JUDGMENT OF THE COURT (First Chamber)

18 November 2010 *

In Case C-142/09,

REFERENCE for a preliminary ruling under Article 234 EC from the rechtbank van eerste aanleg te Dendermonde (Belgium), made by decision of 18 March 2009, received at the Court on 22 April 2009, in the criminal proceedings against

Vincent Willy Lahousse,

Lavichy BVBA,

THE COURT (First Chamber),

composed of A. Tizzano (President of the Chamber), A. Borg Barthet, M. Ilešič, E. Levits (Rapporteur) and M. Berger, Judges,

* Language of the case: Dutch.

Advocate General: N. Jääskinen,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Lahousse and Lavichy BVBA, by E. De Ridder, Advocaat,

— the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent,

— the Commission of the European Communities, by H. van Vliet and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2010

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002 relating to the type-approval of two or three-wheel motor vehicles and repealing Council Directive 92/61/EEC (OJ 1992 L 124, p. 1).

2 The reference was made in the course of criminal proceedings against Mr Lahousse and Lavichy BVBA ('the defendants') who are charged with selling and fitting equipment and advising clients with a view to tuning mopeds.

Legal context

European Union law

3 Directive 2002/24 introduces the procedure for type-approval of two- or three-wheel motor vehicles at European Union level. It thus repeals Council Directive 92/61/EEC of 30 June 1992 relating to the type-approval of two or three-wheel motor vehicles (OJ 1992 L 225, p. 72) while maintaining the majority of the provisions.

4 Article 1 of Directive 2002/24 defines its scope as follows:

‘1. This Directive applies to all two or three-wheel motor vehicles, whether twin-wheeled or otherwise, intended to travel on the road, and to the components or separate technical units of such vehicles.’

This Directive does not apply to the following vehicles:

…

(d) vehicles intended for use in competition, on roads or in off-road conditions;

…

nor to the components or technical units thereof unless they are intended to be fitted to vehicles covered by this Directive.

…

2. The vehicles referred to in paragraph 1 shall be subdivided into:

(a) mopeds, i.e. two-wheel vehicles … or three-wheel vehicles … with a maximum design speed of not more than 45 km/h and characterised by:

(i) in the case of the two-wheel type, an engine whose:

— cylinder capacity does not exceed 50 cm^3 in the case of the internal combustion type, or

— maximum continuous rated power is no more than 4 kW in the case of an electric motor;

(ii) in the case of the three-wheel type, an engine whose:

— cylinder capacity does not exceed 50 cm^3 if of the spark (positive) ignition type, or

— maximum net power output does not exceed 4 kW in the case of other internal combustion engines, or;

— maximum continuous rated power is no more than 4 kW in the case of an electric motor;

…'

5 Under Article 2(7) of Directive 2002/24 'approval' means the procedure whereby a Member State certifies that a type of vehicle, system, separate technical unit or component satisfies the technical requirements set out in that directive or separate directives and the checks on the correctness of the manufacturer's data, as provided for in the exhaustive list set out in Annex I to that directive. With regard to the specific technical properties of the components or separate technical units, Annex I refers to those directives and, in particular, to Directive 97/24/EC of the European Parliament and of the Council of 17 June 1997 on certain components and characteristics of two or three-wheel motor vehicles (OJ 1997 L 226. p. 1).

6 Article 3 of Directive 2002/24 is worded as follows:

'Applications for type-approval shall be submitted by the manufacturer to the approval authority of a Member State. They shall be accompanied by an information document, a model of which, for vehicle type-approval purposes, is set out in Annex II and, for type-approval purposes of systems, separate technical units or components, is contained in an annex or appendix to the relevant system, separate technical unit or component directive, and also by the other documents referred to in the information document. Applications for a given type of vehicle, system, separate technical unit or component may be submitted to one Member State only.'

7 Article 4(1) of Directive 2002/24 states:

'Each Member State shall grant type-approval to all types of vehicle, systems, separate technical units or components if these meet the following conditions:

…

(b) the system, separate technical unit or component meets the technical requirements of the relevant separate directive and is as described by the manufacturer in accordance with the data provided for in the exhaustive list set out in Annex I.'

8 Article 15 of that directive provides:

'1. Member States shall not prohibit the placing on the market, sale, entry into service or use of new vehicles complying with this Directive. Only vehicles complying with this Directive may be presented for initial registration.

2. Member States shall not prohibit the placing on the market, sale or use of new separate technical units or new components complying with this Directive. Only separate technical units and components complying with this Directive may be placed on the market and sold for the first time for use in the Member States.

...

4. This Directive shall not affect the right of the Member States to lay down — in accordance with the Treaty — the requirements which they consider necessary to ensure the protection of users during the use of the vehicles in question, provided that this does not entail modification to the vehicles.'

9 It is stated in recital 3 in the preamble to Directive 97/24/EC that:

'Whereas the drawing-up of harmonised requirements concerning those components and characteristics of two and three-wheel motor vehicles is necessary in order to enable the type-approval and component type-approval procedures covered by Council Directive 92/61 … to be implemented in respect of each type of the aforesaid vehicles'.

10 Chapter 7 of the Annex to Directive 97/24, entitled 'Anti-tampering measures for two-wheel mopeds and motorcycles', includes the following definitions in section 1:

'1. Definitions

For the purposes of this Chapter:

1.1. "Anti-tampering measures for two-wheel mopeds and motorcycles" means a series of technical requirements and specifications the aim of which is to prevent, as far as possible, unauthorised modifications which may prejudice safety, in particular by increasing vehicle performance, and damage the environment;

…

1.3.1. Category A vehicles — mopeds,

…

1.4 "Unauthorised modification" means a modification which is not permitted by this Chapter.

…'

11 Chapter 7, section 2, of the Annex to Directive 97/24 includes, inter alia, general provisions regarding the interchangeability of non-identical parts between component-type-approved vehicles. It is apparent from Chapter 7, section 2.1.1. that the installation of parts must not increase the maximum design speed of a category A vehicle by more than 5 km/h and in no case may this maximum speed be exceeded.

12 Chapter 7, section 3, of the Annex to Directive 97/24 regarding specific requirements for vehicles in categories A and B provides that:

'The requirements in this section are not mandatory unless a single requirement or combination of requirements proves necessary to impede tampering resulting in the vehicle's maximum design speed increasing by more than 5 km/h in the case of category A vehicles … In no case may the maximum design speed or maximum net engine power of the relevant category be exceeded.

…'

National law

13 Article 1(5) of the Law of 21 June 1985 on the technical requirements with which any vehicle that is used for transport by land must comply, as well as its components and safety equipment (*Belgisch Staatsblad* of 13 August 1985, p. 11647) provides:

'The manufacture, import, possession with a view to sale, offer for sale, sale, and distribution free of charge of equipment designed to increase the engine power and/or speed of mopeds is prohibited, as is the offer of assistance with or provision of advice on the installation of such equipment.'

The main proceedings and the question referred for preliminary ruling

14 Mr Lahousse and Mr Lavichy are the managers of Lavichy BVBA, a shop that sells, hires out, maintains and repairs bicycles and mopeds. In this regard, equipment that allowed the engine power and/or speed of mopeds to be increased was sold and installed there.

15 Following an investigation, a coordinated search and seizure of evidence, the defendants were found guilty by the Politierechtbank (Local Criminal Court), Sint-Niklaas, of having contravened Article 1(5) of the Law on technical requirements, in that they had sold equipment designed to increase the engine power and/or speed of mopeds, and offered assistance in that regard.

16 The defendants appealed against that judgment to the referring court.

17 The referring court takes the view that there is a potential contradiction between Article 1(5) of the Law of 21 June 1985 and Directive 2002/24, to the extent that this national provision does not recognise any exception to its scope, unlike Directive 2002/24. In those circumstances, the Rechtbank van eerste aanleg te Dendermonde decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Directive 2002/24, in particular Article 1(1)[second subparagraph](d) thereof (according to which the directive does not apply to vehicles intended for use in competition, on roads or in off-road conditions), be interpreted as allowing the Member States to extend its scope so as to render it applicable to all traffic by land (that is to say, also to the use of two- or three-wheel motor vehicles off-road and/or on private land), without granting the exception in respect of vehicles intended for use in competition on roads (racing) or for vehicles in off-road conditions?'

The question referred for a preliminary ruling

Preliminary remarks

The application of Directive 2002/24

18 It is apparent from the order for reference that the acts with which the accused are charged took place between 1 January 2002 and 7 December 2005.

19 In so far as Directive 2002/24 was adopted on 18 March 2002 to repeal Directive 92/61, the latter was applicable to some of the charges against the defendants.

20 However, as is apparent from the fourth recital in its preamble, Directive 2002/24 merely clarifies certain administrative requirements and supplements the requirements contained in the Annexes to Directive 92/61.

21 Thus, as the Advocate General has observed in paragraph 28 of his Opinion, the concepts referred by the national court for interpretation, as well as the terms of the type-approval procedure laid down by EU law regarding two- or three-wheel motor vehicles, have remained the same.

The type-approval procedure set out in Directives 92/61 and 2002/24

22 As is clear from recital 3 in its preamble, Directive 92/61 aims to set out requirements in relation to technical characteristics, replacing the various national requirements, in order to facilitate trade within the European Community regarding two- or three-wheel motor vehicles.

23 As the requirements are common to all of the Member States, Directives 92/61 and 2002/24 establish a type-approval mechanism, that is, a procedure that enables each Member State to satisfy themselves that vehicles that have undergone type-approval in another Member State and are intended to be offered for sale, entered into service or used in its territory comply with these requirements.

24 In so doing, through the type-approval procedure, a Member State certifies that a type of vehicle, system, separate technical unit or a component satisfies the technical requirements set out in Directives 92/61 and 2002/24 or in separate directives and the checks on the correctness of the manufacturer's data, as provided for in the exhaustive list set out in Annex I to Directives 92/61 and 2002/24, respectively.

25 It is for the manufacturer of a vehicle that falls within the scope of Directives 92/61 and 2002/24 to submit an application for type-approval to the competent authorities of the Member State in which it intends to offer a given type of vehicle for sale. These authorities then check that this vehicle type complies with the technical requirements of the relevant directives.

26 The manufacturer is to draw up a certificate of conformity to accompany each vehicle that has undergone type-approval by the competent national authority. Authorities of other Member States that subsequently receive an application to place this vehicle on the market or enter it into service must then simply establish that it corresponds to the accompanying certificate of conformity. An identical procedure applies to components and separate technical units of vehicles covered by Directives 92/61 and 2002/24 or intended to be fitted on such vehicles, with regard to the technical requirements set out in the separate directives.

27 The EU type-approval procedure has therefore introduced a mechanism of mutual recognition of the monitoring by the approval authorities of the various Member States of compliance with the requirements set out in Directives 92/61 and 2002/24 and in the separate directives.

28 Therefore, such a procedure facilitates movement within the common market of two- or three-wheel motor vehicles and of their separate technical units and components

since (i) goods produced in compliance with an approved type are no longer subject to monitoring with regard to the technical requirements of Directives 92/61 and 2002/24 and of separate directives, and (ii) under the terms of Article 15(1) and (2) of Directives 92/61 and 2002/24, where a new vehicle, separate technical unit or a component complies with these directives or with the separate directives, the Member States may not restrict their placement on the market, sale, entry into service or use, subject to Article 15(5) of Directive 92/61 and Article 15(4) of Directive 2002/24.

Consideration of the question referred

29 The question referred by the national court seeks to ascertain, in essence, whether Directives 92/61 and 2002/24 must be construed as meaning that a Member State can extend the type-approval procedure introduced by those directives for vehicles, components and separate technical units covered by them, to vehicles that do not fall under their scope, that is, those intended for use in competition, on roads or in off-road conditions.

30 Firstly, it has to be borne in mind that it follows from Article 1(1) of Directives 92/61 and 2002/24 that they apply to all two- or three-wheel motor vehicles, whether twin-wheeled or otherwise, intended to travel on the road, that is, specifically, to mopeds and their components and separate technical units. In this regard, according to Article 1(2), a moped means, in essence, two or three-wheel vehicles fitted with a combustion engine having a cylinder capacity not exceeding 50 cm^3, or fitted with an electrical engine whose maximum continuous rated power does not exceed 4 kW.

31 It follows from the fourth indent of the second subparagraph of Article 1(1) of Directive 92/61 and from point (d) of the second subparagraph of Article 1(1) of Directive 2002/24 that these directives do not apply to vehicles intended for use in competitions, on roads or in off-road conditions or to their components or separate technical units.

32 As the Commission of the European Communities has pointed out in its written observations, for these vehicles it was deemed unnecessary or disproportionate to establish harmonised specifications at EU level.

33 It is clear that this type of vehicle caters for needs that are different from those covered by Directives 92/61 and 2002/24, in so far as they are not intended for use on the public highway. Thus, these vehicles are not subject to such stringent standards regarding road safety, and their production is necessarily more limited in number than that of mopeds intended for use on the public highway, which makes a type-approval mechanism of little relevance.

34 It follows from this that it is not so much the purpose of the vehicle that determines whether it can qualify for the EU type-approval mechanism introduced by Directives 92/61 and 2002/2, but rather its ability to comply with the technical requirements imposed by these directives.

35 Accordingly, and in the circumstances of the case in the main proceedings, two situations are likely to arise: either the equipment seized from the defendants underwent an EU type-approval procedure and therefore qualifies for the advantages arising from the mechanism established by Directives 92/61 and 2002/24 with regard to its sale, entry into service or use, or the equipment did not undergo such a type-approval

procedure so that its placement on the market, sale, entry into service or use by their very nature come within the scope of national law and not of the directives.

36 In this respect, it should be stressed at the outset that it is not indicated, either in the order for reference or in the observations submitted to the Court, whether or not the equipment seized from the defendants, and for the sale and installation of which they are being prosecuted, qualified for a type-approval procedure under Directives 92/61 and 2002/24. That order simply states that the equipment is intended to be fitted to mopeds and that it has the effect of increasing their speed and/or engine power in order to convert them into vehicles intended for sporting competitions.

37 In these circumstances, in order to give a useful reply to the national court, it should be pointed out, firstly, that of the separate directives referred to in Annex I of Directive 2002/24, Directive 97/24 adopted anti-tampering measures in its annex, specifically for two-wheel mopeds. In particular, it prohibits the fitting on a moped of components intended for more powerful vehicles, where this has the result of increasing its speed by more than 5 km/h. Furthermore, in no case may the maximum design speed or maximum net engine power be exceeded.

38 Hence, these technical requirements would necessarily preclude EU type-approval, within the meaning of Directives 92/61 and 2002/24, of components or separate technical units that have the effect of increasing the speed of a moped by more than 5 km/h or allowing the maximum design speed or maximum net engine power to be exceeded.

39 Moreover, it should be noted that, for a component or a separate technical unit to qualify for the type-approval mechanism set out in Directives 92/61 and 2002/24, it must relate to a vehicle to which those directives apply, that is, inter alia, a two-wheel vehicle characterised by an engine whose cylinder capacity does not exceed 50 cm^3 if of the internal combustion type or whose maximum continuous rated power is no more than 4 kW in the case of an electric motor, or be intended to be fitted to such a vehicle.

40 Accordingly, under current EU law, a component or separate technical unit cannot qualify for the EU type-approval mechanism if its purpose is to modify the technical characteristics of a moped in such a way that the moped can no longer be defined as such under Directives 92/61 and 2002/24 having regard, in particular, to its power.

41 Secondly, and in so far as the parts confiscated in the case in the main proceedings would not qualify for the EU type-approval mechanism set out in Directives 92/61 and 2002/24, it should be pointed out that their placement on the market, sale and use come within the scope of national law.

42 Thus, as the Advocate General has observed in paragraphs 82 and 83 of his Opinion, in principle there is nothing to prevent a Member State from applying, by analogy, the EU type-approval mechanism as set out in Directives 92/61 and 2002/24 and allowing vehicles, components or separate technical units to be placed on its domestic market where they have undergone an individual type-approval procedure in another Member State, in so far as they do not already qualify for the EU type-approval mechanism.

43 In that case, however, the Member State must exercise its legislative powers in accordance with EU law and, in particular, Articles 34 TFEU and 36 TFEU.

44 In the present case, the fact remains that a general prohibition on the sale or use of equipment designed to increase the power and/or speed of mopeds, as in the case in the main proceedings, may impede the free movement of these goods (see, by analogy, Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 58). Such an obstacle is prohibited by Article 34 TFEU unless it can be justified on one of the public interest grounds set out in Article 36 TFEU or in order to meet imperative requirements.

45 If the national provision in question in the main proceedings can be justified, in particular, by the objective of ensuring road safety, such measure must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it (Case C-110/05 *Commission* v *Italy*, paragraph 59).

46 In the present case, the general prohibition on the sale and use of equipment designed to increase the power and/or speed of mopeds travelling on the public highway necessarily has the effect of impeding their use, for example, for sporting activities off the public highway. Accordingly, it must be asked if there is a measure that is less restrictive than a general prohibition but that is as effective in ensuring road safety.

47 As the Court has no information in this regard, it falls to the national court to carry out such investigations.

48 Therefore, the answer to the question referred is that Directives 92/61 and 2002/24 are to be construed as meaning that, where a vehicle or a component or separate technical unit thereof does not qualify for the type-approval procedure established by those directives, on the ground that it does not come within their scope, the

provisions of those directives do not prevent a Member State from introducing, in its domestic law and in relation to such vehicle, component or separate technical unit, a similar mechanism for recognising the checks carried out by other Member States. In any event, such legislation must comply with EU law, in particular Articles 34 TFEU and 36 TFEU.

Costs

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

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

Council Directive 92/61/EEC of 30 June 1992 relating to the type-approval of two or three-wheel motor vehicles, and Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002 relating to the type-approval of two or three-wheel motor vehicles and repealing Directive 92/61 are to be construed as meaning that, where a vehicle or a component or separate technical unit thereof does not qualify for the type-approval procedure established by those directives, on the ground that it does not come within their scope, the provisions of those directives do not prevent a Member State from introducing, in

its domestic law and in relation to such vehicle, component or separate technical unit, a similar mechanism for recognising the checks carried out by other Member States. In any event, such legislation must comply with EU law, in particular Articles 34 TFEU and 36 TFEU.

[Signatures]