

JUDGMENT OF THE COURT (Second Chamber)

4 June 2009

(Directive 94/25/EC – Approximation of laws – Recreational craft – Prohibition of using personal watercraft on waters other than general navigable waterways – [Articles 34 and 36 TFEU] – Measures having equivalent effect – Access to the market – Impediment – Protection of the environment – Proportionality)

In Case C-142/05,

REFERENCE for a preliminary ruling under [Article 267 TFEU] from the Luleå tingsrätt (Sweden), made by decision of 22 February 2005, received at the Court on 24 March 2005, in the proceedings

Åklagaren

v

Percy Mickelsson,

Joakim Roos,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, P. Küris, G. Arestis (Rapporteur) and J. Klučka, Judges,

Advocate General: J. Kokott,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2006,

after considering the observations submitted on behalf of:

- P. Mickelsson and J. Roos, by P. Olofsson, and H. Tiberg, advokater,
- the Swedish Government, by A. Kruse, acting as Agent,
- the German Government, by M. Lumma and U. Forsthoff, acting as Agents,
- the Austrian Government, by E. Riedl and G. Eberhard, acting as Agents,
- the Norwegian Government, by A. Eide, F. Platou Amble and G. Hanssen, acting as Agents,
- the Commission of the European [Union], by L. Ström van Lier and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2006,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of [Articles 34 to 36 TFEU] 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 P. Mickelsson and J. Roos for failure to comply with a prohibition on the use of personal watercraft laid down by 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

[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 [FEU] 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, as amended by Directive 2003/44, 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.’

National legislation

9 The national regulations entered into force on 15 July 2004.

10 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.’

11 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).’

12 Paragraph 3 of the national 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.’

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

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

- 14 The Åklagaren has brought proceedings before the Luleå tingsrätt (Luleå District Court) against Mr P. Mickelsson and Mr J. Roos, for having, on 8 August 2004, in infringement of the national regulations, operated personal watercraft on waters other than a general navigable waterway. The accused do not dispute the facts but maintain that the application of those regulations is contrary to [Article 34 TFEU] and Directive 94/25.
- 15 It is in those circumstances that the Luleå tingsrätt decided to stay the proceedings and refer the following two questions to the Court of Justice for a preliminary ruling:
- ‘1. (a) Do [Articles 34 to 36 TFEU] preclude national provisions, such as those in the [national] regulations, prohibiting the use of personal watercraft other than on a general navigable waterway or waters in respect of which the local authority has issued rules permitting their use?
 - (b) In the alternative, do [Articles 34 to 36 TFEU] prevent a Member State from applying provisions of that kind in such a way as to prohibit the use of personal watercraft also on waters which have not yet been the subject of an investigation by the local authority of whether or not rules permitting their use in the area are to be issued?
2. Does Directive [94/25] preclude such national provisions prohibiting the use of personal watercraft as set out above?’

The questions referred for a preliminary ruling

- 16 By those 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 34 and 36 TFEU] are to be interpreted as meaning that they preclude national regulations, such as those at issue in the main proceedings, which prohibit the use of personal watercraft on waters other than designated waterways.

The interpretation of Directive 94/25

- 17 By amending the initial version of Article 1 of Directive 94/25, Directive 2003/44 widened the scope of that directive *inter alia* to include personal watercraft.
- 18 Under Article 3(1) of Directive 2003/44 Member States had to adopt the laws, regulations and administrative provisions necessary to comply with the requirements of that directive by 30 June 2004. Member States were required to apply such measures as from 1 January 2005.
- 19 It follows that Directive 2003/44 was not applicable at the time when the events in the main proceedings involving personal watercraft occurred.
- 20 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.

- 21 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.
- 22 The national regulations at issue in the main proceedings fall within the category of national measures covered by Article 2(2) of Directive 94/25. Those regulations provide for a general prohibition on the use of personal watercraft on waters other than general navigable waterways. Under the first subparagraph of Paragraph 3 of those regulations, the länsstyrelsen may designate for the county the waters other than general navigable waterways on which personal watercraft may be used. However, the länsstyrelsen must issue such rules in respect of the waters referred to in points 1 to 3 of Paragraph 3 of those regulations.
- 23 Consequently, it must be examined whether [Articles 34 and 36 TFEU] preclude national regulations such as those in the main proceedings.

The interpretation of [Articles 34 and 36 TFEU]

- 24 It must be borne in mind that measures taken by a Member State, the aim or effect of which is to treat goods coming from other Member States less favourably and, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, even if those rules apply to all products alike, must be regarded as ‘measures having equivalent effect to quantitative restrictions on imports’ for the purposes of [Article 34 TFEU] (see to that effect, Case 120/78 *Rewe-Zentral (Cassis de Dijon)* [1979] ECR 649, paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67). Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept (see Case C-110/05 *Commission v Italy* [2009] ECR I-0000, paragraph 37).
- 25 It is apparent from the file sent to the Court that, at the material time, no waters had been designated as open to navigation by personal watercraft, and thus the use of personal watercraft was permitted on only general navigable waterways. However, the accused in the main proceedings and the Commission of the European [Union] maintain that those waterways are intended for heavy traffic of a commercial nature making the use of personal watercraft dangerous and that, in any event, the majority of navigable Swedish waters lie outside those waterways. The actual possibilities for the use of personal watercraft in Sweden are, therefore, merely marginal.
- 26 Even if the national regulations at issue do not have the aim or effect of treating goods coming from other Member States less favourably, which is for the national court to ascertain, the restriction which they impose on the use of a product in the territory of a Member State may, depending on its scope, have a considerable influence on the behaviour of consumers, which may, in turn, affect the access of that product to the market of that Member State (see to that effect, *Commission v Italy*, paragraph 56).
- 27 Consumers, knowing that the use permitted by such regulations is very limited, have only a limited interest in buying that product (see to that effect, *Commission v Italy*, paragraph 57).
- 28 In that regard, where the national regulations for the designation of navigable waters and waterways have the effect of preventing users of personal watercraft from using them for the specific and inherent purposes for which they were intended or of greatly restricting their use, which is for the national court to ascertain, such regulations have the effect of hindering the access to the domestic market in question for those goods and therefore constitute, save where

there is a justification pursuant to [Article 36 TFEU] or there are overriding public interest requirements, measures having equivalent effect to quantitative restrictions on imports prohibited by [Article 34 TFEU].

- 29 Moreover, in either case, the national provision must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it (see *Commission v Italy*, paragraph 59 and the case-law cited).
- 30 The Swedish Government maintains that the national regulations are justified by the objective of environmental protection and by the objectives referred to in [Article 36 TFEU]. The restriction on the use of personal watercraft to particular waters makes it possible, inter alia, to prevent unacceptable environmental disturbances. The use of personal watercraft has negative consequences for fauna, in particular where such a craft is used for a lengthy period on a small area or driven at great speed. The noise as a whole disturbs people and animals and above all certain protected species of birds. Furthermore, the easy transport of personal watercraft facilitates the spread of animal diseases.
- 31 It must be pointed out, in that regard, that, according to [Article 36 TFEU], [Article 34 TFEU] does not preclude prohibitions or restrictions on imports justified inter alia on grounds of the protection of health and life of humans, animals or plants.
- 32 Furthermore, according to settled case-law, national measures capable of hindering intra-[Union] trade may be justified by the objective of protection of the environment provided that the measures in question are proportionate to the aim pursued (see Case C-524/07 *Commission v Austria* [2008] ECR I-0000, paragraph 57 and the case-law cited).
- 33 As the protection of the environment, on the one hand, and the protection of health and life of humans, animals and plants, on the other hand, are, in the present case, closely related objectives, they should be examined together in order to assess whether regulations such as those at issue in the main proceedings are justified.
- 34 It is not open to dispute that a restriction or a prohibition on the use of personal watercraft are appropriate means for the purpose of ensuring that the environment is protected. However, for the national regulations to be capable of being regarded as justified, it is also incumbent on the national authorities to show that their restrictive effects on the free movement of goods do not go beyond what is necessary to achieve that aim.
- 35 The Swedish Government maintains that the prohibition on the use of personal watercraft leaves users of those craft with not less than 300 general navigable waterways on the Swedish coast and on the large lakes, which constitutes a very extensive area. Furthermore, the geographical position of those aquatic areas in Sweden precludes measures of a scope different from that of the provisions in the national regulations at issue in the main proceedings.
- 36 In that regard, although it is possible, in the present case, to envisage that measures other than the prohibition laid down in Paragraph 2 of the national regulations could guarantee a certain level of protection of the environment, the fact remains that Member States cannot be denied the possibility of attaining an objective such as the protection of the environment by the introduction of general rules which are necessary on account of the particular geographical circumstances of the Member State concerned and easily managed and supervised by the national authorities (see, by analogy, *Commission v Italy*, paragraph 67).
- 37 The national regulations provide for a general prohibition of the use of personal watercraft on waters other than general navigable waterways save where the länsstyrelsen designates waters, other than general navigable waterways, on which personal watercraft may be used. In that

regard, the länsstyrelsen, under Paragraph 3 of the national regulations, must in any event issue such rules in the circumstances set out by that paragraph.

- 38 As regards the allegedly necessary nature of the measure in question, it must therefore be held that the wording of the national regulations themselves suggests that, on waters which must be designated by implementing measures, personal watercraft may be used without giving rise to risks or pollution deemed unacceptable for the environment. It follows that a general prohibition on using such goods on waters other than general navigable waterways constitutes a measure going beyond what is necessary to achieve the aim of protection of the environment.
- 39 Regulations such as those at issue in the main proceedings may, in principle, be regarded as proportionate provided that, first, the competent national authorities are required to adopt such implementing measures, secondly, those authorities have actually made use of the power conferred on them in that regard and designated the waters which satisfy the conditions provided for by the national regulations and, lastly, such measures have been adopted within a reasonable period after the entry into force of those regulations.
- 40 It follows that national regulations such as those at issue in the main proceedings may be justified by the aim of the protection of the environment provided that the above conditions are complied with. It is for the national court to ascertain whether those conditions have been satisfied in the main proceedings.
- 41 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 (Case C-450/06 *Varec* [2008] ECR I-581, paragraph 23). 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, inter alia, Case C-49/07 *MOTOE* [2008] ECR I-0000, paragraph 30).
- 42 In the main proceedings, the national regulations had been in force only for about three weeks at the material time in those proceedings. The fact that measures to implement those regulations had not been adopted at a time when those regulations had only just entered into force ought not necessarily to affect the proportionality of those regulations in so far as the competent authority may not have had the necessary time to prepare the measures in question, a matter which falls to be determined by the national court.
- 43 Furthermore, if the national court were to find that implementing measures were adopted within a reasonable time but after the material time of the events in the main proceedings and that those measures designate as navigable waters the waters in which the accused in the main proceedings used personal watercraft and consequently had proceedings brought against them, then, for the national regulations to remain proportionate and therefore justified in the light of the aim of protection of the environment, the accused would have to be allowed to rely on that designation; that is also dictated by the general principle of [Union] law of the retroactive application of the most favourable criminal law and the most lenient penalty (see, to that effect, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 68).
- 44 In the light of the foregoing, the answer to the questions referred is that Directive 94/25, as amended by Directive 2003/44, 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 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.

Costs

- 45 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) hereby rules:

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.

[Articles 34 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.

[Signatures]