Judgment of the Court of Justice, Sapod Audic, Case C-159/00 (6 June 2002)

Caption: In its judgment of 6 June 2002 in Case C-159/00, Sapod Audic, the Court of Justice points out that, according to established case-law, the Directive laying down a procedure for the provision of information in the field of technical standards and regulations must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that Directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals. Furthermore, the Court recalls that, according to its case-law, the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of the Directive may be invoked in legal proceedings between individuals concerning, inter alia, contractual rights and duties.

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Judgment of the Court (Fifth Chamber) of 6 June 2002 (1)
Sapod Audic v Eco-Emballages SA

Case C-159/00

(Directive 83/189/EEC - Procedure for the provision of information in the field of technical standards and regulations - Obligation to communicate draft technical regulations - Directives 75/442/EEC and 91/156/EEC - Waste - Obligation to make notification of planned measures - National regulations on disposal of packaging waste - Obligation on producers or importers to identify packaging to be disposed of by an approved undertaking - Obligation on the approved undertaking to ensure that packaging for which it is responsible meets technical requirements)

In Case C-159/00,

REFERENCE to the Court under Article 234 EC by the Cour de Cassation (France) for a preliminary ruling in the proceedings pending before that court between

Sapod Audic

and

Eco-Emballages SA

on the interpretation of Articles 1 and 10 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), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75), Article 3(2) of 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), and Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Sapod Audic, by L. Boré, avocat,

- Eco-Emballages SA, by D. Brouchot, T. Schneider and M. Troncoso Ferrer, avocats,

- the French Government, by R. Abraham and R. Loosli-Surrans, acting as Agents,

- the German Government, by W.-D. Plessing and T. Jürgensen, acting as Agents,

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

- the Commission of the European Communities, by G. zur Hausen and J. Adda, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Sapod Audic, represented by L. Boré and M. Quimbert, avocat; Eco-Emballages SA, represented by T. Schneider and M. Troncoso Ferrer; the French Government, represented by R. Loosli-Surrans; and theCommission, represented by G. zur Hausen and J. Adda, at the hearing on 23 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2002,

gives the following

Judgment

1. By judgment of 18 April 2000, received at the Court on 28 April 2000, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1 and 10 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), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75, 'Directive 83/189'), Article 3(2) of 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, 'Directive 75/442'), and Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. Those questions were raised in proceedings between Sapod Audic ('Sapod') and Eco-Emballages SA ('Eco-Emballages') concerning payment of a fee claimed by Eco-Emballages from Sapod under a contract by which, in order to comply with certain legal obligations, Sapod subscribed to a system for the disposal of waste operated by Eco-Emballages.

Community law

3. Article 1 of Directive 83/189 provides:

'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 ...;

...

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.'

4. Articles 8 and 9 of Directive 83/189 require Member States to communicate to the Commission any draft technical regulation falling within its scope, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard suffices, and to postpone the adoption of such drafts for several months to allow the Commission to verify whether they are compatible with Community law or to propose or adopt a directive on the question.

5. Article 10 of Directive 83/189 states that '[a]rticles 8 and 9 shall not apply where Member States honour their obligations arising out of Community directives and regulations'.

6. Article 3 of Directive 75/442 provides:

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

(a) firstly, the prevention or reduction of waste production and its harmfulness, in particular by ...

...

(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

(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.'

7. Article 8 of Directive 75/442 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.'

French law

8. Articles 4 to 6 of Decree No 92-377 of 1 April 1992 implementing, in respect of packaging waste, Law No 75-633 of 15 July 1975 relating to the disposal of waste and the recovery of materials, as amended (JORF of 3 April 1992, p. 5003), provide:

'Article 4

Any producer or importer ... is required to contribute to or organise the disposal of all of its packaging waste... .

To that end, it shall identify the packaging, the handling of which it has entrusted to a body or an undertaking which has been granted the approval referred to in Article 6 below, under the arrangements they determine, as provided for in Article 5 below. The remaining packaging shall be recovered in accordance with the conditions laid down in Article 10 below.

Article 5

Those persons referred to in Article 4 above who have recourse, for the disposal of their packaging waste, to the services of an approved body or undertaking shall enter into a contract [with that body or undertaking] 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 undertaking or body; on those points the contracts must be in

accordance with the standard terms provided for in Article 6 below.

Article 6

Any body or undertaking whose object is the assumption of responsibility for used packaging, as provided for in Articles 4 and 5 hereof, from parties to contracts [with that body or undertaking] is to be granted approval for renewable periods of up to six years by joint decision of the Minister for the Environment, the Minister for Economic Affairs, the Minister for Industry, the Minister for Agriculture and the Minister for Local Authorities.

In support of its application for approval, that body or undertaking shall provide evidence that it has the technical and financial means to carry out the necessary procedures to dispose of the used packaging and shall state how it proposes to comply with the standard terms attached to the approval. ...

...

Those standard terms shall include, for each type of material, the technical requirements which must be met by the used packaging where the approved body or undertaking makes agreements with manufacturers of packaging or packaging materials for the disposal of that waste.

...'

9. According to Article 10 of that decree, the persons referred to in Article 4 may choose to arrange for themselves the disposal of waste resulting from the discarding of the packaging they use. In that case, they must either 'establish a deposit system for their packaging which is clearly labelled on that packaging' (Article 10(a)) or 'organise collection points specifically for that purpose, after obtaining approval, granted by way of joint decision of the Minister for the Environment, the Minister for Industry, and the Minister for Agriculture, of the control procedures for that disposal system, enabling them to measure the amount of packaging disposed of in that way as a proportion of the packaging sold' (Article 10(b)).

The main proceedings and the questions submitted by the national court

10. Eco-Emballages is a company incorporated under private law in 1992. Its object is, inter alia, the organisation of systems for disposal of waste and recovery of materials and, in particular, the collection of packaging from undertakings which are subject to the obligations laid down in Law No 75-633 of 15 July 1975 relating to the disposal of waste and the recovery of materials (JORF of 16 July 1975, p. 7279), as amended ('Law No 75-633'), and its implementing decrees.

11. By joint ministerial decision of 12 November 1992, Eco-Emballages was granted the approval provided for in Article 6 of Decree No 92-377 to organise the collection and recovery of waste resulting from the discarding of used packaging from products intended for household consumption or use, in respect of which producers or importers entered into contracts with Eco-Emballages.

12. Sapod is a French undertaking which markets poultry packaged in plastic wrappings.

13. On 19 September 1993, Sapod entered into a contract with Eco-Emballages on Eco-Emballages's standard terms. Under that contract Sapod stated that, in order to satisfycertain legal obligations imposed on it by Decree No 92-377, it subscribed to the system for the disposal of waste operated by Eco-Emballages.

14. Under that contract, Eco-Emballages granted to Sapod a non-exclusive licence to use a logo (the 'Green Dot logo') which was to be affixed to the packaging of Sapod products in accordance with the detailed rules set out in an annex to the contract.

15. The contract provided for the payment of an annual fee. Initially, Sapod paid the fees due without protest. It then ceased to pay the fee and on 30 September 1996, the contract having been renewed, it owed

an amount of FRF 60 791.

16. Eco-Emballages then brought summary proceedings against Sapod before the Tribunal de Commerce de Paris (Commercial Court, Paris) (France) which, by order of 14 February 1997, ordered Sapod to pay to Eco-Emballages, on a provisional basis, the amount stated in the previous paragraph, plus interest at the statutory rate. That decision was upheld by a judgment of the Cour d'appel de Paris (Court of Appeal, Paris) of 23 January 1998.

17. In those appeal proceedings, Sapod claimed, inter alia, that Decree No 92-377 was a technical regulation within the meaning of Directive 83/189 which had not been notified to the Commission and which could not therefore be relied upon against third parties, and that the obligation to belong to an approved system of the kind operated by Eco-Emballages was a measure having equivalent effect which was incompatible with Article 30 of the Treaty.

18. Sapod appealed against the judgment of the Cour d'appel de Paris, and the Cour de Cassation decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

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 disposal 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, ifit 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, after amendment, Article 28 EC), properly construed, preclude rules such as those contained in Decree No 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?

Preliminary observations

19. By its first and second questions, the national court is seeking an interpretation of Directive 83/189 in the version in force both before and after the entry into force of Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189/EEC (OJ 1994 L 100, p. 30).

20. In that regard, it must be observed, first, that, if the relevant provisions of Decree No 92-377 constitute technical regulations, the drafts of those regulations should have been notified to the Commission pursuant to Directive 83/189, as amended by Directive 88/182 and, second, that the amendments effected by Directive 94/10 to the provisions relevant to this case are material amendments and do not merely clarify the terms which appear in Directive 83/189 (see, to that effect, inter alia, Case C-33/97 Colim [1999] ECR I-3175, paragraphs 25 and 26, and Case C-314/98 Snellers [2000] ECR I-8633, paragraphs 31 to 33).

21. In those circumstances, as the Advocate General points out in paragraphs 30 and 31 of his Opinion, the national court's questions must be considered in the light of Directive 83/189, as amended by Directive 88/182, but without reference to Directive 94/10.

22. Second, as regards the first and second questions, it should be pointed out that it is apparent from the order for reference that the provisions of Decree No 92-377, in respect of which the national court is asking whether Directive 83/189 applies are the second paragraph of Article 4 - in so far as it imposes an obligation on the producer to identify the packaging which he arranges to be collected for disposal by an approved body or undertaking - and the fourth paragraph of Article 6 - in so far as it imposes an obligation on that approved body or undertaking to ensure that the used packaging complies with certain technical requirements.

The first question

23. By its first question, the national court is essentially asking whether provisions of national law such as the second paragraph of Article 4, and the fourth paragraph of Article 6, of Decree No 92-377 constitute technical regulations within the meaning of Directive 83/189, in particular inasmuch as they permit producers not to use an approved system for the disposal of their used packaging, such as the system operated by Eco-Emballages, if the producers themselves arrange for the disposal of their packaging waste.

24. The national court's specific question whether the fact that producers are not obliged to comply with the obligations contained in those national provisions if they decide to arrange for themselves the disposal of their waste has a bearing on their classification as 'compulsory' within the meaning of Article 1(5) of Directive 83/189, must be answered in the negative.

25. As observed by the Commission, the only choice given to producers by Decree No 92-377, in particular by the first paragraph of Article 4 thereof, is whether to arrange for their packaging waste to be collected for disposal by approved bodies or undertakings or to arrange for themselves for the disposal of that waste. However, if, as is the case in the main proceedings, the producer opts for the system of collection by an approved body or undertaking, a number of provisions, including the second paragraph of Article 4, and the fourth paragraph of Article 6, of Decree No 92-377, apply compulsorily. Therefore, those provisions are compulsory within the meaning of Article 1(5) of Directive 83/189.

26. Next, it is necessary to consider whether national provisions such as those at issue in the main proceedings can be regarded as technical specifications within the meaning of Article 1(1) of Directive 83/189.

27. As regards, first, the second paragraph of Article 4 of Decree No 92-377, Sapod claims that that provision must be regarded as a technical specification since it establishes an obligation to display certain symbols on the product packaging. In contrast, Eco-Emballages submits that that provision does not constitute a technical specification since it does not impose an obligation to apply a mark or label. The Commission shares that opinion and observes that Decree No 92-377 does not appear to require the use of a specific symbol, mark or label. The French Government also claims that the provision at issue cannot be regarded as a technical specification since it forms part of a body of detailed rules relating to the provision of a service and not to a product as such.

28. In that regard, it should be observed that, in the light of the wording and the context of the second paragraph of Article 4 of Decree No 92-377, as well as the documents before the Court, that article does not in itself seem to require the placing of a sign on the product or its packaging for the purposes of the identification of the packaging for which it provides.

29. That interpretation appears to be confirmed by Article 5 of Decree No 92-377 in so far as that article provides that the nature of the identification is to be specified in the contracts between the approved bodies or undertakings and the producers. It is apparent from the documents before the Court and, in particular, from the replies to a written question from the Court, that it is only in those contracts, such as the one between Sapod and Eco-Emballages, that the general obligation to identify the packaging laid down in the second paragraph of Article 4 of Decree No 92-377 becomes a specific obligation to mark the packaging, by affixing the 'Green Dot logo', the standard terms on the basis of which Eco-Emballages was granted

approval being silent on that matter.

30. Accordingly, since the obligation to identify the packaging prescribed by the second paragraph of Article 4 of Decree No 92-377 does not seem to imply an obligation to mark or label that packaging, that obligation does not appear necessarily to refer to the product or its packaging as such. Interpreted in that way, that provision cannot be said to lay down the characteristics required of a product within the meaning of Article 1(1) of Directive 83/189 and, hence, cannot be regarded as a technical specification (see, in particular, Case C-278/99 Van der Burg [2001] ECR I-2015, paragraph 20).

31. Nevertheless, it must be observed that under the division of powers provided for in Article 234 EC, it is for the national court to interpret national law, in this case the second paragraph of Article 4 of Decree No 92-377.

32. Consequently, the Court must also consider the possibility that, in the light of all the factual and legal evidence before the national court, that court will reach the conclusion that the second paragraph of Article 4 of Decree No 92-377 must be interpreted as imposing on producers an obligation to mark or label the packaging, although not specifying what sign must be affixed.

33. In such an event, it would have to be held that that provision is in fact a technical specification within the meaning of Directive 83/189 and, consequently, that, since the obligation is imposed by decree in the case of marketing of packaged products throughout the national territory, that provision constitutes a technical regulation.

34. In that case, even though the detailed rules regarding the marking or the labelling remained to be defined, marking or labelling would, in itself, be compulsory, also for imported products (see, in particular, Case C-13/96 Bic Benelux [1997] ECR I-1753, paragraph 23). In addition, having regard to the aim of Directive 83/189, namely the protection of free movement of goods by means of preventive control (see, in particular, Case C-194/94 CIA Security International [1996] ECR I-2201, paragraphs 40 and 48), such a control, implemented in accordance with the procedure prescribed by that directive, would be both appropriate and possible.

35. Second, as regards the question whether the fourth paragraph of Article 6 of Decree No 92-377 can be classified as a technical specification within the meaning of Article 1(1) of Directive 83/189, as the Advocate General points out at paragraphs 56 and 57of his Opinion, it follows from the wording of that provision as well as from the other documents before the Court, in particular the replies to a written question from the Court, that the obligation under that provision is imposed on the approved bodies and undertakings responsible for collecting the packaging waste and lays down the minimum technical requirements which packaging waste must meet in order to be admitted to the waste treatment processes.

36. The documents before the Court do not contain anything to show that the fourth paragraph of Article 6 of Decree No 92-377 can be interpreted as imposing an obligation on producers and importers of products marketed in packaging to ensure that the packaging meets specific technical requirements.

37. Accordingly, that provision differs from the regulations which, in a case such as that at issue in the main proceedings, can be applied to producers of products marketed in packaging (see, in particular, Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 34).

38. Consequently, it is not necessary to consider whether the fourth paragraph of Article 6 of Decree No 92-377 can, in a case such as that at issue in the main proceedings, be regarded as a technical specification within the meaning of Directive 83/189.

39. In the light of the foregoing observations, the answer to the first question must be that a provision of national law such as the second paragraph of Article 4 of Decree No 92-377 could constitute a technical regulation within the meaning of Directive 83/189 only if the national court were to hold that it had to be interpreted as requiring a mark or label to be applied.

The second question

40. By its second question, the national court is seeking an interpretation of both Directive 83/189 and Directive 75/442. It is appropriate to examine those directives consecutively.

Directive 83/189

41. At the outset, it should be observed that, in the light of the answer to the first question, the second question - in so far as it relates to Directive 83/189 - is only relevant if the national court interprets the second paragraph of Article 4 of Decree No 92-377 as requiring a mark or label to be applied, from which it would then follow that, as pointed out in paragraph 33 of this judgment, that provision would have to be regarded as a technical regulation within the meaning of Directive 83/189.

Exemption from the requirement to notify technical regulations to the Commission

42. First, in the event that a provision of national law such as the second paragraph of Article 4 of Decree No 92-377 were to be regarded as a technical regulation within the meaning of Directive 83/189, the national court is essentially asking whether, under Article 10 of that directive, that provision is nevertheless not required to be notified to the Commission under Article 8 of that directive on the ground that, by adopting it, the Member State concerned has discharged an obligation under a Community directive or regulation, in particular, under Directive 75/442.

43. According to Eco-Emballages and the French and Netherlands Governments, Decree No 92-377 was adopted in order to implement or apply Directive 75/442, or to meet the objectives of that directive, and is thus exempt from the notification requirement laid down in Article 10 of Directive 83/189.

44. That point of view cannot be accepted. As pointed out by the Commission, that question must be answered in the negative because, although Decree No 92-377 refers in its preamble to Directive 75/442, that directive establishes only a general framework, leaving Member States a significant degree of freedom (on that point see, in particular, Case C-443/98 Unilever [2000] ECR I-7535, paragraph 29). Directive 75/442 does not contain provisions imposing specific obligations on Member States which are implemented by the second paragraph of Article 4 of Decree 92-377.

45. It should be added that since European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) had not yet been adopted when Decree No 92-377 was adopted, Directive 94/62 cannot be taken into account in examining whether Article 10 of Directive 83/189 is applicable in the present case.

46. The answer to the first part of the second question, in so far as it concerns Directive 83/189, must be that Article 10 of that directive is to be interpreted as meaning that, where a provision of national law such as the second paragraph of Article 4 of Decree No 92-377 must be understood as requiring a mark or label to be applied, that provision is not exempted from the notification requirement under Article 8 of Directive 83/189.

Enforceability of technical regulations not notified to the Commission

47. Second, if a provision of national law such as the second paragraph of Article 4 of Decree No 92-377 must be regarded as a technical regulation which, contrary to the rules laid down in Directive 83/189, was not notified to the Commission and, taking account of the fact that, in that case, as observed at paragraph 46 of this judgment, that provision would not be exempted from the notification requirement under Article 10 of that directive, the national court asks whether the failure to make the notification required under that directive can be invoked by an individual in a case such as that in the main proceedings in order to have that

provision declared unenforceable.

48. According to Sapod, it follows from, in particular, CIA Security International, that it is for the national court to refuse to apply a technical regulation which was not notified to the Commission in accordance with Directive 83/189. The Commission submits that the national court's question has no purpose since the answer to the first question must be that the national regulations at issue in the main proceedings cannot be regarded as technical regulations.

49. In that regard, it should be observed, first, that according to settled case-law Directive 83/189 must be interpreted as meaning that a failure to observe the obligation to notify laid down in Article 8 of that directive constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and thus unenforceable against individuals (see, in particular, CIA Security International, paragraphs 48 and 54, and Lemmens, paragraph 33).

50. Second, it should be borne in mind that according to the case-law of the Court the inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 83/189 may be invoked in legal proceedings between individuals concerning, inter alia, contractual rights and duties (see Unilever, paragraph 49).

51. Accordingly, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to apply a mark or label and, hence, as constituting a technical regulation within the meaning of Directive 83/189, it would be incumbent on that court to refuse to apply that provision in the main proceedings.

52. It should, however, be observed that the question of the conclusions to be drawn in the main proceedings from the inapplicability of the second paragraph of Article 4 of Decree No 92-377 as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract between Sapod and Eco-Emballages, is a question governed by national law, in particular as regards the rules and principles of contract law which limit or adjust that sanction in order to render its severity proportionate to the particular defect found. However, those rules and principles may not be less favourable than those governing similar domestic actions (principle of equivalence) and may not be framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 Rewe v Landwirtschaftskammer für das Saarland [1976] ECR 1989, paragraph 5, and Joined Cases C-52/99 and C-53/99 Camorotto and Vignone [2001] ECR I-1395, paragraph 21).

53. The answer to the second part of the second question, in so far as it concerns Directive 83/189, must therefore be that, in the event that a national provision such as the second paragraph of Article 4 of Decree No 92-377 were to be interpreted as requiring a mark or label to be applied, an individual may invoke the failure to make notification of that national provision in accordance with Article 8 of that directive. It is then for the national court to refuse to apply that provision, the question of the conclusions to bedrawn from the inapplicability of that national provision as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of a contract, being a question governed by national law. That conclusion is, however, subject to the condition that the applicable rules of national law are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law.

Directive 75/442

Obligation to inform the Commission of planned measures

54. First, if Directive 83/189 does not apply to the national provisions at issue in the main proceedings, the national court asks whether the Member State concerned must inform the Commission of the adoption of those provisions in accordance with Article 3(2) of Directive 75/442.

55. Sapod and the Commission claim that the French authorities had a duty to inform the Commission of the proposed national provisions.

56. In that regard, it must be observed that it is clear from both the nature of the rules enacted in Decree No 92-377 and the preamble to that decree that, if Directive 83/189 does not apply, the French authorities ought to have informed the Commission of the proposed national provisions at issue.

57. In the light of the foregoing, the answer to the first part of the second question, in so far as Directive 75/442 is concerned, must be that, if Directive 83/189 does not apply to the provisions of Decree No 92-377, the Member State concerned ought to have informed the Commission of the proposed national provisions in accordance with Article 3(2) of Directive 75/442.

Enforceability of measures adopted without prior notification to the Commission

58. Second, if the failure by a Member State to inform the Commission that it plans to adopt national provisions such as those at issue in the main proceedings constitutes an infringement of Article 3(2) of Directive 75/442, the national court asks whether that failure to inform the Commission may be invoked by an individual in order to have those provisions declared unenforceable.

59. According to Sapod, Eco-Emballages, the Netherlands Government and the Commission, that question should be answered in the negative, applying the case-law of the Court, in particular Case 380/87 Enichem Base and Others v Comune di Cinisello Balsamo [1989] ECR 2491.

60. In that regard, it should be noted that in paragraphs 20 to 23 of its judgment in Enichem Base, the Court observed that neither the wording nor the purpose of Article 3(2) of Directive 75/442 in its original version provides any support for the view thatfailure by the Member States to observe their obligation under that provision to give prior notice in itself renders unlawful the national rules thus adopted, inasmuch as that provision merely requires the Member States to inform the Commission of any draft rules to which it applies, without laying down any procedure for Community control of those draft rules or making implementation of the planned rules conditional upon agreement by the Commission or its failure to object (see, also, CIA Security International, paragraph 49).

61. In the light of those considerations, the Court held, in paragraph 24 of its judgment in Enichem Base, that Article 3(2) of Directive 75/442, in its original version, properly construed, does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within the scope of that provision on the ground that the rules were adopted without having been previously communicated to the Commission.

62. Although it is true that since the judgment in Enichem Base was delivered, Article 3(2) of Directive 75/442 has been amended by Directive 91/156 and that now, under that provision, after a Member State has notified the Commission of the measures it plans to take, the Commission informs the other Member States and the committee provided for in Article 18 of Directive 75/442 of those draft measures, that amendment does not in any way affect the substance of the reasoning underlying that judgment, which is set out in paragraph 60 of this judgment, nor does it therefore affect the conclusions reached by the Court in Enichem Base, which are set out in paragraph 61 of this judgment.

63. In view of the foregoing considerations, the answer to the second part of the second question, in so far as it concerns Directive 75/442, must be that Article 3(2) of that directive, properly construed, does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within the scope of that provision on the ground that the rules were adopted without having been previously communicated to the Commission.

The third question

64. By its third question, the national court is essentially asking whether Article 30 of the EC Treaty (now, after amendment, Article 28 EC) precludes national provisions such as the second paragraph of Article 4 and the fourth paragraph of Article 6 of Decree No 92-377, inasmuch as those provisions, which are applicable to all products alike, are not proportionate to the mandatory requirement relating to the protection of the environment.

65. According to Sapod, the second paragraph of Article 4 of Decree No 92-377 must be regarded as a barrier to trade prohibited by Article 30 of the Treaty. In that regard, Sapod essentially claims that Eco-Emballages benefits from an absolute monopoly in the plastic-packaging disposal sector, that foreign producers who want to sell their packaged products in France are obliged to manufacture or buy packaging of a kind approved by Eco-Emballages and bearing the distinctive mark of that company, namely the 'Green Dot logo', which leads them to incur substantial additional costs and renders it difficult for them to import their products into France and, finally, that that system is neither flexible nor effective.

66. Eco-Emballages and the German and Netherlands Governments, relying on, inter alia, Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 ('Cassis de Dijon'), Case 302/86 Commission v Denmark [1988] ECR 4607 and Case C-389/96 Aher-Waggon [1998] ECR I-4473, submit that if the national regulations at issue in the main proceedings fall within the scope of Article 30 of the Treaty, they are justified on the ground of overriding requirements relating to protection of the environment.

67. The French Government and the Commission consider that the national regulations at issue in the main proceedings do not fall within the scope of Article 30 of the Treaty.

68. In that regard it must be observed, as a preliminary point, first, that in the light of the answers to the first and second questions, if the national court were to interpret the second paragraph of Article 4 of Decree No 92-377 as establishing an obligation to mark or label the packaging, an answer to the third question would not be necessary in so far as it concerns that provision. In the event of such an interpretation, as has been observed at paragraphs 49 to 51 of this judgment, that provision would not be enforceable against individuals.

69. Second, while it is settled case-law that in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to determine whether it has jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-36/99 Idéal tourisme [2000] ECR I-6049, paragraph 20; Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 39; Case C-340/99 TNT Traco [2001] ECR I-4109, paragraph 31, and Case C-472/99 Clean Car Autoservice [2001] ECR I-0000, paragraph 14).

70. As the Court has already observed at paragraph 36 of this judgment, none of the evidence in the documents before the Court supports the conclusion that the fourth paragraph of Article 6 of Decree No 92-377 imposes an obligation on producers of products marketed in packaging and intended for household consumption or on importers of such products from other Member States to use packaging meeting certain technical requirements. To the extent that the third question relates to the compatibility of such an obligation with Article 30 of the Treaty, it must be observed that the Court does not have before it the factual or legal material necessary to give a useful answer to that question in so far as it concerns the fourth paragraph of Article 6 of Decree No 92-377.

71. Therefore, the third question must be answered solely in so far as it seeks to ascertain whether Article 30 of the Treaty precludes a national provision such as the second paragraph of Article 4 of Decree No 92-377 and only in the event that that provision were to be interpreted as not establishing an obligation to apply a mark or label but as imposing only a general obligation to identify the packaging collected for disposal by an approved undertaking.

72. In that regard, it should be observed that, even if that national provision were to be interpreted in that way, the obligation imposed by that provision does not relate as such to the product or its packaging and therefore does not, of itself, constitute a rule laying down requirements to be met by goods, such as requirements concerning their labelling or packaging (see, in particular, Case C-123/00 Bellamy and English Shop Wholesale [2001] ECR I-2795, paragraph 18).

73. On the other hand, in such a case, the general obligation to identify the packaging as provided for in that national provision may be regarded as a selling arrangement. It is for the national court to verify whether the relevant conditions, under the case-law of the Court, for exempting such an obligation from the scope of application of Article 30 of the Treaty are met, namely that the provision at issue applies to all relevant traders operating within the national territory and that it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see, in particular, Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 16, and Case C-254/98 TK-Heimdienst [2000] ECR I-151, paragraph 23).

74. Finally, it must be observed that if the general obligation to identify the packaging laid down in the second paragraph of Article 4 of Decree No 92-377 has taken the form of an obligation on Sapod to mark the packaging by affixing the 'Green Dot logo', that latter obligation arises out of a private contract between the parties to the main proceedings. Such a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 of the Treaty since it was not imposed by a Member State but agreed between individuals (see, to that effect, inter alia, Case 8/74 Dassonville [1974] ECR 837, paragraph 5, and Colim, paragraph 36).

75. In view of the foregoing observations, the answer to the third question must be that if the national court were to interpret a provision such as the second paragraph of Article 4 of Decree No 92-377 as not requiring a mark or label to be applied but as imposing only a general obligation to identify the packaging collected for disposal by an approved undertaking, that provision may be regarded as a selling arrangement. It is for the national court to verify whether the relevant conditions under the case-law of the Court for exempting such an obligation from the scope of application of Article 30 of the Treaty are met, namely that the provision at issue applies to all relevant traders operating within the national territory and that it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Costs

76. The costs incurred by the German, French and Netherlands Government 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 pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Cour de Cassation by judgment of 18 April 2000, hereby rules:

1. A provision of national law such as the second paragraph of Article 4 of Decree No 92-377 of 1 April 1992 implementing, in respect of packaging waste, Law No 75-633 of 15 July 1975 relating to the

disposal of waste and the recovery of materials, as amended, could constitute a technical regulation within the meaning of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Council Directive 88/182/EEC of 22 March 1988, only if the national court were to hold that it had to be interpreted as requiring a mark or label to be applied.

2. Article 10 of Directive 83/189, as amended by Directive 88/182, is to be interpreted as meaning that, where a provision of national law such as the second paragraph of Article 4 of Decree No 92-377 must be understood as requiring a mark or label to be applied, that provision is not exempted from the notification requirement under Article 8 of Directive 83/189.

3. In the event that a national provision such as the second paragraph of Article 4 of Decree No 92-377 were to be interpreted as requiring a markor label to be applied, an individual may invoke the failure to make notification of that national provision in accordance with Article 8 of Directive 83/189. It is then for the national court to refuse to apply that provision, the question of the conclusions to be drawn from the inapplicability of that national provision as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of the contract, being a question governed by national law. That conclusion is, however, subject to the condition that the applicable rules of national law are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law.

4. If Directive 83/189 does not apply to the provisions of Decree No 92-377, the Member State concerned ought to have informed the Commission of the proposed national provisions in accordance with 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.

5. Article 3(2) of Directive 75/442, properly construed, does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules falling within the scope of that provision on the ground that the rules were adopted without having been previously communicated to the Commission.

6. If the national court were to interpret a provision such as the second paragraph of Article 4 of Decree No 92-377 as not requiring a mark or label to be applied but as imposing only a general obligation to identify the packaging collected for disposal by an approved undertaking, that provision may be regarded as a selling arrangement. It is for the national court to verify whether the relevant conditions under the case-law of the Court for exempting such an obligation from the scope of application of Article 30 of the EC Treaty (now, after amendment, Article 28 EC) are met, namely that the provision at issue applies to all relevant traders operating within the national territory and that it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

Jann
von Bahr
Timmermans

Delivered in open court in Luxembourg on 6 June 2002.

R. Grass
Registrar

P. Jann
President of the Fifth Chamber

(1) Language of the case: French.