OPINION OF ADVOCATE GENERAL JACOBS

delivered on 16 December 2004 [1]

1. The issue in this case concerns a Member State's duty under the Technical Standards Directive [2] to notify the Commission (and, through it, other Member States) of draft technical regulations. Specifically, does that obligation apply in the case of an amendment to national law which entails a prohibition on the organisation of gaming on a particular type of gaming machine?

I — The Directive

2. The aim of the Directive, as set out in its preamble, [3] is to preclude the adoption of national technical regulations or standards capable of entailing barriers to trade unless they are necessary in order to meet essential requirements and have an objective in the public interest of which they constitute the main guarantee. Thus, if a Member State contemplates the adoption of such a measure, the Commission and the other Member States should be informed and allowed sufficient time in which to propose amendments to remove or reduce any barriers which it might create to the free movement of goods or, in the case of the Commission, to propose or adopt a Community directive governing the same field. The Court has described that aim as 'by preventive monitoring, to protect the free movement of goods, which is one of the foundations of the Community'. [4]

3. Article 1 of the Directive provides a number of relevant definitions.

1 — Original language: English.

2 — At the material time in the present case, that is to say with regard to provisions adopted in 1996, the applicable version was Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1983 L 109, p. 8, as amended by Directive 88/182/EC 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, OJ 1994 L 100, p. 30, hereinafter 'the Directive'.

3 — See the second to seventh recitals.

4 — See for example Case C-13/96 *Bic Benelux* [1997] ECR I-1753, at paragraph 19 of the judgment; Case C-159/00 *Sapod Audic* [2002] ECR I-5031, at paragraph 34.

4. Under Article 1(9) of the version applicable at the material time, a 'technical regulation' includes three types of measure.

5. First, it includes 'technical specifications' the observance of which is compulsory, *de jure* or *de facto*, in the marketing or use of a product in a Member State or a major part thereof. Under Article 1(2), a 'technical specification' is one 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'.

6. Second, it covers 'other requirements', including administrative provisions, which are similarly compulsory. Under Article 1(3), the term 'other requirement' means 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'.

7. Third, it includes 'laws, regulations or administrative provisions ... prohibiting the manufacture, importation, marketing or use of a product'.

8. For the purposes of those definitions, a 'product' is 'any industrially manufactured product and any agricultural product' (Article 1(1)).

9. Finally, a 'draft technical regulation' is essentially the text of a technical regulation at a stage of preparation at which substantial amendments can still be made (Article 1 (10)).

10. Article 8(1) requires Member States to notify the Commission of any draft technical regulation falling within the scope of the Directive, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is sufficient. If after notification the draft is amended in such a way as, in particular, to alter its scope significantly, to add specifications or to make them more restrictive, it must be notified again.

11. Under Article 9 Member States must postpone the adoption of such draft regulations for a number of months in order to allow the Commission to verify that they are compatible with Community law, or to propose a directive on the matter.

12. Article 10 provides for a number of circumscribed exceptions from the scope of one or both of those obligations. In particular Articles 8 and 9 do not apply, essentially, to provisions which merely bring national law into compliance with Community law (Article 10(1)) and Article 9 does not apply, inter alia, to rules prohibiting manufacture which do not impede the free movement of products (Article 10(2)).

13. It may be noted that that version of the Directive is now repealed and the situation is currently governed by Directive 98/34/EC. [5] The latter was almost immediately amended by Directive 98/48/EC, [6] extending its scope to cover 'Information Society services', namely those 'normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. [7]

14. The Court has held that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals; national courts must decline to apply a national technical regulation which has not been notified in accordance with the Directive. [8]

II — The national proceedings and rules in issue

15. Mr Lindberg is prosecuted for organising unlawful public gaming on prohibited gaming machines in Sweden between January 1997 and April 1998. On appeal to the Högsta Domstolen (Supreme Court) it has to be decided whether the ban on organising public gaming on the type of machine in question is unenforceable because it amounts to a technical regulation which was not notified in accordance with the Directive.

5 — 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 on rules on Information Society services, OJ 1998 L 204, p. 37.

6 — Of the European Parliament and of the Council of 20 July 1998, OJ 1998 L 217, p. 18.

7 — See Directive 98/48, Article 1(2).

8 — Case C-194/94 *CIA Security International* [1996] ECR I-2201, at paragraphs 54 and 55 of the judgment, and point 2 of the operative part.

16. The machines concerned appear to be of the common kind in which the player may win a prize if certain images are aligned by the machine, an outcome which depends largely on chance. The specific feature which distinguishes them from other such machines, for the purposes of the present case, is that they do not themselves pay out winnings in any form whatever. Winnings, if any, must be collected manually from a person in charge of the operation of the machines.

17. Under the Swedish criminal code, it is an offence to organise public gaming on the basis of chance if the stakes are economically significant unless, essentially, the form of gaming in question either (i) is not prohibited by the Law on Lotteries or (ii) is capable of being licensed under that law and the organiser has obtained a licence.

18. Prior to 1 January 1995, the operation of automatic gaming machines was totally prohibited except on board vessels sailing in international waters. As from that date, a new Law on Lotteries, adopted in 1994 ('the 1994 Law'), offered possibilities for licensing the operation of certain such machines in Swedish territory.

19. The 1994 Law prohibits the operation of lotteries for the general public without a licence. The definition of a lottery also includes 'bingo games, gaming machines, roulette games, dice games, card games, chain letter games or similar games', and in those cases the prohibition extends to all situations where the game is arranged for gain, whether it is for the general public or not.

20. In the original version of the Law, gaming machines were defined, exhaustively, as machines paying out prizes in the form of goods, cash, certificates of value, gaming tokens or the like where the possibility of winning is random, or paying winnings in the form of cash where the chances of winning depend on the player's skill.

21. The operation of such machines can be licensed under certain conditions relating in particular to the value of the stakes and the prizes.

22. The interpretation of those provisions with regard to machines which did not themselves pay out any prizes in any form gave rise to some disagreement. Certain appeal courts interpreted the 1994 Law as

not applying to such machines at all, so that their operation was neither prohibited nor required a licence.

23. To plug what thus appeared to be an unintended loophole, the 1994 Law was therefore amended with effect from 1 January 1997 ('the 1996 amendment'). The definition of 'gaming machine' was extended to any 'mechanical or electronic gaming machine', the availability of a licence remaining however confined to the categories previously enumerated, which themselves pay out prizes. Consequently, the organisation of gaming, for gain or for the general public, on machines such as those in issue was prohibited.

24. The 1996 amendment was not notified to the Commission as a draft technical regulation; the Swedish Government took the view that it was merely a clarification of pre-existing rules and did not require notification in accordance with the Directive.

25. Some authorities however expressed doubts as to the correctness of that view. Consequently, while not changing its initial position, the Government decided to send notification none the less. Following that notification, the amendment was enacted anew with effect from 1 February 2002. The notification and re-enactment however post-date the material time in the present case, which is between January 1997 and April 1998.

26. In the national proceedings, Mr Lindberg argues that the 1996 amendment, which forms the basis of his prosecution, should have been notified under the Directive and that, since it was not, it cannot be enforced against him.

27. That view appears to be accepted by the public prosecutor, who does not object to the dismissal of the charge of organising illicit gaming.

28. Before reaching its decision, however, the Högsta Domstolen has sought a preliminary ruling on the following questions:

'(1) Can the introduction in national law of a prohibition on the use of a product constitute a technical regulation which must be notified under the Directive?

(2) Can the introduction in national law of a prohibition on a service which affects the use of a product constitute a technical regulation which must be notified under the Directive?

(3) Can the redefinition in national law of a service connected with the construction of a product constitute a technical regulation which must be notified under the Directive, if the new definition affects the use of the product?

(4) What is the significance for the obligation to notify of factors such as

— the replacement of a licence requirement by a prohibition in national law,

— the greater or lesser value of the product/service,

— the size of the market for the product/service, or

— the effect of a new national provision on use, which could be either a total prohibition on use or a prohibition or restriction within one of a number of possible areas of use?'

29. Written observations have been submitted by Mr Lindberg (who refers to his pleadings before the national courts), by the Portuguese, Swedish and United Kingdom Governments and by the Commission. At the hearing oral submissions were made on behalf of Mr Lindberg, the French and Portuguese Governments and the Commission.

III — Assessment

30. Before examining the national court's four questions in turn, it is helpful to consider two preliminary matters: the scope of those questions in relation to actual or potential restrictions of trade and to the right of Member States to regulate gaming; and the relevance of the date of the introduction of the disputed prohibition in national law.

A — *The scope of the questions*

31. The issue on which the national court seeks guidance is whether the 1996 amendment falls within the definition of a technical regulation contained in the then applicable version of the Directive.

32. The obligation to notify under the Directive depends on that definition, and not on whether the effect of the amendment is to create an actual or potential restriction of intra-Community trade.

33. It is true that the aim of the Directive is to protect the free movement of goods.

34. However, the mechanism which it uses is one of preventive monitoring. The obligation of Member States to participate in that monitoring cannot be dependent on actual incompatibility between the measure concerned and the Treaty rules on free movement.

35. When determining whether a measure is compatible with the Treaty provisions on free movement of goods, it is necessary to examine not only whether there is a restriction of trade but also whether that restriction may be justified on any of the grounds set out in the Treaty or the case-law and is proportionate to the aim pursued. However, it would not be appropriate to consider those factors before deciding whether a measure must be notified in the context of a system of preventive monitoring. The monitoring mechanism is itself designed to evaluate those factors and would be seriously weakened if pre-empted in that way. Moreover, as I have already had occasion to point out, [9] any need for a prior assessment of the effect of a measure would make it less easy to determine which measures are concerned.

36. It is true also that there is a derogation in Article 10(2) for measures which do not impede the free movement of products.

37. However, that derogation applies only to measures prohibiting the manufacture of a product and exempts only from the obligation to postpone adoption of the measure, not from the obligation to notify it. It is thus not relevant to the circumstances of the present case.

9 — See paragraph 48 of my Opinion in *Sapod Audic*, cited in footnote 4.

38. Finally, it is true that, whilst in *CIA Security* the Court took the view that 'breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals', [10] it subsequently in *van der Burg* found unnecessary to rule whether that inapplicability extended to all cases or only to those which actually entailed a barrier to trade or to the free movement of goods in a specific case. Advocate General Ruiz-Jarabo however took the view in the latter case that a technical regulation which has not been notified should be rendered inapplicable only if it is likely to hinder the use or marketing of a specific product, [11] a view which seems to be supported by the Court's earlier judgment in *Lemmens*. [12]

39. However, the national court's questions are based on the premiss that the national rule in question affects the use of certain gaming machines in Sweden, and it seems clear that a measure which affects the use of a particular product in a Member State is also likely to affect the marketing of such products in — and thus their movement into — that State, [13] so that the last-mentioned issue does not appear to arise in the circumstances of the present case.

40. Consequently, a number of observations put forward by the Portuguese Government, which concern in general the compatibility with the Treaty rules on free movement of measures taken by Member States in the exercise of their sovereign right to regulate gaming in the public interest, and which relate to the justification of such measures in the light of the nature of gaming, are not directly relevant to the issue to be decided.

41. I would merely point out that the Court has recently confirmed that national rules restricting the operation of gaming may, even though they constitute a barrier to freedom of trade, be justified by overriding reasons in the public interest. [14]

B — *The date of introduction of the prohibition in issue*

42. The national court's questions are further based on the premiss that a prohibi-

10 — Cited in footnote 8, paragraph 48 of the judgment.

11 — Case C-278/99 [2001] ECR I-2015; see paragraphs 17 and 23 of the judgment, and paragraphs 20 to 24 of the Opinion.

12 — Case C-226/97 [1998] ECR I-3711, at paragraph 36 of the judgment.

13 — Compare Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, at paragraphs 29 to 32 of the judgment.

14 — Case C-6/01 *Anomar* [2003] ECR I-8621, paragraphs 62 to 75 of the judgment.

tion on the organisation of gaming on certain machines was introduced by the 1996 amendment and was not previously contained in the 1994 Law.

43. The Swedish Government maintains however in its written observations that the amendment made no substantive change to the law and that the prohibition in issue was already in effect from 1995. It asks the Court therefore to specify that there is no obligation to notify a technical regulation which does not change the existing state of the law.

44. Clearly, this Court is not competent to interpret the Swedish legislation. Only the national court can determine whether the prohibition in issue was introduced by the 1994 Law or the 1996 amendment. The questions raised must thus be addressed on the basis of that court's premiss that it was the amendment which introduced the prohibition.

45. I shall therefore confine myself to two remarks on the contrary hypothesis put forward by the Swedish Government.

46. First, it seems reasonable that an amendment which affects only the wording of a technical regulation, but does not change the existing state of the law, should not require notification under the Directive. As the Court stated in *Colim*, [15] '[a] national measure which reproduces or replaces, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of [the Directive], have been duly notified to the Commission, cannot be regarded as a "draft" technical regulation ... or, consequently, as subject to the obligation to notify'.

47. However, it is perhaps rare that a change to the wording of a measure will have no effect on its substance. Where there is a possibility of such an effect — and it seems that the Swedish authorities were not unanimous in believing that the 1996 amendment did not change the existing law — it would seem necessary to notify in pursuance of the aim of preventive monitoring which is the *raison d'être* of the system established by the Directive. It may be recalled that, under the third subparagraph of Article 8(1), Member States must communicate a draft again if they make significant changes to it.

48. Second, if the 1994 Law did contain the prohibition in issue from the time of its initial adoption and if that adoption was after

15 — Case C-33/97 [1999] ECR I-3175, paragraph 22 of the judgment.

the Agreement on the European Economic Area came into effect on 1 January 1994, with Sweden as a Member State, it should be noted that — contrary to the view apparently expressed by the public prosecutor — the Directive would seem to have already applied to Sweden at that time. [16]

49. However, the then applicable version of the Directive would require a different analysis. The time-limit for implementing the amendments introduced by Directive 94/10, applicable to national legislation adopted in 1996, did not expire until 1 July 1995. Those amendments significantly added to the definition of a technical regulation. In addition, the obligations of the Swedish Government and the consequences of any failure to comply with them would fall to be assessed in the light of Sweden's status in 1994 as a Member State of the European Economic Area rather than of the European Union, to which it acceded on 1 January 1995.

C — *The first question*

50. The first question asks whether the introduction in national law of a prohibition on the use of a product can constitute a technical regulation which must be notified under the Directive.

51. When it is phrased in such general terms, the answer is clearly yes. Article 1 (9) of the Directive specifies that technical regulations include 'laws, regulations or administrative provisions ... prohibiting the ... use of a product'. Such a prohibition thus falls within the third category of technical regulation, referred to in Article 1(9) of the Directive and paragraph 7 above.

52. However, the rule in issue in the national proceedings may prohibit not so much the use of a product as, more indirectly, the provision of a service which has repercussions on that use. It is clear from the case-law [17] that the provision to the public of the opportunity to use gaming machines constitutes a service.

53. The national court allows for that possibility in its second and third questions.

16 — See Articles 3, 7, 8, 23 and 129(3) of the EEA Agreement, in conjunction with point 11 of Protocol 1 and point 1 of chapter XIX of Annex II thereto, OJ 1994 L 1, p. 3, at pp. 9 to 11, 30, 38, 263 and 313 to 315.

17 — See for example Case C-124/97 *Laara* [1999] ECR I-6067; *Anomar*, cited in footnote 14, in particular at paragraph 56 of the judgment.

D — *The second question*

54. The second question thus asks whether the introduction in national law of a prohibition on a service which affects the use of a product can constitute a technical regulation which must be notified under the Directive.

55. In the applicable version of the Directive, the requirement to notify applies only to technical regulations affecting products, not to those affecting services. It was not until Directive 98/34, as amended by Directive 98/48, entered into force that the obligation extended to certain types of service, though still not to the type with which the present case is concerned. [18]

56. However, that fact is not relevant here, as the issue does not concern trade in services but rather the possible effect on trade in products of a prohibition on the provision of a particular service. A rule prohibiting a service which makes use of a particular product clearly also prohibits the use of that product for the provision of that service. Unless the product may be used without restriction for other purposes, the prohibition may thus have the further effect either of prohibiting entirely any use of that product or of requiring that it comply with certain technical criteria in order to be used for another, permitted, purpose.

57. In that regard, the Portuguese Government none the less submits that, in accordance with the maxim *accessorium sequitur principale,* provisions prohibiting or restricting a service and thereby affecting the use of a product which is a necessary accessory for the provision of that service cannot constitute technical regulations in relation to the product itself.

58. However, the Court made it clear in *Anomar* that while the operation of gaming machines comes under the Treaty provisions relating to freedom to provide services their importation comes under those relating to the free movement of goods, despite the link between the two. [19]

59. Consequently, it must be possible to assess a rule which affects both the operation of gaming machines and their use (which in

18 — See paragraph 13 above.

19 — Cited in note 14, paragraph 55 of the judgment.

turn affects trade in the machines) in the context both of freedom to provide services as regards the former and of the free movement of goods (including the possibility that it may constitute a technical regulation) as regards the latter.

60. In the present case, therefore, a rule which prohibits the organising of gaming, for the general public and/or for gain, on gaming machines which do not themselves pay out prizes might be found to amount either to a prohibition on the use of such machines or to a requirement that all gaming machines be constructed in such a way as to pay out prizes in the form of goods, cash, certificates of value, gaming tokens or the like.

61. As regards the first possibility, the United Kingdom Government submits that the Swedish legislation merely restricts but does not prohibit the use of the machines in issue; it cannot therefore fall within the definition of a technical regulation on that score.

62. It is however in my view necessary to examine more closely the possibilities of use left open by the prohibition.

63. To what extent can a gaming machine serve the purpose for which it is designed if it cannot be operated for gain and cannot be made available to the general public? Presumably some kinds of private use would remain permissible, but it must be borne in mind that the Swedish Law on Lotteries appears to consider private clubs as falling within the definition of 'general public'. [20]

64. A prohibition on the use of a product which falls short of a prohibition on possession will practically never be a prohibition on every conceivable use (a gaming machine could be used as a doorstopper, though few people might wish to acquire one for the purpose).

65. When considering whether a prohibition on a service which affects the use of a product amounts to a prohibition on the use of the product, it is necessary in my view to disregard purely marginal uses to which the product might still be put but for which it is not intended by design. [21] If only such uses remain permissible, then it must be considered that there is a prohibition on use, again within the third category of technical regulation, referred to in Article 1(9) of the

20 — Article 1 of the Law, second paragraph.

21 — Compare *Lemmens*, cited in footnote 12, at paragraph 25 of the judgment.

Directive and paragraph 7 above. If on the other hand the remaining possible uses are merely limited rather than purely marginal I would agree with the United Kingdom Government that there is no prohibition on use for the purposes of the Directive.

66. I also agree with the Portuguese Government's suggestion, made at the hearing, that if the product concerned is a machine which can be programmed for different functions, and the prohibition concerns only one of those functions, then again there is no prohibition on use for the purposes of the Directive.

67. As regards the second possibility — that a rule which prohibits the organising of gaming on machines which do not themselves pay out prizes might be found to amount to a requirement that all gaming machines be constructed in such a way as to pay out prizes — many of the same considerations apply. In particular the possibility of purely marginal uses to which the product might be put, but for which it is not intended by design, must be disregarded.

68. However, rather than considering whether the prohibition of the service in question could be regarded as prohibiting entirely the use of a particular product, one would consider whether it amounted to prohibiting that use in so far as the product did not comply with certain technical criteria (applicable in the case of other, permitted, uses). That would be equivalent to a requirement that in order to be used the product must comply with those criteria, and could thus mean that the prohibition constituted a technical specification laying down the characteristics required of a product, within the first category of technical regulation referred to in Article 1(9) of the Directive and paragraph 5 above and defined in Article 1(2).

69. In the present case, it seems to me that a requirement that gaming machines be constructed so as to pay out prizes in specified ways clearly falls within the normal meaning of the term 'technical specification', and there is nothing to the contrary in the definition in Article 1(2) of the Directive.

70. Thus, where the provision of a service which makes use of a particular product is prohibited, so that the use of the product in

the provision of that service is likewise prohibited, the questions to be asked are:

— Can that product be legitimately used at all for some other purpose, for which it is intended by design and which is not purely marginal?

— If so, can it be legitimately used for such a purpose only if it meets certain technical specifications?

71. If the answer to the first question is no, or the answer to the second question is yes, the prohibition of the service constitutes a technical regulation which must be notified in accordance with the Directive.

72. The assessment is a matter for the national court, but from the case-file it appears likely that the national rule in issue will be found to constitute a technical regulation requiring notification under the Directive unless there are in fact ways in which the machines in question may be used for the purpose for which they are designed, namely gaming, which are not purely marginal and which do not require them to be constructed so as to pay out prizes.

E — *The third question*

73. The third question asks whether the redefinition in national law of a service connected with the construction of a product can constitute a technical regulation which must be notified, if the new definition affects the use of the product.

74. It would not be simple, or perhaps even helpful, to attempt to answer that question in quite such general terms. It must be read in context as referring to a redefinition of a regulated service (that is to say, one which is permitted only subject to certain conditions) which, because it concerns the construction of a product used in that service, affects the use of the product.

75. A significant part of the answer to that question flows from the answer to the second question. In so far as a service is restricted or prohibited in such a way as to prohibit the use of a particular product, either absolutely or unless the product meets certain technical criteria, then the introduction of the measure of restriction or prohibition will constitute a technical regulation which must be notified in draft form.

76. The further element in the third question is the fact that it concerns the *re*definition of a service rather than the introduction of a prohibition on it.

77. I have already referred to the judgment in *Colim* and to the third subparagraph of Article 8(1) of the Directive [22] which, as the Commission points out, indicate the correct approach here.

78. In accordance with the rationale of the third subparagraph of Article 8(1), any redefinition of a service which has the effect of significantly altering the scope of a technical regulation, adding specifications or requirements, or making specifications or requirements more restrictive must clearly be notified to the Commission, and that must be true *a fortiori* if the redefinition actually introduces a technical regulation within the meaning of the Directive.

79. And if a measure which reproduces or replaces an existing technical regulation, without adding new or additional specifications, is not subject to the obligation to notify, then it may be concluded *a contrario* that one which does add new or additional specifications is subject to that obligation.

80. In other words, it is the effect of the redefinition rather than the fact that it is a redefinition which will determine whether it must be notified or not.

F — *The fourth question*

81. Finally, the national court wishes to know whether

— the replacement of a licence requirement by a prohibition,

— the value of the product or service in question,

— the size of the market for the product or service or

22 — See paragraphs 46 and 47 above.

— the fact that a new provision on use has the effect of totally prohibiting use or of prohibiting or restricting use within one of a number of possible areas

are factors which affect the obligation to notify.

82. As regards the first and fourth of those factors, the answer seems clear from what has already been said.

83. The introduction of a prohibition on the use of a product falls within the definition in Article 1(9) of the Directive, while a restriction which still allows the product to be used in other ways which are not purely marginal does not.

84. In that regard, it does not seem relevant whether the newly prohibited use was previously authorised without restriction or was subject to a licence requirement, since provisions making the exercise of an activity subject to prior authorisation do not constitute technical regulations. [23]

85. The second and third factors referred to appear to raise the question of a possible *de minimis* exception to the notification requirement.

86. As the Commission points out, the Directive does not specify any such exception other than perhaps a territorial one which may be deduced from Article 1(9): technical specifications and other requirements whose observance is not compulsory in at least a major part of a Member State do not fall within the definition of a technical regulation. Since there is no suggestion that the prohibition in issue is territorially circumscribed in any way, that aspect is not relevant in the present case.

87. Furthermore, whether there is any scope or not for a *de minimis* rule when determining the existence of a restriction on trade — and the Court has frequently taken the view that there is none — such an approach does not seem appropriate in the context of a preventive monitoring system, since the system is designed in particular to enable the actual or potential effect on trade to be assessed. In any event, it appears from the

23 — See Case C-390/99 *Canal Satelite Digital* [2002] ECR I-607, at paragraph 45 of the judgment

Commission's observations that a number of complaints have been lodged by Swedish operators, manufacturers and importers of gaming machines of the type in question, concerning the restrictive effects of the 1996 amendment. Such a situation tends to suggest that whatever effects exist are not negligible.

G — *Final remarks*

88. On the basis of the analysis I propose, it seems possible that, subject to any further factual investigation which may prove necessary, the national court will find that the 1996 amendment constituted a technical regulation within the meaning of the Directive.

89. If that is so, it follows from the Court's case-law that, since the amendment was not notified to the Commission in accordance with the Directive, national courts must decline to apply it.

90. None the less, there must in my view be some limits to that obligation to disapply such measures.

91. For example, I remain of the opinion that there are difficulties in taking that approach in certain proceedings between individuals, [24] and I have already referred to Advocate General Ruiz-Jarabo's view that only rules likely to hinder the use or marketing of a specific product should be rendered inapplicable. [25]

92. However, no such limits appear to be reached in the present case, which falls clearly within the scope of the abundant case-law to the effect that national provisions incompatible with a directive binding on the Member State may not be enforced against an individual, and which concerns a rule undoubtedly likely to hinder the use and marketing of a specific product.

93. Nor is the case comparable with *Lemmens*, [26] in which the Court decided that failure to notify a technical regulation con-

24 — See paragraphs 99 to 102 of my Opinion in Case C-443/98 *Unilever* [2000] ECR I-7535.

25 — Footnote 1 above.

26 — Cited in footnote 12.

cerning breath-analysis equipment could not be raised as a defence to a criminal charge brought under a different provision but based on evidence obtained by equipment authorised in accordance with the regulation in issue. Here, the prosecution is for breach of the non-notified regulation itself and it must be possible to raise the failure to notify in defence.

Conclusion

94. I am consequently of the opinion that the Court should give the following answers to the Högsta Domstolen:

(1) The introduction in national law of a prohibition on the use of a product constitutes a technical regulation which must be notified under 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.

(2) The introduction in national law of a prohibition on a service which affects the use of a product constitutes a technical regulation which must be notified under Directive 83/189 if the effect of the prohibition is that:

— the product may not legitimately be used at all for any purpose for which it is intended by design and which is not purely marginal,

or that

— the product may legitimately be used for such a purpose only if it meets certain technical specifications.

(3) The redefinition in national law of a service connected with the construction of a product constitutes a technical regulation which must be notified under Directive 83/189 if the new definition affects the use of the product in either of the ways defined above.

(4) The replacement of a licence requirement by a prohibition in national law is subject to the same obligation to notify as the introduction of a prohibition.

(5) Factors such as the greater or lesser value of the product or service affected, or the size of the market for that product or service, are not relevant to the obligation to notify.