OPINION OF ADVOCATE GENERAL COSMAS

delivered on 19 February 1998 *

I — Introduction

1. In the present case, the Rechtbank van Koophandel (Commercial Court), Hasselt, is asking the Court to interpret 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, [1] as amended by Council Directive 88/182/EEC of 22 March 1988. [2]

2. The dispute before the national court has arisen from the respective allegations by two companies, Colim NV (hereinafter 'Colim') and Bigg's Continent Noord NV (hereinafter 'Bigg's'), that the other is selling various products which do not bear any labelling, or sufficient labelling, in the language of the area, namely Dutch, contrary to the relevant Belgian legislation.

II — National provisions

3. The Law of 14 July 1991 on Trade Practices and Consumer Information and Protection (*Moniteur Belge* of 29 August 1991), the text of which is annexed to the written observations of the applicant in the main proceedings, contains provisions regarding the sale of products to consumers generally and certain special types of sale, such as the sale of sale goods, distance selling, sale outside the vendor's trading premises and so forth. It also includes provisions regarding matters such as designations of origin, advertising, the observance of honest practices and the provision of services to consumers.

4. Chapter II, which is headed 'Consumer information', contains, *inter alia*, provisions concerning the obligation to give the price of products sold (Part 1) and the specifying of quantities (Part 2). In Part 3 of the same Chapter, which is entitled 'Designation, composition and labelling of products and services', Article 13 provides:

'The particulars to appear on the labelling which are prescribed by this law, its implementing decrees and the implement-

* Original language: Greek.

1 — OJ 1983 L 109, p. 8.

2 — OJ 1988 L 81, p. 75. In this Opinion, 'directive' means, in the absence of an express indication to the contrary, Directive 83/189 as amended by Directive 88/182.

ing decrees mentioned in the second paragraph of Article 122, instructions for use and guarantee certificates are to be given at least in the language or languages of the area in which the products are placed on the market.

If the labelling is a mandatory requirement, it must be applied in the form and with the content prescribed by the legislation.

The particulars appearing on the labelling must be clearly visible and legible and clearly distinct from advertising.

On no account may the labelling be presented in such a way as to cause confusion with a certificate of quality.'

In addition, Article 14, which is also to be found in Part 3, confers a series of powers on the King to regulate a number of subjects, such as the labelling of specific products or types of products, especially the particulars and other information on the labelling (Article 14(a)), the composition, presentation, quality and safety of products offered for sale (Article 14(b)), prohibitions on the use of, or requirements to use, a sales description (Articles 14(c) and (d) respectively) and requirements to attach, or prohibitions on attaching, certain signs, words or phrases to the designations of products which are placed on the market (Article 14(e) and (f) respectively). Article 15 contains corresponding powers in the field of the provision of services.

5. Furthermore, in Part 1 ('Obligation to inform the consumer') of Chapter V ('General provisions regarding the sale of products and services to consumers') of the same Law, Article 30 provides:

'No later than at the time of the conclusion of the sale, the vendor must in good faith provide the consumer with the appropriate and useful information concerning the characteristics of the product or service and concerning the conditions of sale, having regard to the need for information expressed by the consumer and the use which has been specified by him or is reasonably foreseeable.'

6. Finally, in Chapter x relating to penalties, Part 1 ('Criminal penalties') contains Article 102 which provides:

'A fine of BEF 250 to BEF 10 000 shall be imposed on persons who infringe the provisions:

...

2. of Article 13 relating to the designation, composition and labelling of products and services and of the decrees implementing Articles 14 and 15.

3. ...'

Article 103 then provides:

'A fine of BEF 500 to BEF 20 000 shall be imposed on persons who in bad faith infringe the provisions of this Law other than Articles 102, 104 and 105 and excluding the infringements referred to in Article 97.' [3]

3 — I deduce from those provisions, read together, that contravention of Article 30 is punished under Article 103.

III — Facts

7. Colim, the applicant in the main proceedings, operates a department store in Houthalen-Helchteren, while Bigg's has recently begun to operate one in Kuringen-Hasselt.

8. A court bailiff instructed by Colim visited the defendant's store and established that many of the products sold, including foodstuff, cosmetics, detergents and petfood, did not carry labelling in Dutch, the language of the area, but in other languages. The bailiff also recorded that there were seven 'Information Points' in the store, that is to say devices which recognise goods by means of bar codes on their packaging and show on a screen certain information relating to the product, such as a summary translation of the sales description and the price.

9. Following those findings, Colim applied on 27 September 1996 to the national court for interim relief; it submitted that the sale of a total of 48 products in the abovementioned conditions infringed, *inter alia*, Articles 13 and 30 of the Law of 14 July 1991 and sought an order, subject to financial penalties for non-compliance, restraining the sale of those products.

10. In addition, a court bailiff instructed by the defendant recorded that the applicant's store was likewise selling various products which did not bear labelling in Dutch, contrary to the Belgian legislation.

11. The defendant then brought, on 18 October 1996, a counterclaim before the national court which contained claims analogous to the applicant's.

12. The defendant submitted before the court that the provisions relied on by the applicant, including Articles 13 and 30 of the abovementioned Law, were invalid because they had not been notified to the Commission in accordance with Directive 83/189.

13. According to the applicant, on the other hand, the language employed for labelling and for instructions for use and so forth is not a 'characteristic' of a product but a means of providing information with regard to certain of its characteristics and the Belgian provisions therefore did not have to be notified to the Commission under Directive 83/189.

14. The national court granted the two opposing applications in part and made an order, subject to financial penalties for non-compliance, restraining the parties from continuing to sell the relevant products. It considered, however, that in order to determine whether Articles 13 and 30 of the Law of 14 July 1991 were consistent with Directive 83/189, given the fact that those provisions had not been notified to the Commission, it should submit to the Court of Justice the questions set out below.

IV — Questions referred for a preliminary ruling

'1. Is a legal provision of a Member State whereby:

— the particulars to appear on labelling which are mandatory under national law;

— instructions for use; and

— guarantee certificates;

must be given at least in the language or languages of the area where the

products are placed on the market, with the consequence that the packaging of imported products must be altered, a "technical regulation" within the meaning of Directive 83/189/EEC?

2. (a) Where specific Community rules exist concerning the particulars which must appear on specific products, may a Member State require imported products to carry other information in the language of the area in which the products are sold or in a language readily understood by the consumer?

(b) If the answer to Question (a) is in the affirmative, may such a requirement be made of all information on packaging or only of certain information and, if so, which?

(c) In respect of products for which there are no specific Community rules, may a Member State require all or certain (and if so which) information on the imported products to be given in the language of the area in which the products are sold or in a language readily understood by the consumer?'

V — Directive 83/189

15. The directive lays down a procedure for the provision of information under which the Member States must communicate any draft technical regulation to the Commission.

16. In Article 1(1), (5), (6) and (7) the terms 'technical specification', 'technical regulation', 'draft technical regulation' and 'product' are defined as follows:

'For the purpose of this Directive, the following meanings shall apply:

1. "technical specification", a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling and the production methods and procedures for agricultural products as defined in Article 38(1) of the Treaty and for products intended for human and animal consumption and for medicinal products as defined in Article 1 of Directive 65/65/EEC, as last amended by Directive 87/21/EEC;

...

5. "technical regulation", 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;

6. "draft technical regulation", the text of a technical specification including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage [of] preparation at which substantial amendments can still be made;

7. "product", any industrially manufactured product and any agricultural product.'

17. Article 8(1) of the directive states:

'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.'

18. Following notification, the Commission and the Member States may comment on the draft; under Article 8(2) the relevant Member State is to take those comments into account as far as possible in the subsequent preparation of the technical regulation.

19. In accordance with Article 8(4), the information supplied under Article 8 is confidential. However, the Committee and the Member States may, provided that the necessary precautions are taken, consult for

an expert opinion natural or legal persons, including persons in the private sector. [4]

20. Under Article 9(1) the Member States are to postpone the adoption of a draft technical regulation for six months from the date of the notification 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 relevant Member State is to inform the Commission of the action it proposes to take with regard to such detailed opinions. The Commission is to comment on that reaction. In accordance with Article 9(2), the period is extended from six to twelve months if, within three months following the notification under Article 8(1), the Commission gives notice of its intention to propose or adopt a directive on the subject.

On the other hand, it is apparent from Article 9(1) that Member States may adopt the notified draft where the Commission or a Member State does not comment before the three-month period expires.

4 — Article 8(4) was amended by Directive 94/10/EC of 23 March 1994 (OJ 1994 L 100, p. 30) so that the information supplied is no longer regarded as confidential unless the notifying Member State makes a request in that regard supported by reasons. However, that directive is not applicable in the present case.

21. Article 10 of the directive provides:

'Articles 8 and 9 shall not apply where the Member States fulfil their obligations as arising out of Community directives and regulations; the same shall apply in the case of obligations arising out of international agreements which result in the adoption of uniform technical specifications in the Community.'

VI — Substance

Preliminary observations

22. First of all, the parties agree, rightly in my view, that since the Belgian provisions at issue predate Directive 94/10, [5] by which Directive 83/189 was substantially amended, Directive 83/189 must be interpreted as amended by Directive 88/182.

23. Also, as the French Government correctly points out, instructions for use and guarantees are not among the technical specifications referred to in Article 1(1) of the directive and therefore do not fall

5 — Cited in footnote 4 above.

within the directive's field of application. The issue as to whether Article 13 of the Belgian law is compatible with the directive therefore does not arise in so far as that article imposes a language requirement in relation to those matters. [6]

25. The applicant in the main proceedings and the French Government maintain that that language requirement does not amount to a technical regulation within the meaning of the directive. They contend in particular that the requirement does not relate to the product itself, nor to one of its characteristics or the manner in which it is conceived, produced and packaged. Furthermore, the terms 'marking' and 'labelling' must, for the purposes of the directive, be understood as referring to the external appearance or the content of labels and not to their linguistic form.

Question 1

24. Having regard to the above, the issue raised by the first question is whether the obligation, imposed by Article 13 of the Belgian Law of 14 July 1991, that particulars to appear on labelling which are mandatory under other provisions must be given at least in the language or languages of the area constitutes a 'technical specification' and the provision enacting it constitutes a 'technical regulation' within the meaning of Directive 83/189.

26. By contrast Bigg's, the defendant in the main proceedings, considers that the abovementioned requirement amounts to a technical regulation. It submits that the terminology, symbols and labelling constitute the means by which information relating to a product's characteristics may be conveyed and that the mandatory use of a language is closely linked with the labelling, packaging and terminology. Furthermore, that requirement is liable to obstruct the free movement of goods, by obliging traders to change the packaging or to attach new labels to imported products, and therefore constitutes a measure having an effect equivalent to a quantitative restriction, prohibited by the Treaty.

The United Kingdom Government considers that, in principle, the words 'characteristics required of a product' in Article 1(1) of the directive include requirements relating to the provision of information on labels, so that a requirement relating to the language in which that information is to be

6 — It should be noted that instructions for use may now, following the amending Directive 94/10, be covered as an 'other requirement' imposed on a product for the purpose of protecting consumers and affecting the product's life cycle after it has been placed on the market (see Article 1(3) and (9) of Directive 83/189, in the version applicable following the amendments and additions introduced by Article 1(1)(b) and (g) of Directive 94/10). Also, instructions for use are required by various directives in a variety of instances, for example Articles 3(1)(8) and 10 of Directive 79/112 relating to the labelling of foodstuffs, and Article 3(2) of Council Directive 92/59/EEC of 29 June 1992 on general product safety (OJ 1992 L 228, p. 24) in so far as there are no specific Community rules (Article 1(2) of that directive) and so forth.

provided is also such a characteristic. It submits, however, that, in so far as the national provisions at issue merely reproduce pre-existing measures, using the same terminology as national provisions which preceded Directive 83/189, they do not amount to a draft technical regulation within the meaning of Article 1(6) of the Directive.

27. Finally, the Commission states that two opposing interpretations are tenable.

(i) Under the first approach, the obligation at issue constitutes a technical requirement 'as regards terminology, symbols... packaging, marking or labelling' of the product. An obligation of that kind amounts to a regulation concerning the requirements which the product itself must satisfy, and may make it necessary to adapt the product to the market in question. The Commission states that, if the Court were to adopt this interpretation, it would be expedient to restrict the temporal effects of the ruling, in view of the consequences for the Member States which have enacted analogous provisions without notifying them to the Commission.

(ii) Under the second approach, to which the Commission appears to incline, the language which is used to convey information relating to the product is not to be equated with that information. A national provision under which the particulars appearing on labelling must be expressed in a language that can be readily understood or in a specific language essentially imposes a requirement which is inherent in every linguistic message, that is to say it must be accessible to the reader (addressee).

28. In my opinion, that divergence in the views of the parties and the uncertainty of the Commission itself as to the nature of the obligation at issue are principally due to the lack of clarity in the wording of Article 1 of the directive. This lack of clarity is aggravated by the directive's very broad scope, which has been continually extended by the successive amendments to the directive, in particular the most recent one. That is the case notwithstanding the apparent effort to define the directive's scope accurately by means of the definitions in Article 1. Those imperfections, which are out of place in rules of law and create legal uncertainty, have now been intensified following the draconian interpretation of the Court in *CIA Security* [7] and *Bic Benelux* [8] with regard to the consequence of failure by the Member States to notify technical regulations to the Commission, namely the inapplicability of unnotified drafts as against individuals, which has

7 — Case C-194/94 *CIA Security* v *Signalson and Securitel* [1996] ECR I-2201.

8 — Case C-13/96 *Bic Benelux* v *Belgian State* [1997] ECR I-1753.

the potential to paralyse the Member States' exercise of their legislative function.

29. In view of the above, it is not surprising that the Court has not hitherto made a broad statement as to the meaning of Article 1(1) and (5) of the directive and has merely classified various cases in accordance with those provisions.

30. Thus, provisions which have been held by the Court to constitute technical regulations include the following:

— German legislation which extended to sterile medical instruments the obligations applicable to medicinal products so far as concerns the giving of mandatory labelling particulars (the expiry date); [9]

— the Netherlands provision which laid down the requirements for the manufacture and marketing of new types of margarine and substitute products, which differed from those prescribed for normal margarine; [10]

— the provision that introduced tests as to the quality and proper functioning of alarms systems and networks, which had to be passed if those systems and networks were to be granted authorisation and placed on the market in Belgium; [11]

— Italian provisions which concerned, respectively, the quality of waters inhabited by lamellibranch molluscs, the production and marketing of molluscs and certain safety requirements concerning proprietary medicinal products made from cattle organs and tissues; [12]

— the Belgian provision which imposed an obligation requiring the marking of certain products, that is to say the affixing of a special sign indicating that environmental tax was payable. [13]

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

10 — Case C-273/94 *Commission* v *Netherlands* [1996] ECR I-31.

11 — *CIA Security*, cited in footnote 7 above.

12 — Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405.

13 — *Bic Benelux*, cited in footnote 8 above.

31. On the other hand, the following do not constitute technical regulations under the case-law:

— the enabling provision on the basis of which the provision laying down the technical regulation was adopted; [14]

— the Belgian provision which laid down the conditions governing the establishment of security firms, since that provision did not relate to the characteristics of the products. [15]

32. In my view, the obligation imposed by the national provision at issue is a generally applicable obligation which is imposed without distinction whenever products and services are sold, does not relate to the characteristics of products or to the specifications which are applicable to them and therefore does not amount to a technical specification within the meaning of the directive.

33. I will begin by referring briefly to the aim of the directive. It has been held that 'the aim of [the] 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.' [16]

34. I consider that that aim is the indirect and broader objective of the directive. [17] The specific and direct objective is apparent from the directive's title, broad logic and preamble, and in particular from Article 213 of the Treaty which, together with Article 100, constitutes its legal basis (see the first citation of the directive) and which is referred to again, at length, in the tenth recital in its preamble. That objective is, in my view, the laying down of a procedure for informing the Commission and the other Member States (see the third, fourth and fifth recitals in the preamble) of *certain* technical regulations, regarding certain products, which a Member State proposes to enact. That procedure is intended, in view of the barriers to trade which result from the enactment of unnecessary technical regulations to avoid the adoption of dissimilar and unnecessary technical requirements (see the second recital in the preamble) but also to give the Community institutions, and in particular the Commission, the opportunity to enact common rules on the matter (see the sixth recital).

14 — *Commission* v *Germany*, cited in footnote 9 above, paragraph 26.

15 — *CIA Security*, cited in footnote 7 above, paragraph 25.

16 — *Bic Benelux*, cited in footnote 8 above, paragraph 19.

17 — In other words, safeguarding the free movement of goods is a '*γένος γενικώτατον*' ('*summum genus*'), that is to say an objective pursued by a large number of directives. The search is for the '*ειδοποιός διαφορά*' ('*differentia specifica*'), that is to say the specific objective which characterises the directive and is the objective of greatest importance for filling gaps and interpreting unclear provisions in the directive.

35. I come now to the material scope of the directive, which, although broad, is not unlimited. Given that the subject-matter of the directive is the technical requirements which apply to certain products, it is necessary first of all, when determining the directive's scope, to specify the products to which it applies.

36. The scope of the directive has sometimes been broadened and sometimes been narrowed by the successive amendments to it. Thus, under its original wording, Article 1(7) defined products for the purposes of the directive as industrially manufactured products, but excluding agricultural products, products for human or animal consumption, medicinal and cosmetic products.

37. Following its amendment by Directive 88/182, that provision also included agricultural products. The remaining products which were originally excluded were now made subject to an intermediate regime since, in accordance with Article 1(1) which defines 'technical specification' (as supplemented by Directive 88/182), the directive appears to be concerned only with the *production methods and procedures* for agricultural products, [18] products intended for consumption and medicinal products (therefore not cosmetics). [19]

38. Specifying the products to which the directive applies is relevant for determining the field of application of Article 1(1), which contains the definition of the term 'technical specification' and, by extension, also of Article 1(5) which defines 'technical regulation', since a technical regulation within the meaning of the directive is a regulation containing technical specifications.

39. It should be noted first of all that Article 1(1) and (5) relates to issues of a technical nature, that is to say issues which relate to 'technique'. That term may be regarded, broadly speaking, as referring to all scientific and practical knowledge and methods which are used to produce goods and, generally, to achieve a result.

18 — With regard to the reference to agricultural products in both Article 1(1) and Article 1(7) of the directive, see point 41(a) and (b) below.

19 — Directive 94/10 subsequently widened the field of application further by the addition in the second subparagraph of Article 1(1) (which was renumbered Article 1(2)) of the words 'as well as production methods and processes relating to other products, where these have an effect on their characteristics'. That wording is not applicable to the present case and, whatever its meaning, is in any event concerned only with production methods and processes.

40. Article 1(1) defines a 'technical specification' as the 'characteristics required' of a product, that is to say the technical characteristics which are necessary in order to recognise, identify and evaluate a product, and sets out for that purpose, in the first part of the definition, some examples, such as quality, performance, safety and dimensions. [20] In the second part of the definition, it is provided that the abovementioned characteristics also include requirements which, if testing and test methods are excluded, are basically concerned with the general get-up of the product.

41. In view of the foregoing points, it is apparent from Article 1(1), in conjunction with Article 1(7), that the following are to be understood as technical specifications within the meaning of the directive:

(a) the production methods and procedures for agricultural products, for products intended for human and animal consumption and for medicinal products; and

(b) the technical characteristics of all industrially manufactured products and agricultural products, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking and labelling.

42. However, the directive is not concerned with all the technical specifications relating to the abovementioned products. Thus:

(a) in accordance with Article 8(1), the Member States are not required to send the Commission the text of a draft technical regulation which transposes the full text of an international or European standard. In that case, it is sufficient simply to inform the Commission; [21]

(b) in accordance with the first part of Article 10, technical specifications adopted to fulfil an obligation which arises out of Community directives are not to be notified to the Commission. That provision means, in my view, that the Commission is not to be notified of technical specifications covered by specific directives which require the Member States to adopt implementing measures on 'technical' matters within the meaning of Directive 83/189. This view is reasonable, because in that case the need to adopt technical specifications arises from specific pre-existing rules of Community law which are bind the

20 — In my view, since the words in question are introduced by 'such as', the enumeration in the directive of those characteristics must be indicative and not exhaustive. Thus, for example, the weight of a product must be considered to be a technical characteristic.

21 — I assume that the reason for the exception is that there is presumed in that case to be a need to introduce the standard, which, moreover, is already uniform.

Member States. Those rules are known both to the other Member States and to the Commission, and the latter will not be devising Community rules on the matter in question given that they already exist. Besides, directives generally contain a provision under which the measures adopted by the Member States in implementation of the directive are to be communicated to the Commission; here double notification would simply serve to increase bureaucracy without adding anything of substance;

(c) finally, under the second part of Article 10 the same applies in the case of technical specifications which are adopted in compliance with an international agreement and are therefore already uniform.

43. It follows from the foregoing that Community law is not opposed to technical specifications in themselves but to the adoption of technical specifications which are not coordinated, uniform or necessary. Accordingly, the objective of the Community legislature is, by means of the reciprocal provision of information, the *uniformisation*, which includes the *standardisation*, of technical specifications by product or by product category, so that uniform rules exist within the Community. [22]

44. On the basis of the above considerations, I will now examine whether a provision such as Article 13 of the Belgian Law — for that is the provision principally at issue here [23] — contains a technical specification and whether, for that reason, it constitutes a technical regulation.

45. First of all it is, I believe, clear that the use of a particular language, possibly a particular dialect or a particular linguistic form of that language, [24] when giving the mandatory particulars to appear on labelling does not constitute a 'characteristic' of the product. However broadly that term in Article 1(1) of the directive is interpreted, it will still refer to properties or qualities which are inherent in the product at issue in each case. The language or the linguistic form which is used to express and convey to the purchaser information relating to those qualities and properties constitutes a general system for the transmission of information of every kind, of which the information at issue is just one example. Consequently, the language is necessarily a separate matter and cannot be equated with the information conveyed.

22 — That objective will have to be regarded as an intermediate objective between the direct objective, which is to inform the Member States and the Commission, and safeguarding the free movement of goods. Standardisation is emphasised in particular in the preamble to Directive 94/10.

23 — It is, I believe, clear that Article 30 of the Belgian Law does not amount to a technical regulation within the meaning of the directive inasmuch as it imposes a general obligation on vendors to inform purchasers. Besides, a similar obligation arises from the general principles of contract law of the Member States and is usually also set out in civil codes or legislation governing the sale of goods. I will accordingly not concern myself with that article.

24 — So far as concerns this last possibility, I mention by way of example that until the beginning of the 1980s the accepted language in Greece was *katharevousa*, that is to say a learned form of Greek with many archaistic elements, as opposed to the everyday language, demotic Greek.

46. It remains for me to examine whether the giving of those particulars in a particular language constitutes a requirement applicable to the product within the meaning of the second part of the definition in Article 1(1).

47. It is to be noted first of all that the two parts of the definition are closely linked, the second being included within the first.[25] It follows, in my view, that the requirements covered by the second part of the definition are likewise, essentially, technical characteristics of the product or products at issue in each case, that is to say technical means whereby those products may be recognised, identified and evaluated.

48. Accordingly, the language in which a term relating to a product is expressed or in which a label is written does not constitute, in my view, a 'requirement applicable to the product' for reasons which are essentially the same as the reasons why it does not constitute a 'characteristic' of the product.

Thus, the 'terminology' to which the directive refers is the selection of a scientific term, from among a number available, which will characterise the product or one of its properties. That term will have to be the same in the various Member States, that is to say in each Member State the equivalent term must be found. That term, and not its linguistic form, constitutes the requirement, that is to say the *regulation*, applicable to the product,[26] and it is the uniformisation of those terms that the directive is interested in.[27] Moreover, in the Community, a multilingual entity in which 11 official languages of equal value apply simultaneously, the linguistic form of requirements cannot be rendered uniform precisely because there is no single or uniform Community language.

49. The same is true of the packaging, marking and labelling of products. As the Commission correctly submits in its second approach referred to above,[28] so far as those elements are concerned the 'requirements' applicable to the product must be understood as the references, particulars and other information which, under the relevant legislation, must be put on the packaging, the label and so forth, that is to say their mandatory content, including obligations concerning the packaging or the label themselves such as dimensions and colour, and not the their linguistic form. The latter constitutes the means by which the technical characteristics of the product

25 — The conjunctive wording is 'καθώς και' ('as well as') in Greek. By contrast it is 'including' in English, 'y compris' in French, 'einschließlich' in German, 'comprese' in Italian, and so forth. I conclude that the second, stronger, meaning is more correct.

26 — It is self-understood that every requirement constitutes a regulation applicable to the product.

27 — See, for example, Directive 89/108/EEC of 21 December 1988 on the approximation of the laws of the Member States relating to quick-frozen foodstuffs for human consumption (OJ 1989 L 40, p. 34) which, in Article 8(1)(a), makes it compulsory to use the term 'quick-frozen' as rendered in the various Community languages. Thus, in German it is possible to choose between the terms 'tiefgefroren', 'Tiefkühlkost', 'tiefgekühlt' and 'gefrostet', while in English only the term 'quick-frozen' may be used (and not, for example, 'super-frozen' or 'deeply-frozen' or some similar term). Here, the imposition of a particular term (the same term in all the languages) is a technical issue while the question as to the choice of one language or another by the Member States is a related, 'metatechnical', issue.

28 — See point 27.

are expressed and made known to the person receiving the corresponding message, but cannot be equated with the technical characteristics themselves. In other words, the obligation to include certain particulars on the packaging or label amounts to a technical regulation which relates to and characterises the product, while the obligation to express those particulars in a given language does not relate to or characterise that product, nor, any specific product at all. While, therefore, that obligation is a regulation, it is a a 'metatechnical' regulation, that is to say a regulation which relates to the technical regulation and not to the product.

where goods are placed on the market,[29] the obligation to replace the packaging or the label (or, less onerously, a requirement to affix a self-adhesive label with the translation of the mandatory particulars in the language of the State in which the product is placed on the market) is, in any event, merely an incidental obligation to a basic obligation which, as I have explained above, does not itself constitute a technical regulation; it therefore has no influence on the present case.

Question 2

50. In the present case, Article 13 of the Belgian Law refers, with regard to the question of which particulars are mandatory, either to other provisions of the same Law or to decrees which exist already or will be enacted in the future to implement the Law. The content of Article 13 leads me to the view that that provision does not include a technical requirement relating to a particular product or category of products and therefore does not constitute a technical regulation within the meaning of the directive. Nor is the fact the packaging of an imported product might need to be replaced because that obligation is imposed sufficient in itself to refute the above interpretation. Regardless of the fact that the new Belgian provision adds nothing of substance to previous provisions imposing the same obligation and that a large number of Community directives contain specific provisions regarding labelling in the national or official language of the State

51. In the first two parts of the second question submitted by it, the national court essentially asks whether, where specific Community rules exist for a given product, it is open to the Member States to require information in addition to that imposed under the Community rules and whether they may require that information to be given in a particular language.

52. I consider that the question submitted is put in very imprecise and hypothetical terms given that it neither seeks the interpretation of a specific provision, despite the fact that it presupposes the existence of specific Community rules, nor reveals the

29 — See my Opinion in Case C-385/96 *Goerres* [1998] ECR I-4431, point 33.

factual situation to which it relates. In view of its wording I doubt whether it is possible to give a useful answer to it.

53. With the exception of certain directives of general application,[30] Community legislation regarding the placing of consumer products on the market is fragmentary and regulates the issue by product or categories of product, such as goods for human consumption, goods for animal consumption, cosmetics, detergents and so forth. Those specific directives do not always seek the same degree of harmonisation of national laws. They generally require specified information to be given on labelling, in which case it is not open to the Member States to require additional information.[31] It is possible, however, for the Member States to be left with an element of discretion.[32] Accordingly, the issue as to whether the Member States may require more information than that laid down by the directive must be assessed on a case by case basis, in accordance with the particular provisions and the aim of the directive which governs the marketing of the product at issue in each case.[33]

54. The same is true with regard to the question of the language in which it is permissible, compulsory or prohibited to express mandatory information under a directive or any additional references which the Member States may legitimately require. As we have already seen, Community rules on that issue lack coherence and consistency[34] and the relevant provisions are contained in specific directives for the marketing of a particular product or category of products. Since, in any event, the question of the language in which the additional information is given is ancillary to the question of the latter's permissibility, it follows that where a directive prohibits the Member States from requiring additional information, it also prohibits them from requiring that information to be expressed in a particular language. Where, on the other hand, it allows the Member States to require additional information, a general rule cannot be deduced. The language in which that information is given may be, depending on the interpretation of the directive, either the language in which the mandatory information under the directive must be expressed or the language to be chosen by the Member State subject to observance of Community law.[35]

However, given that, as set out above, the second question submitted for a preliminary ruling is imprecise and general, I propose that no answer be given to it.[36]

30 — Such as Council Directive 85/374/EEC concerning liability for defective products (OJ 1985 L 210, p. 29) and Council Directive 92/59/EEC on general product safety (OJ 1992 L 228, p. 24).

31 — See, for example, Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR I-1629, paragraphs 26 and 27.

32 — For such an instance see, for example, Case C-17/93 *Van der Veldt* [1994] ECR I-3537, paragraph 22.

33 — For an instance of a directive containing provisions of both kinds, see Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 15.

34 — See my Opinion in *Goerres*, cited above, point 56.

35 — See points 59 and 60 below.

36 — See, inter alia, Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraph 25, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* v *Circostel and Others* [1993] ECR I-393, Case C-415/93 *Union Royal Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 60, Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraph 9, and Case C-369/95 *Somalfruit and Camar* v *Ministero delle Finanze and Ministero del Commercio con l'Estero* [1997] ECR I-6619, paragraph 41.

Question 3

55. The national court asks thirdly whether, where no Community rules exist, a Member State may require certain information to be given on the product being sold and to be written in a particular language (for example, the language of the area where the product is placed on the market).

56. As is apparent from the case-law to which I have referred previously, [37] where Community rules do not exist, the Member States are free to adopt rules relating to the marketing of products subject to observance of the rules of Community law, in particular Articles 30 and 36 of the Treaty. They may thus impose restrictions on intra-Community trade, including, in principle, a requirement to specify certain *information* on the product, provided that those restrictions are necessary to serve objectives in the public interest, such as the protection of health, the protection of consumers and so forth, and are proportionate to the aim pursued. [38] However, it is not possible to state in advance which information is allowed and which is not because the answer depends on the circumstances of each case.

57. The position is similar with regard to the imposition of an obligation to give one or more pieces of information in a particular language, which potentially constitutes 'a barrier to intra-Community trade in so far as products coming from other Member States have to be given different labelling causing additional packaging costs'. [39]

58. The answer to the question as to the appropriate language is determined by balancing, on the one hand, the need to inform consumers of the characteristics of the product and to avoid confusion and, on the other, the need for the movement of goods between the Member States to be unimpeded. In that context, the Court has held that a requirement to give certain information in the language or languages of the State where goods are marketed constituted the appropriate method for protecting the consumer, that such a measure was not disproportionate to the goal pursued and that, in adopting a measure of that kind the Community legislature had not exceed the limits of its discretion. [40]

59. I have already set out my view: in monolingual States, it is in principle legit-

37 — See my Opinion in *Goerres*, cited above, point 28.

38 — See *Van der Veldt*, cited in footnote 32 above, paragraphs 23 to 31.

39 — Case C-51/93 *Meyhui* v *Schott Zwiesel Glaswerke* [1994] ECR I-3879, paragraph 13. That case was concerned with a Community provision which required certain information to be given in the language or languages of the State in which the product was marketed (see the Opinion in *Goerres*, paragraph 76), but a measure is reviewed in the same way whether it emanates from a Community institution or from a Member State (see *Meyhui*, paragraph 11).

40 — *Meyhui*, cited above, paragraphs 19, 20 and 21.

imate from the point of view of Community law for a Member State to require mandatory information relating to a product to be given in the national or official language of that State.[41] In States which have more than one official language, it is sufficient for the information to be given in any one of those languages, at the trader's choice.[42] Those languages, being equal in rank, are presumed to be sufficiently known to the purchasing public of the State in question and a trader who draws up the mandatory information in one of them must be regarded as having discharged his obligations as against that State.

60. Accordingly, the obligation to give mandatory information 'in the language of the area' where the product is on the market constitutes a measure which is onerous and disproportionate to the aim which it pursues — as a rule, consumer protection — because it obliges the person concerned either to think each time about the area in which his product is to be placed on the market so that he uses the corresponding language or to use all the official or local languages in order not to be excluded from any area.

61. That view is not inconsistent with the judgment in *Meyhui*, cited above. In my view, it does not follow from *Meyhui* that, in the case of multilingual States, as in the present case, information relating to products must be given in *all* the languages. In that case, the issue raised was not, as in the present case, one of determining the most extreme linguistic requirement which a Member State may put forward in accordance with the Treaty, but whether a Community measure which is acknowledged to confer the Member States sufficient flexibility, since it allows them to require the information to be given in several languages, exceeds the discretion which the Community institution has in the matter.

Excursus

62. In case the Belgian legislation at issue is considered to constitute a technical regulation, I wish to set out some extremely brief reflections on the effects with regard to third parties of the failure to communicate national technical regulations to the Commission, while saving a more extensive exposition of my views for a more appropriate occasion.

63. The issue was raised by the Commission in Communication 86/C 245/05 (OJ 1986 C 245, p. 4), where it began with some stern observations such as 'experience shows that a State's membership of the Community is not always sufficiently reflected in the attitudes and outlook of its administration' and pointed out the obligation under Articles 8 and 9 of the directive to notify the Commission of

41 — See the Opinion in *Goerres*, point 50.
42 — Ibid., point 82.

proposed technical regulations and to suspend their adoption. It then stated that failure by the Member States to comply with that obligation 'would lead to the creation of serious loopholes in the internal market, with potentially damaging trade effects'. It concluded by expressing the view that when a Member State enacts a technical regulation which falls within the scope of the directive without notifying the draft to the Commission, the regulation thus adopted 'is unenforceable against third parties' in the legal system of the Member State in question, and it stated that it expected national courts to refuse to enforce such a regulation.

64. The issue came up again in actions brought by the Commission under Article 169 of the Treaty against Member States which had failed to communicate technical regulations to it. In the course of the administrative procedure, the Commission, in addition to alleging that failure on the part of the Member States, had also put forward the abovementioned view regarding unenforceability. However, it did not persist with the point before the Court and the Advocates General did not express a view on the matter. [43]

65. Subsequently, the Commission included a specific recital to such effect (the sixteenth recital) in the preamble to its proposal for a directive (OJ 1992 C 340, p. 7) which resulted in Directive 94/10, but that approach was not accepted by the Council.

66. Finally, as is known, in *CIA Security* and *Bic Benelux*, cited above, the Court adopted the Commission's view in full and held that national technical regulations which have not been notified are unenforceable against individuals, who may rely on that unenforceability before national courts.

67. We have thus reached the point where a plethora of references for preliminary rulings relating to the directive are pending before the Court, turmoil has been caused in the Member States [44] by the realisation that a large number of legislative provisions risk being held invalid, an attempt is already being made to restrict the extent of the legal consequences of a failure to notify [45] and the Commission itself, clearly troubled by the breadth which the indefinite term 'technical regulation' might take on, seeks, as a subsidiary plea in the present case, a temporal restriction on the effects of a judgment of the Court holding legislation

43 — See, in that regard, point 7 of the Opinion of Advocate General Van Gerven in Case C-52/93 *Commission* v *Netherlands* [1994] ECR I-3591.

44 — 'Something of a commotion' as Advocate General Fennelly tactfully describes the impact in the Netherlands alone caused by the finding that approximately 400 legislative measures which were not notified to the Commission *might* be caught by Directive 83/189 and thus be considered invalid (see paragraph 2 of his Opinion in Case C-226/97 *Lemmens* [1998] ECR I-3711).

45 — See the Opinion of Advocate General Fennelly in *Lemmens*, cited above, in accordance with which only an individual showing an interest linked to the free movement of goods is entitled to rely on the directive in a Member State (see, in particular, paragraph 32).

to constitute a technical regulation (see point 27 above).

68. In my view, it would be desirable for the Court to re-examine the question of unenforceability, because that consequence does not appear to follow either from the directive or from the Treaty articles on which the directive is based.

69. First of all, Article 213, which constitutes *the basis and the limit* of the powers conferred by the Council on the Commission, merely states that the Commission may 'collect any information and carry out any checks required'. This means that the Commission may only demand information about measures which the Member States have adopted or are to adopt and carry out checks which, by express application of the principle of proportionality, are absolutely necessary. Furthermore, the Commission's powers are to be exercised 'within the limits and under conditions laid down by the Council in accordance with the provisions of [the] Treaty'. [46]

70. While the procedure for providing information to the Commission and the other Member States is laid down in the directive, not the slightest reference is made to the possible consequences of failing to notify technical regulations which are (or are assumed to be) caught by the directive. It follows that the only consequences of a failure to notify are the general consequences provided for by the Treaty where a Member State does not fulfil its obligations, that is to say an application to the Court, brought by the Commission under Article 169 of the Treaty or by the Member States under Article 170.

Where the Community legislature has wanted a different result it has stated so expressly, as in Article 93(3) of the Treaty which makes provision for the Commission to be informed of national plans to grant State aid and states that 'the Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'. Because of their specific nature, provisions of that kind cannot be applied by analogy to the present case, as has been suggested in the past. [47]

71. Apart from not being expressly provided for, unenforceability of national regulations is, moreover, manifestly *disproportionate* to the aim pursued by the directive. [48] Just as the Member States are not allowed to rely on generalities in order to justify measures which diverge from Community law, the Community institutions likewise may not rely in a general and

46 — Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 11.

47 — See the Opinion of Advocate General Elmer in *CIA Security*, point 56.

48 — With regard to that aim, see point 34 above.

vague manner on the principles of the Treaty in order to justify measures of whatever kind but must prove that that the measures are appropriate and proportionate. [49]

All the cases concerning Directive 83/189 which the Court has had to deal with hitherto have concerned 'technical regulations', that is to say national regulatory measures whose text must be published officially in the Member States. It would therefore be sufficient if the Committee provided for in Article 5 of the directive scanned periodically, by means of a small number of officials specifically assigned that task, the official journals of the Member States in order to nip in the bud any infringement, real or supposed, of the directive, instead of waiting for a case to reach the courts, should that occur.

72. So far as concerns Article 100 of the Treaty, which is also relied on for the directive's legal basis, it is sufficient to recall that that article requires *unanimity* in order for measures to be adopted under it. Given the strong opposition of at least three Member States to the Commission's position on unenforceability [50] and the subsequent rejection by the Council of a Commission proposal reflecting that position, [51] there is no doubt that an express provision to similar effect would have had no prospects of being approved by the Community legislature, that is to say by the Council, on the adoption of the directive.

73. The Court held in *CIA Security* that Articles 8 and 9 of the Directive are unconditional and sufficiently precise for individuals to be able to rely on them before national courts (paragraph 44) and that an express provision to such effect is not required, it being sufficient that that consequence helps to achieve the aim pursued by the directive (paragraph 48).

74. I will not return to the aim of the directive, nor will I set out now my view regarding the limits which every interpretation, including the teleological interpretation, necessarily has. I will simply state, first, that it is clear in my view from the fourth, fifth, tenth and eleventh recitals in the preamble to the directive and from Articles 8 [52] and 9 thereof that the procedure for providing information laid down by the directive concerns strictly the Commission and the Member States, without any substantive right in favour of individuals being created. [53] Second, the direct

49 — See *Germany* v *Council*, cited in footnote 46 above, paragraph 42.

50 — See the views of the German, Netherlands and United Kingdom Governments in *CIA Security*, cited in footnote 7 above, paragraph 39.

51 — See point 65 above.

52 — It is to be noted that Article 8(4) provides that 'the information supplied under [Article 8] shall be confidential' (see also footnote 4 above).

53 — See Case 380/87 *Enichem Base and Others* v *Comune di Cinisello Balsamo* [1989] ECR 2491, paragraph 23. From that point of view, the fact that Articles 8 and 9 of the directive provide for rudimentary preventive monitoring of national measures which is in any event advisory and not binding in nature, does not, in my opinion, differentiate those provisions from those at issue in *Enichem Base and Others*.

effect of directives, an excellent judicial creation, is designed to allow individuals to enjoy a right which a directive envisages for them and a Member State denies them by not adopting, or by adopting inappropriate, implementing measures. For that reason the substantive rule laid down in the directive is applied in their favour. However, Directive 83/189 was not adopted for the benefit of individuals, nor does it contain substantive rules which can be applied in the absence of national implementing rules. Thus, the only effect of unenforceability, *vis-à-vis* the individual invoking it, is a legal lacuna, and not the regulation of his situation by a rule which flows directly from the directive.

75. In my view, a national court is unable to declare a national measure invalid solely on the basis of a finding that the measure was not notified. Specifically, it must proceed as follows. *First*, it must establish whether the national measure falls within the field of application of the directive. If the measure does, it must, *second*, check whether there are grounds justifying exemption from the obligation to notify, in particular by reason of the fact that, in accordance with Article 10, the matter falls within the field of application of a specific directive. [54] If that is the case, the national measure will be assessed on the basis of the provisions of the specific directive which covers it, in accordance with the general principles of interpretation which the Court has laid down. If, *finally*, the national measure is not covered by a specific directive, it will be assessed on the basis of the Treaty articles, as in all cases where a national measure is reviewed as to its compatibility with Community law.

76. In his Opinion cited above, Advocate General Van Gerven, considering that the Commission's position on unenforceability was clearly untenable, discreetly stated: 'It may be wondered why, if the Commission regards that proposition as being essential to the proper working of the procedure established by Directive 83/189, it has never proposed to the European Parliament and the Council that it should be adopted in an amending directive'. [55]

77. The Council having rejected such a possibility, it may be discreetly asked, following the example of Advocate General Van Gerven, whether it would be appropriate for the Community institutions to re-examine the issue of the consequences arising from a failure to notify national draft technical regulations under Directive 83/189.

54 — For those cases, see point 42 above.

55 — See point 9 of the Opinion cited in footnote 43 above.

VII — Conclusion

In view of the foregoing, I propose that the following answers should be given to the questions referred for a preliminary ruling:

(1) On a proper construction of Article 1(1) and (5) of Directive 83/189/EEC, as amended by Directive 88/182/EEC, a general obligation that the particulars which are required by other national provisions to appear on products sold must be given in the language of the area where the product is on the market does not constitute a 'technical specification' and a national measure which imposes such a requirement does not constitute a 'technical regulation'.

(2) Where common rules do not exist for the marketing of a particular product, Community law allows the Member States to lay down conditions for its marketing, provided that the requirements flowing from Articles 30 and 36 of the Treaty are observed. Those conditions include a requirement to give the information essential for identifying the product in the language, or in one of the languages, of the State in which the product is placed on the market.