OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 26 October 1995 *

1. The Commission has brought this action before the Court of Justice for a declaration that, by adopting on 19 September 1990 the Vrijstellingsregeling Margarinebesluit (Order on derogations from the Margarine Decree, hereinafter 'Vrijstellingsregeling') without notifying it to the Commission at the drafting stage, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 8 of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations. [1]

2. In order to define properly the terms of the dispute, I shall first consider the prior notification procedure laid down in the field of technical regulations by Directive 83/189. Next I shall describe the course of the pre-litigation procedure and the procedure before the Court of Justice. Finally, I shall analyse the claims of the parties which are the subject-matter of the present case.

Procedure for the provision of information laid down in Directive 83/189

3. Directive 83/189, as amended by Directives 88/182/EEC [2] and 94/10/EC, [3] lays down a preventive mechanism which, together with the prohibition on measures having an effect equivalent to quantitative restrictions in Articles 30 to 36 of the EC Treaty and the harmonization of national rules, is intended to eliminate technical barriers to intra-Community trade. In order to prevent the emergence of this kind of restriction, Directive 83/189 establishes a procedure relating to technical regulations which comprises the following four parts:

4. (a) Article 8 requires the Member States to notify the Commission of all draft technical regulations except where they transpose an international or European standard or are adopted in compliance with Community

* Original language: Spanish.

1 — 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).

2 — Council Directive 88/182/EEC of 22 March 1988 amending Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1988 L 81, p. 75).

3 — 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).

standards. The Commission notifies forthwith those drafts to the other Member States and also publishes in the *Official Journal of the European Communities* a list of all the drafts notified to it in order to facilitate bringing it to the attention of individuals. [4] Article 8 of Directive 83/189, as amended by Directive 88/182, provides in particular:

'1. 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. Where appropriate, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

The Commission shall immediately notify the other Member States of any draft it has received; it may also refer this draft to the Committee referred to in Article 5 and, if appropriate, to the Committee responsible for the field in question for its opinion.'

5. (b) Where the State does not invoke urgent reasons making it necessary for the technical regulation to be adopted immediately, a standstill period begins to run from notification, during which the Commission and the other Member States can study the draft technical regulation in order to determine whether it is compatible with Community law. If no reaction is forthcoming, that period lasts three months, at the end of which the Member State can adopt the technical regulation. The standstill period lasts 12 months where the Commission notifies the State of its intention to propose the adoption of a Community standard in the field. In this regard, Article 9 of Directive 83/189, also as amended by Directive 88/182, provides:

'1. Without prejudice to paragraphs 2 and 2(a), Member States shall postpone the adoption of a draft technical regulation for six months from the date of the 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 measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods. The Member State concerned shall report to the Commission on

4 — See, in this regard, Commission Communication 89/C 67/03 of 17 March 1989 concerning the publication in the *Official Journal of the European Communities* of the titles of draft technical regulations notified by the Member States pursuant to Council Directive 83/189/EEC, as amended by Council Directive 88/182/EEC (OJ 1989 C 67, p. 3).

the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

2. The period in paragraph 1 shall be 12 months if, within three months following the notification referred to in Article 8(1), the Commission gives notice of its intention of proposing or adopting a directive on the subject.

2 (a) If the Commission ascertains that a communication pursuant to Article 8(1) relates to a subject covered by a proposal for a directive or regulation submitted to the Council, it shall inform the Member State concerned of this fact within three months of receiving the communication.

Member States shall refrain from adopting technical regulations on a subject covered by a proposal for a directive or regulation submitted by the Commission to the Council before the communication provided for in Article 8(1) for a period of 12 months from the date of its submission.

Recourse to paragraphs 1, 2 and 2(a) of this Article cannot be cumulative.'

6. (c) If the Commission or the Member States consider that the draft technical regulation does not comply with Community law, Article 9 enables a detailed opinion to be delivered to the State which drew up the draft pointing out any barriers which it might create to the free movement of goods. In this case, a six-month standstill period is established before the definitive adoption of the technical regulation.

7. (d) Finally, under Article 9(1), the Commission may ask the States to provide information on the action they take on the detailed opinions and to send it the definitive texts of the technical regulations.

8. According to Article 10 of Directive 83/189, this procedure for the prior notification of draft technical regulations does not apply if such regulations are adopted as a result of Community standards or an international agreement.

Pre-litigation procedure and proceedings before the Court of Justice

9. The Commission learned that the Kingdom of the Netherlands had adopted the

Vrijstellingsregeling, which it considered to be a technical regulation. Since the Netherlands had not observed the procedure for the provision of information laid down in Directive 83/189, the Commission decided to initiate the procedure under Article 169 of the EEC Treaty and on 6 March 1992 it sent a letter of formal notice to the Netherlands authorities, which submitted their observations on 2 June 1992, stating that Directive 83/189 did not apply to the regulation in question since the latter merely eliminated or reduced existing technical obstacles rather than create them. The Commission did not accept that argument and on 15 January 1993, pursuant to Article 169 of the Treaty, sent a reasoned opinion to the Kingdom of the Netherlands, which replied on 3 June 1993, reiterating its view that it had not infringed Directive 83/189.

10. The Commission pointed out in its reasoned opinion that the failure to communicate the Vrijstellingsregeling at the drafting stage constituted a manifest failure to fulfil the obligations under Directive 83/189 which, in its view, entailed the immediate suspension of the Netherlands regulation. The Commission added, moreover, that, as it stated in its Communication of 1986, [5] 'the consequence of non-compliance with the procedure for the provision of information laid down in Directive 83/189 is that the said technical legislation cannot have legal effects and is therefore unenforceable against third parties; ... according to the Commission, the prohibition on adopting national measures without previous notification has direct effect and confers rights on individuals which national courts are required to protect'. The Commission therefore considered that the parties to a dispute could reasonably presume that the national court would refuse to enforce technical regulations which have not been notified as required by Community law.

11. The Commission brought its action against the Netherlands before the Court of Justice on 30 September 1994. The forms of order sought in the application are simple inasmuch as the Court is merely asked to declare that the Kingdom of the Netherlands has failed to fulfil its obligations under Article 8 of Directive 83/189 and to order the defendant to pay the costs of the proceedings. To some extent it is surprising that the Commission in its application and reply merely seeks a declaration that the Netherlands authorities have infringed Directive 83/189 and has not raised the basic legal problem underlying this dispute, namely the consequences of non-respect of the information procedure laid down in Directive 83/189. Moreover, that point had been raised in the reasoned opinion which the Commission sent to the Netherlands in which it clearly argued that the technical regulation which had not been notified should be suspended and was unenforceable as against third parties.

5 — Commission Communication 86/C 245/05 of 1 October 1986 concerning the non-respect of certain provisions 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 1986 C 245, p. 4).

12. For its part, the Netherlands considers that the Vrijstellingsregeling is not a technical regulation within the meaning of Directive 83/189 and that it was therefore not necessary to communicate it to the Commission at the drafting stage. In its view, technical regulations are those rules which require producers to observe certain technical specifications in the manufacture of products. Rules which, like the Netherlands regulation at issue, provide derogations from or exemptions to conditions for the marketing of goods do not constitute technical regulations since they do not create barriers to trade.

13. During the hearing, the agent for the Commission confirmed that the purpose of the action was only that the Court of Justice declare that there had been a failure to observe obligations as a result of the failure to give prior notification of the Vrijstellingsregeling. Thus, the Commission has narrowed the subject-matter of the action since the pre-litigation procedure suggested that the Commission was accusing the Netherlands not only of non-compliance with the obligation to notify measures but also of breach of its obligation to suspend the application of the technical regulation. In its reasoned opinion, the Commission alluded expressly to the suspension of or derogation from the legislative provisions and expounded its view that technical regulations which had not been notified at the drafting stage were unenforceable as against third parties.

14. The Commission's interpretation concerning the consequences of the failure to give prior notification of a technical regulation is quite persuasive and, should the Court of Justice accept it, would make a decisive contribution to a stricter application of the procedure intended to prevent technical obstacles to intra-Community trade, laid down in Directive 83/189. None the less, it is surprising that the Commission did not propose to the Council and the Parliament that it be inserted in the two amendments to the abovementioned directive.

15. Irrespective of this, I concur with the view of Advocates General Darmon [6] and Van Gerven [7] that infringement proceedings are not the appropriate forum to consider the validity of that interpretation proposed by the Commission. In such actions, it is not a matter for the Court to decide on the consequences that a finding of such failure may have in the national legal systems of the Member States. It is the national courts which are competent by virtue of Article 171 of the EC Treaty to draw the necessary inferences from the judgments of the Court and to take all appropriate measures to enable Community law to be given full effect. [8] Thus, according to the Commission, the Court of Justice must simply determine

6 — Opinion delivered on 15 December 1993 in Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039, in particular at p. I-2042, point 67.

7 — Opinion delivered on 18 May 1994 in Joined Cases C-52/93 and C-61/93 *Commission* v *Netherlands* [1994] ECR I-3591, in particular at p. I-3592, point 9.

8 — Judgments in Joined Cases 314/81, 315/81, 316/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337, paragraph 16, and in Case C-101/91 *Commission* v *Italy* [1993] ECR I-191, paragraph 24.

whether or not the Netherlands failed to comply with Article 8 of Directive 83/189 by not notifying the Vrijstellingsregeling at the drafting stage.

Subject-matter of the application

16. Hitherto, the Court of Justice has dealt with various undenied failures to fulfil the obligation to notify draft technical regulations under Directive 83/189, [9] and one case of infringement of that obligation denied by Germany. [10] In the latter case, Germany claimed that its regulation of 25 March 1988 whereby the Federal Minister for Health extended to non-reusable sterile medical instruments the obligations applicable to medicinal products with regard to labelling was not a technical regulation because it merely extended existing technical rules to certain products. The Court held that a rule of that type is a technical regulation which must be notified at the drafting stage pursuant to the Directive 83/189 procedure. [11]

17. In none of the abovementioned cases did the Court have to consider the precise definition of 'technical regulation' within the meaning of Directive 83/189. The present case does raise that question before the Court since the Kingdom of the Netherlands considers that the Vrijstellingsregeling does not fall within the definition of 'technical regulation' laid down in Directive 83/189 and that, therefore, there has been no failure to fulfil the obligation to notify measures laid down in Article 8 of that directive.

18. The Vrijstellingsregeling is a regulation adopted by the Netherlands authorities in order to amend the rules on the conditions for the manufacture and marketing of margarine. It is intended to permit the marketing of new products of recognized quality which do not meet the conditions laid down in the Margarinebesluit (Margarine Decree). To that end, it introduced a number of derogations from the technical regulations laid down in that decree, while establishing the conditions which those products must observe with a view to protecting public health.

19. The technical specifications set out by the Vrijstellingsregeling for the derogations it lays down for the manufacture of margarine

9 — Case C-139/92 *Commission* v *Italy* [1993] ECR I-4707, Case C-52/93 *Commission* v *Netherlands* [1994] ECR I-3591 and Case C-61/93 *Commission* v *Netherlands* [1994] ECR I-3607.

10 — Case C-317/92 *Commission* v *Germany* [1994] ECR I-2039.

11 — Ibid., paragraph 25.

and substitute products include the following:

— low-sodium cooking salt may be used in place of cooking salt and emulsifier E 472 c may be used provided no more than 1 gram is used in 100 grams of the product;

— the water content of margarine may exceed 16%;

— the words 'low-sodium food' or 'for low-sodium diets' may be used instead of 'for a low-salt diet' or 'low-salt food' on margarine and substitute products;

— the maximum sodium content for unsalted margarine is increased from 40 to 50 milligrams in 100 grams of the product;

— since margarine is a basic food product for the intake of vitamin D into the body in countries with little sunshine, vitamin D_3 may be replaced by any other biologically active, chemical form of vitamin D, such as Vitamin D_2, which is not of animal origin, which makes it possible to produce a totally vegetable margarine.

20. In the view of the Netherlands Government, the Vrijstellingsregeling does not fall within the definition of 'technical specification' in Article 1(5) of Directive 83/189 since it lays down derogations from the application of the national rules on the manufacture of margarine and therefore does not create new barriers to trade, but serves to reduce such barriers. Margarine manufacturers may continue to apply the Margarinebesluit or they may avail themselves of the Vrijstellingsregeling and observe the conditions it lays down for the manufacture of margarine.

21. That argument of the Netherlands Government cannot be accepted.

22. Article 1(5) of Directive 83/189 defines 'technical regulation' in the following terms:

'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 ...'.

Article 1(1) of Directive 83/189, as amended by Directive 88/182, defines the concept of '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 ...'.

According to those definitions, technical regulations are the practices and the laws, regulations or administrative provisions of the Member States which require the fulfilment of conditions for the manufacture and marketing of the goods. Thus, three conditions must be met for there to be a technical regulation, namely: an act attributable to a Member State, a *de facto* or *de jure* obligation and an effect on the manufacture or marketing of goods.

23. Technical regulations are always created by an act attributable to a Member State which may consist in the adoption of laws, regulations or administrative provisions directly or indirectly requiring that technical specifications be observed. Administrative practices, such as voluntary agreements involving State authorities, designed to require compliance with technical specifications also constitute technical regulations. Those features distinguish technical regulations from 'technical standards' or 'standards', [12] which are the technical specifications adopted by private, national, European and international standardization organizations.

Directive 83/189 did not consider specifications established by local authorities to be technical regulations, but that restriction was abolished by the amendment introduced by Directive 94/10. Thus, technical regulations may be established by any authority in Member States at whatever level of government.

12 — According to Article 1(2) of Directive 83/189, a 'standard' is 'a technical specification approved by a recognized standardizing body for repeated or continuous application, with which compliance is not compulsory'. Directive 94/10 distinguishes between the following three types:
'— international standard: a standard adopted by an international standardization organization and made available to the public,
— European standard: a standard adopted by a European standardization body and made available to the public,
— national standard: a standard adopted by a national standardization body and made available to the public'.

24. Another characterizing feature of technical regulations is that they be compulsory *de jure* or *de facto*. A technical regulation is compulsory *de jure* where it directly imposes the technical specifications required of products. However, compliance with those requirements may be imposed indirectly, in which case the measures are *de facto* technical regulations. Directive 94/10 adds to Directive 83/189 a non-exhaustive list of the latter type of technical regulations. [13] The question whether measures are compulsory *de jure* or *de facto* is another factor distinguishing technical regulations from technical standards, since observance of the latter is voluntary.

25. The third characteristic of technical regulations is that they affect the manufacture and marketing of goods. Technical regulations require observance of the specifications concerning the characteristics of the product (dimensions, quality, performance, safety, the name under which the product is sold, symbols, testing, packaging, marking or labelling etc.), the procedure for checking conformity and production methods. In order to protect, in particular, the environment or the interests of consumers, technical regulations may also impose on products requirements other than technical specifications, relating to conditions of use, recycling, reuse or disposal which can significantly influence the manufacture of the goods or their marketing.

13 — The second subparagraph of Article 1(9) provides:
'*De facto* technical regulations include:
— laws, regulations or administrative provisions of a Member State which refer either to technical specifications or other requirements or to professional codes or codes of practice which in turn refer to technical specifications or other requirements and compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,
— voluntary agreements to which a public authority is a contracting party and which provide, in the public interest, for compliance with technical specifications or other requirements, excluding public procurement tender specifications,
— technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products by encouraging compliance with such technical specifications or other requirements; technical specifications or other requirements linked to national social-security systems are not included ...'.

26. The Vrijstellingsregeling meets all the criteria of a technical regulation within the meaning of Directive 83/189 since it is a regulation adopted by the Netherlands State, it is compulsory *de jure* and it establishes technical specifications and other requirements for the manufacture and marketing of margarine and substitute products ranging from the substances which may be used in their manufacture to the wording on the labelling.

27. That conclusion is not altered by the argument of the Netherlands Government that the abovementioned measure is not a technical regulation because it lays down exemptions from the technical regulation applicable to margarine and thus reduces the barriers to trade and is not compulsory for operators who may either avail themselves of it or continue to observe the general regulations on margarine.

In the first place, the mere fact that it contains exemptions to other regulations does not mean that a measure ceases to be a technical regulation if it affects the conditions for the manufacture and marketing of goods.

In the second place, all technical regulations must be notified to the Commission at the drafting stage, irrespective of whether they give rise to barriers to intra-Community trade since the fundamental aim of the notification procedure laid down in Directive 83/189 is to enable the Commission and the Member States to acquaint themselves with the draft regulation and assess whether it restricts the free movement of goods and, if so, whether the restriction is compatible with the Treaty. The State which drafted the technical regulation cannot make that assessment by itself and refrain from notifying the text to the Commission at the draft stage since that would be contrary to the intention of Directive 83/189 and would prevent the information procedure from fulfilling its function.

28. The Vrijstellingsregeling, which constitutes a technical regulation and does not implement any international or Community provision, was adopted by the Netherlands without being notified to the Commission at the drafting stage. Since Article 8(1) of Directive 83/189 requires Member States to communicate to the Commission all draft technical regulations, the Kingdom of the Netherlands has failed to fulfil its obligations under that provision.

29. Since the Commission has been successful in its application, the Kingdom of the Netherlands should be ordered, pursuant to the first subparagraph of Article 69(2) of the Rules of Procedure, to pay the costs.

Conclusion

30. In view of the foregoing, I propose that the Court should:

1. Declare that, by adopting on 19 September 1990 the Vrijstellingsregeling Margarinebesluit without notifying it to the Commission at the drafting stage, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 8 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;

2. Order the Kingdom of the Netherlands to pay the costs.