I — Introduction

1. In this case the Tribunal Supremo of Spain (Third Chamber for Administrative Cases) essentially seeks to establish whether the Spanish regulations under which operators of conditional-access digital television services via satellite (hereinafter ‘operators’), before marketing the apparatus, equipment, decoders or systems necessary for that purpose (hereinafter ‘decoders’), are required to obtain certification, as a condition of which they must complete a preliminary procedure and register details of themselves and the decoders in a register, are compatible with Community law. The operators and their decoders are entered in the register upon application. Before registration, an assessment or technical report on the compliance of all decoders with the technical standards have to be obtained from the technical services of the Directorate-General of Telecommunications at the Ministry of Internal Development.

II — Factual background

2. The undertaking Canal Satélite Digital supplies the digital broadcasting of television signals via satellite and the reception of conditional-access television programmes. The digital broadcasting and access to the encoded television services are made possible by purchasing or renting special decoding apparatus. Canal Satélite Digital supplies such decoders in Spain. The decoders were lawfully manufactured and marketed in Belgium and the United Kingdom. Despite a request from the Spanish authorities, Canal Satélite Digital had had neither itself nor the decoders it marketed entered in the Spanish register. After the competent authorities had set a deadline, registration was denied by decision of the Commission for the Telecommunications Market. Despite the lack of registration in Spain, Canal Satélite Digital has a large number of customers who use its decoders. An administrative penalty was not applied.
III — Legal framework

the Community, irrespective of the means of transmission, the following conditions shall apply:

A — Community law


4. Articles 1 to 5 of Directive 95/47 lay down in essence that the Member States shall take all appropriate measures to promote the accelerated introduction of television services in the wide-screen 16:9 aspect ratio. The 16:9 format is specified, whether the television services are transmitted to viewers by cable, satellite or terrestrial means, and the use of particular transmission systems is required.

5. Article 4 states in particular:

(c) Member States shall take all the necessary measures to ensure that the operators of conditional-access services, irrespective of the means of transmission, who produce and market access services to digital television services:

— offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers authorised by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears,

for the provision of information in the field of technical standards and regulations, in the extended 1994 version contained in Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 materially amending for the second time Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations (hereinafter ‘Directive 83/189’), which was valid at the time in question, states in part:

7. ‘Article 1

1. “product”, industrially manufactured products ...

2. “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 the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures;

3. “other requirement”, 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.

9. “technical regulation”, technical specifications and other requirements, 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, as well as laws, regulations or administrative provisions of Member States, except
those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.

agreements by means of which Member States:

— comply with binding Community acts which result in the adoption of technical specifications; ...

8. The first subparagraph of Article 8(1)

Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

B — National law

10. The provisions of national law considered relevant by the court of reference are contained in Royal Decree-Law No 1 of 1997 and Royal Decree No 136 of 1997. To the extent that appears necessary, I have cited them below in the course of my consideration of the legal situation.

9. Article 10(1)

Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary

11. In brief, Royal Decree-Law No 1 of 1997 lays down that operators must register themselves and the decoders in a register being created at the Commission for the Telecommunications Market, and that the marketing of decoders 'without prior certification as to compliance with the rules laid down therein' shall be punishable as a serious or a very serious offence.
12. Royal Decree No 136 of 1997 contains regulations on the establishment of the Register and the registration procedure.

13. Under Spanish law natural or legal persons whose interests may be adversely affected by a general provision of delegated legislation can bring an action for annulment directly before the courts. If the provision has emanated from the Council of Ministers (as in the case of a Royal Decree) and are therefore not laws in the formal sense, action against the provision must be brought under a special procedure before the Tribunal Supremo, whose Third Chamber for contentious administrative proceedings has sole and final jurisdiction to declare provisions of delegated legislation void.

14. The action in the main proceedings relates to the Spanish regulations on the registration of operators and their decoders. Canal Satélite Digital seeks a finding that the provisions are void on the grounds that they are incompatible with Community law.

15. The Tribunal Supremo has put the following questions to the Court for a preliminary ruling in this connection:

‘(1) Does Article 30 of the EC Treaty, in conjunction with the provisions of Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51), preclude national rules which impose on operators of conditional-access services, as a condition of their being permitted to market apparatus, equipment, decoders or systems for the digital transmission and reception of television signals by satellite — including those lawfully manufactured or marketed in other Member States — the following cumulative requirements:

— the obligation to register details of themselves and of the aforementioned apparatus, equipment, decoders and systems in a compulsory official register, such registration being conditional not only on a solemn declaration by the operator concerned that he has complied with the technical specifications, but also on a prior technical report from the national authorities on compliance with the technical and other requirements laid down in the national legislation;
— the obligation, following completion of the registration procedure referred to above, to obtain the appropriate administrative “certification” attesting to compliance with the aforementioned technical and other requirements laid down in the national legislation?

(2) Does Article 59 of the EC Treaty, in conjunction with Articles 1 to 5 of Directive 95/47/EC, preclude national legislation which imposes the administrative requirements set out above on operators of conditional-access services?

(3) Is a national legislative provision which prescribes compliance with such requirements to be regarded as a “technical regulation” for the purposes of the duty to notify the Commission referred to in 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)?

V — Admissibility of the reference for a preliminary ruling

16. The Spanish Government contests the admissibility of the reference for a preliminary ruling on the grounds that the questions referred by the court are of a hypothetical nature and irrelevant to the judgment in the main proceedings. It justifies its view as follows:

17. The registration provisions would be incompatible with Community law only if registration were a constitutive condition for the marketing of the decoders and the provision of conditional-access television signals which they make possible. It maintains that analysis of the Spanish legislation shows, however, that Royal Decree No 136 of 1997, which is the only provision that can be challenged in the main proceedings, in itself relates only to the establishment and operation of the Register and the procedure. Hence, according to the Spanish Government, it neither requires registration nor imposes legal penalties for the provision of services and the marketing of the decoders without prior registration. Royal Decree No 136 of 1997 therefore in itself has nothing to do with those provisions of Community law for which the order for a preliminary ruling seeks an interpretation.

18. The Spanish Government concedes that, as the Tribunal Supremo indicates, a legal requirement to register in conjunction with penalties for placing products on the market without such registration could make the arrangements as a whole appear inadmissible in the light of Community law. It states, however, that the legal requirement and penalties for contravention are not contained in Royal Decree No 136 of 1997 but in Royal Decree-Law No 1 of 1997. Since its approval by Parliament on 3 May 1997, Royal Decree-
Law No 1 of 1997 has had the status of a law and under Spanish law cannot be the subject of an action such as that brought in the main proceedings. Moreover, according to the Spanish Government, the interpretation of the arrangements both in the directives and in the EC Treaty — as these could be a problem only with regard to Royal Decree-Law No 1 of 1997 — is purely hypothetical as it is inapplicable in the main proceedings and the reference for a preliminary ruling is therefore inadmissible according to settled case-law of the Court.

19. The scope of the issue in the main proceedings that is of relevance from the point of view of Community law is described by the Tribunal Supremo as follows: ‘Article 2 of Royal Decree No 136 of 1997, in conjunction with Article 1(2) of Royal Decree-Law No 1 of 1997’. In paragraph 2 of the order for reference, the Tribunal Supremo states that the object of this national procedure is to exercise abstract scrutiny over general provisions of delegated legislation emanating from the Council of Ministers.

20. As a matter of principle, it is for the national court to assess the need to obtain a preliminary ruling to enable it to give judgment in the dispute before it. It should be remembered that in a variety of cases it has been found that the Court lacked jurisdiction to answer questions referred for a preliminary ruling.\(^5\) In the present case the interpretation of Community law is of relevance to the main proceedings in so far as it relates to the validity of national legislation against the background of the Community legislation to be interpreted.

21. In accordance with established case-law of the Court, an examination of admissibility can be based only on the legal classification made by the court of reference in the circumstances of national law. Matters which typically fall within the jurisdiction of the national court relate, inter alia, to national procedural arrangements, in particular questions of the admissibility of particular domestic legal procedures. It is not for the Court ‘to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure’.\(^6\)

22. According to the grounds of the order for reference, the Tribunal Supremo presumes that in the present case, in the context of the Spanish system of legal protection, Royal Decree-Law No 1 of 1997 is relevant for the purposes of a ruling that Royal Decree No 136 of 1997 is void.

23. In view of these considerations, the questions submitted for a preliminary ruling are admissible.

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VI — The first and second questions

24. These questions relate to the compatibility of the Spanish regulations at issue with primary legislation and with Directive 95/47. As explained in the order for reference, these regulations stipulate registration of the decoders and operators and require a prior assessment or technical report to be obtained from the national authorities. Both requirements are preconditions for certification of the marketing of the decoders. I shall now proceed to describe the main features of these two preconditions for certification.

25. First, Canal Satélite Digital points out that the registration provisions as a precondition for certification would infringe Directive 95/47 in that there is no provision in the Directive for such a precondition. The EFTA Surveillance Authority, the Commission and the Spanish Government hold that Directive 95/47 does not contain any provisions on enforcement of the technical specifications it lays down and that Member States are therefore free to choose the means of implementing the directive.

26. Furthermore, Canal Satélite Digital, the Commission and the EFTA Surveillance Authority consider that the registration provisions for both the decoders and the operators are a constitutive condition for the marketing of the decoders and hence are inadmissible restrictions of Articles 28 EC and 49 EC. In their view, registration depends on a decision of the Commission for the Telecommunications Market, which may be negative, and the marketing of the decoders without registration is punishable. In the opinion of the Commission, such regulations are a disproportionate restriction on the fundamental freedoms, particularly as verification of compliance with any legitimate consumer interests could be performed subsequently.

27. The Spanish Government contends that the regulations on registration are only 'declaratory'. It maintains that Royal Decree No 136 of 1997 governs only the establishment of the Register and the organisation of the registration procedure. The administrative penalty laid down in the only additional provision of Royal Decree-Law No 1 of 1997 does not, according to the Spanish Government, relate to the registration provisions. The reference it contains to the Spanish Law transposing the so-called 'telecommunications terminal equipment directive'7 indicates clearly that the threat of an administrative penalty relates only to the marketing of apparatus without the certification of its electromagnetic compatibility required by the law in question, something that is also required by the telecommunications terminal equipment directive. Hence, according to the Spanish Government, it is always possible to market the decoders without the con-

tested registration (either because it has not been applied for or because the application has been rejected) without incurring an administrative penalty. Moreover, the Spanish Government contends that the regulations had been issued to protect public interests. They served to protect the interests of consumers, in particular to protect against abuse of a dominant position. According to the Spanish Government, there was a strong trend towards concentration in the Spanish market in digital satellite television. In order to counter the danger of operators acquiring a dominant market position that could be abused, the authorities were attempting to establish transparency in the market of the operators and the decoders they used. In this connection the Spanish Government also points to its obligation under Article 4(c) of Directive 95/47, which requires Member States to take ‘all the necessary measures’ in the field of conditional-access television services to ensure compliance with Community competition law, in particular if a dominant position appears.

28. Finally, the Spanish Government relies on the judgment of the Court in the Keck case. It thus contends that the registration provisions do not constitute a restriction on market access but merely the regulation of marketing arrangements.

29. Canal Satélite Digital, the Commission and the EFTA Surveillance Authority contest the requirement to obtain a prior assessment or technical report on the decoders from the national authority for decoders to the extent that this is laid down for equipment which has been manufactured or marketed in other Signatory States of the EEA in accordance with the requirements of Directive 95/47. In contrast, the Spanish Government maintains that an assessment is not or is only partially required for products from other Member States, as corresponding tests carried out in the country of manufacture would be taken into account.

A — Directive 95/47

30. The parties in the case disagree as to whether certain provisions of Directive 95/47 preclude Spanish regulations requiring operators and the decoders they use to be registered and a prior assessment or technical report to be obtained from national authorities.

31. The following can be stated in this regard: as the purpose of directives based on Article 100a of the EC Treaty (now, after amendment, Article 95 EC), such as the one in question, is essentially to bring about minimum harmonisation, the contested regulations could infringe Directive 95/47 if a corresponding ‘total harmon-
isation’ of the means of implementing the substance of the directive were to be inferred therefrom. Whether Directive 95/47 regulates those means exhaustively must be determined from the text of the directive or by interpreting its purpose and objective. 9

32. Directive 95/47 is to be viewed in the context of the Community’s overall strategy for establishing the internal market for advanced television technology. It is designed to promote the accelerated development of television services in the widescreen 16:9 aspect ratio and the introduction of high-definition television (HDTV) in Europe and contains provisions for the new market in digital conditional-access television services (pay TV). It contains no express provisions on the manner of enforcing or verifying the technical specifications and other requirements it lays down. Nor do the stated purposes of the directive indicate that certain means of enforcement are necessary. It can therefore not be ruled out a priori that verification of the substance of the directive can in principle also be performed by means of regulations requiring registration in conjunction with a prior assessment or technical report from national authorities.

33. Subject to the remarks which follow, Articles 1 to 5 of Directive 95/47 do not therefore in principle preclude national regulations of the kind in question.

B — Articles 28 EC and 49 EC

34. As the decoders, the marketing of which is allegedly being impeded, are products of a new technological development offering various technical possibilities, it is first necessary to examine which of the so-called fundamental freedoms may be affected and then whether the registration provisions and the requirement to obtain a prior assessment or technical report from the national authorities constitutes inadmissible restrictions of fundamental freedoms.

1. Digital television technology in the context of the fundamental freedoms

35. The registration provisions relate both to the operators of services (scrambled television services via satellite, so-called ‘pay TV’) and to goods (decoders). In digital television services, however, services and goods are closely interrelated, as the decoders make it possible not only to

9 — See, for example, Case C-127/95 Norbrook Laboratories v Ministry of Agriculture, Fisheries and Food [1998] ECR I-1531, paragraph 32 et seq.
convert the digital signals themselves but also to access certain digital television services and overcome the access restrictions on conditional-access digital television services.

36. It was in the Sacchi judgment\(^\text{10}\) that the Court of Justice first adopted a position on the dividing-line between the freedom of movement for goods and the freedom to supply services in the field of television technology. In that case it drew a distinction by ruling that ‘a television signal must, by reason of its nature, be regarded as provision of services’ and that ‘trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods’. The Court subsequently elaborated on this fundamental distinction.\(^\text{11}\)

37. With the decoders in question, the new transmission technology for digital television introduces a new product into international trade. First, they serve to convert television signals from digital to analogue so that television sets of the kind commonly available can display television pictures and sound in the better quality this makes possible, given that the common television transmitters broadcast in both analogue and digital formats. In addition, they enable viewers to gain access to special digital television channels. Finally, they also permit the transmission and use of scrambling software for conditional-access television services (pay TV).\(^\text{12}\) The fact that all these functions are performed by one device must not, however, obscure the fact that two inherently different objects of trade are involved here, which can be classified under different provisions of the EC Treaty.

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\(^{10}\) — Case 155/73 Sacchi [1974] ECR 409, paragraph 6 et seq.


\(^{12}\) — For this reason undertakings such as the plaintiff in the main proceedings operate as suppliers of conditional-access television services and generally also as marketers of decoders.
39. To the extent that decoders give access to special but freely accessible digital television channels and in addition enable viewers to remove the access restrictions on scrambled digital television programmes, access to services is affected. In that respect there is probably no fundamental difference in relation to ‘television signals’ in the conventional sense, as set out by the Court in the Sacchi judgment. The marketing of decoders would therefore, in so far as they thus permit access to services, be covered by Article 49 EC.

41. As the questions run in parallel, I shall attempt to deal with Articles 28 EC and 49 EC together. The Spanish regulations apply equally to operators from Spain and operators from other Member States and irrespective of the country of origin of the decoders. It is necessary to examine whether the registration provisions are a restriction on the respective fundamental freedoms and, if that is the case, whether there are circumstances that might justify permitting such a restriction.

2. Registration provisions

40. Under the Spanish regulations, it is necessary to register both the decoders before they are marketed and the operators of digital television services offering conditional-access television services (pay TV). On the basis of the above considerations, in the case of the operators this could constitute a restriction on the freedom to supply services (pay TV) and in that of decoders a restriction on both the freedom of movement for goods (devices to convert digital signals) and the freedom to supply services (decoding of scrambled television programmes).

The question of the restriction of the free movement of goods and the freedom to provide services

42. If a State establishes penalties for the marketing of goods or the provision of services without complying with national registration provisions and hence calls the lawfulness of their marketing into question, such registration provisions do in any case have constitutive legal effects for trade in the goods or services, and those effects represent a restriction on the fundamental freedoms. By contrast, registration provisions whose legal consequences can be described as ‘declarative’ in so far as they do not affect the lawfulness of the market-

ing of goods or the supply of services, even if non-compliance is punishable, could in principle be compatible with Community law, at least if compliance does not entail particular cost or administrative effort.

43. The parties are of different opinions as to how the provisions of Royal Decree No 136 of 1997 and Royal Decree-Law No 1 of 1997 should be interpreted in this respect. In its order for reference the Tribunal Supremo states that

— 'This Chamber considers that, for these purposes, the most coherent interpretation of the block of legislation referred to above is the following: by means of Article 2 of Royal Decree No 136 of 1997, in conjunction with Article 1(2) of Royal Decree-Law No 1 of 1997 and the Sole Additional Provision thereof, the Spanish Government created a compulsory register in which operators of conditional-access services are required to record details not only of themselves but also of the telecommunications apparatus, equipment, devices and systems which they themselves market or offer. Registration in that register is by no means automatic, but is subject to a prior administrative decision which may be negative ... Nor does registration take place solely on the basis of the "solemn declaration as to compliance with the technical specifications" made by the operator in question; rather, it is subject to a prior technical report by officials of the Ministry of Internal Development on compliance with the technical and other requirements laid down in Royal Decree-Law No 1 of 1997. Only after successfully completing the registration procedure and obtaining the relevant "certification" is it legally possible to market, distribute, transfer or hire out the equipment, systems and decoders necessary for the digital transmission of television signals. Operators engaging in the marketing, distribution, transfer or hiring-out of the aforementioned apparatus without having obtained such certification commit a serious or a very serious offence punishable under administrative law.'

44. The Court can answer the questions submitted for a preliminary ruling only on the basis of the interpretation of national law made by the national court of reference. In this way the use to which the answers to the questions are put in the subsequent course of the main proceedings is closely bound up with the situation of national law as set out for the Court in the order for reference.

45. Hence, if we assume, as does the court of reference, that the marketing of decoders without registering the equipment and the
operators leads to penalties which affect the lawfulness of their marketing, registration is constitutive for the marketing of goods and the supply of services. On that basis, it would therefore be legitimate to speak henceforth of ‘registration requirements’. Such measures would be restrictions, which as a matter of principle are incompatible with the fundamental freedoms guaranteed by Articles 28 EC and 49 EC.

46. With regard to the argument of the Spanish Government that the registration provisions are purely a way of regulating selling arrangements which, in accordance with the judgment of the Court in the Keck case, do not impose any restriction on the fundamental freedoms, suffice it to say that national regulations which make the lawfulness of the marketing of devices contingent on compliance with particular registration provisions cannot be means of regulating selling arrangements within the meaning of the case-law cited.

47. Restrictions on the free movement of goods or the freedom to provide services can, however, be warranted in individual cases on justified grounds, for example if they serve to safeguard imperative require-

48. At this point it has to be stated that the consumer protection which the Spanish Government claims is provided by safeguarding competition is undoubtedly of general interest. It can also be assumed that registration of all operators and their decoders as a means of monitoring the market in digital television services is an appropriate way of creating transparency in that market.

49. There are, however, serious doubts whether the registration provisions in question as a precondition for marketing the decoders and offering digital television services are ‘necessary’ within the meaning of the case-law of the Court. The Court has repeatedly ruled that a restriction on a fundamental freedom can be ‘necessary’ only if the objective cannot be attained by a

15 — Cited in footnote 8.

milder means which restricts the fundamental freedom to a lesser extent or not at all.  

50. In this connection, account must be taken of Article 2(9) of Royal Decree No 136 of 1997 cited by the court of reference, which reads as follows:

— 'In any event, the provisions of this article are without prejudice to the powers of the Commission for the Telecommunications Market ... to limit or prohibit the activities of operators of conditional-access services and of broadcasters in order to protect competition and guarantee plurality in the provision of services.'

51. It therefore appears that the Commission for the Telecommunications Market also performs competition-monitoring functions and that registration in the register kept by that body is designed to facilitate the monitoring of the competitive situation in the digital television market. To that extent, it could also be said — as the Spanish Government argues — that the registration provisions represent an implementation of the provisions of Directive 95/47.

52. However, a national measure, even one whose purpose is to implement a directive, must comply with the limits imposed by the fundamental freedoms, and in particular be 'necessary and appropriate' to attaining the objectives. If constitutive registration requirements were the only effective means of monitoring a market in which there was the danger of abuse of a dominant position, similar provisions would also have to exist for other markets in which this danger is equally present, which is clearly not the case. Moreover, the Spanish Government does not argue that the competitive situation in the market for digital television services differs to such an extent from that in other equally vulnerable markets that the monitoring of this market situation could not be achieved, or not achieved with sufficient effectiveness, by means of conventional measures that place less restrictions on the fundamental freedoms.

53. A national arrangement such as the one described in the main proceedings, which requires operators and decoders to be registered as a necessary precondition for the lawful marketing of such apparatus, is therefore incompatible with Articles 28 EC and 49 EC.
3. Assessment or technical report by the national authorities

54. The parties disagree as to whether and to what extent tests of compliance with the technical specifications of Directive 95/47 previously conducted in other Member States are taken into account in the assessments or technical reports (hereinafter also referred to as evaluation) that have to be obtained from the national authorities or may even lead to these requirements being waived.

55. Under national legislation, as described by the national court of reference in the first question in the order for reference, the Spanish regulations impose

— 'on operators of conditional-access services, as a condition of their being permitted to market apparatus, equipment, decoders or systems for the digital transmission and reception of television signals by satellite — including those lawfully manufactured or marketed in other Member States —, the following cumulative requirements:

— ... a prior technical report from the national authorities on compliance with the technical ... requirements ...'.

56. The following remarks are in order in this connection. Ensuring compliance (here by means of controls) with technical requirements for decoders produced in Spain or marketed in that country for the first time is not only permissible but also required by Directive 95/47. However, Directive 95/47 deals with an area of the internal market which has been harmonised in accordance with Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now, after amendment, Article 95 EC). Hence it should be assumed that regulations transposing Directive 95/47 exist in every Member State and that they govern decoders manufactured or marketed there. As has been explained, the Spanish regulations nevertheless clearly require a prior assessment or technical report from the national authorities, without distinction for decoders of Community origin.

57. In accordance with settled case-law of the Court, such 'double checks' constitute unjustified restrictions of the fundamental freedoms if and in so far as they again verify compliance with conditions which have already been checked in the country of origin. 18 This applies in particular where there is a presumption that the means of

supervision are sufficiently effective and conditions are sufficiently equivalent thanks to Community harmonisation measures.  

58. Hence, in so far as national regulations make a prior assessment or prior technical report from national authorities a condition for the lawful marketing of the decoders in question, which have been lawfully manufactured or marketed in other Member States, as described in the dispute in the main proceedings, they are incompatible with Articles 28 EC and 49 EC.

VII — The third question

59. In its third question the court of reference seeks to ascertain whether the registration provisions and the prior assessment or technical report from the national authorities, in so far as they are necessary conditions for approval of the marketing of the decoders, are 'technical regulations' within the meaning of Directive 83/189, which should have been communicated to the Commission.

60. As the Spanish regulations in question were issued in 1997, this question must be examined in the light of the wording of Directive 83/189 contained in Directive 94/10  

61. The Commission and Canal Satélite Digital emphasise the constitutive effect of the Spanish regulations for the marketing of the decoders. In their opinion these are 'technical regulations', as compliance therewith is a condition for the lawful marketing of the decoders. The Spanish Government disputes the applicability of Directive 83/189 and relies upon its description of the registration provisions under national law as being purely declarative. In its view, the regulations cannot be 'technical regulations' within the meaning of Directive 83/189, as the term relates only to national provisions, the observance of which is compulsory, de jure or de facto, for the marketing of the appliances.

62. The Commission, Canal Satélite Digital and the Belgian Government are of the opinion that the Spanish provisions in question relate to the configuration of the decoders. They contend that they are 'technical regulations' in the form of 'other requirements'. The EFTA Surveillance Authority takes the view that these reg-


lations are not ‘other requirements’, as they have no direct impact on the characteristics of the decoders in question.

63. The Spanish Government and the EFTA Surveillance Authority further point out that these regulations were expressly declared to be measures transposing Directive 95/47 and hence that the exemption contained in the first subparagraph of Article 10(1) of Directive 83/189 applies. According to the abovementioned parties, the purpose of Article 10 is to simplify administrative procedures. The Spanish regulations in question were communicated to the Commission in accordance with the special notification requirements of Directive 95/47 and in that context declared to be a mechanism for verifying compliance with the technical specifications it contains. The fact that the directive contains no provisions for registration and that in that respect the national measure goes beyond the content of the directive is irrelevant, in their opinion, provided that it serves to attain the objectives of the directive, which is the case here. The Belgian Government, Canal Satélite Digital and the Commission essentially hold the opposite view.

64. Lastly, the Spanish Government points to the compatibility of the system of registration with Directive 97/13/EC on telecommunications services. In its opinion, the exemption set out in the first subparagraph of Article 10(1) of Directive 83/189 also applies to Directive 97/13. The fact that the latter directive did not come into force until after the Spanish provisions is, it contends, immaterial. The Spanish Government maintains that the national regulations in question constituted timely transposition, which was acknowledged by Community law.

65. It must first be observed that the regulations on registration of the operators and decoders on the one hand and the requirement to obtain a prior assessment or technical report from the national authorities on the other are two different things for the purposes of Directive 83/189 and must therefore be dealt with separately here.

A — Registration provisions

66. As indicated by the court of reference, it is to be taken as a premise that the Spanish regulations make the lawful marketing of the decoders contingent on registration of the operators and of the decoders they use.

67. It must therefore be examined whether these regulations should have been notified under Article 8(1) of Directive 83/189. This would apply if they were 'technical regulations' within the meaning of Article 1(9) of Directive 83/189 and the exemption set out in the first subparagraph of Article 10(1) did not apply.

68. It must first be clarified whether the Spanish regulations are arrangements for the marketing of 'products' within the meaning of Article 1(1) of Directive 83/189. Registration relates primarily to the decoders. These are to be regarded as 'products' within the meaning of the Directive, at least in so far as they convert digital television signals into analogue ones. The decoders also perform an ancillary technical function for the provision of services, namely access to special digital television channels. In addition, by receiving the descrambling software, they enable users to lift the access restrictions for pay TV.

69. Lastly, registration also relates to the operators of services, that is to say the operators of digital conditional-access television services. It is therefore necessary to examine whether such registration provisions for operators of services and for equipment which, among other things, facilitate the provision of services fall within the scope of Directive 83/189. The Spanish regulations therefore give grounds for exploring the difference between national provisions on the marketing of products and those on the provision of services.

70. Services were not covered in the version of Directive 83/189 in force at the time in question. It was only as a result of the last amendment of the 1998 codified directive that certain services, namely Information Society services, were expressly brought within the scope of the directive. Hence, as a matter of principle, national provisions regulating the supply of services per se are excluded from the scope of the directive. Services were not covered in the version of Directive 83/189 in force at the time in question. It was only as a result of the last amendment of the 1998 codified directive that certain services, namely Information Society services, were expressly brought within the scope of the directive. Hence, as a matter of principle, national provisions regulating the supply of services per se are excluded from the scope of the directive.

22 — This is of particular importance since the Court dealt with the legal consequences of breach of the notification requirements in Case C-194/94 CIA Security International v Signalon and Securitel [1996] ECR I-2201.

23 — ‘Television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC (OJ 1989 L 298, p. 23) are excluded, however (Article 1(2) of Directive 98/34/EC, in the version contained in Directive 98/48/EC). According to the definition given in Directive 89/552/EEC, ‘television broadcasting’ means, inter alia, ‘the initial transmission ... by satellite, in unencoded or encoded form, of television programmes intended for reception by the public’. Hence, the provision of digital television programmes as such does not fall within the scope of the directive in the version in force at that time.
condition for the provision of certain services. As in fact the regulation of services was the central concern, it appears legitimate to ask whether in such cases the provisions are 'provisions, the observance of which is compulsory ... in the case of marketing or use [of the products]', and hence should have been notified.

71. Notifiable provisions for 'products' could possibly be distinguished from non-notifiable or not necessarily notifiable provisions for 'services' by considering the purpose of the national provision regarding marketing. However, this approach seems to offer little help, as differentiation is likely to be particularly difficult where national provisions on the marketing of products consider both the characteristics of the products themselves and the regulation of the services for which they are to be used.

72. In view of the fact that Directive 83/189 was a harmonisation measure based, inter alia, on Article 100 of the EC Treaty (now Article 94 EC) and the amending Directive 94/10 was passed, inter alia, on the basis of Article 100a of the EEC Treaty (now, after amendment, Article 95 EC) and in the light of the distinction in the Treaty between the free movement of goods and the freedom to provide services, such a differentiation is also unlikely to be decisive in settling the question of the scope of the directive.  

73. For Directive 83/189 to apply, the registration requirement therefore need relate neither to the possible subject of the requirement (e.g. providers of television services) nor to particular functions of the products (e.g. access to special digital television channels and removal of the restriction on access to television services) if it is clear that the registration provisions relate to the marketing of 'products' within the meaning of Article 1(1) of Directive 83/189. This holds true in the present case.

74. Hence, if the Spanish registration provisions relate to the marketing of 'products', it is necessary to examine whether they are 'technical regulations' within the meaning of Article 1(9) of Directive 83/189. As defined in Directive 83/189, 'technical regulations' are 'technical specifications' (Article 1(2)) or 'other requirements' (Article 1(3)).

75. As the Spanish registration provisions are not provisions relating only to the 'characteristics' of the decoders, they are

24 — To that extent, the first recital in the preamble of the original version of Directive 83/189 is misleading. In the amended version contained in Directive 94/10/EC reference is made only to 'the smooth functioning of the internal market'.
not ‘technical specifications’ within the meaning of the directive. They could therefore be ‘other requirements’. National provisions come under this heading if they affect the ‘life cycle [of the product] after it has been placed on the market,... where such conditions can significantly influence the composition or nature of the product or its marketing’.

76. The scope of Directive 83/189 was widened in 1994, when the clause relating to ‘other requirements’ was introduced. In order to interpret the provision, it is necessary to refer to the case-law of the Court on the definition of ‘technical specifications’. According to that case-law, only national provisions which relate to the characteristics of a product fall within the scope of Directive 83/189. The wording of the provision on ‘other requirements’ also assumes that compliance with the national regulation affects the substance (‘composition’, ‘nature’) of the product. The provision was extended by the addition of the term ‘marketing’.

77. As according to the submissions of the Spanish Government the purpose of the registration provisions is to monitor the market in digital television services, compliance therewith should have no effect whatsoever on the characteristics of the products or their marketing. The registration of operators of conditional-access digital television services and the decoders which they market, as provided for in the Spanish regulations, cannot therefore constitute ‘other requirements’ within the meaning of Article 1(3) of Directive 83/189.

78. It must also be observed that the Spanish regulations, in so far as they make the lawful marketing of decoders contingent on registration of the decoders and of the operators, do not constitute ‘technical regulations’ notifiable under Article 8(1) of the directive.

79. In case the Court does not endorse these arguments, it is also necessary to examine the Spanish Government’s argument that the non-notification of the registration provisions in accordance with the first subparagraph of Article 10(1) of Directive 83/189 was legitimate in view of the pre-transposition effects of Directive 97/13.

80. This line of argument clearly relies on the judgment of the Court in the Inter-


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81. In accordance with the case-law of the Court, the prior legal effects of a directive stem from the principle of sincere cooperation resulting from Article 10 EC. Exemptions — such as that stated in the first subparagraph of Article 10(1) of Directive 83/189 — are, in accordance with consistent case-law, to be interpreted narrowly and the principle of sincere cooperation hardly appears an appropriate instrument for extending the scope of Community legislation which grants individual Member States exemptions from the application of Community law in narrowly defined circumstances.

82. It follows that a Member State cannot rely on Community law which at the time of the notification requirement was not yet in force in order to claim the exemption provided for in the first subparagraph of Article 10(1) of Directive 83/189.

83. As described by the court of reference, the Spanish provisions make the lawful marketing of decoders additionally contingent on an assessment or technical report from the Spanish authorities, which is intended to confirm that the decoders comply with the technical requirements of Directive 95/47.

84. The third sentence of Article 2(4) of Royal Decree No 136 of 1997 reads as follows:

— '... In any event, it [the Commission for the Telecommunications Market] shall request the mandatory report produced by the technical services of the Directorate-General of Telecommunications at the Ministry of Internal Development on compliance with the provisions of Royal Decree-Law No 1 of 31 January 1997 transposing into Spanish law Directive 95/47/EC of the European Commission (sic) of 24 October 1995 on the use of standards for the transmission of television signals and approving additional measures to liberalise the sector [final wording incorporating corrections].'

28 — Article 5 of the EC Treaty at the time in question.
85. It is necessary to examine whether the notification requirement laid down in Article 8(1) of Directive 83/189 might be inapplicable in view of the first subparagraph of Article 10(1) of Directive 83/189 in so far as the regulations in question were national transposition measures notified in the context of Directive 95/47.

The technical requirements contained in Articles 1 to 5 of Directive 95/47 are 'technical specifications' within the meaning of Article 1(2) of Directive 83/189.

86. It appears that by evaluating the decoders the Spanish arrangements are intended to ensure compliance with the technical conditions of Directive 95/47.

87. In these circumstances, the first subparagraph of Article 10(1) of Directive 83/189 applies.

VIII — Conclusion

88. On the basis of these considerations, I propose that the Court should answer the questions submitted by the Tribunal Supremo as follows:

(1) Article 28 EC is to be interpreted as precluding national rules which establish for operators of conditional-access services as a condition for the lawful marketing of the necessary apparatus — including apparatus which has been lawfully manufactured or marketed in other Member States — administrative requirements such as those described in the main proceedings.
(2) Article 49 EC is to be interpreted as precluding national arrangements which establish for operators of conditional-access services administrative requirements such as those described in the main proceedings.

(3) Articles 1 to 5 of Directive 95/47/EC are to be interpreted as not precluding national arrangements, such as those described in the main proceedings, provided they are compatible with Community law of a higher order.

(4) Directive 83/189/EEC in the version contained in Directive 94/10/EC is to be interpreted as meaning that national regulations requiring operators of conditional-access services, as a condition for the lawful marketing of the necessary apparatus,

— to register themselves and the apparatus in an official register are not ‘technical regulations’ within the meaning of Article 1(9) of the directive;

— to present a prior assessment or technical report from the national authorities of the kind described are ‘technical regulations’ within the meaning of Article 1(9) of the directive and should have been notified unless the conditions set out in the first subparagraph of Article 10(1) of the Directive apply.