OPINION OF ADVOCATE GENERAL LÉGER
delivered on 14 July 2005 [1]

1. In the present case, the Court is asked to rule on whether toys, in addition to complying with the cadmium bioavailability limit of 0.6 micrograms per day [2] laid down in Council Directive 88/378/EEC, [3] must also be subject to the restrictions imposed by Council Directive 91/338/EEC. [4]

2. This, in essence, is the question referred for a preliminary ruling by the Hoge Raad der Nederlanden (Netherlands Supreme Court) (Netherlands) in the course of criminal proceedings against Geharo BV ('Geharo').

3. In that question the Court of Justice is called upon to consider the scope of Article 1, second sentence, of Directive 91/338 and the applicability of the standards it lays down for toys falling within Directive 88/378.

I — Legal context

A — *Community legislation*

4. Article 2 EC provides that the task of the Community is to promote a high level of protection and improvement of the quality of the environment. To that end and according to Article 3(1) CE, the activities of the Community are to include a contribution to the attainment of a high level of health protection.

5. In accordance with those objectives and taking into account the increasing level of exposure of humans and the environment to

1 — Original language: French.

2 — Cadmium is a metal whose physical and chemical properties are similar to those of zinc. It is mainly used in the manufacture of storage batteries and tinting colours and is used as a stabiliser for plastics. It may also be included in the composition of a number of alloys and corrosion-resistant coatings. Cadmium discharge may arise at a number of stages in the processes of production, manufacture and use of products and during waste disposal.

3 — Directive of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ 1988 L 187, p. 1).

4 — Directive of 18 June 1991 amending for the tenth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1991 L 186, p. 59).

cadmium, the European Community has developed a number of actions to protect them against that substance. Cadmium is considered nowadays to be particularly dangerous due both to its high toxicity with regard to the human body, and to the harmful effects it may have on the ecosystem in the long term.

1. Directive 88/378

6. Directive 88/378 lays down the safety requirements to be met by all toys if they are to be placed on the market. [5]

7. The first and second recitals in the preamble to that directive seek, on the one hand, to remove barriers to trade between Member States by laying down harmonised rules concerning safety standards for toys and, on the other hand, to ensure effective protection of consumers, particularly children, against risks connected with the use of such toys within the common market.

5 — Article 1(1) of that directive defines a 'toy' as meaning 'any product or material designed or clearly intended for use in play by children of less than 14 years of age'. Annex I to that directive lists the products which are not regarded as toys for its purposes.
Article 2(3) of that directive provides: '"placed on the market" shall cover both sale and distribution free of charge'.

8. Article 2(1) of Directive 88/378 provides:

'Toys may be placed on the market only if they do not jeopardise the safety and/or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children'.

9. To that end, Article 3 of that directive requires Member States to take 'all steps necessary to ensure that toys cannot be placed on the market unless they meet the essential safety requirements set out in Annex II'.

10. Annex II to that directive sets out in particular the essential safety requirements regarding the chemical properties of toys. On one hand, Title II, paragraph 3, point 1, second subparagraph of that annex identifies the risks involved in using toys and stipulates that they must in all cases comply with the requirements laid down in the Community legislation relating to the use of dangerous substances and preparations. This paragraph reads as follows:

'1. Toys must be so designed and constructed that ... they do not present health hazards or

risks of physical injury by ingestion, inhalation or contact with the skin, mucous tissues or eyes.

They must in all cases comply with the relevant Community legislation relating to certain categories of products or to the prohibition, restriction of use or labelling of certain dangerous substances and preparations.'

11. On the other hand, as regards the chemical properties of toys, Title II, paragraph 3, point 2, second subparagraph of that annex contains special provisions relating to the maximum bioavailability of cadmium in toys. That standard is also called the 'sucking standard' or 'dilution standard'. It is used to calculate the daily quantity of cadmium likely to be released from the toy and absorbed by the body through handling, inhalation, sucking or ingestion of the toy. Point 2 reads as follows:

'2. ... for the protection of children's health, *bioavailability* resulting from the use of toys must not, as an objective, exceed the following levels per day:

...

0.6 µg for cadmium,

...

or such other values as may be laid down for these or other substances in Community legislation based on scientific evidence.

The bioavailability of these substances means the soluble extract having toxicological significance.'[6]

2. Directive 91/338

12. Directive 91/338 amends for the tenth time Council Directive 76/769/EEC,[7] which lays down harmonised rules concerning the marketing and use of certain dangerous substances and preparations.

6 — Emphasis added.

7 — Directive of 27 July 1976 (OJ 1976 L 262, p. 201).

13. Article 1(1) of Directive 76/769 reads as follows:

'Without prejudice to the application of other relevant Community provisions, this Directive is concerned with restricting the marketing and use in the Member States of the Community, of the dangerous substances and preparations listed in the Annex.'

14. Directive 91/338 amends Directive 76/769 by adding cadmium to the list of dangerous substances and preparations whose marketing and use is restricted.

15. Directive 91/338 has two objectives: first, according to the first and fifth recitals in the preamble to the directive, it seeks to improve the functioning of the internal market by harmonising the rules on the marketing and use of products containing cadmium [8] and, second, according to the second recital, it seeks to combat environmental pollution by cadmium and to protect the health of the population in the long term.

16. Article 1 of Directive 91/338 reads as follows:

'Annex I to Directive 76/769/EEC is hereby amended as set out in the Annex hereto. *However, the new provisions shall not apply to products containing cadmium which are already covered by other Community legislation.*' [9]

17. As the Court stated in *Netherlands* v *Commission*, [10] Directive 91/338 inserted in Annex I to Directive 76/769 a new point 24, which lists for a certain number of products specifically mentioned three types of application for cadmium and its compounds — as colourants, as stabilisers and for surface treatment (cadmium plating) [11] — whose use it regulates. For each of those applications the annex to Directive 91/338 lays down a maximum cadmium content in order to protect the population as a whole from the consequences of dispersal of that substance in the environment.

18. In that regard, point 24, 1.1 states that finished products coloured with cadmium may not be placed on the market if their

8 — The list of those products appears in the annex to Directive 91/338.

9 — Emphasis added.

10 — C-314/99 [2002] ECR I-5521, paragraph 7.

11 — See the same point 24, under 1.1 and 1.2, 2.1 and 3 respectively.

cadmium content exceeds 0.01% by mass of the plastic material. In other words, a product made from plastic must not contain more than 100 mg/kg of cadmium if it is to be placed on the market.

B — *National legislation*

1. The legislation concerning the safety of toys

19. Directive 88/378 was transposed in the Netherlands by the toy safety order of 29 May 1991, adopted under the law on goods (Warenwetbesluit Speelgoed), [12] which lays down the rules relating to the safety of toys and products intended for children.

20. Paragraph 11 of Annex II to the toy safety order lays down the requirements relating to the safety of toys containing dangerous substances and preparations and restricts the bioavailability of cadmium to 0.6 micrograms.

12 — Stbl. 1991 No 269, 'the toy safety order'.

2. The dangerous substances legislation

21. At the time of the alleged offence, Article 2(1) of the cadmium order of 12 October 1990, adopted under the law on substances that constitute a danger to the environment (Cadmiumbesluit Wet milieugevaarlijke stoffen), [13] prohibited 'the manufacture, importation into the Netherlands, making available to a third party or keeping in commercial stocks of products containing cadmium'.

22. Article 1(a) of the cadmium order defines products containing cadmium as 'products in which cadmium is used as a stabiliser, pigment or surface coating and products in which artificial products or colours containing more than 50 mg/kg of cadmium have been included'.

II — Facts and main proceedings

23. On 16 February 1999, the Inspectie Gezondheidsbescherming Waren en Veterinaire Zaken (Inspectorate for Health Pro-

13 — Stbl. 1990, 'the cadmium order', replaced by the order of 22 March 1999 raising the maximum permitted level of cadmium to 100 mg/kg (Stbl. 1999, p. 149).

tection, Goods and Veterinary Matters) seized a consignment of toys at Geharo's premises. Tests carried out on those goods revealed the presence of a cadmium content of over 100 mg/kg, in breach of Article 1(a) of the cadmium order, of 12 October 1990, which provided for a maximum content of that substance of 50 mg/kg.

24. Those findings gave rise to the institution of criminal proceedings against Geharo under Article 2 of the cadmium order.

25. On 3 July 2000 the competent judge hearing criminal matters of the Arrondissementsrechtbank de Zutphen (District Court, Zutphen) acquitted Geharo and ruled that the standard of 50 mg/kg provided for in Article 1 of the cadmium order was not applicable due to the existence of specific legislation on the safety of toys. In the view of that judge, only the standard of 0.6 micrograms provided for by the toy safety order was therefore applicable in the present case. As the tests carried out on the toys had not revealed a bioavailability of cadmium that exceeded the ceiling laid down in that order the judge held that there were no grounds for a conviction.

26. When an appeal was made to it by the Openbaar Ministerie (Public Prosecutor's Office), the Gerechtshof te Arnhem (Court of Appeal, Arnem), the competent appeal court, annulled the decision of the Arrondissementsrechtbank te Zutphen and convicted Geharo by a judgment of 6 May 2002, under Article 2 of the cadmium order. The Gerechtshof te Arnhem ruled that toys containing cadmium fell within both Directive 91/338 and Directive 88/378. It held that the wording of Article 1, second sentence, of Directive 91/338 referred only to Community provisions with an objective and/or standard that corresponded to those of the cadmium directive, which Directive 88/378 did not. However, since the maximum cadmium content laid down by Article 1 of that order (50 mg/kg) derogated from that laid down in Directive 91/338 (100 mg/kg), the Gerechtshof te Arnhem ruled that Article 1 of the cadmium order did not apply. That court therefore convicted Geharo under Article 2 of that order, but only in cases where a cadmium content exceeding 100 mg/kg had been found.

27. Geharo lodged an appeal in cassation before the Hoge Raad der Nederlanden, in which it relied upon the provisions of Article 1, second sentence, of Directive 91/338. In support of its appeal, Geharo contends that the national law conflicts with Community law since the rules laid down in the toy safety order and the cadmium order are applied concurrently, although in its opinion only the rules laid down by Directive 88/378 are applicable, and not those laid down by Directive 91/338.

III — The question referred for a preliminary ruling

28. In order to determine whether the criminal proceedings had been brought against Geharo on grounds that complied with Community law, the Hoge Raad der Nederlanden decided to stay proceedings and to refer the following question to the Court of Justice:

'Does the second sentence of Article 1 of Directive 91/338/EEC (cadmium directive) preclude the application of the rules in that directive regarding the cadmium content of (finished) products and components, as set out in the Annex thereto, to toys within the meaning of Directive 88/378/EEC (toy safety directive)?'

29. By that question, the referring court seeks to ascertain in essence whether Article 1, second sentence, of Directive 91/338 should be interpreted as meaning that it precludes the prohibition contained in that directive on marketing products with a cadmium content which exceeds 0.01% by mass of the plastic material from applying to products such as toys, where the marketing of the latter is already subject to compliance with a bioavailability standard as provided for in Directive 88/378.

IV — Assessment

30. Like the Netherlands, Greek, Finnish and Swedish Governments, I think that Article 1, second sentence, of Directive 91/338 should be interpreted as meaning that it does not preclude the prohibition contained in that directive on marketing products with a cadmium content which exceeds 0.01% by mass of the plastic material from applying to toys falling within Directive 88/378.

31. In order to assess the meaning of Article 1, second sentence, of Directive 91/338, I shall consider, first, its wording and, second, the general scheme of the Community rules on restrictions on the marketing and use of dangerous substances and preparations in conjunction with the general scheme of Directive 88/378 and, third, the objectives of Directive 91/338, on the one hand, and Directive 88/378, on the other hand.

A — *The wording of Article 1, second sentence, of Directive 91/338*

32. Article 1, second sentence, of Directive 91/338 provides that '... the new provisions [which it lays down regarding the maximum cadmium content] shall not apply to pro-

ducts containing cadmium *which are already covered by other Community legislation*'.[14]

33. As worded, that sentence could be interpreted as meaning that it precludes application of the standards laid down by Directive 91/338 to products containing cadmium falling within any other pre-existing Community legislation, whatever their normative content or objective.

34. It would be unreasonable, however, to attribute such a wide scope to that article. In my view, such an interpretation does not stand up to examination of the general scheme of the Community legislation relating, on the one hand, to restrictions on the marketing and use of dangerous substances and preparations and, on the other hand, to the safety of toys, or to a study of the objectives of Directives 91/338 and 88/378.

B — *The general scheme of the Community rules on restrictions on the marketing and use of dangerous substance and preparations in conjunction with the general scheme of Directive 88/378*

35. Careful consideration of the general scheme of the rules in question allows me to state that, from the outset, the Community legislature envisaged the concurrent application of the rules that had been laid down in order to control and reduce the use of dangerous substances and preparations, which included cadmium.

36. First, Article 1 of Directive 76/769 states clearly that the restrictions on the marketing of products containing dangerous substances and preparations are to apply '[w]ithout prejudice to the application of other relevant Community provisions'.[15]

37. Second, Directive 88/378 on the safety of toys requires that such products should be subject not only to the requirements laid down in that directive but also to the additional restrictions laid down in the Community legislation relating to the use of dangerous substances and preparations, among which is to be found Directive 91/338. Annex II, Title II, paragraph 3, point 1, second subparagraph of Directive 88/378 provides that '[toys] must *in all cases* comply with the *relevant* Community legislation relating to certain categories of products or to the prohibition, *restriction of use* or

14 — Emphasis added.

15 — As the European Parliament stated in its resolution of 21 February 1975 embodying the opinion of the European Parliament on the draft proposal of the Commission of the European Communities to the Council for a directive on the approximation of the laws of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ 1975 C 60, p. 49), that proposal constitutes an 'essential addition to the directives ... already applying to dangerous substances and preparations'.

labelling of certain dangerous substances and preparations'. [16] The use of the words 'in all cases' immediately makes one think that that requirement is designed to apply as a matter of course.

38. It is clear in my view that a concurrent application of the rules concerning restrictions on the use of dangerous substances and preparations can only be intended to apply in cases where those rules have a separate normative purpose. This is indeed so in the present case.

39. I note that the standard laid down in Directive 91/338 relates to a different reference value from that adopted by the Community legislature in Directive 88/378.

40. As I stated above, Directive 91/338 restricts the marketing of products coloured with cadmium to complying with a standard relating to the maximum *quantity* of cadmium that a product may contain (0.01% by mass of the plastic material). That standard is also referred to as the 'weight standard'.

41. As for Directive 88/378, Title II, point 3, 2, first subparagraph of Annex II thereto lays down a maximum standard of *bioavailability* for cadmium (0.6 micrograms) in order to protect the user of the toy from the risks linked to the product's chemical properties. As I have stated, that standard, also referred to as the 'sucking standard' or 'dilution standard', only makes it possible to calculate the capacity of a substance, in this case cadmium, to be dispersed and to be absorbed by the body, but by no means enables the cadmium content of a product to be calculated.

42. The fact remains that the standards laid down in Directives 91/338 and 88/378 relate to different reference values (quantity and bioavailability respectively) which are in line with the objectives of the Community legislature. Traditionally, those standards may be applied concurrently.

43. In that regard, the Commission of the European Communities considered in its Guidance Document No 3 on the application of the directive on the safety of toys (88/378/EEC) that the abovementioned standards should be applied concurrently. [17] In its words, that directive 'requires that toys comply in all cases with the relevant Com-

16 — Emphasis added.

17 — See: http://www.europa.eu.int/comm/enterprise/toys/documents/gd003_en.pdf.

munity chemical legislation (Annex II.II.3). Therefore, toys, in addition to fulfilling the daily limit of 0.6 micrograms for the bioavailability of cadmium set by the Directive 88/378/EEC, have to comply with the additional restrictions imposed by Directive 91/338/EEC, as far as the relevant toys are made of the substances and preparations which are covered by Directive 91/338/EEC (mainly plastics)'.

44. I therefore consider that the general scheme of the Community legislation relating, on the one hand, to restrictions on the marketing and use of dangerous substances and preparations and, on the other hand, to the safety of toys, militates in favour of a concurrent application of the standards laid down in Directive 91/338 as regards the maximum cadmium content of the products, and those laid down in Directive 88/378 as regards the maximum bioavailability of cadmium in toys.

C — *The objectives of Directives 91/338 and 88/378*

45. In my view, the objectives of Directive 91/338, far from precluding such an interpretation, require that the prohibition contained in that directive on marketing products with a cadmium content exceeding 0.01% by mass of the plastic matter applies to toys falling within Directive 88/378.

46. Directive 91/338 has two objectives. First, in the words of the first and fifth recitals in the preamble to that directive, it seeks to harmonise the national laws on the marketing and use of products containing cadmium. Second, according to the second recital in the preamble to that directive, it seeks to protect the environment against harmful effects caused by the dispersal of cadmium in the ecosystem and to protect the health and quality of life of humans in the long term. [18]

47. It is in the light of those two objectives that the scope of Article 1, second sentence, of Directive 91/338 should be established.

48. First, I consider that a mere literal interpretation of the contested provision would clearly result in depriving that directive of any useful effect, or in doing so to a significant extent, in particular as regards the objective of harmonisation.

18 — It should be pointed out in that regard that, according to the first three recitals in the preamble to Directive 76/769, that directive was adopted with the aim of 'protecting the public', '[to] contribute to the protection of the environment from all substances and preparations which have characteristics of ecotoxicity or which could pollute the environment' and lastly 'to restore, preserve and improve the quality of human life'.

49. In so far as the objective of Directive 91/338 is harmonisation of the rules relating to restrictions on the marketing and use of products containing cadmium, it is clear in my view that that purpose would be seriously jeopardised if the standards it lays down did not apply to products containing cadmium which fell within any other pre-existing Community legislation, whatever their normative content or objective.

50. Thus, by way of illustration, it is impossible not to apply the standards contained in Directive 91/338, which were laid down in order to restrict the marketing of products containing a high level of cadmium, because there is pre-existing Community legislation governing the labelling of products for example or, in a case such as that at issue in the main proceedings, restricting the bioavailability of cadmium in toys. Clearly, such an interpretation would be irrelevant and would be contrary to the Community legislature's objective of harmonisation.

51. Second, it seems to me that to exclude application of Directive 91/338 on the grounds that Directive 88/378 was applicable would be contrary to the very objectives of Directive 91/338, which are to protect the environment.

52. The objectives of Directive 91/338 are only partly the same as those of Directive 88/378. Whilst the latter seeks to protect the health and safety of the users of toys, Directive 91/338 is above all part of the Community action programme to combat environmental pollution by cadmium. It is only in the long term that that directive seeks to protect human health.

53. Therefore, to exclude application of Directive 91/338 to toys likely to constitute in the long term waste that is a danger to the environment would be contrary to the objectives of the Community legislature.

54. The toys at issue in the main proceedings, although complying with the security requirements laid down in Directive 88/378, contain a quantity of cadmium that exceeds the ceiling laid down in Directive 91/338. Failure to apply the latter directive would therefore be likely to result in a situation in which the marketing of a toy with a high cadmium content would be legal so long as the toy did not release a level of cadmium which exceeded the limit laid down in Directive 88/378. Such a product, although complying with the rules concerning the safety of toys, would not be compatible with the objectives of Directive 91/338 or the requirements to protect and improve the quality of the environment contained in Articles 2 EC and 174(1) EC. [19]

19 — Article 174(1) EC provides that Community policy on the environment is to contribute not only to 'preserving, protecting and improving the quality of the environment', but also 'to protecting human health'.

55. Directive 91/338 therefore constitutes an essential adjunct to the application of Directive 88/378. As evidence of this, it should be noted that, in addition to the rules relating to the bioavailability of cadmium contained in Directive 88/378, the Community legislature called in that directive for the application of the additional restrictions laid down by the Community legislation relating to limits on the use of dangerous substances and preparations, which includes Directive 91/338.

56. In those circumstances, I think that toys should not only be subject to the requirements of Directive 88/378 concerning the safety of toys, but also to the additional restrictions laid down by Directive 91/338 relating to limits on the marketing and use of dangerous substances and preparations. Only a concurrent application of those directives would, in my view, meet the requirements relating to the protection of public health and the environment as referred to in the preambles to those two directives and as set out in the EC Treaty.

57. I therefore consider that the objectives of Directive 91/338 call for the prohibition on the marketing of products with a cadmium content exceeding 0.01% by mass of the plastic material to apply to toys falling within Directive 88/378.

58. With regard to the above, I therefore think that Article 1, second sentence, of Directive 91/338 should be interpreted as meaning that the provisions of that directive do not apply to products containing cadmium that are already covered by other Community provisions having a *similar normative purpose*, that is to say, making the marketing of the product concerned conditional on compliance with a rule concerning the maximum cadmium content. [20]

59. In the light of all these considerations, I therefore suggest that the Court should answer the question referred for a preliminary ruling by the Hoge Raad der Nederlanden to the effect that Article 1, second sentence, of Directive 91/338 does not preclude the prohibition contained in that directive on marketing products with a cadmium content which exceeds 0.01% by mass of the plastic material from applying to products such as toys falling within Directive 88/378.

20 — See, by way of illustration, Annex I, point 1, to Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38), which prohibits the marketing of batteries and accumulators containing more than 0.025% of cadmium by weight and Article 4(a), second indent, of Council Directive 88/388/EEC of 22 June 1988 on the approximation of the laws of the Member States relating to flavourings for use in foodstuffs and to source materials for their production (OJ 1988 L 184, p. 61), which prohibits the marketing and use of flavourings containing more than 1 mg/kg of cadmium.

V — Conclusion

60. In the light of all the above considerations, I suggest that the Court should answer the question referred by the Hoge Raad der Nederlanden as follows:

'Article 1, second sentence, of Council Directive 91/338/EEC of 18 June 1991 amending for the tenth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations must be interpreted as meaning that it does not preclude the prohibition contained in that directive on marketing products with a cadmium content which exceeds 0.01% by mass of the plastic material from applying to products such as toys falling within Council Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys.'