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SPSD II

LEGAL CONSTRAINTS ON NATIONAL MEASURES TO PROMOTE ENVIRONMENT-FRIENDLY PRODUCTS

SPSD II

GENERAL ISSUES

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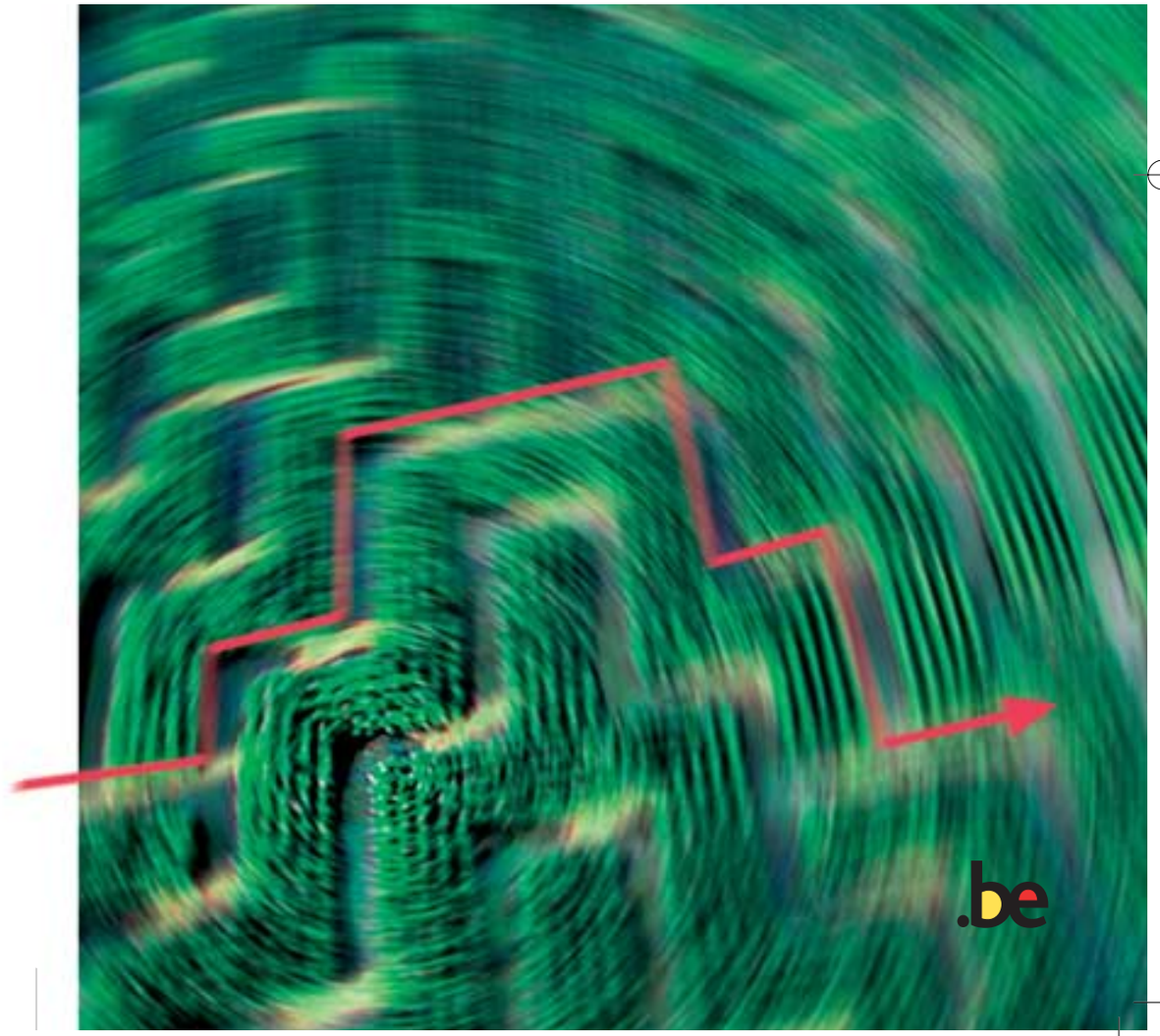

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LEGAL CONSTRAINTS ON NATIONAL MEASURES TO PROMOTE ENVIRONMENT-FRIENDLY PRODUCTS

A PRODUCT REGULATOR'S TRADE LAW HANDBOOK

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Belgian Science Policy

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FOREWORD

Products are one of the levers which can be used in initiatives against climate change and, more generally, to protect our environment.

Indeed, if products placed on the market are conceived so as:

- to use energy efficiently,
- to discharge fewer pollutants into water and atmosphere,
- to cause less noise pollution, or
- to be later use for other purposes than they were initially created for,

one could consider such products to have proved their usefulness from the perspective of sustainable development. This is particularly true with regard to the necessity to avoid the exhaustion of natural resources.

In Belgium, the federal public authorities are competent for the establishment of product standards. They can encourage and influence producers to rethink the "eco-design" of their products, when they are not naturally stimulated to do so by market forces and by the need to improve their brand image in the eyes of consumers.

This handbook is the result of a research project carried out by four university teams (FUSL, VUB, UG and ULB), and was funded by the Belgian Federal Science Policy Department in the framework of the SPSD II programme in 2002 – 2003. The Handbook defines the limits of competence of the federal authorities in this area with regard to national law, European law and the rules of the World Trade Organisation. Though it focuses on the legal situation in Belgium, its findings on EC law and WTO law are also relevant for public authorities in other Member States of the EU and the WTO.

Beyond the technical aspects of these matters, the Handbook enables the reader to ascertain the national authorities' latitude in their task with regard to the establishment of product norms. It considers the implementation of a "pilot" policy at the level of the Belgian market, particularly when no harmonisation process is yet in place in the European or international sphere.

It demonstrates that the adoption of such measures is legally possible.

It is up to the public authorities to seize this opportunity.

Philippe METTENS
Chairman of the Belgian Science Policy

INTRODUCTION

This handbook was prepared within the framework of research financed by the Belgian Federal Science Policy Department on "The feasibility of an integrated environmental product policy in Belgium". It is part of the second programme on scientific support for a sustainable development policy (SPSD II) [1], and was carried out in 2002-2003, by three university teams :

- CEDRE, Centre d'étude du droit de l'environnement (Centre for the study of environmental law), Facultés Universitaires Saint-Louis (project coordinator, promoters : Nicolas de Sadeleer and Delphine Misonne),
- The Vrije Universiteit Brussel (Free University of Brussels), (promoter: Marc Pallemaerts),
- The Universiteit Gent (promoter: Luc Lavrysen) and

The authors are :

- Delphine Misonne and Nicolas de Sadeleer (CEDRE-FUSL), authors of the chapter on European law and Delphine Misonne (CEDRE-FUSL), who was responsible for coordination and for the synthesis of the work;
- Katia Bodard and Marc Pallemaerts (VUB), authors of the chapter on the World Trade Organisation's, multilateral trading system ; and
- Stanislas Horvat, Lien Vanwalle and Luc Lavrysen (UG), authors of the chapter on Belgian federal law.

The handbook was completed on 31 December 2003.
It is available in French, Dutch and English.

Products have an effect on the environment. Depending on their composition, their production method and how they are used, they can either become a source of pollution, or they can be conceived in such a way as to avoid such negative secondary effects.

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1 All the studies resulting from this research project may be obtained from the Belgian Federal Science Policy Department, rue de la Science 8, 1000 Brussels, www.belspo.be.

In Belgium, it is the federal authories that are responsible for regulating the placing of products on the market. These authorities are responsible for setting the conditions that products must fulfil in order to be marketed or, more generally, made available (for consumption) on national territory.

For instance, regulations set the sulphur or lead content of petrol, they set out the list of chemical substances which may not be retailed, and they impose restrictions related to the composition of packaging, the phosphate content of detergents and the maximum noise levels for some types of appliances.

Most of these standards are derived from European law – whose objective to create a common market often leads to the harmonisation of technical standards relating to products – occasionally also from international environmental conventions.

The advantage of such an harmonisation at the European or, more rarely, at international level, is undeniable for producers and distributors since it allows the setting, on the scale of a large territory, of environmental standards which then govern the marketing of products and their free circulation within a given area. Norms that are strictly national consider, on the contrary, that the product will be conceived or adapted specifically in order to gain access to a particular national market.

So why does it matter what a national authority's latitude is in terms of being able to conduct an innovative product policy within its own territory, particularly when that latitude is limited?

Firstly, because the level of environmental protection promoted by harmonised supranational legislation may be considered by national authorities not to be sufficient. They may aspire to more ambitious objectives than the standard decided at supranational level. This is legitimate, particularly in view of international trade law, which explicitly recognises that "no country should be prevented from taking measures necessary to ensure […] the protection of […] the environment […] *at the levels it considers appropriate"* [2].

Secondly, because many areas linked to product policy are not subject to such harmonisation yet. In these cases it is up to individual States to take the initiative that is deemed appropriate. Moreover, many rules of European or international law in fact stem from the impetus of one State in particular, which, in so acting, opens the debate and poses the question as to whether the measure it takes should be applied on a larger scale.

Finally, because the process of drawing up and adopting these harmonised standards tends to be particularly lengthy. In the future, it is likely, to be even longer at European level, because of EU enlargement. In a broader international framework, this process is inevitably even more difficult, and only very rarely does international law fix precise norms specifically relating to the marketing or use of products.

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2 Preamble to the WTO's Agreement on Technical Barriers to Trade.

Legally speaking, there undeniably is a latitude for the adoption of such national measures concerning products. But this latitude is contained within limits which are not always very clear.

This work aims to schematically present the legal determinants which should be taken into account in the elaboration of such national product policies. On the one hand, it should enable the selection of a measure within the available latitude for the adoption of national initiatives and, on the other hand, it analyses the appropriate way to elaborate the envisaged regimes so as to ensure that they cannot successfully be contested before national courts, the European institutions or the WTO.

For this purpose, the rules applicable under national law, European Union (or "Community") law and the multilateral trading system of the World Trade Organisation are analysed.

This document was conceived as a handbook to ease access to its subject matter.

Each chapter has two distinct parts. One consists in a table summarizing how to find oneself a way through the mass of relevant legislation. The following part details the questions raised in the table, and gives the possible responses to them.

Anyone particularly interested in the questions asked may then look further into the matter by consulting, for example, the general report of the research project which this handbook is based on. It is available from the Belgian Federal Science Policy Department (Rue de la Science 8, 1000 Brussels [www.belspo.be])

Delphine MISONNE
Project coordinator

CHAPTER I

BELGIAN LAW

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FACED WITH AN ENVIRONMENTAL PROBLEM WHICH ENCOURAGES CONSIDERING ADOPTION OF A MEASURE RELATING TO THE PLACING OF PRODUCTS ON THE MARKET, WHAT IS THE COMPETENCE OF THE FEDERAL GOVERNMENT ?

DOES THE MEASURE COME UNDER THE COMPETENCE OF THE FEDERAL AUTHORITIES ? ➲ 1

♦ **YES**	Setting product standards ➲ **1.1**	Art. 6 § 1, II, subpara 2, 1° Special Law on institutional reform
	Imposing fiscal measures in respect of those products ➲ **1.2**	Art. 170 Constitution + Special Law on financing for the Communities and the Regions
	Other federal competences ➲ **1.3**	
♦ **NO**	End ➲ **1.4**	

IS THERE AN OBLIGATION TO COOPERATE WITH THE REGIONAL AUTHORITIES ? ➲ 2

♦ **YES**	Setting product standards ➲ **2.1**	Involvement of the Regions
	Imposing fiscal measures in respect of those products ➲ **2.2**	Observe the principle of proportionality
♦ **NO**	But a cooperation is desirable in order to favour an integrated product policy ➲ **2.3**	

WHAT ARE THE AVAILABLE LEGAL BASES ? UNDER WHAT LEGISLATION IS THE MEASURE LIKELY TO BE ADOPTED? ➲ 3

♦ **YES**	Law on product standards ➲ **3.1**	– General powers ➲ **3.1.1** - types of measures - specific instruments: sectoral agreements – Specific powers ➲ **3.1.2** - substances and preparations - plant protection products - biocides - packaging Levies and fees ➲ **3.1.3**
	Law completing the federal structure of the State ➲ **3.2**	– Products falling within the scope of the Law ➲ **3.2.1** – Other products ➲ **3.2.2** – Collection of taxes and fees ➲ **3.2.3**
	Other legal bases pertaining to taxation ➲ **3.3**	– Customs and excise ➲ **3.3.1** – Energy charges ➲ **3.3.2** – Value Added Tax ➲ **3.3.3** – Income tax ➲ **3.3.4**
	Other legal bases ➲ **3.4**	
♦ **NO**	Creation of a legal base	

Faced with an environmental problem which encourages considering adoption of a measure relating to the placing of products on the market, the following questions must be asked:

1. Does the measure come under the competence of the federal Government ?
2. Must the federal Government, when it considers adopting such a measure, act in concert with the regional and community authorities ? Is there an obligation to cooperate with the Regions and/or the Communities?
3. What are the available legal bases ? Under what legislation is the measure likely to be adopted?

1.

WHAT ARE THE POWERS OF THE FEDERAL AUTHORITIES?

1.1. Federal competence for establishing product standards

Pursuant to the first point of the second paragraph of Article 6(1) of the Special Law on institutional reforms (LSRI), the federal Government is responsible for drawing up product standards.

Product standards are defined in the parliamentary working documents for the Law on product standards as "*standards that establish the degree of pollution or nuisance which may not be exceeded in the composition or during the emission of a product, or which include specifications concerning product characteristics, methods of use, sampling standards, packaging, marking and labelling"*.

Products are defined as *movable tangible property, including substances and preparations, biocidal products and packaging, but excluding waste.* [3] The Law on product standards is therefore applicable, within the limits which it sets out, to almost all products. Nevertheless, the law lists a limited number of products which do not fall within the law, such as waste, explosive substances, medicinal products, etc. [4]

A product standard is applicable *when the product is placed on the market*, inter alia at the time of its *"introduction, importation or possession, for the purpose of sale or making available to a third party, offer for sale, sale, offer for rent, rent, or assignment for consideration or free of charge"* [5].

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3 Article 2.1 of the Law on product standards.

4 Articles 2.1 and 3 § 2 Law on product standards.

5 Article 2.3 Law on product standards.

Requirements relating to environmental protection which apply *after* the product has been placed on the market, such as those concerning the use or release of products, come under the power of the Regions and not of the federal authorities.

Product standards establish the degree of pollution or nuisance which may not be exceeded in the composition of or at the time of release of a product and may contain specifications concerning the characteristics, sampling methods, packaging or labelling of products.

Since the Regions also exercise powers relating to the alteration of producer and consumer behaviour, through the establishment of policies for the management of waste and, in particular, of packaging, for example, the federal authorities must ensure, when drawing up product standards, that they do not make it overly difficult, or even impossible, for the Regions to exercise their powers.

1.2. Federal power to impose fiscal measures on products

In Belgium, fiscal competence is not linked to competence *ratione materiae*, as regards taxes. It is therefore possible in principle, through the system of the division of powers, for the State to intervene by means of fiscal action as regards issues which come under regional competence. It can also intervene by means of taxes on products, for example in order to influence methods of production and consumption. It is also by virtue of its fiscal power that the federal authorities act in the matter of ecotaxes.

Article 170 of the Constitution is the locus of federal competence in tax matters. It requires that taxes be imposed by law and that their adoption therefore be subject to Parliamentary debate. The Government may not unilaterally decide to establish new taxes. It may only set their implementing procedures, such as the means of declaration, the notification of taxes and monitoring and collection measures.

The Special Law of 16 January 1989 on the financing of the Communities and the Regions transferred certain taxes to the Communities and the Regions on the basis of variable conditions. Some of those transferred taxes could initially be used in the framework of a product policy, but henceforth come under Regional competence. Such is the case for the circulation tax on automobiles, road tax and the *eurovignette* [6]. The Regions are competent to alter the tax rate, the tax base and exemptions from the circulation tax on automobiles and the road tax, but in certain cases the exercise of these powers is subject to a cooperation agreement being concluded among the three

6 Articles 3(1), 10, 11 and 12.

7 Article 4 § 3. "Where the taxpayer [...] is a company [...], an independent public undertaking or a not-for-profit association engaged in leasing activities, the exercise of those powers is subject to a preliminary cooperation agreement being concluded among the three Regions, within the meaning of Article 92 *a)* § 2 of the Special Law of 8 August 1980 on institutional reforms".

Regions [7]. They have the same competences as regards the *eurovignette*, but a cooperation agreement among the three Regions is necessary in that case as well [8].

1.3 Other federal competences ?

The measure proposed by the federal Government in the context of its product policy may come under competences other than those connected to the environment or fiscal measures.

Thus, the LSRI confers general competence on the federal authorities as regards consumer protection and the law governing business practices.

1.4. No federal competence

If the federal authority has no competence, it cannot adopt the proposed measure.

2.

AFTER DETERMINING THE COMPETENCE OF THE FEDERAL AUTHORITIES, IT IS NECESSARY TO ASCERTAIN WHETHER, FOR THE PURPOSE OF REGULATING A GIVEN ISSUE, IT MUST CONSULT WITH THE REGIONS AND/OR THE COMMUNITIES OR WHETHER THE DIFFERENT LEVELS ARE REQUIRED TO COOPERATE.

2.1. For the purpose of formulating product standards

In accordance with Article 6 § 4(1) LSRI, the Regional Governments must be involved when the federal Government wishes to formulate product standards. Such association requires more than a merely informal contact between officials. It requires a genuine exchange of views at governmental level (for example, within the Interministerial Conference on environment). Nonetheless, according to the Council of State [9], that obligation does not apply to standards imposed by the federal Government in order to protect consumers [10] or as regards commercial or standardisation practices [11], although it applies to standards which it lays down in respect of technical regulations for means of transport and circulation [12].

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8 Article 4 § 4. "For vehicles which are registered abroad, the exercise of those powers is subject to a preliminary cooperation agreement being concluded among the three Regions, within the meaning of Article 92 *a)* § 2 of the Special Law of 8 August 1980 on institutional reforms".

9 *Doc. Chambre,* 1991-92, No° 600/2, 18.

10 Pursuant to Article 6 § 1, VI, para 4, 2, LSRI.

11 Pursuant to Article 6 § 1, VI, para 5, 4 and 9 LSRI.

12 Pursuant to Article 6 § 4, 3 LSRI.

2.2. Introduction of fiscal measures

Taxes are set by laws enacted by the legislature. The adoption and implementation of these laws by the federal Government does not require formal agreement by the Regions since, following the adoption of the Special Law of 13 July 2001, ecotaxes are no longer considered "regional taxes" but are now exclusive federal taxes. Nevertheless, in exercising those powers, the federal legislature must respect the principle of proportionality – that is, it must ensure that it does not render it excessively difficult, if not impossible, to exercise Regional competences. Dialogue between the federal authorities and the Regional authorities, while certainly not obligatory, could favour conflict avoidance and assist in the coordination of federal ecotax policies and regional waste policies.

2.3. Cooperation agreements

An integrated product policy, which seeks to minimise the environmental impacts of products throughout their life cycle, comes partly under the competence of the federal authorities and partly under the Regional authorities. In order to develop a coordinated policy on the issue between the different authorities, extensive dialogue appears necessary. One of the legal instruments which may be used to formalise that policy coordination is a cooperation agreement. This makes it possible to formalise the dialogue between the Regional and federal authorities (or merely among Regional authorities), to create common institutions and directly to attribute rights or impose obligations on citizens. In the latter case – as when such agreements have budgetary consequences for the authorities concerned – those agreements must be approved by the respective legislatures before coming into force. Such agreements ensure a high level of legislative harmonisation between the authorities involved in a specific field.

3.

WHAT LEGAL BASES ARE AVAILABLE ? UNDER WHAT LEGISLATION IS THE MEASURE LIKELY TO BE ADOPTED ?

3.1. The Law on product standards

3.1.1. General powers

The Law of 21 December 1998 on product standards empowers the King to adopt standards for products which are placed on the market (see Annex I).

Pursuant to Article 5, the King may take extremely diverse measures in respect of those products, *either* for the purpose of protecting public health *or* for the purpose of protecting the environment or public health and promoting sustainable methods of production and consumption.

Thus, in order to promote sustainable methods of production and consumption, the King may regulate, suspend or prohibit the placing on the market of a product, or subject that placing on the market to prior authorisation, registration or notification; regulate the characteristics, composition, packaging and presentation of a product with a view to placing it on the market; encourage the placing on the market of reusable products; determine what information relating to a product or a category of products must or can be given prior to or at the time of placing on the market; subject the activities of persons who participate in placing on the market of products or categories of products to conditions and to prior notification to or authorisation by the Minister ; place products into categories, with a view to regulating their placing on the market according to their effects on public health or the environment; establish specific rules for the labelling of a product or a category of products, etc. [13]

Those implementing decisions are subject to a preliminary opinion by the Federal Council for Sustainable Development, the Public Health Board, the Consumer Council and the Central Economic Council [14]. Implementing decisions which merely transpose harmonisation measures adopted at European level need not be submitted for preliminary opinions ; however, they must be brought to the attention of the aforementioned Councils.

Article 5 of the Law thus provides extremely wide powers to the federal Government for the purpose of adopting measures intended to regulate within an environmental perspective the placing of products on the market.

Those measures will in principle be regulatory in character ; they must be adopted by means of a Royal Order.

Nevertheless, the Law also provides for recourse to other types of instruments, such as sectoral agreements (Article 6) : the Law thus creates the possibility for an alternative approach by means of negotiated agreements between the Government and the private sector [15] for a specified period of time, by activity sector, relating to the placing on the market of a product or a category of products, for the purpose of achieving the objectives of the Law on product standards. The Law lays down certain conditions in respect of both content and procedure, as well as requirements as regards the

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13 Several of these measures, such as subjecting the placing on the market to authorisation or registration or other conditions, or the encouragement of the placing on the market of reusable products, must be taken by Orders decided by the Council of Ministers (Article 5 §§ 1 and 2, *in fine*). The King is empowered to designate the officials and agents who will monitor the implementation of the law's provisions on product standards and its implementing measures and who will thereby exercise the coercive powers laid down in the law (Articles 15-18). The responsible Minister may conclude protocols with other Ministers in order to distribute the competences and tasks relating to supervision and monitoring or in order to prepare legislation (Article 20 *b)*.

14 Article 19 § 1 of the Law on product standards. The Minister of public health and of the environment shall set, in his request for an opinion, the period in which it must be issued (three months in principle, unless a shorter period is required, but never less than one month).

15 Article 6 § 1 : "undertakings which participate in the placing on the market of the same product or the same category of product or associations bringing such undertakings together".

associations representing undertakings which wish to conclude such agreements or to become party to them.

3.1.2. Intervention by the legislature in respect of specific products

In addition to the general powers mentioned above, the Law also regulates certain elements of the system which applies to the following product categories, by conferring precise tasks or powers on the federal Government :

a) Substances and preparations (Article 7)

Pursuant to Article 7, the King may establish the notification procedures to be followed by anyone wishing to place on the market a new substance or preparation, such as the conditions and time-limits which the notification must satisfy, the authority to which the notification must be addressed, the procedure for its examination and assessment, in which cases and in what conditions that notification is to be subject to the opinion of certain scientific and technical bodies, etc.

b) Plant protection and biocidal products (Articles 8 and 9)

Article 8(a) provides that the King is to establish [16] a reduction programme intended to reduce the use and the placing on the market of dangerous active substances to which humans and the environment could be exposed, and which include plant protection and biocidal products [17]. The first programme is to be adopted by 31 December 2004 at the latest, and the reduction programme is to be updated every two years.

Article 8 states that the King may [18] subject the placing on the market of *plant protection and biocidal products* to prior approval, authorisation or registration, according to conditions which it lays down.

Article 9 lists, in addition, a number of measures which may be taken by the King in the interest of public health as regards plant protection products. Those measures include: conditions of production, processing, composition, packaging, presentation, quantity, origin, quality, efficacy, acquisition, possession, conservation and use of those products; maximum amounts for residues of the active substances in those products and any products resulting from their degradation; marks, seals, labels, certificates, notices, symbols and packaging establishing that legal conditions have been satisfied. It is important to note that the article in question clearly states that those measures may be taken *in the interest of public health*. Their link with the environment is therefore only an indirect one.

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16 By decision of the Council of Ministers.

17 Also by decision of the Council of Ministers.

18 By decision of the Council of Ministers.

c) Packaging (Articles 10 to 14)

Article 10 prohibits the placing on the market of products in packaging which is neither reusable nor recoverable, including recyclable. Derogations may be granted when the placing on the market of such packaging is necessary in order to satisfy legal standards in respect of the hygiene, safety or conservation of the packaged product. The date for the entry into force of that prohibition must, however, be established by Royal Order, by decision of the Council of Ministers.

Article 11 § 2 introduces a *standstill* obligation: any person who places products on the market packaged in non-reusable packaging is required to ensure that, for the same packaging material, the relation between the weight of the packaging and the weight of the product placed on the market in that packaging does not increase as against the same relation which existed at the time the Law on product standards entered into force. That Article does not, however, provide that the King is to take implementing measures.

Article 14 allows the King to specify essential requirements (such as, inter alia, maximum content of harmful substances, the possibility of recycling, sustainability…), provided for in Articles 11 to 13, by laying down technical standards specific to certain categories of packaging or packaging materials [19].

3.1.3. Levies and fees

Pursuant to Article 20(a), the King may set, by Order by decision of the Council of Ministers, levies and fees to be paid to the Fund for raw materials and products, for the purpose of financing administrative tasks resulting from the processing of dossiers (setting up priority lists for harmful substances, risk assessment, information to the European Commission, etc.) [20]. That Royal Order must be confirmed by the legislature in the year following its publication in the *Moniteur belge*.

3.2. Ordinary Law completing the federal structure of the State (Law of 16 July 1993)

3.2.1. Products falling within the scope of the Law

The Law in its present version provides, first, for a *packaging fee for certain beverage containers subject to excise duty* (set off by a reduction in VAT and excise) and, secondly, for ecotaxes on *cameras, batteries* and *packaging of certain industrial products*.

Article 371 establishes a packaging fee when drinks in individual packaging are consumed. However, an exemption is granted to certain reusable packaging and to certain non-reusable packaging which contains a minimum percentage of recycled materials.

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19 These implementing decisions are also subject to the prior opinion of the Federal Council for Sustainable Development, the Public Health Board, the Consumer Council and the Central Economic Council, unless they merely transpose harmonisation measures taken at European level, in which case they need only be brought to the attention of the aforementioned Councils.

20 Levies are paid into a special account of the Federal Public Service for Public Health and the Environment.

Disposable cameras enjoy an exemption from the ecotax if they are subject to a collection system which makes it possible to ensure that at least 80% of the cameras received by Belgian development labs are reused or recycled.

All batteries used are subject to an ecotax (except batteries placed in medical devices), but an exemption may be obtained under certain conditions when the batteries are subject to a system of deposit or guarantee or to a system of collection and recycling.

Article 379 sets the rate for ecotaxes on containers of certain industrial products. Those rates may be increased or differentiated on a product basis, by Royal Order taken by decision of the Council of Ministers, to be confirmed by law. When containers are subject to an organised deposit system or a system of guarantees, packaging credit or specialised collection, they enjoy an exemption from the ecotax [21] to the extent that the packaging carries the mention "deposit" and the amount of that deposit or a distinctive mark indicating special collection [22].

3.2.2. Other products

The Law can of course be amended. Existing fees and ecotaxes can be modified and new fees or ecotaxes may be introduced on other products, in order to stimulate the production and purchase of products which better respect the environment. Since fiscal competence must be exercised by the legislature itself, the legislative procedure must be set in motion in order to achieve such a result.

3.2.3. Collection of ecotaxes and of packaging fees

The customs and excise administration is responsible for collecting ecotaxes and packaging fees [23]. The Ministry of Finance sets the conditions for granting reductions or exemptions as regards the ecotax or packaging fee and monitors undertakings in which containers or products are manufactured, filled, used, received, sent or distributed, as well as transport operations (Article 394) [24].

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21 The specific conditions to be satisfied in order to obtain an exemption from the ecotax are laid down in Article 380. The King may modify the minimum deposit and guarantee or set the amount of the packaging credit in order to facilitate the achievement of the Law's objective.

22 The Royal Order of 23 December 1993 on the distinctive mark to be affixed to beverage containers, batteries and receptacles containing certain industrial products and on the exemption from mentioning the amount of the deposit (*Moniteur belge* 29 December 1993 ; Err. *Moniteur belge* 17 March 1994) sets the conditions to be met by the distinctive mark.

23 Article 393 § 1. To that end, customs and excise agents have available the means and powers allocated to them as regards excise by the general Law on customs and excise and by specific laws relating to excise. The King may approve natural or legal persons situated in Belgium for the purpose of carrying out operations to ascertain that the conditions for enjoying the exemption are being met (Article 392 § 1, para 2).

24 The Minister of Finance also, in order to ensure fiscal supervision and to inform consumers, sets how and what distinctive mark may be affixed to products likely to be subject to an ecotax, in order to make clear that they are in fact subject to an ecotax or that they are exempt (and for what reason) and what the amount of the ecotax or deposit is (Article 391).

3.3. Other relevant fiscal legal bases

3.3.1. Customs and excise duties

Customs and excise come under federal competence. That competence may be implemented as regards products subject to excise (mineral oils, alcohol and alcoholic drinks, non-alcoholic drinks, tobacco products, coffee) in order to stimulate the purchase of less polluting products or to discourage the purchase of more polluting products by providing for differentiated tax on the basis of the environmental characteristics of the products concerned. Thus, the Law of 22 October 1997 on the structure and rates of excise duty on mineral oils at present provides for higher rates for leaded petrol than for unleaded petrol. A second distinction is drawn within the category of unleaded petrol, in order to provide a fiscal incentive for the use of fuels which meet the quality standards that will become mandatory as from 1 January 2005, according to whether the concentration of aromatic compounds or of sulphur does or does not exceed certain limit values (35% vol% or 50 mg/kg, respectively) [25]. A similar distinction is made for gas oil (sulphur limit value of 50 mg/kg). Liquified petroleum gas used as a fuel or for heating is exempt from excise duty. For a time, excise duties on heavy fuel oil varied according to whether or not they contained more than 1% sulphur. In addition, there are exemptions which can, from an environmental point of view, be called in question, such as the exemption for mineral oils supplied for use as fuel for aircraft, including for private tourism (Article 16 § 1(b)).

Any amendment of the relevant legislation must follow the legislative procedure.

3.3.2. Levy on energy

The federal authority is also competent for establishing taxes on energy. Thus, it established, under the Law of 22 July 1993 [26], a "levy on energy", that is to say, "an indirect tax applying to the consumption or use in the country of fuels, fossil fuels and electrical energy from whatever source" (Article 1).

Those taxes may also vary as a function of the environmental characteristics of the products concerned or of the use made of them. For fuels, for example, there is at present a levy on petrol and fuel oil used as transport fuel, but not on liquified petroleum gas used as fuel or on diesel. It should be noted that there are at present exemptions for the products referred to when they are used for the purposes of and in circumstances where excise exemptions are granted by virtue of the legislation concerning excise duties on mineral oils, so that the same criticisms, for example as regards mineral oils supplied for use as aircraft fuel, may be raised.

Any amendment of the relevant legislation must follow the legislative procedure.

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25 Royal Order of 29 October 2001, *Moniteur belge* 1 November 2001.

26 Law of 22 July 1993 instituting a levy on energy in order to safeguard competitiveness and employment, *Moniteur belge* 20 July 1993, amended several times.

3.3.3. Value added tax

Value added tax, which comes under federal competence, although part of the proceeds of the tax is allocated to the Communities and the Regions, is a tax on turnover. The tax is payable on the supply of goods and services. By decision of the Council of Ministers, the King sets tax rates and determines the distribution of goods and services between those taxes, taking into account the relevant legislation adopted by the European Communities. Through that same procedure, the King may alter the distribution and the taxes when economic or social contingencies make such measures necessary. Those Royal Orders must be confirmed by the federal legislature (Article 37 of the VAT Code). At present, there are three VAT tax rates : 6%, 12% and 21% [27]. The federal authorities may stimulate the sale of certain product categories by applying the low rate and discourage the sale of other product categories by applying the intermediate or high rate. Until now, those rates have been uniform for products and services in a single category (for example, 12% for coal, 21% for other fuels), without distinction within a single product category on the basis of the environmental characteristics of different products which belong to the same category. It must be noted in that regard that the relevant European Directive (Directive 67/388/EEC) provides that reduced rates (below 15%, with a minimum of 5%) may be applied only to products and services which are listed in Annex H to that Directive. The environmental characteristics of products are not yet considered criteria which may warrant a reduced rate being applied.

3.3.4. Income tax

Income taxes include the following taxes : (1) personal income tax, (2) corporate tax, (3) tax on legal persons, (4) tax on non-residents. These taxes come under federal competence, even if part of the proceeds of some of these taxes, in particular personal income tax, is allocated between the Communities (Article 6 § 1, Special Law of 16 January 1989) and the Regions (Article 6 § 2, Special Law of 16 January 1989). The federal legislature may therefore introduce environmental incentives into these taxes, which are governed by the Code for tax on revenue 1992 (CIR 1992). The legislature may thus, for example, discourage the use of cars for professional activities, by limiting the deductability as professional costs of charges relating to their purchase or use, or may limit the deductability of charges relating to movements by car between home and the workplace [28]. Inversely, it may, for the purpose of promoting other, more environmentally friendly modes of transport, grant tax deductions which can in certain cases be greater than the real costs borne by the taxpayer [29]. It may favour certain investments

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27 Royal Order N° 20 of 20 July 1970, confirmed by the Law of 27 May 1971 (amended several times).

28 See Articles 64 and 66 CIR 1992.

29 See Article 66(a) CIR 1992.

which tend to protect the environment by providing, for example, increased deductions for capital used to promote research and development for new products and state-of-the-art technologies which do not affect the environment or seek to minimise negative effects on the environment, or equipment which favours a more rational use of energy, improving industrial processes from the point of view of energy efficiency [30].

It may similarly favour, for example, investments which are necessary in order to increase the market share for reusable containers [31]. Tax reductions are possible for various expenses made as part of an investment in the taxpayer's home for the purpose of energy savings [32].

Although those incentives come under federal competence, in certain conditions and within certain limits the regional legislatures are in turn – which does not appear to exclude action by the federal legislature in the matter – also competent to introduce such incentives into taxes for physical persons. That follows from the Special Law of 13 July 2001, amending the Special Law of 16 January 1989. Article 6 § 2(4) of the Special Law of 16 January 1989 henceforth provides that the Regions are authorised, as regards taxpayers who are domiciled in the Region in question, to put into effect general fiscal reductions and increases "linked to regional competences", for example, environmental protection. The procedures to be complied with in such cases are described in Article 9 and 9(a) of the Special Law of 16 January 1989 and imply dialogue with the federal Government and the Governments of the other Regions. The total of increases and reductions may not exceed 6.75% of the proceeds from the tax located in each Region and the Regions may not reduce the progressiveness of the tax or carry out a policy of unfair fiscal competition.

3.4. Other legal bases

If the Law on product standards is not sufficient as a legal base for adopting regulatory or other measures, it may be asked whether there are not other framework laws which might be used as a legal basis for the proposed measure.

Thus, the Law of 24 January 1977 on the protection of consumer health as regards foodstuffs and other products contains wide powers for the King to *safeguard public health* or *prevent fraudulent practices or adulteration*. That law applies to foodstuffs and to a series of "other products", such as detergents and cleaning and maintenance products, materials and objects intended to enter into contact with foodstuffs or even cosmetic products.

The Law of 9 February 1994 on product safety, which concerns all products and services but does not seek to protect the environment (Article 1, second paragraph)

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30 See Articles 69 § 1, 2 and 70 CIR 1992.

31 See Article 69 § 2, CIR 1992.

32 See Article 14524 CIR 1992.

33 Royal Order of 13 January 1995.

empowers the King to take a wide range of measures relating to products and services for the purpose of ensuring the *protection of user safety and health*.

The Law of 14 July 1991 on commercial practices and on information to and the protection of consumers empowers the King, without prejudice to the competence conferred upon Him in the field of public health, for the purpose of ensuring the *fairness of commercial transactions or consumer protection*, to require *inter alia* the labelling of certain categories of products, to set the conditions for composition, constitution, presentation, quality and safety which products must satisfy in order to be placed on the market or to prohibit the appending of certain marks, words or terms to the trade names under which products are placed on the market. The Law includes an entire chapter on *advertising*. Article 28 provides that the King may, by decision of the Council of Ministers, prohibit or restrict advertising for (categories of) products or services which it decides, with a view to ensuring greater protection for consumer and environmental safety. On the basis of Article 29, the King has created, within the Consumer Council, a committee [33] charged with issuing opinions and recommendations on *advertising and labelling relating to environmental effects* and on the formulation of a *code on ecological advertising*. That committee must be consulted before Orders concerning advertising and labelling relating to environmental effects may be adopted. The King is empowered to impose a code on ecological advertising after having asked the opinion of the committee.

The Law of 14 July 1994 setting up the Committee which awards the European ecolabel provides that the King may, after consulting the Committee, organise and put in place, by Order decided by the Council of Ministers, a system to award, monitor and withdraw a *national ecolabel*.

Article 132 of the Law of 20 July 1991 on social and other provisions lays down that, in order to ensure the implementation of obligations arising from international agreements or treaties relating to the *deliberate release of genetically modified organisms*, the King, by Order decided by the Council of Ministers, is to regulate the deliberate release of genetically modified organisms.

33 Royal Order of 13 January 1995.

CHAPTER II

EUROPEAN LAW

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WHEN AN ENVIRONMENTAL PROBLEM LEADS NATIONAL PUBLIC AUTHORITIES TO CONSIDER ADOPTING A MEASURE RELATING TO THE PLACING OF PRODUCTS ON THE MARKET, WHAT ARE THE RULES OF EUROPEAN (OR "COMMUNITY") LAW TO BE TAKEN INTO ACCOUNT ?

♦ **Is the issue one which is subject to Community harmonisation?** ➲ 1	**YES** ↳ Analysis of the secondary legislation ➲ **4 to 10** **NO** ↳ Analysis of the Treaty ➲ **11 to 16**	When can a measure be considered to fall within the scope of secondary legislation? What is secondary legislation ? ➲ **2** When can a measure be considered not to fall within the scope of secondary legislation? ➲ **3**

↳ *THE MEASURE FALLS WITHIN THE SCOPE OF SECONDARY LEGISLATION*

♦ **What is the nature of the Community measure?** ➲ **4**	Importance: to understand how much flexibility is afforded the Member State in choosing the form and methods needed to achieve the objective set	A *regulation* determines result and methods. It is binding in its entirety and directly applicable. A *directive* is binding as to result but leaves it to the Member State to choose methods. It requires a transposing measures. A *decision* is directly applicable and binding in its entirety upon those to whom it is addressed.
♦ **What is the legal basis of an act of Community law?** ➲ **5**	Importance: to understand how much flexibility is afforded the Member State in strengthening an objective set at Community level.	– What is the legal basis? ➲ **5.1** – How is the legal basis chosen? ➲ **5.2**

♦ **Article 95 CE** ➲ **6** "Internal market" ➲ **6.1** Principle : little flexibility	What are the conditions for adopting more stringent measures of protection? ➲ **6.2**	– as regards provisional measures laid down by the act of Community law (safeguard clause) ➲ **6.2.1** – as regards permanent measures ➲ **6.2.2 et sq.**
	● The measure proposed is a new measure	– *Basic conditions:* ➲ **6.2.2.1.a, 6.2.2.1.c** - scientific evidence - of a new problem - specific to the Member State - compatibility with the EC Treaty – *Basic conditions:* ➲ **6.2.2.2** (notification)
	● The measure exists in national law at the time the Community law is adopted	– *Basic conditions:* ➲ **6.2.2.1.b, 6.2.2.1.c** - compatibility with the Treaty – *Formal conditions:* ➲ **6.2.2.2** (notification)
	May the Member State challenge a rejection decision by the Commission ? ➲ **6.2.3**	
♦ **Article 175 CE** ➲ **7** Environment Principle : flexibility	Conditions for national measures	– *Basic conditions:* ➲ **7.1** - a more stringent objective - compatibility with the Treaty (test of necessity, proportionality) ➲ **11 à 16** – *Formal conditions:* ➲ **7.2** (notification)
♦ **Other legal bases** ➲ **8**	● Ex article 100A ➲ **6** ● Ex article 130R ➲ **7** ● Ex article 100 ➲ **8.1** ● Ex article 235 ➲ **8.1** ● Article 94 ➲ **8.1** ● Article 308 ➲ **8.1** ● Other legal bases ➲ **8.2**	
♦ **What provisions do secondary legislation lay down concerning the leeway which Member States enjoy?** ➲ **9**		
♦ **Does the measure comply with the principle of subsidiarity ?** ➲ **10**		

THE MEASURE DOES NOT FALL WITHIN THE SCOPE OF SECONDARY LEGISLATION

It is necessary to determine that it complies with the Treaty ➲ 11

♦ **Is the national measure likely to create an obstacle to intra-Community trade?**	General principle: prohibition to create obstacles to trade ➲ **12**	What is an obstacle? ➲ **12**
♦ **What are the implications of the legal characterisation of that obstacle? ➲ 13**	Effect on the provisions of the Treaty which govern the admissibility of potential derogations to the general prohibition on the creation of obstacles	
♦ **Under what conditions can obstacles be accepted?**	● Customs duties and charges having equivalent effect (Article 25 EC) ➲ **14**	Absolute prohibition
	● Measures of internal taxation (article 90 EC) ➲ **15**	The national taxation system may not discriminate against imported products However, differentiated taxation is permitted where: - it is based on objective criteria - it has a legitimate objective - it does not discriminate against foreign producers
	● Quantitative restrictions (article 28 EC) ➲ **16**	Obstacles are prohibited in principle – *Article 30 EC* ➲ **16.1** The restriction is permitted where : - it satisfies one of the objectives set out in the Article (health/life of animals or plants) - it does not constitute a means of arbitrary discrimination

– *ECJ case-law Cassis de Dijon* ➲ **16.2**

The restriction is permissible if the measure :

- is applicable without distinction
- meets a legitimate objective (environment protection)
- makes it possible to achieve that objective
- is necessary in order to achieve that objective
- is proportionate to the expected result

May national measures have an extra-territorial effect and apply to conditions of manufacture or production outside the European Union? ➲ **16.3**

NOTIFICATION PROCEDURES WITHIN THE MEANING OF DIRECTIVE 98/34/CE ➲ 17

♦ **What is the purpose of the notification procedure? ➲ 18**

What measures should be notified? ➲ **19**

– Notion of "draft technical regulation" ➲ **19.1**
– Quid labelling procedures ? ➲ **19.2**
– Quid environmental agreements ? ➲ **19.3**
– What measures are exempt from notification? ➲ **19.4**

♦ **What is the notification procedure and what are its consequences for adoption of the measure? ➲ 20**

What is the status quo ? ➲ **20.1**

– When does the status quo apply?
– When does the status quo not apply?

What effect do the Commission's observations have on the adoption of a national standard? ➲ **21**

How does this procedure fit in with other notification procedures? ➲ **22**

♦ **What is the penalty for failure to comply with the notification procedures? ➲ 23**

1.

In examining whether a proposed measure is acceptable in the light of Community law, it is first necessary to determine whether the measure falls within the scope of a Directive, a Regulation or a Decision in Community law.

It is necessary to determine the framework for the proposed measure in order to assess the degree of leeway enjoyed by the Member State. A couple of examples are:

– *Case 1: the issue is already very well regulated at the Community level*

A Regulation, Directive or Decision deals with the subject in question. That Regulation, Directive or Decision was adopted by the European institutions pursuant to the Treaty and is categorised as "secondary legislation".

When an issue is dealt with by secondary legislation, it is that legislation which determines the latitude available to the States in adopting more stringent protective measures. Secondary Community legislation has primacy over national law.

That assessment is carried out by analysing the legal basis of the Community text and its contents.

> For example, any national measure relating to the solvent content of paints must be evaluated in the light of the European Directive which deals with that issue.

– *Case 2: the proposed measure does not fall within the scope of secondary legislation*

No specific rule regulates the issue at European level. In that case, the acceptability of the proposed measure is evaluated directly on the basis of the general rules laid down in the Treaty, which are characterised as "primary legislation".

> For example, there is no "European ecotax" on beverage containers. National measures which establish such exotaxes must be assessed in the light of primary legislation: it is necessary to ascertain that they are compatible with the general principles set out in the Treaty.

2.

When can the proposed measure be considered to fall within the scope of secondary legislation?

In order to know whether the proposed measure falls within the scope of secondary legislation, it is necessary to assess the extent to which the instruments of Community law which appear, *a priori*, to be relevant to the issue are harmonised.

It is possible that a Community instrument governs only some aspects of an issue, or only certain products, or only some stages in the life-cycle of those products. It is therefore necessary to establish:

– *the scope of application of the measure of Community law*

Does it concern products covered by the measure being proposed at national level? Does it cover specific aspects referred to by the proposed measure?

> The Community measure which sets labelling rules for products does not necessarily harmonise the rules relating to the composition of those products or the requirements relating to their energy efficiency.

> A Directive on toy safety does not necessarily guarantee toys free movement within Europe in respect of conditions such as their packaging or their heavy metal content.

– *the objectives pursued by the Community measure*

There may be instances of "implicit harmonisation" which result from the spirit of a Community legal text.

> Thus, if a Directive provides that its objectives may be achieved by allocation of financial aid by the Member States, the Member State may not arrange to meet the objectives laid down by the Directive in another manner, for example, by the creation of import bans.

The degree of harmonisation therefore makes it possible to assess the legal constraints for the proposed national measure. So (i) either it will be assessed only in the light of secondary legislation (as in the case of complete harmonisation), or (ii) it will be observed that the proposed measure goes beyond the scope of existing directives and regulations, and its lawfulness will be assessed directly in the light of the EC Treaty.

The harmonisation carried out under secondary legislation maybe total (no flexibility is intended) or minimal (the Directive allows the Member State to decide what system will be implemented in respect of that question).

3.

WHEN MAY A PROPOSED MEASURE BE CONSIDERED NOT TO FALL WITHIN THE FRAMEWORK OF SECONDARY LEGISLATION?

The proposed national measure does not fall within the framework of secondary legislation in the three following cases:

– *The issue is not yet specifically regulated at Community level*

> For example, the placing on the market of product X1 is not regulated.

– *The issue is regulated only in respect of certain products, other than those envisaged at the national level*

> Conditions for placing on the market are laid down for products X2 and X3 but not for product X1.

– *The rules which apply at Community level relate to the same products but for aspects of the life cycle other than those covered by the national measure*

Composition versus labelling, for example, or placement on the market versus use or other environmental aspects.

> The conditions laid down in secondary legislation as regards labelling do not prejudice the acceptability of national measures relating to minimal energy performance for electric appliances.

4.

When the national measure falls within the scope of secondary legislation, it is first necessary to examine the character of the Community measure: is it a regulation, a directive, a decision, an opinion or a recommendation?

The nature of the Community measure has a determining effect on the tasks which are in principle devolved to the Member State.

In order to carry out their tasks, and in accordance with the provisions of the Treaty, the European Parliament acting jointly with the Council, the Council and the Commission are empowered to draft or adopt the following measures:

a) Regulations

A Regulation has general application. It is binding in its entirety, a very complete text which binds the Member States as regards objectives and the methods for implementing them. It is directly applicable, which means that it does not need to be transposed into national legislation: it automatically applies, as worded. However, in certain cases it requires supplementary legislation to be adopted at the national level in order to ensure its effective implementation (creation of management bodies, setting up review and monitoring mechanisms, etc.).

b) Directives

A Directive is binding on all Member States to which it is addressed as to the result to be achieved, while leaving national authorities the power to choose the form and methods of implementation. Consequently, the Member State always has a certain

degree of leeway, in principle, to adopt what it considers to be the most suitable measures for the purpose of achieving that objective.

c) Decisions

A Decision refers to very specific addressees, whether they are individuals or certain clearly defined Member States. It is directly binding in its entirety upon those to whom it is addressed.

d) Recommendations and opinions

Recommendations and opinions have no binding legal force.

e) Green papers, communications and white papers

While not specifically provided for by the EC Treaty, green papers are non-binding measures by which the European institutions present policies which they wish to discuss with civil society at large. Communications and white papers present the results of the thinking which takes place following that debate. These documents are not legally binding but they constitute basic elements of policy proposals.

The nature of the instrument in question directly influences the tasks devolved to the Member States. When a Directive is adopted at European level, it requires a transposing of measures at the national level, for the Member States may choose the methods and form for achieving the result set at Community level. Regulations and Decisions, on the other hand, are directly applicable, as they are.

Nevertheless, the nature of the instrument does not reveal what leeway is afforded the Member States as regards the objective (the result to be achieved), which is set at Community level.

In order to know whether Member States may strengthen the objective set at Community level by maintaining or adopting national measures which are more favourable to environmental protection, it is necessary to look at the legal basis of the Community measure.

5.

TO UNDERSTAND THE DEGREE OF FLEXIBILITY ALLOWED THE MEMBER STATES UNDER SECONDARY LEGISLATION AS REGARDS THE OBJECTIVES TO BE ACHIEVED, IT IS NECESSARY TO EXAMINE THE LEGAL BASIS OF THE COMMUNITY MEASURE.

5.1. What is the legal basis of a Community measure?

Directives, regulations and decisions are always adopted on the basis of one or several specifically identified Articles of the Treaty, which are identified in the the preamble to the text in question. These legal bases are important for several reasons:

a) They assert the competence of the European institutions

They make it possible to specify the competence of the European institutions to act in respect of the issue in question. The legislative measure proposed must have a basis in one of the policies for which the Treaty confers competence to the European Communities, whether of a general nature (e.g. for Article 95 EC on the establishment and functioning of the internal market) or of a specific nature (e.g. Article 175 EC for the environment).

b) They specify the procedure for adoption of the measure

The choice of legal basis determines which procedure must be followed when adopting the provisions in question at Community level (co-decision or cooperation, qualified majority or unanimity, etc.), but it should be noted that the tensions which existed earlier between Articles 95 EC et 175 EC have calmed down following the reforms adopted under the Treaty of Amsterdam in 1997. While previously the choice made between ex Articles 100a EC and 130r EC determined the role of the European Parliament in the decision-making process and the rules relating to voting quorum (majority or unanimity), the Treaty now provides for a co-decision between the Parliament and the Council, with qualified majority voting the rule (except in certain exceptional cases).

c) They determine the degree of flexibility allowed to the Member States for the purpose of adopting more stringent measures

The choice of legal basis is decisive in assessing how much flexibility the Community measure allows Member States. It makes it possible to assess whether the objective pursued by a Directive or Regulation may be strengthened at national level. While classification as a "directive" or a "regulation" governs the degree of flexibility as regards the methods to be used in achieving the objective set by the Community measure, the legal basis answers the question as to whether that objective may itself be modified in the direction of stronger protection.

> Thus, the eco-label Regulation 1980/2000, which is based on Article 175 EC, and imposes conditions for the award of the European label, does not prejudice the Member State's power to adopt more stringent measures, for example by making it mandatory to obtain the label.

The discretion conferred on Member States to adopt more stringent measures of protection will be greater if the legal basis is "environmental" (Article 175 EC, ex-Article 130r EC), than if it is "internal market" (Article 95 EC, ex-Article 100a EC). In order to ascertain the room for manoeuvre available to Member States to adopt or maintain any supplementary measures, it is necessary to refer to the legal basis of the text being considered (aside from determining the content of the text, carried out as described in paragraph 9)

5.2. How is the legal basis for an instrument of Community law chosen?

The legal basis for an instrument of Community law is chosen as a function of several objectives open to judicial review. These include:

– *The content of the measure and its purpose*

A measure concerning waste management will a priori be based on Article 175 EC, given that its main purpose is related to environmental protection.

– *The goal, the primary objective pursued by the Community legislature*

If the legislature seeks to achieve several objectives, it is the measure's main purpose will determine the most suitable legal basis.

- If the main objective is to harmonise national rules for the purpose of promoting the establishment of a common market, the measure will be based on Article 95 EC ("internal market", ex-Article 100a EC), even if the measure also has an environmental objective. That legal basis is often used to regulate conditions for placing on the market and the free movement of products.
- By contrast, if the centre of gravity (the main objective, of the measure) is to protect the environment, its legal basis will be Article 175 EC (ex-Article 130r).

Other legal bases are also possible, for example when the Community legislature's main objective relates to other grounds of competence (health, consumer protection, agricultural policy, etc.), or if the measure was adopted at a time when the environment did not explicitly figure in the list of objectives pursued at Community level (ex-Articles 100 and 235 EC).

When a measure simultaneously pursues several objectives which are not incidental in nature, multiple legal bases may be proposed, provided that the procedures may be simultaneously applied. The fact that the Community instrument has various legal bases does not pose a problem when the adoption procedures are identical (for example, co-decision). However, when they diverge, the instrument must take a single legal basis.

6.

WHAT ARE THE IMPLICATIONS OF USING ARTICLE 95 OF THE TREATY AS LEGAL BASIS?

6.1. The objective of Article 95 EC

Article 95 EC seeks to achieve the harmonisation of conditions for the free movement of goods, in order to ensure the proper functioning of the internal market. In order to function efficiently, that harmonisation must be as complete as possible. In that context, supplementary national measures are not welcome, since they risk creating undesirable obstacles to free intra-Community trade.

Directives concerning products are often based on Article 95 EC or on the former Article 100 EC, given the direct effect of such measures on the free movement of goods in the internal market.

Considerable tension exists between protection of the environment and the internal market as regards conditions relating to placing products on the market. Since products are intended to circulate and to be the subject of physical movement for the purpose of trade, requirements for them to comply with environmental objectives affect their ease of access to the market of the Member State which takes the measure in question. It is therefore desirable that any such step be taken, at the very least, at European Union level.

In order not to favour trade to the detriment of other values recognised by the Treaty, Article 95 provides certain guarantees. It states that measures proposed at European level concerning health, safety, and environmental and consumer protection are to take as a base a high level of protection, taking account in particular of any new development based on scientific facts.

If the level of protection ensured by secondary Community legislation does not necessarily have to be at the highest possible level, it nevertheless cannot be non-existent, weak or intermediary. Moreover, that obligation may be subject to judicial review, if the Court finds that there has been a manifest error of assessment.

6.2. What are the conditions for adopting more stringent measures of protection?

When the objective sought at national level is not covered at the level of Community law, and no safeguard clause within the meaning of Article 95(10) EC is expressly laid down, Article 95 provides the Member States the possibility of adopting more stringent measures of protection, subject to compliance with very strict requirements. Those measures may be of two kinds:

– provisional measures, or
– permanent measures.

6.2.1. Provisional measures : the safeguard clause laid down in Article 95(10) EC

Article 95(10) EC authorises the Community legislature to include, within the newly created measure, a safeguard clause in respect of Member States which wish to adopt more stringent protective measures, on a provisional basis.

In such cases, the possibilities for exceptions are specifically laid down by the text of the Community law itself. It is for the Member States, when transposing that text, to decide whether or not to make use of it.

> Thus, Directive 2001/18/CE of 12 March 2001 on the deliberate release of GMOs to the environment contains a safeguard clause (Article 23). This authorises Member States provisionally to restrict or prohibit the use and/or sale of a

> GMO as or in a product on its territory, even if that use and/or sale has received a written consent which complies with the procedure laid down by the Directive, because of new or additional information which gives grounds for considering that the GMO presents a risk to the environment or human health.

The existence of such a safeguard clause is often interpreted to mean that a subject matter has been fully harmonised.

6.2.2. Permanent measures

6.2.2.1. Requirements concerning the content of the proposed national measure

The requirements laid down by Article 95 EC vary depending on whether the intention is to introduce new provisions (Article 95(5)) or to maintain provisions existing prior to the instrument of Community law (Article 95(4)).

In both cases, those requirements must be strictly construed, given that they lead to a level of protection which the Community act does not in principle authorise.

a) Introduction of a new measure

The proposed measure must be considered as new when it does not form part of the body of national legislation at the time when the Community measure is adopted. It must satisfy the following conditions:

1. It must be based on new scientific evidence relating to the protection of the environment or the working environment ;

> Member States must present a risk assessment dossier setting out the cause-and-effect relationship between the regulated activity and suspected damage. Nevertheless, to require the Member State to submit irrefutable evidence would be contrary to the precautionary principle.

2. The measure must be necessary on the grounds of a problem specific to the Member State ;

> In the case of a dossier concerning pentachlorophenol, it was demonstrated that the Danish population ran a higher allergy risk than other populations as the result of genetic predisposition, eating habits and natural environment.

3. The problem must have arisen after the adoption of the harmonisation measure.

> The proposed provisions will be rejected if the Commission takes the view that they constitute a means of arbitrary discrimination, or a disguised restriction on trade between Member States or an obstacle to the functioning of the internal market.

b) Maintenance of an existing measure

If the measure already exists in national law, the requirements for its maintenance are less strict.

The State must notify the Commission of the reasons for the maintenance of the national measures on grounds of major needs referred to in Article 30 EC (which include protection of health and public security) or relating to the protection of the environment or the working environment.

However, in contrast to the preceding case, it need not prove that the risk is specific to the Member State.

The proposed provisions will be rejected if the Commission takes the view that they constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States or otherwise constitute an obstacle to the functioning of the internal market.

c) Scope of the Commission assessment

The proposed provisions under a and b above will be rejected if the Commission takes the view that they constitute (i) a means of arbitrary discrimination, or (ii) a disguised restriction on trade between Member States, or (iii) an obstacle to the functioning of the internal market. The Commission's assessment should respect the principle of proportionality between the objectives pursued by the Member State, and the effect of the measure on the free movement of goods.

6.2.2.2. Requirements concerning the form of notification

a) Introduction of the dossier

The envisaged national measure must be notified to the Commission, which will approve or reject the adoption of the measure at national level.

The notification must take place sufficiently soon after publication of the Directive so that the Commission may give its opinion on it during the transition period, before the date of the Directive's entry into force. In the time period preceding the Commission's decision, a standstill is imposed on the Member State: it may not adopt the proposed measure.

In the case where a new national measure is introduced, the scientific dossier must accompany the notification. It is for the Member State to prove that the conditions laid down by the Treaty for obtaining derogation are fully satisfied: it bears the burden of proof.

When the information provided by the Member State is incomplete, the Commission must reject the application.

b) Period granted to the Commission to take a decision

Since the entry into force of the Treaty of Amsterdam, the Commission has six months in which to assess the notifications it receives and to decide whether to approve

or reject the national provisions in question. That period may be extended up to a maximum period of one year when justified by the complexity of the dossier and in the absence of a threat to human health.

In the absence of a decision by the Commission within six months, the national provision is deemed to have been approved.

The notification must therefore take place as soon as possible and at least six months before the expiry of the Directive's transposition period, so that the Commission may decide prior to the Directive acquiring direct effect.

c) Penalty for failure to notify

Failure to notify excludes the State from benefiting from the derogation. If the measure is nevertheless adopted at national level, it can be declared illegal by the Court of Justice of the European Communities.

6.2.3. May the Member State challenge a rejection by the Commission ?

If the Member State disputes a rejection by the Commission, it may bring an action before the Court of Justice on the basis of Article 230 EC.

Any Member State may, in addition, bring an action before the Court of Justice if it considers that another Member State is making improper use of the leeway allowed under Article 95 EC. The Commission itself may challenge the national measure before the Court for improper use of powers (Article 95(9) EC).

7.

What are the implications of the use of Article 175 EC of the Treaty as a legal basis?

Article 175 EC (ex-Article 130r EC) is the legal basis for measures which may be adopted by the European institutions in order to protect the environment.

In order for Article 175 EC to be the suitable legal basis for a measure, it is not sufficient that the measure simply relates to the environment. The environmental objective must be the main objective aimed at, constituting the measure's centre of gravity.

> If the main objective of a measure relating to substances dangerous for the environment is to harmonise conditions for the free movement of those products in Europe, the measure's centre of gravity will require the choice of Article 95 EC as the appropriate legal basis, even if the measure envisaged deals with environmental concerns.

According to the current wording of the Treaty, Community policy on the environment aims at a high level of protection and is based on the principles of precaution and preventive action, the principle of rectification of environmental degradation at source and the polluter-pays principle (Article 174 EC).

Article 176 EC states: "*The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaty. They shall be notified to the Commission.*"

This means that Community harmonisation takes place in this case at only minimal level: the Member States may, in the process of transposition, set objectives which are more stringent than the Community requirements, and adopt legislation to that end.

Nevertheless, such proposed measures are subject to requirements relating to both the content of the standard and the procedure for notification to the Commission.

7.1. Requirements relating to the content of the national rule

The ECJ acknowledges that it is for the Member State to choose the level of environmental protection which it wishes to see applied in its territory, as long as the envisaged measures are measures which strengthen the objective sought by the Community measure. A derogation for the purpose of Article 176 EC is not a means of derogating from a Directive in the direction of less stringency or to delay its implementation.

Measures developed at national level under Article 176 EC may be new measures or measures which already existed when the Community law in question was adopted but which the Member State wishes to maintain.

Those measures must be compatible with the Treaty and secondary legislation. Measures may not constitute unfair discrimination, or a disguised restriction on trade between Member States or competition rules. Obstacles to the movement of goods which might be created are to be the least restrictive possible as regards intra-Community trade.

The fact that national measures pursue objectives set by the Community harmonisation measure, while strengthening them, makes them appear necessary in principle; courts will therefore tend to favour such measures.

7.2. Formal conditions

Proposed national measures must be notified to the Commission.

However, Article 176 does not contain comparable details to those laid down in Article 95 EC as regards the effects of notification.

No time-limit has been laid down for communicating national legislation. However, implementation of the notification system requires close cooperation between the Commission and the Member States and it is for the latter, pursuant to Article 10 (ex-article 5) EC, to notify as early as possible the national provisions which they intend to apply, so that the Commission may efficiently exercise its control.

8.

CASES WHERE COMMUNITY MEASURES TAKE A DIFFERENT LEGAL BASIS

8.1. Articles 94 EC (ex-article 100 EC) and 308 EC (ex-article 235 EC)

A certain number of measures adopted in the field of the environment remain based on either Article 94 (ex-Article 100, on the approximation of laws) or on Article 95 (ex-Article 235, residual authority) or, most often, on both of these together. The legal bases are those which were formerly used when no specific environmental basis was contained in the Treaty.

The directives adopted on those bases often expressly grant Member States the right to take measures which are either more or less binding than those provided for by the Community harmonisation measure.

Where the right to adopt stricter standards is provided, Member States which wish to make use of that derogation are nevertheless required to comply with the rules of the Treaty (primary legislation) and, in particular, Articles 28 *et seq.* Thus, the national measure which is stricter than the Community harmonisation measure is valid in so far as it satisfies the conditions of necessity and proportionality. In addition, such a measure must comply with the substantive and formal conditions laid down by the harmonisation measure.

8.2. Other possible Articles

A measure concerning the environment may find its centre of gravity in the legal bases relating to the common agricultural policy (Article 37), public health (Article 152), consumer protection (Article 153) or the common commercial policy (Article 131*et seq.* EC).

In that case, it is necessary to refer to the articles cited in the preamble to the Community text being considered in order to determine the leeway conferred on the Member State for the purpose of adopting more stringent protective measures.

As regards consumer protection, for example, Article 153(5) EC states that "*Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.*"

In this area, the objective pursued at European Union level is worded as follows: "*In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*

The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through measures adopted pursuant to Article 95 in the context of the completion of the internal market and by measures which support, supplement and monitor the policy pursued by the Member States."

Consumer protection may therefore be established on the basis of two legal foundations, under Articles 95 and 153 EC.

9.

When an instrument of secondary Community legislation exists, a preliminary analysis of its provisions must also be carried out in order to determine which tasks are explicitly conferred on the Member State.

In order to delimit the Member State's latitude under an instrument of secondary legislation, its content must also be determined.

Directives sometimes explicitly allow Member States leeway to adapt their provisions to reflect national realities, either by providing the possibility of derogations, or by stipulating, for example, that "Member States may set more stringent rules as regards scope and procedure". The text thus sometimes expressly empowers the State to adopt more stringent protective measures. It is therefore important to take note of the powers granted to Member States in parallel with examination of the legal basis of the text.

If such a possibility of derogation is laid down in a directive based on Article 95 EC, it can be used only under conditions of strict compliance with the conditions or formalities which have been laid down.

10.

Does the instrument of Community law comply with the principle of subsidiarity ?

Measures adopted at European level must be justified on the basis of the subsidiarity principle, in accordance with Article 5 EC, which states that "... *the Community shall take action ... only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."*

The measure issued at European level will be justified in the areas which fall within the competences shared with the Member States :

– When the issue in question has transnational consequences and the objectives of the proposed action cannot be adequately achieved by action on the part of the Member States : the "scale" of the proposed measure must be examined ;
– When it is proved that the effects of a measure adopted at European level are broader than the effects of a measure adopted at national level and can be better achieved at that level : the "added value" of the Community measure must be examined.

Value added is also established when action adopted at Member State level might come into conflict with the Treaty, for example by giving rise to distortions in competition or the free movement of goods, which is frequently the case when product standards are set.

A Member State may bring an action before the Court of Justice to decide on the lawfulness of the instrument of Community law as regards respect for the principle of subsidiarity. The action must, however, be brought within two months of publication of the instrument.

11.

When is it necessary to assess compliance with the Treaty independently of provisions of secondary legislation ?

If it is established that no Community act of secondary legislation (regulation, directive, decision) governs the area addressed by the national measure, or if Community harmonisation exists but proves to be partial or incomplete, the lawfulness of the proposed national measure must be tested in the light of the general rules laid down in the Treaty, referred to as "primary law".

12.

What are the implications of the general principle which prohibits creating obstacles to intra-Community trade?

The implementation of the fundamental principle of the free movement of goods laid down in the EC Treaty rests, inter alia, on a general prohibition on barriers. The concept of a barrier in the widest sense refers to any disturbance affecting a product which circulates within the territory of the Community.

> National measures which seek to promote environmental protection are likely to create barriers to intra-Community trade, particularly if they cover products, since these are essentially intended to move beyond borders.

There are, however, exceptions to this general prohibition, the precise scope of which must be established.

13.

What are the implications of legal characterisation as a barrier ?

In order to be acceptable where a dispute is brought before the Court of Justice, potential obstacles must satisfy strict conditions, which vary according to whether the measure in question establishes a financial charge (customs duties and measures having equivalent effect, measures of internal taxation) or a technical restriction (quantitative restrictions and measures having an equivalent effect).

This distinction is basic, for it determines how articles which cannot be cumulatively applied to a single national measure will be used among various areas of application. The articles concerned are :

– Articles 25 EC *et seq.* (charges having equivalent effect to customs duties) ;

– Articles 28, 29 EC *et seq.* (quantitative restrictions and measures having equivalent effect) ;

– Articles 90 EC *et seq.* (discriminatory internal taxation measures).

In order to assess the acceptability of the potential obstacle created by the national measure in question, it is necessary to establish the category to which it exclusively belongs, in order subsequently to evaluate the conditions under which a potential obstacle might be permitted – conditions which differ considerably according to whether the measure falls within Article 25, 28, 29 or 90 EC.

14.

Prohibition on customs duties and charges having equivalent effect

Article 25 EC prohibits customs duties on imports and exports, whether these are tariffs or fiscal measures. Customs duties are a charge levied when a border is crossed, determined on the basis of a percentage of the value of the good in question.

Fiscal charges which lead to the same result are also prohibited. The prohibition thus refers to unilateral measures adopted by a State in respect of a specific product on the basis of or at the time of its import or export within the Community, but which excludes a similar national product ("like product"). This is the case, inter alia, when the proposed measure appears to apply to both national and imported products although its practical effect is to affect only foreign products, to the exclusion of national products (for example, when the charge levied is refunded, but only to national taxpayers).

That prohibition is widely construed by the Court of Justice and does not permit of any derogation.

However, it does not relate to fiscal measures which come under internal taxation and are applicable without distinction.

15.

PROHIBITION ON CREATING DISCRIMINATORY INTERNAL TAXATION IN RESPECT OF FOREIGN PRODUCTS (ARTICLE 90 EC)

Member States have significant freedom to establish or amend domestic requirements. Fiscal measures adopted at national level also benefit from a presumption of legitimacy in the light of Community law. That presumption will be refuted, however, if the fiscal measure sets up a system which discriminates against foreign producers.

A Member State cannot, in effect, impose a taxation regime whose effect is to protect only its nationals and thereby to discriminate against foreign producers, as stated in Article 90 EC:

> *"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."*

The taxation measures referred to here are all taxes and other fiscal charges which come under a general domestic taxation system and apply to products.

In order to be admissible, the charge must be part of a general taxation regime which applies the same criteria to domestic and foreign products and which is objectively warranted by the goal which provided the impetus for its application. The proposed tax must have the same effects on all taxpayers, be they domestic or foreign. The amount of tax to be paid cannot be greater for imported products. Similarly, the tax base and the means of collecting the tax must be identical.

In addition, paragraph 2 of Article 90 prohibits indirect fiscal discrimination. That is taxes which apply in a general manner to a category of products but where it can be observed that the goods referred to are not produced on the national territory but that they compete with another category of products which are produced on the national territory... but are not subject to the tax. Thus, Belgium may not adopt protectionist fiscal measures in respect of foreign products which are in competition – even partially, indirectly or potentially – with national products.

The aim of the Article is to ensure that internal taxation is completely neutral as regards competition between national and imported products. That principle of identical taxation is therefore also valid for products which, without appearing to be similar, present analogies as regards their use. The relevant criterion in this regard is the interchangeability of products. It is necessary to ascertain whether products have sufficient properties in common to be considered an alternative choice for the consumer. The assessment of discrimination requires, in principle, the existence of a comparative element between national production and its competition. Failing such production, the measure in question would appear to fall outside the scope of Article 90 EC (it must

then be ascertained whether it falls within Article 235 EC or Article 28 EC), but the position of the Court of Justice is not settled in that regard.

Article 90 thus unconditionally prohibits measures of internal taxation of a discriminatory or protectionist nature. That does not mean that differentiated taxation cannot be accepted. In the light of settled case-law, it is admissible under three conditions:

a) The distinction must be based on an objective criterion

In that regard, the Court of Justice takes the view that the nature of the raw materials and the means of production used to produce the electricity constitute objective criteria which warrant the application of a differentiated fiscal policy as regards products and energy. An exemption from consumption tax in favour of regenerated oils, and imposition of a progressive tax as a function of the number of cylinders of vehicles being taxed are also based on objective criteria.

b) The objective sought must be legitimate

Article 90 EC does not prohibit Member States from establishing differentiated fiscal regimes as regards competing products when the objective sought is compatible with a Community policy, such as protection of the environment.

c) Its detailed rules must avoid any form of direct or indirect discrimination

In that regard, particular attention must be given to *de facto* discrimination. The assessment will consider all the characteristics of the taxation measure including, of course, the tax itself, but also the tax base, the means of collection and the system of penalties.

16.

PROHIBITION OF TECHNICAL BARRIERS

Article 28 EC prohibits quantitative restrictions on imports as well as all measures having equivalent effect which affect trade between Member States. Similarly, Article 29 EC prohibits restrictions on exports.

Any trade measure taken by a Member State which is likely to restrict intra-Community trade – directly or indirectly, actually or potentially – is to be considered a measure having equivalent effect to a quantitative restriction.

This is not an absolute prohibition.

At present, two actions which may create barriers are permitted, subject to very specific conditions.

The first is based on Article 30 EC. The second possibility arises from an interpretation of the Court of Justice in what is known as the *Cassis de Dijon* case.

16.1. Derogations permitted under Article 30 EC

Article 30 EC permits restrictions to intra-Community trade. These are based on the reasons set out below but are subject to the condition that they do not constitute a

means of arbitrary discrimination or a disguised restriction on trade between Member States.

Those reasons include: public morality; public policy; public security ; the protection of the health and life of humans, animals or plants ; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property.

Non-arbitrary discrimination may therefore be permitted when it makes possible the achievement of one of the objectives set out in Article 30 EC.

However, the reasons relied on by the national Government can only be upheld in a restrictive manner. The conditions laid down by the Article may not be interpreted broadly. This means that measures specifically relating to environmental protection and which cannot be covered by the notions of health or the protection of animals or plants – as would be the case, for example, for waste recycling – do not fall within that Article and cannot be accepted in this context.

The discriminatory character of a measure will be considered acceptable if :

– *It is based on non economic considerations :* only pursuit of the public interest can justify a derogation ;

– *The proposed measure is warranted in the light of the objective pursued ;*

– *The proposed measure is necessary and complies with the principle of proportionality.* The measure is necessary if there is no alternative measure making it possible to achieve the same result and if it does not replicate control measures carried out in the country of origin ; a measure is considered disproportionate if another measure, less restrictive of intra-Community trade, could have been adopted to achieve the same result.

16.2. The case-law in *Cassis de Dijon*

The Court of Justice was led to rule on restrictions of a quantitative character which had been drawn up at national level in order to meet objectives other than those mentioned in Article 30 EC, among them protection of the environment.

The Court of Justice acknowledged the status of environmental protection as a "legitimate objective of general interest" which could form the basis for a possible barrier to trade.

According to that case-law, a national measure which creates barriers to intra-Community trade may be accepted under the following conditions :

– *The situation in question must be a case where there is no secondary legislation :* the subject has not been the subject of harmonisation at Community level. That condition follows from the primacy of Community over national law.

– *Respect for the principle of non-discrimination.* The measure must not draw distinctions on the basis of the nationality of products or producers. It must in effect be

"indistinctly applicable". Nevertheless, that principle may vary as regards conditions of public interest and proportionality, discussed below ;

– *The measure must pursue a legitimate objective of public interest.* This is the case as regards protection of the environment, recognised as "a major need in Community law" by the Court of Justice ;

– *The measure must be necessary and proportionate:* The measure must have a causal link to the objective pursued and be appropriate for achieving it. The assessment of whether the Member State is effectively pursuing the objective relied on will be made on that basis.

The measure is necessary if there is no alternative measure making it possible to achieve the same result ; a result will be considered disproportionate if it is shown that another measure, less restrictive of intra-Community trade, could have been adopted to achieve the same result ;

> The Court of Justice takes the view that German legislation which lays down acoustical technical standards for certain planes is proportional to the environmental objective sought, for the measures adopted are necessary in order to reduce nuisance caused by noise.

– *The test of proportionality between objectives pursued by the Treaty:* According to some authors, in principle it is also necessary to ascertain proportionality in the strict sense of the measure, by examining the measure in itself and not in a comparative manner, in order to see whether the advantage which it confers is disproportionate in relation to the damage which it will entail for intra-Community trade. That test, which can be termed the "test of proportionality", requires that disadvantages created by the contested measure do not exceed the expected benefits. The measure adopted by the national authority must be considered reasonable under this criterion.

16.3. May national measures give rise to extra-territorial effects and cover conditions of manufacture or production outside the European Union ?

Measures adopted by States for the purpose of extra-territorial protection are likely to be classified as measures having equivalent effect to quantitative restrictions on exports of goods.

It is therefore necessary to ask whether such measures may be justified either under Article 30 of the Treaty or by the case-law in *Cassis de Dijon*. Until now, the Court has never addressed the question satisfactorily and its case-law is unclear.

According to academic analysis, however, it cannot be affirmed as a general rule that a Member State may not adopt measures having as their main objective the protection of the environment in a third country. Cases of this sort must be examined on a case-by-case basis, on the understanding that it all States bear primary responsibility for ensuring environmental protection in their own territory.

Of course, the lawfulness of such measures must be assessed with regard to WTO law, as discussed in Chapter III, in the light of the debate on the extent of the similarity of competing products in respect of processes or production methods (PPM). In European law, and as regards the question concerning us, the analysis of similarity is of minimal interest in the context of the discussion on technical barriers (similarity of products is useful only for the application of Article 90 of the Treaty, not Article 28).

17.

The obligation of prior notification to the Commission of technical regulations within the meaning of Directive 98/34/EC

In order to avoid having the adoption of standards and technical regulations create quantitative restrictions to trade, Directive 98/34/EC establishes a procedure for prior notification to the Commission of any "*proposed technical regulation*" envisaged by Member States.

That procedure supplements the prohibition on measures having equivalent effect to quantitative restrictions laid down in Articles 28 to 30 of the EC Treaty, as well as the harmonisation of national legislation through secondary legislation.

Its objective is to prevent technical obstacles to intra-Community trade which can result from differences between the national legislation of Member States relating to the production and marketing of goods, by requiring Member States to notify the Commission, in certain specific cases, of new measures being proposed at national level.

18.

What is the purpose of the prior notification procedure concerning "technical regulations" ?

The purpose of notification is to enable the Commission to obtain the most complete information possible so that it may effectively exercise its powers of control. Member States are therefore required to notify the full text which contains the draft technical regulation.

In addition to notifying the draft technical regulation to the Commission, the Member State is required to state the reasons which made the regulation necessary, unless those reasons are made clear by the draft text itself. The State must at the same time, where appropriate, notify to the Commission the texts of the main legislative provisions and the actual legislation which are directly concerned, unless these have been transmitted with an earlier notification. If it is apparent that knowledge of these is necessary in order to assess the scope of the draft. If necessary for that assessment, the proposed legislation must be sent to the Commission in its entirety, even if only some of its provisions constitute technical regulations.

> Thus, the Court found that only the full notification of an Italian law on asbestos could enable the Commission to assess the full scope of the technical regulations which might be established.

Moreover, if significant amendments are made to technical regulations which have already been notified, the latter are also subject to the requirement for notification.

When a draft technical regulation seeks to limit the marketing or use of a substance, preparation or chemical product for reasons of public health, or the protection of consumers, or the protection of the environment, Member States are also required to transmit a certain amount of scientific evidence justifying the adoption of their measures.

> That evidence includes reference to relevant information on the substance, as well as information on known and available substitute products and the effects the measures are expected to have as regards public health and the protection of consumers or the environment. In particular, a risk assessment must be carried out in accordance with Community legislation on chemical substances.

19.

What measures are likely to be subject to the Directive's notification requirement ?

19.1. The measure must fall within the definition of "technical regulation"

The notification procedures laid down by the Directive apply to the adoption of any "*draft technical regulation"*. This is defined as follows :

> "The text of a *technical specification* or of *another requirement*, including administrative provisions, which has been drawn up in order to establish it or finally have it established as a *technical regulation* and which is at a stage in its preparation where it is still possible to make substantial changes to it."

To clarify that definition, the following meanings should be noted :

– *"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.

– *"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;

– *"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**.**

The Directive provides various examples of *"de facto technical regulations"*. These 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, 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, excluding public procurement tender specifications,

– *Technical specifications or other requirements which are linked to fiscal or financial measures* affecting the consumption of products by encouraging compliance with such technical specifications or other requirements or rules on services.

These concepts have also been extensively interpreted by the Court of Justice. A technical rule is defined as a function of its effects, not its objective.

> In its judgment in *Bic Benelux*, of 20 March 1997, the Court of Justice held that not only provisions whose immediate purpose is to hinder trade can constitute technical regulations, but also regulations which could give rise to such an effect while pursuing a different goal (for example, environmental protection). Regardless of its environmental protection objective, a technical regulation relating to waste management or the protection of waters is therefore subject to the notification requirement. Directive 98/34/EC thus applies to regulations falling within criminal law, since its scope is not limited to products intended for uses which do not come under the rights and powers of the public authorities.

The Directive does not lay down a minimum threshold for the expected effect of the measures at issue (no *de minimis* rule) and does not draw distinctions on the basis of the value of the products in question or the importance of the markets involved. Draft technical regulations which have negligible economic impact are therefore subject to the notification requirement.

19.2. Are marking rules for products subject to the notification procedure ?

The Court has on several occasions held that national measures which require goods to carry specific symbols, markings or labels must be classified as technical regulations.

> Such is the case for specific and detailed marking or labelling requirements relating to the extension to medical and sterile instruments of the labelling requirements for medicinal products, the limitation date on the labelling of medical instruments, the geographical origin of olive oils, the requirement to apply specific distinctive symbols to products subject to a tax applied to them as the result of ecological nuisance, the conformity of electrical and gas appliances in furnished lodgings to specific technical standards laid down by Belgian law and the requirement to be marked "CEBEC".

Nonetheless, a distinction must be drawn between enabling provisions which, since they do not produce any legal effect are not, in principle, subject to a notification requirement, and implementing measures which are adopted on the basis of those enabling provisions and which must be notified.

A provision which requires the producer or importer of packaging to "identify" it, without however requiring a mark or label to be affixed to it, is not setting required characteristics for the product within the meaning of Article 1(1) of the Directive and therefore cannot be classified as a technical specification. However, the national court may conclude, in the light of all the elements of fact and of law, that the information requirement must be interpreted as imposing marking or labelling on the producer. In that case, it will constitute a technical specification, even if the precise details of that marking or labelling remain imprecise.

19.3. Are environmental agreements subject to notification ?

Voluntary agreements of which the public authority is a contracting party and which seek compliance with technical specifications or other requirements are tantamount to "de facto technical regulations" (Article 1(9)) which must be notified to the Commission.

19.4. Which provisions need not be notified ?

The Court of Justice has held that the following provisions do not constitute technical regulations and therefore need not be notified :

– A provision setting the conditions for establishing security companies, since these do not define product characteristics;

– A standard establishing limit values for concentrations of inhalable asbestos fibres in the workplace, since it "*does not define a characteristic required of a product"* and does not "*in principle fall within the definition of a technical specification and con-*

sequently cannot be regarded as a technical regulation which has to be notified to the Commission";

– A prohibition on advertising products which are not approved;

– The obligation to provide information on a product in a specific language to the extent that it concerns a supplementary rule necessary for the effective transmission of information to the consumer;

– An application for approval for an undertaking which collects and recycles packaging waste, which includes specifications referring to technical requirements which used packaging must satisfy.

Moreover, Directive 98/34/CE does not apply to measures which Member States consider necessary "*under the Treaty for the protection of persons, in particular workers, when products are used, provided that such measures do not affect the products"* (Article 1, last indent). Thus, a rule which reserves the use of certain appliances which are considered dangerous to certain qualified workers does not fall within the scope of the Directive.

Nor is notification required in case of urgency (Article 9(7)) and in the case of transposition of a binding Community act (Article 10(1), first indent).

As regards the urgency procedure, the Court of Justice has implicitly held that the existence of grounds which allow the urgency procedure to be relied on does not excuse Member States from the obligation to notify their technical rules.

In addition, the Directive provides that notification of a draft does not take place: "where it merely *transposes the full text* of an international or European standard, in which case information regarding the relevant standard shall suffice" (Article 8(1)). International standards are understood to be those drawn up by the ISO and European standards those adopted by CEN and CENELEC.

To that must be added that the Directive also provides that Articles 8 (notification requirement) and 9 (*standstill* obligations) "*shall not apply to those laws, regulations and administrative provisions of the Member States … by means of which Member States: comply with binding Community acts which result in the adoption of technical specifications"* (Article 10, first indent).

This is not redundant in relation to the exclusion mentioned in Article 8(1). The wording of Article 10(1) undoubtedly gives rise to certain difficulties in interpretation. The term "*comply with*" must be interpreted as "*take over*", "*translate literally"*, "*copy"*, "*conform to"*, "*follow"*, "*model itself on"*. Therefore, a technical standard which does not simply reproduce in its entirety a provision of Community law cannot benefit from the exemption system. The Court has held that in order for transposition to be taking place, it is necessary to establish a direct link between the binding Community measure and the national measure.

Other exclusions relate to the implementation of judgements given by the Court of Justice of the European Communities (Article 10(1), fifth indent), which is self-evident

inasmuch as the Community Court finds against Member States who have not transposed Community standards.

When Member States "*make use of safeguard clauses provided for in binding Community acts*", Articles 8 and 9 do not apply (Article 10(1), third indent). We have already referred to the conditions that must be satisfied for the implementation of safeguard clauses, which involve a Community review procedure (see 6.2.1).

20.

WHAT IS THE NOTIFICATION PROCEDURE AND ITS EFFECT ON THE ADOPTION OF A STANDARD?

Upon receipt of notification of the draft technical regulation, the European Commission immediately brings it to the attention of the other Member States.

20.1. The status quo

The Member State which has notified the draft should postpone its adoption of a draft technical regulation for three months from the date of receipt by the Commission of its communication (Article 9(1)).

If the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods, the Member State must postpone for six months the adoption of the draft technical regulation (Article 9(2)).

That period begins from the date of receipt by the Commission of the communication.

20.2. Derogations

Nevertheless, notification of "*technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products by encouraging compliance with such technical specifications or other requirements"* enjoy a derogation.

These measures may enter into force from the time they are communicated to the European Commission, without the Member State having to postpone their adoption during the period laid down for their examination by the Commission and the other Member States (Article 10(4)).

For such measures, control takes place *a posteriori* and thereby offers less assurance than the *a priori* control in general law. Nevertheless, in *Bic Benelux*, the Court interpreted that derogation very strictly: it found that the notion of need linked to a fiscal measure is limited to measures which *exclusively* constitute accompanying fiscal measures. That is not the case for the marking of a product subject to an ecological tax in order to inform the public of the product's effects on the environment.

Finally, the detailed observations and opinions which could be issued by the Commission and other Member States as regards technical specifications or other requirements linked to fiscal or financial measures, may "*concern only the aspect which may hinder trade and not the fiscal or financial aspect of the measure*" (sixth subparagraph, Article 8(1)).

21.

Effect of detailed observations and opinions on the adoption of the draft technical regulation

If a detailed opinion is addressed to a Member State, it is required to report to the Commission on the action it proposes to take on that opinion. Directive 98/34/EC provides that "*The Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation*" (Article 8(2)).

In other words, the Member State retains the possibility of adopting its technical regulation even if it has been the subject of a detailed opinion. In that regard, the procedure laid down by Directive 98/34/EC differs from the authorisation procedure provided for in Article 95(6) EC.

If the draft technical regulation which has been the subject of objections on the part of the Commission or another Member State is adopted without those objections being taken into account, the Commission retains the right to send a letter of formal notice to the Member State under Article 226 EC.

Finally, Member States are required to communicate "*the definitive text of a technical regulation"* to the Commission without delay (Article 8(3)).

22.

Coordination with other notification procedures

Article 8(5) of the Directive provides that "*When draft technical regulations form part of measures which are required to be communicated to the Commission at the draft stage under another Community act, Member States may make a communication within the meaning of paragraph 1 under that other act, provided that they formally indicate that the said communication also constitutes a communication for the purposes of this Directive*".

23.

What is the penalty for failure to comply with the notification procedure?

Infringement of the notification requirement, like the adoption of a national technical regulation during a suspension period, constitutes a substantive procedural defect

which can lead to technical regulations that have not been notified to the Commission being inapplicable to individuals. It therefore constitutes a serious source of legal uncertainty.

In principle, all State bodies should refrain from applying technical regulations which have not been communicated to the European Commission in draft form, as well as any technical regulation adopted without respect for the periods prescribed by the Directive.

The case-law makes clear that failure to respect the notification procedure renders the national measure inapplicable, so that it can no longer be enforced against individuals. The rights of individuals can be provisionally protected by national courts, while waiting for the European Court of Justice to give its judgement following a reference for a preliminary ruling on whether the national measure must be notified. Finally, an individual who has had to comply with a technical regulation adopted in non-compliance with the Directive is entitled to obtain compensation for damage suffered to the extent that the conditions set out in the case-law are met.

In addition, failure to comply with Community procedures can have effects on contractual relationships between individuals (see the general report).

The unenforceability of national technical regulations is, however, limited to cases where the objective of Directive 98/34/EC has been compromised. If the failure to notify technical regulations to the Commission constitutes a procedural defect whose effect is to make those regulations unenforceable against individuals, that non-application only applies "*to the extent that regulations do impede the use and marketing of a product which is not in conformity with those regulations"*. A technical regulation used in the course of criminal proceedings which has not been notified to the Commission is not covered by that case-law.

CHAPTER III

WTO RULES : GUIDE TO THE NOTIFICATION REQUIREMENTS

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WHAT ARE THE NOTIFICATION PROCEDURES UNDER WTO RULES WHICH ARE IMPOSED ON STATES WHEN WISHING TO ESTABLISH NATIONAL MEASURES IN ORDER TO DEAL WITH AN ENVIRONMENTAL PROBLEM WHOSE ORIGIN LIES IN THE PLACING ON THE MARKET OF CERTAIN PRODUCTS OR TYPES OF PRODUCT?

♦ **Does the proposed measure relate to technical specifications?** ➲ **1**

NO
↳ no notification under the TBT Agreement ➲ **2**

YES
↳ in principle, notification in accordance with the TBT Agreement (or the SPS Agreement, in the case of technical regulations relating to sanitary or phytosanitary measures), but *exceptions* are provided for. ➲ **3**

♦ **If there is no notification requirement, are other requirements laid down in WTO law ?** ➲ **2**

– GATT 1994: NT and MFN principles ➲ **2.a**

– exception: Art. XX GATT ➲ **2.b**

♦ **In which cases are mandatory technical regulations not subject to a notification requirement ?** ➲ **3**

– Technical regulation based on an international standard ➲ **3.1** and without a significant effect on trade

– No notification required for fiscal and economic measures imposed on or granted to a product

– In all other cases, notification is required

(preliminary substantive check-list) ➲ **4**

♦ **What check-list must be consulted a priori in order to ascertain that the proposed technical specification (regulation or standard) complies with the WTO Agreement ?**
➲ **4**

a) Technical regulation : ➲ **4.1**

– What is the *justification* for the implementation measure to be adopted ?

– Could it *influence* the trade interests of other WTO Members?

– Assessment of proportionality: are less trade-restrictive measures possible ?

– Assessment of the *risks* related to failure to achieve the objective sought.

– Are the *principles of NT and MFN* being applied to the importation of products covered by the technical regulations ?

– Are there sufficiently effective and suitable relevant *international standards* on which the implementation measure could be based ?

if not, mandatory notification
➲ **5 to 7**

b) Optional standard : ➲ **4.2**

– (not provided for in the Code of Good Pratice)

– are unnecessary obstacles to trade being created ?

– (not provided for in the Code of Good Pratice)

– Does the standardising body apply the *principles of NT and MFN* to the importation of products ?

– Are there sufficiently effective and suitable relevant *international standards* on which the standard could be based ?
➲ **9**

Comment : ➲ **4.3**

The SPS Agreement imposes on WTO Members several obligations comparable to those laid down by the TBT Agreement, namely:

– What *justification* (legitimate objective) is relied on when introducing sanitary and phytosanitary measures?

– *Assessment of proportionality*: Is the establishment of sanitary and phytosanitary measures *necessary* to protect human, animal or plant life or health ?

– Is there a *disguised restriction on international trade* ?

– Are measures being retained without sufficient scientific proof?

– Is there any arbitrary or unjustifiable discrimination; are the *principles of national treatment and most favoured nation* being applied?

– Are measures based on *international standards, guidelines or recommendations, where these exist,* unless there is a provision to the contrary under the Agreement, and in particular the provisions of paragraph 3 (this allows a higher level of protection if there is a scientific justification and provided that they are not inconsistent with the provisions of the SPS Agreement) ?

♦ **At what stage of the preparatory legislative procedure must the notification requirement be satisfied ?** ➲ **5**

– Project sufficiently advanced

– Legislation has not yet been adopted

♦ **Who is responsible for notification ?** ➲ **6**

– Central government authorities, for notification and implementation at national level ➲ **6.a**

– WTO Secretariat for transmission of notifications to other Members, with particular attention to developing countries

♦ **What should the notification contain and what is the procedure for introducing national measures containing technical regulations which implement the TBT Agreement? (cf. SPS Agreement)** ➲ **7**

– The notification must be clear and complete

– Notification of the intention to introduce a measure relating to a product must be made sufficiently early

– Notification of the products affected by the measure, with reference to the objective and the purpose of the measure

– Allow sufficient time for any written comments which might be made by other WTO Members

– No obligation to notify in urgent circumstances (however, see ➲ **8**), but other WTO Members may present written observations *a posteriori*

– Technical regulations or sanitary or phytosanitary measures must be published immediately after adoption in order to inform other Members of their existence

– Allow a reasonable period of time between publication and entry into force so that other Members may make any necessary adaptations

➲ **8**

♦ **What is the procedure for introducing optional standards under the TBT Agreement?** ➲ **9**

– The standardising body is to publish a programme of work

– The existence of the work programme is announced in a national or regional publication concerning standards activities

– For every standard, mention of the classification, the stage of development and any international standards used as a basis

– Allow a period of at least 60 days for any observations; that period may be shortened under urgent circumstances

– Publication:
  a) of the time-limit;
  b) of the (possible) fact that the proposed measure differs from the relevant international standards

– The standard must be published immediately following adoption

♦ **To what extent is the WTO urgency procedure affected by the European directive on notification ? ➲ 8**

– Approval by the European Commission of the urgency procedure for European notification ;

– European "*standstill"* clause.

Under the TBT Agreement (Agreement on Technical Barriers to Trade) [1] and the SPS Agreement (Agreement on the Application of Sanitary and Phytosanitary Measures) [2], States who are Members of the WTO are subject to a notification obligation [3].

Any draft legislation which sets technical requirements for products relating to their intrinsic characteristics or the manner in which they are produced must be notified to the WTO Secretariat. This is in order to allow other WTO Members to make comments in the case where the proposed legislation might create obstacles to trade.

Technical regulations or quality standards which apply to products include, for example, certification and approval procedures; requirements relating to processing and production methods (PPM); labelling, packaging and quality requirements; service conditions; testing procedures; product specifications; conditions relating to size, trade name, terminology and symbols; conditions of use, re-use and disposal or recycling; requirements prohibiting the marketing, use or consumption of a specific product; requirements relating to the mention of fiscal or financial measures likely to influence the marketing, use or consumption of a product; requirements relating to quantitative and qualitative information.

Failure to notify does not result in non-applicability of such rules and requirements but may give rise to a WTO dispute settlement procedure for failure to comply with international trade rules.

The notification requirements laid down by the TBT Agreement concern:

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1 This is one of the agreements finalised in Marrakech in 1994, at the time the World Trade Organisation (WTO) was created under the Uruguay Round, which was the eighth round of multilateral trade negotiations since the creation of the GATT (General Agreement on Tariffs and Trade) in 1947. The WTO Agreement was incorporated into Belgian law by the Law of 23 December 1994 approving the following international measures: *a)* Agreement establishing the World Trade Organisation, Final Act, Annexes 1A, 1B, 1C, 2, 3 and 4, Ministerial Decisions and Declarations, and the Understanding on Commitments in Financial Services, and *b)* Agreement on Government Procurement and Annexes I, II, III and IV, signed in Marrakech on 15 April 1994, *Moniteur belge* 23 January 1997, 1172 and Supplement, *Moniteur belge* of 23 January 1997, 111-132 (Agreement on Technical Barriers to Trade).

2 Like the WTO Agreement, the SPS Agreement is one of the agreements negotiated and implemented as part of the creation of the World Trade Organisation. See the Supplement to the *Moniteur belg*e of 23 January 1997, 59-73 (Agreement on the Application of Sanitary and Phytosanitary Measures).

3 Technical measures are notified, according to the specific issue in question, in accordance with the TBT Agreement or the SPS Agreement. For a detailed analysis, see in particular reply (1) to question 1.

– Notification of the situation as regards the implementation and administration of the TBT Agreement in national legislation (Article 15.2 TBT) [4],

– Notification of planned measures which contain technical regulations and procedures for assessment of conformity pursuant to Articles 2.9.2 [5], 2.10.1 [6], 3.2 [7], 5.6.2 [8], 5.7.1 [9], 7.2 [10], 8.1 [11] and 9.2 [12] TBT (Article 10.6 TBT [13]),

– Notification of bilateral or multilateral agreements reached with other States Members of the WTO on questions relating to technical regulations, standards or procedures for assessment of conformity (Article 10.7 TBT [14]),

– notification of acceptance of or withdrawal from the Code of good practice for the preparation, adoption and application of standards to the ISO/IEC Information Centre in Geneva (Annex 3.C of the TBT Agreement), and

– Notification of the national enquiry point (Article 10.1 TBT [15]).

In addition, WTO Members are required to designate a single central government authority to be responsible for implementation at national level of the provisions concerning notification procedures under the TBT Agreement (Article 10.10 TBT).

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4 Notification of existing measures or those taken by States Members in order to ensure the implementation and administration of the TBT Agreement, as well as any subsequent amendment of the measures taken to comply with the TBT Agreement.

5 Notification of technical regulations drawn up by central Government bodies.

6 Notification of technical regulations adopted by the central Government bodies of a State Member confronting urgent problems.

7 Notification of technical regulations drafted or adopted for urgent reasons by local government bodies and non-governmental bodies.

8 Notification of proposed procedures for assessment of conformity by central government bodies.

9 Notification of procedures for assessment of conformity adopted for urgent reasons by central government bodies.

10 Notification of procedures for assessment of conformity drafted or adopted for urgent reasons by local government bodies.

11 Notification of procedures for assessment of conformity drafted or adopted by non-governmental bodies.

12 Notification of procedures for assessment of conformity adopted by international and regional systems in which relevant bodies within their territories are members.

13 The notification obligations resulting from Article 10.6 TBT are carried out in accordance with a standard form drafted by the TBT Committee. That model is among the decisions and recommendations adopted by the TBT Committee since 1995 (see, in particular, World Trade Organization, Committee on Technical Barriers to Trade, *Decisions and Recommendations adopted by the Committee since 1 January 1995,* Note by the Secretariat, G/TBT/1/Rev.8, 23 May 2002, 14)

14 The notification of bilateral or multilateral agreements reached between a WTO Member and one or several other countries on questions relating to technical regulations, standards or procedures for assessment of conformity takes place in accordance with a standard form; cf. supra, note 13 (*Ibidem,* 24)

15 The TBT Agreement also lays down the obligation for each WTO Member to establish an enquiry point and to communicate it to the WTO Secretariat.

1.

DOES THE PROPOSED MEASURE INVOLVE TECHNICAL SPECIFICATIONS?

If the proposed measure does *not* involve a technical specification, the TBT Agreement does not require notification.

If, however, the proposed measure *does* concern a technical specification (particularly product requirements and product-related requirements), it must be notified to the WTO Secretariat under the TBT Agreement.

If technical measures are intended specifically to protect human, animal or plant life or health, they must be notified to the WTO Secretariat under the SPS Agreement [16].

2.

IF THERE IS NO NOTIFICATION REQUIREMENT, ARE OTHER REQUIREMENTS LAID DOWN?

Aside from specific TBT Agreement provisions relating to products, international trade in goods is also (and primarily) subject to the general provisions of the GATT, which regulates international trade between States Members of the WTO.

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16 Article 1.5 of the TBT Agreement does not apply to sanitary and phytosanitary measures as defined in the SPS Agreement. Therefore, if a technical measure relates to a matter which comes under the SPS Agreement, application of the TBT Agreement is in principle excluded and the conformity of the measure will be considered in respect of the SPS Agreement.

Nevertheless, all measures which fall within the SPS Agreement also remain within the scope of application of the GATT, since the SPS rules are in principle stricter that the general rules of the GATT. However, it is not possible definitively to determine whether the bodies dealing with WTO disputes which must rule on a contested measure on the basis of its incompatibility with the GATT and with the SPS Agreement will apply only GATT provisions, only SPS principles, or both of these Agreements. Where a measure pursues a twofold objective which falls within the scope of both the SPS Agreement and GATT rules (for example, food safety and biodiversity), the WTO's reaction must be awaited. The WTO dispute settlement bodies will eventually have to determine the exact relationship between the GATT, the WTO Agreement and the SPS Agreement, as specific cases are referred to them. In most of those cases, there will be a problem of "redundance" between the TBT or SPS Agreement and the GATT, rather than conflicts between provisions. Since the TBT Agreement and the SPS Agreement both involve specific Agreements whose scope goes further than the general definition laid down by the GATT (Article xx *b)*, it will in principle be necessary to first examine the conformity of the proposed measure with the TBT or SPS Agreement (see, for example, the Asbestos case, and in particular the general report), since Article xx *b)* can be applied as a supplementary provision. Concretely : the SPS Agreement concerns sanitary and phytosanitary legislation and measures intended to ensure protection against exposure to harmful animals and plants, parasites (e.g., harmful insects), micro-organisms, additives, contaminants, toxins and pathogens in food products and animal feed. Thus, a measure to protect against the presence of insecticides in fruit falls within the scope of the SPS Agreement, but a protection measure against bio-engineering of fruit may not be covered by the SPS Agreement, because the genetic modification of organisms will not necessarily be considered as a sanitary or phytosanitary risk. For that reasons, the application of the SPS Agreement to GMOs, for example, is a complex question.

(See, inter alia, Sampson, Gary P., *Effective Multilateral Environment Agreements and Why the WTO Needs Them, World Economy,* 2001, Vol. 24, No. 9, 211; Matsushita, Mitsuo, Schoenbaum, Thomas J., and Mavroidis, Petros C., *The World Trade Organization. Law, Practice and Policy,* Oxford, Oxford University Press, 2002, 488 and 489.)

It is necessary to ascertain that the proposed measure is not contrary to the basic principles of the GATT Agreement, particularly as regards application of the principles of NT and MFN. If this is in fact the case, it is necessary to determine whether it might be possible to invoke the general exceptions laid down in Article XX of the GATT [17].

a) National Treatment

– NT = National Treatment, the principle under which imported products must be provided treatment no less favourable than that accorded to similar products ("*like products*") of national origin.

– MFN = Most Favoured Nation Treatment, which means that any advantage granted by a WTO Member to a product from another Member is accorded in the same way to all other States Members. In other words, when WTO Members grant an advantage to one other Member, they must grant that same advantage to all other Members.

b) Article XX of the GATT

Article XX of the GATT allows Members to apply certain trade restrictions if these satisfy one of the objectives set out in that article [paragraphs *a)* to *j)*] and subject to the general "requirement" that national measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The objectives which are relevant to environmental protection are set out in paragraphs *b)* and *g)* :

– Art. XX *b)*: "*necessary to protect human, animal or plant life or health*"

– Art. XX *g)*: "*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"*.

WTO Members may make use of these exceptions in order to develop their own environment policy and may accordingly apply specific environmental protection measures which discriminate against imports of products from other Members provided that those measures do not amount to unjustified or arbitrary discrimination and are not a disguised form of protectionism.

3.

When are mandatory technical regulations not subject to a notification requirement?

Regulations are not subject to a notification requirement:

– When the proposed technical regulations are based on international standards (see the explanation in 3.1 below) and have no significant effect on commercial exchanges

17 For a detailed discussion of this provision, see the general report of the research project, published on the website www.belspo.be.

with other WTO Members (Art. 2.4 and 2.5 WTO, in conjunction with Art. 2.9 WTO *a contrario*) (see also SPS Agreement, Annex B.5 *a contrario*) ;

– In the case of fiscal and economic measures applied to a product (e.g., "green" VAT, ecotax) [18], the TBT Agreement does not in principle require notification, but there is a risk of non-compliance with the national treatment (NT) principle laid down in GATT 1994 and, therefore, restriction of international trade.

In all other cases, the technical regulation will be subject to the notification requirement.

Before proceeding to notification, it is necessary to ascertain whether the regulation in question meets a certain number of substantive conditions laid down in the WTO Agreement.

3.1. The notion of international standards

The TBT Agreement draws a distinction between "mandatory" technical regulations and "voluntary" standards.

a) Voluntary standards

Voluntary standards fall within the scope of the "Code of Good Practice for the Preparation, Adoption and Application of Standards" (Annex 3 TBT). Under Article 4 of the TBT Agreement, Members of the WTO must :

– *Ensure* that their central government standardising bodies accept and comply with the Code of Good Practice ;

– *Take all such reasonable measures as may be available to them* to ensure that local government and non-governmental standardising bodies within their territories accept and comply with the Code of Good Practice;

– *Take all such reasonable measures as may be available to them* to ensure that non-governmental standardising bodies within their territories, as well as regional standardising bodies of which they or one or more bodies within their territories are members, accept and comply with the Code of Good Practice.

b) Mandatory technical regulations

In drawing up a (mandatory) technical regulation, WTO Members are required, in accordance with Article 2.4 of the TBT Agreement, to use *existing international standards* or international standards whose completion is imminent, or the relevant parts of such standards, as a basis for the national measure which they wish to adopt, except where those international standards or their relevant parts would be ineffective or inappropriate to achieve the legitimate objectives being pursued (e.g., protection of the environment).

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18 Fiscal measures are part of the category of economic instrument which may be used to achieve a specific policy. The use of economic instruments may infringe the general provisions of the GATT.

Annex 1 of the TBT Agreement defines a "standard" as follows : "*Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*"

That definition of the notion of standards is based on the terms provided in the sixth edition of the ISO/IEC Guide 2: 1991, *General Terms and Their Definitions Concerning Standardisation and Related Activities*, and it has the same meaning as that which is given to it in the definitions in that Guide (see the introductory paragraph to Annex 1).

The explanatory note to that definition stresses that for the purposes of the TBT Agreement, standards are understood as voluntary and technical regulations as mandatory documents. It is also specified that standards prepared by the international standardisation community are based on consensus, but that the TBT Agreement also covers documents that are not based on consensus.

However, it is not specified what is meant by the terms "international standardisation community" or "documents that are not based on consensus". As a result, it is not entirely clear whether those documents also include those which contain standards agreed at international level but not in the framework of the "international standardisation community", or (supra)national standards, or all those categories. In other words, it is not clear how the notion of international standards is to be understood.

4.

WHAT CHECK-LIST MUST BE FOLLOWED A PRIORI IN ORDER TO ENSURE THAT THE PROPOSED TECHNICAL SPECIFICATION (REGULATION OR STANDARD) COMPLIES WITH THE TBT AGREEMENT?

4.1. Technical regulation

In order for a *technical regulation* to comply with the conditions laid down in the TBT Agreement, it must satisfy a series of substantive conditions. [19] (Art. 2.1, 2.2, 2.4, 2.5 and 2.9 TBT):

– Above all, it must be possible to *justify* the drafting and implementation of the technical regulation (= legitimate objective). That objective may, for example, be the protection of human health or safety, animal or plant life or health, or the environment.

– It must also be possible to ascertain whether the proposed measure could have an *effect* on the trade interests of other WTO Members and whether it would create unnecessary obstacles to international trade.

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19 For further details, *supra* note 17.

– The proposed technical regulation must also be subject to a *proportionality test*, in order to determine whether the intended objective cannot be achieved by other measures which are less trade-restrictive than the measure proposed.
– The intended measure must subsequently undergo a *risk assessment*. That assessment determines the risks inherent in failure to achieve the intended objective. In assessing such risks, elements to be taken into account are, inter alia, available scientific and technical information, related processing technology or intended end-uses of products.
– Finally, in cases where a technical regulation is required, it must be determined whether a relevant *international standard* exists on which the technical regulation could be based, and whether that standard is sufficiently effective and appropriate to achieve the legitimate objectives pursued. If that is not the case, the WTO Member concerned must notify the proposed technical regulation, since it could seriously affect the trade of other WTO Members.

4.2. Voluntary standards

As regards the introduction of *voluntary standards*, the Code of Good Practice provides substantive conditions which are relatively comparable to those in force for the application of technical measures (see Annex 3 TBT).

Voluntary standards which are drawn up may not create unnecessary obstacles to international trade (Annex 3.E of the TBT Agreement, see Article 2.2 TBT), must comply with the general principles of the GATT (NT and MFN) (Annex 3.D of the TBT Agreement, see Article 2.1 TBT) and must be based on international standards except where these would be ineffective or inappropriate (Annex 3.F of the TBT Agreement, see Article 2.4 TBT).

4.3. SPS Agreement

The *SPS Agreement* imposes a number of obligations on WTO Members which are similar to those laid down in the TBT Agreement, including, among others :

– Art. 2.1: Members have the right to take sanitary and phytosanitary measures *necessary for the protection of human, animal or plant life or health*, provided that such measures are not inconsistent with the provisions of [the SPS] Agreement.
– Art. 2.2: Members are to ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary* to protect human, animal or plant life or health, is based on *scientific principles* and is not maintained without sufficient *scientific evidence*, except as provided for in paragraph 7 of Article 5 (= application of the precautionary principle).
– Art. 2.3: Members are to ensure that their sanitary and phytosanitary measures do not *arbitrarily or unjustifiably discriminate* between Members where identical or simi-

lar conditions prevail (=*MFN*), including between their own territory and that of other Members (=*NT*). Sanitary and phytosanitary measures are *not* to be applied in a manner which would constitute a *disguised restriction on international trade*.

– Art. 3.1: In order to harmonise sanitary and phytosanitary measures on as wide a basis as possible, Members are to *base* their sanitary or phytosanitary measures *on international standards, guidelines or recommendations, where they exist*, except as otherwise provided for in [the SPS] Agreement, and in particular in paragraph 3 (= higher level of protection where there is a scientific justification, on the condition that it is not inconsistent with other provisions of the SPS Agreement).

5.

At what stage of the legislative process must the notification requirement be satisfied ?

In order for other WTO Members to be able to submit their comments on a proposed measure which contains a technical regulation, the draft legislation should be at a stage where it can still be amended and, at the same time, should be sufficiently advanced so that it is possible to present relevant observations.

6.

Who is responsible for notification ?

In order to ensure that transparency obligations are fulfilled as efficiently as possible, the TBT Agreement requires WTO Members to designate, as stated above, a single central government authority that will be responsible for implementation at national level of the provisions concerning notification procedures (Art. 10.10 TBT).

If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the WTO Member concerned must provide to the other Members complete and unambiguous information on the scope of responsibility of each of those authorities (Art. 10.11 TBT)

The WTO Secretariat is to circulate copies of the notifications which it receives to all Members and interested international standardising and conformity assessment bodies. It is to draw the attention of developing country Members to any notifications relating to products of particular interest to them (Art. 10.6 TBT)

> The Belgian central government authority which is responsible for notification to the WTO of measures containing technical regulations is the *Bureau belge de*

Normalisation (successor to the *Institut belge de Normalisation* [IBN/BIN]), which is required under the Law of 3 April 2003 [20] to uphold Belgian interests within European and international standardising bodies.

7.

WHAT INFORMATION MUST APPEAR IN THE NOTIFICATION AND HOW DOES THE PROCEDURE UNFOLD?

Notification must be as complete and as clear as possible and must specify whether the regulation in question is being notified under the TBT or the SPS Agreement. In accordance with both WTO Agreements (Art. 2.9 TBT and Annex B.5 SPS), Members must make known "at an early appropriate stage" and "at an early stage", respectively, their intention to adopt a particular technical regulation, so as to enable interested parties in other Members to become acquainted with it.

They are to notify other WTO Members, through the Secretariat, of the products to be covered by the proposed technical regulation or SPS measure, together with a brief indication of the objective and rationale of the proposed regulation or measure. The other Members must be allowed a reasonable time period in which to communicate their comments. The period recommended by the TBT Committee is 60 days, but in practice this is generally reduced to 45 days, on average [21].

Where there are urgent problems (Art. 2.10 TBT : safety, health, protection of the environment or national security; Annex B.6 SPS : protection of health), no notifica-

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20 Law of 3 April 2003 on standardisation, *Moniteur belge*, 27 May 2003.

Art. 5 : Under the standardisation policy established by the minister, the tasks of the Bureau shall be :

1. Carrying out a general iventory of both the need for new standards and technical documents as well as tenders to produce them, and assessment of the financial resources required ;
2. Coordination of standardisation work and harmonisation of the rules on which that normalisation must be based;
3. Centralisation, examination, consultation and/or approval of proposed standards;
4. Dissemination of standards and technical documents;
5. Promotion of standardisation and the coordination of measures intended to facilitate its implementation;
6. Management of the resources allocated and devoted to the development of scientific and technical expertise in areas where standardisation is needed;
7. Drawing up standards, and monitoring, developing and finalising technical documents as new products which do not have the status of standards but meet market needs;
8. Representing Belgian interests in European and international standardising bodies;
9. Setting up and disbanding standardisation committees;
10. Recognising or withdrawing recognition for sectoral standardisation operators, in accordance with the detailed rules established by the King, by Order of the Council of Ministers;
11. Carrying out tasks related to standardisation and certification which have been entrusted to it by the King, by Order of the Council of Ministers.

21 For further figures, see the general report, *supra* note 17.

tion is required, but other WTO Members must immediately be notified, through the Secretariat, of the technical regulation in question and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems. The other Members may present their comments, even if they do so *a posteriori*.

Technical regulations or sanitary or phytosanitary measures which have been adopted must be published immediately, in such a manner as to enable other Members to become acquainted with them. Except in urgent circumstances, there must be a reasonable interval between the publication of a measure and its entry into force, in order to allow time for other WTO Members to make the necessary adaptations.

8.

To what extent is the TBT urgency procedure affected by the European Directive on notification ?

As Member States of the European Union are also subject to a European notification requirement, the WTO urgency procedure can in practice be used only if the European Commission has approved the European urgency notification procedure. Under the WTO procedure, the new legislation enters into force when the time allowed for comments has elapsed, but as a result of the European notification Directive, a rule cannot actually come into force until the "standstill" period laid down in European law has expired.

9.

What is the procedure for introducing voluntary standards ?

At least once every six months, the standardising body is to publish a work programme containing the standards it is currently preparing and those which it has adopted in the preceding period. A notice of the existence of the work programme is to be published in a national or, as the case may be, regional publication of standardisation activities (Annex 3.J §1 TBT).

The work programme is to indicate, for each standard, the classification relevant to the subject matter, the stage attained in the standard's development and the references of any international standards taken as a basis (Annex 3.J §2 TBT).

The standardising body must allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. The standardising body is to publish a notice announcing the period for commenting and that notification is to include, as far as practicable, whether the draft standard deviates from relevant international standards (Annex 3.L TBT). Once the standard has been adopted, it must be promptly published (Annex 3.O TBT).

GLOSSARY

GATT 1994	General Agreement on Tariffs and Trade 1994	NT	National Treatment
GATT 1947	General Agreement on Tariffs and Trade of 30 October 1947	PPMs	Production and Processing Methods
GMOs	Genetically Modified Organisms	SPS	(Agreement on the Application of) Sanitary and Phytosanitary Measures
IPP	Integrated Product Policy	TBT	(Agreement on) Technical Barriers to Trade
ISO	International Organisation for Standardisation	WTO	World Trade Organisation
MFN	Most Favoured Nation		

CONCLUSIONS

In order to determine the leeway accorded to national authorities to carry out an independent product policy, it is necessary to analyse the provisions of both domestic and European law and the rules laid down at the WTO level.

1.

BELGIAN LAW

As regards domestic law, three main considerations govern any action envisaged at the national level:

1. First of all, the question of the competence of the federal Government must be examined in the light of the rules relating to the division of powers: these confer very wide powers on the Regions as regards the environment, with the notable exception of setting product standards ;
2. Where federal competence is established, it is necessary to identify which legal bases could justify immediate action by the Government. If no relevant legal basis exists, adoption of a new law by Parliament will be considered. However, Belgium is well endowed with enabling powers under the framework Law of 21 December 1998 on product standards ;
3. When drawing up rules, it is of course necessary to comply with the provisions of the Constitution (principle of equality, principle of legality in fiscal matters) and with the principle of the hierarchy of laws under domestic law.

2.

EUROPEAN LAW

The analysis of European (Community) law which should be carried out in parallel to the examination of domestic law must centre around the following concerns:

1. First of all, it is necessary to consider whether the issue is subject to harmonisation at European level and, if so, to seek the legal basis for the relevant legislation. If the legal basis is Article 95 EC, there will be very little leeway for national action. If the legal basis is Article 175 EC, it implies that the national authorities may adopt more stringent measures of protection, which must, however, comply with the EC Treaty.

2. Next, it is necessary to ascertain the extent of the harmonisation effected by that legislation and which cases would not be covered by those Community measures and where the national power to act would therefore still take precedence.
3. If the issue has not been harmonised or has not been fully harmonised at Community level, there is leeway to adopt national measures, provided that they comply with the rules laid down by the EC Treaty.

   Some of the rules laid down by the Treaty are not open to discussion (for example, it is not possible to create customs duties), while other rules are more ambiguous and difficult to interpret, in particular when they seek to resolve conflicts between environmental concerns and the free movement of goods.

   The following paths may prove promising, however, for the purpose of justifying specific action by Member States: *a)* when measures are based on Article 30 of the EC Treaty and promote the protection of health and of biodiversity (provided they do not constitute arbitrary discrimination); *b)* when technical or quantitative restrictions on the movement of goods created at the national level result from a genuine concern to protect the environment and are necessary in order to achieve the desired result; *c)* when national provisions of a fiscal nature result from a genuine concern to protect the environment and are designed in such a way that they do not discriminate between national and foreign producers.
4. Finally, particular attention should be given to procedural requirements under European law, in particular as regards the notification of proposed provisions to the Commission prior to their adoption. Those requirements may have a decisive effect on the conditions for adopting the measure at national level, inter alia because in certain cases they require suspension of the domestic legislative or regulatory process for periods ranging from three to six months, at least.

A challenge by the European Commission or by other Member States to the legitimacy of proposed national rules will in the last resort, if the national authority remains convinced of the need for those rules and decides not to withdraw them, be brought before the Court of Justice of the European Communities, so that it may rule on the lawfulness of the national measure in the light of Community law, inter alia by balancing the interests which will be affected. If the Court takes the view that the national measure is incompatible with European law, the Member State will have to consider it inoperative and not implement it.

In addition, compliance with notification procedures is particularly important because national courts are empowered to declare inapplicable any national provisions which have not been adopted in compliance with certain of those notification procedures.

Let no one harbour any illusions: national provisions which favour the environment and relate to products constitute a handicap for products intended for distribution

throughout Europe, in that they impose specific conditions which are not required in order to have access to markets in other States. Nevertheless, the case-law of the Court of Justice of the European Communities considers that protection of the environment is of such importance that it may justify such disadvantages for private economic interests, provided that the environmental concern is genuine and does not disguise protectionist intentions. A measure which genuinely aims to protect the environment therefore enjoys a real degree of legitimacy.

3.

Rules laid down by the World Trade Organisation (WTO)

While European law seeks to guarantee the free movement of goods in European territory, the rules governing extra-Community trade – that is, transactions between the countries of Europe and the rest of the world – are primarily set within the framework of the WTO.

International trade in goods is subject to the general provisions of the GATT, which requires compliance with the following principles:

1. the principle of "national treatment", under which imported products must be accorded treatment no less favourable than similar ('like') products of national origin ;
2. the principle of "most favoured nation treatment", under which any advantage granted by a WTO Member to any product from another Member must similarly be accorded to like products from all other Members. In other words, when WTO Members grant an advantage to one other Member, they must grant it to all other Members.

Nonetheless, Article XX of the GATT allows Members to establish certain restrictions to international trade, provided they correspond to one of the objectives in the exhaustive list set out in that Article (paragraphs (a) to (j), which include protection of health and natural resources) and subject to the requirement that such national measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Moreover, in accordance with the two Agreements adopted under the WTO – the TBT Agreement (Agreement on Technical Barriers to Trade) and the SPS Agreement (Agreement on Sanitary and Phytosanitary Measures) – States must notify the WTO Secretariat of proposed measures concerning technical regulations on products. That notification makes it possible to ascertain to what extent the proposed national provisions comply with the requirements set out in those two Agreements.

In contrast to European law, failure to notify does not result in inapplicability of the rules and requirements set, but it may give rise to an action being brought by a WTO Member under the WTO dispute settlement mechanism for failure to comply with international trade rules. If it is found that these rules have been infringed, the State

must repeal the contested measures or lay itself open to retaliatory trade measures taken by the State or States affected by those measures.

The rules laid down at the European level and at the international level thus converge around the following points:

– Both systems centre on a pressing concern to avoid trade restrictions which might be based on arbitrary considerations. Europe, however, merely avoids discrimination within its own internal market, leaving a space in which restrictions may be imposed on products coming from outside Europe ;
– Both systems leave the door open to the adoption of national measures based on environmental concerns. Nevertheless, the conditions laid down by each of these systems are highly nuanced and differ in how they treat individual cases. Among those differences are the importance accorded the requirement of non-discrimination (which is not relevant, for example, as regards Article 30 of the EC Treaty) and the concept of "like products" (which is much less specific in European law than in WTO law).

ANNEXES

I.

BELGIAN LAW

Law of 21 December 1998 on product standards, with the aim of promoting sustainable production and consumption patterns and of protecting the environment and public health (extracts) (unofficial translation)

Chapter I :

INTRODUCTORY PROVISIONS

Article 1. This Law shall govern a subject referred to in Article 78 of the Constitution.

Art. 2. For the purposes of this Law, the following definitions shall apply :

1. Products: movable tangible property, including substances and preparations, biocides and packaging, but excluding waste;
2. Product categories: products intended for the same use and which can be used in an equivalent manner;
3. Placing on the market : the introduction, importation or possession, for the purpose of sale or making available to a third party, the offer for sale, sale, offer for rent, rent, or assignment for consideration or free of charge;
4. Substances : chemical elements and their compounds in the natural state or obtained by any production process, including any additive necessary to preserve the stability of the products and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition;
5. New substance : any substance not set out in EINECS (European Inventory of Existing Commercial Chemical Substances), mentioned in Article 2(1)(h) of Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances;
6. Preparations : mixtures or solutions composed of two or more substances;
7. Dangerous substances, dangerous preparations or dangerous biocidal products: substances, preparations or biocidal products which are explosive, oxidising, extremely flammable, highly flammable, flammable, extremely toxic, toxic, harmful, corrosive, irritant, sensitising, carcinogenic, mutagenic, toxic for reproduction or dangerous for the environment;
8. Biocidal products : active substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to destroy, deter, render harmless, prevent the action of, or otherwise exert a controlling effect on any harmful organism by chemical or biological means; the King may more precisely define the notion of biocidal products in accordance with the related directives and regulations of the European Community.
9. Packaging : all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer; "non-returnable` items used for the same purposes shall also be considered to constitute packaging. Packaging consists only of:

   a) Sales packaging or primary packaging, i. e. packaging conceived so as to constitute a sales unit to the final user or consumer at the point of purchase;

b) Grouped packaging or secondary packaging, i. e. packaging conceived so as to constitute at the point of purchase a grouping of a certain number of sales units whether the latter is sold as such to the final user or consumer or whether it serves only as a means to replenish the shelves at the point of sale; it can be removed from the product without affecting its characteristics;

c) Transport packaging or tertiary packaging, i. e. packaging conceived so as to facilitate handling and transport of a number of sales units or grouped packagings in order to prevent physical handling and transport damage. Transport packaging does not include road, rail, ship and air containers;

10. Reusable packaging : any packaging which has been conceived and designed to accomplish within its life cycle a minimum number of trips or rotations, is refilled or used for the same purpose for which it was conceived, with or without the support of auxiliary products present on the market enabling the packaging to be refilled; such reused packaging will become packaging waste when no longer subject to reuse;
11. Recovery : any of the following operations :
    a) Solvent regeneration;
    b) Recycling/reclamation of organic substances which are not used as solvents (including for composting and other biological transformation processes);
    c) Recycling or reclamation of metals and metal compounds;
    d) Recycling or reclamation of other inorganic materials;
    e) Regeneration of acids or bases
    f) Reclamation of components used for pollution abatement;
    g) Reclamation of components from catalysts;
    h) Oil refining or other re-uses of oil ;
    i) Use principally as a fuel or other means to generate energy;
    j) Spreading on land resulting in agricultural or ecological improvement;
    k) Use of wastes obtained from any of the operations listed above;
    l) Exchange of wastes for submission to any of the operations listed above;
    m) Storage of waste prior to any of the operations listed above, excluding temporary storage, pending collection, on the site where it is produced.
12. Recycling : the reprocessing in a production process of waste materials for their original purpose or for other purposes including organic recycling but excluding energy recovery;
13. Energy recovery : the use of combustible packaging waste as a means to generate energy through direct incineration with or without other waste but with recovery of the heat;
14. Organic recycling : the aerobic (composting) or anaerobic (biomethanisation) treatment, under controlled conditions and using micro-organisms, of the biodegradable parts of packaging waste, which produces stabilised organic residues or methane. Landfill shall not be considered a form of organic recycling;
15. Disposal : any of the following operations:
    a) Tipping above or underground (e.g. landfill, etc.)
    b) Land treatment (e.g. biodegradation of liquid or sludge discards in soils, etc.)
    c) Deep injection (e.g. injection of pumpable discards into wells, salt domes or naturally occurring repositories, etc.)
    d) Surface impoundment (e.g. placement of liquid or sludge discards into pits, ponds or lagoons, etc.)
    e) Specially engineered landfill (e.g. placement into lined discrete cells which are capped and isolated from one another and the environment, etc.)
    f) Release into a water body, except seas/oceans
    g) Release into seas/oceans, including sea-bed insertion
    h) Incineration at sea
    i) Incineration on land
    j) Permanent storage (e.g. emplacement of containers in a mine, etc.)
    k) Biological treatment not specified elsewhere above which results in final compounds or mixtures which are disposed of by means of any of the operations listed above
    l) Physico-chemical treatment not specified above which results in final compounds or mixtures which are disposed of by means of any of the operations listd above (e.g. evaporation, drying, calcination, etc.)
    m) Blending or mixture prior to submission to any of the operations listed above
    n) Repackaging prior to submission to any of the operations listed above
    o) Storage pending any of the operations listed above, excluding temporary storage,

pending collection, on the site where it is produced.

16. Reusable product: any product conceived and designed to be entirely or mainly reused for the same purpose for which it was conceived ;
17. Environment : air, land, water, ecosystems, climate, flora, fauna and other organisms apart from humans ;
18. Pollution : the presence, as a result of human activity, of solids, liquids, gases, micro-organisms, heat, non-ionising radiation, noise or other vibrations, in air, land or water, which are or may be harmful, directly or indirectly, to humans or the environment;
19. The Minister : as the case may be, the Minister who has responsibility for public health or the environment;
20. Plant protection products : active substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to:
    a) Protect plants or plant products against all harmful organisms or prevent the action of such organisms, in so far as such substances or preparations are not otherwise defined below;
    b) Influence the life processes of plants, other than as a nutrient (e.g. growth regulators);
    c) Preserve plant products, in so far as such substances or products are not subject to special provisions on preservatives;
    d) Destroy undesired plants;
    e) Destroy parts of plants, check or prevent undesired growth of plants;
    f) Improve the functioning of plant protection products.

The King may describe more precisely the notion of plant protection products in accordance with the Directives and Regulations of the institutions of the European Community.

Art. 3. § 1. Without prejudice to the application of other legal provisions, the present Law shall seek to encourage and promote sustainable methods of production and consumption by means of product standards, and in particular :

1. To protect the environment from the harmful effects or risks of harmful effects of certain products placed on the market or exported to countries which are not members of the European Community ;
2. To protect public health from the harmful effects or risks of harmful effects of certain products placed on the market or exported to countries which are not members of the European Community ;
3. To ensure the implementation of European Community directives and regulations relating to product standards and seeking to protect public health or the environment. The present law shall not apply to the protection of workers or consumer safety.

§ 2. The present law shall apply to all products, in respect of the aspects referred to in § 1.

Notwithstanding the preceding paragraph, the present law shall not apply to products which come under the following laws and their implementing decisions when these contain conflicting provisions, or if, through implementation of the law, their objectives may be put at risk :

1. The Law of 28 May 1956 on substances and mixtures which are explosive or likely to deflagrate and vehicles which contain them ;
2. The Law of 20 June 1956 on the improvement of species of domestic animals useful in agriculture ;
3. The Law of 25 March 1964 on medicinal products ;
4. The Law of 24 January 1977 on the protection of consumer health in respect of foodstuffs and other products ;
5. The Law of 15 April 1994 on protection of the population and the environment against the dangers resulting from ionising radiation and on the Federal Agency for Nuclear Control :
6. The Law of 9 February on the safety of products and services.

Chapter II :

GENERAL PRODUCT PROVISIONS

Art. 4. All products which are placed on the market must be conceived in such a way that their manufacture, intended use and disposal do not adversely affect public health and do not contribute, or contribute as little as possible, to an increase in the amount and degree of the harmfulness of waste and to other forms of pollution.

Art. 5. § 1. In order to protect the environment or public health and to promote sustainable methods of production and consumption, the King may take measures to :

1. Regulate, suspend or prohibit the placing on the market of a product ;
2. Subject the placing on the market of a product to prior authorisation, registration or notifica-

tion, and to set the conditions in which authorisations or registrations may be granted, suspended or withdrawn ;

3. Regulate the characteristics, composition, packaging and presentation of a product with a view to placing it on the market and determine the manner in which compliance with those rules must be established or demonstrated ;
4. Encourage the placing on the market of reusable products ;
5. Set criteria for the analysis, testing or study of a product or a category of products and their life-cycle, in order to determine their sustainability and the dangers or potential risks their marketing may pose to public health or the environment and to require analyses, testing or studies according to those rules ;
6. Determine what information relating to a product or a category of products, with the exception of advertising within the meaning of Article 22 of the Law of 14 July 1991 on trade practices and on information to and protection of consumers, must or can be given prior to or at the time of placing on the market, and to whom and according to what rules it must or may be disclosed;
7. Subject the activities of persons who participate in placing on the market of products or categories of products to conditions and to prior notification to or authorisation by the Minister and to lay down the procedures for carrying out the notification and the conditions in which authorisation may be granted, suspended and withdrawn ;
8. Prohibit the exportation of products to countries which are not members of the European Community or to subject them, beforehand or not, to notification, authorisation or conditions ;
9. Place products into categories, with a view to regulating their placing on the market according to their effects on public health or the environment ;
10. Establish specific rules for labelling of a product or a category of products.
    Where those rules apply to a product or a category of products for which labelling requirements have been laid down under Article 14 of the Law of 14 July 1991 on trade practices and on information to and protection of consumers, they shall be decided on the basis of a joint proposal by the Minister and the Minister with responsibility for consumer interests ;
11. Impose an obligatory declaration of the amounts of products placed on the market or exported and of their composition ;
12. Subject the placing on the market of a product or a category of products to other specific conditions ;
13. Take any other necessary measure for the implementation of the provisions of conventions and/or international acts binding Belgium and relating to the placing on the market of products.

    The Decrees adopted in implementation of provisions under 2, 4, 7, 11 and 12 shall be decided by the Council of Ministers.

§ 2. For the purpose of protecting public health, the King may also:

1. Subject to certain conditions, suspend or prohibit the use of a product ;
2. Subject the use of a product to prior authorisation, registration or notification and to set the conditions in which authorisations or registrations may be granted, suspended or withdrawn ;
3. Subject to certain conditions, suspend or prohibit the production of a product ;
4. have certain products withdrawn from the market ;
5. Subject the activities of persons who participate in the use of products or of categories of products to conditions and to prior notification or authorisation by the Minister and to set out the procedures according to which the notification must be carried out and the conditions in which the authorisation may be granted, suspended or withdrawn ;
6. Subject the use of a product or a category of products to other specific conditions.

    The Decrees adopted in implementation of provisions under 2, 3, 4, 5 and 6 shall be decided by the Council of Ministers.

§ 3. Except in cases where Article 5 of the Law of 9 February 1994 on consumer safety applies, the Minister with responsibility for public health may, by reasoned decision and without requesting the opinions provided for in the present law or its implementing decisions, adopt provisional measures prohibiting the use, placing on the market or maintaining on the market of one or several products which constitute a serious and urgent danger to public health.

§ 4. The Minister with responsibility for the environment may, by reasoned decision and without

requesting the opinions provided for in the present law or its implementing decisions, take provisional measures prohibiting the placing on the market or maintaining on the market of one or several products which constitute a serious and urgent danger to the environment.

§ 5. Provisional measures adopted under paragraphs 3 and 4 shall cease to have effect at the latest at the end of the sixth month following the month in which they enter into force. Those measures may be prolonged for a period of time which does not exceed that same period.

Art. 6. § 1. In order to protect public health or the environment and to promote sustainable methods of production and consumption, and in particular in order to implement Article 4 of the present Law, the State may enter into sectoral agreements concerning the placing on the market of a product or a category of products with undertakings which participate in the placing on the market of a similar product or a similar category of products or with associations which bring together such undertakings. The associations referred to in the preceding paragraph must demonstrate that they :

1. Have legal personality ;
2. Are representative of the undertakings which belong to that sector and participate in the placing on the market of a similar product or a similar category of products ;
3. And have the legal competence required to enter into such an agreement or are mandated by at least three quarters of their members to enter into a sectoral agreement with the State which will bind them in accordance with § 4.1 of the present article.

§ 2. In so far as an undertaking or an association fulfils the conditions set out in § 1 of the present article, and with the agreement of the State, it may become party to an existing sectoral agreement.

§ 3. A sectoral agreement may not replace existing law or regulations or derogate therefrom by laying down less stringent provisions.

During the period in which a sectoral agreement is valid, the King shall not adopt any rules under the present Law which lay down, for the issues governed by the sectoral agreement concerning the products in question, stricter requirements than those provided for in that agreement, except in the case of urgent necessity or if necessary to meet international obligations.

§ 4. Sectoral agreements must comply with certain minimum conditions:

1. A sectoral agreement shall legally bind the parties once it has been signed by all the parties concerned.

   Depending on its provisions, the sectoral agreement shall also bind all association members or a group of members described in a general manner.

   The sectoral agreement shall bind, as of right, the undertakings which join the association following the signature of the agreement and which, where relevant, belong to the group of members described in a general manner in a sectoral agreement.

   The members of the association bound by the sectoral agreement may not evade the obligations following therefrom by withdrawing from the association.

1 *a)* A sectoral agreement must establish the manner in which the review that seeks to ensure compliance with its provisions is to be carried out.

1 *b)* In the case of infringement of the provisions of a sectoral agreement, any person bound by that agreement may call for the non-compliant party to carry these out in kind or by equivalent means.

2. A sectoral agreement is concluded for a prescribed period which may not, in any case, exceed 10 years. Any longer period shall automatically be reduced to 10 years. A sectoral agreement may not be renewed by tacit consent. The State and one or more affiliated associations may extend the sectoral agreement without amendment.
3. A sectoral agreement may be put to an end :

   a) When its period of validity expires ;

   b) As the result of termination by one of the parties; unless otherwise provided for in the agreement, the time-limit for termination is six months;

   c) By an agreement between the parties.

§ 5. The provisions of the present article are a matter of public interest. They shall apply to sectoral agreements which are concluded after the entry into force of the present Law. Sectoral agreements concluded prior to the entry into force of the present Law may not be amended or renewed unless the amendment or the renewal complies with the provisions of the present Law and its implementing decisions. They shall remain valid for a maxi-

mum of five years after the entry into force of the present Law.

§ 6. Any sectoral agreement concluded in implementation of the present Law, as well as any amendment, renewal or termination of or adherence to a sectoral agreement must be published in the *Moniteur belge*. That is also the case where a sectoral agreement is terminated prematurely by means of an agreement between the parties.

§ 6 *a).* When sectoral agreements are concluded, the relevant representative associations whose members belong to the special committees referred to in Article 7 of the Law of 20 September 1948 on the organisation of the economy shall in all cases take part in the negotiations.

§ 7. A summary of the draft sectoral agreement, as well as of any amendment, renewal, termination or premature cessation, shall be published, at the initiative of the Minister, in the *Moniteur belge* and in other media designated to that effect by the King. The full draft text may be consulted, for a period of 30 days, at the location set out in the published text. It shall also be transmitted to the consultative bodies referred to in the first paragraph of Article 19 § 1, to the Chamber of Deputies and to the regional Governments.

Objections and comments may be submitted in writing, within 30 days of publication of the summary in the *Moniteur belge*, to the competent federal services which are designated for that purpose in the publication. Within that same period, the regional Governments and the bodies referred to in the preceding paragraph may produce an opinion, which they shall address to the Minister. The Minister shall examine opinions, objections and comments and shall forward them, for information purposes, to the associations and undertakings concerned and to the Chamber of Deputies.

§ 8. During the first two months of the ordinary session of the Chamber of Deputies, the Minister shall draw up a report concerning the implementation of sectoral agreements.

Chapter III :

PROVISIONS SPECIFIC TO SUBSTANCES AND PREPARATIONS

Art. 7. § 1. Anyone wishing to place on the market a new substance, as such or incorporated in a preparation, shall be required to notify it to the federal authority, except in cases determined by the King as not requiring notification under Directive 67/548/EEC of 27 June 1967 on the approximation of law, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances.

§ 2. The King shall establish, by decision of the Council of Ministers :

1. The authority to which the notification referred to in § 1 must be addressed ;
2. The conditions which that notification must satisfy and the procedure for its examination and assessment ;
3. In which cases and in what conditions that notification is to be subject to the opinion of a body of scientific and technical experts, whose composition and procedures shall be determined by the King ;
4. The prescribed period between the notification and the placing on the market of the substance ;
5. In what conditions and for which aspects of the notification the notifier may invoke confidentiality. Confidentiality shall in any event be precluded in respect of information concerning risks to worker health and safety, public health and the environment and relating to the precautions to be taken during use of or contact with the products, substances or preparations ;
6. The conditions in which the information referred to in point 5 may be communicated to the competent authorities of other Member States of the European Union and to the European Commission.

§ 3. The King may, in addition :

1. Adopt measures requiring shared use of testing results ;
2. Establish the cases and conditions in which the Minister with responsibility for public health, environment or labour may request an opinion from the body referred to in § 2.3 concerning new substances which have been notified by another Member State of the European Union.

Chapter IV :

PROVISIONS SPECIFIC TO PLANT PROTECTION AND BIOCIDAL PRODUCTS

Art. 8. The King may subject the placing on the market of plant protection and biocidal products to prior approval, authorisation or registration, granted by the Minister following upon the opinion of a body of scientific and technical experts, whose composition and procedures shall be determined

by the King, by decision of the Council of Ministers.

The King may establish the conditions governing the application for approval, authorisation or registration and its examination by that body. He may also lay down the conditions for granting, amending, suspending and withdrawing the approval, authorisation or registration.

Art. 8 ***a).*** § 1. The King shall establish, by decision of the Council of Ministers, a reduction programme, to be updated every two years, with a view to reducing the use and the placing on the market of dangerous active substances to which humans and the environment could be exposed, and which encompasses plant protection and biocidal products.

It is envisaged gradually to reduce the active substances and plant protection and biocidal products based on these, referred to in the preceding paragraph, on the basis of a detailed inventory of their effects on humans and the environment. In order to assess the results of the reduction programme, the latter shall also include, for the active substances covered, an indicator which takes into account of effects on the environment and/or health and which includes both qualitative and quantitative aspects. The programme may not in any event undermine requirements imposed by international regulations. A draft programme shall be submitted to the body referred to in Article 8 for an opinion.

The first programme must be completed by 31 December 2004 at the latest.

§ 2. […]

Art. 9. Without prejudice to the provisions of Chapter II, the King may, in the interests of public health :

1. Establish conditions for the production, processing, composition, packaging, presentation, quantity, origin, quality, efficacy, acquisition, possession, conservation and use of plant protection and biocidal products ;
2. Set maximum amounts for residues of the active substances in plant protection and biocidal products and any products resulting from their degradation ;
3. Make the activities of person who carry out the operations covered in point 1 subject to prior authorisation or approval by the Minister and define the conditions relating thereto and the conditions in which authorisations or approvals which have been issued may be suspended or withdrawn ;
4. Determine the marks, seals, labels, certificates, attestations, notices, symbols, packaging, trade names or other information establishing or demonstrating that the conditions mentioned in point 1 have been satisfied.

The decisions taken to implement the provisions in point 4 shall be proposed jointly by the Minister and the Ministers with responsibility for economy and for small and medium enterprises, the liberal professions and the self-employed.

Chapter V :

PROVISIONS SPECIFIC TO PACKAGING

Art. 10. The placing on the market of products in packaging which is neither reusable nor recoverable, including recyclable within the meaning of Article 2 (12), shall be prohibited. The King shall establish, by decision of the Council of Ministers, the date of the entry into force of that prohibition and may grant derogations to that prohibition when the placing on the market of such packaging is necessary in order to satisfy legal standards as regards the hygiene, safety or conservation of the packaged product.

Art. 11. § 1. Anyone placing packaged products on the market shall ensure that the packaging of those products satisfies the following essential requirements :

1. The packaging must be manufactured in such a way as to limit its volume and weight to the minimum necessary to ensure the required level of safety, hygiene and acceptability for both the packaged product and for the consumer ;
2. The packaging must be conceived, manufactured and placed on the market in such a way as to allow reuse or recovery, including recycling, and to reduce to a minimum its effect on the environment during the collection, recovery or disposal of packaging waste or residues from those management operations ;
3. The packaging must be manufactured in such a way as to reduce to a minimum the content of harmful substances and materials and other dangerous substances in packaging material and its elements, as regards their presence in the emissions, ash or lixiviate which results from the incineration or landfilling of packaging waste or in residues from packaging waste management operations.

§ 2. Without prejudice to the provisions of § 1, any person who places packaged products on the market in non-reusable packaging shall be required to ensure that, for the same packaging material, the relation between the weight of the packaging and the weight of the product placed on the market in that packaging does not increase as against the same relation which existed at the time the present Law enters into force.

The King may grant derogations to this requirement when the additional weight of the packaging :

1. Is necessary in order to meet legal standards of hygiene, safety or conservation ;
2. Is compensated by a simultaneous equivalent reduction in weight in other elements of the system of packaging, sales packaging, grouped packaging and transport packaging, of which the packaging in question is a part ;
3. Is caused by the reconversion of one-way packaging material into reusable packaging ;
4. Is caused by the use of recycled materials in the packaging ;
5. Facilitates recycling.

Art. 12. Anyone placing on the market products packaged in reusable packaging must ensure that that packaging satisfies the following essential requirements :

1. The physical properties and characteristics of the packaging must allow it to be used for several trips or rotations in normal conditions of use :
2. It must be possible to treat used packaging in accordance with the relevant requirements as regards worker health and safety ;
3. The requirements specific to packaging which is recoverable at the time the packaging ceases to be used, thereby becoming a waste, must be complied with.

Art. 13. Anyone placing on the market products packaged in non-reusable packaging must ensure that that packaging satisfies the following essential requirements :

1. When packaging is intended to be recovered by the recycling of materials, it must be manufactured so as to permit a certain percentage by weight of the materials used to be recycled for the production of marketable goods, in compliance with the standards in force in the European Community. That percentage may vary as a function of the materials which constitute the packaging.
2. When packaging is intended to be recovered by means of energy recovery, it must have a lower minimal thermal value which allows the optimal reclamation of energy ;
3. When packaging is intended to be recovered by means of composting, it must be sufficiently biodegradable so as not to hinder separated collection or the composting process or activity in which it is used and so that the majority of the compost obtained finally decomposes into carbon dioxide, bio-mass and water.

Art. 14. The King may set the minimum thermal value referred to in Article 12(2) and specify the other essential requirements referred to in Articles 11, 12 and 13, by laying down technical standards specific to certain categories of packaging or packaging materials.

Chapter VI :

INSPECTION AND PENALTIES

[*omitted*]

Chapter VII :

FINAL, AMENDING, RESCINDING AND TRANSITIONAL PROVISIONS

[*omitted*]

II.

EUROPEAN LAW

Extracts from the Treaty establishing the European Community

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 29

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 90

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.
Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.
4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.
6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions

involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

Article 175

1. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 95, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

   a) provisions primarily of a fiscal nature;
   b) measures affecting:
      - town and country planning;
      - quantitative management of water resources or affecting, directly or indirectly, the availability of those resources;
      - land use, with the exception of waste management;
   c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

   The Council may, under the conditions laid down in the first subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

3. In other areas, general action programmes setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.

   The Council, acting under the terms of paragraph 1 or paragraph 2 according to the case, shall adopt the measures necessary for the implementation of these programmes.

4. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:

   – temporary derogations, and/or
   – financial support from the Cohesion Fund set up pursuant to Article 161.

Article 176

The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.

III.

RELEVANT PROVISIONS OF THE GATT AND THE TBT AGREEMENT

Extracts from the General Agreement on Tariffs and Trade (GATT)

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III

National treatment on Internal Taxation and Regulation

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

a) necessary to protect public morals;
b) necessary to protect human, animal or plant life or health;
c) relating to the importations or exportations of gold or silver;
d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
e) relating to the products of prison labour;
f) imposed for the protection of national treasures of artistic, historic or archaeological value;
g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
i) involving restrictions on exports of domestic materials necessary to ensure essential quanti-

ties of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

Extracts from the Agreement on Technical Barriers to Trade (TBT)

2.1. Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

2.4. Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5. A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.9.2. [Members shall] notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account.

2.10.1. [Members shall] notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems.

3.2. Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical

content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

5.6. Whenever a relevant guide or recommendation issued by an international standardising body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardising bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.2. notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account

5.7. Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1. notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems.

7.2. Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

8.1. Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

9.2. Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

10.1. Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1. any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardising bodies of which such bodies are members or participants;

10.1.2. any standards adopted or proposed within its territory by central or local government bodies, or by regional standardising bodies of which such bodies are members or participants;

10.1.3. any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4. the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardising bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5. the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6. the location of the enquiry points mentioned in paragraph 3.

10.7. Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.10. Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

15.2. Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

Annex 1 :

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

Preamble

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, *General Terms and Their Definitions Concerning Standardisation and Related Activities,* shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

Annex 1.1 – Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note
The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

Annex 1.2 – Standard

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note
The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardisation community are based on consensus. This Agreement covers also documents that are not based on consensus.

Annex 3.C.

Standardising bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardisation activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

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