

European Court of Justice, 8 November 2007, SIAE



COPYRIGHT

Obligation to communicate draft technical regulations

- National provisions such as those at issue in the main proceedings – in so far as such provisions introduced, after the implementation of Directive 83/189, the obligation to affix the distinctive sign ‘SIAE’ to CDs of works of figurative art for the purposes of marketing them in the Member State concerned – constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

The Commission stated in its written observations and at the hearing, without being contradicted by the Italian Republic in that regard, that that change was not communicated to the Commission by the Italian Republic.

According to the case-law of the Court, failure to observe the obligation to notify constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against individuals (see, in particular, *CIA Security International*, paragraph 54, and *Lemmens*, paragraph 33). Individuals may rely on that inapplicability before the national court which must decline to apply a national technical regulation which has not been notified in accordance with Directive 98/34 (see, in particular, *CIA Security International*, paragraph 55, and *Sapod Audic*, paragraph 50).

In view of those points, it must be held that Directive 98/34 is to be interpreted as meaning that national provisions such as those at issue in the main proceedings – in so far as such provisions introduced, after the implementation of Directive 83/189, the obligation to affix the distinctive sign ‘SIAE’ to CDs of works of figurative art for the purposes of marketing them in the Member State concerned – constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

Admissibility

- Consequently, the reference for a preliminary ruling may be deemed admissible only in so far as it concerns the interpretation of Directive 98/34.

Source: curia.europa.eu

European Court of Justice, 8 November 2007

(A. Rosas, U. Löhmus, J. Klučka, A. Ó Caoimh and P. Lindh)

JUDGMENT OF THE COURT (Third Chamber)

8 November 2007 (*)

(Directive 98/34/EC – Procedure for the provision of information in the field of technical standards and regulations – Obligation to communicate draft technical regulations – National law requiring the distinctive sign of the national body responsible for collecting copyright royalties to be affixed to compact discs placed on the market – Definition of ‘technical regulation’)

In Case C-20/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale civile e penale di Forlì (Italy), made by decision of 14 December 2004, received at the Court on 21 January 2005, in the criminal proceedings relating to

Karl Josef Wilhelm Schwibbert,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus (Rapporteur), J. Klučka, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: V. Trstenjak,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2007,

after considering the observations submitted on behalf of:

– Mr Schwibbert, by A. Sirotti Gaudenzi, avvocato,

– Società Italiana degli Autori ed Editori, by M. Mandel and M. Siragusa, avvocati,

– the Italian Government, by I.M. Braguglia, acting as Agent, and by S. Fiorentino and M. Massella Ducci Teri, avvocati dello Stato,

– the Commission of the European Communities, by L. Pignataro and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3 EC, Articles 23 EC to 27 EC, 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; ‘Directive 98/34’), Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and re-

lated rights in the information society (OJ 2001 L 167, p. 10).

2 The reference was made in criminal proceedings brought against Mr Schwibbert in Italy, in which he was charged with holding compact discs ('CDs') which did not bear the distinctive sign of the national body responsible for collecting copyright royalties.

Legal context

Community legislation

3 Council Directive 83/189/EEC of 28 March 1983 (OJ 1983 L 109, p. 8) introduced a procedure for the provision of information in the field of technical standards and regulations into Community law.

4 Article 12 of Directive 83/189 is worded as follows:

'1. Member States shall bring into force the measures necessary in order to comply with this Directive within 12 months following its notification and shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field governed by this Directive are communicated to the Commission.'

5 Directive 83/189 has been variously and substantially amended, and was consolidated by Directive 98/34.

6 Article 1 of Directive 98/34 provides:

'For the purposes of this Directive, the following meanings shall apply:

(1) "product", any industrially manufactured product and any agricultural product, including fish products;

...

(3) "technical specification", a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

...

(4) "other requirements", 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;

...

(11) "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibit-

ing the provision or use of a service, or establishment as a service provider.

...

7 Articles 8 and 9 of Directive 98/34 require Member States to notify the Commission of the European Communities of any draft technical regulation falling within its scope, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is sufficient, and to postpone the adoption of such drafts for several months to allow the Commission to verify that they are compatible with Community law, and in particular with the principle of free movement of goods, or to propose a directive, a regulation or a decision on the question.

8 Directive 92/100 aims to harmonise the legal protection for copyright works and for the subject-matter of related rights protection. It seeks to ensure that authors and performers receive an adequate income. To that end, Directive 92/100 states that the Member States are to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject-matter as set out in Article 2(1) of that directive. In Chapter II of Directive 92/100, concerning rights related to copyright, Article 9 provides that Member States are to provide for the exclusive right to make available to the public, by sale or otherwise, the objects listed in that article.

National legislation

9 According to Law No 633 of 22 April 1941 on copyright (GURI No 166 of 16 July 1941; 'the 1941 Law'), the mandatory requirement to affix a distinctive sign to any medium containing protected works is an authentication tool and safeguard enabling legitimate products to be distinguished from pirated products. The Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers), an ad hoc public body, has protection, mediation and certification responsibilities. The distinctive sign thus provided for by the law bears the initials 'SIAE'.

10 Law No 121/87 of 27 March 1987 (GURI No 73 of 28 March 1987) extended the requirement to affix the distinctive sign 'SIAE' to other media containing intellectual works.

11 When transposing Directive 92/100, the Italian legislature introduced into the 1941 Law – pursuant to Legislative Decree No 685 of 16 November 1994 (GURI No 293 of 16 December 1994) which repealed Law No 121/87 – inter alia, Article 171b(1)(c), a provision which imposes specific criminal penalties and which is worded as follows:

'1. Any person who:

...

(c) sells or rents video cassettes, music cassettes or any other medium containing phonograms or videograms of cinematographic or audiovisual works or sequences of moving images which do not bear the mark of the Italian Society of Authors and Publishers (SIAE) in accordance with this law and with the implementing regulation

shall be punished with a term of imprisonment of between three months and three years and with a fine of between ITL 500 000 and ITL 6 000 000.

...

The dispute in the main proceedings and the question referred for a preliminary ruling

12 On 12 February 2000, the Procura della Repubblica presso il Tribunale civile e penale di Forlì (Public Prosecutor at the Civil and Criminal Court of Forlì) opened a judicial investigation in respect of Mr Schwibbert, resident in Italy, the legal representative of the company K.J.W.S. Srl, and confirmed that, on 9 and 10 February 2000, Mr Schwibbert was holding a certain number of CDs of reproductions of the works of the artists Giorgio De Chirico and Mario Schifano for sale in the company's warehouses. Those CDs, which were imported from Germany on behalf of other companies with a view to being sold at cultural events, did not bear the distinctive 'SIAE' sign.

13 In the course of inquiries carried out on 9 and 10 February 2000 by members of the Guardia di Finanza – Comando Tenenza di Cesena (Financial Investigation Unit – Cesena Headquarters), a record of the seizure of those CDs was drawn up in accordance with the Code of Criminal Procedure, in which it was stated that, after initial examination, the goods appeared to be counterfeit.

14 On 23 May 2001, the Procura della Repubblica presso il Tribunale civile e penale di Forlì interviewed Mr Schwibbert and charged him with having committed an offence under Article 171b(1)(c) of the 1941 Law, and brought him before the aforementioned court.

15 The hearing before the Tribunale di Forlì civile e penale was held on 14 December 2004. In the record of the hearing, the referring court states that it is not alleged that Mr Schwibbert reproduced the works unlawfully, since he had the necessary authorisations, but only that the CDs did not bear the distinctive 'SIAE' sign.

16 At that hearing, Mr Schwibbert's lawyer called on the court to refer a question to the Court of Justice for a preliminary ruling. The Tribunale civile e penale di Forlì granted the application but, in its order for reference, the court merely attached the lawyer's statement and did not formulate specific questions itself.

17 On 17 July 2006, the Court of Justice requested clarification from the national court, pursuant to Article 104(5) of the Rules of Procedure. The referring court's reply was received at the Court of Justice on 31 October 2006.

18 According to that reply, the question referred by the Tribunale civile e penale di Forlì is as follows:

'Are the national provisions concerning the affixing of the SIAE marking compatible with Article 3 EC, Articles 23 EC to 27 EC, Articles 1, 8, 10 and 11 of Directive 98/34 and Directives 92/100 and 2001/29?'

**The question referred for a preliminary ruling
Admissibility**

19 In its written observations and at the hearing, the Italian Government submitted that the reference for a

preliminary ruling should be dismissed as inadmissible. In its view, the reference does not contain the information necessary to enable the Court to provide a helpful answer to the question referred. In that regard, the Italian Government claims that, contrary to the requirements of Article 20 of the Statute of the Court of Justice, the reference does not specify why the interpretation of Community rules is necessary and does not clearly set out the national provisions which are actually applicable to the main proceedings. In any event, the reference is irrelevant to the outcome of those proceedings.

20 The Commission claims in its written observations that the question referred must be declared inadmissible in so far as it relates to the interpretation of Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100 owing to the absence of sufficient information in the order for reference.

21 It should be borne in mind that the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice (order in Case C-422/98 Colonia Versicherung and Others [1999] ECR I-1279, paragraph 5). It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (Joined Cases 141/81 to 143/81 Holdijk and Others [1982] ECR 1299, paragraph 6; order in Case C-326/95 Banco de Fomento e Exterior [1996] ECR I-1385, paragraph 7; and Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681, paragraph 23). Thus, according to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (see, in particular, order in Case C-116/00 Laguillaumie [2000] ECR I-4979, paragraph 16, and [Joined Cases C-94/04 and C-202/04 Cipolla and Others \[2006\] ECR I-11421](#), paragraph 38).

22 In the present case, as stated in paragraph 17 of this judgment, the referring court provided clarification at the request of the Court of Justice as to the facts of the dispute in the main proceedings and the legal framework under national and Community law. Furthermore, the Società Italiana degli Autori ed Editori, the Italian Government and the Commission took the view that it was possible to submit observations to the Court on the basis of the information provided by the referring court.

23 As regards Directive 98/34, the interested parties differ in their views as to whether the obligation to affix the distinctive sign 'SIAE' applies to the CDs at issue in the main proceedings and, if at all, at what point that obligation was extended to such media, that is to say before or after the obligation to notify draft technical regulations was introduced into Community

law. There is no dispute in the present case about the fact that criminal proceedings were initiated against Mr Schwibbert in respect of the failure to affix the 'SIAE' sign. However, determining the point at which the affixing obligation was in fact brought into Italian law is a matter of interpreting national law, which is not within the Court's jurisdiction. In any event, the uncertainty on that point is not such as to render it impossible for the Court to provide a useful answer to the question referred as clarified by the referring court as requested.

24 In those circumstances, the Court considers that it has sufficient information to enable it to reply to the question concerning Directive 98/34.

25 By contrast, as regards the interpretation of Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100, it must be held that the order for reference does not provide the information necessary to enable the Court to provide the referring court with a useful reply.

26 It must be borne in mind that those EC Treaty provisions prohibit – between Member States – customs duties on imports and exports and all charges having equivalent effect. Directive 92/100 harmonises the rules relating to rental right and lending right and to certain rights related to copyright in the field of intellectual property.

27 However, the particulars provided by the referring court in relation to the factual background to the dispute in the main proceedings do not enable the place where the CDs were manufactured to be determined with any certainty, or the fact that they were actually imported into Italy to be established. As far as the information concerning the national legal framework is concerned, this does not give the Court sufficient information about the characteristics of the financial consideration given for obtaining the distinctive sign 'SIAE' so as to enable the Court to determine whether it amounts to a customs duty or a charge having equivalent effect within the meaning of the aforementioned articles of the Treaty. Nor, finally, do those particulars enable the Court to assess whether Directive 92/100 precludes such national rules.

28 In those circumstances, it is not possible to give a ruling on whether Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100 preclude an obligation such as that which is in dispute in the main proceedings.

29 In addition, it must be noted that the question referred also concerns the interpretation of Directive 2001/29. That directive is based on the principles and rules already laid down, inter alia, by Directive 92/100, which it amends. Directive 2001/29 was adopted on 22 May 2001 and Article 13 thereof provides that the Member States must comply with it before 22 December 2002. However, the events underlying the main proceedings occurred in February 2000, before the directive was adopted. Therefore, the question referred for a preliminary ruling is inadmissible in so far as it concerns the interpretation of Directive 2001/29.

30 Consequently, the reference for a preliminary ruling may be deemed admissible only in so far as it concerns the interpretation of Directive 98/34.

Substance

31 By its question, the referring court asks, in essence, whether Articles 1, 8, 10 and 11 of Directive 98/34 preclude national provisions such as those at issue in the main proceedings, inasmuch as the latter provide for the initials of the Società Italiana degli Autori ed Editori to be affixed to media containing reproductions of intellectual works.

32 In that regard, the documents before the Court show that, in the main proceedings, criminal proceedings were initiated against Mr Schwibbert for failing to affix that distinctive sign to CDs of works of figurative art. It is necessary therefore to consider whether the Community legislation referred to by the national court precludes national provisions imposing such an obligation.

33 First, it is necessary to consider whether the obligation to affix such initials can be described as a 'technical regulation' within the meaning of Article 1 of Directive 98/34. If so, it will be necessary to check whether the draft technical regulation was notified to the Commission by the Italian authorities, failing which it would be unenforceable against Mr Schwibbert (see, in particular, Case C-194/94 CIA Security International [1996] ECR I-2201, paragraphs 48 and 54; Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 33; and Case C-159/00 Sapod Audic [2002] ECR I-5031, paragraph 49).

34 It follows from Article 1(11) of Directive 98/34 that the definition of 'technical regulation' can be broken down into three categories: first, the 'technical specification' within the meaning of Article 1(3) of that directive; second, the 'other requirement', as defined in Article 1(4); and, third, the prohibition of the manufacture, importation, marketing or use of a product referred to in Article 1(11) (see, in particular, Case C-267/03 Lindberg [2005] ECR I-3247, paragraph 54).

35 As the Court has held, the concept of technical specification presupposes that the national measure refers to the product or its packaging as such and thus lays down one of the characteristics required of a product (see, to that effect, Case C-278/99 van der Burg [2001] ECR I-2015, paragraph 20; Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 45; and also Sapod Audic, paragraph 30, and Lindberg, paragraph 57).

36 In the present case, it is clear, as the Advocate General has stated in points 46 and 48 of her Opinion, that the distinctive sign 'SIAE', which is intended to inform consumers and the national authorities that the reproductions are lawful, is affixed to the actual medium containing the intellectual work and thus to the product itself. It is not, therefore, correct to maintain, as the Società Italiana degli Autori ed Editori and the Italian Government have done, that that sign relates solely to the intellectual work.

37 Such a distinctive sign constitutes a 'technical specification' within the meaning of Article 1(3) of Directive 98/34, since it falls within the requirements applicable to the products concerned as regards marking or labelling. Therefore, since observance of that

specification is compulsory de jure for marketing those products, the specification constitutes a 'technical regulation' within the meaning of Article 1(11) of that directive (see, to that effect, Case C-13/96 *Bic Benelux* [1997] ECR I-1753, paragraph 23).

38 Under Article 8 of Directive 98/34, 'Member States shall immediately communicate to the Commission any draft technical regulation'. In the event of non-compliance with that obligation, the technical regulation remains unenforceable against individuals, as has been noted in paragraph 33 of this judgment. It is necessary therefore to ascertain whether, in the present case, the Member State has fulfilled its obligations under Article 8 of Directive 98/34. If it has not, the technical regulation at issue would be unenforceable against Mr Schwibbert.

39 The Società Italiana degli Autori ed Editori and the Italian Government claim that the obligation to affix the distinctive sign 'SIAE' to media containing intellectual works was already provided for in respect of paper media under the 1941 Law – some considerable time before the entry into force of the relevant Community directives – and that the statutory amendments introduced after their entry into force, in 1987 and 1994 respectively, did no more than bring the legislation into line with technological progress, merely including new media within the scope of that obligation. Accordingly, those statutory amendments did not have to be notified to the Commission.

40 In the present case, the documents submitted to the Court appear to show that the obligation to affix the distinctive sign 'SIAE' became applicable to the media at issue in the main proceedings, namely CDs of works of figurative art, in 1994 by virtue of Legislative Decree No 685. Accordingly, that obligation should have been communicated to the Commission by the Italian Republic because it arose after the introduction, by Directive 83/189, of the procedure for the provision of information in the field of technical standards and regulations. Nevertheless, as has been pointed out in paragraph 23 of this judgment, it is for the referring court to ascertain whether the obligation at issue had in fact been brought into Italian law at that point.

41 In so far as the obligation to affix the distinctive sign 'SIAE' was extended to products such as those at issue in the main proceedings after the implementation of Directive 83/189, it must be borne in mind that, according to settled case-law, the aim of the second part of the first subparagraph of Article 8(1) of Directive 98/34 is to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by the Directive (see, in particular, *CIA Security International*, paragraph 50; Case C-279/94, *Commission v Italy* [1997] ECR I-4743, paragraph 40; and Case C-145/97 *Commission v Belgium* [1998] ECR I-2643, paragraph 12).

42 Similarly, according to the third subparagraph of Article 8(1) of Directive 98/34, 'Member States shall communicate the draft again ... if they make changes

to the draft that have the effect of significantly altering its scope ...'. The inclusion of new media, such as CDs, within the scope of the obligation to affix the distinctive sign 'SIAE' must be regarded as such a change (see, to that effect, Case C-317/92 *Commission v Germany* [1994] ECR I-2039, paragraph 25, and *Lindberg*, paragraphs 84 and 85).

43 The Commission stated in its written observations and at the hearing, without being contradicted by the Italian Republic in that regard, that that change was not communicated to the Commission by the Italian Republic.

44 According to the case-law of the Court, failure to observe the obligation to notify constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against individuals (see, in particular, *CIA Security International*, paragraph 54, and *Lemmens*, paragraph 33). Individuals may rely on that inapplicability before the national court which must decline to apply a national technical regulation which has not been notified in accordance with Directive 98/34 (see, in particular, *CIA Security International*, paragraph 55, and *Sapod Audic*, paragraph 50).

45 In view of those points, it must be held that Directive 98/34 is to be interpreted as meaning that national provisions such as those at issue in the main proceedings – in so far as such provisions introduced, after the implementation of Directive 83/189, the obligation to affix the distinctive sign 'SIAE' to CDs of works of figurative art for the purposes of marketing them in the Member State concerned – constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that national provisions such as those at issue in the main proceedings – in so far as such provisions introduced, after the implementation 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, the obligation to affix the distinctive sign 'SIAE' to compact discs of works of figurative art for the purposes of marketing them in the Member State concerned – constitute a technical regulation which, if

not notified to the Commission, cannot be invoked against an individual.

**OPINION OF ADVOCATE GENERAL
TRSTENJAK**

delivered on 28 June 2007 (1)

Case C-20/05

Pubblico Ministero

v

Karl Josef Wilhelm Schwibbert

(Reference for a preliminary ruling from the Tribunale di Forlì (Italy))

(*Directive 98/34/EC – Definition of ‘technical regulation’ – National legislation imposing the obligation to affix to compact discs the initials of the national body responsible for collecting royalties – Obligation to notify*)

I – Introduction

1. In connection with the criminal charges brought against Mr Schwibbert for holding compact discs (hereinafter ‘CDs’) which did not bear the distinctive sign of the national body responsible for collecting royalties (Società Italiana degli Autori ed Editori, hereinafter ‘SIAE’), the Tribunale di Forlì, Italy, at the request of Mr Schwibbert’s lawyer, asks the Court whether national provisions imposing the obligation to affix that distinctive sign are compatible with Articles 3 EC and 23 EC to 27 EC, and with 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) – a directive in fact consolidated by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, (3) itself amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, (4) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5) and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. (6)

II – Legal framework

A – Community law

1. EC Treaty

2. According to Articles 23 EC to 27 EC, the Community is to be based upon a customs union which will cover all trade in goods and which will involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect.

2. Directives

(a) Directive 92/100

3. Directive 92/100 is intended to bring about harmonised legal protection in respect of rental right and lending right and of certain rights related to copyright in the field of intellectual property. According to the

first recital in the preamble to the Directive, that harmonisation is intended to remove differences between the national rules when those differences ‘are sources of barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market’.

4. The second recital states that ‘such differences in legal protection could well become greater as Member States adopt new and different legislation or as national case-law interpreting such legislation develops differently’.

5. The third recital states that ‘such differences should therefore be eliminated in accordance with the objective of introducing an area without internal frontiers as set out in Article 8a of the Treaty so as to institute, pursuant to Article 3(f) of the Treaty, a system ensuring that competition in the common market is not distorted’.

(b) Directive 98/34, consolidating Directive 83/189

6. Under Article 1:

‘For the purposes of this Directive, the following meanings shall apply:

1. “product”, any industrially manufactured product and any agricultural product, including fish products;
2. “technical specification”, a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures ...

...

10. “draft technical regulation”, the text of a technical specification or other requirement, including administrative provisions formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made ...’.

7. Article 8 of Directive 98/34 provides:

‘1. ... 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.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.’

8. Article 9 of Directive 98/34 provides:

‘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).’

(c) Directive 98/48, amending certain points of Directive 98/34

9. Point 9 of Article 1 of Directive 98/34 becomes point 11 as follows:

‘11. “technical regulation”, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations include:

- laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,
- voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,
- technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.’

(d) Directive 2001/29

10. Directive 2001/29 reproduces the principles and rules contained inter alia in Directive 92/100 and introduces amendments to them.

B – National law

11. The Italian copyright law is based on Law 633 of 1941. (7) This law created an ad hoc public body, SIAE, which has protection, mediation and certification responsibilities, and provided for criminal penalties for certain unauthorised conduct (marketing, reproduction, ...). It also introduced the obligation to affix the SIAE distinctive sign.

12. Law 121/87 of 27 March 1987 (8) extended the obligation to affix the SIAE distinctive sign and the possibility of criminal penalties to other media.

13. Legislative Decree No 685/94 of 16 November 1994 (9) repealed Law 121/87. Article 171 b(c) of that decree provides:

‘Any person who:

... sells or rents video cassettes, music cassettes or any other medium containing phonograms or videograms or cinematographic or audiovisual works or sequences of moving images which do not bear the mark of the Italian Society of Authors and Publishers (SIAE) in accordance with this law and with the implementing regulation

shall be punished with a term of imprisonment of between three months and three years and with a fine of between ITL 500 000 and ITL 6 000 000.’

III – The dispute in the main proceedings and the reference for a preliminary ruling

14. On 9 and 10 February 2000, CDs were seized on the premises of the company K.J.W.S. Srl, of which Mr Schwibbert, who is resident in Italy, is the legal representative. Those CDs, which were seized because they did not bear the SIAE distinctive sign, contained reproductions of works of the artists Giorgio De Chirico and Mario Schifano. Mr Schwibbert’s lawyer stated at the hearing before the Court of Justice that some of the CDs included musical accompaniment. Moreover, a document annexed to Mr Schwibbert’s written observations indicates that, at least, the CDs which reproduced the works of the first of those artists contained a film. It is also apparent from information provided by the national court and from the explanations supplied by Mr Schwibbert’s lawyer to the hearing before the Court that the CDs had been copied in Germany and were intended to be sold to two Italian companies for them to sell by mail order.

15. On 23 May 2001, the Procura della Repubblica presso il Tribunale di Forlì interviewed Mr Schwibbert under caution and sent him for trial before the Tribunale di Forlì.

16. On 14 December 2004, the Tribunale di Forlì pointed out in the record of its hearing that it is not alleged that Mr Schwibbert reproduced the works unlawfully, since he had the necessary authorisations, but only that the CDs did not bear the SIAE distinctive sign.

17. The Tribunale di Forlì also granted the application made by Mr Schwibbert’s lawyer for a reference for a preliminary ruling from the Court of Justice. However, the order for reference merely attached the arguments of Mr Schwibbert’s lawyer and did not formulate specific questions. The order was lodged at the Court Registry on 21 January 2005.

18. On 17 July 2006, the Court requested, pursuant to Article 104(5) of the Rules of Procedure, clarification from the national court regarding the factual and legal context of the dispute in the main proceedings, and the Community law provisions to be interpreted and the reasons why the court considered it necessary to request their interpretation. Its replies were received by the Court on 8 November 2006.

19. It follows from the replies given by the Tribunale di Forlì that the questions which that court is asking the Court of Justice may be formulated as follows:

‘Are the national rules concerning the affixing of the SIAE marking compatible with Articles 3 EC, 23 EC to 27 EC, Articles 1, 8, 10 and 11 of Directive 98/34/EC of 22 June 1998 and Directives 92/100 and 2001/29?’

20. The Court decided to put some questions, to be answered in writing before the hearing, to the Italian Government and the Commission, requesting them *inter alia* to present their observations in the light of the clarifications provided by the national court. The Italian Government and the Commission replied to those requests in writing.

IV – Observations presented to the Court of Justice

21. Mr Schwibbert maintains that the obligation to affix the SIAE sign is a technical regulation which should have been notified by Italy to the Commission in accordance with Article 8(1) of Directive 83/189.

22. The obligation to affix that distinctive sign is also in the nature of a measure having equivalent effect, since it constitutes a barrier that prevents operators from other countries developing their business in the Italian market.

23. Furthermore, the affixing of that sign offers no protection to the author and to the other holders of intellectual property rights. The Italian legislation imposes criminal penalties for failure to affix it, whether or not the reproduction was unlawful.

24. Moreover, the obligation to affix the initials SIAE is contrary to Articles 23 EC and 25 EC, namely, the prohibition, laid down by the Treaty, of customs duties and of all charges having equivalent effect, since those initials are charged for and must be affixed to all works from the moment they enter Italy from a Community country.

25. Finally, that obligation infringes Directive 92/100, the first three recitals of which state that there are differences between the various national legal systems and, consequently, a risk that competition between the Member States will be distorted.

26. SIAE, which has not submitted written observations, stated at the hearing that the obligation to affix the sign did not have to be notified to the Commission, since it was already provided for by a law of 1941, which, at the time, referred to works produced on paper. Since 1971, agreements had been concluded between all disc manufacturers for the SIAE to be affixed to that medium.

27. SIAE also states that, at the material time, Italian law did not impose the obligation to affix the distinctive sign on works of figurative art; that obligation has existed only since Law 248/2000 came into force. In the present case, CDs with musical content should have borne the SIAE initials.

28. As regards Articles 3 EC, 22 EC and 27 EC, SIAE argues that the prohibition laid down by those articles concerning duties levied on imports affects only imported products, to the exclusion of domestic products. However, the Italian legislation requiring the affixing of the distinctive sign applies to all products, whether domestic or imported. Therefore, those articles do not affect that obligation, which, furthermore, as the Italian Government also states, is designed to enable

both the forces of law and order and consumers to distinguish between original works and pirated works.

29. SIAE adds that Directive 92/100 was transposed in Italy by Legislative Decree 685/94. As a measure to implement the Directive, that Legislative Decree, which, in the words of the SIAE, ‘contained within it the rules concerning the distinctive sign’, was notified to the Commission.

30. Finally, SIAE argues that, if the Court wished to reformulate the question referred for a preliminary ruling in relation to Articles 28 EC and 30 EC, the obligation to affix ought to be regarded as proportionate to the objectives *inter alia* of combating piracy and informing consumers who, if they buy illegal copies, are liable to criminal proceedings.

31. The Italian Government considers that the question referred for a preliminary ruling is inadmissible, since the referring court has merely granted the request as submitted by the accused’s lawyer. The national court ought to give at least some explanation as to why the Community law provisions in respect of which it has made the reference need an interpretation from the Court.

32. The Italian Government states that SIAE is a public undertaking which has a legal monopoly and whose role is *inter alia* to collect, as required by law, the revenue from the affixing of the SIAE sign. By supplying that sign, SIAE provides its members with a guarantee that the reproductions are lawful. That service is part of the fight against piracy and has no effect on the free movement of goods. The Italian Government agrees with the SIAE that, in any event, Article 30 EC lends validity to the obligation to affix the SIAE sign. That measure, since it is not discriminatory, also complies with Directive 92/100.

33. The Italian Government shares the view of SIAE that the obligation, imposed by Law 121/87, to affix the sign did not have to be notified to the Commission because that obligation has existed since 1941, and the introduction of a criminal penalty is only an adjustment made in response to the appearance of new technological media in the market.

34. Finally, the Italian Government asserts that intellectual works cannot be treated in the same way as any other product which may be placed on the market within the Community because they are not goods. The SIAE distinctive sign cannot be treated like a marking in accordance with technical regulations within the meaning of Directive 83/189, since that distinctive sign or label essentially identifies the characteristics of the intellectual work which has been reproduced and therefore of the *corpus mysticum*; it does not identify the *corpus mechanicum*, in other words the medium. It is therefore not possible to refer, as does the Commission, to the judgment in *Bic Bénélux*. (10) In that case, the stamp was intended to inform the public of the effects of the BIC product on the environment; it therefore described the characteristics of that product. However, the SIAE stamp does not contain any description of the characteristics of the product. It simply indicates to the forces of law and order and to consumers that the stamp

has been affixed in accordance with the law. Consequently, the measure is entirely incidental to the objective, which is to demonstrate that the regulations have been properly observed.

35. The Commission, in the light of the written replies given to the written questions posed by the Court and of the observations presented at the hearing by the various parties, considers that the question referred for a preliminary ruling is admissible.

36. The Commission points out that only Article 2 of Law 121/87 extended the obligation to affix the SIAE sign to music cassettes and CDs. That rule constitutes a technical regulation which should have been notified to the Commission. The Commission cites Article 1(5) of Directive 83/189, (11) which was in force in 1987, according to which 'technical regulation' means 'technical specifications, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use ...'. In order to market videocassettes and CDs in 1987 in Italy, it was necessary to affix that sign. It was therefore a technical regulation the observance of which was compulsory in the case of marketing in Italy.

37. The Commission adds that Legislative Decree 685/94, since it repealed Law 121/87, is the only legislation applicable at the material time. Article 171b(c), since it also imposes an obligation, subject to criminal penalties, to affix the SIAE sign, should also have been notified to the Commission. That sign, which may be affixed either directly to the CD or on the outer packaging, is equivalent to a marking. The present situation is therefore comparable to the situation in *Bic Benelux* concerning fiscal aspects. In that regard, the Commission also refers to the judgment in *CIA Security International*, (12) in which the Court held that breach of the obligation to notify laid down, inter alia, in Article 8 of Directive 89/189, renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals.

38. The Commission counters the argument raised by SIAE at the hearing, that the Commission was aware of the obligation to affix the sign owing to notification of Legislative Decree 685/94 as a measure transposing Directive 92/100, by stating that that obligation is not a measure transposing Directive 92/100, because that obligation is not necessary for transposing the directive. Consequently, that notification as a measure transposing Directive 92/100 cannot be regarded as one of the situations envisaged by Article 10 of Directive 83/189, which exempts Member States from the obligation to notify measures transposing Community directives.

39. In the light of the present observations, which the Commission considers to be sufficient, it nevertheless argues that the obligation to affix the SIAE sign is contrary neither to Articles 23 EC and 25 EC, because it is not linked to the crossing of the border but is an obligation which must be fulfilled prior to marketing, nor to Directive 92/100, which merely defines the scope of certain rights but leaves it to the Member States to select the mechanisms for ensuring obser-

vance of those rights; the obligation to affix may be regarded as a mechanism.

V – Assessment

A – The admissibility of the question referred for a preliminary ruling

40. In spite of the submissions of the Italian Government, I consider that this question referred for a preliminary ruling is admissible. Admittedly, it is not desirable that the national court should merely enclose the application for a reference for a preliminary ruling as formulated by a party's lawyer, and that it should have compelled the Court of Justice to request, pursuant to Article 104(5) of the Rules of Procedure, clarification from the national court regarding the factual and legal context of the dispute in the main proceedings, the Community law provisions to be interpreted and the reasons why the court considers it necessary to request their interpretation. However, it is not apparent from any legislation, and in particular not from the information note on references from national courts for a preliminary ruling, (13) that the national court has formally to draft the question or questions and itself provide any relevant information regarding the case, (14) failing which the reference will be inadmissible. Moreover, in the present case, the national court, to use its own words, 'deems [the document submitted by Mr Schwibbert's lawyer] to be reproduced in its judgment'.

B – The special features of the Italian legislation

41. In the great majority of the Member States, the law does not impose an obligation to affix the sign of the national body responsible for administering royalties relating to media. (15) If, however, those bodies require or recommend, as a condition for authorising reproduction, that certain particulars be stated on the media, (16) those particulars need only be on the reproductions, but there is absolutely no requirement for the reproductions to bear stickers sold by the bodies in question. Moreover, the fact that the bodies may require their sign to be affixed to reproductions is not based on a legal obligation, but simply on the contract concluded between the bodies and the holder of the reproduction authorisation. Thus, failure to affix the sign may involve penalties only of a contractual nature, such as the payment of additional royalties.

42. The Italian legal system, by imposing criminal penalties for failure to affix the sign of the body responsible for collecting royalties, therefore appears to have special features as compared with the systems of the other Member States of the European Union.

C – The obligation to affix the SIAE sign: a technical regulation subject to the obligation to notify

43. Article 8 of Directive 98/34 requires Member States to communicate immediately to the Commission any draft technical regulation. SIAE and the Italian Government maintain that Italy did not have to communicate the obligation to affix the SIAE sign because it was not a technical regulation. It is therefore necessary to examine the definition of technical regulation (17) and to determine whether it may include the obligation to affix such a sign.

44. The Court has held, for example, that national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations. (18) Likewise, national rules which do not lay down the characteristics required of a product but are confined to regulating the closing times of shops do not constitute technical regulations. (19)

45. On the other hand, detailed rules defining the conditions concerning the quality tests and function tests which must be fulfilled in order for the product to be approved and marketed do constitute technical regulations. (20) Similarly, provisions which require the undertakings concerned to apply for prior approval of their equipment constitute technical regulations. (21) The Court has also held that the concept of technical specification includes production methods and procedures for medicinal products. (22) The Court has declared, furthermore, that rules which are intended to prevent the administration of sympathicomimetic substances to certain fattening cattle constitute technical specifications, since they are issued by the national administrative authorities, apply to the whole of the national territory and are binding on their addressees. (23) In its judgment in *Bic Benelux*, the Court also pointed out that a marking intended to inform the public of the effects of a product on the environment is no different, in spite of the fact that it is linked to an eco-tax system, from other labelling which reminds consumers of the harmful effects of the products in question on the environment. Therefore such a marking cannot be regarded as exclusively a fiscal accompanying measure and, consequently, it must be notified. (24) Similarly, the obligation to indicate the origin of a product on the label is notifiable. (25) Even national provisions which entail a prohibition on the organisation of games of chance using certain gaming machines, (26) requirements relating to the maximum length and depth and maximum power restriction of pleasure motor-boats (27) or national legislative provisions which prohibit the installation of all electrical, electromechanical and electronic games on all public and private premises, including computer games in undertakings providing internet services, and make the operation of such undertakings subject to the issue of a special authorisation, must be considered to be technical regulations. (28)

46. In this case, as the Commission submits, the obligation to affix the SIAE sign is comparable to the obligation to affix a marking in *Bic Benelux*, cited above, the purpose of which was to inform the public of the environmental effects of a product. In the present case, the sign is intended, as the SIAE and the Italian Government pointed out in their observations, to inform consumers and the forces of law and order that the reproductions are lawful. Accordingly, just as the Court held in paragraph 23 of the judgment in *Bic Benelux*, the obligation to affix the SIAE sign should be regarded as constituting, in the words used by the Court in the aforementioned paragraph 23 ‘according to the

definition given in [Article 11 of Directive 98/48], a *de jure* technical regulation in that its “observance ... is compulsory ... in the case of marketing” of the product concerned and in that it is, according to the definition given in [Article 5(2) of Directive 98/34], a technical specification, since the enactment defines “the characteristics required of a product such as ... the requirements applicable to the product as regards ... marking or labelling”’.

47. The Italian Government’s argument that intellectual works cannot be treated in the same way as any other marketable product because they are not goods must therefore be rejected. Directive 98/34 concerns itself with ‘products’ rather than ‘goods’. (29) Directive 98/34, according to Article 1(1) thereof, applies to ‘any industrially manufactured product’. CDs are unquestionably industrially manufactured products. Moreover, that Directive does not exclude any sector, *inter alia* intellectual works, from its scope. (30) Furthermore, Directive 98/48, (31) which was adopted one month after Directive 98/34, extends its scope to ‘any Information Society service’, that is to say, ‘any service normally provided for remuneration, at a distance, by electronic means ...’. Since such services are certainly ‘intellectual works’, it cannot be maintained that intellectual works do not fall within the fields in which rules may be described as technical regulations.

48. It is also necessary to reject the Italian Government’s argument that the SIAE distinctive sign cannot be treated in the same way as a marking in accordance with technical regulations, since that distinctive sign essentially identifies the characteristics of the intellectual work which has been reproduced and therefore of the ‘*corpus mysticum*’; it does not identify the ‘*corpus mechanicum*’, in other words the medium. That distinction is illusory, in fact. The SIAE distinctive sign is intended, as has just been reiterated, to inform consumers and the forces of law and order that the CDs have been copied in compliance with copyright. The sign therefore definitely refers to the medium.

49. Consequently, pursuant to Article 8 of Directive 98/34, under which ‘Member States shall immediately communicate to the Commission any draft technical regulation’, Italy should have communicated the obligation to affix the SIAE sign, as required under the national legislation in force at the material time, namely Legislative Decree 685/94 of 16 November 1994.

50. Furthermore, the reply to be given to SIAE – which maintains that if it were held that the obligation to affix the SIAE sign was to be regarded as a technical regulation which had to be communicated, that communication was made indirectly, since the Legislative Decree was communicated to the Commission as a measure implementing Directive 92/100 – is that, under Article 8 of Directive 98/34, Member States ‘shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary’. Moreover, the Court has already had occasion to point out that the aim of that provision ‘is to enable the Commission to have as much information

as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by [Directive 83/189]. (32) Clearly, no notification was sent to that end. Article 8 also provides that ‘Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation’. In view of the special features of the Italian legislation on the matter as compared with the legislation of the other Member States and having regard to the overall objective of the Directive, (33) such communication would not have been redundant.

D – The obligation to communicate an extension to the scope of a technical regulation

51. SIAE and the Italian Government submit that the obligation to affix the SIAE initials imposed by Law 121/87 did not have to be communicated to the Commission, because that obligation was already provided for in the 1941 Law for works produced on paper. Law 121/87, extending that obligation to other sectors and providing for criminal penalties, and Legislative Decree 685/94 of 16 November 1994 which repealed Law 121/87, are only adjustments made in the light of technological progress, and the increase in the fields subject to the obligation to affix the SIAE initials was therefore not communicated.

52. However, Article 8 also provides that ‘Member States shall communicate the draft again ... if they make changes to the draft that have the effect of significantly altering its scope’. Consequently, the Court has also pointed out that the extension of the scope of a technical regulation to other products constitutes a new technical regulation. (34)

E – The obligation of the national court to decline to apply a technical regulation which has not been notified

53. It is apparent from the case-law of the Court that, since Italy did not notify the Commission of the obligation to affix the SIAE initials, the Italian authorities cannot complain that Mr Schwibbert has not affixed it.

54. In its judgment in *CIA Security International*, (35) the Court stated that Articles 8 and 9 of Directive 83/189 were 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 not been notified in accordance with the Directive. The Court explains that, on the one hand, those provisions, since they lay down a precise obligation on Member States to notify draft technical regulations before they are adopted, are unconditional and sufficiently precise in terms of their content. On the other hand, an interpretation of the Directive as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals will ensure the effectiveness of the Community preventive control for which provision is made in the

Directive in order to attain its objective, which is to protect freedom of movement for goods. (36) Similarly, in *Sapod Audic v Eco-Emballages*, the Court held that an individual may invoke the failure to make notification of a national provision which has to be interpreted as requiring a mark or label to be applied, and it is then for the national court to refuse to apply that provision. (37)

55. It is apparent from the foregoing considerations that the obligation to affix the SIAE initials, laid down in Legislative Decree 685/94, (38) should be deemed to constitute a technical regulation. That technical regulation was not notified to the Commission, contrary to the provisions of Article 8 of Directive 98/34. Therefore, the Italian authorities may not complain that Mr Schwibbert did not affix the sign. Consequently, it is not necessary to respond to the other matters raised in the reference for a preliminary ruling, since answers to them are not necessary for judgment to be given in the main action. (39)

VI – Conclusion

56. In the light of the foregoing considerations, I propose that the Court give the following reply to the questions submitted by the Tribunale di Forlì:

National provisions requiring the affixing of the distinctive sign of the national body responsible for collecting royalties constitute a technical regulation which must be notified to the Commission of the European Communities, in accordance with Article 8 of Directive 98/34 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. Each extension of the scope of that obligation must be notified. It is for the national court to decline to apply a provision which does not comply with that obligation to notify.

1 – Original language: French.

2 – OJ 1983 L 109, p. 8.

3 – OJ 1998 L 204, p. 37.

4 – OJ 1998 L 217, p. 18.

5 – OJ 1992 L 346, p. 61.

6 – OJ 2001 L 167, p. 10.

7 – GURI No 166 of 16 July 1941.

8 – GURI No 73 of 28 March 1987.

9 – GURI No 293 of 16 December 1994.

10 – Case C-13/96 [1997] ECR I-1753.

11 – The version in force at the material time, which is still in force today, is that of point 11 of Directive 98/48 (see ‘Legal framework’ above).

12 – Case C-194/94 [1996] ECR I-2201.

13 – OJ 2005 C 143, p. 1.

14 – Thus, in *Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others* [2005] ECR I-3565, paragraph 37, the Court formulated the questions itself, having regard to the grounds for the decision to make the reference.

15 – Portuguese and Romanian law impose the obligation to affix such a label on reproductions, whether they have been imported or produced on national territory.

The affixing of the label is regarded as a measure to protect copyrights against piracy.

In Portuguese law (Decree-law 39/88 of 6 February 1988, *Diário da República I*, Series A, No 31, of 6 February 1988, p. 418, as amended by Decree-law 121/2004 of 21 May 2004, *Diário da República I*, Series A, No 119 of 21 May 2004, p. 3326), the holder of the exploitation rights must apply to the *Inspecção Geral das Actividades Culturais* (General Inspectorate for Cultural Arts) (IGAC) for the issue of a label to affix to each copy. The label, the model for which was approved by administrative order, shows inter alia the initials IGAC, the title, classification and registration number. For each label, that body charges the sum of EUR 0.18 (to which is added a tax of EUR 37.41 payable annually to the *Comissão de Classificação de Espectáculos* (Entertainment Classification Board)). The distribution or display of reproductions which do not bear the IGAC compulsory label is punishable by a fine of between EUR 500 and EUR 3 470 when this has been done by a natural person and a fine of between EUR 1 000 and EUR 3 000 when it has been done by a legal person.

Romanian law (Law 8 of 14 March 1996 concerning copyright and related rights, 'Monitorul Oficial', Part I, No 60 of 26 March 1996 and No 843 of 19 September 2005, and Government Order No 25 of 26 January 2006 concerning the strengthening of the administrative capacity of the Romanian Copyright Office (O.R.D.A.), 'Monitorul Oficial' Part I, No 84 of 30 January 2006) imposes an obligation to affix a holographic mark on reproductions. That mark, the model for which is authorised by O.R.D.A., consists in a silver-coloured adhesive stamp bearing a three-dimensional image, an alphanumeric code and the words MOSTRA ORDA. The aforementioned Office supplies the holographic labels on demand following the issue of a certificate proving that the reproduction has been entered in the National Videogram Register. The party concerned must pay a royalty proportional to the sale price and a fee to cover the administrative costs. The marketing or holding for the purpose of marketing of reproductions which do not bear the mark constitutes a minor offence punishable by a fine.

Greek and Cypriot legislators have contemplated similar measures, but have never adopted them.

16 – The particulars which must be reproduced are the following: Austria: © VBK ('Verwertungsgesellschaft bildender Künstler')/author's name/title of work; Germany: © VG ('Verwertungsgesellschaft BILD-KUNST') Bild-Kunst, Bonn, year of authorisation; Finland: author's name/© Kuvasto/year of authorisation; Sweden: © author's name/BUS ('Bildkonst Upphovsrätt i Sverige')/year of authorisation; Denmark: © author's name/COPY-DAN Billedkunst/licence number; France: © author's name/publication date of work; Hungary: author's name/title of work/HUNGART ©; United Kingdom: © author's name/title of work/DACS ('Design and Artists Copyright Society Limited')/date of authorisation; Netherlands © author's name/original title of work

(possibly with a translation)/year created/c/o Beeldrecht Amsterdam/year of authorisation; Luxembourg: logo of the SDRM ('Société des droits de reproduction mécaniques') – SACEM ('Société des auteurs, compositeurs et éditeurs musicaux'); Spain: logo of the SGAE ('La Sociedad General de Autores y Editores'). Ireland also has similar requirements or recommendations.

17 – Directive 98/48, which amended Directive 98/34, defines 'technical regulation' as follows: '... technical specifications ..., including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing ...'. The definition of technical specification remains as given in Directive 98/34; it is 'a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures. The term 'technical specification' also covers production methods and processes ...'. It must be inferred from the words 'such as' that this list of technical specifications is by no means exhaustive. See Fronia, J., 'Transparenz und Vermeidung von Handelshemmnissen bei Produktspezifikationen im Binnenmarkt', *Europäische Zeitschrift für Wirtschaftsrecht*, No 4, 1996, p. 102. As regards the definition of technical regulation, see also Lecrenier, S., 'Les articles 30 et suivants CEE et les procédures de contrôle prévues par la directive 83/189/CEE', *Revue du Marché commun*, No 283, January 1985, p. 10, Bernhard, A. and Madner, V., 'Das Notifikationsverfahren nach der Informationsrichtlinie, Eine Auseinandersetzung im Lichte des 'CIA-Urteils' des EuGH', *Journal für Rechtspolitik* No 6, p. 87, Weber, D.M., 'The notification of Directive 83/189/EEC in the field of direct and indirect taxation', *EC Tax Review*, 1998, p. 276.

18 – Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 45, concerning Spanish legislation requiring operators of conditional-access television services to register in a national register created for that purpose, indicating the characteristics of the technical equipment they use, and subsequently to obtain administrative certification thereof.

19 – Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, paragraph 38.

20 – CIA Security International, paragraph 26.

21 – CIA Security International, paragraph 30, and *Canal Satélite Digital*, paragraph 46.

22 – Case C-289/94 *Commission v Italy 'Molluscs'* [1996] ECR I-4405, paragraph 51.

23 – Joined Cases C-425/97 to C-427/97 *Albers* [1999] ECR I-2947, paragraphs 16 to 18.

24 – *Bic Benelux*, paragraph 24 (see Levis, L., '*Bic Benelux SA v. Belgium State – Case C-13/96*', *Review of European Community & International Environ-*

mental Law, 1997, pp. 334-335 and Rainer, A., *Internationales Steuerrecht*, 1997, p. 287).

25 – Case C-443/98 Unilever [2000] ECR I-7535, paragraph 26, concerning a law on labelling indicating the origin of olive oil in Italy.

26 – Case C-267/03 Lindberg [2005] ECR I-3247, paragraph 80 (see Segura Roda, I., ‘La sentencia “Lindberg”: el TJCE confirma y precisa su jurisprudencia relativa al procedimiento de información en materia de reglamentaciones técnicas, Directivas 83/189/CEE y 98/34/CE’, *Unión Europea Aranzadi*, 2005, No 11, p. 23).

27 – Judgment of 8 September 2006 in Case C-500/03 *Commission v Portugal*, not published in the ECR, paragraphs 30 and 31.

28 – Case C-65/05 *Commission v Greece* [2006] ECR I-10341, paragraph 61.

29 – The directive refers to ‘laws, regulations or administrative provisions of Member States ... prohibiting the manufacture, importation, marketing or use of a product ...’ (point 9 of Directive 98/34, replaced by point 11 of Directive 98/48).

30 – On the contrary, the Directive even covers agricultural products, products intended for human and animal consumption, and medicinal products (Article 1(2) of Directive 98/34).

31 – That Directive expressly states, in Article 1(2), the sectors excluded from its scope. They are inter alia radio and television broadcasting services.

32 – Case C-279/94 *Commission v Italy ‘Asbestos’* [1997] ECR I-4743, paragraph 40, relating to rules concerning the cessation of the use of asbestos in Italy, and Case C-145/97 *Commission v Belgium* [1998] ECR I-2643, paragraph 12, concerning standards of quality and safety in furnished accommodation in Belgium.

33 – Thus, in *CIA Security International*, paragraph 50, the Court pointed out that ‘the aim of the directive is not simply to inform the Commission. ... [T]he directive has, precisely, a more general aim of eliminating or restricting obstacles to trade, to inform other States of technical regulations envisaged by a State, to give 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 and to afford the Commission time to propose a harmonising directive. Moreover, the wording of Articles 8 and 9 of Directive 83/189 is clear in that those articles provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission’s agreement or lack of opposition’.

34 – Case C-317/92 *Commission v Germany – ‘sterile medical instruments’* [1994] ECR I-2039, paragraph 25, concerning the extension to single-use sterile medical instruments of certain labelling obligations already applied to medicinal products. Similarly, in *Lindberg*, paragraphs 84 and 85, the Court stated that redefining in national legislation a service connected with the design of a product, in particular that of operating certain gaming machines, can constitute a technical regulation

which must be notified (see Bernhard, A. and Madner, V., *op.cit.*, p. 94).

35 – That case concerned Belgian legislation on the marketing of alarm systems and networks, which requires that they be approved before marketing. Two of CIA’s competitors, which marketed alarm systems, had claimed that one of CIA’s products did not fulfil the requirements laid down by Belgian legislation. The Court held that the obligation to obtain approval constitutes a technical regulation and should have been notified.

36 – *CIA Security International*, paragraphs 40, 44, 48, 55 (see Picod, F., *Revue des affaires européennes*, 1996, p. 183; Simon, D., *Europe*, 1996, June, Comm. No 245, p. 11; Vorbach, U., *Das EuGH-Urteil Security International: Keine Anwendung von nationalen technischen Vorschriften, die nicht zuvor der EU-Kommission notifiziert wurden*, *Österreichische Zeitschrift für Wirtschaftsrecht*, No 4, 1997, p. 110; Lecrenier, S., ‘Le contrôle des règles techniques des États et la sauvegarde des droits des particuliers’, *Journal des tribunaux*, 1997, p. 1; Fronia, J., *Europäische Zeitschrift für Wirtschaftsrecht*, 1996, p. 383; Berrod, F., *Revue du marché unique européen*, 1996, No 2, p. 217; Slot, P.J., *Common Market Law Review*, 1996, p. 1035; Candela Castillo, F., ‘La confirmation par la Cour du principe de non-opposabilité aux tiers des règles techniques non notifiées dans le cadre de la directive 83/189/CEE’, *Revue du Marché commun*, 1997, p. 51).

37 – Case C-159/00 [2002] ECR I-5031, concerning French legislation requiring producers to arrange for their packaging waste to be collected for disposal by approved undertakings or to arrange themselves for the disposal of that waste.

38 – That Decree applies to any ‘medium containing phonograms or videograms of cinematographic or audiovisual works or sequences of moving images’. It appears from the facts, as presented by the national court and explained by Mr Schwibbert’s lawyer in reply to the questions put by the Court, that some of the CDs contained only reproductions of paintings, with no video or musical accompaniment. Those CDs therefore do not fall within the scope of that Legislative Decree and, accordingly, the obligation to affix the SIAE initials cannot apply to them.

39 – I would simply point out, with regard to free movement of goods, that the Court has held that the Directive is designed to protect, by means of preventive control, that freedom, which is one of the foundations of the Community. This control serves a useful purpose in that technical regulations covered by the Directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling public interest requirements (*CIA Security International*, paragraph 40, and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 35).