OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 January 2002 [1]

1. At issue in the present case are provisions of national law which oblige producers and importers of household goods to contribute to the disposal and recovery of packaging waste. Under those provisions, producers and importers must either agree with an approved body to arrange for disposal or themselves arrange for disposal either by establishing a deposit system or by organising collection points specifically for that purpose. Producers and importers who agree with an approved body must, moreover, identify the packaging which is to be disposed of by that body.

2. Are such provisions to be regarded as a technical regulation within the meaning of Article 1(5) of Directive 83/189? [2] What are the consequences of a Member State's failure to notify such provisions under Article 3(2) of Directive 75/442? [3] Does Article 28 EC preclude such rules?

3. Those are, essentially, the issues raised by the questions referred by the Cour de Cassation (Court of Cassation, France) in the present case.

The relevant legislative provisions

Community provisions on technical standards and regulations

4. Directive 83/189 prescribes certain procedures to be followed when a Member State intends to adopt technical regulations. The purpose of those procedures, as is clear from the preamble, is to facilitate the proper functioning of the internal market by obviating the restrictions on the free movement of goods which might arise if

1 — Original language: English.

2 — Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1983 L 109, p. 8, as amended by Council Directive 88/182/EEC of 22 March 1988, OJ 1988 L 81, p. 75.

3 — Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39, as amended by Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32.

Member States were to enjoy complete freedom in laying down different technical requirements for goods marketed or used within their territories. Essentially, a Member State which intends to adopt such provisions must notify them in advance to the Commission and then refrain from enacting them for a specified standstill period, in order to allow the Commission and the other Member States to submit observations concerning possible obstacles to trade at a stage at which they can be taken into account, and to allow the Community legislature, if it thinks fit, to adopt legislation regulating the field in question. The relevant provisions of Directive 83/189 as amended by Directive 88/182, the version which applies in the present case,[4] are as follows.

5. Article 1 contains the following definitions:

'(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 ... ;

...

(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 o[f] preparation at which substantial amendments can still be made;

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

4 — See below paragraphs 30 and 31. Directive 83/189 was further amended by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994, OJ 1994 L 100, p. 30, and has now been replaced by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204, p. 37.

6. Article 8 provides:

'1. Member States shall immediately communicate to the Commission any draft technical regulation ...; 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.

...'

7. Article 10 provides:

'Articles 8 and 9 shall not apply where the Member States fulfil their obligations ... 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.'

Community provisions on waste

8. Directive 75/442, as amended by Directive 91/156, lays down a number of general provisions and general principles regarding the disposal of waste. [5] Articles 3 and 8 are of particular relevance to the present case.

9. Article 3 provides:

'1. Member States shall take appropriate measures to encourage:

(a) firstly, the prevention or reduction of waste production and its harmfulness

...

(b) secondly:

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials,

or

5 — Cited in note 3.

(ii) the use of waste as a source of energy.

2. Except where 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 applies, Member States shall inform the Commission of any measures they intend to take to achieve the aims set out in paragraph 1. The Commission shall inform the other Member States and the committee referred to in Article 18 of such measures.'

10. Article 8 provides:

'Member States shall take the necessary measures to ensure that any holder of waste:

— has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B,

or

— recovers or disposes of it himself in accordance with the provisions of this Directive.'

The national legislation

11. The national legislation at issue is Decree No 92-377 of 1 April 1992 [6] implementing, in respect of packaging waste, Law No 75-633 of 15 July 1975 [7] on waste disposal and recovery as amended.

12. That Decree lays down general rules for the system of collection and recovery of household packaging waste in France. Under the Decree, producers [8] and importers of products which are marketed in packaging [9] are required to contribute to the disposal of all of their packaging waste either by agreeing with a body approved by the authorities to carry out their disposal operations or by recovering the packaging themselves.

6 — JORF of 3 April 1992, p. 5003.

7 — JORF of 15 July 1975, p. 7279.

8 — According to Article 2, a 'producer' means anyone who packages products or has products packaged with a view to placing them on the market.

9 — According to Article 2, 'packaging' means any form of container or the like intended to contain a product and to facilitate its transport or presentation for sale.

13. For the present case, Articles 4, 5, 6 and 10 of the Decree are in particular relevant.

14. Article 4(1) of the Decree provides that any producer or importer whose products are marketed in packaging or, if the producer or the importer cannot be identified, the person first responsible for placing the products on the market is required 'to contribute to or organise the disposal of all of its packaging waste'. [10]

15. Article 4(2) of the Decree provides that where an approved body agrees to carry out a producer's disposal operations, the producer 'shall identify (*identifier*) the packaging the handling of which it has entrusted to [the] body ... under the arrangements they determine as provided for in Article 5 below'.

16. According to Article 5, 'persons ... who have recourse, for the disposal of their packaging waste, to the services of a[n approved] body ... shall enter into a contract [with that body] stipulating in particular the nature of the identification of the packaging, the estimated volume of waste to be taken back each year and the fee payable to the body; on those points, the contracts must be in accordance with the standard terms [*clauses du cahier des charges*] provided for in Article 6 below'.

17. Article 6 of the Decree provides for ministerial approval of bodies wishing to organise the disposal and recovery of household waste. It stipulates, in particular, that approval is granted for renewable periods of up to six years, and that approved bodies are to negotiate agreements with producers, waste collection and recovery firms and local authorities. Applications for approval must under Article 6(4) include a set of standard terms (*cahier des charges*) indicating, *inter alia*, the method of calculating the financial contribution required from producers and, for each type of material, where the approved body makes agreements with manufacturers of packaging or packaging materials, the technical criteria which the used packaging is to meet.

18. Article 10 provides that producers may themselves arrange for the elimination of packaging waste. Where they do so, they must either 'establish a deposit system' [11] or

10 — Hereafter, the term 'producer' includes any person covered by this requirement.

11 — At the material time, the French text read: 'établir un dispositif de consignation de leurs emballages signalé de manière apparente sur ceux-ci'. The words 'signalé de manière apparente sur ceux-ci' were deleted by Decree No 99-1169 of 21 December 1999. The latter Decree was notified in draft under Directive 83/189, see the notice published in OJ 1997 C 392, p. 2.

'organise collection points specifically for that purpose'. [12]

19. Pursuant to Article 12, the Decree entered into force on 1 January 1993.

The facts and the questions referred

20. The facts as set out in the order for reference and other documents in the file may be summarised as follows.

21. Eco-Emballages SA (hereafter 'Eco-Emballages'), the applicant in the main proceedings, is a private limited-liability company which was set up in 1992. According to its articles of association, its purpose is to organise on the French territory a system of collection and recovery of waste stemming from products marketed by producers and importers subject to the obligations laid down in Law No 75-633 of 15 July 1975 relating to the elimination of waste and the recovery of materials.

22. On 12 November 1992 Eco-Emballages was granted ministerial approval, pursuant to Article 6 of the Decree, to organise the collection and recovery of all types of waste which results from the disposal of packaging of products intended for household use.

23. Eco-Emballages does not itself collect household packaging waste. That is done by the French local authorities, either on their own or with the help of subcontractors, as part of their general refuse-collection activities. The essential function of Eco-Emballages is to coordinate collection and recovery of household packaging waste and to reallocate funds between producers (who pay a fee under 'producer contracts' with Eco-Emballages), local authorities (who receive funds from Eco-Emballages under 'local authority contracts') and industrial undertakings (which undertake in 'take-back agreements' to process raw materials recovered from household waste by the local authorities or their subcontractors). [13]

24. Société Sapod Audic (hereafter 'Sapod'), the defendant in the main proceedings, is a French company which markets poultry products packaged in plastic wrappings. In order to comply with the provisions of the Decree, Sapod entered into a contract with Eco-Emballages on 19 September 1993. Under the contract,

12 — The establishment of a system of collection points is subject to the approval of the competent French authorities.

13 — See further below, paragraph 55.

Eco-Emballages granted to Sapod a non-exclusive licence to affix to its products a logo (the 'Green Dot logo'). The logo consists of a circle containing two interlocking arrows, rotating in opposite directions round a central vertical axis. In return for the licence to use that logo, Sapod agreed to pay a fee. The affixing of the logo enabled the packaging covered by the contract to be identified, in accordance with Article 4(2) of the Decree, and provided proof to the French authorities that Sapod had fulfilled its obligation under Article 4(1) of the Decree to contribute to the disposal of packaging waste.

25. When the parties concluded the contract, Eco-Emballages was the only company which had been approved by the French authorities under Article 6 of the Decree to organise the collection and recovery of all types of household packaging waste.

26. Having paid the agreed fee for the period from 1 January 1993 to 1 October 1994, Sapod ceased its payments under the contract. Eco-Emballages then brought proceedings before the French courts seeking payment of FRF 60 791 of fees due in respect of the period from 1 October 1994 to 30 September 1996.

27. The lower French courts upheld that claim, and Sapod appealed to the Cour de Cassation. Before that court it argued that the applicant's claim should be dismissed. In its view the contract of 19 September 1993 is unenforceable since, first, Decree No 92-377 constitutes a technical regulation within the meaning of Directive 83/189 which, in the absence of proper notification to the Commission, cannot be enforced against private parties and, second, the obligation for producers and importers to participate in the Eco-Emballages system amounts to a measure with equivalent effect to a quantitative restriction which, in the absence of an overriding justification, is contrary to Article 28 EC.

28. Considering that the case before it raised issues of Community law, the Cour de Cassation decided to stay the main proceedings and refer the following questions to this Court:

'1. Must 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, as drafted both before and after amendment by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending Directive 83/189/EEC for the second

time, be interpreted as meaning that the provisions of Decree No 92-377 of 1 April 1992 constitute a technical regulation, in particular inasmuch as they permit a producer not to use Eco Emballages' approved system if the producer itself arranges for the elimination of its packaging waste?

2. Must Article 10 of Directive 83/189, both before and after amendment by Directive 94/10, and Article 3(2) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, be interpreted as meaning that the French Government was required to notify the Commission of the provisions of the decree of 1 April 1992 and, if it was so required, that an individual may rely on the failure to notify in order to have the provisions declared unenforceable?

3. Does Article 30 of the EC Treaty (now Article 28 EC), properly construed, preclude rules such as those contained in Decree 92-377 requiring an importer of products from other Member States intended for household use to use packaging meeting certain technical requirements and to affix to that packaging a "logo" proving that he has subscribed to an approved system for the recovery of packaging waste, inasmuch as those rules, which are applicable to all products alike, are not proportionate to the mandatory requirement related to the protection of the environment?'

29. Sapod, Eco-Emballages, the French, German and Netherlands Governments and the Commission have submitted written observations. At the hearing Sapod, Eco-Emballages, the French Government and the Commission were represented.

The first question

The applicable Community legislation

30. Directive 83/189 was substantially amended by Directive 88/182 of 22 March 1988: Member States were required to take the necessary measures to comply with that Directive not later than 1 January 1989. Directive 83/189 was further substantially amended by Directive 94/10 of 23 March 1994: [14] Member States were required to take the necessary measures to comply with

14 — Cited in note 4.

that Directive before 1 July 1995. It appears from the questions referred that the Cour de Cassation considers the latter amendments to be relevant for the present case. However, at issue is whether the French authorities, when they adopted Decree No 92-377 on 1 April 1992, failed to comply with the requirement of notification. I agree with Sapod, Eco-Emballages, the French and Netherlands Governments and the Commission that that issue must be resolved on the basis of Directive 83/189 as amended by Directive 88/182, Directive 94/10 being inapplicable *ratione temporis*. [15]

31. According to the French Government, Directive 94/10 is however indirectly relevant for the present case. It points out that that Directive added certain 'other requirements' [16] to the definition of technical regulations laid down in Article 1 of Directive 83/189, and argues that those requirements therefore fell outside the scope of Directive 83/189 prior to amendment. I do not agree. It is clear from the preamble to Directive 94/10 that the Community legislature aimed not only to extend the scope of Directive 83/189, but also to clarify what was considered to fall within its scope already. The addition of 'other requirements' to the definition of technical regulations cannot, therefore, be taken as evidence that the Community legislature considered those requirements to fall outside the scope of Directive 83/189 prior to amendment. [17]

Delimitation of the issues

32. By its first question, the Cour de Cassation asks, in substance, whether national rules such as those laid down in the Decree constitute technical regulations within the meaning of Directive 83/189. In order to answer that question, it is — as the Commission points out — necessary to consider, first of all, whether the provisions laid down in the Decree may be regarded as technical specifications within the meaning of Article 1(1) of Directive 83/189. In case of an affirmative reply to that question, it falls to be considered whether compliance with those specifications is compulsory *de jure* or *de facto* within the meaning of Article 1(5) of the Directive.

33. As is common ground in this case, there are two provisions of the Decree which must be examined in order to answer the

15 — See to the same effect Case C-33/97 *Colim* [1999] ECR I-3175, paragraphs 25 and 26 of the judgment; Case C-314/98 *Snellers* [2000] ECR I-8633, paragraph 33.

16 — 'Other requirements' was, after amendment by Directive 94/10, defined in Article 1(3) as 'a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing'.

17 — See to that effect *Snellers*, cited in note 15, paragraphs 31 and 32 of the judgment.

Cour de Cassation's first question: Article 4(2) (which obliges producers to 'identify' packaging) and Article 6(4) (which refers to technical criteria to be met by used packaging).

Is Article 4(2) of the Decree to be regarded as a technical specification within the meaning of Article 1(1) of Directive 83/189?

34. It may be recalled that according to Article 1(1) of Directive 83/189, a technical specification is 'a specification contained in a document which lays down the characteristics required of a product ... including the requirements applicable to the product as regards ... symbols ... packaging, marking or labelling'.

35. Article 4(2) of the Decree, read in conjunction with Article 5, provides that producers who choose not to arrange for the disposal of packaging waste themselves must (i) 'identify' the packaging they market, (ii) enter into a contract with an approved body which will arrange for disposal and recovery of the waste which arises from the packaging and (iii) in that contract stipulate the nature of the identification of the packaging to be disposed of by the approved body.

36. At the hearing it was accepted by all of those present that in order to comply with Article 4(2) of the Decree producers must affix some form of distinguishing mark to the packaging in which they market household goods. It was accepted too that that mark might take a number of forms; producers might conceivably identify their packaging by affixing a symbol, a bar-code, a text, a number, or even an electronic chip to their packaging. The Decree thus requires products to be identified, but does not insist on the use of a particular mark or symbol.

37. On the basis of that interpretation of Article 4(2), the answer to the question whether the Decree lays down technical specifications might appear to be straightforward. Article 4(2) requires producers to affix some form of mark, symbol or label to packaging. Article 1(1) of Directive 83/189 refers to requirements applicable to goods both as regards 'symbols', 'packaging', and 'marking or labelling'. Thus, it would — as Sapod stresses — appear to follow directly from the wording of the Directive that Article 4(2) is a technical specification.

38. That interpretation is, however, contested by Eco-Emballages, the French and Netherlands Governments and the Commission.

39. Eco-Emballages and the Commission contend, in particular, that Article 1(1) of Directive 83/189 applies only to national rules which lay down specific and precise requirements for the use or marketing of products. Since Article 4(2) of the Decree lays down only a general and imprecise requirement (*exigence de principe*) to 'identify' goods, without prescribing the use of a particular mark or symbol, it falls outside the scope of Directive 83/189.

40. There is considerable force in that argument. The term 'specification' is commonly understood to mean an explicit or detailed enumeration or statement. [18] Similar terminology is used in other language versions of the Directive, for example Danish (specifikation), Dutch (specificatie), French (spécification), German (Spezifikation), Italian (specificazione), Spanish (especificación) and Swedish (specifikation). It is therefore, in my view, clear from the wording of Article 1(1) that the Community legislature intended the Directive to apply only to national measures which lay down precise requirements for the marketing or use of goods.

41. That view is consistent with the legislative history of Directive 83/189 [19] and with the Court's case-law. The Court has held on a number of occasions that national measures which require goods to carry particular signs, marks or labels must be regarded as technical regulations. However, in all of those cases the measures at issue imposed specific and detailed marking or labelling requirements. Thus, *Commission* v *Germany* [20] concerned national legislation which extended to sterile medical instruments the obligation, hitherto applicable only to medicinal products, to state an expiry date on the label affixed to the instruments. In *Unilever* [21] the Court considered a law on labelling which required the geographical origin of olive oil to be indicated. At issue in *Commission* v *Belgium* [22] was a provision which prescribed that gas and electrical appliances present in furnished rented accommodation must comply with specific technical standards laid down by Belgian law and bear the mark 'CEBEC'. In *Bic Benelux*, [23] which concerned provisions requiring certain environmentally harmful products to carry a special sign indicating that environmental tax was payable, the Court held that 'an obligation to affix specific distinctive signs to products constitutes a technical specification'. Finally, in *Colim* [24] the Court ruled that while an obligation to convey certain information about a product to a consumer, which is carried out by affixing particulars to the product or adding documents to it such as instructions for use and the guarantee certificate, must be regarded as a technical specification, the obligation to give that information in a specified

18 — See *The New Shorter Oxford English Dictionary*.

19 — See the Commission's proposal (OJ 1980 C 253, p. 2), the Opinion of the European Parliament (OJ 1981 C 144, p. 122) and the Opinion of the Economic and Social Committee (OJ 1981 C 159, p. 23).

20 — Case C-317/92 [1994] ECR I-2039.

21 — Case C-443/98 [2000] ECR I-7535.

22 — Case C-145/97 [1998] ECR I-2643.

23 — Case C-13/96 [1997] ECR I-1753.

24 — Case C-33/97 [1999] ECR I-3175.

language does not in itself constitute a technical regulation within the meaning of Directive 83/189. [25]

42. Sapod maintains, however, that that interpretation is contrary to the purpose of Directive 83/189. It argues that it is irrelevant whether a Member State lays down precise technical specification by legislation or lays down general requirements and leaves the task of implementing them to one or more private bodies approved by the State, since in either case restrictions on trade may ensue. In the present case the Court should also, in Sapod's view, take into account that in 1993 Eco-Emballages was the only body approved by the French authorities to arrange for the disposal of the type of waste which arises from the products sold by Sapod, and that the use of the Green Dot logo formed part of the standard contract (*contrat d'adhésion*) then offered by Eco-Emballages to all producers. Owing to the monopoly enjoyed by Eco-Emballages at that time, and the obligation under the Decree to contribute to waste disposal, Sapod was unable to negotiate the use of any other form of identification. The system established by the Decree thus had, at the material time, the effect of forcing Sapod and other producers to mark their packaging with one specific mark, namely the Green Dot logo.

43. In *Bic Benelux* [26] the Court held that '[t]he aim of [Directive 83/189] 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.' It is clear from that judgment and from the second recital of the preamble to Directive 83/189, which states that 'barriers to trade resulting from technical regulations relating to products may be allowed only when they are necessary in order to meet essential requirements and have an objective in the public interest', that the Directive is designed to prevent obstacles to trade.

44. As I have explained above, the effect of Article 4(2) of the Decree is to oblige producers to mark — in accordance with contractual arrangements with an approved body — the packaging in which they market their goods. In my view, and here I agree with Sapod, it is clear (and accepted also by Eco-Emballages, the German and Netherlands Governments and the

25 — See further on the scope of Article 1 of Directive 83/189, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 29 and 30 of the judgment; Joined cases C-418/93, C-419/93, C-420/93, C-421/93, C-460/93, C-461/93, C-462/93, C-464/93, C-9/94, C-10/94, C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and others* [1996] ECR I-2975, paragraph 38; Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 32; Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 29 and 34; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraphs 20 to 26; Case C-425/97 *Albers* [1999] ECR I-2947, paragraphs 16 to 18; Case C-314/98 *Snellers*, cited in note 15, paragraph 38 and 39; Case C-37/99 *Donkersteeg*, judgment of 16 November 2000, paragraphs 21 and 31; Case C-278/99 *Van der Burg* [2001] ECR I-2015, paragraph 20.

26 — Case C-13/96, cited in note 23, paragraph 19 of the judgment.

Commission) that such a requirement is capable of hindering intra-Community trade, actually or potentially, since it makes it more difficult and costly for producers in other Member States to market their products in France. In that context it is, as Sapod points out, immaterial that the Decree does not specify exactly what mark or symbol must be affixed, since trade may be restricted independently of what mark or symbol the producers and the approved body agree to use.

45. It must therefore be accepted that the purpose of Directive 83/189 would be better achieved if general provisions such as Article 4(2) of the Decree were to be regarded as falling within the scope of the Directive. However, I do not consider that that teleological argument justifies the conclusion Sapod seeks to draw from it.

46. First, to accept that a provision such as Article 4(2) of the Decree constitutes a 'technical specification' entails, in my view, a departure from the plain meaning of the wording of Article 1(1) of the Directive.

47. In that regard, it must be kept in mind that the Court held in *CIA Security*[27] that national courts must decline to apply a national technical regulation which has not been notified in accordance with the Directive and that, according to the judgment in *Unilever*,[28] that applies even in civil proceedings between individuals concerning contractual rights and obligations. A finding that a measure of national law, which has not been notified under Article 8 of the Directive, constitutes a technical regulation may thus have direct and serious consequences for traders throughout the Community.[29] For reasons of legal certainty it is, therefore, important that the definitions laid down in Article 1 of the Directive be interpreted in a way which is predictable to traders and national authorities. That consideration calls for an interpretation which does not go beyond, or distort, the ordinary meaning of the wording of Article 1(1).

48. The need for legal certainty in this area might also explain why the Community legislature chose to delimit the scope of the Directive by reference to the notion of 'technical specifications', and not by reference to the effect on trade of measures of national law. While the former notion provides an objective criterion, which

27 — Cited in note 25.

28 — Cited in note 25.

29 — See further my Opinion in *Unilever*, cited in note 21, at paragraphs 100 and 101.

enables national authorities and traders to predict with reasonable ease whether measures of national law fall within the scope of the Directive, the latter might require an economic analysis which is unlikely to provide the required predictability and certainty.

49. Second, Directive 83/189 draws a distinction between, on the one hand, technical regulations issued by public authorities and, on the other hand, technical standards approved by recognised standardising bodies, and it applies different notification and stand-still requirements to those regulations and standards. The Directive does not refer to the actions of private companies, such as Eco-Emballages, or lay down requirements to be met where such companies take action which is analogous in effect to the imposition of technical standards. Thus it appears from the structure of the Directive that the Community legislature considered that the actions of private companies are — in so far as they affect intra-Community trade — to be controlled under the Community competition rules, [30] not *via* the system of notification laid down in the Directive. Those rules are *prima facie* applicable where — as a result of contractual arrangements or abuse of a dominant position [31] — the actions of private companies adversely affect intra-Community trade. The application of those rules is thus capable of ensuring that the purpose of Directive 83/189 is not undermined.

50. Third, the Directive envisages that the Member States are to notify the Commission of technical regulations before they are finally adopted by the national authorities. I cannot see how a Member States could comply with that requirement if the Directive covered rules, such as Article 4(2) of the Decree, which do not in themselves lay down technical specifications, but which *might* as a result of *subsequent* actions by private companies effectively compel traders to comply with certain specific requirements.

51. I conclude, for those reasons, that a provision which obliges producers to 'identify' packaging, and leaves it to be decided in contractual arrangements between private companies how that obligation is to be carried out, cannot be regarded as a technical specification within the meaning of Article 1(1) of Directive 83/189.

30 — It may be noted in that context that the Commission has recently considered the lawfulness of the system of contracts operated by Eco-Emballages under the Decree. See Commission Decision of 15 June 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, OJ 2001 L 233, p. 37.

31 — See in that context the Order of the President of the Court of First Instance, of 15 November 2001, in Case T-151/01 R, [2001] ECR II-3295, *Duales System Deutschland (DSD)*, and the pending proceedings in Case T-151/01 which concern the compatibility with Article 82 EC of the 'Green Dot' scheme operated by DSD in Germany.

52. It may be added, finally, that there is no information in the file to suggest that the French authorities deliberately drafted the provisions of the Decree in such a way as to evade their obligations under the Directive.

Is Article 6(4) of the Decree to be regarded as a technical specification within the meaning of Article 1(1) of Directive 83/189?

53. Article 6(4) of the Decree, it will be recalled, provides that a body desiring to arrange for waste disposal in France must apply for approval from the competent authorities and include with the application a set of standard terms (*cahier des charges*) indicating, for each type of material, where the approved body makes agreements with manufacturers of packaging or packaging materials, the technical criteria which the used packaging is to meet.

54. The observations submitted in the present case have to a considerable extent been devoted to explaining the meaning and effect of that provision. It emerges from those observations, and the replies of the French Government and Eco-Emballages to a written question asked by the Court, that it must be understood in the context of the French system of waste management.

55. Within that system, the collection and sorting of household waste is carried out by local authorities or their sub-contractors. Once sorted, waste materials are passed on to private undertakings for recovery. Eco-Emballages enters into contracts with both the authorities and the private (recovery) undertakings. Under contracts with the local authorities, Eco-Emballages offers a guarantee that household packaging waste collected and sorted by them will be taken back from them for recovery. Under contracts with Eco-Emballages, the recovery undertakings guarantee that they will take back and recover waste collected by the local authorities. However, those guarantees apply only in so far as the waste passed on by the local authorities for recovery meets certain technical criteria (*prescriptions techniques minimales*) set out in the contracts.

56. In the light of those explanations, it appears that the purpose of Article 6(4) of the Decree is to subject the technical criteria (*prescriptions techniques minimales*) — which are to be included in contracts between an approved body, the local authorities and the recovery undertakings — to a requirement of approval by the competent French authorities. Article 6(4) is thus, as the French Government and Eco-Emballages stress, a provi-

sion concerned essentially with the quality and treatment of household packaging waste; it does not lay down rules applicable to household products or the packaging in which those products are marketed.

57. That interpretation of Article 6(4) is not, in my view, affected by Sapod's assertion that Eco-Emballages might prevent the marketing of a product where the packaging in which it is sold cannot — after it has been discarded by consumers and collected and sorted by the local authorities — meet the technical criteria applicable to household waste. There is, as the French Government and Eco-Emballages point out, no basis in the text of the Decree for that assertion, nor is there any suggestion that Eco-Emballages has in fact sought to prevent the marketing of products on such grounds.

58. It follows, in my view, that Article 6(4) falls outside the scope of Directive 83/189. As is clear from the preamble and the definitions in Article 1(1) and 1(5), the Directive applies to national provisions which lay down technical specifications for 'products'. According to Article 1(7) 'product' is to be understood as 'any industrially manufactured product and any agricultural product'. It seems clear that household packaging waste falls outside that definition.

Does the Decree constitute a technical regulation within the meaning of Article 1(5) of Directive 83/189?

59. Since, in my view, Articles 4(2) and 6(4) of the Decree cannot be regarded as technical specifications within the meaning of Article 1(1) of Directive 83/189, it is not necessary to consider whether the observance of those provisions is compulsory, *de jure* or *de facto*, in the case of marketing or use in a Member State within the meaning of Article 1(5) of the Directive.

The second question

60. By its second question, the Cour de Cassation asks essentially whether the French Government was required to notify the provisions of the Decree to the Commission under Article 8 of Directive 83/189 and/or Article 3(2) of Directive 75/442. In case of an affirmative reply to that question, the Cour de Cassation desires to know whether an individual may rely on the failure to notify in order to have the provisions of the Decree declared unenforceable in proceedings before national courts.

Notification under Directive 83/189

61. According to Article 8 of Directive 83/189 the duty to notify the Commission applies to draft technical regulations. As I have explained, the provisions of the Decree cannot be regarded as technical regulations within the meaning of Article 1(5) of the Directive. I consider, therefore, that the French authorities were not required to notify the provisions of the Decree under the Directive.

62. In the light of that conclusion, it is not necessary to consider what would have been the consequences, in the context of national legal proceedings, of a failure to comply with the duty of notification under Article 8 of the Directive. It may, however, be noted that the present case illustrates the difficulties which may arise as a result of the Court's ruling in *Unilever*. [32] It appears from documents in the file that a ruling in the present case to the effect that the French State violated its obligations under the Directive might affect the validity and enforceability in national courts of several thousand contracts which have been concluded, in reliance upon the rules laid down in the Decree, between Eco-Emballages and producers of household goods since the Decree entered into force nearly 10 years ago.

32 — Cited in note 21.

Notification under Directive 75/442

63. Under Article 3(2) of Directive 75/442, the Member States must inform the Commission of any measures they intend to take to achieve the aims set out in Article 3(1). Those aims include 'the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials'. According to Article 8, the Member States must take the necessary measures to ensure that any holder of waste has it handled by a private or public waste collector or recovers or disposes of it himself in accordance with the provisions of the Directive.

64. The Decree lays down general rules for the system of collection and recovery of household packaging waste in France, including provisions which oblige producers to contribute to waste disposal by contracting with an approved body or arranging for waste disposal themselves. In the preamble, the Decree explicitly refers to Directive 75/442 as amended by Directive 91/156.

65. It is thus clear that the French State was under an obligation to inform the Commission under Article 3(2) of Directive 75/442 of its intention to adopt the Decree.

From the order for reference and the Commission's explanations at the hearing it appears that the French State did not fulfil that obligation.

66. In my view, the French State's failure to notify the Commission does not, however, render the provisions of the Decree unlawful and unenforceable in proceedings before national courts.

67. In *Enichem Base*[33] the Court held that 'neither the wording nor the purpose of [Article 3(2) of Directive 75/442] provides any support for the view that failure by the Member States to observe their obligation to give prior notice in itself renders unlawful the rules thus adopted' and that Article 3(2) 'concerns relations between the Member States and the Commission and does not give rise to any right for individuals which might be infringed by a Member State's breach of its obligation to inform the Commission in advance of draft rules'.

68. I agree with Eco-Emballages and the Commission that the Court should confirm that ruling. It is, as I pointed out in my Opinion in *Enichem Base*,[34] instructive to compare Directive 83/189 and Directive 75/442. While the former Directive contains detailed provisions enabling the Commission and other Member States to make comments on the notified drafts and requires Member States in certain circumstances to postpone the adoption of the drafts for certain periods, the provisions in Directive 74/442 are more limited. When the facts which gave rise to the reference in *Enichem Base* occurred, Directive 75/442 laid down only an obligation to inform the Commission. I considered therefore that 'in the absence of any prescribed procedure for suspension of introduction of the measure, or for Community control, it cannot be maintained that a failure to inform the Commission has the effect of rendering the measures unlawful'.

69. Directive 75/442 has since then been amended by Directive 91/156.[35] Article 3(2) now provides that the Commission must 'inform the other Member States and the committee referred to in Article 18' of measures notified to it. However, that change does not affect the conclusion reached in *Enichem Base*. The fact remains that Directive 75/442 as amended does not provide for suspension of the introduction of national measures,

33 — Case 380/87 [1989] ECR 2491, paragraphs 22 and 23 of the judgment.

34 — At paragraph 14.

35 — Cited in note 3.

subject their entry into force to agreement or lack of objection on the part of the Commission, or lay down a detailed procedure aimed at enabling the Commission and other Member States to make comments on notified drafts. [36]

The third question

70. By its third question, the Cour de Cassation asks, in substance, whether Article 28 EC precludes national rules such as those laid down in the Decree. That question must be understood as seeking to ascertain whether Article 28 EC precludes national rules under which producers and importers must either arrange themselves for disposal of packaging waste or agree with an approved body to arrange for disposal and identify the packaging which is to be disposed of by that body.

71. It may be noted, first of all, that the facts at issue in the main proceedings appear to be confined to a single Member State. Those proceedings arise out of a contractual dispute between two French companies concerning the identification of packaging of household goods marketed in France and the treatment of packaging waste in that State. There is moreover no suggestion — in the order for reference or in the explanations given at the hearing — that the products and packaging marketed by Sapod are imported, wholly or in part, from other Member States.

72. I argued in my Opinion in *Pistre* [37] that the Court should decline to rule on the application of Article 28 EC to imports when it is clear from the facts of the case before it that the situation in the main proceedings is wholly confined to the national territory. [38] I continue to believe that the concerns which I there expressed are valid where the national measure in issue is applicable without distinction to domestic and imported products and where the case before the national court concerns not imported but domestic products. As regards such a measure, Article 28 EC has effects only in so far as it applies to

36 — See also, with regard to the notification requirement laid down in Article 7(3) of Directive 75/442, Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraphs 96 to 102 of the judgment.

37 — Joined Cases C-321/94, C-322/94, C-323/94 and C-324/94 [1997] ECR I-2343, at paragraphs 33 to 41 of the Opinion.

38 — Those arguments were endorsed by Advocate General Saggio in Case C-448/98 *Guimont*, judgment of 5 December 2000, at paragraph 8 of his Opinion. See also the Opinion of Advocate General Cosmas in Case C-63/94 *Belgapom* [1995] ECR I-2467 at paragraph 13; P. Oliver, 'Some further reflections on the scope of Articles 28 to 30 (ex 30 to 36) EC', *Common Market Law Review* 1999, 783, at p. 787; and the Opinion of Advocate General Geelhoed in Joined Cases C-515/99 and C-527/99 to C-540/99 *Reisch and Others* and C-519/99 to C-524/99 and C-526/99 *Lassacher and Others*, delivered on 20 November 2001, at paragraphs 75 to 101.

imports, and does not affect the measure in so far as it applies to national products. [39] Consequently an interpretation by the Court of Article 28 EC in a case involving only domestic products is either irrelevant for the outcome of the main proceedings or relevant only by virtue of a national rule prohibiting reverse discrimination. In both cases the Court would be answering a hypothetical question on imported products outside its factual context.

73. I consider, therefore, that the Court should decline to answer the third question referred by the Cour de Cassation.

74. That view is consistent with the Court's case-law. It is true that the Court has held that it is normally for the national courts, within the system established by Article 234 EC, to determine the relevance of the questions which they refer to the Court, [40] and that the Court has occasionally been willing to answer questions relating to Article 28 EC although the facts giving rise to the main proceedings were confined to a single Member State. [41] However, while the national measures at issue in those cases discriminated against imported goods, the present case is concerned with provisions of national law which (as is common ground for all those who have submitted observations) apply to domestic and imported household products without distinction and which are (according to the submissions of Eco-Emballages, the French, German and Netherlands Governments and the Commission) wholly justified on environmental grounds.

75. I am encouraged in that view by the Court's ruling in *Guimont*. [42] In that case, the Court was asked whether national rules reserving the designation 'Emmenthal' for cheese which meets certain requirements constitutes a measure with equivalent effect within the meaning of Article 28 EC. That question was raised in the context of criminal proceedings against a French national for selling, contrary to the requirements laid down in those rules, French produced Emmenthal on the French market. The German, Netherlands and Austrian Governments and the Commission argued, by reference to *Pistre*, [43] that the Court should reply to the question referred. In response to that argument, the Court

39 — See, in particular, Joined Cases 314/81 to 316/81 and 83/82 *Waterkeyn* [1982] ECR 4337; Case 355/85 *Cognet* [1986] ECR 3231; Case 98/86 *Mathot* [1987] ECR 809, paragraphs 3 and 7 to 9 of the judgment.

40 — See, for example, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 33 to 35 of the judgment; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraphs 18 and 19.

41 — See, in particular, *Pistre*, cited in note 37, Case C-67/97 *Bluhme* [1998] I-8033 with the explanations given by Advocate General Fennelly at paragraph 22 of his Opinion; Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

42 — Case C-448/98, cited in note 38, paragraphs 18 to 22 of the judgment.

43 — Cited in note 37.

held that 'the *Pistre* judgment concerned a situation where the national rule in question was not applicable without distinction but created direct discrimination'. That statement suggests that the Court will answer questions about the application of Article 28 EC to imports in cases which are confined to a single Member State less readily where the measures at issue are applicable without distinction than where they discriminate against imported goods. [44]

76. It may be added that in *Guimont* the Court chose to reply to the Article 28 question, although the national measures at issue applied without distinction to domestic and imported goods, considering that 'a reply might be useful to [the national court] if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation'. [45] By contrast, it has not been suggested that the interpretation of Article 28 EC as regards imports might be relevant — by way of a domestic principle of equal treatment — for the resolution of the contractual dispute between Sapod and Eco-Emballages which is at issue in the present case.

77. I consider, moreover, that the present case presents particular difficulties which militate against answering the Article 28 question. The Court has been given very little information — and heard almost no argument at the hearing — on the effects on imports of the Decree, the justification for the Decree and the proportionality of that justification. More specifically, the file contains no information about the French legislation on waste management, the developments leading to the adoption of the Decree, the level of financial contribution producers are required to make under agreements with approved bodies such as Eco-Emballages or the extent to which the obligation to contribute financially to waste disposal and recovery duplicates requirements under French tax law. Moreover, while it appears from the observations of Eco-Emballages and the German Government that a number of Member States have adopted provisions which require producers to affix the Green Dot logo on to the packaging in which they market their products, the observations do not cast light on the extent to which such national rules might in practice reduce the adverse effects on trade caused by the provisions of the Decree.

78. In the absence of relevant information and arguments it is, in my view, impossible to express a view on the compatibility with Article 28 of the provisions laid down in the Decree.

44 — See however Case 298/87 *Smanor* [1988] ECR 4489.

45 — The defendant had contended that French case-law prohibits reverse discrimination against domestic traders in criminal proceedings, and that Article 28 EC was therefore relevant for the resolution of his case.

Conclusion

79. I am accordingly of the opinion that the questions referred by the Cour de Cassation should be answered as follows:

(1) Provisions of national law — such as those laid down in the French Decree No 92-377 of 1 April 1992 — under which producers of household goods who do not themselves arrange for the disposal of packaging waste must identify the packaging to be disposed of, enter into a contract with an approved body which will arrange for disposal and recovery of packaging waste and in that contract stipulate the nature of the identification of the packaging to be disposed of by the approved body, do not constitute a technical regulation within the meaning 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, as amended by Council Directive 88/182/EEC of 22 March 1988.

(2) Although the Decree ought to have been notified to the Commission pursuant to Article 3(2) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, that failure to notify may not be relied upon by an individual in order to have the provisions of the Decree declared unenforceable.