JUDGMENT OF THE COURT (Fifth Chamber)
20 March 1997 *

In Case C-13/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between

Bic Benelux SA

and

Belgian State

on the interpretation of Article 1(1) and (5) 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 (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, C. Gulmann (Rapporteur), D. A. O. Edward and P. Jann, Judges,

* Language of the case: French.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bic Benelux SA, by Emmanuel de Cannart d'Hamale and Patrick Baeten, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Deputy Foreign Affairs Secretary in the same directorate, acting as Agents, and

— the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Francisco de Sousa Fialho, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Bic Benelux SA, represented by Emmanuel de Cannart d'Hamale and Ian S. Forrester QC; of the Belgian Government, represented by Bernard van de Walle de Ghelcke, of the Brussels Bar; and of the Commission, represented by Hendrik van Lier, at the hearing on 24 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1996,

gives the following

Judgment

1 By judgment of 4 December 1995, received at the Court on 19 January 1996, the Belgian Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 1(1) and (5) 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).

2 That question was raised in proceedings in which Bic Benelux SA ('Bic') seeks annulment of, *inter alia*, the Ministerial Order of 24 December 1993 concerning products subject to environmental tax (*Moniteur Belge*, 29 December 1993, p. 28903, hereinafter 'the Ministerial Order'), which entered into force on 1 January 1994, in so far as it relates to disposable razors.

3 A system of environmental taxes was introduced into Belgian law by Articles 369 to 401 of the Law of 16 July 1993 completing the Federal Structure of the State (*Moniteur Belge*, 20 July 1993, p. 17013, hereinafter 'the Law'). Under Article 369 of the Law, environmental tax is 'a tax assimilated to excise duty, applicable to a product which has been released on to the market, on account of the environmental damage which that product is deemed to cause'.

4 Environmental tax is applicable to, *inter alia*, disposable articles, which are defined in Article 369(7) of the Law as any 'article designed to be used either once only or a limited number of times and which loses its usefulness either after being used

once or a limited number of times, or because one of its essential parts has been used, emptied or exhausted and cannot be replaced, refilled or recharged'.

5 Under Article 376(1) of the Law, disposable razors are subject to an environmental tax of BFR 10.

6 Article 391 of the Law requires a marking to be placed on products subject to environmental tax:

'To ensure that the collection of environmental tax is monitored and consumers are informed, all containers or products subject to one of the environmental taxes provided for by this Law must be clearly marked by a distinctive sign indicating either that environmental tax is payable and the amount of such tax, or the reason for their exemption or the amount of the returnable deposit. The Finance Minister shall lay down detailed rules for the implementation of this Article; he may provide *inter alia* for a stamp, tape, seal, disc, label or other to be affixed to each container, product or packaging. ...'.

7 In the Ministerial Order, the Minister of Finance laid down various measures implementing the Law.

8 Article 11 of the Ministerial Order provides:

'1. Prior to their collection with a view to release on to the market, the products must be marked with the distinctive sign specified in Annex 1 hereto.

2. The amount of the environmental tax must be stated.

3. Where a number of products subject to environmental tax are marketed in a single package, the distinctive sign and the total amount of environmental tax payable may be placed on the packaging.'

9 Under Article 18(1) and (2) of the Ministerial Order:

'1. Products subject to environmental tax intended for supply in the context of diplomatic tax-free sales may be placed on the market without payment of environmental tax.

2. Prior to such supply, the products referred to in paragraph 1 must be marked with the distinctive sign specified in Annex 2.'

10 Bic, which marketed integral disposable razors in Belgium before the environmental tax arrangements came into force, based its action for annulment before the Conseil d'État on, *inter alia*, infringement of Directive 83/189 on the ground that the Ministerial Order was not notified to the Commission, in accordance with Article 8(1) of that Directive, prior to its adoption.

11 That provision requires Member States to communicate immediately to the Commission any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard, and to provide a brief indication of the reasons which make the enactment of such a technical regulation necessary.

12 Article 1(5) of Directive 83/189 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'. Article 1(1) defines a '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 ...'.

13 In so far as Articles 11 and 18 of the Ministerial Order require distinctive signs to be affixed to products subject to environmental tax, the Conseil d'État considers that the merits of Bic's plea based on Directive 83/189 depend on whether those provisions, which lay down a specific and binding labelling requirement, are to be regarded as forming a 'technical specification' within the meaning of the Directive.

14 The Conseil d'État therefore decided to stay proceedings and submit the following question to the Court:

'Do the obligation to affix a particular distinctive sign on products subject to a tax payable on account of the environmental damage which they are deemed to cause, prior to the release of such products on to the market, and the obligation to affix another distinctive sign on products of the same type if they are exempt from that tax by virtue of diplomatic privilege, constitute "technical specifications", within the meaning of Article 1(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, or "technical regulations", within the meaning of Article 1(5) of that Directive?'

15 The essence of that question is whether an obligation to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause, such as that laid down in Articles 11 and 18 of the Ministerial Order, constitutes a technical specification within the meaning of Directive 83/189 and whether the national enactment introducing it is a technical regulation within the meaning of the same Directive.

16 The Belgian Government and the Commission consider that that question should be answered in the negative.

17 In the Belgian Government's submission, the definition of a technical specification in the Directive does not, despite its wording, cover each and every type of marking requirement. It must be interpreted in the light of the aims and scope of the Directive, which implies that the duty to notify applies only to marking requirements implementing a technical standard which is itself capable of constituting an obstacle to free movement. The marking in question in the main proceedings is intended to inform the public that the products have an effect on the environment and to encourage consumers to switch to other, less harmful, products. It applies without distinction to national and imported products and does not duplicate any labelling with the same content which may have been affixed in the Member State of origin. It is an environmental protection measure falling outside the scope of Directive 83/189, which is confined to national measures capable of harmonization at a Community level only on the basis of Article 100a of the Treaty.

18 The Belgian Government further considers that this interpretation is supported 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/EEC (OJ 1994 L 100, p. 30), which introduces a new paragraph 3 into Article 1 of Directive 83/189, defining 'other requirement' as 'a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular ... the environment, and which affects its life cycle after it has been placed on the market ...'. In its view, the addition of that definition by Directive 94/10, which does not apply *ratione temporis* to the case before the national court, proves that requirements imposed on a product on grounds of environmental protection were not included under the definition of a 'technical specification' in Directive 83/189.

19 Those arguments cannot be accepted. There is no basis in Directive 83/189 for an interpretation limiting its application to national measures capable of harmonization only on the basis of Article 100a of the Treaty. The aim of that Directive is, by preventive monitoring, to protect the free movement of goods, which is one of the foundations of the Community. Such monitoring is necessary since technical regulations covered by the Directive are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade in goods. Such hindrances may arise from the adoption of national technical regulations even if those regulations do not duplicate markings affixed in the Member State of origin and irrespective of the grounds on which they were adopted.

20 Consequently, the fact that a national measure was adopted in order to protect the environment or that it does not implement a technical standard which may itself constitute a barrier to free movement does not mean that the measure in question cannot be a technical regulation within the meaning of Directive 83/189.

21 Nor are the definition of 'other requirement' introduced by Directive 94/10, and the reference therein to protecting the environment, of any relevance as regards the

meaning to be given to 'technical specification', since the new provision concerns only requirements other than technical specifications.

22 In the Commission's submission, the mandatory marking of products subject to environmental tax, which is intended to ensure that the collection of environmental tax is monitored, must be regarded as a fiscal accompanying measure, and thus as a fiscal measure comparable to national provisions requiring tax strips to be affixed to products subject to excise duty. The Commission submits that, in the absence of any express provision, Directive 83/189, which was applicable at the material time, cannot be applied to fiscal measures. As far as national measures adopted before 1 July 1995 are concerned, the non-applicability of Directive 83/189 is clear from the new provision in the third indent of the second subparagraph of Article 1(9), introduced into Directive 83/189 by Directive 94/10, which provides: '*De facto* technical regulations include: ... — 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 ...'. In the Commission's view, that provision covers the marking requirement in issue in the main proceedings, with the result that, since it was adopted before 1 July 1995, there was no obligation to notify it.

23 As to that, first, the marking requirement in issue in the main proceedings constitutes, according to the definition given in Article 1(5) of Directive 83/189, a *de jure* technical regulation in that its 'observance ... is compulsory ... in the case of marketing' of the product concerned and in that it is, according to the definition given in Article 1(1), a technical specification, since the enactment defines 'the characteristics required of a product such as ... the requirements applicable to the product as regards ... marking or labelling'.

24 Second, the marking in issue is intended to inform the public of, *inter alia*, the effects of the products on the environment, and the Belgian Government has confirmed the importance to be attached to that aspect of the rules governing marking. The aim of the environmental tax, which is to protect the environment, is thus reinforced by the marking, which, like other environmental labelling, whether linked to an environmental tax or not, reminds consumers of the harmful effects of the products in question on the environment.

25 Since the marking requirement in issue can in no way be regarded as exclusively a fiscal accompanying measure, it does not therefore constitute a requirement linked to a fiscal measure for the purposes of the third indent of the second subparagraph of Article 1(9) of Directive 83/189, as amended by Directive 94/10.

26 Consequently, the answer to be given is that an obligation to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause, such as that laid down in Articles 11 and 18 of the Ministerial Order, constitutes a technical specification within the meaning of Directive 83/189, and the national enactment introducing it is a technical regulation within the meaning of the same Directive.

Costs

27 The costs incurred by the Belgian and French Governments and the Commission of the European Communities, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Belgian Conseil d'État, by judgment of 4 December 1995, hereby rules:

An obligation to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause, such as that laid down in Articles 11 and 18 of the Ministerial Order of 24 December 1993 concerning the treatment of products subject to environmental tax, constitutes a technical specification within the meaning 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, and the national enactment introducing it is a technical regulation within the meaning of the same Directive.

Moitinho de Almeida Sevón Gulmann

Edward Jann

Delivered in open court in Luxembourg on 20 March 1997.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber