Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

1 February 2017 *

(Reference for a preliminary ruling — Procedures for the provision of information in the field of technical standards and regulations and of rules on Information Society services — Directives 83/189/EEC and 98/34/EC — Draft technical regulation — Notifying the European Commission — Obligations of Member States — Infringement — Consequences)

In Case C-144/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Judicial da Comarca de Setúbal (Setúbal District Court, Portugal), made by decision of 2 February 2016, received at the Court on 14 March 2016, in the proceedings

Município de Palmela

v

Autoridade de Segurança Alimentar e Económica (ASAE) — Divisão de Gestão de Contraordenações,

THE COURT (Sixth Chamber),

composed of E. Regan, President of the Chamber, A. Arabadjiev and S. Rodin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Portuguese Government, by L. Inez Fernandes and M. Figueiredo, acting as Agents,

— the Czech Government, by M. Smolek and J. Vláčil and by T. Müller, acting as Agents,

— the Netherlands Government, by M. Bulterman and C. Schillemans, acting as Agents,

— the European Commission, by G. Braga da Cruz and D. Kukovec, acting as Agents,

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

gives the following

* * Language of the case: Portuguese.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8(1) of Directive 83/189/EEC of the Council 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 the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 83/189'), and Article 8(1) 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) ('Directive 98/34').

2 The request has been made in proceedings between the Município de Palmela (Municipality of Palmela, Portugal) and the Autoridade de Segurança Alimentar e Económica (Food and Economic Security Authority, Portugal) ('the ASAE'), in respect of a fine imposed on the former, for breaches of the mandatory safety requirements regarding the localisation, implementation, design and functional organisation of play and recreation areas and their equipment and impact surfaces.

Legal context

EU law

Directive 83/189

3 Article 1 of Directive 83/189 reads as follows:

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

1. "product", any industrially manufactured product and any agricultural product, including fish products;

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 Article 8(1) of that directive provided:

’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.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

…’

Directive 98/34

5 Directive 98/34, which repealed Directive 83/189, laid down in Article 1:

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

1. “product”, any industrially manufactured product and any agricultural product, including fish products;

2. “service”: any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

…

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.

…

4. “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;

5. “rule on services”, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

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.

…’

6 Article 8(1) of that directive 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.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

…’

Portuguese law

7 Article 13 of the Regulamento que estabelece as condições de segurança a observar na localização, implantação, conceção e organização funcional dos espaços de jogo e recreio, respetivamente, equipamento e superfícies de impacto (Regulation on the mandatory safety requirements regarding the localisation, implementation, design and functional organisation of play and recreation areas and their equipment and impact surfaces), annexed to Decreto-Lei No 379/97 (Decree-Law No 379/97), of 27 December 1997 ('the Play and Recreation Areas regulation' or 'the PRA regulation'), entitled 'Useful information', reads as follows:

'In play and recreation areas, the following information shall be visibly and legibly displayed in several locations:

(a) name and telephone number of the body responsible for the play and recreation area and of the body responsible for inspection;

(b) location of the nearest phone;

(c) address and telephone number of the nearest hospital emergency department or other emergency service;

(d) national emergency telephone number.'

8 Article 16 of the PRA regulation, entitled 'Compliance with safety requirements', provided, in paragraphs (1) and (2):

'1 – Compliance with safety requirements shall be certified by the manufacturer or its authorised representative or by the importer established in the European Union, by displaying visibly, legibly and indelibly on the equipment and their packaging the words 'Complies with safety requirements'.

2 – The manufacturer or its authorised representative, or the importer established in the European Union, of equipment intended for recreational play areas, shall also display visibly, legibly and indelibly:

(a) on the equipment and its packaging:
  (i) its name, trade name or trade mark, address, model reference and year of manufacture;
  (ii) the age range of the users for whom the equipment is intended;
  (iii) the maximum number of simultaneous users;

(b) on the equipment, the information necessary to prevent risks inherent in its use.

…'

9 Decreto-Lei No 119/2009 (Decree-Law No 119/2009) of 19 May 2009 amended the PRA regulation, in particular Articles 13 and 16 thereof.

10 Article 13 of the PRA regulation, as amended by Decree-Law No 119/2009, reads as follows:

'In play and recreation areas, the following information shall be displayed in several places visibly and legibly:

(a) name and telephone number of the body responsible for the play and recreation area and of the body responsible for monitoring;

(b) maximum capacity of the recreation and play space;

(c) location of the nearest phone;

(d) address and telephone number of the nearest hospital emergency department or other emergency service;

(e) national emergency telephone number.'

11 Article 16(2) of the PRA regulation, as amended by Decree-Law No 119/2009, provides as follows:

'The manufacturer, or its authorised representative or the importer established in the European Union, of equipment intended for recreational play areas, shall also display visibly, legibly and indelibly:

(a) on the equipment and its packaging:
   (i) its name, trade name or trade mark, address, model reference and year of manufacture;
   (ii) the age range of the users for whom the equipment is intended;
   (iii) the number and date of the applicable technical standard;
   (iv) the maximum number of simultaneous users;
   (v) the minimum and maximum size of the children;

(b) on the equipment, the information necessary to prevent risks inherent in its use.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 On 25 November 2010, the ASAE sent a report in which it was apparent that the Municipality of Palmela had committed infringements provided for and sanctioned in the PRA regulation, as amended by Decree-Law No 119/2009.

13 In its defence observations submitted on 2 March 2011, the Municipality of Palmela argued, primarily, that the alleged infringements could not be attributed to it because of the lack of clarity of the allegedly infringed rules. In the alternative, given the limited gravity of those infringements, that municipality contended that a simple warning would have been sufficient to sanction those infringements.

14 On 23 October 2013, the Municipality of Palmela received notification of the decision of the ASAE imposing on it a single fine of EUR 15 500 together with EUR 100 by way of costs. On 14 November 2013, the applicant appealed against that decision.

15 By judgment of 3 April 2014, the Tribunal Judicial da Comarca de Setúbal (Setúbal District Court, Portugal) declared inapplicable the provisions of Article 13(b) and Article 16(1) and (2) of the PRA regulation, as amended by Decree-Law No 119/2009 and, consequently, annulled the contested decision on the grounds of failure to provide adequate reasons and a contradiction between the reasons given and the operative part of that decision. On 30 January 2016 the Municipality of Palmela was notified of a new decision, imposing on it a fine of EUR 10 000 together with EUR 100 by way of costs.

16 The Municipality of Palmela brought an action against that new decision before the referring court, inviting the latter to submit a request for a preliminary ruling to the Court of Justice regarding the consequences of failure to comply with the obligation to notify the technical regulations introduced by Directive 98/34.

17 The referring court observes that the Member States must, under that directive, notify both the technical regulations and their subsequent amendments and the text of the basic legislative or regulatory provisions that are most directly concerned. On the premiss, based on national case-law, that Article 13(b) and Article 16(1) and (2) of the PRA regulation, as amended by Decree-Law No 119/2009, constitute technical regulations, that court asks the Court what the consequences are of failure to comply with the obligation to notify those regulations to the Commission.

18 Furthermore, that court asks whether the penalty for failure to comply with that obligation is the non-applicability of those regulations only, or of the entire text in which they are contained.

19 In those circumstances, the Tribunal Judicial da Comarca de Setúbal (Setúbal District Court, Portugal) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must the national court declare that a national law is entirely inapplicable if it introduces technical standards and, in breach of the provisions of Directive 98/34, that law has not been notified to the European Commission, or must the court’s declaration of inapplicability be limited to the new technical regulations introduced by the national law? Or,

(2) Must a national law be declared entirely inapplicable if it introduces technical standards and, in breach of the provisions of Directive 98/34, it has not been notified to the Commission, or must the declaration of inapplicability be limited to the new technical regulations introduced by the national law?

(3) Are all the technical standards set out in the PRA regulation inapplicable, or only those amended or introduced by Decree-Law No 119/2009 of 19 May?’

Consideration of the questions referred

20 It should be observed as a preliminary point that, according to settled case-law of the Court, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. With that in mind, the Court may have to reformulate the questions referred to it (judgment of 28 April 2016, *Oniors Bio*, C-233/15, EU:C:2016:305, paragraph 30 and the case-law cited). Further, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (order of 14 July 2016, *BASF*, C-456/15, not published, EU:C:2016:567, paragraph 15, and the case-law cited).

21 In the present case the referring court asks, in essence, in situations where national provisions, such as Article 13(b) and Article 16(1) and (2) of the PRA regulation, as amended by Decree-Law No 119/2009, constitute technical regulations within the meaning of Directives 83/189 and 98/34, whether Article 8(1) of Directive 83/189 and Article 8(1) of Directive 98/34 are to be interpreted as meaning that the penalty of unenforceability of technical regulations which have not been notified applies to those regulations only or to the entire legislative text in which they are contained.

22 It is apparent from the decision to refer that Decree-Law No 119/2009 amended Article 13(b) and Article 16(2) of the PRA regulation, while leaving Article 16(1) of that regulation unchanged. The referring court starts from the premiss that those national regulations constitute technical rules.

23 As regards Article 16(1) and (2) of the PRA regulation, as amended by Decree-Law No 119/2009, it must be observed, as the referring court noted, that it constitutes a technical regulation within the meaning of Directives 83/189 and 98/34, in so far as that provision lays down requirements imposed on a product, for the purpose of protecting consumers, which affect its life cycle after it has been

placed on the market and significantly influence the composition and marketing of such a product. Accordingly, that provision falls within the category of 'other requirements' within the meaning of both Article 1(3) of Directive 83/189 and Article 1(4) of Directive 98/34.

24 It is necessary to consider whether the same conclusion can be drawn with regard to Article 13(b) of the PRA regulation, as amended by Decree-Law No 119/2009, as that decree-law was adopted on a date when Directive 98/34 was already in force.

25 It must be noted in that context that the concept of a 'technical regulation' extends to four categories of measures, namely (i) the 'technical specification', within the meaning of Article 1(3) of Directive 98/34, (ii) 'other requirements', as defined in Article 1(4) of that directive, (iii) the 'rule on services', covered in Article 1(5) of that directive, and (iv) the 'laws, regulations or administrative provisions of Member States 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', under Article 1(11) of that directive (judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 70).

26 In that regard, it should be clarified, in the first place, that the concept of 'technical specification' presupposes that the national measure necessarily refers to the product or its packaging as such and therefore lays down one of the characteristics required of a product. In contrast, where a national measure lays down conditions governing the establishment of undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, those conditions do not constitute technical specifications (judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 19 and the case-law cited).

27 In the second place, before a condition can be classified within 'other requirements', within the meaning of Article 1(4) of Directive 98/34, a national measure must constitute a 'condition' which can significantly influence the composition or nature of the product concerned or its marketing. However, it is necessary to determine whether such a measure is to be deemed a 'condition' relating to the use of the product concerned or whether it is, rather, a national measure falling within the category of technical regulations referred to in Article 1(11) of that directive. Whether a national measure falls within one or other of those two categories of technical regulations depends on the scope of the prohibition laid down by that measure (judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 20 and the case-law cited).

28 In the third place, the concept of a 'rule on services', referred to in Article 1(5) of Directive 98/34, covers solely regulations relating to information society services, that is, any service provided at a distance by electronic means and at the individual request of a recipient of services (see, to that effect, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 21 and the case-law cited).

29 In the present case, Article 13(b) of the PRA regulation, as amended by Decree-Law No 119/2009, made it compulsory to display, in several locations in the play and recreation area, information on the maximum capacity of that area.

30 First, it must be held that such a provision does not fall within the category of technical specifications within the meaning of Article 1(3) of Directive 98/34, in so far as it is undisputed that the provisions that lay down the requirements and general objectives in relation to safety and protection, without necessarily referring to the product concerned or its packaging as such and thus without laying down the characteristics of that product, do not constitute technical specifications (see, to that effect, judgment of 9 June 2011, *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, C-361/10, EU:C:2011:382, paragraphs 17 and 18).

31 Secondly, that provision cannot be placed in the category of rules on services, referred to in Article 1(5) of Directive 98/34, since it does not relate to information society services, within the meaning of Article 1(2) of that directive.

32 Finally, for the purpose of determining whether, where relevant, a national provision such as Article 13(b) of the PRA regulation, as amended by Decree-Law No 119/2009, falls within Article 1(4) of Directive 98/34 or Article 1(11) of that directive, it is necessary to ascertain whether it is likely to have a significant influence on the composition, nature or marketing of the product concerned, namely the installations in the play and recreation areas, as a 'condition' relating to the use of the products concerned, or whether it falls within the category of prohibitions referred to in Article 1(11) of that directive.

33 First, it is common ground that a provision such as that at issue in the main proceedings does not amount to an 'other requirement' within the meaning of Article 1(4) of Directive 98/34, taking account of the general nature of the requirements which it sets out (see, to that effect, judgment of 9 June 2011, *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, C-361/10, EU:C:2011:382, paragraph 21). On the other hand, it does not contain any prohibitions which could bring it within the category of the prohibitions set out in Article 1(11) of that directive.

34 In such circumstances, it must be held that a provision, such as Article 13(b) of the PRA regulation, as amended by Decree-Law No 119/2009, does not constitute a technical regulation within the meaning of Directive 98/34.

35 As regards the penalty of the unenforceability of technical rules which have not been communicated to the Commission, it should be pointed out, first of all, that Article 8(1) of Directive 83/189 provided for the obligation on Member States to communicate to the Commission any draft technical regulation, and that that obligation was incorporated in Article 8(1) of Directive 98/34.

36 Moreover, the penalty for failure to comply with such a notification obligation is that technical rules which have not been notified will be inapplicable (see, to that effect, with regard to Directive 83/189, judgment of 30 April 1996, *CIA Security International*, C-194/94, EU:C:1996:172, paragraph 54, and, with regard to Directive 98/34, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 67 and the case-law cited).

37 As regards the extent of such a penalty, even though Article 8(1) of Directive 83/189 and Article 8(1) of Directive 98/34 require the entire draft of a law containing technical regulations to be communicated to the Commission, the non-applicability which results from the breach of that obligation extends, not to all of the provisions of such a law, but only to the technical regulations contained therein (see, to that effect, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 68).

38 In those circumstances, the answer to the questions referred must be that Article 8(1) of Directive 83/189 and Article 8(1) of Directive 98/34 must be interpreted as meaning that the penalty of unenforceability of a technical regulation which has not been notified, such as Article 16(1) and (2) of the PRA regulation, as amended by Decree-Law No 119/2009, applies only to that technical regulation and not to the entire legislative text in which it is contained.

Costs

39 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 (Sixth Chamber) hereby rules:

Article 8(1) of Directive 83/189/EEC of the Council of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, and Article 8(1) 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 the penalty of unenforceability of a technical regulation which has not been notified, such as Article 16(1) and (2) of the Regulamento que estabelece as condições de segurança a observar na localização, implantação, conceção e organização funcional dos espaços de jogo e recreio, respetivamente, equipamento e superfícies de impacto (Regulation on the mandatory safety requirements regarding the localisation, implementation, design and functional organisation of play and recreation areas and their equipment and impact surfaces), annexed to Decreto-Lei No 379/97 (Decree-Law No 379/97), of 27 December 1997, as amended by Decreto-Lei No 119/2009 (Decree-Law No 119/2009), of 19 May 2009, applies only to that technical regulation and not to the entire legislative text in which it is contained.

[Signatures]