OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 12 December 2000 [1]

1. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) has made a reference to the Court under Article 234 EC for a ruling on the interpretation 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] ('Directive 83/189'). The order for reference makes specific mention of Article 1, which defines the terms 'technical specification' and 'technical regulation'.

I. National legislation governing radioelectrical transmitting equipment

2. Article 17(1) of the Law on Telecommunications Services (Wet op de telecommunicatievoorzieningen) prohibits, otherwise than by concession, the installation, use or possession of radioelectrical transmitting equipment without ministerial authorisation. The licensing system distinguishes between licences permitting installation and use, which are only granted in respect of approved equipment, and those permitting possession.

Commercial operators specialising in the trade of radioelectrical equipment may obtain a licence to manufacture, market, repair and install transmitting equipment. The licence contains several categories, which are classified into three groups. Groups I and II cover approved transmitting equipment. The Group III licence, which covers non-approved equipment, is granted exclusively for possession and not for use. The use of non-approved transmitting equipment is prohibited in the Netherlands and the marketing of such equipment is very strictly regulated in order to prevent disruption of the air waves. Companies operating in this sphere must keep a register of the transmitting equipment they manufacture, receive and deliver. Under Article D.1.4 of the Decree on Radio Electrical Equipment (Besluit radio-elektrische inrichtingen) these companies are not permitted to keep transmitting equipment belonging to Group III in places which are accessible to the public.

Radio-frequency amplifiers which are suitable for use with transmitting equipment

1 — Original language: Spanish.

2 — OJ 1983 L 109, p. 8.

are to be treated in the same way as transmitting equipment and a licence for use will not be granted in respect of non-approved amplifiers.

Article C.11.1 of the Decree on Radio Electrical Equipment prohibits commercial advertisements for non-approved transmitting equipment. In its written observations, the Netherlands Government states that this restriction, the aim of which is to prevent this type of equipment becoming widespread, with the attendant risk of misuse, refers to advertising aimed at the general public, since advertising in specialised catalogues is permitted.

Infringement of this provision is a criminal offence.

II. The facts of the main proceedings

3. In January 1994, Mr van der Burg placed advertisements for radio-frequency amplifiers with a capacity of 1000 and 1500 watts in a magazine for radio amateurs. These amplifiers are active electronic components which can increase the strength of a signal and are treated in the same way as non-approved transmitting equipment.

Mr van der Burg was prosecuted because the Decree on Radio Electrical Equipment prohibits the advertisement of amplifiers with these specifications. The Kantonrechter (Cantonal Court), Brielle, gave judgment in default in May 1995. On appeal, the Rechtbank (District Court), Rotterdam, set aside the judgment, ordering the accused to pay a fine of NLG 600 (or in the alternative to serve a twelve-day prison term). It is this ruling which Mr van der Burg is seeking to have set aside in the appeal in cassation. He asserts that the applicable measure of national law is contrary to Community law because it is a technical regulation within the meaning of Directive 83/189 which was not notified to the Commission.

III. The questions referred for a preliminary ruling

4. To enable it to reach a decision in the proceedings before it, the Hoge Raad has referred the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 1 of Directive 83/189 be interpreted as meaning that Article C.11.1(1) of the Besluit radio elektrische inrichtingen (Decree on Radio Electrical Equipment), which provides that "[i]t is prohibited to make commercial advertisements, or to cause commercial advertisements to be made, for transmitting equipment which is not of an approved type", should be treated as a technical regulation within the meaning of Directive 83/189...?

2. If the answer to Question 1 is in the affirmative: does this have the result that such a provision must be disapplied only if it constitutes a barrier to trade or to the free movement of goods in a specific case, or should it be held that such a provision must not be applied if the provision generally, and thus irrespective of the specific case, has or may have the effect of an obstacle to trade?'

5. The Hoge Raad requests that, in answering the first question, the Court of Justice have regard to the legal context in which this rule operates and to the relationship between the requirements which transmitting equipment must satisfy and the prohibition of advertising.

The Hoge Raad states in paragraph 6.11.1 of the order for reference that, while it appears that the disputed provision cannot be treated as a technical regulation within the meaning of Directive 83/189, it should be borne in mind that there is a direct relationship between the requirements which transmitting equipment must satisfy and the prohibition of commercial advertising, and that the scope of this prohibition is determined in its entirety by the requirements which transmitting equipment must satisfy in order to qualify for approval. In other words, if transmitting equipment fails to satisfy the prescribed technical requirements, it must be treated as being of a non-approved type, which means that it may not be commercially advertised, pursuant to Article C.11.1(1) of the Decree on Radio Electrical Equipment.

IV. The relevant Community legislation

6. Article 1 of Directive 83/189[3] defines 'technical specification', 'standard', 'standards programme', 'draft standard', 'technical regulation', 'draft technical regulation' and 'product'. I have inferred from the wording of the questions referred that the national court only requires an interpretation of paragraphs (1) and (5) of Article 1, which set out the definitions of 'technical specification' and 'technical regulation' respectively.

A 'technical specification' is to be understood as meaning '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'.

3 — As the Commission rightly points out in its written observations, it is the text of the 1983 Directive which applies to the facts of the main proceedings. The Decree on Radio Electrical Equipment was adopted on 5 December 1988 and, in the event that it does constitute a technical regulation, it should have been communicated to the Commission by this date. Under Council Directive 88/182/EEC of 22 March 1988 amending Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1988 L 81, p. 75), Member States were granted until 1 January 1989 to comply with the provisions therein.

A 'technical regulation' is to be understood as meaning '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'.

7. Under Article 8 of Directive 83/189, Member States must immediately communicate to the Commission any draft technical regulation, except where the latter merely transposes the full text of an international or European standard, in which case information will suffice.

V. The proceedings before the Court of Justice

8. The Governments of France, Belgium, the Netherlands and the United Kingdom, together with the Commission, submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice. Since none of the interested parties applied to present oral observations, the Court decided not to hold a hearing, in accordance with Article 104(4) of the Rules of Procedure.

VI. Consideration of the questions referred for a preliminary ruling

A. *The first question*

9. From the wording of this question, it is my understanding that, in essence, the national court wishes to know whether the rule set out in Article C.11.1(1) of the Decree on Radio Electrical Equipment, which provides that it is prohibited to make commercial advertisements or to cause commercial advertisements to be made for non-approved transmitting equipment, is a technical regulation within the meaning of Directive 83/189.

10. I agree with the view, shared by all those who have submitted written observations in these preliminary proceedings, that this question should be answered in the negative.

11. As the Court has indicated, the aim of Directive 83/189 is to protect, by means of preventive control, the free movement of goods, which is one of the foundations of the Community. This control is useful in that the technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States,

such obstacles being permissible only if they are necessary to satisfy compelling public interest requirements. [4]

12. As the Commission rightly points out, the national rule in question cannot be regarded as a technical specification or a technical regulation within the meaning of Directive 83/189, because the prohibition of advertising is not a specification defining the characteristics of transmitting equipment, but rather a procedural guideline to be followed where transmitting equipment has not been approved, and because compliance with the rule is not obligatory either for the marketing or for the use of transmitting equipment in the Netherlands.

13. There are, moreover, further arguments in favour of this interpretation. First, advertising is a service rather than a product, which means that it is not covered by Article 30 of the EC Treaty (now, after amendment, Article 28 EC) or by Directive 83/189, the aim of which is to prevent obstacles to the free movement of goods. Pursuant to the Court's interpretation in previous case-law, technical regulations are, within the meaning of Directive 83/189, specifications defining the characteristics of products. [5] Where a characteristic required of a product is not stipulated, the provision does not in principle fall within the definition of a technical specification and consequently cannot be regarded as a technical regulation which has to be notified to the Commission pursuant to the first subparagraph of Article 8(1) of the Directive. [6] Therefore, the obligation to notify laid down by Directive 83/189 does not apply to national rules which do not lay down the characteristics required of a product. [7]

14. Second, the definition of 'technical specification' provided by Article 1(1) of Directive 83/189 refers to the characteristics of a product but makes no mention of advertising, or of methods of sales promotion. In any event, this is an ancillary rule which does not regulate, either directly or indirectly, the characteristics required of transmitting equipment in order that it may be marketed and used and its application depends upon whether or not the transmitting equipment has been approved by the authorities. The Court has taken the view that the obligation to provide information in a specified language does not in itself constitute a 'technical regulation' within the meaning of Directive 83/189, but an ancillary rule necessary in order for the information to be effectively communicated. [8]

4 — Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 40; Case C-13/96 *Bic Benelux* [1997] ECR I-1753, paragraph 19; Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 22; and Case C-443/98 *Unilever* [2000] ECR I-7535, paragraph 40.

5 — *CIA Security International*, cited in footnote 4 above, paragraph 25.

6 — Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 34.

7 — Joined Cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, paragraph 38.

8 — *Colim*, cited in footnote 4 above, paragraph 29.

15. Third, the rule in question governs advertising, which is too remote from and insufficiently directly connected to the production and marketing of a product. The Court has stated, in this regard, that certain measures may impose, in respect of a product intended for a particular group of users, technical specifications whose content depends on the specific objective pursued by that group and which are too remote in terms of their relationship with the production and marketing of the product to be classified as technical regulations within the meaning of Directive 83/189.[9]

16. Finally, the prohibition of advertising does not mean that it is illegal to market non-approved transmitting equipment.

17. In its written observations, the Commission suggests that were the national courts to construe the prohibition set out in Article C.11.1(1) of the Decree on Radio Electrical Equipment so as to apply to media generally (such as photographic publications or radio) which carry advertisements for non-approved transmitting equipment, then that provision would constitute a technical regulation.

In my view, it is not necessary for the Court to consider that hypothesis in the context of the question referred for a preliminary ruling since, as the Commission acknowledges, it bears no relation to the events which gave rise to the proceedings against Mr van der Burg, who is a businessman selling transmitting equipment, rather than a member of the media.

18. For the reasons stated, I believe that the rule set out in Article C.11.1(1) of the Decree on Radio Electrical Equipment prohibiting the advertisement of non-approved transmitting equipment does not a constitute a technical regulation within the meaning of Directive 83/189.

That is so notwithstanding the existence of a direct relation between the technical requirements which transmitting equipment must satisfy in order to be approved and the prohibition of advertising non-approved equipment, since such a prohibition only takes effect where an authorisation is required but has not been obtained.

19. In the light of the answer I propose to give to the first question, it is my view that there is no need to reply to the second. However, I will deal with the second question in case the Court does not share my opinion.

9 — Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 24.

B. *The second question*

20. By its second, subsidiary, question, which is to be answered in the event that the reply to the first question is in the affirmative, the national court wishes to know whether, in order for a technical regulation which has not been communicated to be rendered inapplicable, it must constitute a barrier to the free movement of goods in a specific case or whether it is sufficient that the provision is generally likely to disrupt trade.

21. It is the view of both the French and Netherlands Governments that whether or not a technical regulation which has not been communicated is rendered inapplicable should be considered in each specific case, having regard to the aim of Directive 83/189, and that the regulation will only be rendered inapplicable if none of the grounds for justification set out in Article 36 of the EC Treaty (now, after amendment, Article 30 EC) applies.

However, in the case before the Court, the rule at issue is vital in order to protect the air waves and is therefore justified. The need to prohibit commercial advertising of non-approved transmitting equipment aimed at the general public — since advertisements aimed at specialised groups are authorised — arises from the serious disruption that use of this type of apparatus can cause to the communications network and from the fact that it can affect, *inter alia*, ambulance traffic, police communications, radio and television signals, air traffic controls, shipping and national security.

22. The Court has ruled in the past on the legal consequences of failure by a Member State to notify technical regulations to the Commission. In this regard, the Court has stated that the aim of Directive 83/189 is to protect the free movement of goods by means of preventive control and that the obligation to notify is essential for achieving such control. The effectiveness of Community control will be that much greater if the Directive is interpreted as meaning that breach of the obligation to notify constitutes a substantive procedural defect such as to render technical regulations which have not been notified inapplicable to individuals. [10]

23. I agree with the Commission when it draws attention to the fact that there is only a partial overlap between the scope of Directive 83/189 and that of Article 30 of the Treaty, [11] and with its assertion that the penalty of rendering technical regulations inapplicable, the purpose of which is to increase the effectiveness of preventive control within the framework of Directive 83/189, should be restricted by its material

10 — *CIA Security International*, cited in footnote 4 above, paragraph 48.

11 — The Commission suggests, by way of an example, that the linguistic requirements imposed by Member States with regard to labelling are not technical regulations but do constitute a barrier to intra-Community trade, whereas production standards, which do not affect trade between Member States, could be regarded as technical regulations, even though they do not fall within the scope of Article 30 of the Treaty.

scope. Therefore, a technical regulation which has not been notified should only be rendered inapplicable to the extent that it is likely to hinder the use or marketing of the specific product about which the national judge has been asked to deliver a ruling.

In my view, the prohibition set out in Article C.11.1(1) of the Decree on Radio Electrical Equipment does not constitute a barrier to the use or marketing of transmitting equipment. For this reason, even if the Court were to regard this rule as a technical regulation within the meaning of Directive 83/189, the national court would not be entitled to set the provision aside in the proceedings before it.

24. In the event that the Court deems it necessary to reply to this question, it is my opinion that a technical regulation which has not been notified to the Commission should only be rendered inapplicable if it is likely to hinder the use or marketing of a specific product. Since Article C.11.1(1) of the Decree on Radio Electrical Equipment does not hinder the use or marketing of transmitting equipment, the Hoge Raad is not entitled to set aside this rule in the present proceedings.

VII. Conclusion

25. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the questions referred for a preliminary ruling by the Hoge Raad as follows:

(1) The rule set out in Article C.11.1(1) of the Decree on Radio Electrical Equipment prohibiting the advertisement of non-approved transmitting equipment does not constitute a technical regulation 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. That applies notwithstanding the existence of a direct relationship between the technical requirements which transmitting equipment must satisfy in order to be approved and the prohibition of advertising non-approved equipment, since such a prohibition only takes effect where an authorisation is required but has not been obtained.

(2) A technical regulation which has not been notified to the Commission should only be rendered inapplicable if it is likely to hinder the use or marketing of a specific product. Since Article C.11.1(1) of the Decree on Radio Electrical Equipment does not hinder the use or marketing of transmitting equipment, the Hoge Raad is not entitled to set aside this rule in the present proceedings.