

JUDGMENT OF THE COURT

22 January 2002 *

In Case C-390/99,

REFERENCE to the Court under Article 234 of the EC Treaty by the Tribunal Supremo (Spain) for a preliminary ruling in the proceedings pending before that court between

Canal Satélite Digital SL

and

Administración General del Estado,

intervener:

Distribuidora de Televisión Digital SA (DTS),

on the interpretation of Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC), read in conjunction with Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51) and of Article 1, point 9, of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of

* Language of the case: Spanish.

information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 (OJ 1994 L 100, p. 30),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F. Macken, and N. Colneric (Presidents of Chambers), C. Gulmann, D.A.O. Edward (Rapporteur), A. La Pergola, J.-P. Puissochet, R. Schintgen and V. Skouris, Judges,

Advocate General: C. Stix-Hackl,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Canal Satélite Digital SL, by P. Cortés and J.M. Jiménez Laiglesia, abogados,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the Belgian Government, by P. Rietjens, acting as Agent,
- the Commission of the European Communities, by G. Valero Jordana, acting as Agent,

— the EFTA Surveillance Authority, by P. Dyrberg and J. Svenningsen, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Canal Satélite Digital SL, of the Spanish Government, of the Commission and of the EFTA Surveillance Authority at the hearing on 28 November 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2001,

gives the following

Judgment

- 1 By order of 22 September 1999, received at the Court on 12 October 1999, the Tribunal Supremo (Supreme Court) referred to the Court for a preliminary ruling three questions on the interpretation of Articles 30 and 59 of the EC Treaty (now, after amendment, Articles 28 EC and 49 EC), read in conjunction with Articles 1 to 5 of Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ 1995 L 281, p. 51) and of Article 1, point 9, of Council Directive

83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994 (OJ 1994 L 100, p. 30; hereinafter ‘Directive 83/189’).

- 2 Those questions were raised in administrative-law proceedings brought by Canal Satélite Digital SL (‘Canal Satélite Digital’) before the Tribunal Supremo for a declaration that Royal Decree No 136/1997 of 31 January 1997 approving the Technical Regulation on Provision of the Satellite Telecommunications Service (*Boletín Oficial del Estado* No 28 of 1 February 1997, p. 3178; hereinafter ‘Decree 136/1997’) is void.

Legal background

Community legislation

- 3 Under the first paragraph of Article 1 of Directive 95/47:

‘Member States shall take appropriate measures to promote the accelerated development of advanced television services including wide-screen television services, high definition television services and television services using fully digital transmission systems.’

- 4 Article 8 of Directive 83/189 lays down an information procedure, whereby Member States are required to communicate to the Commission any draft technical regulation within the scope of that directive.

- 5 Article 1, points 2 and 9, of Directive 83/189 provide:

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

...

- (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

...

- (9) “technical regulation”: technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative

provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.’

6 The first subparagraph of Article 8(1) of Directive 83/189 provides:

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

7 Under Article 10(1) of the same directive:

‘Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the Member States or voluntary agreements by means of which Member States:

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

...’

National legislation

- 8 On 31 January 1997, the Spanish Government adopted Royal Decree-Law 1/1997, transposing into Spanish law Directive 95/47/EC on the use of standards for the transmission of television signals and approving additional measures for the liberalisation of that sector (*Boletín Oficial del Estado* No 28, of 1 February 1997, p. 3174; hereinafter 'Decree-Law 1/1997'). That decree-law was ratified by the Cortes in accordance with Spanish constitutional rules and thus became Law No 17/1997 of 3 May 1997 (*Boletín Oficial del Estado* No 108, of 6 May 1997, p. 14953).
- 9 Article 1(1) of Decree-Law 1/1997 approved the transposition into Spanish law of the technical specifications set out in Directive 95/47. Article 1(2), which provides for the creation of a register of operators of conditional-access services ('the register'), is worded as follows:

'In order to enable any person to verify that they comply with the technical specifications contained in this decree-law, operators of conditional-access services shall be required to be registered in the register which is to be created for that purpose at the Commission for the Telecommunications Market. That register, which shall be open to the public, shall contain personal information relating to the operators, details of the technical equipment they use, and their undertaking to comply with the aforementioned technical specifications, together with the appropriate supporting documentation. The structure and operation of the register shall be determined by Royal Decree.'

- 10 Decree-Law 1/1997 also contains a single additional provision, headed 'Penalties', which reads as follows:

'The marketing, distribution, temporary transfer or hiring-out of apparatus, equipment, decoders or any system falling within the ambit of this Royal

Decree-Law without prior certification of compliance with the rules laid down therein shall be punishable as a serious or a very serious offence under Article 33(2)(h) and (3)(c) of Law 31/1987 on the Regulation of Telecommunications, as amended by Law 32/1992 of 3 December 1992. Prosecution may result in the adoption of the precautionary measures laid down in Article 34(2) and (3) of Law 31/1987, and the imposition of the penalties provided for in the same article.’

- 11 On 31 January 1997, the Spanish Government also adopted Decree 136/1997. Article 2 of that decree provides for the implementation, in relation to the register, of Article 1(2) of Decree-Law 1/1997. Under Article 2:

‘1. The register of operators of conditional-access services for digital television, created by Decree-Law 1/1997 transposing into Spanish law Directive 95/47/EC ... shall be maintained by the Commission for the Telecommunications Market and shall serve to ensure the compulsory registration of natural or legal persons engaged in the marketing, distribution, temporary transfer or hiring-out of decoders.

2. The registration procedure shall be initiated at the request of the natural or legal persons required to register, by means of an application addressed to the President of the Commission for the Telecommunications Market which shall be filed at any legally competent registry.

3. On the application form, applicants shall state their name or the name of the company, their address and tax identification number, the nature of their business, and, where appropriate, their entry number in the Commercial Register, as well as the type and model of the conditional-access telecommunications apparatus, equipment, devices or systems which they offer or market.

4. Upon receipt of the form, the Commission for the Telecommunications Market shall process the application for registration, and, in so doing, may require such proof and conduct such checks as it considers appropriate in connection with the information provided. In any event, it shall request the mandatory report produced by the technical services of the Directorate-General of Telecommunications at the Ministry of Public Works on compliance with the provisions of Decree-Law 1/1997 ...

5. If registration cannot be carried out because the information provided is insufficient, the applicant shall be required to supply the missing information within 10 working days, in accordance with Article 71 of the Law on the Rules governing Administrative Authorities and the Common Administrative Procedure.

6. On completion of the procedure, the Council of the Commission for the Telecommunications Market shall decide whether or not to approve registration, and shall advise the applicant of its decision and of the number assigned to him in the register.

Once the period for rectification has elapsed, the initial and any subsequent applications for registration shall not be granted where the information to be registered has not been provided in full, or where such information is inaccurate.

Information relating to the operators shall be registered separately from that relating to each type or model of telecommunications apparatus, equipment, devices or systems suitable for decoding which those operators market or offer for sale.

7. At the Registry, a book shall be kept in which each operator shall be assigned a folio on which shall be set out the information identifying the natural or legal person who is registered.

An auxiliary register shall also be kept, consisting of an indeterminate number of numbered pages, one per operator, organised in such a way that the serial numbers of the pages in the auxiliary register correspond to the numbers assigned in the main register; the auxiliary register shall record the names of the natural or legal persons listed in the main register.

Each of those pages shall be followed by as many other pages as may be necessary, the latter in turn classified by the number appearing on the first page followed by a letter in alphabetical order. The alphabetically-ordered pages shall list, one after the other, in separate, numbered entries, the individual type, model and acceptance-certificate number, if any, of the telecommunications apparatus, equipment, devices or systems suitable for conditional-access services which the operator offers or markets.

8. The register, which is national in its scope, shall be open to the public and the certificates issued by the Secretary of the Council of the Commission for the Telecommunications Market shall constitute the sole means of providing irrefutable evidence of the content of the entries in the register. Registration, the making of further entries in the register and the issue of certificates at the request of any party shall be subject to the payment of charges determined in accordance with the Law on the Regulation of Telecommunications.

The information in the register shall be available for consultation by interested third parties on request.

On completion of the initial registration, each operator must apply to register any other type or model of telecommunications apparatus, equipment, device or system suitable for decoding which forms part of his business and which has not previously been registered.

Similarly, he must apply to remove from the register details of any type or model of decoding equipment, apparatus, device or system which he no longer markets or offers.

Registration as an operator shall be cancelled at the request of the natural or legal person registered, by decision of the Council of the Commission for the Telecommunications Market.

9. In any event, the provisions of this article are without prejudice to the powers of the Commission for the Telecommunications Market, under Article 1(2)(2)(d) of Decree-Law 6/1996 of 7 June 1996 on the Liberalisation of Telecommunications, to limit or prohibit the activities of operators of conditional-access services ... and of broadcasters in order to protect competition and guarantee plurality in the provision of services.'

- ¹² According to the national court, the most coherent interpretation of that legislation is that, by means of Article 2 of Decree 136/1997, in conjunction with Article 1(2) of Decree-Law 1/1997 and the single additional provision thereof, the Spanish authorities created a compulsory register in which operators of conditional-access services are required to record details not only of themselves but also of the telecommunications apparatus, equipment, devices and systems which they market or offer. Registration in that register is by no means automatic, but is subject to a prior administrative decision which may be negative. To be entered in the register, it is not sufficient for the operator concerned to 'undertake to comply with the technical specifications', but he first has to obtain a prior technical report by officials of the Ministry of Public Works

stating that the technical and other requirements laid down in Decree-Law 1/1997 have been complied with. Only after successfully completing the registration procedure and obtaining the relevant 'certification' is it legally possible to market, distribute, transfer or hire out the equipment, systems and decoders necessary for the digital transmission of television signals. Operators engaging in the marketing, distribution, transfer or hiring-out of the aforementioned apparatus without having obtained such certification commit a serious or a very serious offence punishable under administrative law.

The main proceedings and the questions referred to the Court

- 13 Canal Satélite Digital provides conditional-access services for digital satellite television broadcasting and the reception of televised messages. Digital broadcasting and access to encoded television services are made possible by purchasing or renting special decoding apparatus. Canal Satélite supplies such decoders in Spain, which have been lawfully manufactured and marketed in Belgium and the United Kingdom. Despite the fact that neither Canal Satélite Digital nor the decoders which it distributes have been registered, Canal Satellite has many customers in Spain who use its decoders. It has not, however, been subject to an administrative penalty.
- 14 Spanish law permits natural or legal persons whose interests may be affected by a general provision of secondary legislation to bring an action for annulment directly before the courts. Where the general provision is issued by the Council of Ministers, as royal decrees are, the contentious administrative chamber of the Tribunal Supremo has jurisdiction at first and last instance to declare that general provision void *erga omnes*.

- 15 Considering itself directly affected by Article 2 of Decree 136/1997, Canal Satélite Digital brought an administrative action against that provision before the Tribunal Supremo, seeking a declaration that it was void. The pleas in law in support of that action relate both to procedural defects allegedly vitiating that provision and to matters of substance, including infringement of Community rules.
- 16 Having doubts as to the correct interpretation of the relevant Community law, the Tribunal Supremo decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

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

- the obligation to register details of themselves and of the aforementioned apparatus, equipment, decoders and systems in a compulsory official register, such registration being conditional not only on an undertaking by the operator concerned of compliance with the technical specifications, but also on a prior technical report from the national authorities on compliance with the technical and other requirements laid down in the national legislation;

— the obligation, following completion of the registration procedure referred to above, to obtain the appropriate administrative “certification” of compliance with the aforementioned technical and other requirements laid down in the national legislation?

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

3. Is a national legislative provision which prescribes compliance with such requirements to be regarded as a “technical regulation” for the purposes of the duty to notify the Commission referred to in Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations ...?’

Admissibility of the reference

- 17 The Spanish Government argues that the case in the main proceedings is exclusively concerned with Article 2 of Decree 136/1997, given that, in Spanish law, an administrative-law action cannot be concerned with statutory rules, as is the case with Decree-Law 1/1997, which became Law 17/1997. It was not Article 2 of Decree 136/1997 which required operators to register but Decree-Law 1/1997. Article 2 of Decree 136/1997 merely governs the ‘structure and operation’ of that register. The Spanish Government concludes that examination of the case in the main proceedings by the Tribunal Supremo must necessarily be limited to Article 2 of Decree 136/1997 and that, in those circumstances, the questions referred for a preliminary ruling are purely hypothetical.

- 18 It is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, for example, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).
- 19 However, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, Case C-379/98 *PreussenElektra* [2001] I-2099, paragraph 39).
- 20 In this case, even if the Court's answer to Questions 1 and 2 may have repercussions on the conformity of Decree-Law 1/1997 with Community law and the assessment of that conformity does not constitute the subject-matter of the case in the main proceedings, which is limited to the examination of Decree 136/1997, it cannot be argued that the reply to those questions cannot be of use in enabling the national court to determine whether Decree 136/1997 is consistent with Community law. If compulsory registration is, as such, contrary to Community law, national provisions relating to that registration, whatever their position in the hierarchy of legal rules, cannot be applied.
- 21 It follows that the reference for a preliminary ruling is admissible.

The first and second questions

22 In its first two questions, the national court is asking, essentially, whether Articles 1 to 5 of Directive 95/47, read in conjunction with Articles 30 and 59 of the EC Treaty, preclude a Member State from making the marketing by conditional-access service operators of apparatus, equipment, decoders or systems for the digital transmission and reception of television signals by satellite conditional upon a prior authorisation procedure with the following features:

- that it involves the obligation to enter both the operators and their products in an official register, and

- that in order to obtain that registration, operators must:

- (a) undertake to comply with the technical specifications and

- (b) obtain a prior technical report drawn up by the national authorities and prior administrative ‘certification’, stating that the technical and other requirements laid down in the national legislation have been complied with.

The legal nature of entry in the register

- 23 The Spanish Government challenges the national court's interpretation of the legislation at issue in the main proceedings. In its submission, entry in the register does not constitute a precondition for marketing decoders or carrying on the business of operator, since that registration does not create or alter rights and is simply intended to establish, for the information of third parties, that the operators are complying with the rules and technical specifications laid down by Community legislation. It maintains that that interpretation is supported by the wording of Article 1(2) of Decree-Law 1/1997, according to which entry in the register must 'enable any person to verify that [operators] comply with the technical specifications contained in this decree-law'.
- 24 In that respect, it is sufficient to point out that the Court of Justice has no jurisdiction either to decide whether the referring Court's interpretation of provisions of national law is correct or to rule, in the context of a reference for a preliminary ruling, on the conformity of those provisions with Community law. It is the task of the Court solely to interpret provisions of Community law in order to give the national court all the guidance on matters of Community law that it needs in order to decide the case before it (Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 24).
- 25 The relevant interpretation of national law for the Court of Justice is therefore that adopted by the referring court and reproduced in paragraph 12 of this judgment.

Directive 95/47

- 26 Forming as it does a part of the overall Community strategy of establishing the internal market for advanced television technologies, Directive 95/47 is designed

to promote rapid development of large-format television services (16:9) and the introduction of high definition television (HDTV) in Europe. To that end, it contains provisions relating to the new market in conditional-access digital television services ('pay TV'), including provisions relating both to the obligations of conditional-access service operators and to the features of the equipment which they rent out or sell.

- 27 On the other hand, Directive 95/47 does not contain any provisions concerning detailed administrative rules for implementing the obligations incumbent on Member States under that directive. That finding does not, however, justify the conclusion that the Member States may not establish a prior authorisation procedure consisting of compulsory entry in a register together with the requirement of a prior technical report drawn up by the national authorities.
- 28 However, where they establish such an administrative procedure, Member States must at all times comply with the fundamental freedoms guaranteed by the Treaty.

The existence of restrictions on the fundamental freedoms guaranteed by the Treaty

- 29 The requirement imposed on an undertaking wishing to market apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite to register as an operator of conditional-access services and to state in that register the products which it proposes to market restricts the free movement of goods and the freedom to provide services guaranteed by Articles 30 and 59 of the Treaty respectively (see, as regards crafts businesses, *Corsten*, paragraph 34).

- 30 Moreover, the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the abovementioned requirements from being treated as selling arrangements within the meaning of paragraph 16 of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

Justification for the restrictions found to exist

- 31 Where a national measure restricts both the free movement of goods and the freedom to provide services, the Court will in principle examine it in relation to one only of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, in relation to lottery activities, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22).
- 32 In the field of telecommunications, however, it is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. As the case in the main proceedings shows, the two aspects are often intimately linked. The supply of telecommunication equipment is sometimes more important than the installation or other services connected therewith. In other circumstances, by contrast, it is the economic activities of providing know-how or other services of the operators concerned which are dominant, whilst delivery of the apparatus, equipment or conditional-access telecommunication systems which they supply or market is only accessory.
- 33 Accordingly, the question whether the restrictions referred to in paragraph 29 of this judgment are justified must be examined simultaneously in the light of both Article 30 and Article 59 of the Treaty, in order to determine whether the national measure at issue in the main proceedings pursues an objective of public interest and whether it complies with the principle of proportionality, that is to

say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it (see, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 35; and *Corsten*, paragraph 39).

- 34 It is undisputed that informing and protecting consumers, as users of products or services, constitute legitimate grounds of public interest which are in principle capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty. However, in order to determine whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account considerations which include the following.
- 35 First, it is settled case-law that a system of prior administrative authorisation cannot legitimise discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, particularly those relating to the fundamental freedoms at issue in the main proceedings (Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 90). Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (*Analir*, paragraph 38).
- 36 Second, a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State.

- 37 First, it is well established in case-law that a product which is lawfully marketed in one Member State must in principle be able to be marketed in any other Member State without being subject to additional controls, save in the case of exceptions provided for or allowed by Community law (see, in particular, Case 120/78 *Rewe-Zentral* ('Cassis de Dijon') [1979] ECR 649, paragraph 14, and Case C-123/00 *Bellamy and English Shop Wholesale* [2001] ECR I-2795, paragraph 18).
- 38 Second, it is incompatible in principle with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established (see, in particular, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; *Arblade*, paragraph 34).
- 39 Third, a prior authorisation procedure will be necessary only where a subsequent control is to be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued.
- 40 In order to determine whether that is the case, it is necessary to consider, on the one hand, whether it is possible to discover defects in the products and services concerned at the time when the statements made by the operators of conditional-access services are checked, and, on the other hand, the risks and dangers that would result from not discovering those defects until after the products have been marketed or the services supplied to end-users.
- 41 Finally, it should be noted that, for as long as it lasts, a prior authorisation procedure completely prevents traders from marketing the products and services concerned. It follows that, in order to comply with the fundamental principles of the free movement of goods and the freedom to provide services, such a

procedure must not, on account of its duration, the amount of costs to which it gives rise, or any ambiguity as to the conditions to be fulfilled, be such as to deter the operators concerned from pursuing their business plan.

- 42 In that regard, once examination of the conditions for obtaining registration has been carried out and it has been established that those conditions have been satisfied, the requirement to obtain certification for the apparatus, equipment or conditional-access telecommunication systems after that registration procedure must neither delay nor complicate exercise of the right of the undertaking concerned to market those products and related services. Moreover, the requirements of entry on a register and the obtaining of certification, assuming they are justified, must not give rise to disproportionate administrative expenses (*Corsten*, paragraphs 47 and 48).

- 43 In the light of all the foregoing considerations above, the answer to the first and second questions must be:

1. National legislation which makes the marketing of apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite and the provision of related services by operators of conditional-access services subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. Therefore, in order to be justified with regard to those fundamental freedoms, such legislation must pursue a public-interest objective recognised by Community law and comply with the principle of proportionality; that is to say, it must be appropriate to ensure achievement of the aim pursued and not go beyond what is necessary in order to achieve it.

2. In determining whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account the following considerations in particular:
- for a prior administrative authorisation scheme to be justified even though it derogates from those fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;
 - a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State;
 - a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;
 - a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

The third question

- 44 By its third question, the referring court is asking, first, essentially, whether national legislation which requires operators of conditional-access services to have their name entered in a register and indicate therein the products which they propose to market, and to obtain prior certification for those products, constitutes a ‘technical regulation’ within the meaning of Article 1, point 9, of Directive 83/189, and, second, whether such national legislation must be notified to the Commission in accordance with that directive.
- 45 As regards the first part of that question, the Court has already held 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 within the meaning of Article 1, point 9, of Directive 83/189. Technical regulations within the meaning of that provision are specifications defining the characteristics of products and not specifications concerning economic operators (Case C-194/94 *CIA Security* [1996] ECR I-2201, paragraph 25; Case C-278/99 *Van der Burg* [2001] ECR I-2015, paragraph 20).
- 46 However, a national provision must be classified as a technical regulation within the meaning of Article 1, point 9, Directive 83/189 if it requires the undertakings concerned to apply for prior approval of their equipment (*CIA Security*, paragraph 30).
- 47 It follows that a national rule which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a

register and to obtain prior certification for those products before being able to market them constitutes a 'technical regulation' within the meaning of Article 1, point 9, of Directive 83/189.

- 48 As regards the second part of the third question, which relates to the obligation under Article 8 of Directive 83/189 to communicate any draft technical regulation to the Commission, Article 10 of that directive shows that Articles 8 and 9 do not apply to laws, regulations or administrative provisions of Member States, or to voluntary agreements entered into by them, whereby Member States comply with binding Community measures which result in the adoption of technical specifications. So, to the extent that the national legislation at issue in the main proceedings transposes Directive 95/47, and to that extent only, there will be no duty of notification under Directive 83/189.
- 49 However, having regard to the content of Directive 95/47 referred to in paragraphs 26 and 27 of this judgment, the national legislation in question, in so far as it establishes a system of prior administrative authorisation, cannot qualify as legislation whereby the Member State complies with a binding Community measure resulting in the adoption of technical specifications.
- 50 The answer to the third question must therefore be that national legislation which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a 'technical regulation' within the meaning of Article 1, point 9, of Directive 83/189.

Costs

- 51 The costs incurred by the Spanish and Belgian Governments, by the Commission and by the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Supremo by order of 22 September 1999, hereby rules:

1. National legislation which makes the marketing of apparatus, equipment, decoders or digital transmission and reception systems for television signals by satellite and the provision of related services by operators of conditional-access services subject to a prior authorisation procedure restricts both the free movement of goods and the freedom to provide services. Therefore, in order to be justified with regard to those fundamental freedoms, such legislation must pursue a public-interest objective recognised by Community law and comply with the principle of proportionality; that is to say, it must be appropriate to ensure achievement of the aim pursued and not go beyond what is necessary in order to achieve it.

2. In determining whether national legislation such as that at issue in the main proceedings complies with the principle of proportionality, the referring court must take into account the following considerations in particular:
 - for a prior administrative authorisation scheme to be justified even though it derogates from those fundamental freedoms, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily;
 - a measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State;
 - a prior authorisation procedure will be necessary only where subsequent control must be regarded as being too late to be genuinely effective and to enable it to achieve the aim pursued;
 - a prior authorisation procedure does not comply with the fundamental principles of the free movement of goods and the freedom to provide services if, on account of its duration and the disproportionate costs to which it gives rise, it is such as to deter the operators concerned from pursuing their business plan.

3. National legislation which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a 'technical regulation' within the meaning of Article 1, point 9, of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended and updated by Directive 94/10/EC of the European Parliament and of the Council of 23 March 1994.

Rodríguez Iglesias

Macken

Colneric

Gulmann

Edward

La Pergola

Puissochet

Schintgen

Skouris

Delivered in open court in Luxembourg on 22 January 2002.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President