JUDGMENT OF THE COURT (Third Chamber)

15 April 2010 *

In Case C-433/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Handens tingsrätt (Sweden), made by decision of 21 November 2005, received at the Court on 5 December 2005, in criminal proceedings against

Lars Sandström,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis (Rapporteur), J. Malenovský and D. Šváby, Judges,

Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

* Language of the case: Swedish.

after considering the observations submitted on behalf of:

— L. Sandström, by R. Ihre, advokat, and D. Putzeys and B. Dumortier, avocats,

— the Åklagaren, by S. Creutz, advokat,

— the Swedish Government, by A. Kruse, R. Sobocki, S. Johannesson and K. Petkovska, acting as Agents,

— the Austrian Government, by E. Riedl, acting as Agent,

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

— the Norwegian Government, by A. Eide and K.B. Moen, acting as Agents,

— the European Commission, by L. Ström van Lier, A. Alcover San Pedro and D. Lawunmi, S. Schønberg and K. Simonsson, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 28 EC and 30 EC and Directive 94/25/EC of the European Parliament and of the Council of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft (OJ 1994 L 164, p. 15), as amended by Directive 2003/44/EC of the European Parliament and of the Council of 16 June 2003 (OJ 2003 L 214, p. 18) ('Directive 94/25').

2 The reference was made in the course of criminal proceedings brought by the Åklagaren (Public Prosecutor's Office) against Mr Sandström for failure to comply with Regulation 1993:1053 on the use of jet-skis (personal watercraft) (förordning (1993:1053) om användning av vattenskoter), as amended by Regulation 2004:607 (förordning (2004:607)) ('the national regulations').

Legal context

European Union legislation

3 The second recital in the preamble to Directive 94/25 provides:

'… [T]he laws, regulations and administrative provisions in force in the various Member States relating to the safety characteristics of recreational craft differ in scope and content; … such disparities are liable to create barriers to trade and unequal conditions of competition within the internal market'.

4 The third recital in the preamble to Directive 94/25 provides:

'… [H]armonisation of national legislation is the only way in which to remove these barriers to free trade; … this objective cannot be satisfactorily achieved by the individual Member States; … this Directive merely lays down the requirements vital to freedom of movement for recreational craft'.

5 Article 1 of Directive 94/25 defines the scope of that directive. That provision was replaced by the wording in Article 1 of Directive 2003/44 which inter alia widened that scope to include personal watercraft.

6 Article 2 of Directive 94/25, headed 'Placing on the market and putting into service', provides:

'1. Member States shall take all necessary measures to ensure that the products referred to in Article 1(1) may be placed on the market and put into service for use in accordance with their intended purpose only if they do not endanger the safety and health of persons, property or the environment when correctly constructed and maintained.

2. The provisions of this Directive shall not prevent Member States from adopting, in compliance with the [EC] Treaty, provisions concerning navigation on certain waters for the purpose of protection of the environment, the fabric of waterways, and ensuring safety of waterways, providing that this does not require modification to craft conforming to this Directive.'

7 Article 4(1) of Directive 94/25 provides:

'Member States shall not prohibit, restrict or impede the placing on the market and/or putting into service in their territory of products referred to in Article 1(1) bearing the CE marking referred to in Annex IV, which indicates their conformity with all the provisions of this Directive, including the conformity procedures set out in Chapter II.'

8 Article 3(1) of Directive 2003/44 provides:

'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with the requirements of this Directive by 30 June 2004. They shall immediately inform the Commission thereof.

Member States shall apply such measures as from 1 January 2005.'

9 Article 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 (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), and codifying Council Directive 83/189/EEC of 28 March 1983 (OJ 1983 L 109, p. 8) ('Directive 98/34'), provides as follows:

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

...

(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;

…

(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.

…'

10 The first subparagraph of Article 8(1) of Directive 98/34 provides that, subject to Article 10, Member States are to communicate immediately to the Commission any draft technical regulation.

11 According to the third subparagraph of Article 8(1) of Directive 98/34, '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'.

12 Under Article 8(3) of Directive 98/34, 'Member States shall communicate the definitive text of a technical regulation to the Commission without delay'.

13 Under the first subparagraph of Article 9(2) of Directive 98/34, Member States are to postpone, where necessary, the adoption of a draft technical regulation for four or six months 'from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market'.

National legislation

14 The national regulations, in the version in force at the time of the facts in the main proceedings, entered into force on 15 July 2004.

15 Paragraph 1 of those regulations provides:

'In this regulation a jet-ski [personal watercraft] is defined as being a craft of less than four metres in length and which (1) has an internal combustion engine with a water jet unit as its primary source of propulsion and (2) is designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, the hull.'

16 Paragraph 2 of those regulations provides:

'Jet-skis may be used only in general navigable waterways and in such waters as defined in Paragraph 3(1).'

17 Paragraph 3 of those regulations provides:

'The länsstyrelsen [(local authority)] may issue rules regarding the waters in the county, other than general navigable waterways, on which jet-skis may be used. Such rules are in any event to be issued for:

(1) waters which are subject to such a great amount of other human activity that future noise and other disturbances from the use of jet-skis cannot be regarded as constituting a significant nuisance for the public or the environment;

(2) waters other than in the vicinity of residential or holiday home areas and which are of little value in the protection of the natural and cultural environment, biological diversity, outdoor life, recreational or professional fishing, and

(3) other waters where the use of jet-skis does not cause a nuisance to the public by way of noise or other disturbances or cause a significant risk of injury or disturbance to flora or fauna or the spreading of infectious diseases.

The länsstyrelsen may also issue rules regarding the demarcation of general navigable waterways for the use of jet-skis, if necessary to avoid the nuisances and risks of injury referred to in point 3 of the first subparagraph, and regarding travel to and from the general navigable waterways.'

18 Under Paragraph 5 of the national regulations, anyone who drives a jet-ski in violation of Paragraphs 2 or 3 of those regulations or of rules issued under Paragraph 3 will be subject to a fine.

19 By Decision No 2589 2004 41950 of 20 May 2005 ('the decision of 20 May 2005'), the Länsstyrelsen i Stockholms län (Stockholm County Administrative Board), acting on the basis of Paragraph 3 of the national regulations, authorised the use of jet-skis in certain areas in its jurisdiction. That decision took effect as from 15 June 2005.

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

20 On 13 July 2005, Mr Sandström drove a jet-ski on waters which are not a general navigable waterway and in an area not covered by the provisions adopted by the Länsstyrelsen on waters where the use of jet-skis is permitted. The Åklagaren brought proceedings against Mr Sandström for infringement of the national regulations.

21 The relevant waters in the main proceedings have been defined by the decision of 20 May 2005.

22 The defendant does not deny the facts of which he stands accused but argues that the application of the national regulations is contrary to Article 28 EC and Directive 94/25.

23 In those circumstances, the Handens tingsrätt (Handen District Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. (a) Does [Directive 2003/44] preclude national provisions prohibiting the use of jet-skis … other than [on a] general [navigable] waterway and waters for which the local authorities give permission in accordance with Paragraph 3(1) of the [national] regulations?

(b) Is a prohibition such as that referred to in Question 1(a) permissible only when the local authorities, in assessing whether permission should be granted in accordance with Paragraph 3(1), comply with the requirement that permission must always be given for areas which fulfil the criteria in Paragraph 3(1) to (3)?

2. Do Articles 28 [EC] to 30 EC preclude such national provisions prohibiting the use of personal watercraft as referred to in Question 1(a) generally or only in the circumstances referred to in Question 1(b) above?

3. Irrespective of the foregoing, does the failure to notify the Commission … of the adoption of the new jet-ski prohibition on 20 June 2004 pursuant to [Directive 98/34] preclude national provisions such as those set out above?'

The questions referred for a preliminary ruling

Preliminary observations

24 It should be noted, as a preliminary point, that the national regulations at issue in the main proceedings have already been considered to a large extent by the Court in the light of Directive 94/25 and also Articles 28 EC and 30 EC in Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273. This judgment and the present case involve similar facts and are situated within a similar legal framework.

25 The fundamental difference between the two cases lies in the fact that, unlike in *Mickelsson and Roos*, in the present dispute, the Länsstyrelsen exercised powers provided for in Paragraph 3 of the national regulations allowing it to authorise the use of jet-skis in certain navigable areas. As to the legal framework, Directive 2003/44, amending Directive 94/25, was applicable at the time of the facts giving rise to the main proceedings.

The first and second questions

26 By the first and second questions, which it is appropriate to examine together, the national court asks, in essence, whether Directive 94/25 or, as the case may be, Articles 28 EC and 30 EC are to be interpreted as precluding national regulations, such as those at issue in the main proceedings, which prohibit the use of jet-skis on waters other than designated waterways.

27 Directive 94/25 aims to harmonise the legislation of the Member States with respect to recreational craft, in order to eliminate disparities in the content and scope of

application of the safety features of recreational craft in so far as those disparities are liable to create barriers to trade between Member States and unequal conditions of competition within the internal market. In amending Article 1 of Directive 94/25, in its initial version, Directive 2003/44 expanded the scope of application of the first directive in order, inter alia, to cover personal watercraft.

28 Furthermore, Article 2(2) of Directive 94/25 states that its provisions do not prevent Member States from adopting, in compliance with the Treaty, provisions concerning navigation on certain waters for the purpose of protection of the environment, the fabric of waterways, and ensuring safety of waterways, providing that that does not require modification to craft conforming to that directive (*Mickelsson and Roos*, paragraph 20).

29 Therefore, under Article 2(2) thereof, that directive does not preclude national provisions prohibiting the use of personal watercraft on certain waters for reasons connected with the protection of the environment, provided that they do not infringe the provisions of the Treaty (*Mickelsson and Roos*, paragraph 21).

30 The national regulations and the decision of 20 May 2005 fall within the category of national provisions covered by Article 2(2) of Directive 94/25. They provide for a prohibition of the use of personal watercraft outside designated areas.

31 Consequently, it must be examined whether Articles 28 EC and 30 EC, now, after the entry into force of the Treaty of Lisbon, Articles 34 TFEU and 36 TFEU, preclude national regulations such as those at issue in the main proceedings.

32 In the case which gave rise to the judgment in *Mickelsson and Roos*, a question had already been referred to the Court concerning the interpretation of Articles 28 EC and 30 EC in order to enable the national court to assess the compatibility of the national regulations with those provisions. At the time of the facts in the main proceedings in *Mickelsson and Roos*, the national regulations had not yet been implemented by measures provided for in the first subparagraph of Paragraph 3 of those regulations, such as the decision of 20 May 2005, with the result that, under Paragraph 2 of the same regulations, the use of personal watercraft was authorised only in general navigable waterways.

33 It is apparent from paragraph 44 of the judgment in *Mickelsson and Roos* that Articles 28 EC and 30 EC do not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of personal watercraft on waters other than designated waterways, provided that:

— the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which personal watercraft may be used;

— those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations, and

— such measures have been adopted within a reasonable period after the entry into force of those regulations.

34 Such an answer is not affected by the adoption of the decision of 20 May 2005. The national regulations at issue in the main proceedings are still based on the principle of a general prohibition on use of personal watercraft on waters other than general navigable waterways, subject to designation by the competent authorities of areas where they may be used. It is therefore for the national court to ascertain whether the national regulations, as implemented by the decision of 20 May 2005, comply with the three conditions referred to in the preceding paragraph.

35 In that regard, it must be observed that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see, to that effect, *Mickelsson and Roos*, paragraph 41).

36 Regarding the first condition referred to in paragraph 33 above, it must be noted that, under Paragraph 3 of the national regulations, the länsstyrelsen is required to adopt provisions for designating areas other than general navigable waterways where personal watercraft may be used.

37 Regarding the second condition referred to in paragraph 33 above, it must be borne in mind that the decision of 20 May 2005 designates, pursuant to Paragraph 3 of the national regulations, waters where personal watercraft may be used in the county of Stockholm.

38 It is for the national court to ascertain whether it may be reasonably considered that the decision of 20 May 2005 designates all areas which, in the county in question, satisfy the conditions laid down in the national regulations, in particular the first

subparagraph of Paragraph 3. Where the use of personal watercraft in an area satisfying those conditions is, according to the very wording of the national regulations, not liable to give rise to risks or pollution deemed unacceptable for the environment (see *Mickelsson and Roos*, paragraph 38), it must be considered that any prohibition on use of personal watercraft in such an area, resulting from its not being designated in the implementing measure, is a measure going beyond what is necessary to achieve the objective of protection of the environment.

39 Regarding the third condition referred to in paragraph 33 above, the information in the case-file indicates that the decision of 20 May 2005 took effect as from 15 June 2005, 11 months after the entry into force of the national regulations. In order to determine whether that period was reasonable, account must be taken of the fact that, as indicated in the reasons for the decision of 20 May 2005, it was adopted following consultation with the municipalities and other parties concerned.

40 In the light of the foregoing, the answer to the first two questions referred is that Directive 94/25 does not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of personal watercraft on waters other than designated waterways. Articles 34 TFEU and 36 TFEU do not preclude such national regulations, provided that:

— the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which personal watercraft may be used;

— those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations, and

— such measures have been adopted within a reasonable period after the entry into force of those regulations.

It is for the national court to ascertain whether those conditions have been satisfied in the main proceedings.

The third question

41 By its third question, the national court asks, in essence, whether the failure to give prior notification to the Commission, provided for in Article 8(1) of Directive 98/34, of an amendment to national legislation in circumstances such as those of the main proceedings renders those national provisions invalid.

42 In that 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 a public interest (see Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 40; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 32; and Case C-303/04 *Lidl Italia* [2005] ECR I-7865, paragraph 22).

43 As the obligation to notify referred to 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 substantive procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals (*Lidl Italia*, paragraph 23).

44 It is apparent from the case-file submitted to the Court that, on 1 April 2003, the Swedish Government notified to the Commission the draft national regulations which defined the concept of personal watercraft and which included a general prohibition on their use, with a few exceptions. Following that notification, the Commission sent the Swedish Government a detailed opinion pursuant to Article 9(2) of Directive 98/34. The Swedish authorities then amended the draft. However, they provided the Commission with the text thus amended only after it had been adopted.

45 It thus appears, but it is for the national court to verify, that the initial draft of the national regulations was notified pursuant to the first subparagraph of Article 8(1) of Directive 98/34 but the amendments made following the Commission's detailed opinion were not so notified beforehand. The Swedish Government and the Commission emphasise in that regard that those amendments concern merely a relaxation of the conditions of use of personal watercraft.

46 It should be remembered in that connection that the third subparagraph of Article 8(1) of Directive 98/34 provides that Member States are to communicate a draft technical

regulation again 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.

47 It must also be borne in mind, however, that in the light of the objective of Directive 98/34, referred to in paragraph 41 above, amendments made to a draft technical regulation already notified to the Commission pursuant to the first subparagraph of Article 8(1) of Directive 98/34, which contain, in relation to the notified draft, merely a relaxation of the conditions of use of the product in question and which, therefore, reduce the possible impact of the technical regulation on trade, are not a significant alteration of the draft for the purposes of the third subparagraph of Article 8(1) of that directive. Such amendments are not, therefore, subject to the obligation of prior notification.

48 Although, under Article 8(3) of Directive 98/34, Member States are to communicate the definitive text of a technical regulation to the Commission without delay, the failure to communicate a non-significant amendment to such a regulation prior to its adoption does not affect the applicability of that regulation, if there is no obligation of prior notification.

49 The answer to the third question is therefore that Article 8(1) of Directive 98/34 is to be interpreted as meaning that an amendment made to a draft technical regulation already notified to the European Commission, pursuant to the first subparagraph of that provision, and which contains, in relation to the notified draft, merely a relaxation of the conditions of use of the product in question and which, therefore, reduces the possible impact of the technical regulation on trade, is not a significant alteration of the draft for the purposes of the third subparagraph of that provision and need not

be notified beforehand to the Commission. In the absence of such an obligation of prior notification, the failure to inform the Commission of a non-significant amendment to a technical regulation, prior to its adoption, does not affect the applicability of that regulation.

Costs

50 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 (Third Chamber) hereby rules:

1. **Directive 94/25/EC of the European Parliament and of the Council of 16 June 1994 on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft, as amended by Directive 2003/44/EC of the European Parliament and of the Council of 16 June 2003, does not preclude national regulations which, for reasons relating to the protection of the environment, prohibit the use of personal watercraft on waters other than designated waterways.**

2. Articles 34 TFEU and 36 TFEU do not preclude such national regulations, provided that:

— the competent national authorities are required to adopt the implementing measures provided for in order to designate waters other than general navigable waterways on which personal watercraft may be used;

— those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions laid down in the national regulations, and

— such measures have been adopted within a reasonable period after the entry into force of those regulations.

It is for the national court to ascertain whether those conditions have been satisfied in the main proceedings.

3. 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 is to be interpreted as meaning that an amendment made to a draft technical regulation already notified to the European Commission, pursuant to the first subparagraph of that provision, and which contains, in relation to the notified draft, merely a relaxation of the conditions of use of the product in question and which,

therefore, reduces the possible impact of the technical regulation on trade, is not a significant alteration of the draft for the purposes of the third subparagraph of that provision and need not be notified beforehand to the Commission. In the absence of such an obligation of prior notification, the failure to inform the Commission of a non-significant amendment to a technical regulation, prior to its adoption, does not affect the applicability of that regulation.

[Signatures]