999/93/EC and Annexes II and III thereto legally binding from the date when that decision entered into force in so far as regards the type of attestation of conformity procedure to be complied with by manufacturers (door fitters) of doors intended to be fitted with panic bars?

26. At the hearing on 25 January 2007, Carp, Ecorad and the Commission put forward oral argument and answered the questions put by the Court.

IV — Analysis

A — *The first question*

1. Arguments of the parties

(3) Are Articles 2 and 3 of Decision 1999/93/EC and Annexes II and III thereto to be regarded as being invalid on the basis that they are contrary to the principle of proportionality in so far as

27. Carp claims that, pursuant to Directive 89/106, construction products which are intended to become an integral part of a

building, such as doors and gates, may be placed on the market only if they are suitable for their intended use, if they satisfy the essential requirements laid down in the explanatory documentation and are manufactured in compliance with the harmonised legislation.

28. Carp further maintains that doors which are intended to be fitted with panic bars must be manufactured in such a way that they can be quickly opened outwards simply by pressing on the bar. Their purpose is to facilitate the rapid escape of persons from the premises in the event of danger. They therefore differ from doors for use in fire/smoke compartmentation, which are fire-resistant. The latter are designed to prevent fire or smoke spreading from one site to another. Carp none the less considers that Directive 1999/93 requires the intervention of a certification body to attest the conformity of doors and gates (with or without bars), as well as of the bars themselves.

29. Ecorad contends that it is clear from point 2 of Annex II to Directive 89/106 and from Decision 1999/93 that, for the kind of door which is intended to be fitted with a panic bar and which is at issue in this case, the system that applies for attestation of conformity is system 1.

30. The Austrian Government maintains that Article 2, in conjunction with Annex II to Decision 1999/93, relates to doors, gates and windows designed for use in fire/smoke compartmentation and on escape routes, as well as to building hardware designed for use in fire/smoke compartmentation and on escape routes, but does not cover doors fitted with panic bars or the bars themselves. Doors intended to be fitted with panic bars are not, in fact, the same as fire doors. Furthermore, harmonised standards applicable to doors which are intended to be fitted with panic bars have yet to be introduced; consequently, such doors may also be manufactured by manufacturers who do not satisfy the requirements under system 1.

31. The Commission points out that Directive 89/106 and Decision 1999/93 relate to construction products, not to the manufacturers or fitters of those products; moreover, it is the construction products that must satisfy the essential safety requirements. System 1 relates to the product and not the manufacturer, since it attests whether the product may be used for the purpose for which it was manufactured but not whether the manufacturer is fit to manufacture such products. Furthermore, Directive 89/106 and Decision 1999/93 do not apply to the circumstances forming the subject-matter of the main proceedings because that case does not have cross-border implications. In the case of doors intended to be fitted with panic bars, there are no technical specifications containing essential requirements, harmonised standards, European technical

approvals or national rules which have been referred to the Commission. Harmonised rule EN 1125 'Building hardware — Panic exit devices operated by a horizontal bar — Requirements and test methods' was approved in relation to panic bars only (Commission Communication in the framework of the implementation of Council Directive 89/106/EEC of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products⁷).

produce and in relation to which he must also apply the procedure of attestation of conformity. The provisions of those two legislative acts are designed to govern relations between the manufacturers and the Member States as regards the specific technical and physical properties of construction products.⁸

2. Assessment of the Advocate General

32. Before I begin my analysis of the first question, I must point out, by way of preliminary, that the Commission's contentions that Directive 89/106 and Decision 1999/93 relate to construction products and not to the manufacturers or fitters of those products, hence it is the construction products themselves which must comply with the essential safety requirements, are unfounded. Directive 89/106 and Decision 1999/93 are legislative acts. Legislative acts govern relations between persons with legal rights or obligations, not between the objects forming the subject-matter of those rights or obligations. They may govern relations between such persons with reference to specific such objects, including the construction products which the manufacturer must

33. Before answering the first question, it is necessary to point out that the so-called 'new approach' directives⁹ — of which Directive 89/106 is an example — do not list in detail all of the requirements relating to the safety of a particular product,¹⁰ rather, they set out in general terms, with reference to consumer

8 — Legal writers take the view that the law governs relations between entities capable of legal rights or obligations, not between the objects covered by the subject-matter of legal rights or obligations. The difference between such entities and objects emerges more clearly in property law. Let us take, for the purposes of comparison, the definition of the law of property proposed by Professor Juhart, a Slovene academic lawyer. According to Professor Juhart, in terms of legal relationships, that law governs the relationship between property ownership and rights over property (see Juhart, M., Tratnik, M. and Vrenčur, R.: *Stvarno pravo*, Ljubljana, 2007, p. 39). A similar approach is taken by Professors Larenz and Wolf, who argue that the law of property governs the rights of the individual over property (Larenz, K. and Wolf, M.: *Allgemeiner Teil des bürgerlichen Rechts*, 9th edition, Munich 2004, p. 12).

9 — For a review of the 'new approach' directives, see the articles by Klindt, T.: *Der 'new approach' im Produktsrecht des europäischen Binnenmarkts: Vermutungswirkung technischer Normung*, EuZW 5/2002, pp. 133-136, and by Langner, D.: *Technische Vorschriften und Normen*, in Dausen, M. (ed.): *Handbuch des EU-Wirtschaftsrecht*, volume 1, Munich 2004, paragraphs 55 to 105.

10 — Röhl, H.-C., and Schreiber, Y.: *Konformitätsbewertung in Deutschland*, Constance, 2006, <http://www.ub.uni-konstanz.de/kops/volltexte/2006/1993/>, p. 49.

7 — OJ 2005 C 319, p. 1.

protection, the minimum safety requirements which a specific product must satisfy.¹¹

34. The structure of Directive 89/106 differs from that of other 'new approach' directives primarily in that it merely lays down the procedures. The essential requirements¹² of construction products are laid down in the interpretative documents and the harmonised standards based on those documents, or in guidelines for European technical approval.¹³ It is also worth pointing out that Directive 89/106 differs from the other 'new approach' directives in that it provides that — after publication and on expiry of the transitional period — the harmonised standards established on the basis of that directive are to become binding on the Member States.¹⁴ According to legal writers, Directive 89/106 is to be applied only gradually, as harmonised standards for individual products or groups of products are published. Until such rules enter into force,

the relevant national legislation applies.¹⁵ Consequently, it is not possible to consider the procedure for the attestation of conformity of construction products laid down in Decision 1999/93 without providing a brief description of the technical Community provisions.

35. When a manufacturer places a product on the market for the first time, that product is subject to the application of all of the Community rules on the free movement of goods on the common market.¹⁶ Those rules govern three sectors in particular, namely technical standards and provisions, access to the market and market controls.¹⁷ They also include the provisions on the technical safety of products.¹⁸

36. A manufacturer who manufactures or otherwise constructs products to be placed on the market can choose between two

11 — Klindt, T.: *Der 'new approach' im Produktsrecht des europäischen Binnenmarkts: Vermutungswirkung technischer Normung*, p. 134.

12 — In his Opinion in Case C-254/05, Advocate General Mázak maintains that the key feature of the essential requirements laid down in the annexes to the 'New Approach' directives is that they define the results to be attained or the hazards to be dealt with, but do not specify or predict the technical solutions for doing so (Opinion of 8 February 2007 in Case C-254/05 *Commission v Belgium*, pending before the Court, point 33).

13 — Langner: *Technische Vorschriften und Normen*, paragraph 69.

14 — Opinion in Case C-254/05, cited in footnote 12, point 33.

15 — Langner: *Technische Vorschriften und Normen*, paragraph 69.

16 — Klindt, T.: *Der 'new approach' im Produktsrecht des europäischen Binnenmarkts: Vermutungswirkung technischer Normung*, p. 133.

17 — Röhl and Schreiber: *Konformitätsbewertung in Deutschland*, p. 49. The authors point out that, so far as technical standards are concerned, the requirements which the products must satisfy are laid down in general terms. Market access for any product is regulated within that sector, whereas possible risks linked to the product in question are regulated in the market control sector.

18 — Klindt, T.: *'Spielzeugleuchten' an der Schnittstelle zwischen Niederspannungs- Richtlinie, Spielzeug- Richtlinie und technischer Normung*, EuzW 14/1998, p. 426. The author believes that the purpose of those standards is the proactive protection of consumers and users.

methods of ensuring that his products meet the technical and physical requirements under the technical provisions. Basically, under the first method, the products may be manufactured in accordance with the technical standards,¹⁹ while, under the second method, they may be manufactured in such a way that the products themselves satisfy the essential requirements laid down in specific provisions,²⁰ particularly in annexes to the technical harmonisation directives. That is not, however, the position if the standards are binding in nature.

the product does not comply lies with the complainant²¹ not with the manufacturer.

37. In the case of products manufactured in compliance with the harmonised technical standards, the presumption of conformity with the requisite technical and physical characteristics applies, as laid down by the technical legislation and, in particular, the technical harmonisation directives. In the event of a dispute, the burden of proving that

38. In the present case, it is common ground — as both the Commission and Carp point out — that the harmonised standards for doors intended to be fitted with panic bars are not yet applicable. On 3 February 2006, on the basis of the mandate²² conferred by the Commission, the CEN²³ adopted harmonised standard EN²⁴ 14351-1:2006 which lists the essential requirements for doors, gates, windows, shutters and blinds. That harmonised standard will enter into force as of 1 January 2009. Pursuant to the general legal principle *tempus regit actum*, that standard cannot be regarded as the law

19 — Article 1(4) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37) provides that 'standard' means a technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory. Those 'standards' are divided into international, European and national standards.

20 — Aubry-Caillaud, F.: *La libre circulation des marchandises: nouvelle approche et normalisation européenne*, Paris 1998, p. 216. The author points out that in both cases the products must comply with mandatory rules.

21 — Legal writers take the view that application of the harmonised standards is not compulsory. Should a dispute arise, the burden of proof lies with the producer. If that producer does not comply with the harmonised standards in the manufacture of his products, he must prove that his product fulfils the essential requirements laid down by the directives. For that reason, legal writers advise the parties to the case to ascertain, first of all, whether harmonised standards exist for a given product. But even if harmonised standards actually exist, it is still necessary to establish whether the harmonised standards meet all of the requirements which the directive lays down. That evidence is provided by the method of control of conformity (Dubois, L., Blumann, C.: *Droit matériel de l'Union européenne*, 3rd edition., Paris 2004, p. 290; Langner: *Technische Vorschriften und Normen*, paragraph 44; Röhl, Schreiber, *Konformitätsbewertung in Deutschland*, pp. 49-50).

22 — Mandate M/101 to CEN/CENELEC concerning the Execution of Standardisation Work for Harmonised Standards on Doors, Windows, Shutters and Related Building Hardware.

23 — CEN is the abbreviation for the Comité européen de normalisation (European Committee for Standardisation). This is a body with its headquarters in Brussels which takes the form of a non-profit-making organisation under Belgian law. CEN was created in 1961 by the national bodies responsible for harmonising standards in the Member States of the EEC and the EFTA countries.

24 — EN is the abbreviation for European Norm.

applicable in the present case. The case-law of the Court of Justice permits derogations from the principle of *tempus regit actum* specifically in relation to technical regulations.²⁵ Thus, in *Unilever Italia*,²⁶ the Court of Justice held that, in civil proceedings relating to a dispute between two parties concerning contractual rights and obligations, the national court is required to refuse to apply a national technical regulation adopted during the period when such adoption must be postponed pursuant to Article 9 of Council Directive 83/189/EEC, as amended by Directive 94/10/EC ('Directive 83/189').

transpose into national law within the prescribed period a directive which created rights for individuals. In *Unilever Italia*, Directive 83/189 did not in any way define the substantive content of the legal rule on the basis of which the national court had to decide the case before it. The directive created neither rights nor obligations for individuals.²⁷ The national legislation — Italian Law No 313 — was, in fact, manifestly in breach of the procedural provisions of Directive 83/189, which specify a period of time during which the Member States must not adopt rules of a similar nature.

39. It is necessary to emphasise, however, that *Unilever Italia* concerned technical rules. Furthermore, the Court of Justice expressly pointed out in that judgment that the case did not concern a failure to

40. Given that the harmonised standards for doors intended to be fitted with panic bars are not yet applicable, it is necessary to ascertain, by means of a special attestation procedure, whether those doors comply with the essential requirements laid down in Annex I to Directive 89/106. However, Directive 89/106 does not regulate the certification procedures or the procedures for attesting conformity in a comprehensive and exhaustive manner. On the basis of Article 20 of Directive 89/106 and in conjunction with the Standing Committee on Construction, the Commission is to determine for every construction product the most appropriate method of attesting conformity.²⁸ Annex III to Directive 89/106

25 — Article 1(9) of Directive 98/34/EC provides that 'technical regulation' means technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.

26 — Case C-443/98 *Unilever Italia* [2000] ECR I-7535. The civil action involved in the main proceedings before the Italian court related to the dispute between Central Food and Unilever Italia. On 29 September 1998, Unilever Italia delivered 648 litres of olive oil, on the basis of an order from Central Food. On 30 September 1998, after inspecting the goods, Central Food identified a substantial defect and informed Unilever Italia that the oil was not labelled in compliance with the requirements of Italian law, namely Law No 313/98, which had been published in the *Gazzetta Ufficiale della Repubblica Italiana* of 29 August 1998 and had entered into force on the following day. Central Food therefore refused payment and called on Unilever Italia to remove the oil from its warehouses.

27 — *Unilever Italia*, cited in footnote 26, paragraph 51.

28 — Langner: *Technische Vorschriften und Normen*, paragraph 73.

merely establishes the methods of assessing conformity,²⁹ which may then be combined for the purpose of drawing up the modules for the attestation of conformity of a particular product. Point 2 of Annex III to Directive 89/106 provides for a number of different module arrangements for attesting conformity which contain various combinations of conformity control methods. The modules are not, however, binding *per se*;³⁰ when taking its decision on the attestation of conformity of construction products, the Commission may, in fact, determine different combinations of procedures for attesting conformity. As a rule, the Commission's decision on the choice of procedure for attesting conformity is adopted together with the decision conferring the mandate for the harmonised standards.³¹

41. Council Decision 90/683/EEC³² provided that industrial products governed by

the technical harmonisation directives could be placed on the market only if they carried the CE marking.

42. That decision was repealed and replaced by Decision 93/465/EEC³³ which contains similar provisions in relation to the CE marking.³⁴ According to Council Decision 93/465/EEC, the essential objective of a conformity assessment procedure is to enable the public authorities to ensure that products placed on the market conform to the requirements laid down in the provisions of the directives, in particular with regard to the health and safety of users and consumers.³⁵ Those provisions are principally to be found in the annexes to the directives, which contain the essential requirements, and those requirements are binding.³⁶ Decision 93/465/EEC provides, as a general rule, that the product must undergo two phases of conformity assessment, namely the design phase and the production phase, and may be

29 — Point 1 of Annex III to Directive 89/106 lays down the methods of control of conformity. These consist in: initial type-testing of the product by the manufacturer or an approved body; testing of samples taken at the factory in accordance with a prescribed test plan by the manufacturer or an approved body; audit-testing of samples taken at the factory, on the open market or on a construction site by the manufacturer or an approved body; testing of samples from a batch which is ready for delivery, or has been delivered, by the manufacturer or an approved body; factory production control; initial inspection of factory and of factory production control by an approved body; continuous surveillance, judgement and assessment of factory production control by an approved body.

30 — Langner: *Technische Vorschriften und Normen*, paragraph 73.

31 — Langner: *Technische Vorschriften und Normen*, paragraph 73.

32 — Council Decision 90/683/EEC of 13 December 1990 concerning the modules for the various phases of the conformity assessment procedure which are intended to be used in the technical harmonisation directives (OJ 1990 L 380, p. 13).

33 — Council Decision 93/465/EEC of 22 July 1993 concerning the modules for the various phases of the conformity assessment procedure and the rules for the affixing and use of the CE conformity marking, which are intended to be used in the technical harmonisation directives (OJ 1993 L 220, p. 23).

34 — Analysing the penalties provided for under French law, French legal writers maintain that, where the CE marking is compulsory, the placing on the market of products without the CE marking constitutes a criminal offence [Inforeg: 'Le marquage CE: cahier pratique', *Cahiers de droit de l'entreprise*, 1/2006, p. 79 (81)].

35 — General Guidelines I(A)(a) in Council Decision 93/465/EEC.

36 — Advocate General Mazák points out that, unlike the technical specifications, the essential requirements are binding (Opinion in Case C-254/05, cited in footnote 12, point 33).

placed on the market only if the results of both are positive.³⁷ It is therefore possible to speak in terms of binding conformity assessment procedures.

43. It is clear from Article 2(1) of Directive 89/106 that construction products may be placed on the market only if they fulfil the essential requirements. However, it can be inferred from Article 4(6) of the Directive, read in conjunction with Article 4(2) thereof, that the CE marking, affixed to construction materials, implies that the product satisfies the essential requirements. Consequently, legal writers take the view that construction products, too, may be placed on the market only if they bear the CE marking.³⁸ The CE marking indicates that the product is suitable to be placed on the market within the Community.³⁹

44. Decision 1999/93 provides the answer to the question whether a particular construction product meets the essential requirements laid down in Annex I to Directive 89/106. Pursuant to Article 2 of that decision, the conformity of doors or gates, with or without hardware, which are designed for use in fire/smoke compartmen-

tation and on escape routes is to be attested by means of a procedure whereby, in addition to a factory production control system, an approved certification body is involved in assessment and surveillance of the production control or of the product itself. Annex III to Decision 1999/93 expressly specifies system 1 for the conformity attestation of doors with hardware which are designed for use in fire/smoke compartmentation and on escape routes.

45. Lastly, it remains to be established whether doors intended to be fitted with panic bars constitute doors and gates with hardware designed for use in fire/smoke compartmentation and on escape routes for the purposes of Annexes II and III to Decision 1999/93.

46. At the hearing before the Court of Justice, and at the Court's express request, Carp and Ecorad explained that the doors at issue fitted with panic bars are a combined product consisting of a door and a panic bar. The purpose of the product is to facilitate rapid escape from the building. Carp and Ecorad also explained that, as of 2003, the bars must also bear their own CE marking. In response to a specific question put by the Court, Carp and the Commission added — and Ecorad did not challenge their statements — that doors intended to be fitted

37 — General Guidelines I(A)(a), (b) and (c) in Council Decision 93/465/EEC.

38 — Rocco, G.: *L'etichettatura dei prodotti in commercio, Santarcangelo di Romagna*, 2006, p. 132.

39 — Finke, K.: 'Die europäische technische Normung', in: Reichel, C., Schneider, H., Weyer, H. (eds): *Beiträge zum deutschen und europäischen Energierecht: Festschrift für Professor Dr. jur. Jürgen F. Baur zum 60. Geburtstag*, Baden-Baden, 1998, p. 141(147); Aubry-Caillaud, *La libre circulation des marchandises: nouvelle approche et normalisation européenne*, p. 218.

with panic bars must, as a unit, bear the CE marking: in other words, the whole of the product which serves as an exterior door⁴⁰ on the escape route or which even serves as the emergency exit from the building, must bear the CE marking.

48. For that reason, I propose that the Court should state in answer to the first question referred by the national court that Articles 2 and 3 of Decision 1999/93 and Annexes II and III thereto must be interpreted as meaning that exit doors which are intended to be fitted with panic bars but which have not been certified in accordance with conformity assessment system No 1 may not be placed on the market.

B — *The second question*

47. Crucially important when it comes to classing the doors intended to be fitted with panic bars as doors fitted with bars for escape routes for the purposes of Decision 1999/93, is the submission by Carp and Ecorad, at the hearing, that the doors sold — that is to say, the doors which are the subject-matter of the main proceedings — were designed to act as exterior doors to facilitate rapid escape from the premises. Also of some significance in that respect is the argument put forward by Ecorad at the hearing that the doors are intended for the emergency exit. In the present case, it is sufficient that the doors at issue, which were manufactured by Carp and intended to be installed as exterior doors to facilitate rapid escape from the premises, may be included in the general category of doors fitted with hardware for escape routes, for the purposes of Annexes II and III to Decision 1999/93.

1. Arguments of the parties

49. Carp maintains that Decision 1999/93 is addressed exclusively to the Member States and does not produce binding effects as between individuals, since, by virtue of Article 249 EC, it is binding only in relation to its addressees. By approving that decision, the Commission merely complied with the obligation to establish the systems for attesting conformity of the various categories of door on the basis of Directive 89/106, laying down, by that decision, the type of procedure to be used for attesting whether a given product or category of product was compliant in accordance with Directive 89/106. The Commission confers on CEN the mandate to set the technical standards, and on the basis of that mandate, CEN draws up, by means of technical specifications, the

⁴⁰ — Exterior door means the doors situated at the exits from a building.

essential requirements for a specific product and, at the same time, determines the procedure for attesting conformity. When the harmonised standard is adopted, the Member States transpose it into their own legal systems. Only when the harmonised standard has been thus transposed do the technical requirements become obligatory for manufacturers.

1999/93 already produces its effects. Decisions addressed to individuals are directly applicable per se and take effect immediately in the Member States. Decision 1999/93 is binding on and directly applicable in relation to manufacturers operating on the Italian market.

50. Ecorad points out that, in approving Decision 1999/93, the Commission implemented Article 13(4) of Directive 89/106. In addition, as regards the effects of the decision, Ecorad argues, with reference to Article 249 EC, that the decision has binding effect and is binding upon all those to whom it is addressed. A decision addressed to the Member States is, to some degree, similar to a directive in so far as it requires the Member States to take clear defined action as well as to transpose it into their national legal systems. If, however, the decision contains provisions which are directly applicable, those provisions take effect immediately in national law.

52. The Austrian Government considers it unnecessary to answer the second question.

53. The Commission takes the view that Article 2 of Decision 1999/93 and Annex II thereto must be applied if technical specifications within the meaning of Directive 89/106 exist. However, it considers that Article 3 of Decision 1999/93 and Annex III thereto do not apply in the absence of harmonised standards. At the hearing, and in response to a specific question by the Court, the Commission also explained that Decision 1999/93 does not have binding effect as between individuals. The latter may invoke before the courts only the provisions of national law transposing the decision.

51. According to Ecorad, Decision 1999/93 was adopted to establish a technical standard which may affect the rights of individuals. That decision defined the procedure for attesting the conformity of a category of products. It is clear that, once it has been adopted, the Member States must transpose the harmonised standard into their own legal systems; up to the present, however, Decision

2. Assessment of the Advocate General

54. It must first be pointed out that, in practice, the Commission's decision con-

cerning the choice of method or methods for attesting conformity was properly adopted together with the decision conferring the mandate for the standards,⁴¹ and is addressed to the Member States.

55. Article 249 EC contains the list of legislative acts which characterise Community law.⁴² Under the fourth paragraph of Article 249, a decision is binding in its entirety upon those to whom it is addressed. That article defines the legal effects of a decision, but not its legal nature. For that reason, the question whereby the national court asks whether Articles 2 and 3 of Decision 1999/93 and Annexes II and III thereto are legally binding must be construed as inquiring whether that decision has direct effect. In view of the third question referred by the national court, the second question may not be interpreted *a contrario* as seeking to ascertain whether the decision is valid. Consequently, it is necessary to consider whether Decision 1999/93 — which is addressed to all the Member States — has direct effect, and whether that effect is vertical or horizontal.

56. In the context of the direct effect of legislative acts, Community law distinguishes

between full direct effect and partial direct effect. Full direct effect means that an act of Community law creates rights in relations between individuals (*horizontal direct effect*), rights vis à vis the State in the relationship between the individual and the Member State (*vertical direct effect upwards*) and rights vis à vis the individual in the relationship between the Member State and the individual (*vertical direct effect downwards*). Partial direct effect creates only rights for the individual vis à vis the Member State (*vertical direct effect upwards*).⁴³

57. Pursuant to Article 249 EC, the addressees of a decision may be individuals, or some or all of the Member States.⁴⁴

58. If the addressees of the decision are specific individuals, then the decision — adopted under the fourth paragraph of Article 249 EC — is comparable to an administrative act.⁴⁵ That is why legal

43 — Sauron, J.-L.: *L'application du droit de l'Union européenne en France*, 2nd edition, Paris 2000, pp. 30 and 40. The author argues that, where certain conditions are met, directives and decisions have upward vertical direct effect only.

44 — Oppermann, T.: *Europarecht*, 3rd edition, Munich 2005, p. 169. Fischer, H.G.: *Europarecht*, 3rd edition, Munich, 2001, p. 79. Öhlinger, T., Potacs, M.: *Gemeinschaftsrecht und staatliches Recht*, 3rd edition, updated, Vienna, 2006, p. 12. Blumann, C., and Dubois, L.: *Droit institutionnel de l'Union européenne*, 2nd edition, Paris 2005, p. 416. Greaves, R.: 'The Nature and Binding Effect of Decisions under Article 189 EC', *European Law Review*, 21(1996), p. 3 (3 and 4). Mager, U.: *Die staatengerichtete Entscheidung als supranationale Handlungsform*, *Europarecht* 36(2001), p. 661 (663).

45 — That applies only in relation to legal systems in which administrative acts constitute individual and specific legal acts, such as, for example, Germany, Austria and Slovenia (see Schütz, H.-J., Bruha, T., and König, D.: *Casebook Europarecht*, Munich 2004, p. 156).

41 — Langner: *Technische Vorschriften und Normen*, paragraph 73.

42 — Schmidt, G., in von der Groeben and Schwarze, Article 249 EC, paragraphs 15 and 16.

writers maintain that a decision addressed to specific individuals constitutes an individual legislative act,⁴⁶ lacking general and abstract effects.⁴⁷ Since a decision addressed to one or more specific individuals does not require that the Member States adopt national legislation to transpose the substance of that decision into domestic law, it may have direct effect in relations between the addressees and the Member State,⁴⁸ and the addressees may invoke that direct effect before the national courts.⁴⁹

Decision 1999/93 is more akin to that of a directive than to that of a collective decision⁵¹, which governs individual relationships.⁵²

59. A decision which is addressed to all of the Member States constitutes a general act in terms of its effects.⁵⁰ The content of

60. If the purpose of a decision adopted by the institutions is to harmonise the application of Community law, that decision will as a rule be addressed to all the Member States. The effect of such a decision in the Member

46 — Blumann and Dubois: *Droit institutionnel de l'Union européenne*, p. 419.

47 — Lenaerts, K., van Nuffel, P., and Bray R.: *Constitutional Law of the European Union*, 2nd edition, London 2006, pp. 780 and 781; van Raepenbusch, S.: *Droit institutionnel de l'Union européenne*, 4th edition, Brussels, 2005, p. 373. The latter author points out that it is frequently difficult to distinguish between a legislative act and a collective decision addressed to all of the Member States. German academic lawyers argue that through the instrument of the decision, the fourth paragraph of Article 249 EC makes available to the Community institutions and bodies a legal instrument to regulate individual cases with binding effect (Schütz, Bruha and König, *Casebook Europarecht*, p. 156).

48 — Schütz, Bruha and König: *Casebook Europarecht*, p. 167. Schmidt, G., in von der Groeben and Schwarze, Article 249 EC, paragraph 46.

49 — Jacqué, J.-P.: *Droit institutionnel de l'Union européenne*, 3rd edition, Paris 2004, p. 575.

50 — Legal writers take the view that decisions addressed to all the Member States constitute 'in a manner of speaking, legislative acts' since they generally contain obligations on the Member States in relation to the public and not individuals (see Greaves: *The Nature and Binding Effect of Decisions under Article 189*, pp. 4 and 10). However, other academics take the view that, because of their similarity with directives, the horizontal effect of decisions addressed to the Member States does not apply in relationships between individuals (Jacqué, *Droit institutionnel de l'Union Européenne*, p. 575). German academic lawyers also consider that, as in the case of directives, the limitations on immediate and binding vertical effect in relation to individuals applies also to decisions addressed to the Member States (Vogt, M., 'Die Rechtsform der Entscheidung als Mittel abstrakt genereller Steuerung', Schmidt-Assmann, E. and Schöndorf, B. (eds), *Der Europäische Verwaltungsverbund*, Tübingen 2005, p. 232).

51 — A collective decision has several addressees but basically performs the function of a series of individual decisions (Opinion of Advocate General Lagrange of 20 November 1962 in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others v Council* [1962] ECR 471). From that perspective, it is of particular interest to compare the definition of a collective decision in Slovenia's legal system. To that effect, Article 217 of the Slovenian Law on general administrative procedure defines collective decisions as follows: 'Where the issue concerns a large number of specific individuals, a single decision may be adopted in relation to all of them; the individuals must be named in the operative part of the decision, and the reasons must be set out in the statement of reasons with reference to each individual.'

52 — Blumann and Dubois: *Droit institutionnel de l'Union européenne*, p. 420. The authors point out that decisions of the Commission which are addressed to all the Member States are, in practice, published in the *Official Journal of the European Union* because of their 'legislative nature' — in other words, their general effect — even though Article 254 EC does not require their publication. A linguistic analysis of Article 254 EC shows that only decisions approved by the European Parliament and the Council in the context of the codecision procedure under Article 251 EC have to be published in the *Official Journal*, but not general decisions of the Commission which are addressed to all the Member States.

States is general and abstract.⁵³ If we compare that with the situation in domestic law, the Community decision addressed to all the Member States is similar, in terms of content, to the sort of recommendation that a government adopts in relation to the authorities for the implementation of legislation: the Member States must transpose the decision into national law. In point of fact, Articles 1 and 2 of Decision 1999/93 indicate to the Member States how Directive 89/106 is to be implemented as regards the process of attesting the conformity of doors, windows, shutters, blinds, gates and building hardware. For that reason, the content of Articles 1 and 2 is comparable with that of a directive.

61. The Court of Justice has held that 'in the case of decisions addressed to the Member States, they are binding on all the organs of the State to which they are addressed, including the courts. It follows that, by virtue of the principle of the precedence of Community law ... the national courts must refrain from applying any national provisions ... the implementation of which would be likely to hinder the implementation of a Community decision'.⁵⁴

62. Provided that certain requirements are satisfied, decisions addressed to the Member States have direct effect, with the result that third parties also may invoke them before the courts.⁵⁵

53 — Mager, U, *Die staatengerichtete Entscheidung als supranationale Handlungsform*, p. 664. The author points out that, for that reason, the content of a decision addressed to all the Member States, and that of a directive overlap. In its order of 25 May 2004 in Case T-264/03 *Schmoldt and Others v Commission* [2004] ECR II-1515 (paragraph 94), the Court of First Instance found that Commission Decision 2003/312/EC of 9 April 2003 on the publication of the reference of standards relating to thermal insulation products, geotextiles, fixed fire-fighting equipment and gypsum blocks, addressed to all the Member States, is an act of 'general character' pursuant to Council Directive 89/106/EEC (O) 2003 L 114, p. 50). That decision, which is addressed to all the Member States, was approved on the basis of Article 5(1) of Directive 89/106, which provides that where a Member State or the Commission is of the opinion that the harmonised standards or European technical approvals or the mandates do not satisfy the provisions of Articles 2 and 3 of the directive, that Member State or the Commission is to notify the committee referred to in Article 19, setting out its reasons. The committee is to deliver an urgent opinion. In the light of the opinion of the committee, and after consultation with the committee set up under Directive 83/189/EEC where harmonised standards are concerned, the Commission is to inform Member States if the standards or approvals concerned should be withdrawn in the publications referred to in Article 7(3). The Court of First Instance rejected the application because the applicant failed to prove an individual interest. By order of 16 September 2005 in Case C-342/04 P *Schmoldt and Others v Commission*, not published in the ECR, the Court of Justice declared the appeal against that order to be in part clearly unfounded and in part clearly inadmissible.

54 — Case 249/85 *Albako* [1987] ECR 2345, paragraph 17. In that case, the Court of Justice gave its ruling in a dispute between a margarine producer and the German agricultural intervention agency concerning the conduct of that agency in response to the Commission's decision on sales of butter.

55 — Schmidt, G., in von der Groeben and Schwarze, Article 249 EC, paragraph 46. However, legal writers advise that the direct effect of decisions addressed to the Member States has also to be inferred from the nature, the context and the content of the provision in question; that provision must, in fact, be capable of creating an immediate effect in the legal relationship between the addressee and third parties (Lenaerts, van Nuffel and Bray: *Constitutional Law of the European Union*, p. 781). Some German legal writers even maintain that decisions addressed to the Member States acquire direct effect subject to the same conditions (*die gleichen Voraussetzungen*) that are required of directives (Schütz, Bruha and König: *Casebook Europarecht*, p. 167). I cannot, however, agree with the expression the 'same conditions', particularly after analysing the judgments in Case 148/78 *Ratti* [1979] ECR 1629, Case 8/81 *Becker* [1982] ECR 53, and Case 190/87 *Oberkreisdirektor des Kreises Borken* [1988] ECR 4689. It is clear from those judgments that if the directive has been properly transposed into national law, its effects will apply to individuals via the implementing provisions which the Member State has adopted. Problems arise only if the Member State has not transposed the directive correctly and, more particularly, if the provisions of the directive have not been implemented, even though the time-limit for transposition has expired, or if they create rights for individuals in relations with the State. In that event, the right of the individual to invoke before the courts — in relations with a Member State which has not ensured the proper transposition of a directive — an unconditional and sufficiently clearly defined provision of the directive will be established on the basis of the third paragraph of Article 249 and Article 10 EC.

63. In the early 1970s, case-law evolved the theory according to which 'it would be incompatible with the binding effect attributed to decisions by Article 189⁵⁶ to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities have, by means of a decision, imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (*effet utile*) of such a measure would be weakened if the nationals of that State could not invoke it before the courts and the national courts could not take it into consideration as part of Community law. Although the effects of a decision may not be identical with those of a provision laid down in a regulation, this difference does not exclude the possibility that the end result — namely, the right of the individual to invoke the measure before the courts — may be the same.'⁵⁷

64. For a decision addressed to the Member States to be directly applicable, it is necessary that the obligation incumbent upon the Member State under that decision be 'unconditional and sufficiently clear and precise to be capable of producing direct effects in the legal relationships between the

Member States and those subject to their jurisdiction'.⁵⁸ 'The fact that a decision allows the Member States to which it is addressed to derogate from clear and precise provisions of that decision does not in itself deprive those provisions of direct effect. In particular, such provisions may have direct effect where recourse to the possibilities of derogation thus provided for is subject to judicial review.'⁵⁹

65. On studying that line of authority, it is clear that the case-law pertaining to decisions has dealt exclusively with upward vertical direct effect, that is to say, the right of the individual to invoke before the courts the effect of the decision vis à vis the Member State or Member States to which that decision is addressed. It is common ground in the present case that, in a dispute with the Italian bodies which exercise public authority — that it to say, with the Italian State — Carp could invoke before the courts the provisions of Decision 1999/93 concerning the fulfilment of the essential requirements laid down in relation to doors which are intended to be fitted with panic bars.

56 — Now Article 249 EC.

57 — Case 9/70 *Grad* [1970] ECR 825, paragraph 5; Case 20/70 *Lesage* [1970] ECR 861, paragraph 5; and Case 23/70 *Haselhorst* [1970] ECR 881, paragraph 5.

58 — *Grad*, cited in footnote 57, paragraph 9. In that case, the Court held that the Council decision of 13 May 1965 prohibiting the Member States from applying the common system of turnover tax concurrently with specific equivalent taxes, could have direct effect in relations between the Member States to which the decision was addressed and individuals, and that those individuals were entitled to invoke that direct effect before the national courts.

59 — Case C-156/91 *Hansa Fleisch* [1992] ECR I-5567, paragraph 15. In that case concerning the levels of fees to be charged for expenditure incurred in relation to health inspections and controls of fresh meat, pursuant to Directive 85/73/EEC, the Court referred to the judgment in Case 41/74 *van Duyn* [1974] ECR 1337, in which the Court also gave a ruling on the upward vertical direct effect of directives.

However, the present case concerns a civil action brought by one individual against another. In consequence, it concerns the horizontal direct effect of Decision 1999/93, which is addressed to all of the Member States.

between private parties.⁶³ For that reason, legal writers point out that, according to the case-law, an individual cannot, in relation to another individual, invoke the provisions of directives before the courts, even if those provisions fulfil the requirements for direct effect.⁶⁴

66. Legal writers maintain that decisions addressed to all the Member States do not produce horizontal direct effects.⁶⁰ They arrive at that conclusion on the basis of the argument that the case-law on the horizontal direct effect of directives is 'widely (*largement*)' applied also to decisions addressed to the Member States.⁶¹ Traditionally, the case-law on the horizontal direct effect of directives has taken the firm approach that 'a directive may not of itself impose obligations on an individual and ... a provision of a directive may not be relied upon as such against such a person.'⁶² It follows that even a clear, precise and unconditional provision of a directive which seeks to confer rights or impose obligations on individuals cannot be applied as such in proceedings exclusively

67. In its more recent case-law, the Court has applied a directive in the context of a horizontal relationship between two individuals, most notably in *Mangold*.⁶⁵ *Mangold* is in fact the first case in which the Court has ruled on the issue of discrimination based on age. Of particular interest for present purposes are paragraphs 74 and 75 of that judgment. At paragraph 2 of the operative part of *Mangold*, the Court ruled that 'Community law and, more particularly, Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in

60 — Sauron: *L'application du droit de l'Union européenne en France*, pp. 39 and 40.

61 — Jacqué: *Droit institutionnel de l'Union européenne*, p. 575. In confirming the conclusion that the case-law developed in relation to the direct effect of directives also applies extensively to decisions, the author cites the judgments in *Grad* (cited in footnote 57) and *Hansa Fleisch* (cited in footnote 59).

62 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 15; and Case C-355/96 *Silhouette International Schmied* [1998] ECR I-4799, paragraph 36. That case-law gave an interpretation of the non-existence of horizontal direct effect, maintaining that in applying national law, regardless of whether those national rules predate or postdate a directive, the national court required to interpret that law must do so as far as possible in the light of the wording and purpose of the directive so as to attain the result sought by the directive and thus to comply with Article 249 EC.

63 — Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 109.

64 — Isaac, G., and Blanquet, M.: *Droit général de l'Union européenne*, 9th edition, Paris, 2006, p. 279. The authors consider that this constitutes a limitation on the capacity to protect the rights of individuals.

65 — Case C-144/04 *Mangold* [2005] ECR I-9981. The particular facts of the case may be summarised as follows: in 2003, Werner Mangold, aged 56, concluded a fixed-term contract of employment on the basis of German law. The German provisions allowed fixed-term contracts to be concluded, subject to certain conditions, with workers who had reached the age of 52. Mr Mangold argued that the restriction on the contract was unlawful on the ground that the legislation on the conclusion of fixed-term contracts discriminated against older workers and was incompatible with Directive 2000/78/EC. He therefore decided to bring an action before the Arbeitsgericht (Employment Court), Munich, claiming that the clause restricting the length of the employment relationship, which his contract contained, was invalid since, although compatible with German law, it was in breach of Community law.

employment and occupation ('Directive 2000/78')⁶⁶ must be interpreted as precluding a provision of domestic law ... which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.'⁶⁷ Since *Mangold* turned on the validity of a contractual clause which limited the duration of that contract of employment, paragraph 2 of the operative part of that judgment must be construed as meaning that where the dispute in the main proceedings concerns two individuals — the employer and the employee — the national court may not apply a national provision which is incompatible with Community law.

68. The Court reached that conclusion on the ground that 'Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation", the source of the actual princi-

ple underlying the prohibition of those forms of discrimination being found, as is clear from the first and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.'⁶⁸

69. 'The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.'⁶⁹ The judgment in *Mangold* may be compared with the approaches adopted in German constitutional law, in particular, the theory of the indirect effect of basic rights vis à vis third parties (*mittelbare Drittwirkung der Grundrechte*).⁷⁰ German legal writers maintain that a clause in a contract for secretarial employment, under which the contract is to be terminated if the secretary gets married, is void.⁷¹ A clause of that nature is void because the provision which it makes is in breach of a key principle laid down in Article 6(1) of the German Basic Law (the *Grundgesetz*, 'GG').⁷² The provisions laid down in

66 — OJ 2000 L 303, p. 16.

67 — *Mangold*, cited in footnote 65, operative part.

68 — *Mangold*, cited in footnote 65, paragraph 74. It is legitimate to query here why the Court first refers to various international instruments and the constitutional traditions of the Member States and only then mentions the general principle of Community law.

69 — *Mangold*, cited in footnote 65, paragraph 75.

70 — Mannsen, G.: *Staatsrecht II: Grundrechte*, 4th edition, Munich, 2005, pp. 31 and 32. The author maintains that in constitutional law, fundamental rights protect the individual from State intervention but not in relation to other individuals. In the field of private law, however, the legislature must directly guarantee respect of fundamental rights.

71 — Badura, P.: *Staatsrecht, systematische Erläuterung des Grundgesetzes*, 3rd edition, Munich 2003, p. 107.

72 — Article 6(1) of the German Basic Law states: 'Ehe und Familie stehen unter dem besonderem Schutze der staatlichen Ordnung' ('Marriage and the family shall enjoy the special protection of the State').

Article 6 GG are to be used as reference criteria for the drafting of general clauses. Paragraph 138(1) of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB') lays down the general rule as regards legal transactions *contra bonos mores*.⁷³ The national courts must respect the State's fundamental decision to protect marriage and the family. They must interpret the provisions concerning the validity of contracts in the light of the basic rights⁷⁴ and, accordingly, must declare to be void a clause in a contract of employment which is incompatible with the protection of marriage and the family, since that clause is contrary to public policy and the basic moral principles of society.

70. That reasoning applies by analogy to *Mangold*. It was the Court's intention to highlight the prohibition of discrimination based on age and to set out the forms of legal protection available to workers who suffer harm as a result of such discrimination. The prohibition of discrimination based on age reflects a decision of a universal and moral nature which is integral to Community law, even though it is laid down in a directive, which, in principle, does not have horizontal direct effects. For the purposes of Article 10 EC, the Member States must take account of a value-judgement of that nature. When taking decisions concerning relationships between individuals, the organs of the Member States and the public bodies on which they confer authority must also respect the value-judgements and decisions contained in Community law. That is the

rationale underlying *Mangold*. In disputes concerning discrimination based on age, that judgment serves as a guideline for the national courts where the national law does not provide the same protection as Community law. Consequently, in the case of disputes arising in other sectors, there is no valid reason why we should not apply the standard case-law, under which provisions contained in directives or decisions addressed to the Member States are not recognised as having horizontal direct effect.

71. The question of the horizontal direct effect of Decision 1999/93 must be distinguished from that of the non-performance or inadequate performance of a contract. Under Community law, there is no link between the question whether the supply of doors which are intended to be fitted with panic bars but have not been certified in accordance with system 1 implies non-performance — or, at least, inadequate performance — of the contract and the question of the application of system 1 in relationships between individuals. According to Community law, the binding — and thus obligatory — attestation of the conformity of the construction products relates exclusively to the relationship between the manufacturer and the Member State, and does not concern the relationship between two individuals.

73 — Under Paragraph 138(1) BGB: 'Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig' ('A legal transaction contrary to public policy is void').

74 — Badura: *Staatsrecht, systematische Erläuterung des Grundgesetzes*, p. 110.

72. For that reason, I propose that the Court should state in answer to the second

question referred by the national court that Article 2 and 3 of Decision 1999/93 and Annexes II and III thereto must be interpreted as meaning that they do not have horizontal direct effect in a dispute between two individuals and do not, in the context of a dispute between individuals, permit one party to invoke Decision 1999/93 before the courts against the other party.

in such a way as to guarantee that the doors are safe but must not have a disproportionate impact on the activity of the manufacturers. System 1, which requires the intervention of a certification body, is neither appropriate nor necessary to guarantee that doors fitted with panic bars are safe, because the same level of safety can be guaranteed by other conformity attestation systems provided for in Directive 89/106, which are less onerous for the manufacturer and which guarantee that the manufactured product complies with the technical specifications.

C — *The third question*

1. Arguments of the parties

73. Carp maintains that Decision 1999/93 is invalid and argues, in that connection, that the obligation under Decision 1999/93 to apply system 1 is unfounded. Decision 1999/93 does not state the relevant reasons and is therefore in breach of Article 253 EC. Furthermore, Decision 1999/93 is in breach of the principles of proportionality and freedom of competition.

74. As far as the principle of proportionality is concerned, Carp first reiterates that doors to be fitted with panic bars are basically intended to make it easier for people to flee the premises. It also points out that the bars which are to be fitted to those doors already bear the CE marking. That being so, the procedure for attesting conformity in order to obtain the CE marking must be structured

75. According to Carp, Decision 1999/93 is in breach also of the principle of freedom of competition under Articles 2 and 98 EC because it creates privileges benefiting certain parties which have the effect of modifying and restricting competition on the market. Small-scale craft enterprises and small companies do not have sufficient resources to apply system 1 to the manufacture of doors and will consequently be compelled to cease production. On the other hand, that is all to the benefit of large and medium-sized companies, which have long held Certificate ISO 9000 which complies with the requirements under system 1.

76. Ecorad did not submit observations on the third question and deferred to the decision of the Court of Justice.

77. The Commission and the Austrian Government do not consider it necessary to answer the third question.

necessary to give a useful answer to the questions submitted to it.’⁷⁷

2. Assessment of the Advocate General

78. It is necessary to point out by way of preliminary that ‘it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.’⁷⁵ However, ‘where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.’⁷⁶

79. It is settled case-law that ‘the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought has no bearing on the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material

80. In the present case, an answer by the Court of Justice to the third question would not be useful for the purposes of the main proceedings.

81. In the main proceedings, the national court raised three questions. The second and third questions are closely linked. The third question, which concerns the validity of Decision 1999/93, depends on the specific and precise answer given to the second question. The answer to the third question, which concerns the validity of Decision 1999/93, would be meaningful for the purposes of the main proceedings only if the answer to the second question were that Decision 1999/93 has horizontal direct effect, with the result that it is binding on individuals in disputes between individuals. Since Decision 1999/93 does not have horizontal direct effect, it does not apply in proceedings or relationships between individuals and, in consequence, the question whether that decision is valid is not pertinent for the purposes of the decision to be taken by the national court in the main proceedings.

82. For that reason, I propose that the Court should state in answer to the third question referred by the national court that it is not necessary to determine whether Decision 1999/93 is in fact valid.

75 — Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52, and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 74.

76 — Case C-150/05 *Van Straaten* [2006] ECR I-9327, paragraph 33.

77 — Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 35, and *Van Straaten*, cited in footnote 76, paragraph 34.

V — Conclusions

83. On the basis of the above considerations, I propose that the Court of Justice should state in answer to the questions referred by the Tribunale Ordinario di Novara that:

- (1) Articles 2 and 3 of Commission Decision 1999/93/EC of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware, and Annexes II and III thereto must be interpreted as meaning that exit doors which are intended to be fitted with panic bars but which have not been certified in accordance with conformity assessment system No 1 may not be placed on the market.
- (2) Articles 2 and 3 of Decision 1999/93 of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware, and Annexes II and III thereto do not have direct horizontal effect in a dispute between two individuals and do not, in the context of a dispute between individuals, permit one party to invoke that decision before the courts against the other party.
- (3) It is not necessary to give a ruling on the validity of Decision 1999/93 of 25 January 1999 on the procedure for attesting the conformity of construction products pursuant to Article 20(2) of Council Directive 89/106/EEC as regards doors, windows, shutters, blinds, gates and related building hardware.