JUDGMENT OF THE COURT (Sixth Chamber)
16 November 2000 *

In Case C-37/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the criminal proceedings before that court against

Roelof Donkersteeg,

on the interpretation of Article 1 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75),

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, J.-P. Puissochet and F. Macken, Judges,

* Language of the case: Dutch.

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

— the Danish Government, by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and N. Green, Barrister,

— the Commission of the European Communities, by H. van Lier, Legal Adviser, C. van der Hauwaert, of its Legal Service, and M. Shotter, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Donkersteeg, represented by D. van Niel, of the Utrecht Bar; of the Netherlands Government, represented by M.A. Fierstra; of the Danish Government, represented by J. Molde; of the United Kingdom Government, represented by J.E. Collins; and of the Commission, represented by H. van Lier and C. van der Hauwaert, at the hearing on 9 March 2000,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2000,

gives the following

Judgment

1 By judgment of 5 January 1999, received at the Court on 10 February 1999, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) four questions on the interpretation of Article 1 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75) ('the directive').

2 Those questions were raised in criminal proceedings brought against Mr Donkersteeg on the grounds that he failed to provide footwear disinfecting facilities on his agricultural holding and that he failed to have the pigs reared on his holding vaccinated against Aujeszky's disease.

The Community legislation

3 Article 1(1) of the directive defines 'technical specification' as 'a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing

and test methods, packaging, marking or labelling and the production methods and procedures for agricultural products as defined in Article 38(1) of the Treaty...'.

4 Article 1(5) defines 'technical regulation' as 'technical specifications, 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, except those laid down by local authorities'.

5 According to Article 1(7), 'product' includes *inter alia* 'any agricultural product'.

6 The first subparagraph of Article 8(1) of the directive provides:

'Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft...'

7 According to the definition in Article 1(2) of the directive, as amended by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189 (OJ 1994 L 100, p. 30), a 'technical specification' is 'a specification contained in a document

which lays down the characteristics required of a product... The term "technical specification" also covers production methods and processes used in respect of agricultural products as referred to in Article 38(1) of the Treaty... where these have an effect on their characteristics'.

The Netherlands legislation

8 Article 2(1) of the Verordening Minimumeisen Varkenshouderij 1993 (1993 Regulation on the Minimum Requirements for Pig-Keeping, 'the VMV'), which was adopted on 2 December 1992 and came into force on 4 September 1993, provides as follows:

'The operator is required to ensure that one or more proper disinfectant containers or appropriate cleaning facilities for disinfecting footwear are present on his holding.'

9 Article 2(1) of the Verordening Bestrijding Ziekte van Aujeszky 1993 (1993 Regulation on the Combating of Aujeszky's Disease, 'the VBZA'), which was adopted on 9 June 1993 and came into force on 4 September 1993, provides:

'Every operator is required to have (meat) pigs present on his holding vaccinated against Aujeszky's disease in accordance with the vaccination scheme set up for the animal species concerned and the individual areas by the Afdeling Varkenshouderij (Pig Breeding Department) on the recommendation of the Stichting Gezondheidszorg voor Dieren (Veterinary Care Association).'

10 The national authorities set up such a vaccination scheme which was approved by the Commission. In accordance with the provisions of that scheme, fattening pigs must be vaccinated between 10 and 16 weeks after their birth; if operating circumstances so require, a second vaccination must be given four weeks after the first.

The dispute in the main proceedings and the questions referred

11 Mr Donkersteeg has been prosecuted for contravening provisions of Netherlands law concerning pig-keeping. He was charged *inter alia* with the following offences:

— first, that on 22 March 1995 he failed to meet his obligation, as a farmer to whom the VMV applied, to ensure that he had on his holding one or more proper disinfectant containers or appropriate cleaning facilities for disinfecting footwear, and

— second, that during or around the period 1 December 1994 to 22 March 1995 he failed to meet his obligation, as a farmer to whom the VBZA applied, to have the pigs reared on his holding vaccinated against Aujeszky's disease in accordance with the scheme set up for that purpose.

12 Setting aside a judgment at first instance given in the defendant's absence, the Gerechtshof (Regional Court of Appeal), Arnhem (Netherlands) convicted Mr Donkersteeg on *inter alia* the two offences mentioned in the paragraph above.

13 Mr Donkersteeg appealed on a point of law to the Hoge Raad, claiming, in relation to those two offences, that in accordance with the judgment given by the Court of Justice in Case C-194/94 *CIA Security* v *Signalson and Securitel* [1996] ECR I-2201 the Gerechtshof ought not to have found that the matters with which he was charged constituted criminal offences, because the national regulations on the basis of which he was prosecuted had not been notified to the Commission pursuant to the directive.

14 In those circumstances, the Hoge Raad decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 1 of Directive 83/189 to be interpreted as meaning that the provision in Article 2(1) of the [VMV]... which states that "The operator is required to ensure that one or more proper disinfectant containers or appropriate cleaning facilities for disinfecting footwear are present on his holding" must be regarded as a technical regulation within the meaning of that Directive?

(2) Is Article 1 of Directive 83/189 to be interpreted as meaning that the provision in Article 2(1) of the [VBZA]... which states that "Every operator is required to have pigs present on his holding vaccinated against Aujeszky's disease in accordance with the vaccination scheme set up for the animal species concerned and the individual areas by the Pig Breeding Department on the recommendation of the Veterinary Care Association" must be regarded as a technical regulation within the meaning of that Directive?

(3) Where a draft technical regulation within the meaning of Directive 83/189 is not communicated to the Commission pursuant to Articles 8 and 9 of that Directive, does that render such a regulation inapplicable to the extent to which it constitutes a barrier to trade or the free movement of goods in a

particular case, or should it be ruled that such a provision cannot be applied where the regulation constitutes, or may constitute, a barrier to trade in general irrespective of the particular case?

(4) If the second question is to be answered in the affirmative, does the fact that in December 1995 the Netherlands programme for combating Aujeszky's disease in pigs was approved by the European Commission for 1996 have any bearing on the question whether Article 2(1) of the VBZA is applicable to the present case? If so, what bearing does it have?'

The first question

15 By its first question the national court is in essence asking whether a provision such as that in issue in the main proceedings, which requires there to be one or more disinfectant containers or appropriate cleaning facilities for disinfecting footwear on pig farms, is a technical regulation within the meaning of the directive which ought to have been notified to the Commission before being adopted.

16 The Netherlands Government states that Article 2(1) of the VMV is not a 'technical specification' for the purposes of the directive. It does not concern the characteristics required of the product, nor is it a provision concerning production methods, since it does not lay down any condition in respect of the fattening, reproduction or rearing of pigs.

17 The Danish Government maintains that the VMV contains no requirement concerning pigs reared on the holdings referred to in that regulation and therefore does not define the characteristics required of a product. It adds that, although

pork is an agricultural product, the VMV does not deal with production methods or procedures either, since it does not affect the possibility of lawfully marketing the pigs reared in the holdings referred to. Moreover, the production methods and procedures provided for at national level would have to have an effect, direct or indirect, on the characteristics of the products concerned in order to be classified as technical specifications for the purposes of the directive.

18 According to the United Kingdom Government, the VMV does not define the characteristics of any product at all, whether breeding pigs or pigs raised to provide meat. The VMV merely prescribes rules applicable to the farmer himself. In addition, while the rules in issue in the main proceedings lay down hygiene conditions for pig-keeping, they do not lay down any criterion applicable to pig production itself.

19 The Commission submits that the VMV cannot be regarded as a technical specification, on the ground that it does not lay down production methods or procedures for agricultural products within the meaning of Article 1(1) of the directive. The rule in question is one of many hygiene measures imposed by the VMV on pig farms that are not linked to the actual production of the agricultural product concerned. In addition, production methods and procedures can be regarded as technical specifications within the meaning of the directive only in so far as they have an appreciable effect on the characteristics of that product. In the dispute in the main proceedings, the obligation relating to disinfecting facilities has no effect on the characteristics of the agricultural product.

20 It should be noted that, according to Article 1(7) of the directive, 'product' refers to industrial and agricultural products, and that Article 1(1), in the version applicable in the present case, defines 'technical specification' as a specification contained in a document which lays down the characteristics required of a product and also, in the case of agricultural products, production methods and procedures.

21 As the Netherlands, Danish and United Kingdom Governments and the Commission have observed, Article 2(1) of the VMV does not lay down a rule defining a 'characteristic required' of the agricultural products concerned. Nor does it define a production 'method' or 'procedure' for those products. The Commission argues correctly that that provision of national law, which merely requires disinfectant containers or appropriate cleaning facilities for disinfecting footwear to be provided on pig farms, does not concern production in the strict sense of the agricultural product under consideration.

22 It must therefore be held that a rule such as that in Article 2(1) of the VMV is not a technical specification within the meaning of Article 1(1) of Directive 83/189 and that, as a result, that national provision cannot be a technical regulation for the purposes of that directive.

23 In those circumstances, the answer to be given to the first question must be that a provision such as that in issue in the main proceedings, which requires there to be one or more disinfectant containers or appropriate cleaning facilities for disinfecting footwear on pig farms, is not, for the purposes of the directive, a technical regulation which ought to have been notified to the Commission before being adopted.

The second question

24 By its second question the national court seeks to ascertain whether a provision such as that in issue in the main proceedings which requires every farmer to have his pigs vaccinated against Aujeszky's disease is, for the purposes of the directive, a technical regulation which ought to have been notified to the Commission before being adopted.

25 The Netherlands Government maintains that the rule in issue in the main proceedings cannot be regarded as a technical regulation for the purposes of the directive. It is intended to ensure that pigs do not become infected with the Aujeszky's disease virus. An obligation to vaccinate has no connection with the characteristics required of a product. It is possible that pigs will not be infected by the virus even though they have not been vaccinated. By having his pigs vaccinated, the farmer simply eliminates the risk of their catching the Aujeszky virus and thus avoids certain restrictions on the export of infected pigs. However, failure to vaccinate, that is to say, failure to comply with the rule in question, does not in any way limit the possibility of marketing or using a pig which has not been vaccinated against Aujeszky's disease.

26 The United Kingdom Government claims that the VBZA cannot be regarded as a technical regulation within the meaning of Article 1(5) of the directive. First, it submits that even if it is accepted that a vaccination requirement affects the characteristics of the product, since vaccinated pigs supply healthy meat, that requirement does not, however, specifically define the characteristics of the product itself. Furthermore, that requirement does not apply to production methods or procedures. It is intended to set and maintain acceptable standards of health in pigs reared in specialised holdings.

27 Second, the United Kingdom Government maintains that while the provision in issue in the main proceedings is mandatory at the stage of pig rearing it is not sufficiently directly correlated with the marketing and use of the product to fall within the classification of a technical regulation. It relates to a stage prior to use of the product in the narrow sense or to its being placed on the market. Nor can it be read as a prohibition or limitation on marketing or use of the product.

28 According to the Commission, the VBZA has to be defined as a technical specification for the purposes of the directive because it concerns a production method or procedure for agricultural products. Live animals are agricultural products within the meaning of Article 38(1) of the EC Treaty (now, after

amendment, Article 32(1) EC) and the precise and detailed rules concerning vaccination against Aujeszky's disease have a direct effect on the production, in the strict sense, of the agricultural product and must be observed throughout the production cycle. Furthermore, vaccination has an appreciable effect on one characteristic of the agricultural product, namely the essential characteristic of the health of the animals concerned.

29 The Commission also considers that the rule laid down in Article 2(1) of the VBZA has to be classified as a technical regulation. In that regard it points out that the VBZA contains no provision which imposes restrictions on the marketing of pigs when, in contravention of that provision, they have not been vaccinated against Aujeszky's disease. A pig may be marketed without vaccination being necessary, if that pig is not carrying the disease. However, according to the Commission, since Article 1(5) of the directive employs the term 'use' in a broad sense it must cover any restriction on the use of an agricultural product during the production cycle, that is to say, before it is placed on the market as a finished product intended for human consumption. The Commission submits that the kind of specification in issue in the main proceedings relates to a stage prior to that at which the product is offered on the market as a finished product and that the result of restrictive interpretation of the term 'use' would be to deprive the notion of technical specification of all significance.

30 As pointed out in paragraph 20 above, in accordance with Article 1(1) of the directive, so far as agricultural products are concerned, a 'technical specification' is one contained in a document which lays down the characteristics required of a product or its production methods and procedures.

31 A rule such as that contained in Article 2(1) of the VBZA is a technical specification within the meaning of Article 1(1) of the directive. As the Commission rightly maintains, since the precise and detailed rules concerning vaccination against Aujeszky's disease are linked to the production, in the strict

sense, of the agricultural product concerned and must be complied with throughout the production cycle, that rule therefore defines a 'procedure' in the production of that product.

32 Nevertheless, in order to be classified as a technical rule within the meaning of the directive, the rule at issue in the main proceedings must, in accordance with Article 1(5) of the directive, contain technical specifications '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, except those laid down by local authorities'.

33 It must be pointed out, as the Netherlands Government has done, that the rule in Article 2(1) of the VBZA imposes no restrictions on either the marketing or the use of the products concerned if, in contravention of that rule, pigs have not been vaccinated against Aujeszky's disease.

34 The answer to be given to the second question must therefore be that a provision such as that in issue in the main proceedings which requires every farmer to have the pigs on his holding vaccinated against Aujeszky's disease is not, for the purposes of the directive, a technical regulation which ought to have been notified to the Commission before being adopted.

35 In light of the answers to the first and second questions, there is no need to reply to the third and fourth questions.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Hoge Raad der Nederlanden by judgment of 5 January 1999, hereby rules:

1. A provision such as that in issue in the main proceedings, which requires there to be one or more disinfectant containers or appropriate cleaning facilities for disinfecting footwear on pig farms, is not, for the purposes of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Council Directive 88/182/EEC of 22 March 1988, a technical regulation which ought to have been notified to the Commission before being adopted.

2. **A provision such as that in issue in the main proceedings which requires every farmer to have the pigs on his holding vaccinated against Aujeszky's disease is not, for the purposes of Directive 83/189, as amended by Directive 88/182, a technical regulation which ought to have been notified to the Commission before being adopted.**

Gulmann Puissochet Macken

Delivered in open court in Luxembourg on 16 November 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber