JUDGMENT OF THE COURT (Sixth Chamber)
8 March 2001 *

In Case C-278/99,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the criminal proceedings pending before that court against

Georgius van der Burg,

on the interpretation of Article 1 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8),

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Belgian Government, by A. Snoecx, acting as Agent,

— the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,

— the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by N. Green QC,

— the Commission of the European Communities, by C. van der Hauwaert and M. Shotter, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 12 December 2000,

gives the following

Judgment

1 By judgment of 6 July 1999, received at the Court on 26 July 1999, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 1 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).

2 Those questions were raised in criminal proceedings brought against Mr Van der Burg for placing in a monthly magazine an advertisement for the sale of radio-frequency amplifiers for which no declaration of approval had been issued.

The Community legislation

3 Article 1(1) of Directive 83/189 defines a 'technical specification' as 'a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling'.

4 Under Article 1(5) of that directive, the term 'technical regulation' means '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'.

5 Articles 8 and 9 of Directive 83/189 require Member States both to communicate to the Commission any draft technical regulation falling within its scope and to postpone the adoption of such drafts for several months to allow the Commission to verify whether such drafts are compatible with Community law or to propose or adopt a directive on the question.

The Netherlands legislation

6 The Netherlands legislation at issue in the main proceedings is described as follows by the Hoge Raad in the judgment making the reference.

7 Under Article 17(1) of the Wet op de Telecommunicatievoorzieningen (Law on Telecommunications Services, hereinafter 'the WTV'), which was in force at the time when the offences with which Mr Van der Burg is charged were committed, it is prohibited, otherwise than by concession, to instal, have in one's possession or use radioelectrical transmitting equipment without ministerial authorisation.

8 Article C.11.1(1) of the Besluit radio-elektrische inrichtingen (Decree on Radio-electrical Equipment) of 5 December 1988 (*Staatsblad* 1988, p. 552, hereinafter 'the Decree') provides:

'[i]t is prohibited to make commercial advertisements, or cause commercial advertisements to be made, for transmitting equipment which is not of an approved type'.

9 Article C.2.1(2) of the Decree states:

'[t]ransmitting equipment is of an approved type if the Minister has issued a declaration of approval in respect of it'.

10 Under Article 16(b) of the WTV and Article A.3.1 of the Decree, radio-frequency amplifiers which are suitable for use with transmitting equipment are to be treated in the same way as transmitting equipment, in particular for the purpose of the rules contained in the Decree or adopted pursuant thereto in regard to transmitting equipment.

11 The Regeling toelating radio-elektrische inrichtingen (Regulation on the Approval of Radioelectrical Equipment) (*Staatscourant* 1992, p. 64) governs the conditions for the issue of a declaration of approval. Article 8 of that regulation states that the technical requirements applicable to radioelectrical equipment are set out in the specifications in Annex 2 to the regulation. Radio-frequency amplifiers are not mentioned in that annex.

12 Under Article H(a) of the Decree, contravention of the prohibition laid down in Article C.11.1 is a criminal offence.

The main proceedings and the questions referred for a preliminary ruling

13 In January 1994, Mr Van der Burg placed in 'Elektron', a monthly magazine for radio amateurs, an advertisement for the sale of radio-frequency amplifiers with an output of 1 000 and/or 1 500 watts. Radio-frequency amplifiers are electronic devices for amplifying the power of a transmitted signal. The amplifiers put up for sale by Mr Van der Burg were transmitting equipment covered by the WTV for which no declaration of approval had been issued.

14 In the criminal proceedings brought against Mr Van der Burg for contravention of Articles 17 of the WTV and C.11.1 of the Decree, the Arrondissementsrechtbank te Rotterdam (District Court, Rotterdam) ordered him on appeal to pay a fine of NLG 600.

15 Mr Van der Burg brought an appeal in cassation against that judgment, arguing that the national legislation on which the proceedings were based was contrary to Community law inasmuch as it had not been notified in accordance with Directive 83/189.

16 With regard to the question whether Article C.11.1(1) of the Decree constitutes a technical regulation, the Hoge Raad, at point 6.11.1 of its judgment making the reference, makes the following analysis:

'In [Case C-194/94 *CIA Security International* v *Signalson and Securitel* [1996] ECR I-2201,] the Court of Justice of the European Communities ruled... that technical regulations within the meaning of [Directive 83/189] "are specifications defining the characteristics of products". Up to now that judgment, read in conjunction with the above definitions of terms in the Directive, has appeared to suggest that a provision such as that here in issue should not be treated as a technical regulation within the meaning of the Directive. On the other hand, it should be borne in mind that there is a direct relationship between the requirements which transmitting equipment must satisfy and the prohibition here in question. The scope of the prohibition of commercial advertising is determined in its entirety by the requirements which transmitting equipment must satisfy in order to qualify for type approval. In other words: if transmitting equipment fails to satisfy the prescribed technical requirements, the transmitting equipment must be treated as being of a non-approved type, which means that, under Article C.11.1(1) of the Decree on Radio-Electrical Equipment, transmitting equipment of that type may not be commercially advertised.'

17 In those circumstances, the Hoge Raad decided to stay the proceedings and to refer the following questions to the Court 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, 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, regard being had to the statutory rules set out above... and in light of the issues considered in that context in paragraph 6.11.1 [of the judgment making the reference]?

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?'

The first question

18 By its first question, the national court is asking in essence whether national legislation such as Article C.11.1(1) of the Decree, which prohibits commercial advertising for transmitting equipment of a non-approved type, constitutes, for the purposes of Directive 83/189, a technical regulation which should have been notified to the Commission prior to its adoption.

19 As the Netherlands, Belgian, French and United Kingdom Governments and, in essence, the Commission have pointed out, such legislation does not constitute a technical specification within the meaning of Directive 83/189 and therefore cannot be regarded as a technical regulation falling within the scope of that directive.

20 Under Article 1(1) of Directive 83/189, for the purposes of the directive a 'technical specification' is 'a specification contained in a document which lays down the characteristics required of a product'. Technical specifications for the purposes of Directive 83/189 must thus refer to the product as such (see Case C-314/98 *Snellers Auto's* v *Algemeen Directeur van de Dienst Wegverkeer* [2000] ECR I-8633, paragraph 38). However, legislation such as Article C.11.1(1) of the Decree, which merely prohibits a marketing method, does not lay down the characteristics required of a product.

21 As the national court observed, the fact that there is a direct relationship between an advertising prohibition such as that at issue in the main proceedings and the technical requirements which transmitting equipment must satisfy is not sufficient for the prohibition in question to be regarded as a 'technical specification' within the meaning of Directive 83/189.

22 Accordingly, the answer to the first question referred for a preliminary ruling must be that national legislation such as Article C.11.1(1) of the Decree, which prohibits commercial advertising for transmitting equipment of a non-approved type, does not constitute, for the purposes of Directive 83/189, a technical regulation which should have been notified to the Commission prior to its adoption.

The second question

23 In view of the answer to the first question, there is no need to answer the second question.

Costs

24 The costs incurred by the Netherlands, Belgian, French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 6 July 1999, hereby rules:

National legislation such as Article C.11.1(1) of the Besluit radio-elektrische inrichtingen, which prohibits commercial advertising for transmitting equipment of a non-approved type, does not constitute, for the purposes 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, a technical regulation which should have been notified to the Commission prior to its adoption.

Gulmann Skouris Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber