JUDGMENT OF THE COURT (Fifth Chamber)

8 September 2005 *

In Case C-303/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Voghera (District Court of Voghera) (Italy), made by decision of 1 July 2004, received at the Court on 16 July 2004, in the proceedings

Lidl Italia Srl

v

Comune di Stradella,

THE COURT (Fifth Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C. Gulmann (Rapporteur) and J. Klučka, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Lidl Italia Srl, by Professor F. Capelli, assisted by M. Valcada, avvocato,

— the Comune di Stradella, by F. Abbà,

— the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,

— the Commission of the European Communities, by D. Recchia, acting as Agent, and M.R. Mollica, avocat,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 1 and 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June

1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) (hereinafter 'Directive 98/34'), and also of Article 28 EC.

2 This reference has been made in the course of an action brought by Lidl Italia Srl (hereinafter 'Lidl') against the Comune di Stradella in which Lidl seeks the annulment of an order enjoining it to pay an administrative fine for marketing non-biodegradable cotton buds.

Law

Community legislation

3 Article 1 of Directive 98/34 provides:

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

...

3. "technical specification", a specification contained in a document which lays down the characteristics required of a product such as levels of quality,

performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

...

6. "standard", a technical specification approved by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory and which is one of the following:

...

— national standard: a standard adopted by a national standardisation body and made available to the public;

...

11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member

States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

...'

4 The first subparagraph of Article 8(1) of Directive 98/34 is worded as follows:

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

National legislation

5 Article 19 of Law No 93 of 23 March 2001 on the environment (GURI No 79 of 4 April 2001) (hereinafter 'Law No 93/2001') provides:

'1. With a view to preventing dispersion, including that taking place through sewers, of non-biodegradable products in the environment, buds intended for the cleaning of ears which are marketed on national territory must, within 18 months from the

date of the coming into force of this law, be manufactured entirely from biodegradable materials, in accordance with UNI 10785 standards.

2. The production and marketing of products referred to in paragraph 1 which do not exhibit the features mentioned shall, once the period of 18 months from the date of the coming into force of this law has expired, constitute infringements subject to administrative penalties ...'

The main proceedings and the questions referred for a preliminary ruling

6 On 7 February 2003, the local police ('Vigili urbani') of the Comune di Stradella carried out, on a precautionary basis, a seizure, in the Lidl supermarket located on the territory of that commune, of a package containing 47 boxes of cotton buds originating in France in order to determine whether they complied with the rules in Article 19 of Law No 93/2001.

7 The police, after having noted in their report of 18 February 2003, that the cotton buds seized were non-biodegradable imposed an administrative fine in the amount of EUR 3 098 on Lidl for infringement of the abovementioned rules. That fine having remained unpaid, the mayor of the Comune di Stradella notified the management of the company on 31 July 2003 of a 'mandatory order' to pay an administrative fine amounting to EUR 3 109.61.

8 Lidl challenged that order before the Tribunale di Voghera on the ground that, inasmuch as it had not been notified to the Commission prior to its promulgation, Law No 93/2001 was inapplicable on the ground that it was contrary to Community law relating to the procedure for providing information in the field of technical standards and regulations.

9 The Tribunale di Voghera accordingly decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the provisions in Article 1 of Directive 83/189/EEC (now Directive 98/34/EC) laying down a procedure for the provision of information in the field of technical standards and regulations to be interpreted as meaning that the expression "technical regulation" used in Article 1 of that directive must be understood as applying to a national legislative provision such as Article 19 of Law No 93 of 23 March 2001 which prohibits the marketing in Italy of buds for cleaning ears (more commonly known by the name of "cotton-stick") on the ground that the material from which they are manufactured is non-biodegradable?

2. If the answer to the first question is in the affirmative, should Article 19 of Law No 93 of 23 March 2001, mentioned above, have been notified beforehand to the Commission ... on the initiative of the Italian Government, in accordance with the provisions in Article 8 of Directive 83/189/EEC (now Directive 98/34/EC) in order to have its application in Italy approved, as provided for in Articles 8 and 9 of that directive?

3. If the answer to the second question is in the affirmative and if there was a failure to fulfil the obligation of notifying the Commission of Article 19 of Law No 93..., does Article 28 [EC] relating to the free movement of goods in conjunction with Directive 83/189/EEC (now Directive 98/34/EC) allow the Italian courts to discount the national provision at issue, which must be considered as unlawful in so far as it applies to products coming from another Member State of the European Union?'

The questions referred for a preliminary ruling

The first question

10 By its first question the referring court is essentially asking whether Article 1(11) of Directive 98/34 is to be interpreted as meaning that a national legislative provision such as Article 19 of Law No 93/2001 constitutes a technical regulation to the extent to which it includes a prohibition on the marketing of cotton buds which are not manufactured using biodegradable materials in accordance with a national standard.

11 Lidl, the French Government and the Commission submit that this question must be answered in the affirmative.

12 In this respect it is appropriate to state that under Article 1(11) of Directive 98/34, a national provision of a Member State prohibiting the manufacture, importation, marketing or use of a product must be regarded as a category of technical regulation (see Case C-267/03 *Lindberg* [2005] ECR I-3247, paragraph 54).

13 In the present case, it is sufficient to state that Article 19(2) of Law No 93/2001 is a provision of that kind. Under that provision, the manufacture and marketing of cotton buds which do not exhibit the features mentioned, namely those which are not manufactured entirely from biodegradable materials in accordance with UNI 10785 standards, constitute infringements attracting administrative penalties.

14 The answer to the first question must therefore be that Article 1(11) of Directive 98/34 is to be interpreted as meaning that a national legislative provision such as Article 19 of Law No 93/2001 constitutes a technical regulation to the extent to which it includes a prohibition on the marketing of cotton buds which are not manufactured from biodegradable materials in accordance with a national standard.

The second question

15 By its second question the referring court is asking whether a national provision such as Article 19 of Law No 93/2001 ought, to the extent to which it constitutes a technical regulation, to have been notified to the Commission by the Italian Republic prior to its adoption in accordance with the first subparagraph of Article 8 (1) of Directive 98/34.

16 Lidl, the French Government and the Commission submit that this question should receive an affirmative answer.

17 In this respect it must firstly be stated that the fifth recital in the preamble to Directive 98/34 explains that it is essential for the Commission to have the necessary information at its disposal before the adoption of technical provisions and that Member States which are required to facilitate the achievement of its task pursuant to Article 10 EC must notify it of their projects in the field of technical regulations.

18 Secondly, it is settled case-law that the first subparagraph of Article 8(1) of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109,

p. 8), which is essentially reproduced in the first subparagraph of Article 8(1) of Directive 98/34, imposes on Member States the duty to notify the Commission of any draft technical regulation (see, in particular, Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraphs 52 and 53, and Case C-145/97 *Commission* v *Belgium* [1998] ECR I-2643, paragraph 10).

19 Therefore, the answer to the second question must be that the first subparagraph of Article 8(1) of Directive 93/34 must be interpreted as meaning that a national provision which constitutes a technical regulation, such as Article 19 of Law No 93/2001 must be notified to the Commission prior to its adoption.

The third question

20 By its third question the referring court is essentially asking whether, if Article 19 of Law No 93/2001 constitutes a technical regulation which ought to have been notified to the Commission, the provisions of Directive 98/34 allow the national courts to refrain from applying it on the ground that that such prior notification has not been effected.

21 Lidl, the French government and the Commission submit that an affirmative answer must be given to the third question also.

22 In this connection, it is settled case-law that Directive 98/34 is designed to protect, by means of preventive monitoring, the free movement of goods, which is one of the foundations of the Community and that this control serves a useful purpose in that technical regulations falling within the scope of that directive may constitute

obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest (see, to that effect, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 40, and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 32).

23 As the obligation to notify referred to, inter alia, in the first subparagraph of Article 8(1) of Directive 98/34 is essential for achieving that Community control, the effectiveness of such control will be that much greater if that directive is interpreted as meaning that failure to observe the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals (*CIA Security International*, paragraphs 44, 48 and 54, and *Lemmens*, paragraph 33).

24 Consequently, the answer to the third question must be that the first subparagraph of Article 8(1) of Directive 98/34 is to be interpreted as meaning that the national courts may refuse to apply a national legal provision constituting a technical regulation, such as Article 19 of Law No 93/2001, if it has not been notified to the Commission prior to its adoption.

Costs

25 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 (Fifth Chamber) hereby rules:

1. **Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a national legislative provision such as Article 19 of Law No 93 of 23 March 2001 on the environment constitutes a technical regulation to the extent to which it includes a prohibition on the marketing of cotton buds which are not manufactured from biodegradable materials in accordance with a national standard.**

2. **The first subparagraph of Article 8(1) of Directive 98/34, as amended by Directive 98/48, must be interpreted as meaning that a national provision which constitutes a technical regulation, such as Article 19 of Law No 93 of 23 March 2001, must be notified to the Commission of the European Communities prior to its adoption.**

3. **The first subparagraph of Article 8(1) of Directive 98/34, as amended by Directive 98/48, must be interpreted as meaning that the national courts may refuse to apply a national legal provision constituting a technical regulation, such as Article 19 of Law No 93/2001 of 23 March 2001, if it has not been notified to the Commission of the European Communities prior to its adoption.**

[Signatures]