OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 6 April 2000 *

1. The present reference for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concerns the definition of 'technical regulations' 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, and the interpretation of the derogation allowed under Article 10 thereof for national measures adopted to fulfil obligations arising out of Community directives and regulations. [1]

I — Facts and procedural background

2. The appellant, a pig farmer in the Netherlands, was convicted at first instance of a number of offences, committed on or before 22 March 1995, under national measures governing agricultural activities. The two national provisions which are at issue in the present proceedings are Article 2(1) of the Verordening Minimumeisen Varkenshouderij 1993 (1993 Regulation on the Minimum Requirements for Pig Keeping, hereinafter 'VMV') and Article 2(1) of the Verordening Bestrijding Ziekte van Aujeszky 1993 (1993 Regulation on the Combating of Aujeszky's disease, hereinafter 'VBZA').

3. Article 2(1) of the VMV 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.'

* Original language: English.

1 — 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 facts arose before the expiry of the deadline for compliance with Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1994 L 100, p. 30, which also amended the Directive.

4. Article 2(1) of the VBZA provides that:

'Every operator is required to have (meat) pigs [2] 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 [Pig Breeding Department] on the recommendation of the Stichting [Veterinary Care Association].'

5. On appeal to the Hoge Raad der Nederlanden the accused argued that these provisions should have been notified to the Commission in accordance with Directive 83/189/EEC, and relied upon the direct effect of Articles 8 and 9 thereof established by the Court in *CIA Security*. [3]

6. Article 1(1) of Directive 83/189 defines the term 'technical specification' as follows:

'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... .'

7. Article 1(5) defines 'technical regulation' as follows:

'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.'

8. Article 1(7) defines 'product' as including 'any agricultural product'.

9. Article 8(1) requires the Member States to notify the Commission of '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'. Article 9 obliges the Member States to 'postpone the adoption of a draft technical

2 — A distinction is drawn in this area between pigs for meat and pigs for reproduction.

3 — Case C-194/94 *CIA Security* v *Signalson and Securitel* [1996] ECR I-2201 (hereinafter '*CIA Security*').

regulation for six months from the date of notification referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date', to the effect that the draft regulation would cause a barrier to trade, and to postpone the adoption of any such measure where the Commission submits a legislative proposal on the same subject-matter to the Council. Article 10 allows a derogation for national provisions which implement Community obligations.

10. The Hoge Raad referred the following questions to the Court:

'1. Is Article 1 of Directive 83/189/EEC to be interpreted as meaning that the provision in Article 2(1) of the Verordening Minimumeisen Varkenshouderij 1993... must be regarded as a technical regulation within the meaning of that Directive?

2. Is Article 1 of Directive 83/189/EEC to be interpreted as meaning that the provision in Article 2(1) of the Verordening Bestrijding Ziekte van Aujeszky 1993... 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/EEC 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 Verordening Bestrijding Ziekte van Aujeszky is applicable to the present case? If so, what bearing does it have?'

11. Denmark, the Netherlands, the United Kingdom and the Commission have submitted written observations. They also took part in the oral hearing. Counsel for the appellant appeared at the oral hearing without submitting any substantive observations. Denmark's observations concern the first question only, the United Kingdom's only the first two. The third and fourth questions do not arise if negative answers are given to the first two.

II — Analysis

(a) *Article 2(1) of the VMV*

12. The parties who have submitted written observations agree that, though pigmeat is a 'product' for the purposes of Directive 83/189/EEC, Article 2(1) of the VMV is not a 'technical specification' as it neither regulates the production of pigmeat nor defines the characteristics of pigmeat as a product. The United Kingdom adds that, even if it were considered a technical specification, the contested provision is not a technical regulation as it has no direct impact on the marketing and use of the product. The Commission and Denmark argue that the national legislation does not make observance of this provision compulsory *de jure* or *de facto* in the marketing or use of the product in the Netherlands. Consequently it does not amount to a technical regulation.

13. I would agree that Article 2(1) of the VMV does not 'lay down the characteristics required of a product', *in casu*, pigmeat. While it may be desirable that pig farmers comply with this provision, it does not 'lay down the characteristics required of a product ...', namely pigmeat, or a 'method' or 'procedure' for the production of pigmeat as those terms are employed in Article 1(1) of Directive 83/189, but merely that disinfectant containers or appropriate cleaning facilities for disinfecting footwear be present on the pig farmers' holdings.

14. In *Commission* v *Italy*, the Court considered an Italian law laying down 'limits for concentrations of inhalable asbestos fibres at workplaces ...' and held that, since it did 'not define a characteristic required of a product, it [did] not in principle fall within the definition of a technical specification'. [4] That judgment makes it clear that, if the observance of such a national rule is to be regarded as having 'consequences as regards the characteristics of the product in question', those consequences would have to be demonstrated before it could be considered a technical specification. [5]

15. In two other cases, the Court has adverted to the need for a clear link with the 'characteristics of a product' before a national rule qualifies as a technical specification. In *CIA Security* [6] a rule laying down conditions governing the establishment of security firms and in *Semeraro*

4 — Case C-279/94 [1997] ECR I-4743, paragraph 34.
5 — Loc. cit.
6 — Loc. cit., at footnote 3 above.

Casa Uno and Others v *Sindaco del Comune di Erbusco and Others*[7] rules regulating the closing times of shops failed to satisfy the definition for the same reason.

16. Since Article 2(1) of the VMV is not a technical specification, it cannot, in any event, be a technical regulation.

17. However, I would further agree with the United Kingdom, Denmark and the Commission that, even if it were to be considered a 'technical specification', *quod non*, Article 2(1) of the VMV could not, on any view, amount to a 'technical regulation'. Its observance is not 'compulsory, *de jure* or *de facto*, in the case of marketing or use' of pigmeat, as distinct from that of the operation of a pig farm.

18. The VMV does not establish, as between the national standards required of pig farmers in regard to the disinfectant facilities at issue and the marketing or use of pigmeat, anything corresponding to the 'very close correlation' which, in the view of the Court, obtained between the water quality standards in *Commission* v *Italy* and the marketing of the products there at issue (lamellibranch molluscs).[8] The Italian law at issue in that case prohibited the marketing of lamellibranch molluscs not grown in waters complying with the standards laid down. While, as I suggest later (paragraph 32), 'a very close correlation' may not be required, there is no link at all in the present case. I am of the view that Article 2(1) of the VMV is not, in any case, a technical regulation which the Netherlands was obliged to notify to the Commission under Article 8 of Directive 83/189.

(b) *Article 2(1) of the VBZA*

19. The Netherlands argues that this provision also has no link with the characteristics required of the product, as non-vaccinated pigs are not necessarily infected with Aujeszky's disease, and they may legally be marketed. However, the Netherlands does point out that an infected pig may not be exported to countries or regions subject to additional guarantees as regards Aujeszky's disease, in accordance with the applicable Community legislation. At most, there is a very tenuous connection between

7 — Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94 and C-15/94, C-23/94 and C-24/94, and C-332/94 [1996] ECR I-2975, paragraph 38.

8 — Case C-289/94 [1996] ECR I-4405, paragraph 32.

vaccination and the characteristics of the product, and the national provision cannot therefore be considered a technical regulation. The United Kingdom also argues that Article 2(1) of the VBZA does not specifically define the characteristics of the product and is not sufficiently directly correlated with the marketing and use of the product to constitute a technical regulation.

20. The Commission, on the other hand, is of the view that this provision is a technical specification, in that the vaccination requirement has a direct impact on the production of pigmeat and on the characteristics of the product, and in particular the essential characteristic, viz. the health of the animals concerned.

21. It is important, in my view, to identify clearly the precise nature and scope of Article 2(1) of the VBZA. It applies to operators of holdings upon which pigs are kept, obliging them to have their pigs vaccinated in accordance with a vaccination scheme organised officially for that purpose. The order for reference does not state that it is associated with any other Dutch national provisions regarding restrictions on movement or sale of pigs, whether vaccinated or not. The Dutch Government, in its observations, says that the article involves no limitation concerning the marketing of pigs. The only applicable restrictions arise from Community rules. [9]

22. The Commission maintains, none the less, that, even if Article 2(1) is not linked to any marketing condition, the vaccination requirement amounts to a compulsory provision relating to the 'use' of pigs, so as to bring it within the scope of the definition of a technical regulation.

23. This raises a very precise question of interpretation relating to a word, 'use', of almost entirely indeterminable application. It can only be usefully answered, in my view, in accordance with the accepted manner of interpretation of Community law, i.e. by having regard, not only to the words used, but also to the context in which they appear and the purpose of the scheme of which they form part.

24. The purpose of Directive 83/189 is, as has recently been explained by Advocate General Jacobs, '... the protection of free

9 — Commission Decision 93/24/EEC of 11 December 1992 concerning additional guarantees relating to Aujeszky's disease for pigs destined to Member States or regions free of the disease (OJ 1993 L 16, p. 18); Commission Decision 93/244/EEC of 2 April 1993 concerning additional guarantees relating to Aujeszky's disease for pigs destined for certain parts of the territory of the Community, OJ 1993 L 111, p. 21.

movement of goods by means of a preventive control mechanism'.[10] Though it is not coterminous with Article 30 of the EC Treaty (now, after amendment, Article 28 EC), it is based, as the second recital states, on the premiss that 'barriers to trade resulting from technical regulations relating to products may be allowed only when they are necessary in order to meet essential requirements and have an objective in the public interest ...'.[11] Consequently, the Directive should be interpreted as being designed to prevent obstacles to trade.

25. The Commission rightly emphasised at the hearing that there is a clear distinction between the definitions of 'technical specification' and 'technical regulation'.

26. The definition of 'technical specification' concentrates on rules laying down 'the characteristics of a product', but not every such rule is also a 'technical regulation'. For that result, something more is necessary. Otherwise, there would be no distinction between the two definitions. In particular, the Commission's suggestion, made at the hearing, that the mere possession or keeping of a product through the different stages of production satisfied the definition of 'use' runs the risk of eliminating the distinction and is not, in my view, acceptable.

27. It is necessary, in the first instance, to consider whether the vaccination requirement 'lays down the characteristics of a product'. I think it does. I am not persuaded by the arguments of the Dutch Government that, for example, an unvaccinated animal does not necessarily have Aujeszky's disease or that of the United Kingdom that the vaccination requirement does not relate to production methods or define the characteristics of the product. In my view, a vaccination requirement indisputably lays down characteristics required of a product, i.e. in the case of a pig, that it be vaccinated. In any event, it seems to me unarguable that it comes within the scope of the particular rule for agricultural products by virtue of amounting to a rule relating to 'production methods and procedures'. Neither the need for nor the effectiveness of the vaccination is relevant. A vaccinated pig, by that very fact, has a characteristic which is different from an unvaccinated pig. The rule in question does not differ in principle from the types of prior-approval requirement that were considered in both *CIA Security*[12] and *Lemmens*.[13] Each of those cases concerned rules providing for the examination, testing and approval of equipment. The fact that they did not purport to affect or alter their

10 — Case C-443/98 *Unilever Italia* v *Central Food*, Opinion delivered on 27 January 2000, paragraph 79, judgment pending. See also Case C-13/96 *Bic Benelux* v *Belgian State* [1997] ECR I-1753, paragraph 19.

11 — Recital in the preamble to the Directive.

12 — Loc. cit., footnote 3 above, paragraph 26.

13 — Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraphs 24 and 25.

characteristics had no bearing on whether they should be treated as technical specifications and, ultimately, technical regulations.

28. It remains, then, to consider whether the vaccination requirement amounts also to a technical regulation. It neither contains nor is associated with any provision independent of that already considered in relation to the vaccination itself other than the one which creates the offence of which the appellant was convicted.

29. The definition of 'technical regulation' envisages a provision which, in addition to being a 'technical specification', is 'compulsory, *de jure* or *de facto*, in the case of marketing or use in a Member State or a major part thereof ...'.

30. In *CIA Security*, the Court held that '[a] rule is classified as a technical regulation for the purposes of Directive 83/189 if it has legal effects of its own', in the sense of not being a mere enabling provision. [14] In Case C-279/94 *Commission* v *Italy* it considered that 'distinct legal effects' were required. [15] It follows both from the wording of the definition and from its interpretation by the Court that a provision must have a binding legal character to satisfy the definition. That principle applies most obviously to legal prohibitions on marketing: these are 'compulsory, *de jure* ...'.

31. The second element is that it must concern the 'marketing or use' of the product in question. The Court has principally had to rule in its case-law on provisions that were very clearly related to marketing. [16]

32. In Case C-289/94 *Commission* v *Italy*, the Court, in a passage much cited by the intervening parties, emphasised the 'very close correlation between the quality of waters used for [the] cultivation and the marketing of lamellibranch molluscs for human consumption'. [17] It did not there, however, as was implied in argument, go so far as to suggest that this 'very close correlation' was required in order for the rule to satisfy the definition of a 'technical regulation'.

33. There are two cases where the national rule appeared to combine a marketing ban with other provisions. Case C-279/94 *Commission* v *Italy* (the '*Asbestos* case')

14 — Loc. cit., paragraph 29.

15 — Op. cit., paragraph 36.

16 — *CIA Security*, loc. cit., paragraph 27; Case C-279/94 *Commission* v *Italy*, loc. cit., paragraph 30; Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405; *Bic Benelux*, op. cit., [1997] ECR I-1753, paragraph 23.

17 — Loc. cit., paragraph 32.

concerned a provision of a law which 'prohibit[ed] the extraction, importation, exportation, marketing and production of asbestos, asbestos products and products containing asbestos ...'. [18] The Court considered that to be a prohibition on the 'marketing and use' of asbestos, but did not have to consider the hypothetical possibility of a mere ban on extraction or production.

34. *Albers* was a case concerning a Dutch law prohibiting the administration to cattle of certain growth promoters, in particular Clenbuterol. [19] This was Article 1 of the law. A separate provision, Article 3, of the same law provided:

'It is prohibited to keep or to have in stock, to buy or to sell fattening cattle to which ... [growth promoters] ... have been administered ...'. The Court ruled, firstly, that Article 1 constituted a technical specification, as it defined 'production methods and procedures'. [20] It did not separately address the question of whether Article 3 related to marketing or use but simply ruled that the law constituted a technical regulation.

35. Both the *Asbestos* case and *Albers* concerned laws containing a prohibition on marketing combined with other provisions. It might, in particular, be suggested that there is an analogy between Article 2(1) of the VBZA at issue in this case and that part of Article 3 of the law at issue in *Albers* which prohibited keeping or having in stock cattle that had been treated with growth promoters.

36. That view would, in my view, be mistaken. The rule considered in *Albers* inseparably linked the ban on keeping or having cattle in stock to the marketing ban, i.e. that on buying and selling. The Court did not have to consider the purely theoretical hypothesis of a ban limited to keeping or having in stock.

37. In my opinion, the word 'use' in the definition of a technical regulation refers to use in a market-related context or, perhaps, in part of a market. It is, I think, more instructive to consider *Lemmens*. [21] That case was concerned with the Dutch breath-analysis regulation, part of the road traffic provisions relating to driving under the influence of alcohol. One regulation laid down a requirement that breath-analysis apparatus used by the police to test suspects

18 — Op. cit., paragraph 30.

19 — Joined Cases C-425/97 to C-427/97 *Albers and Others* [1999] ECR I-2947.

20 — Loc. cit., paragraphs 16 and 17.

21 — Loc. cit., at footnote 13 above.

had to be of a type approved by a designated control body. There was no general prohibition on the marketing of unapproved breath-analysis apparatus. The regulation concerned only the use of approved apparatus by the police. None the less, the Court ruled it to be a technical regulation, stating that: 'the fact remains that the rules laid down by that regulation must be complied with by those who sell such apparatus to the police, which is a major user of that product ...'. [22]

38. It is, in my view, only obligatory provisions concerning the use of a product and which are such as to affect trade in that product or in related products which are covered by the word 'use' in the present context. A prohibition on keeping an unvaccinated cow, i.e. its 'use', might have an effect on the sale of milk. Safety regulations of many kinds lay down rules on the materials or equipment permitted in premises open to the public so as to affect the 'use' of products even in the absence of direct marketing rules. It is possibly this kind of partial or indirect effect on marketing that is intended to be covered by the expression '*de facto*' in Article 1(5) of Directive 83/189. An excellent example of the type of 'use' rule that amounts to a technical regulation was presented to the Court in an uncontested infringement action against Belgium. [23] A Decree of the Government of the Region of Metropolitan Brussels laid down quality and safety standards for the letting of furnished accommodation, applying specific generally known technical standards for gas and electrical appliances. There was no general restriction on the marketing of such products. But the rule regulating use was a technical regulation because it affected access to part of the market.

39. Article 2(1) of the VBZA contains no provision regulating 'use' of pigs in any of the senses I have described. Nor is it linked to any national rule affecting marketing or use. As I have pointed out at paragraph 21, the only applicable rules are Community rules. Accordingly, it is not a technical regulation.

40. In view of the answers I propose to the first two questions, there is no need to address the third and fourth questions.

22 — Op. cit., paragraph 25.

23 — Case C-145/97 *Commission* v *Belgium* [1998] ECR I-2643.

III — Conclusion

41. In the light of the foregoing, I propose that the Court reply as follows to the first two questions submitted by the Hoge Raad der Nederlanden:

Neither a provision such as Article 2(1) of the Verordening Minimumeisen Varkenshouderij 1993 nor a provision such as Article 2(1) of the Verordening Bestrijding Ziekte van Aujeszky 1993 is to be regarded as a technical regulation within the meaning 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, as amended by Council Directive 88/182/EEC of 22 March 1988.