

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 27 January 2000 *

1. In civil proceedings between individuals arising from a contract, should a national court disapply a national technical regulation which, although notified to the Commission in accordance with Council Directive 83/189,¹ was adopted before the expiry of the 'standstill' period applicable under that directive? That is the question posed in the present case, in the wake of the Court's judgment in *CIA Security*.²

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

The Community legislation

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

3. Article 1 contains, *inter alia*, the following definitions:

- '1. "product", any industrially manufactured product and any agricultural product;
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

* Original language: English.

1 — 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 in particular by Council Directive 88/182/EEC of 22 March 1988, OJ 1988 L 81, p. 75, and 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.

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

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

4. Article 8 provides, *inter alia*:

The term “technical specification” also covers production methods and processes used in respect of agricultural products..., products intended for human and animal consumption, and medicinal products..., as well as production methods and processes relating to other products, where these have an effect on their characteristics.³

‘1. Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation...; 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.

...

...

9. “technical regulation”, technical specifications... 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...

The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it...

10. “draft technical regulation”, the text of a technical specification..., the text being at a stage of preparation at which substantial amendments can still be made.’

2. The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

3 — The extension of the definition contained in the second subparagraph of Article 1(2) was not present in the original version of the Directive; it was introduced by Directives 88/182 and 94/10, cited in note 1.

...

5. Article 9 contains the following provisions:

poses to take on such detailed opinions. The Commission shall comment on this reaction.

'1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).

3. Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within the three months following that date, the Commission announces its intention to propose or adopt a Directive, Regulation or Decision on the matter in accordance with Article 189 of the Treaty.

2. Member States shall postpone:

...

...'

— ... for six months the adoption of any... draft technical regulation,

Under Article 9(7), those standstill requirements do not apply 'where, for urgent reasons, occasioned by serious and unforeseeable circumstances, relating to the protection of public health or safety, the protection of animals or the preservation of plants, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible.'

from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market.

The Member State concerned shall report to the Commission on the action it pro-

6. Article 10(1) of Directive 83/189 provides that Articles 8 and 9 are not to apply to technical provisions by means of which Member States, *inter alia*, 'comply with

binding Community acts which result in the adoption of technical specifications’.

stressed the usefulness of the notification and standstill requirements in the directive in order to prevent the creation of new technical barriers to trade. It concluded:

7. Directive 83/189 was transposed into Italian law, as was pointed out at the hearing, by Law No 317 of 21 June 1986.⁴ Article 1 of that Law, as amended,⁵ defines terms in a way similar, though not identical, to the directive provisions cited above. Article 9 transposes, essentially, Articles 8, 9 and 10 of the directive. It provides in particular that technical regulations may not be brought into effect before three months from their communication to the Commission, that if within that period there are detailed observations from the Commission or observations from a Member State concerning possible technical barriers to trade implementation must be deferred for four or six months as the case may be, and that if within the same three-month period the Commission gives notice of proposed Community legislation implementation is to be deferred for 12 months.

‘Member States’ obligations are therefore clear and unequivocal:

1. they must notify *all* draft technical regulations falling under the Directive;
2. they must suspend the adoption of the draft technical regulations automatically for three months, other than in the special cases covered by Article 9(3)⁷ of the Directive;
3. they must suspend the adoption of the draft technical regulations for a further period of three or nine months depending on whether objections have been raised or whether Community legislation is envisaged.

8. On 1 October 1986, the Commission published a communication concerning the non-respect of certain provisions of Directive 83/189.⁶ In that communication, it

4 — *Gazzetta Ufficiale della Repubblica Italiana* (‘GURI’) 1986 No 151, p. 3.

5 — Most recently by Law No 52 of 6 February 1996, GURI Supplemento ordinario No 24, p. 1, Article 46 of which implements Directive 94/10.

6 — Commission communication concerning the non-respect of certain provisions of Council Directive 83/189/EEC, OJ 1986 C 245, p. 4.

7 — The equivalent of Article 9(7) in the version quoted above.

It is clear that the failure by Member States to respect their obligations under this information procedure would lead to the creation of serious loopholes in the internal market, with potentially damaging trade effects.

not been notified in accordance with the directive.'

The Italian legislation in issue and the notification procedure

The Commission therefore considers that when a Member State enacts a technical regulation falling within the scope of Directive 83/189/EEC without notifying the draft to the Commission and respecting the standstill obligation, the regulation thus adopted is unenforceable against third parties in the legal system of the Member State in question. The Commission therefore considers that litigants have a right to expect national courts to refuse to enforce national technical regulations which have not been notified as required by Community law.'

9. On 30 April 1996, in its judgment in *CIA Security*,⁸ the Court of Justice examined the position taken by the Commission in that communication and ruled, *inter alia*: 'Articles 8 and 9 of Directive 83/189... are to be interpreted as meaning that individuals may rely on them before the national court which must decline to apply a national technical regulation which has

10. Italian Law No 313 of 3 August 1998⁹ contains provisions on the labelling of origin of extra virgin olive oil, virgin olive oil and olive oil.

11. Article 1(1) of that Law provides, in summary, that such oils may be marketed with an indication that they were 'produced' or 'made' in Italy only if the entire process of harvesting, production, processing and packaging has taken place in Italy. The labelling of oil obtained in Italy wholly or partly from oils originating elsewhere must state that fact, indicating the relevant percentages and country or countries of origin (Article 1(2)); any such oil not bearing those indications must be disposed of within four months from the entry into force of the Law or withdrawn from sale thereafter (Article 1(4)). The provisions of Articles 2 to 4 are not directly relevant to the present case, although Article 2 concerns the separate storage of different oils by olive oil refining plants and Article 4 concerns supervision by customs and other

8 — Cited in note 2; see paragraphs 36 to 55 of the judgment, and point 2 of the operative part.

9 — GURI No 201 of 29 August 1998.

authorities. Article 5, however, lays down penalties for infringements; in particular, any person producing, possessing for sale or placing on the market virgin or extra virgin olive oil not in compliance with Article 1 incurs an administrative fine of ITL 800 000 per 100 kilograms of oil.

cial Journal of the European Communities,¹⁰ stating that the three-month standstill period under Article 9(1) of Directive 83/189 — specifically described as the ‘period during which the draft may not be adopted’ — ran until 5 August 1998 (although it might be questioned whether that date should not have been 4 August if notification took place on 4 May).

12. It appears from indications in the GURI that the draft of Law No 313 was first presented to the Italian Parliament on 27 January 1998; it was examined by the Senate in February and March of that year and by the Chamber of Deputies in April and June, being finally approved by the latter on 28 July and by the former on 29 July 1998.

15. In a text appended to the notification in the Official Journal, the Commission drew attention to the fact that, according to the judgment in *CIA Security*, national courts must decline to apply a national technical regulation which has not been notified in accordance with Directive 83/189, so that the technical regulations concerned are rendered unenforceable against individuals.

13. Meanwhile, the Commission, having become aware of the draft, had requested the Italian authorities to notify it in accordance with Directive 83/189, which they did on 4 May 1998. The Court has not been informed whether, in accordance with Article 8(1) of Directive 83/189, they also provided a statement of the grounds which made its enactment necessary. Nor has it been suggested that there was any recourse to the accelerated procedure provided for in Article 9(7).

16. On 23 July 1998, within the three-month period referred to above, the Commission informed the Italian authorities of its intention to legislate in the field covered by the draft Law and called on them to postpone its adoption for a period of 12 months from notification — that is to say until 4 May 1999 — in accordance with Article 9(3) of Directive 83/189.

14. The Commission then notified the draft Law to the Member States and on 10 June 1998 published a notification in the *Offi-*

17. Law No 313 was none the less adopted — that is to say, signed by the

10 — OJ 1998 C 177, p. 2.

President, the Prime Minister and the Minister for Agriculture, following final approval by both houses of the Italian Parliament — on 3 August 1998, two days before the end of the initial three-month standstill period as indicated in the notice in the Official Journal. On the following day, the Commission informed the Permanent Representative of the Italian Republic that it would initiate proceedings under Article 169 of the EC Treaty (now Article 226 EC) if the Law were published in the GURI and stated that the Law would be unenforceable against individuals if published before 4 May 1999.

18. On 4 August 1998, still within the initial three-month period, the Commission received detailed opinions, within the meaning of Article 9(2) of Directive 83/189, on the draft Law from the Spanish and Portuguese Governments and on 5 August it received comments, within the meaning of Article 8(2), from the Netherlands Government.

19. On 29 August 1998, Law No 313 was published in the GURI as adopted on 3 August, and it entered into force on the following day.

main proceedings arose. However, a number of subsequent developments may be mentioned, to paint a slightly fuller picture of the relevant context.

21. On 22 December 1998, the Commission adopted the legislation it had announced to the Italian authorities, in the form of Regulation No 2815/98.¹¹ That regulation lays down rules governing designations of origin on the labelling or packaging of virgin and extra virgin olive oils, and prohibits the use of such a designation for olive oils and olive-residue oils. For virgin and extra virgin olive oils, the designation may be either a registered protected designation of origin or protected geographical indication,¹² or the name of a Member State, the European Community or a third country. Where the designation of origin is the name of a Member State, it must be that of the State where the oil was 'obtained'; in other words, the mill in which the oil was extracted must be located there. Blends must be indicated as such but, if more than 75% of the oil was obtained in one Member State, that fact may also be stated, together with the relevant percentage.

22. Regulation No 2815/98 became applicable on 1 April 1999.

Subsequent developments

20. The paragraphs above summarise the situation as it stood when the dispute in the

11 — Commission Regulation (EC) No 2815/98 of 22 December 1998 concerning marketing standards for olive oil, OJ 1998 L 349, p. 36.

12 — That is to say, a designation of origin or geographical indication registered in accordance with Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ 1992 L 208, p. 1.

23. On 27 January 1999, the Commission delivered a reasoned opinion to Italy in accordance with Article 169 of the EC Treaty, asserting that the adoption and entry into force of Law No 313 infringed Article 9 of Directive 83/189. That procedure does not appear to have reached the stage of being brought before the Court.

24. On 17 March 1999, however, the Italian Government brought proceedings against the Commission before the Court of Justice in Case C-99/99, seeking the annulment of Regulation No 2815/98. It argues, essentially, that the purpose of an indication of origin is to inform the consumer of the distinctive qualities of the finished product, which derive largely from the area of origin of the olives rather than where they were pressed and which are just as present in ordinary olive oil as in virgin and extra virgin oils.

25. It further transpired at the hearing that a Law repealing Articles 1 and 2 of Law No 313 was currently at the draft legislative stage.

ings, ordered 648 litres of 'Dante' extra virgin olive oil from Van den Bergh, a division of Unilever Italia SpA. That oil was delivered to Central Food on 29 September. From what was said at the hearing, it appears that it was oil a certain proportion of which originated in Spain and Greece. On 30 September 1998, Central Food wrote to Unilever Italia, stating that the oil supplied was not labelled in accordance with the provisions of Law No 313 and that it was thus unable to pay the relevant invoice. It requested Unilever Italia to take the oil back and supply oil labelled in accordance with the Law.

27. On 2 October 1998, Unilever Italia replied to Central Food that the Commission had enjoined Italy not to apply any new national provisions on the labelling of olive oil until after 4 May 1999. The provisions of Law No 313 could thus not be applied before that date, and the oil supplied was in complete conformity with the legislation in force.

The facts of the case in the main proceedings

26. On 25 September 1998, Central Food SpA, the defendant in the main proceed-

28. Central Food still refused to accept or pay for the oil, claiming that its position was supported by that of many distribution groups. Unilever Italia therefore brought

proceedings in the Pretura Circondariale di Milano (District Magistrate's Court, Milan), seeking a payment order against Central Food.

29. On 6 November 1998, before hearing submissions from Central Food, that court made an order referring the following question to the Court of Justice for a preliminary ruling:

'May a national provision which has been promulgated and entered into force in the Member State (Law No 313 of 3 August 1998) be disapplied by a national court called upon to issue an order for payment in relation to the supply of extra virgin olive oil labelled in a manner not in accordance with the provisions of the aforementioned national provision, considering that, following the notification and the subsequent examination of a draft national Law concerning the labelling of extra virgin olive oil, virgin olive oil and olive oil, the European Commission, on the basis of Article 9(3) of Council Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations, formally requested the notifying State not to legislate, prescribing a period (until 14 September 1999) ¹³ in respect of the marketing rules for olive oil, pending the adoption of a Community regulation on the matter at issue?'

13 — It is common ground that the date given here is the result of an error, and should read '4 May 1999'.

Procedure

30. Written observations were submitted to the Court by Unilever, by the Belgian, Danish, Italian and Netherlands Governments and by the Commission. Central Food, although invited to submit observations, did not do so. At the hearing, oral argument was presented by Unilever, the Italian Government and the Commission.

Admissibility of the reference

31. At the hearing there was discussion as to the precise provisions of Law No 313 which were in issue in the present case — namely whether it was those relating to the use of the terms 'made (or produced) in Italy' in Article 1(1) or those concerning the labelling of oils originating wholly or partly in other Member States in Article 1(2). The agent for the Italian Government submitted that the reference for a preliminary ruling was inadmissible on the ground that it was not clear which provisions were in issue.

32. I cannot agree. It is clear from the order for reference and the national case-file accompanying it that the dispute on which the national court has to decide turns on the enforceability of the labelling requirements in Law No 313 and that a ruling is

sought on whether those requirements are enforceable in the light of Directive 83/189. The fact that it is not specified exactly which of two apparently related requirements is alleged to have been transgressed in the context of the national proceedings should not prevent the Court from apprehending the issues and giving an appropriate ruling in reply to the national court.

light of Directive 83/189, which was in force throughout the examination of the draft Law by the Italian legislature, at the time of its adoption, throughout the initial three-month standstill period and at the time of receipt both of the detailed opinions of the Spanish and Portuguese Governments, extending the standstill period to six months, and of the Commission's communication of its intention to legislate, extending it to 12 months.

The applicable version of the Community legislation

33. Another preliminary point which may merit brief attention concerns the appropriate version of the Community legislation to be considered here.

34. Directive 83/189 has been repealed, and its provisions consolidated and extended, by Directive 98/34,¹⁴ which entered into force on 10 August 1998.¹⁵ Law No 313 entered into force, and the facts giving rise to the dispute in the main proceedings all took place, after that date. However, it seems clear that the enforceability of the Law falls to be assessed in the

35. In any event, no changes material to the issues in the present case were made to the relevant provisions of Directive 83/189 by Directive 98/34. Although, less than one month after its adoption, the latter was amended by Directive 98/48, those amendments — the deadline for transposition of which was in any event 5 August 1999 — merely extend the scope of the relevant provisions to cover 'Information Society services' — namely those requested and provided, at a distance, by electronic means — an area quite extraneous to the dispute in the present case.

The substantive issues

14 — Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, OJ 1998 L 204, p. 37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ 1998 L 217, p. 18.

15 — Directive 98/34 contains no deadline for transposition, but maintains the deadlines for transposition of Directive 83/189 and its amending directives.

36. There are, essentially, two substantive issues to be addressed when answering the

national court's question. First, it must be ascertained whether the relevant national rules constitute a technical regulation within the meaning of Directive 83/189, requiring notification at the draft stage. If so, it must then be determined what effects may ensue from a failure to comply with any of the standstill periods laid down in Article 9 following compliance with that notification requirement.

37. In addressing the issues, I shall consider only the rules on labelling in Article 1 of the Law, since labelling is specifically referred to in the order for reference and appears clearly from the case-file and the documents produced by Unilever Italia to be the only issue in the main proceedings.

38. It must also be borne in mind that Directive 83/189 has been transposed into Italian law by Law No 317 of 21 June 1986, as amended. However, since the questions in the case have been debated entirely — save for a brief reference at the hearing — without regard to the Italian implementing legislation, I shall consider them, in the main part of my analysis, purely from the point of view of the Community directive.

Are the labelling rules in Law No 313 technical specifications to which Articles 8 and 9 of Directive 83/189 apply?

39. First, it should be stressed that whether the other rules in Law No 313 constitute technical specifications or not cannot affect the status of the labelling rules. A law may group together different provisions, some of which fall within the scope of Directive 83/189 while others do not.

40. The Italian Government argues that (i) the labelling rules do not fall within the scope of Directive 83/189 at all and/or (ii) that they were enacted in compliance with Directive 79/112,¹⁶ so that, in accordance with Article 10(1) of Directive 83/189, Articles 8 and 9 do not apply.

Are the labelling rules covered by the definition in Directive 83/189?

41. The Italian Government submits that labelling rules intended to protect the

¹⁶ — Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, OJ 1979 L 33, p. 1, as amended.

consumer by requiring accurate information as to country of origin on the label are not technical specifications within the meaning of Article 1(2) of Directive 83/189. Admittedly, they concern 'the name under which the product is sold,... packaging, marking or labelling', as specified in the first subparagraph of that provision. However, that subparagraph relates only to industrial products. It was the *second* subparagraph, added during a later amendment, which extended the definition of a technical specification to cover 'production methods and processes' for agricultural products, 'where these have an effect on their characteristics'. The labelling rules in Law No 313 do not purport to lay down technical requirements regarding the production of olive oil, which are already provided for in the Community rules on the common organisation of the market in oils and fats, nor do they prohibit marketing or impede the free movement of goods within the Community.

42. The Commission retorts that the Italian authorities notified the draft Law in accordance with Directive 83/189, from which it may be deduced that it constitutes a technical regulation. Under Article 1(2) of Directive 83/189, moreover, labelling requirements are technical specifications, whether the products they relate to are industrial or agricultural.

43. The Commission's argument based on the actual notification of the Law cannot, I

consider, be decisive as regards establishing that the rules are technical specifications. Notification was at the Commission's request, not on the initiative of the Italian authorities, although one might well have expected them to point out their reservations at the time of notification had they then been convinced that any part of the Law did not fall within the scope of the directive, and we have not been told that they did so.

44. The Italian Government's argument that the labelling rules in issue are not technical specifications may be dealt with very simply. The directive as it stood at the relevant time defined a product as 'any industrially manufactured product and any agricultural product'. Olive oil is an agricultural product. It further defined a technical specification as one laying down 'the characteristics required of a product such as... labelling'. Labelling is the subject-matter of the rules in issue in the present proceedings.

45. The argument that there is no obstacle to the free movement of goods seems to turn on the contention that the labelling rules in issue do not impose any obligation to mention Italian origin on the label but merely lay down the conditions for its use should the labeller choose to do so. There is

thus no actual labelling requirement, and no impediment to intra-Community trade.

46. I do not consider that a labelling rule may be considered any less of a requirement simply because it may prohibit, rather than impose, the mention of certain particulars in certain circumstances. In addition, the rules as to indication of non-Italian origin in Article 1(2) of Law No 313 — which appear to be relevant in the main proceedings since, we have been told, the disputed oil is partly of Greek and Spanish origin — have a specific effect on trade between Member States (and so, by extension, do those in Article 1(1)).

47. I therefore have no difficulty in concluding that the labelling rules in Article 1 of Italian Law No 313 constitute technical specifications falling within the scope of Directive 83/189.

Do the labelling rules constitute compliance with Directive 79/112?

48. Article 10(1) of Directive 83/189 exempts provisions by means of which Member States comply with binding Community acts which result in the adoption of

technical specifications. The Italian Government submits that the rules in issue comply with an obligation laid down in Directive 79/112, Article 3(1)(7) of which requires origin or provenance to be included on the labelling of a foodstuff where failure to do so might materially mislead the consumer as to its true origin or provenance.

49. The Commission considers that the directive provisions cited are couched in general terms, allowing the Member States a certain margin for manoeuvre and that it is precisely that margin that Directive 83/189 is intended to regulate.

50. This is the first time the Court has been called upon to interpret Article 10(1) of Directive 83/189 or define what is meant by compliance with 'binding Community acts which result in the adoption of technical specifications'. However, it is clear that Directive 79/112 is a binding Community act; Article 22 requires Member States to amend their laws in order to comply with it. And, as I have concluded above, labelling requirements are technical specifications.

51. Under Article 3(1) of Directive 79/112, 'indication of the following particulars alone shall be compulsory on the labelling of foodstuffs:

...

(7) particulars of the place of origin or provenance in the cases where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff'.

52. If, as the Italian Government says, the disputed Italian rules do not in fact require any indication of origin on labelling, then it is very difficult to see how they could transpose that provision, which does appear to require such an indication.

53. In any event, as the Commission pointed out at the hearing, Directive 79/112 was transposed into Italian law in 1982, by Presidential Decree No 322 of 18 May 1982,¹⁷ under Article 3(g) of which the labelling of foodstuffs is to include 'the place of origin or provenance'. Since it contains no further qualification, that provision presumably requires such

particulars to be mentioned in all cases, and not merely where failure to do so might materially mislead the consumer.¹⁸ That being so, I cannot discern any grounds for considering that any further labelling rules, such as those in Law No 313, were in any way necessary to complete the transposition of Directive 79/112.

54. Finally, the fact that the Italian Government notified the Law in accordance with Directive 83/189, at the Commission's request, whilst not conclusive evidence that the labelling rules constitute technical specifications, does suggest that the Italian Government did not at that time consider itself to be enacting legislation implementing obligations under a binding Community act, in which case there would have been no requirement for notification under that directive. It would seem an implausible concatenation of circumstances that the Italian authorities should have left Article 3(1)(7) of Directive 79/112 inadequately implemented for many years, should then have experienced the need to repair the inadequacy, with specific regard to olive oil, with such urgency that they were compelled to disregard the Commission's enjoiner not to legislate during a limited period, pending forthcoming Community legislation, but should have omitted

17 — GURI No 156 of 9 June 1982, p. 4167. Article 3(h) of this decree was considered by the Court in Case C-83/96 *Provincia Autonoma di Trento and Another v Dega* [1997] ECR I-5001.

18 — Although the general requirement that labelling must not mislead the purchaser in that regard is contained in Article 2 both of Directive 79/112 and of the Presidential Decree.

to mention the fact that they were implementing Directive 79/112 when notifying the draft legislation at the Commission's behest.

55. I conclude that the labelling rules in Law No 313 are technical specifications which required notification to the Commission at the draft stage, not being exempted by virtue of Article 10(1) of Directive 83/189.

What breaches were there of the standstill requirements and what effects do they entail?

Breaches of the standstill requirements under Article 9 of Directive 83/189

— The three-month period

56. In the first place Italy infringed Article 9(1) of the directive according to which Member States must postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the notification referred to in Article 8(1).

57. The draft of Italian Law No 313 was notified to the Commission on 4 May 1998. The standstill period under Article 9(1) ran, therefore, until 4 August or 5 August depending on how the end of the three-month period is to be determined.

58. The draft Law in question was none the less adopted on 3 August 1998 and thus in any event before the expiry of the standstill period. On that day the President, the Prime Minister and the Minister for Agriculture signed the Law, which had previously been approved by the Chamber of Deputies on 28 July and by the Senate on 29 July 1998.

59. The fact that the Law entered into force only on 30 August 1998, one day after publication in the GURI, and thus after the expiry of the standstill period does not affect the finding that Italy infringed Article 9(1). That is, first, because according to the clear wording of that rule the decisive act is the adoption of the draft technical regulation and not its entry into force. Secondly, Article 9(1) refers to the adoption of a 'draft technical regulation'. Under Article 1(10) of the directive a technical regulation is at the draft stage only where it is 'at a stage of preparation at which substantial amendments can still be made'. Since a draft law ceases to be in an amendable form at the very latest when it is signed by the competent constitutional authorities, 'adoption' within the meaning of Article 9(1) cannot mean entry into force

through publication. Thirdly, a different interpretation would jeopardise the aim of Article 9(1), which is to ensure that technical rules are not adopted and brought into force without giving an effective opportunity for objections to be voiced and for those objections to be taken into account at the drafting stage. It would frustrate that aim if a Member State were to adopt a definitive version of a law shortly after notification, merely postponing its entry into force until after the end of the standstill period.

whether in the present case the six-month standstill period laid down therein was triggered. In order to decide that question the notion of 'delivery' of a detailed opinion within the meaning of Article 9(2) and the calculation of the end of the initial three-month period would have to be discussed. That is, in my view, not necessary because Law No 313 was in any event adopted in breach of Article 9(1) and (3) of the directive.

— The twelve-month period

Consequences of the breaches of the standstill requirements under Article 9 of Directive 83/189

60. Italy also infringed Article 9(3) of the directive, which requires Member States to postpone the adoption of a draft technical regulation for 12 months from the date of the notification if the Commission announces within the three months following notification that it intends to propose or adopt a directive, regulation or decision on the matter. Italy adopted the Law although the Commission had made such an announcement on 23 July 1998.

62. As a first consequence, the breaches might result either in infringement proceedings brought by the Commission or other Member States, or possibly in claims for damages.

— The six-month period

61. As regards, finally, Article 9(2) of the directive, I shall leave open the question

63. In the present case the national court's question is concerned with a second potential consequence of Italy's breach of the standstill requirements. The referring court asks, in essence, whether in civil proceedings between individuals concerning rights and obligations arising out of a contract a national court should disapply a technical regulation which, although notified to the Commission in accordance with the

requirements of the directive, was adopted before the expiry of a standstill period applicable under the directive.

obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals'.

64. The Italian court's question arises in the wake of the Court's judgment in *CIA Security*.¹⁹ That case concerned three companies engaged in the manufacture and sale of alarm systems and networks. One of those companies, CIA Security, marketed an alarm system which, apparently, did not comply with the applicable Belgian legislation. That legislation had, however, not been notified to the Commission in accordance with Directive 83/189. Two competitors (Signalson and Securitel) publicly asserted that the alarm system in question did not meet the requirements of the Belgian legislation. CIA Security sought an order restraining them from making such allegations on the ground that to do so was an unfair trading practice and, as such, prohibited. It argued that the legislation on which those assertions were based was invalid since it was a technical regulation which had not been notified. In counter-claims, Signalson and Securitel sought, essentially, to have the legislation in question enforced against CIA Security.

65. The Court held, at paragraph 54 of that judgment, that 'Directive 83/189 is to be interpreted as meaning that breach of the

66. In the light of the facts of the case, it may be seen that the Court thus established two rules. A technical regulation adopted without prior notification may not be enforced (a) by a Member State against individuals and (b) in civil proceedings between competitors on the basis of national rules prohibiting unfair trading practices.

67. The Court's line of reasoning in support of that ruling may be summarised as follows.

68. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.²⁰

69. As regards the question whether unnotified technical regulations should be unen-

19 — See note 2.

20 — See paragraphs 42 to 44 of the judgment.

forceable, the aim of the directive is decisive. Directive 83/189 is designed to protect freedom of movement for goods by means of preventive control. The obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be enhanced if the breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.²¹

70. Finally, a legislative vacuum in the national legal system caused by the inapplicability of an unnotified technical regulation can be countered, where necessary, by the adoption of technical regulations under the urgent procedure provided for in the directive.²²

71. Two features distinguish the present case from *CIA Security*. First, the question of the inapplicability of the technical regulation arises in civil proceedings between individuals concerning rights and obligations within a contractual relationship and not in proceedings between competitors on the basis of national rules prohibiting unfair trading practices. Proceedings of the latter kind resemble in some respects enforcement proceedings brought by the State.²³ Secondly, in this case, in contrast to what happened in *CIA Security*, the

Italian Law in question was correctly notified to the Commission. Italy's infringement lay not in a failure to notify but in a breach of the standstill requirements imposed by the directive.

72. The three questions to be addressed are thus as follows.

- (1) What is the basis for holding that a Member State cannot enforce against individuals a technical regulation adopted without prior notification?
- (2) Does that basis suggest that the procedural requirements of the directive, and in particular the notification requirement, are such that a breach should render the measure unenforceable in all types of proceedings between individuals, in particular those arising out of a contract?
- (3) If so, then should a breach of the standstill requirements have that effect?

73. The factual background to the present case might tempt the Court, which, moreover, did not receive observations from

21 — See paragraph 48 of the judgment.

22 — See paragraphs 51 to 53 of the judgment.

23 — See paragraph 98 below.

Central Food, to answer the last two questions in the affirmative. First of all, the Italian legislator has blatantly disregarded the standstill requirements of the directive despite being urged by the Commission not to do so. Then, from a substantive point of view the Court might have the strong impression that the labelling rules in Law No 313 create an unjustifiable obstacle to trade in goods and thus also infringe the prohibition of Article 30 of the EC Treaty (now Article 28 EC).

74. None the less, I am of the opinion that the Court should answer both those questions in the negative. The present case shows that, if 'hard cases make bad law', the same danger arises sometimes in 'soft cases'.

75. Before discussing the three questions set out above, it is necessary to clarify the nature of Directive 83/189.

76. Directives usually have as their purpose the approximation of national laws, regulations or administrative provisions in a given field. They oblige Member States to adopt, within a given time-limit, regulatory measures and impose requirements as to the content of those measures. In principle, they leave to the Member States the choice

of form and methods of transposition into the national legal system.

77. Where a Member State fails to transpose a directive of that kind into national law before expiry of the time-limit, or fails to transpose it properly, the effectiveness and the uniformity of Community law are threatened and individuals might be deprived of the rights the directive intended to confer on them.

78. In order to counter those problems, in particular as regards private litigants, the Court has developed what Community lawyers often refer to as the doctrines of consistent interpretation of national law in the light of directives,²⁴ vertical direct effect of directives,²⁵ and the absence of horizontal direct effect of directives.²⁶ In many cases, however, those catchwords hide a more complex legal reality.²⁷

79. Directive 83/189, which applies in the present case, is of an entirely different nature. Its purpose is not the approximation of laws, but the protection of free movement of goods by means of a preven-

24 — See, for example, Case C-106/89 *Marleasing* [1990] ECR I-4135.

25 — See, for example, Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.

26 — See, for example, Case C-91/92 *Faccini Dori v Recrebel* [1994] ECR I-3325.

27 — See, for example, Case C-72/95 *Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403 and for a recent discussion of some of the problems the Opinion of Advocate General Léger in Case C-287/98 *Luxembourg v Linster and Others*, ECR I-6917, ECR I-6920, delivered on 11 January 2000.

tive control mechanism. It lays down a procedure for the provision of information in the field of technical standards and regulations. The Member States' obligation is not to legislate, but to notify draft legislation and then to await and take account of any reactions from other Member States or the Commission. As regards the procedure under Article 8 and 9 of the directive, the use of concepts such as 'transposition into national law' and 'failure to do so within the applicable time-limit' is thus clearly not helpful.

80. In Community law the rules of Directive 83/189 can best be compared with those contained, for example, in Regulation No 17 implementing Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC)²⁸ or in Regulation No 659/1999 laying down detailed rules for the application of Article 93 of the Treaty (now Article 88 EC).²⁹ Those regulations provide for procedures of *ex ante* control in the field of restrictive practices and State aids. Certain planned national or private measures have to be notified in advance to the Commission which then decides (sometimes tacitly) whether or not to authorise them. That type of preventive control is intended to enhance the effectiveness of fundamental prohibitions contained in the Treaty. Moreover, the provisions of Directive 83/189 might have been adopted in the form of a regulation rather than a directive; it makes

no difference to the legal analysis, in my view, that it was enacted in the form of a directive.

81. The differences between Directive 83/189 and 'normal' directives on the one hand, and the fact that procedures comparable to those contained in the directive are laid down in Community acts of a different legal nature, such as regulations, on the other hand, make it in my view clear that the above-mentioned case-law on the consequences of failures to comply with 'normal' directives is of no relevance for the questions with which the present case is concerned. It is, therefore, necessary to consider those questions on the basis of general principles of Community law alone.

82. I turn now to the discussion of the three questions set out above.

(1) What is the basis for holding that a Member State cannot enforce against individuals technical regulations adopted without prior notification?

83. When considering this question, it is important to point out that failure to notify a draft technical regulation *as such* has no direct negative consequences for the uniformity of Community law, the effective-

²⁸ — OJ, English Special Edition (Series I) 1959-62, p. 87.

²⁹ — OJ 1999 L 83 p. 1.

ness of Article 30 of the Treaty or the rights individuals derive from Community law.

84. As regards, first, uniformity, the directive's purpose is to provide for a control and coordination mechanism designed to prevent the adoption of measures which might impede the free movement of goods; its purpose is not to harmonise national rules. Only as a last resort will the Commission propose harmonisation measures. Uniformity is thus not directly affected where a technical regulation is not notified.

85. Secondly, as to the effectiveness of Article 30 of the Treaty, an unnotified technical regulation might infringe Article 30, but it might equally not do so. It might even eliminate a pre-existing obstacle to trade. The directive contains only procedural rules which are by definition neutral from a substantive point of view. The fact that a technical regulation was not notified therefore gives no clear indication whether the rules it contains comply with the substantive requirements of Article 30 of the Treaty.

86. Thirdly, Directive 83/189 as such is not intended to confer rights on or to create obligations for individuals. It merely lays down the respective rights and obligations of the Member States and the Commission within a procedure in which individuals are in principle not involved. Thus a Member State's infringement of the notification

requirement does not affect any rights of individuals under the directive. As regards the rights of individuals under Article 30 of the Treaty, the substantive compatibility of the rules in question with free movement of goods is decisive. It must be borne in mind that if a technical regulation does constitute an obstacle to trade between Member States, individuals can rely directly on the Treaty, without the need to resort to the directive.

87. In view of those considerations, it does not come as a surprise that the Court, when it ruled in *CIA Security* that unnotified technical regulations are not enforceable against individuals, relied only on the effectiveness of the directive's control mechanism.

88. Are the threats to the effectiveness of *ex ante* control, and indirectly to the free movement of goods, sufficiently grave to justify precluding a Member State from enforcing unnotified technical regulations against individuals?

89. In the scheme of the directive the notification of draft technical regulations is clearly essential because it brings those drafts into the light of day. Only through notification will the Commission and other Member States become aware of a Member State's plans to adopt new technical regula-

tions. That awareness is the necessary precondition for exercising the different rights under the directive (right to comment, delivery of detailed opinion with the effect of prolonging the standstill period, declaration of the intention to adopt harmonising measures). The knowledge that the adoption of such technical regulations is currently under consideration is also crucial for alternative means of redress outside the scope of the directive, such as infringement proceedings.

the draft measure. Infringement proceedings are thus unlikely; they will in any event take time, and are unlikely to result in sanctions. Actions for damages brought by individuals are not certain to succeed. Affected individuals will normally have to wait for the enactment and a concrete application of such a technical regulation before they can rely on Article 30 to have those rules set aside.

90. If a Member State is aware that it is unable to enforce unnotified technical regulations against individuals, the incentive to notify is strong. It is always possible that a trader will find out that the Member State did not notify a technical regulation and object to its enforceability on that ground. A lack of notification will thus constantly threaten, like the sword of Damocles, the enforceability of the unnotified national measure.

92. For those reasons, it is in my view correct to hold, as the Court did in *CIA Security*, that in order to safeguard the effectiveness of the control mechanism established by the directive, a Member State should not be able to enforce against individuals a technical regulation adopted without prior notification.

91. If, by contrast, unnotified technical regulations were to remain enforceable against individuals, a Member State might be tempted to refrain from notification, in particular where it is aware that a planned technical regulation would in fact create an obstacle to trade in goods. In the absence of notification there is little risk that the Commission or other Member States will discover the obstacle to trade contained in

93. It might be added that the unenforceability of unnotified technical regulations may, as a side effect, create windfall benefits for some traders. They will be able to rely against a Member State on an infringement of a procedural rule which was not intended to confer rights on them, and that will be so independently of whether the technical regulation in question constitutes an unjustifiable obstacle to trade under Article 30 of the Treaty.

94. Moreover, in *Lemmens*³⁰ the Court recognised certain limits on the effects of a failure to notify. It held at paragraph 35 of the judgment that the failure to notify technical regulations rendered such regulations inapplicable only inasmuch as they hindered the use or the marketing of a product which was not in conformity therewith. The judgment in *Lemmens* might be read as a first signal that, in the Court's view, *CIA Security* must be applied and extended with caution.

(2) Are the procedural requirements of the directive, and in particular the notification requirement, such that a breach should render the measure unenforceable in all types of proceedings between individuals, in particular those arising out of a contract?

95. According to *CIA Security* a technical regulation adopted without prior notification may not be enforced in civil proceedings between competitors on the basis of national rules prohibiting unfair trading practices. The question is whether that rule should be extended to civil proceedings between individuals concerning rights and obligations arising out of a contract. Should a trader such as Unilever be able to rely on the Member State's failure to comply with the procedural requirements of Directive 83/189 in proceedings against

another trader such as Central Food in order to set aside a national technical regulation such as Italian Law No 313?

96. In the light of paragraphs 68 to 74 of the Opinion of Advocate General Elmer it might be argued that the Court in *CIA Security* has already answered that question in the affirmative.

97. I consider, however, that the Court cannot have intended that the sanction of unenforceability should apply in all types of proceedings between individuals.

98. In the first place, the Court's ruling must be read in the light of the special procedural circumstances of the case. Where competitors seek to enforce a technical regulation on the basis of national rules on unfair trading practices, the possible outcome of such proceedings, such as for example an order to cease a certain activity or to pay periodic penalties, is not very different from the possible outcome of a Member State's enforcement activities in the same field when it acts through a public prosecutor or an administrative authority.

99. Secondly, there are more fundamental considerations to be taken into account. The fact that a Member State did not comply with the procedural requirements of the directive as such should not, in my

30 — Case C-226/97 *Lemmens* [1998] ECR I-3711.

view, entail detrimental effects for individuals.

larly, the Commission is also not required to publish the fact that it has informed a Member State of intended or pending Community legislation.

100. That is, first, because such effects would be difficult to justify in the light of the principle of legal certainty. For the day-to-day conduct of trade, technical regulations which apply to the sale of goods must be clearly and readily identifiable as enforceable or as unenforceable. Although the present dispute concerns a relatively small quantity of bottled olive oil of a value which may not affect the finances of either Unilever or Central Food to any drastic extent, it is easy to imagine an exactly comparable case involving highly perishable goods and sums of money which represent the difference between prosperity and ruin for one or other of the parties concerned. In order to avoid difficulties in his contractual relations, an individual trader would have to be aware of the existence of Directive 83/189, to know the judgment in *CIA Security*, to identify a technical regulation as such, and to establish with certainty whether or not the Member State in question had complied with all the procedural requirements of the directive. The last element in particular might prove to be extremely difficult because of the lack of publicity of the procedure under the directive. There is no obligation on the Commission to publish the fact that a Member State has notified or failed to notify a given draft technical regulation. In respect of the standstill periods under Article 9 of the directive, there is no way for individuals to know that other Member States have triggered the six-month standstill period by delivering detailed opinions to the Commission. Simi-

101. The second problem is possible injustice. If failure to notify were to render a technical regulation unenforceable in private proceedings an individual would lose a case in which such a regulation was in issue, not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour. The economic survival of a firm might be threatened merely for the sake of the effectiveness of a mechanism designed to control Member States' regulatory activities. That would be so independently of whether the technical regulation in question constituted an obstacle to trade, a measure with neutral effects on trade, or even a rule furthering trade.³¹ The only redress for a trader in such a situation would be to bring *ex post* a hazardous and costly action for damages against a Member State. Nor is there any reason for the other party to the proceedings to profit, entirely fortuitously, from a Member State's failure to comply with the directive.

102. It follows, in my view, that the correct solution in proceedings between individuals is a substantive solution. The applicability of a technical regulation in proceedings

31 — That seems to follow from the reasoning in paragraph 57 of the judgment in *CIA Security*, cited in note 2.

between individuals should depend only on its compatibility with Article 30 of the Treaty. If in the present case Italian Law No 313 complies with Article 30, I can see no reason why Central Food, which understandably relied on the rules laid down in the Italian statute book, should lose the case before the national court. If, however, Italian Law No 313 infringes Article 30 then the national court should be obliged to set the Law aside on that ground.

103. I accordingly conclude that as against an individual another individual should not be able to rely on a Member State's failure to comply with the requirements of Directive 83/189 in order to set aside a technical regulation.

(3) In the alternative: should the breach of the standstill requirements entail the unenforceability of a technical regulation?

104. If, contrary to what has just been stated, the Court were to decide that technical regulations which are adopted in breach of essential procedural requirements laid down in the directive are unenforceable in all types of proceedings between individuals, the question is whether the standstill requirement constitutes such a procedural requirement.

105. The judgment in *CIA Security* might be read as meaning that the breach of the standstill requirement constitutes 'a substantial procedural defect' to the same extent as the lack of notification. The conclusion in that judgment was reached after consideration of Articles 8 and 9 — the notification and standstill requirements — taken together, in the light of the aims of the directive. At paragraph 44, for example, the Court held that 'Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted' and, at paragraph 50, that the directive has the 'general aim of eliminating or restricting obstacles to trade, [of informing] other States of technical regulations envisaged by a State, [and of giving] the Commission and the other Member States time to react and to propose amendments for lessening restrictions to the free movement of goods arising from the envisaged measure...'. The conclusion was also reached after considering the Commission's 1986 communication linking the notification and standstill requirements.³²

106. Despite those factors, I consider that a failure to respect the standstill periods should not in itself entail the unenforceability of the technical regulation in question. I have argued above that the only consideration justifying the unenforceabil-

³² — See above, paragraph 8.

ity of an unnotified technical regulation on procedural grounds is the potential undermining of the effectiveness of Community control. However, while compliance with the duty to notify a draft technical regulation is crucial for the effectiveness of that control, compliance with the standstill period is less important.

108. I consider, therefore, that it would be disproportionately severe to impose the sanction of unenforceability for infringements of procedural requirements other than the obligation to notify under Article 8(1) of the directive.

107. Once a draft technical regulation has been notified, it has been impelled into the open. Other Member States and the Commission are then in a position to monitor effectively the respect for the procedural requirements of the directive and the substantive requirements of Article 30 and, where necessary, to start infringement proceedings.

109. I accordingly conclude that in civil proceedings between individuals a national court should not disapply a technical regulation which, although notified to the Commission in accordance with the requirements of the directive, was adopted before the expiry of a standstill period applicable under the directive.

Conclusion

110. I have dealt relatively briefly with the standstill requirements, although they form the subject of the national court's question, because that question cannot be considered in isolation and necessarily raises the wider issue of the effects of breach of the procedural requirements of the directive generally. Moreover, in practical terms, the question of by far the greatest importance is likely to be that of the effects of failure of a Member State to notify a technical regulation. The answer which I have proposed to that question also determines the answer to the national court's question.

111. In my view, a failure to notify (which may happen very frequently, given the vast range of measures potentially within the scope of the directive, and which may of course be inadvertent) cannot be treated as having far-reaching effects on contractual relations between individuals. In substance the effect would be that, solely on the basis of such failures by Member States, courts would be obliged to find a breach of contract.

112. Such consequences would be contrary to principles fundamental to our legal systems, and contrary in particular to fundamental requirements of legal certainty. There may be uncertainty as to whether the measure is a technical regulation and whether it required notification; uncertainty, in the absence of any provisions laying down a transparent procedure, as to whether it has in fact been notified; uncertainty, where a national regulation or parts of it are disapplied, as to what legal regime is to replace the disapplied measures; uncertainty as to the appropriate remedies for the breach of contract, in the absence of fault in either party. Moreover, such consequences would follow whether or not the technical regulation was an obstacle to the free movement of goods, and even where it facilitated such freedom of movement. I can see no basis for giving such consequences to a failure to notify.

113. If, as I have argued, the failure of a Member State to notify a technical regulation should not be treated as affecting contractual relations between individuals and as founding a breach of contract, then it is clear that infringement of the standstill requirements should not be so treated either. There are several arguments common to both. In particular, the arguments based on legal certainty, on injustice, and on the absence of transparency apply, in different ways, to all the consequences of procedural irregularities on the part of Member States.

114. The truth is that the code of procedure laid down by the directive is a code designed to regulate relations between the Commission and the Member States. It was not designed to confer substantive rights on individuals, still less to have adverse effects on them. Nor does it seem necessary that it should be given such effects. The Community's overriding interest in ensuring the free movement of

goods does not arise until it is established that the technical regulation does obstruct such freedom of movement. In cases such as the present the Community's interest can be fully secured by reliance on Article 30 of the Treaty.

115. Accordingly the question referred by the Pretura Circondariale di Milano should in my opinion be answered as follows:

Where a Member State fails to comply with the procedural requirements laid down by Articles 8 and 9 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, such a failure cannot be relied upon in national courts in proceedings between individuals arising from a contract.