OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 December 2006 [1]

I — Introduction

1. The present reference for a preliminary ruling raises the question whether Articles 28 EC and 30 EC or 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 [2] (hereinafter: the Recreational Craft Directive) preclude Swedish rules on the use of personal watercraft. There are therefore grounds to examine the extent to which national provisions by which the use of products is restricted should be assessed on the basis of Article 28 EC.

2. The main proceedings concern the criminal liability of two defendants who are accused of having infringed the Swedish jet-ski regulations [3] (hereinafter: the Swedish regulations). Under those regulations, the use of personal watercraft other than on general navigable waterways and on waters on which the county administrative board has permitted the use of personal watercraft is prohibited and punishable by a fine.

3. This reference for a preliminary ruling also gives cause to interpret 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 [4] (hereinafter: the Information Directive).

II — Legal framework

A — *Community law*

4. The scope of the Recreational Craft Directive initially covered only recreational craft.

1 — Original language: German.

2 — 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 amending Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft (OJ 2003 L 214, p. 18).

3 — Regulations 1993:1053, which entered into force on 15 July 2004.

4 — 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).

The scope of the directive was extended to include personal watercraft by Directive 2003/44/EC.

5. Article 2(2) of the Recreational Craft Directive provides:

'The provisions of this Directive shall 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 this does not require modification to craft conforming to this Directive.'

6. Article 4(1) of the Recreational Craft Directive states:

'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'.

7. Article 1 of the Information Directive provides:

'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.

…'

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

9. Under the third subparagraph of Article 8(1) of the Information Directive, Member States must 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.

10. Under the third subparagraph of Article 9(2), the Member State concerned must report to the Commission on the action it proposes to take on detailed opinions. The Commission shall comment on this reaction.

11. Article 10(1) provides for various situations where the obligation to notify does not apply.

B — *National law*

12. The Swedish jet-ski regulations (1993:1053) entered into force in the version applicable in the present case on 15 July 2004.

13. For the purposes of the Swedish regulations a personal watercraft is a craft of less than four metres in length which has an internal combustion engine with a water jet

unit as its primary source of propulsion and is designed to be operated by a person or persons sitting, standing or kneeling on, rather than within the confines of, the hull.

14. Under Paragraph 2 of the regulations, personal watercraft may be used only on general navigable waterways and on such waters as defined in Paragraph 3(1).

15. Paragraph 3 of the regulations provides as follows:

'The länsstyrelsen may issue rules regarding the waters in the county, other than general navigable waterways, on which personal watercraft 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 personal watercraft 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 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 personal watercraft 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 designation of general navigable waterways for the use of personal watercraft, 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 general navigable waterways.'

16. Paragraph 5 of the regulations provides that anyone who drives a personal watercraft in violation of Paragraphs 2, 3 or rules issued under Paragraph 3 shall be subject to a fine.

17. According to the referring court, the Sjöfartsverket (National Maritime Administration) decides what are to be regarded as general navigable waterways and publishes this in its statute book. General navigable waterways are designated on maritime charts. A general navigable waterway may be established if the waterway is of material importance for general traffic, if it is of material importance for the fishing industry or if it is of material importance for recreational craft traffic and is necessary for the safety of the waterway.

III — Facts and main proceedings

18. A Swedish Public Prosecutor has brought proceedings before the Luleå Tingsrätt (Luleå District Court) [5] (Sweden) against Percy Mickelsson and Joakim Roos (hereinafter: the defendants in the main proceedings). They are accused of having driven personal watercraft on 8 August 2004 on waters on which personal watercraft may not be used under the Swedish regulations. It is common ground that those waters are neither general navigable waterways within the meaning of the Swedish regulations, on which personal watercraft may be driven, nor had the competent county administrative board permitted the use of personal watercraft on those waters pursuant to Article 3 of the Swedish regulations.

19. In their defence, the defendants in the main proceedings essentially claim that the Swedish regulations are contrary to Community law since they infringe Articles 28 and 30 EC, the Recreational Craft Directive and the Information Directive.

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

20. By order of 21 March 2005, the Luleå Tingsrätt stayed its proceedings and made reference to the Court of Justice for a preliminary ruling on the following questions:

1. (a) Do Articles 28 EC to 30 EC preclude national provisions, such as those in the Swedish jet-ski 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?

5 — Hereinafter also: the referring court.

(b) In the alternative, do Articles 28 EC to 30 EC 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 2003/44/EC of the European Parliament and of the Council of 16 June 2003 amending Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft preclude such national provisions prohibiting the use of personal watercraft as set out above?

21. In the proceedings before the Court, written and oral observations were submitted by the defendants in the main proceedings, the Swedish, Norwegian and Austrian Governments and the Commission. The German Government submitted written observations.

V — Assessment

22. The questions asked by the referring court are to be answered in reverse order; it is necessary first to examine the legislative content of the Recreational Craft Directive. If it transpires that the directive contains exhaustive rules on the use of personal watercraft, it would not be possible, within their scope and in the context of the examination of Article 28 EC, to justify unilateral national measures under Article 30 EC. [6]

A — *Interpretation of the Recreational Craft Directive*

1. Application in time of the Recreational Craft Directive

23. The defendants in the main proceedings derive from the directive a right to unrestricted use of personal watercraft and therefore consider the conflicting Swedish rules to be inapplicable. However, it must be examined whether the directive is applicable at all as regards time.

6 — See inter alia Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 19, Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32, and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 64.

24. The Recreational Craft Directive has applied to personal watercraft only since it was amended by Directive 2003/44. Under Article 3(1) of Directive 2003/44, the directive had to be implemented by 30 June 2004, although the implementing rules did not have to be applied by the Member States until 1 January 2005 (hereinafter: the application period). The offences which are the subject-matter of the main proceedings occurred on 8 August 2004, after the end of the implementation period, but before the end of the application period. If, as is to be assumed, national law takes the time when the offence was committed as the basis for assessing criminal liability, the problem therefore arises that the application period for the directive had not yet ended at that time. It must be considered whether this prevents the defendants relying on the directive.

25. A directive is not directly applicable before the end of the implementation period. [7] This must also be the case for the course of the application period. In order to substantiate the applicability in time of the directive, the defendants rely on the Court's case-law according to which the Member States may not take any measures during the implementation period which are liable seriously to compromise the result prescribed by the directive. [8] However, the direct applicability of the directive does not follow from this either. [9]

26. Nevertheless, it follows from the principle of the retroactive application of the more lenient penalty, [10] as recognised in Community law, that a defendant may claim impunity from prosecution or reduced criminal liability in respect of his act under a directive even where the implementation or application period for the directive had ended at the time of the conviction, but not at the time the offence was committed. The principle of the retroactive application of the more lenient penalty is based on the idea that a defendant should not be convicted for behaviour that is no longer punishable at the time of the conviction based on the modified view of the legislature. [11] If a directive provision therefore precludes criminal liability at the time of the conviction, the defendant must be able to rely on these assessments by the Community legislature, which regards the conduct in question as exempt from punishment, even if the application or implementation period for the directive had not yet ended at the time of the offence. Nor does this constitute a departure from the principle that a directive provision cannot be directly applicable during its implementation or application period, since the defendants benefit from the more

7 — Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 16, and Case C-348/98 *Mendes Ferreira* [2000] ECR I-6711, paragraph 33. The situation appears to be different, according to the judgment in Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 78, in the case where a general principle of Community law lies behind a directive provision. With regard to interpretation in conformity with a directive see Case C-212/04 *Adeneler* [2006] ECR I-6057, paragraph 123 et seq.

8 — See Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58, and Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, paragraph 42.

9 — Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 69.

10 — See, with regard to the existence of this principle in Community law, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 69.

11 — See in this regard my Opinion in Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 69 et seq., and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 155 et seq.

favourable assessments under the directive retroactively only at the time of the conviction.

27. Against this background, it must therefore be examined below whether Directive 94/25 precludes national rules prohibiting the use of personal watercraft in principle other than on general navigable waterways, for the purpose of protection of the environment, and, moreover, permits such use only on waters which the county administrative boards have designated for the use of personal watercraft.

2. Legislative content of the Recreational Craft Directive

28. In the view of the governments which have submitted observations, the Recreational Craft Directive governs only the technical requirements for personal watercraft and not their use. It is not therefore possible to infer from it any prohibition of national restrictions on the use of personal watercraft either. The defendants in the main proceedings, on the other hand, understand the Recreational Craft Directive as precluding any restriction on the use of personal watercraft if they satisfy the technical requirements laid down in the Recreational Craft Directive. They base their arguments on Article 4(1) of the directive. Under that provision Member States may not prohibit, restrict or impede the placing on the market and/or putting into service of personal watercraft which meet the requirements laid down in the directive. The question therefore arises whether national rules which limit the possibilities for using personal watercraft constitute an unlawful restriction of putting into service within the meaning of Article 4(1).

29. It is settled case-law that, in interpreting a provision of Community law, its wording, context and objectives must all be taken into account. [12]

30. The natural meaning of the expression 'putting into service' suggests that it does not cover any use behaviour, since the broad range of uses of equipment takes place after it is simply put into service and must be distinguished from it. In particular, in general parlance rules concerning putting into service are understood to mean provisions which relate to the requirements for the equipment to be put into service and thus deal with its characteristics, whilst rules on use are rules which concern the use of equipment which has already been put into service, i.e. the way in which it is used. Provisions on putting into service and on use therefore have clearly different regulatory objects. In so far as the Community legislature employs the specific term 'putting into service' in Article 4(1) of the directive, this precludes a reading under which national

12 — See, most recently, Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 34, and Case C-323/03 *Commission* v *Spain* [2006] ECR I-2161, paragraph 32.

restrictions on use are also covered by the prohibition.

31. This conclusion is confirmed by Article 2(2) of the Recreational Craft Directive, to which the governments making submissions rightly refer. Article 2(2) makes clear that the directive does 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 this does not require modification to craft conforming to this directive'.

32. Aside from simple traffic rules,'provisions concerning navigation' undoubtedly also mean restrictions on use, since in navigation — as in road transport — different forms of restriction going as far as the exclusion of individual means of transport are conventional means of control. They therefore cover both rules on the way watercraft are used and rules on where they are used. Even though Article 2(2) mentions only provisions concerning navigation on 'certain' waters in this regard, the provision make clear that rules on use are not harmonised by the directive.

33. A teleological interpretation also confirms that only technical requirements and not use are the regulatory object of the Recreational Craft Directive.

34. Thus, the directive's 12th recital expressly states that the directive does not contain any provisions directed towards limiting the use of the recreational craft after it has been put into service. It can be seen from other recitals that the directive merely seeks to remove barriers to trade resulting from different technical requirements through the harmonisation of technical requirements for recreational craft and personal watercraft. [13]

35. The historical background also confirms that the Recreational Craft Directive does not seek to lay down rules on the use of personal watercraft, but only to harmonise the technical requirements for personal watercraft. [14] In the Council's Common Position on the amendment of Directive 94/25 it is stated that after the amendment of the directive the possibilities for Member States to apply stricter standards regarding the use of certain types of boats are being maintained. [15] Special restrictions on the use are subject to

13 — See the second, third and fifth recitals of the Recreational Craft Directive.

14 — See Case C-310/90 *Egle* [1992] ECR I-177, paragraph 12, on using the historical background to confirm a conclusion reached by means of another interpretation method.

15 — Common Position (EC) No 40/2002 of 22 April 2002 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council amending Directive 94/25/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft (OJ 2002 C 170 E, p. 1, especially p. 16).

national legislation following the principle of subsidiarity. [16]

36. A comprehensive interpretation of the Recreational Craft Directive therefore shows that the directive sought to harmonise only the technical requirements, but not the use of recreational craft and personal watercraft. [17]

3. Interim conclusion

37. Therefore, to summarise:

The Recreational Craft Directive does not preclude national provisions prohibiting the use of personal watercraft for the purpose of protection of the environment provided they do not infringe the provisions of the Treaty, in particular Article 28 EC. It must therefore be examined below whether Articles 28 EC and 30 EC preclude national rules like the Swedish regulations.

16 — Common Position (cited in footnote 15, p. 19).

17 — See also, to that effect, Case C-83/05 *Voigt* [2006] ECR I-6799, paragraph 17 et seq.

B — *Interpretation of Articles 28 EC and 30 EC*

1. Article 28 EC — Measure having equivalent effect

38. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

39. In the view of the Commission, restrictions on use as contained in the Swedish regulations constitute measures having equivalent effect.

(a) Dassonville formula

40. According to the definition developed by the Court in *Dassonville* all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. [18]

18 — See inter alia Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11, and Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135, paragraph 15.

41. According to the arguments put forward by the defendants in the main proceedings — which are, however, disputed by the Swedish Government — the restriction on the use of personal watercraft introduced by the new Swedish regulations would lead to a fall in personal watercraft sales of more than 90 per cent. Accordingly, the Swedish regulations would impair trade between Member States directly and *actually*. In any case, however, according to the *Dassonville* formula a *potential* impairment would be sufficient for classification as a measure having equivalent effect. At any rate it is not inconceivable that national rules restricting the number of waters on which personal watercraft may be used have a bearing on purchasers' interest in that product and thus lead to a decline in sales and therefore also to a decline in sales of products from other Member States. Such national rules are therefore at least potentially capable of impairing trade between Member States. Accordingly, the Swedish regulations would constitute a measure having equivalent effect.

(b) Application of the *Keck* criteria to arrangements for use

42. However, because the *Dassonville* formula is so broad, ultimately any national rules restricting the use of a product may be classified as a measure having equivalent effect and need to be justified.

43. The question therefore arises which the Court also raised — albeit in another connection — in its judgment in *Keck*, which is whether any measure which potentially also affects the volume of sales of products from other Member States can be characterised as a measure having equivalent effect. [19]

44. It becomes clear that this question regarding arrangements for use, that is to say national rules governing how and where products may be used, is particularly pressing when we consider a few examples.

45. For example, a prohibition on driving cross-country vehicles off-road in forests or speed limits on motorways would also constitute a measure having equivalent effect. In the case of these restrictions on use too, it could be argued that they possibly deter people from purchasing a cross-country vehicle or a particularly fast car because they could not use them as they wish and the restriction on use thus constitutes a potential hindrance for intra-Community trade.

19 — See Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (cited in footnote 18, paragraph 13).

46. With regard to the delimitation of the broad scope of Article 28 EC when the *Dassonville* formula is applied, the Court has attempted from time to time to exclude national measures whose effects on trade are too uncertain and too indirect from the scope of Article 28 EC. [20] However, an argument against these criteria is that they are difficult to clarify and thus do not contribute to legal certainty.

47. Instead I suggest excluding arrangements for use in principle from the scope of Article 28 EC, in the same way as selling arrangements, where the requirement set out by the Court in *Keck and Mithouard* is met.

48. In its judgment in *Keck and Mithouard* the Court found that there is an increasing tendency of traders to invoke Article 28 EC as a means of challenging any rules whose effect is to limit their *commercial freedom* even where such rules are not aimed at products from other Member States. [21] In the context of arrangements for use, ultimately individuals may even invoke Article 28 EC as a means of challenging national rules whose effect is merely to limit their *general freedom of action*.

49. With regard to *selling arrangements* the Court ruled in *Keck and Mithouard* that the application to products from other Member States of such national provisions is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [22] The '*Keck* exception' does not cover *product-related rules*, which relate to the characteristics of products. [23] The judgment in *Keck and Mithouard* concerned the prohibition on selling goods below the purchase price. Following that judgment the Court has for example classified prohibitions on Sunday trading and the prohibition on anyone other than specially authorised retailers selling tobacco as provisions on selling arrangements. [24]

50. The consequence of this case-law is that national rules which satisfy the selling arrangement criterion do not fall within the scope of Article 28 EC with the result that they

20 — Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009, paragraph 12, Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033, paragraph 22, and Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, paragraph 31, in which the criterion '*too insignificant and uncertain' is used. With regard to freedom to provide services* see Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 38.

21 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (cited in footnote 18, paragraph 14).

22 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (cited in footnote 18, paragraph 16).

23 — Case C-470/93 *Mars* [1995] ECR I-1923, paragraph 13, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 11. With regard to a proposed modification of the *Keck* criteria, in particular in order to avoid difficulties in distinguishing between product-related and sales-related rules, see the Opinion of Advocate General Poiares Maduro of 30 March 2006 in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos* [2006] ECR I-8135, paragraph 42 et seq.

24 — See Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355 and Case C-387/93 *Banchero* [1995] ECR I-4663.

are permissible under Community law without the need for the Member State to justify them.

51. Against this background the present case now gives grounds to consider whether arrangements for use should not, by analogy with the Court's ruling in *Keck*, be excluded from the scope of Article 28 EC.

52. If we consider the characteristics of arrangements for use and selling arrangements, it is clear that they are comparable in terms of the nature and the intensity of their effects on trade in goods.

53. Selling arrangements apply in principle only after a product has been imported. Furthermore, they indirectly affect the marketing of a product through consumers, for example because they cannot buy the product on certain days of the week or advertising for a product is subject to restrictions. Arrangements for use also affect the marketing of a product only indirectly through their effects on the purchasing behaviour of consumers.

54. National legislation which governs selling arrangements is not normally designed to regulate trade in goods between Member States. [25] A national legislature does not in general seek to regulate trade between Member States with arrangements for use either.

55. Against this background, it therefore appears logical to extend the Court's *Keck* case-law to arrangements for use and thus to exclude such arrangements from the scope of Article 28 EC.

56. Consequently, a national provision restricting or prohibiting certain arrangements for use does not come under the prohibition laid down by Article 28 EC, so long as it is not product-related, so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

25 — See, for example, Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (cited in footnote 18, paragraph 12) for the national prohibition on selling below the purchase price. It should be made clear that the criterion of intention cannot in itself be a suitable distinguishing criterion.

(c) Application of the *Keck* criteria to the present case

57. The Swedish regulations are not product-related since they do not make use dependent in particular on personal watercraft meeting technical requirements other than those harmonised in the Recreational Craft Directive. The restriction on use does not therefore require any modifications to the personal watercraft themselves.

58. The Swedish regulations also apply to all relevant traders operating within the national territory, since they do not discriminate according to the origin of the products in question.

59. However, it is uncertain whether the Swedish regulations affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. At first sight, this requirement is also met. A restriction on use may make a product less attractive to consumers and thus impair the marketing of the product. However, as a rule domestic products and foreign products are affected in the same manner by that consequence.

60. Nevertheless, it became apparent in the oral procedure that Sweden does not produce personal watercraft domestically. It must therefore be considered how the fact that there is no domestic production affects the examination of the *Keck* criterion, according to which products from other Member States and domestic products must be affected in the same manner by the national rules.

61. In connection with a *selling arrangement*, the Court has ruled that the existence of domestic production cannot be relevant. [26] As grounds the Court states that such a purely fortuitous factual circumstance may, moreover, change with the passage of time; if it were the relevant factor, this would have the illogical consequence that the same legislation would fall under Article 28 EC in certain Member States but not in other Member States, depending on whether or not there was domestic production. The situation would be different only if the national rules at issue protected domestic products which were similar to products covered by the contested rule or which were in competition with those products. [27]

62. Those principles can be applied by analogy to arrangements for use. It must therefore be examined whether the national measure *protects* domestic products which are in competition in the sense that it affects

26 — Case C-391/92 *Commission* v *Greece* [1995] ECR I-1621, paragraph 17.

27 — Case C-391/92 *Commission* v *Greece* (cited in footnote 26, paragraph 18).

products from other Member States more than competing domestic products.

63. Motorboats are possibly products which are in competition with personal watercraft. In the absence of sufficient factual information it is not possible to assess in the present case whether motorboats are in competition with personal watercraft and whether personal watercraft are more affected by the Swedish rules than the comparable domestic products; this is a question for the national court. If the referring court answers these questions in the negative, the Swedish rules would not fall within the scope of Article 28 EC for that reason. If, on the other hand, the questions are to be answered in the affirmative, the referring court would then be required to examine whether the unequal treatment could be justified on grounds of protection of the environment. [28] However, there could be no justification under the second sentence of Article 30 EC if the Swedish rules proved to be a protectionist measure or arbitrary discrimination. [29]

64. However, it is possibly not actually necessary, for the purposes of assessing the present case, to examine whether there are domestic products which are in competition with personal watercraft and whether those comparable products are less affected by the Swedish rules.

65. In its judgment in *Keck* the Court held that national selling arrangements which satisfy the *Keck* criteria are not by nature such as to *prevent* their access to the market or to impede access any more than they impede the access of domestic products and therefore fall outside the scope of Article 28 EC. [30]

66. It may be concluded from this finding that, conversely, a national measure restricting or prohibiting an arrangement for use is not excluded from the scope of Article 28 EC if it prevents access to the market for the product in question. [31]

67. In this respect it is not only rules which result in complete exclusion, such as a general prohibition on using a certain product, that are to be regarded as preventing access to the market. A situation where only a marginal

28 — With regard to the justification of a difference in treatment, see for example Case C-322/01 *Deutscher Apothekerverband* (cited in footnote 6, paragraph 75 et seq.).

29 — See Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraph 21.

30 — Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* (cited in footnote 18, paragraph 17).

31 — Whether a measure prevents access to the market or impedes access to the market significantly is often also regarded as a crucial criterion for determining the scope of Article 28 EC; see the Opinions of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, point 38 et seq., and of Advocate General Stix-Hackl in Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 78.

possibility for using a product remains because of a particularly restrictive rule on use is to be regarded as preventing access to the market.

68. It is for the national court to decide whether national rules prevent access to the market. In the present case there are several reasons to suggest that the Swedish rules prevent access to the market for personal watercraft. The provisions of the Swedish regulations lay down a prohibition on the use of personal watercraft with the sole exception of use on general navigable waterways — at least for the period until the county administrative boards have designated other waters for the use of personal watercraft.

69. In determining whether the Swedish rules amount to general prohibition on use in the transitional period until other waters have been designated by the county administrative boards the crucial question is whether permission to use personal watercraft on general navigable waterways is given more than a merely marginal importance which does not affect the character of the Swedish regulations as a general prohibition on use.

70. The Swedish Government has argued that there are roughly 300 such general navigable waterways, although it was not able to indicate the surface covered by the general navigable waterways. On the other hand, the statement by the defendants in the main proceedings during the oral procedure gave the impression that despite their number general navigable waterways offer only marginal possibilities for using personal watercraft. They claimed that such waterways simply do not exist in much of the country, they are not interconnected, are difficult to reach and, moreover, are often not suitable for the use of personal watercraft on safety grounds, since they are, for example, frequently used by heavy tankers or are a long way from the coast. The Commission also takes the view that the rules amount to a complete prohibition on use. The exclusion of general navigable waterways from the prohibition on using personal watercraft does not therefore appear to affect the character of the Swedish regulations as a fundamental prohibition on use during the transitional period until other waters have been designated by the county administrative boards. It is irrelevant that the prevention of access to the market would be only temporary since access would be prevented not only for a negligibly short period.

71. For the purposes of the examination it will therefore be assumed hereinafter that the Swedish rules constitute a barrier to access to the market and that they should not therefore be excluded from the scope of Article 28 EC. In order to be compatible with Community law they must therefore be justified under Article 30 EC or by imperative requirements in the general interest.

72. If the referring court finds that the Swedish regulations are not to be classified as a barrier to access to the market, it would have to undertake the examination described above, but put aside, that is to say it would have to investigate whether there are domestic products which are in competition with personal watercraft which are less affected in law or in fact. [32]

2. Justification

73. According to the *Cassis-de-Dijon* case-law, national measures having equivalent effect which apply without distinction may be justified where they are necessary in order to satisfy imperative requirements. [33] Since the Swedish rules do not discriminate according to the origin of the product, they are applicable without distinction to domestic products and to products from other Member States. [34] The Swedish Government relies on protection of the environment in order to justify its regulations on the use of personal watercraft. This is recognised as an imperative requirement in case-law. [35] The Court has also repeatedly stressed that protection of the environment constitutes one of the essential objectives of the Community. [36]

74. The national rules must also comply with the principle of proportionality, that is to say they must be appropriate, necessary and suitable for the purpose of attaining the desired objective. [37] This means in particular that if a Member State has a choice between equally appropriate measures it should choose the means which least restricts the free movement of goods. [38]

75. On account of their exhaust and noise emissions and because they can be ridden in areas where there are breeding and spawning grounds, personal watercraft can cause damage to the environment. Against the background of the various negative effects of personal watercraft on the environment, to which all the governments which have made submission in the proceedings have referred, national rules which limit the use of personal watercraft are undoubtedly appropriate for the purpose of protecting the environment.

32 — See point 63 of this Opinion.

33 — Case 120/78 *Rewe* (*'Cassis de Dijon'*) [1979] ECR 649, paragraph 8; Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraph 10 et seq.

34 — The question can therefore remain open whether in the Court's case-law the requirement of applicability without distinction has been abandoned in favour of the imperative requirement of the protection of the environment in particular; see, to this effect, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 75.

35 — See Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8, and Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 22.

36 — Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 32, and Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 72.

37 — See inter alia Case C-463/01 *Commission* v *Germany* [2004] ECR I-11705, paragraph 78, and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 79.

38 — See Case 261/81 *Rau* [1982] ECR 3961, paragraph 12, and Case C-270/02 *Commission* v *Italy* [2004] ECR I-1559, paragraph 25.

76. However, it must still be considered whether national rules like the Swedish regulations are *necessary*, i.e. whether there is no equally appropriate but less onerous means of protecting the environment.

77. As far as necessity is concerned, the question arises first of all whether rules which differentiate according to the way in which the personal watercraft in question is used would constitute a less drastic, but equally appropriate, means. The defendants in the main proceedings have argued that personal watercraft have different effects on the environment depending on the way they are used. Thus, only the use of personal watercraft as sports vehicles or toys, with the characteristic circuit driving and fast acceleration, is detrimental to the environment, whereas the use of personal watercraft as a means of transport would not have any greater effects on the environment in terms of noise and exhaust emissions than small motor boats — indeed it would even have lesser effects as a result of lower fuel consumption.

78. Even assuming that these statements are correct, [39] however, the Swedish rules could not be classified as disproportionate for that reason, since compliance with rules that differentiate according to the driving method would, as the Swedish Government has rightly pointed out, be more difficult to monitor and to implement than rules which prohibit use on certain waters in principle, and are not therefore equally appropriate.

79. However, the principle of proportionality could possibly require national rules on the use of personal watercraft to distinguish between different types of personal watercraft. The defendants in the main proceedings have argued that a distinction should be drawn between different kinds of personal watercraft. Only jet-skis would be used for play and sport and are characterised by driving methods which are harmful to the environment. Personal watercraft, on the other hand, would merely be used as a means of transport and are even less damaging to the environment than motorboats, which are also to be taken into consideration. The Court does not have all the information on the properties and effects of different kinds of personal watercraft to give a definitive answer to the question of proportionality from this point of view. Nor was it possible to infer from the statements made by the other parties to the proceedings before the Court that such a differentiation could be made with regard to effects on the environment; rather, they took the view that all personal watercraft had identical characteristics. If, however, the referring court is able to confirm that different kinds of personal watercraft also have different effects on the environment in terms of intensity, it would have to take into account, when examining the question of proportionality, the extent to which a proportionate measure on the use of personal watercraft can include such a differentiation on grounds of protection of the environment.

39 — It would be for the referring court to assess these points of fact.

80. In a situation like the present case, nor does the principle of proportionality preclude the criminalisation of a prohibition which may be necessary in order to reinforce the prohibition, in particular because the penalty is only a fine.

81. The Swedish regulations, aside from general navigable waterways, chose the form of a fundamental prohibition subject to authorisation and not the less drastic form of authorisation subject to prohibition. General authorisation subject to prohibition as a rule constitutes the less drastic measure. Nevertheless, the principle of proportionality does not automatically require that approach to be taken. Authorisation subject to prohibition would have to be equally appropriate for the purpose of protecting the environment. In assessing this question, particular attention should be paid to the specific regional features of each Member State. In this regard, the Swedish Government has argued that Sweden is characterised by a very large number of lakes and a long coast with sensitive flora and fauna which require protection. Against this background, Sweden's argument that in view of the specific geographical features the approach of authorisation subject to prohibition is not practicable and as such not equally appropriate as the opposite model of prohibition subject to authorisation is persuasive.

82. However, problems appear to be raised by the proportionality of rules like the Swedish regulations in view of the fact that during the period until a decision is taken by the county administrative boards the use of personal watercraft is generally prohibited other than on general navigable waterways.

83. This means that until a decision is taken by the county administrative boards riding is also prohibited on waters in respect of which the protection of the environment may not actually require this. The Swedish rules themselves assume that aside from general navigable waterways there are waters on which protection of the environment would permit personal watercraft to be used.

84. However, if it were required that until other waters are designated by the county administrative boards personal watercraft may be ridden, this could mean that the flora and fauna of many waters which are sensitive to encroachments by personal watercraft would be destroyed irretrievably. Such rules would not therefore be as appropriate for the protection of the environment as the approach chosen.

85. In order to satisfy the principle of proportionality, however, as the Commission has rightly pointed out, rules like the contested regulations must include a deadline by which the county administrative boards must have complied with their obligation to designate other waters. As Norway has rightly

stated, the length of the deadline must take account of the fact that the county administrative boards require a certain time to obtain the information that they require in order to decide on which waters the use of personal watercraft has no detrimental effect. On the other hand, the legal certainty of traders, such as importers of personal watercraft, requires that the date by which the county administrative boards must have taken their decisions be fixed in order to allow those traders, amongst other things, to plan their business. As the Swedish Government acknowledged in the oral procedure, by the time of the oral procedure only 15 of 21 counties had adopted relevant provisions. National rules which do not provide by which date a very far-reaching prohibition of personal watercraft remains therefore breach the principle of proportionality.

86. If use of a certain category of personal watercraft were permissible without any great restriction before the Swedish regulations were adopted — according to the submissions made by the defendants in the main proceedings this seems to have been the case for personal watercraft —, the principle of proportionality could also require that a transitional period should have been introduced for them. [40]

40 — Case C-320/03 *Commission* v *Austria* [2005] ECR I-9871, paragraph 90, and Case C-463/01 *Commission* v *Germany* (cited in footnote 37, paragraphs 79 and 80), and Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* (cited in footnote 37, paragraphs 80 and 81).

3. Interim conclusion

87. Thus, to summarise:

National legislation which lays down arrangements for use for products does not constitute a measure having equivalent effect within the meaning of Article 28 EC so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related. However, prohibitions on use or national legislation which permit only a marginal use for a product, in so far as they (virtually) prevent access to the market for the product, constitute measures having equivalent effect which are prohibited under Article 28 EC, unless they are justified under Article 30 EC or by an imperative requirement.

National rules which also lay down a prohibition on using personal watercraft in waters in respect of which the county administrative boards have not yet taken any decision on whether protection of the environment requires a prohibition on use there are disproportionate and therefore not justified unless they include a reasonable deadline by which the county administrative boards must have taken the relevant decisions.

C — *Interpretation of the Information Directive*

88. Finally, it must be considered what requirements the Information Directive imposes for the adoption of the Swedish regulations.

89. The referring court has not explicitly asked the Court of Justice for an interpretation of the Information Directive, but it nevertheless appears appropriate, on the basis of the parties' submissions in particular, to give the referring court the information necessary in order to examine whether there is a breach of the obligation to notify under the Information Directive.

90. With regard to the subject-matter of references for preliminary rulings, the Court has ruled that the right to determine the questions to be brought before the Court devolves upon the national court alone and the parties may not change the tenor of the questions. [41] On the other hand, as the Court has consistently held, in the procedure laid down by Article 234 EC 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. [42]

91. An answer which will be of use in the present reference for a preliminary ruling must also include a discussion of the implications of the Information Directive for the Swedish regulations, since according to the Court's case-law the infringement of the obligation to notify laid down in the Information Directive renders the unnotified provision inapplicable and therefore unenforceable against individuals. [43]

92. If the obligation to notify laid down in the Information Directive was breached in the adoption of the Swedish regulations, the referring court should not therefore rely on the Swedish regulations as grounds for the criminal liability of the defendants in the main proceedings. An answer which will be of use to the referring court must also therefore consider this aspect of the conformity of the Swedish regulations with Community law.

93. Furthermore, not only have the parties raised the aspect of the Information Directive, but the referring court itself also considered the subject in its order for reference. In that order it stated that the defendants in the main proceedings had complained that the Swedish Government had failed to notify the Commission of the Swedish regulations in the correct manner and therefore they were invalid and were not to be applied.

41 — Case C-402/98 *ATB* [2000] ECR I-5501, paragraph 29, and Case C-412/96 *Kainuun* [1998] ECR I-5141, paragraph 23.

42 — Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 32, Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraph 18, and Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22.

43 — Case C-303/04 *Lidl Italia* [2005] ECR I-7865, paragraph 23, and Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraph 54, on the predecessor Directive 83/189/EWG.

94. Under Article 8(1) of the Information Directive Member States must immediately communicate to the Commission any draft technical regulation. Under Article 1 a 'technical regulation' for the purposes of the Information Directive includes a 'technical specification', 'other requirement' or a law, regulation or administrative provision prohibiting inter alia the use of a product.

95. Rules like the Swedish regulations do not come under the first-mentioned category of 'technical specifications'. For that purpose they would have to lay down the characteristics required of a product in accordance with Article 1(3) of the Information Directive. [44] However, the Swedish regulations do not lay down any characteristics required of personal watercraft.

96. However, the Swedish regulations may be either an 'other requirement' or a 'technical regulation' within the meaning of the Information Directive.

97. On the one hand, they may be an 'other requirement' within the meaning of Article 1(4) of the Information Directive since in that article 'other requirements' are defined as a requirement imposed on a product for the purpose of protecting, in particular, the environment, and which affects its life cycle after it has been placed on the market, such as conditions for its use, where such conditions can significantly influence the composition or nature of the product or its marketing.

98. However, it might also be possible to classify the prohibition on the use of personal watercraft contained in the Swedish regulations as a 'technical regulation' within the meaning of Article 1(11) of the Information Directive. Under that provision, 'technical regulations' are inter alia laws of Member States prohibiting the use of a product.

99. The Court has stated that the classification of a national measure in one or the other of the categories depends on the scope of the prohibition laid down by that measure. [45] The prohibition on use laid down in Article 1(11) must be a measure whose scope goes well beyond a limitation to certain possible uses of the product and must thus not be confined to a mere restriction of its use; it is therefore 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. [46]

44 — See, with regard to the essentially identical provisions of the predecessor Directive 83/189/EEC, Case C-267/03 *Lindberg* [2005] ECR I-3247, paragraph 57, and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paragraph 30.

45 — See Case C-267/03 *Lindberg* (cited in footnote 44, paragraph 74).

46 — Case C-267/03 *Lindberg* (cited in footnote 44, paragraph 75 et seq.).

100. If the Swedish regulations amount to a de facto general prohibition on the use of personal watercraft, at least for the period until the county administrative boards have designated other waters for the use of personal watercraft, and leave room for only a marginal use of personal watercraft, the Swedish regulations would fall within the scope of Article 1(11) of the Information Directive. It is for the referring court to make the final assessment on whether the Swedish regulations constitute a prohibition on use in that sense. [47]

101. If the examination by the referring court reveals that the national restriction on use is not a prohibition on use within the meaning of Article 1(11), the Swedish regulation could possibly be regarded as a requirement within the meaning of Article 1(3). For that purpose the restriction on use would also have to influence significantly the composition or nature of the product or its marketing. The contested regulations influence neither the composition nor the nature of the product. However, it appears likely that the contested national restriction on use does significantly influence the marketing of personal watercraft. This would again have to be ascertained definitively by the referring court.

102. National provisions which fall within the scope ratione materiae of the Information Directive must be communicated to the Commission pursuant to Article 8(1) of the Commission. However, Article 10(1) of the Information Directive provides for exceptions to this generally applicable obligation to notify.

103. The obligation to notify ceases to apply under the first indent of Article 10(1) of the Information Directive where the Member States adopt laws by which they comply with binding Community acts which result in the adoption of technical specifications. The Court has already ruled that Article 2(2) of the Recreational Craft Directive, under which Member States have the power to adopt provisions concerning navigation, does not constitute a binding Community act in this sense. [48]

104. Under the third indent of Article 10(1) of the Information Directive the obligation to notify ceases to apply if the Member States adopt laws which make use of safeguard clauses provided for in binding Community acts. In Article 7 the Recreational Craft Directive contains a provision which is expressly entitled 'safeguard clause'. Under that provision, the Member States may take certain interim measures in situations of serious danger to humans or the environment, for example. However, the provisions of the Swedish regulations are not interim measures, with the result that for that reason they do not constitute an application of Article 7 of the

47 — See Case C-267/03 *Lindberg* (cited in footnote 44, paragraph 77).

48 — Judgment of 8 September 2005 in Case C-500/03 *Commission* v *Portugal*, not published in the ECR, which may be consulted at www.curia.europa.eu, paragraph 34.

Recreational Craft Directive and the obligation to notify cannot be inapplicable for that reason either. [49]

105. The obligation to notify likewise ceases to apply under the sixth indent of Article 10(1) of the Information Directive where Member States restrict themselves to amending a technical regulation, in accordance with a Commission request, with a view to removing an obstacle to trade. However, this exception can be relevant only where specific amendments have been proposed by the Commission and they have been implemented precisely by a Member State. Only in such a case does the purpose of a prior check pursued by the obligation to notify cease to apply, since the Commission already knows which national provision is being adopted and no longer needs to check this. However, there has been nothing in the proceedings before the Court to indicate that such a situation had existed in the present case.

106. The Swedish regulations should therefore have been communicated to the Commission pursuant to Article 8(1) of the Information Directive.

107. As the Commission argued in the oral procedure before the Court of Justice, a first draft of the Swedish regulations was communicated to the Commission on 1 April 2003. [50] Thereupon the Commission sent the Swedish Government a detailed opinion within the meaning of the first subparagraph of Article 9(2) of the Information Directive on 27 June 2003. Receipt of such a detailed opinion initiates a three-month standstill obligation under Article 9(1), i.e. the Member State must wait three months before adopting planned and notified rules. The Swedish Government also complied with this standstill period since, according to the statement made by the Commission in the oral procedure, it did not adopt the final text of the Swedish regulations until 10 June 2004. [51] At first sight the Swedish Government therefore appears to have complied with the notification requirement and the standstill period under Articles 8 and 9.

108. According to the defendants in the main proceedings, however, the text of the regulations finally adopted departs from the draft notified to the Commission. In any case, as is apparent from the Commission's statements in the oral procedure, the text finally adopted was not notified again to the Commission before it was adopted. The question therefore arises in this connection whether under the Information Directive the text of the regulations should have been notified again in the version in which they were adopted before they were adopted.

49 — Case C-500/03 *Commission* v *Portugal* (cited in footnote 48, paragraph 37).

50 — See also the Commission's TRIS database (see http://ec.europa.eu/enterprise/tris/pisa/app/search/index.cfm?fuseaction=pisa_notif_overview&iYear=2003&inum=119&-lang=EN&sNLang=EN).

51 — The jet-ski regulations then entered into force on 15 July 2004.

109. An obligation to give notification again of an amended draft could follow from two considerations.

110. First of all, under the third subparagraph of Article 8(1), a Member State is required to communicate the draft again if it makes 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. A breach of the obligation to notify again must, just like a breach of the initial obligation to notify, render the unnotified rule inapplicable. The spirit and purpose of the Information Directive is to protect, by means of preventive monitoring of national measures, the free movement of goods. [52] This monitoring can be carried out by the Commission effectively only if it is also notified of significant changes to the notified draft.

111. According to the information available to the Court, however, there are grounds to assume that the regulations adopted do not contain any significant changes compared with the notified draft. The content of the notified original draft was to have been a fundamental prohibition of the use of personal watercraft other than on general navigable waterways. It appears that the last adopted modification only incorporated into the regulations the duty of the county administrative boards to designate other waters for use by personal watercraft. That change would not constitute a 'significant change' within the meaning of the Information Directive, since the change would make the requirement not more restrictive, but less so, also in terms of a possible effect on trade in goods, which the Information Directive seeks to protect by means of preventive monitoring. However, the question whether significant changes were made to the draft of the notified regulations and whether the changes were not notified again must be assessed definitively by the referring court, which is competent to interpret national law and which can ascertain the times and the contents of the relevant communications which are necessary for the assessment.

112. The second consideration to be examined stems from the third subparagraph of Article 9(2) of the Information Directive. Under that provision, a Member State must report to the Commission on the action it proposes to take on such detailed opinions, following which the Commission must comment on this reaction. In the present case, however, according to the statement made by the Commission in the oral procedure, the Swedish Government reacted only after the contested national regulations were adopted. Nevertheless, in the oral procedure the Commission rightly pointed out that this does not produce any legal consequences. If there is no dialogue between the Commission and the Member State, as provided for in the third subparagraph of Article 9(2), this cannot

52 — See Case C-303/04 *Lidl Italia* (cited in footnote 43, paragraph 22), Case C-194/94 *CIA Security International* (cited in footnote 43, paragraph 40) and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 32.

render the national regulation inapplicable, since the Information Directive permits a Member State in principle to adopt a national measure even where the Commission has objected to it, provided it was notified and the standstill requirement has expired. Furthermore, the Member State is also required to notify again any significant change to a draft. These requirements imposed on the Member State's action are sufficient for the purpose of effective preventive monitoring by the Commission, which is the aim of the Information Directive. In addition, it is not necessary for the purposes of effective monitoring by the Commission to make the penalty for failure by the Member State to react to the Commission's detailed opinion the inapplicability of the national measure.

113. Therefore, to summarise:

Under the Information Directive, a Member State is required to notify again a regulation which has already been notified only under the conditions mentioned in the third subparagraph of Article 8(1).

VI — Conclusion

114. On the basis of the above considerations, I propose that the Court give the following answers to the referring court:

(1) Directive 94/25/EC as amended by Directive 2003/44/EC does not preclude national provisions prohibiting the use of personal watercraft for the purpose of protection of the environment provided they do not infringe the provisions of the Treaty, in particular Article 28 EC.

(2) National legislation which lays down arrangements for use for products does not constitute a measure having equivalent effect within the meaning of Article 28 EC so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related. However, prohibitions on use or national legislation which permit only a marginal use for a product, in so far as they (virtually) prevent access to the market for the product, constitute measures having equivalent effect which are prohibited under Article 28 EC, unless they are justified under Article 30 EC or by an imperative requirement.

(3) National rules which also lay down a prohibition on using personal watercraft in waters in respect of which the county administrative boards have not yet taken any decision on whether protection of the environment requires a prohibition on use there are disproportionate and therefore not justified unless they include a reasonable deadline by which the county administrative boards must have taken the relevant decisions.

(4) Under the Information Directive, a regulation which has already been notified must be notified again by a Member State only under the conditions referred to in the third subparagraph of Article 8(1).