JUDGMENT OF THE COURT (Second Chamber)

21 April 2005 *

In Case C-267/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Högsta domstolen (Sweden), made by decision of 10 April 2003, received at the Court on 18 June 2003, in the criminal proceedings against

Lars Erik Staffan Lindberg,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, C. Gulmann, R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 7 October 2004,

* Language of the case: Swedish.

after considering the observations submitted on behalf of:

— Mr Lindberg, by C.-G. Tauson, advokat,

— the Swedish Government, by A. Kruse, acting as Agent,

— the French Government, by R. Loosli-Surrans, acting as Agent,

— the Portuguese Government, by L. Fernandes and A.P. Barros, acting as Agents, and J. da Cruz Vilaça, advogado,

— the United Kingdom Government, by K. Manji, acting as Agent, and M. Demetriou, Barrister,

— the Commission of the European Communities, by L. Ström van Lier, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 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), as amended by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 (OJ 1994 L 100, p. 30, 'Directive 83/189').

2 The reference was made in the course of criminal proceedings against Mr Lindberg, who is charged with contravening the Swedish legislation on lotteries by organising unlawful games of chance for the public using certain automatic gaming machines.

Legal background

Community legislation

3 Article 1 of Directive 83/189 provides:

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

1. "product", any industrially manufactured product and any agricultural product ...;

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

...

3. "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;

...

9. "technical regulation", technical specifications and other requirements, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product.

...

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

4 Articles 8 and 9 of Directive 83/189 require Member States to notify the Commission of the European Communities of any draft technical regulation falling within its scope, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is sufficient, and to postpone the adoption of such drafts for several months to allow the Commission to verify that they are compatible with Community law, and in particular with the principle of free movement of goods, or to propose a directive, a regulation or a decision on the question.

Swedish legislation

The Criminal Code

5 Under Chapter 16, Section 14, of the Criminal Code (brottsbalken, 'Swedish Criminal Code'), anyone who unlawfully organises games or similar activities for the public, the outcome of which entirely or essentially depends on chance, and which, given their nature, the economic value of the stakes and the other circumstances of the case, entail risk for the player or are likely to secure substantial economic gain for their organiser, is guilty of the offence of organising unlawful games of chance, punishable by a fine or imprisonment for up to two years.

The legislation on lotteries

6 Before the adoption of the Law on Lotteries (lotterilagen (1994:1000), SFS 1994, No 1000, 'the Law on Lotteries'), which came into force on 1 January 1995, the regulation on lotteries (lotteriförordningen (1979:207), SFS 1979, No 207) applicable from 1 January 1979 and the law on lotteries (lotterilagen (1982:1011), SFS 1982, No 1011), which came into force on 1 January 1984, prohibited the organisation of automatic gaming, other than on board vessels in international waters.

7 Section 3 of the Law on Lotteries provides:

'For the purposes of this Law "lottery" shall mean an activity where one or more participants may, with or without a stake, obtain winnings of a higher value than those each of the other participants may obtain, by means of:

1. drawing of lots, guessing, betting and similar procedures,

2. amusements at fairs and amusement parks,

3. bingo games, gaming machines, roulette games, dice games, card games, chain letter games or similar games.

...'

8 Section 6 of the Law on Lotteries provides:

'For the purposes of this Law "gaming machine" shall mean the following mechanical or electronic gaming machines:

1. "varuspelautomat" (goods gaming machine), a gaming machine paying winnings in the form of goods and where the possibility of winning is wholly or partly dependent on chance,

2. "penningautomat" (cash gaming machine), a gaming machine paying winnings in the form of cash and where the possibility of winning is essentially dependent on chance,

3. "värdeautomat" (token gaming machine), a gaming machine paying prizes only in the form of certificates of value, gaming tokens or similar and where the possibility of winning is essentially dependent on chance,

4. "skicklighetsautomat" (skill gaming machine), a gaming machine paying winnings in the form of cash and where the chances of winning depend wholly or partly on the player's skill.'

9 Under Section 9 of the Law on Lotteries:

'Save as otherwise provided by this Law, lotteries shall only be operated under licence.'

10 Under Section 54(1)(1) of the Law on Lotteries, a fine or a maximum of six months' imprisonment may be imposed on persons who intentionally or by gross negligence unlawfully arrange a lottery.

11 According to the order for reference, following the entry into force of the Law on Lotteries, the Swedish courts almost immediately encountered problems over the delimitation of the scope of the law.

12 In particular, the question whether games played on the category of gaming machine known as 'lyckohjulsspel' (wheel of fortune) fell within the scope of the Law on Lotteries arose. A feature of such games, which include the 'fruktspel' or fruit machine and even poker games, is that any winnings are not paid out directly by the machine but are paid manually at the request of the player.

13 On that point, several Swedish courts, including appeal courts, have held that, because of that feature, 'lyckohjulsspel' did not fall within one of the categories of gaming machine referred to in Section 6 of the Law on Lotteries and could not be classified as 'similar games' within the meaning of Section 3(3) thereof. It followed, according to that case-law, that those games did not fall within the scope of that law.

14 In the light of that case-law, the Swedish Government proposed, according to the order for reference, that the Law on Lotteries be amended to bring 'lyckohjulsspel' within the definitions of gaming machines in Sections 3(3) and 6 of that law.

15 By the law amending the Law on Lotteries (lag om ändring i lotterilagen (1996:1168), SFS 1996, No 1168, 'the 1996 law'), which entered into force on 1 January 1997, the government's proposal was adopted by the Riksdag (Swedish Parliament).

16 The 1996 law inserted an introductory part into Section 6 of the Law on Lotteries, worded as follows:

'For the purposes of this Law "gaming machine" shall mean a mechanical or electronic gaming machine.

...'

17 The 1996 law also inserted into the Law on Lotteries a Section 24a which provided:

'Licences for gaming on gaming machines shall only be issued in respect of "varuspelautomat", "penningautomat", "värdeautomat" and "skicklighetsautomat".'

18 It follows from Section 24a of the Law on Lotteries that since a licence cannot be issued for 'lyckohjulsspel' their use is prohibited in Sweden under that law.

19 In 1999, other amendments were made to the Law on Lotteries, particularly as regards the system of 'varuspelautomat' by the law amending the Law on Lotteries (lag om ändring i lotterilagen (1999:358), SFS 1999, No 358, 'the 1999 law').

The main proceedings and the questions referred for a preliminary ruling

20 By judgment of the Ljungby tingsrätt (Ljungby Court of First Instance) of 16 June 1999, upheld on appeal by a judgment of the Göta hovrätt (Göta Court of Appeal) of 31 October 2000, Mr Lindberg was found guilty of the offence of organising unlawful games of chance and ordered to pay a fine of 80 units of SEK 150.

21 He was charged with having organised from 1 January 1997 to 20 April 1998 public lotteries entailing risk within the meaning of Chapter 16, Section 14, of the Swedish Criminal Code. The activities in question were games of chance of the 'lyckohjulsspel' type held on the premises of Ingvar's kiosk in Älmhult.

22 Mr Lindberg appealed to the Högsta domstolen (Supreme Court) against the judgment given on appeal by the Göta hovrätt.

23 By his appeal, he claimed, first, that the charges against him should be dismissed and, second, that the offence with which he was charged should be deemed a mere infringement of the Law on Lotteries and that the number of units of the fine imposed on him should be reduced.

24 He submitted, in particular, that, since they entailed the prohibition as of 1 January 1997 of organising 'lyckohjulsspel', the provisions of the 1996 law constituted technical regulations within the meaning of Directive 83/189, which could not be relied on against him as they had not been notified to the Commission by the Swedish authorities before their entry into force.

25 In its order for reference, the Högsta domstolen refers to the written submissions of the public prosecutor. Those submissions may be summarised as follows.

26 According to the public prosecutor, the assessment whether the organisation of the game was unlawful or not should not be made taking into account matters other than the provisions of the legislation on lotteries because any activity which is licensed or which does not require a licence under that legislation cannot entail liability under Chapter 16, Section 14, of the Swedish Criminal Code.

27 After describing the background to the adoption of the 1996 law, set out in paragraphs 11 to 15 of this judgment, the public prosecutor pointed out that at the time the Law on Lotteries was adopted in 1994, Sweden was not a member of the EU and that there is no retroactive obligation under Directive 83/189 to notify provisions which had already been adopted.

28 However, he noted that at the time of the adoption of the 1996 law, Sweden had become a member of the EU.

29 The public prosecutor pointed out that the Swedish Government bill which became the 1996 law was not notified to the Commission under Directive 83/189 but that subsequently some uncertainty arose as to whether such notification was required.

30 The Swedish Government took the view that such notification was not necessary because the Law on Lotteries already covered 'lyckohjulsspel' as such games fell within the expression 'similar games' referred to in Section 3(3) of that law. Therefore the 1996 law is merely a clarification of the legislature's intention and thus did not make any substantive change to the scope of the Law on Lotteries.

31 However, in an opinion of 29 January 2001, the Kommerskollegium (Swedish Board of Commerce), which had been consulted on that point by the Swedish Government, reached the opposite conclusion.

32 In the light of that uncertainty, the Swedish Government none the less proposed to repeal the 1996 and 1999 laws and incorporate the amendments those laws made to the Law on Lotteries into a new bill which was notified to the Commission under Directive 83/189.

33 That bill was subsequently passed by the Swedish legislature to become the law amending the Law on Lotteries (lag om ändring i lotterilagen (2001:1045), SFS 2001, No 1045), which entered into force on 1 January 2002.

34 The public prosecutor took the view that the Swedish Government's interpretation, according to which the amendments made to the Law on Lotteries by the 1996 law did not have to be notified to the Commission under Directive 83/189 since they made no substantive amendment to the legislation on lotteries, was plausible. There was justification for the view that 'lyckohjulsspel' were covered by the expression 'similar games' in Section 3(3) of that law. Indeed, the wording of that provision indicated clearly that that was so.

35 However, an overall assessment of all the arguments put forward suggested rather that there was an obligation to notify under Directive 83/189. The *travaux préparatoires* for the Law on Lotteries suggest that the expression 'similar games' should be considered to refer only to the 'chain letters' mentioned in that provision. Account should also be taken of the fact that the Swedish Parliament repealed the amendments made by the 1996 law to the Law on Lotteries and re-enacted them after they had been notified to the Commission, as pointed out in paragraph 32 of this judgment.

36 That meant that, following those amendments, 'lyckohjulsspel' were classified as gaming machines covered by the Law on Lotteries and a new express prohibition was inserted in that law, relating to gaming machines other than those listed in Section 6 of that law.

37 A failure to notify such a prohibition entailed that it could not be relied on against individuals. The public prosecutor maintained in that regard that the technical standards and regulations relating to gaming machines were covered by Directive 83/189 and that that directive did not provide for any express exemption from the obligation to notify in the case of minor amendments or clarifications of such standards.

38 In the light of those arguments, the public prosecutor declared that he had no objection to the dismissal of the charges made against Mr Lindberg of organising unlawful games of chance.

39 Against that background, the Högsta domstolen decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Can the introduction in national law of a prohibition on the use of a product constitute a technical regulation which must be notified under the directive [83/189]?

(2) Can the introduction in national law of a prohibition on a service which affects the use of a product constitute a technical regulation which must be notified under the directive [83/189]?

(3) Can the redefinition in national law of a service connected with the design of a product constitute a technical regulation which must be notified under the directive [83/189], if the new definition affects the use of the product?

(4) What is the significance for the obligation to notify laid down by the directive [83/189] of factors such as:

— the replacement of a licence requirement by a prohibition in national law,

— the greater or lesser value of the product/service,

— the size of the market for the product/service or

— the effect of a new national provision on use, which could be either a total prohibition on use or a prohibition or restriction within one of a number of possible areas of use?'

Preliminary observations

40 As a preliminary point, it must be observed, first, that, according to the grounds of the order for reference, the referring court seeks to know whether the national provisions of the Law on Lotteries, as amended by the 1996 law ('the amended Law on Lotteries'), which came into force on 1 January 1997, fall within the scope of Directive 83/189, in so far as they entail a prohibition on the organisation of games of chance using certain gaming machines, namely the 'lyckohjulsspel' at issue in the main proceedings, the essential feature of which is that any winnings are not paid out directly by the machine but are paid manually at the request of the player.

41 The Swedish Government submits, however, that, in its original version, the Law on Lotteries already entailed that prohibition and that the 1996 law merely served to clarify that prohibition. That interpretation of the national legislation, which, according to the order for reference, appears not to have been followed by several

Swedish courts, including courts of appeal, is based on a controversial point of interpretation of national law which is outside the jurisdiction of the Court in a reference for a preliminary ruling.

42 Accordingly, in order to answer the questions referred, the facts as stated in the order for reference must be accepted, namely that the prohibition in question was inserted into the Law on Lotteries by the 1996 law.

43 Second, if the provisions of the amended Law on Lotteries at issue had constituted technical regulations, the Member State concerned would have been required to notify them in the form of a draft under Directive 83/189 in the version resulting from Directive 94/10 (see, inter alia, to that effect Case C-33/97 *Colim* [1999] ECR I-3175, paragraphs 25 and 26).

44 It must be observed that Directive 83/189, in the version applicable to the dispute in the main proceedings, provides for an obligation to notify draft technical regulations relating to products only.

45 Following the adoption of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 217, p. 18), the scope of the obligation to notify draft technical regulations was extended to cover those relating to certain services, which are not at issue in the main proceedings, namely those relating to information society services as defined in Article 1(2) 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). However, that directive cannot be taken into account in the case in the main proceedings.

46 Third, the Portuguese Government observes that the Court has held that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the EC Treaty and, accordingly, it cannot come within the scope of Articles 30 and 34 of the EC Treaty (now, after amendment, Articles 28 EC and 29 EC) relating to the free movement of goods (see Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 56).

47 It follows, according to that government, that Directive 83/189, whose scope is the same as that of the Treaty provisions on free movement of goods, is applicable in the case in the main proceedings only if the case falls within those provisions of the Treaty rather than those relating to the freedom to provide services. It argues that, since it follows from the case-law that the operation of games such as those at issue in the dispute in the main proceedings must be classified as the provision of services, that directive is not applicable to the dispute.

48 In that regard, it must be observed that Directive 83/189 is designed to protect, by means of preventive monitoring, the free movement of goods, which is one of the foundations of the Community (see, inter alia, Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 32).

49 However, the scope of Directive 83/189, in that it is essentially based on the concept of technical regulation, is autonomously defined and does not depend, in every hypothetical case, on the fulfilment of the conditions for the application of the Treaty provisions on free movement of goods.

50 This is a result of the fact that Directive 83/189 lays down a preventive monitoring procedure for ascertaining whether a national standard comprising a technical regulation falls within the Treaty provisions on free movement of goods and, if it does, for examining whether such a standard is compatible with those provisions.

51 The possible effects of the technical regulation on intra-Community trade do not constitute a criterion for the definition of the scope of Directive 83/189.

52 Similarly, although it is true that obstacles to trade in goods between Member States may be justified if they are necessary to fulfil overriding public interest requirements, such justifications, relied on inter alia in the observations submitted to the Court by the Portuguese Government, do not constitute a criterion laid down by Directive 83/189 for defining its scope either, particularly as such considerations are alien to the concept of technical regulation.

The questions referred for a preliminary ruling

The first two questions

53 By its first two questions, which should be considered together, the referring court seeks essentially to know whether national provisions such as those in the amended Law on Lotteries constitute a technical regulation within the meaning of Article 1(9) of Directive 83/189 in that they entail a prohibition on the organisation of games of chance using certain automatic gaming machines.

54 It follows from Article 1(9) of Directive 83/189 that the definition of 'technical regulation' is divided into three categories, namely, first, the 'technical specification' within the meaning of Article 1(2) of that directive, second, the 'other requirement' as defined in Article 1(3) of that directive and, third, the 'provisions ... prohibiting the manufacture, importation, marketing or use of a product' referred to in the first subparagraph of Article 1(9) of that directive.

55 As regards, first, the possible classification as a technical regulation of national provisions such as those at issue in the main proceedings by virtue of their belonging to the category of technical specification referred to in Article 1(2) of Directive 83/189, it is true that Section 24a of the Law on Lotteries contains a prohibition on the use of a particular category of gaming machine which is defined according to certain of its specific characteristics.

56 In the present case, however, the classification of such provisions as 'technical specifications' within the meaning of Article 1(2) of Directive 83/189 cannot be upheld.

57 As the Court has held, the concept of technical specification presupposes that the national measure refers to the product or its packaging as such and thus lays down one of the characteristics required of a product (see, to that effect, Case C-278/99 *Van der Burg* [2001] ECR I-2015, paragraph 20; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 45; and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paragraph 30).

58 It must be observed that a national measure like that in the main proceedings essentially entails a prohibition imposed on operators like Mr Lindberg who wish to make certain types of gaming machine available to players and thus to consumers.

59 Such a measure is therefore intended to regulate the activity of undertakings operating in the area of providing services in connection with gaming machines. Thus, the Court has held that national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical specifications (see, to that effect, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 25).

60 That measure does not necessarily refer to the product or its packaging as such and thus does not lay down one of the characteristics required of a product within the meaning of Article 1(2) of Directive 83/189 as interpreted by the Court in the case-law cited in paragraph 57 of this judgment.

61 That interpretation is confirmed by the explanatory memorandum accompanying the proposal for a Council directive amending for the second time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1992 C 340, p. 7), the proposal which, following its adoption by the Council of the European Union, became Directive 94/10.

62 By that directive, applicable *ratione temporis* to the dispute in the main proceedings, a second category of technical regulation, namely that falling under the heading of 'other requirements' was inserted in Directive 83/189.

63 Accordingly, the question arises whether the national measure at issue in the main proceedings may be classified as an 'other requirement' within the meaning of Article 1(3) of Directive 83/189, which, according to Article 1(9), also constitutes a technical regulation.

64 In that regard, paragraph 18 of the abovementioned explanatory memorandum states inter alia that, whereas, as it was originally conceived, Directive 83/189 only covered technical regulations applied to a product for the purposes of placing it on the market, and chiefly for safety reasons, that concept had to be widened subsequently.

65 The Commission explained in that memorandum that the insertion of the term 'other requirements' was intended to extend the original scope of Directive 83/189 so that it also covered national rules on, inter alia, consumer protection, entailing requirements arising from the consideration of the product after its marketing, in particular those relating to the possible use of the product.

66 In the same paragraph of that explanatory memorandum, it is pointed out that extending the scope of Directive 83/189 in this way makes it possible to include rules which are liable to have an effect on the product and may cause distortion of the market.

67 It must be observed that the definition of 'other requirements' appearing in that proposal for a directive submitted by the Commission to the Council was adopted by the Council and appears in that form in the final version of Directive 94/10.

68 In the light of those considerations, it must be held that a national measure such as the prohibition at issue in the main proceedings seems to be specifically covered by the term 'other requirements' inserted by Directive 94/10 in Directive 83/189 in order to widen its scope and that it therefore does not fall within the category of technical specifications.

69 Such a measure is a requirement imposed in connection with a product, namely gaming machines, essentially for the purpose of the protection of consumers, in this case the players concerned.

70 Accordingly, a prohibition such as that laid down by the relevant provisions of the amended Law on Lotteries relates to the use of a product within the meaning of Article 1(9) of Directive 83/189.

71 Moreover, the requirement at issue in the main proceedings is not imposed on gaming machines for the purposes of placing them on the market but concerns their life cycle after they have been placed on the market within the meaning of the definition of 'other requirements' set out in Article 1(3) of Directive 83/189.

72 In order to fall within 'other requirements' within the meaning of Article 1(3) of Directive 83/189, a requirement such as the prohibition on the use of the gaming machines at issue in the main proceedings must constitute a 'condition', in this case, of use, which can significantly influence the composition or nature of the product or its marketing.

73 However, the question then arises whether that prohibition must be deemed a 'condition' of the use of the product concerned or whether it is, rather, a national measure falling within the third category of technical regulations referred to in Article 1(9) of Directive 83/189, which was also inserted in it by Directive 94/10, namely that of 'laws ... of Member States ... prohibiting the manufacture, importation, marketing or use of a product'.

74 Whether a national measure such as that at issue in the main proceedings falls within one or the other of those two categories of technical regulation depends on the scope of the prohibition laid down by that measure.

75 In that connection, it is significant that, unlike the second category consisting of other requirements within the meaning of Article 1(3), that third category of technical regulation defined in Article 1(9) of Directive 83/189 does not include the condition that the prohibition in question must be such as to significantly influence the composition or nature of the product or its marketing.

76 To fall within that third category of technical regulation concerning a prohibition inter alia on use the measures must have a scope which goes well beyond a limitation to certain possible uses of the product in question and must thus not be confined to a mere restriction of its use.

77 As the Advocate General pointed out in point 70 of his Opinion, that category of technical regulation is particularly intended to cover national measures which leave no room for any use which can reasonably be made of the product concerned other than a purely marginal one. It is for the national court to ascertain whether the prohibition entailed by the national provision at issue in the main proceedings is such a measure.

78 If it should prove, following such examination by the referring court, that such is not the case in the main proceedings, that national provision would be liable to be deemed an 'other requirement' since it is common ground that compliance with that requirement is mandatory de jure for the use of the product in the Member State

concerned within the meaning of Article 1(9) of Directive 83/189. However, in that event, it is also for the referring court to verify that the prohibition at issue may significantly influence the composition or nature of the product or its marketing within the meaning of Article 1(3).

79 In the course of the verification to be carried out by the referring court, it would be permissible for it to examine inter alia the possible implications of the argument, raised by the Portuguese Government, that the gaming machines concerned can be programmed and, if necessary, reprogrammed to perform different functions.

80 In the light of the foregoing, the answer to the first two questions should be that national provisions such as the amended Law on Lotteries which entail a prohibition on the organisation of games of chance using certain gaming machines are liable to constitute a technical regulation within the meaning of Article 1(9) of Directive 83/189 where it is established that the scope of the prohibition at issue leaves no room for any use which can reasonably be expected of the product concerned other than a purely marginal one or, if that is not the case, where it is established that that prohibition may significantly influence the composition or nature of the product or its marketing.

The third question

81 By its third question, the referring court essentially asks whether redefining in national legislation a service connected with the design of a product, in particular that of operating certain gaming machines, as the 1996 law did, can constitute a technical regulation which must be notified under Directive 83/189, if the new definition affects the use of the product.

82 In that regard, it must first be observed that a national measure which reproduces or replaces, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of Directive 83/189, have been duly notified to the Commission, cannot be regarded as a 'draft' technical regulation within the meaning of Article 1(9) of Directive 83/189 or, consequently, as subject to the obligation to notify (see *Colim*, cited above, paragraph 22). In the present case, the date of the entry into force of Directive 83/189 as regards the Kingdom of Sweden should be taken into account.

83 Next, as observed in paragraph 41 of this judgment, the question whether the prohibition on the organisation of games of chance using certain gaming machines, in particular the 'lyckohjulsspel' at issue in the main proceedings, was already laid down by the original version of the Law on Lotteries, so that the 1996 law merely clarified that point or whether, rather, it was that law which inserted the prohibition in the Law on Lotteries, constitutes a question of national law which falls within the jurisdiction of the referring court.

84 Finally, according to the answer given to the first two questions, a national measure imposing restrictions on a service such as that consisting in the operation of certain gaming machines may, under certain conditions, constitute a technical regulation which must be notified under Directive 83/189.

85 In the light of the foregoing, the answer to the third question must be that redefining in national legislation a service connected with the design of a product, in particular that of operating certain gaming machines, as the 1996 law did, can constitute a technical regulation which must be notified under Directive 83/189, if that new

legislation does not merely reproduce or replace, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of Directive 83/189 in the Member State concerned, have been duly notified to the Commission.

The fourth question

86 By its fourth question, the referring court seeks the views of the Court on the significance for the purpose of the obligation to notify laid down by Directive 83/189 of the following factors:

— the replacement of a licence requirement by a prohibition in national law,

— the greater or lesser value of the product/service,

— the size of the market for the product/service or

— the effect of a new national provision on use, which could be either a total prohibition on use or a prohibition or restriction within one of a number of possible areas of use?

87 As regards the first factor mentioned by the referring court, that is to say, the replacement of a licence requirement by a prohibition in national law, it must be observed that the Court has held that national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of Article 1(9) of Directive 83/189. Technical regulations within the meaning of that provision are specifications defining the characteristics of products and not specifications concerning economic operators (see *Canal Satélite Digital*, paragraph 45, and the case-law cited).

88 It follows that national legislation which provides for a licence requirement for services such as the operation of certain gaming machines does not constitute a technical regulation within the meaning of Article 1(9) of Directive 83/189.

89 As regards the question of the relevance, in the light of the obligation to notify laid down by Directive 83/189, of a system of prohibition of a service such as the operation of certain gaming machines, it must be pointed out that such a question overlaps with that raised by the fourth factor mentioned in the fourth question referred for a preliminary ruling.

90 As held in reply to the first two questions, a national measure entailing the prohibition of such a service is liable, under certain conditions, to constitute a technical regulation within the meaning of Article 1(9) of Directive 83/189.

91 As regards the second and third factors mentioned in the fourth question referred for a preliminary ruling, it must be observed that, as pointed out in paragraph 50 of

this judgment, Directive 83/189 lays down a preventive monitoring procedure for ascertaining whether a national standard comprising a technical regulation falls within the Treaty provisions on free movement of goods and, if so, for examining whether such a standard is compatible with those provisions.

92 On that point, it was held in paragraph 51 of this judgment that the possible effects of the technical regulation on intra-Community trade do not constitute a criterion for the definition of the scope of Directive 83/189, as regards, in particular, the obligation to notify for which it provides.

93 If a national measure falls within that scope, the preventive monitoring procedure entailed by Directive 83/189 allows those effects to be assessed if necessary.

94 Moreover, as the Advocate General pointed out in point 86 of his Opinion, the rules laid down by Directive 83/189 to define the scope of the obligation to notify which it entails make no provision for a de minimis exception, that is to say an exception excluding from that obligation national measures with only a relatively minor effect on intra-Community trade.

95 In the light of the foregoing, the answer to the fourth question should be that:

— the replacement of a licence requirement by a prohibition in national law may be a significant factor with regard to the obligation to notify provided for by Directive 83/189;

— the greater or lesser value of the product or service or the size of the market for the product or service are factors which are not relevant as regards the obligation to notify provided for by that directive.

Costs

96 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 (Second Chamber) rules as follows:

1. **National provisions such as the Law on Lotteries (lotterilagen (1994:1000)), in the version resulting from the law amending the Law on Lotteries (lag om ändring i lotterilagen (1996:1168)), which entail a prohibition on the organisation of games of chance using certain gaming machines are liable to constitute a technical regulation within the meaning of Article 1(9) of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 94/10/EC of the European Parliament and the Council of 23 March 1994, where it is established that the scope of**

the prohibition at issue leaves no room for any use which can reasonably be expected of the product concerned other than a purely marginal one or, if that is not the case, where it is established that that prohibition may significantly influence the composition or nature of the product or its marketing.

2. **Redefining in national legislation a service connected with the design of a product, in particular that of operating certain gaming machines, as the law (1996:1168) amending the Law on Lotteries did, can constitute a technical regulation which must be notified under Directive 83/189, as amended by Directive 94/10, if that new legislation does not merely reproduce or replace, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of Directive 83/189 in the Member State concerned, have been duly notified to the Commission of the European Communities.**

3. **The replacement of a licence requirement by a prohibition in national law may be a significant factor with regard to the obligation to notify provided for by Directive 83/189, as amended by Directive 94/10.**

The greater or lesser value of the product or service or the size of the market for the product or service are factors which are not relevant as regards the obligation to notify provided for by that directive.

[Signatures]