

JUDGMENT OF THE COURT (Third Chamber)

8 November 2007*

In Case C-20/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale civile e penale di Forlì (Italy), made by decision of 14 December 2004, received at the Court on 21 January 2005, in the criminal proceedings relating to

Karl Josef Wilhelm Schwibbert,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus (Rapporteur), J. Klucka, A. Ó Caoimh and P. Lindh, Judges,

Advocate General: V. Trstenjak,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2007,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

- Mr Schwibbert, by A. Sirotti Gaudenzi, avvocato,

- Società Italiana degli Autori ed Editori, by M. Mandel and M. Siragusa, avvocati,

- the Italian Government, by I.M. Braguglia, acting as Agent, and by S. Fiorentino and M. Massella Ducci Teri, avvocati dello Stato,

- the Commission of the European Communities, by L. Pignataro and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 3 EC, Articles 23 EC to 27 EC, Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society

services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18; 'Directive 98/34'), Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

- 2 The reference was made in criminal proceedings brought against Mr Schwibbert in Italy, in which he was charged with holding compact discs ('CDs') which did not bear the distinctive sign of the national body responsible for collecting copyright royalties.

Legal context

Community legislation

- 3 Council Directive 83/189/EEC of 28 March 1983 (OJ 1983 L 109, p. 8) introduced a procedure for the provision of information in the field of technical standards and regulations into Community law.
- 4 Article 12 of Directive 83/189 is worded as follows:

'1. Member States shall bring into force the measures necessary in order to comply with this Directive within 12 months following its notification and shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field governed by this Directive are communicated to the Commission.'

5 Directive 83/189 has been variously and substantially amended, and was consolidated by Directive 98/34.

6 Article 1 of Directive 98/34 provides:

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

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

...

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

...

- (4) “other requirements”, a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

...

- (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.

...’

- 7 Articles 8 and 9 of Directive 98/34 require Member States to notify the Commission of the European Communities of any draft technical regulation falling within its scope, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard is sufficient, and to postpone the adoption of such drafts for several months to allow

the Commission to verify that they are compatible with Community law, and in particular with the principle of free movement of goods, or to propose a directive, a regulation or a decision on the question.

- 8 Directive 92/100 aims to harmonise the legal protection for copyright works and for the subject-matter of related rights protection. It seeks to ensure that authors and performers receive an adequate income. To that end, Directive 92/100 states that the Member States are to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject-matter as set out in Article 2(1) of that directive. In Chapter II of Directive 92/100, concerning rights related to copyright, Article 9 provides that Member States are to provide for the exclusive right to make available to the public, by sale or otherwise, the objects listed in that article.

National legislation

- 9 According to Law No 633 of 22 April 1941 on copyright (GURI No 166 of 16 July 1941; 'the 1941 Law'), the mandatory requirement to affix a distinctive sign to any medium containing protected works is an authentication tool and safeguard enabling legitimate products to be distinguished from pirated products. The Società Italiana degli Autori ed Editori (Italian Society of Authors and Publishers), an ad hoc public body, has protection, mediation and certification responsibilities. The distinctive sign thus provided for by the law bears the initials 'SIAE'.
- 10 Law No 121/87 of 27 March 1987 (GURI No 73 of 28 March 1987) extended the requirement to affix the distinctive sign 'SIAE' to other media containing intellectual works.

11 When transposing Directive 92/100, the Italian legislature introduced into the 1941 Law — pursuant to Legislative Decree No 685 of 16 November 1994 (GURI No 293 of 16 December 1994) which repealed Law No 121/87 — inter alia, Article 171b(1)(c), a provision which imposes specific criminal penalties and which is worded as follows:

‘1. Any person who:

...

(c) sells or rents video cassettes, music cassettes or any other medium containing phonograms or videograms of cinematographic or audiovisual works or sequences of moving images which do not bear the mark of the Italian Society of Authors and Publishers (SIAE) in accordance with this law and with the implementing regulation

shall be punished with a term of imprisonment of between three months and three years and with a fine of between ITL 500 000 and ITL 6 000 000.

...’

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

12 On 12 February 2000, the Procura della Repubblica presso il Tribunale civile e penale di Forlì (Public Prosecutor at the Civil and Criminal Court of Forlì) opened a judicial investigation in respect of Mr Schwibbert, resident in Italy, the legal representative of the company K.J.W.S. Srl, and confirmed that, on 9 and 10 February 2000, Mr Schwibbert was holding a certain number of CDs of

reproductions of the works of the artists Giorgio De Chirico and Mario Schifano for sale in the company's warehouses. Those CDs, which were imported from Germany on behalf of other companies with a view to being sold at cultural events, did not bear the distinctive 'SIAE' sign.

- 13 In the course of inquiries carried out on 9 and 10 February 2000 by members of the Guardia di Finanza — Comando Tenenza di Cesena (Financial Investigation Unit — Cesena Headquarters), a record of the seizure of those CDs was drawn up in accordance with the Code of Criminal Procedure, in which it was stated that, after initial examination, the goods appeared to be counterfeit.
- 14 On 23 May 2001, the Procura della Repubblica presso il Tribunale civile e penale di Forlì interviewed Mr Schwibbert and charged him with having committed an offence under Article 171b(1)(c) of the 1941 Law, and brought him before the aforementioned court.
- 15 The hearing before the Tribunale di Forlì civile e penale was held on 14 December 2004. In the record of the hearing, the referring court states that it is not alleged that Mr Schwibbert reproduced the works unlawfully, since he had the necessary authorisations, but only that the CDs did not bear the distinctive 'SIAE' sign.
- 16 At that hearing, Mr Schwibbert's lawyer called on the court to refer a question to the Court of Justice for a preliminary ruling. The Tribunale civile e penale di Forlì granted the application but, in its order for reference, the court merely attached the lawyer's statement and did not formulate specific questions itself.
- 17 On 17 July 2006, the Court of Justice requested clarification from the national court, pursuant to Article 104(5) of the Rules of Procedure. The referring court's reply was received at the Court of Justice on 31 October 2006.

18 According to that reply, the question referred by the Tribunale civile e penale di Forlì is as follows:

‘Are the national provisions concerning the affixing of the SIAE marking compatible with Article 3 EC, Articles 23 EC to 27 EC, Articles 1, 8, 10 and 11 of Directive 98/34 and Directives 92/100 and 2001/29?’

The question referred for a preliminary ruling

Admissibility

19 In its written observations and at the hearing, the Italian Government submitted that the reference for a preliminary ruling should be dismissed as inadmissible. In its view, the reference does not contain the information necessary to enable the Court to provide a helpful answer to the question referred. In that regard, the Italian Government claims that, contrary to the requirements of Article 20 of the Statute of the Court of Justice, the reference does not specify why the interpretation of Community rules is necessary and does not clearly set out the national provisions which are actually applicable to the main proceedings. In any event, the reference is irrelevant to the outcome of those proceedings.

20 The Commission claims in its written observations that the question referred must be declared inadmissible in so far as it relates to the interpretation of Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100 owing to the absence of sufficient information in the order for reference.

- 21 It should be borne in mind that the information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also enable the governments of the Member States and other interested parties to submit observations pursuant to Article 20 of the Statute of the Court of Justice (order in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5). It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties (Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6; order in Case C-326/95 *Banco de Fomento e Exterior* [1996] ECR I-1385, paragraph 7; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, paragraph 23). Thus, according to the case-law of the Court, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (see, in particular, order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16, and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 38).
- 22 In the present case, as stated in paragraph 17 of this judgment, the referring court provided clarification at the request of the Court of Justice as to the facts of the dispute in the main proceedings and the legal framework under national and Community law. Furthermore, the Società Italiana degli Autori ed Editori, the Italian Government and the Commission took the view that it was possible to submit observations to the Court on the basis of the information provided by the referring court.
- 23 As regards Directive 98/34, the interested parties differ in their views as to whether the obligation to affix the distinctive sign 'SIAE' applies to the CDs at issue in the main proceedings and, if at all, at what point that obligation was extended to such media, that is to say before or after the obligation to notify draft technical regulations was introduced into Community law. There is no dispute in the present case about the fact that criminal proceedings were initiated against Mr Schwibbert in respect of the failure to affix the 'SIAE' sign. However, determining the point at

which the affixing obligation was in fact brought into Italian law is a matter of interpreting national law, which is not within the Court's jurisdiction. In any event, the uncertainty on that point is not such as to render it impossible for the Court to provide a useful answer to the question referred as clarified by the referring court as requested.

- 24 In those circumstances, the Court considers that it has sufficient information to enable it to reply to the question concerning Directive 98/34.
- 25 By contrast, as regards the interpretation of Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100, it must be held that the order for reference does not provide the information necessary to enable the Court to provide the referring court with a useful reply.
- 26 It must be borne in mind that those EC Treaty provisions prohibit — between Member States — customs duties on imports and exports and all charges having equivalent effect. Directive 92/100 harmonises the rules relating to rental right and lending right and to certain rights related to copyright in the field of intellectual property.
- 27 However, the particulars provided by the referring court in relation to the factual background to the dispute in the main proceedings do not enable the place where the CDs were manufactured to be determined with any certainty, or the fact that they were actually imported into Italy to be established. As far as the information concerning the national legal framework is concerned, this does not give the Court sufficient information about the characteristics of the financial consideration given for obtaining the distinctive sign 'SIAE' so as to enable the Court to determine whether it amounts to a customs duty or a charge having equivalent effect within the meaning of the aforementioned articles of the Treaty. Nor, finally, do those particulars enable the Court to assess whether Directive 92/100 precludes such national rules.

- 28 In those circumstances, it is not possible to give a ruling on whether Article 3 EC, Articles 23 EC to 27 EC and Directive 92/100 preclude an obligation such as that which is in dispute in the main proceedings.
- 29 In addition, it must be noted that the question referred also concerns the interpretation of Directive 2001/29. That directive is based on the principles and rules already laid down, inter alia, by Directive 92/100, which it amends. Directive 2001/29 was adopted on 22 May 2001 and Article 13 thereof provides that the Member States must comply with it before 22 December 2002. However, the events underlying the main proceedings occurred in February 2000, before the directive was adopted. Therefore, the question referred for a preliminary ruling is inadmissible in so far as it concerns the interpretation of Directive 2001/29.
- 30 Consequently, the reference for a preliminary ruling may be deemed admissible only in so far as it concerns the interpretation of Directive 98/34.

Substance

- 31 By its question, the referring court asks, in essence, whether Articles 1, 8, 10 and 11 of Directive 98/34 preclude national provisions such as those at issue in the main proceedings, inasmuch as the latter provide for the initials of the Società Italiana degli Autori ed Editori to be affixed to media containing reproductions of intellectual works.

- 32 In that regard, the documents before the Court show that, in the main proceedings, criminal proceedings were initiated against Mr Schwibbert for failing to affix that distinctive sign to CDs of works of figurative art. It is necessary therefore to consider whether the Community legislation referred to by the national court precludes national provisions imposing such an obligation.
- 33 First, it is necessary to consider whether the obligation to affix such initials can be described as a ‘technical regulation’ within the meaning of Article 1 of Directive 98/34. If so, it will be necessary to check whether the draft technical regulation was notified to the Commission by the Italian authorities, failing which it would be unenforceable against Mr Schwibbert (see, in particular, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 48 and 54; Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 33; and Case C-159/00 *Sapod Audic* [2002] ECR I-5031, paragraph 49).
- 34 It follows from Article 1(11) of Directive 98/34 that the definition of ‘technical regulation’ can be broken down into three categories: first, the ‘technical specification’ within the meaning of Article 1(3) of that directive; second, the ‘other requirement’, as defined in Article 1(4); and, third, the prohibition of the manufacture, importation, marketing or use of a product referred to in Article 1(11) (see, in particular, Case C-267/03 *Lindberg* [2005] ECR I-3247, paragraph 54).
- 35 As the Court has held, the concept of technical specification presupposes that the national measure refers to the product or its packaging as such and thus lays down one of the characteristics required of a product (see, to that effect, Case C-278/99 *van der Burg* [2001] ECR I-2015, paragraph 20; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 45; and also *Sapod Audic*, paragraph 30, and *Lindberg*, paragraph 57).

- 36 In the present case, it is clear, as the Advocate General has stated in points 46 and 48 of her Opinion, that the distinctive sign 'SIAE', which is intended to inform consumers and the national authorities that the reproductions are lawful, is affixed to the actual medium containing the intellectual work and thus to the product itself. It is not, therefore, correct to maintain, as the Società Italiana degli Autori ed Editori and the Italian Government have done, that that sign relates solely to the intellectual work.
- 37 Such a distinctive sign constitutes a 'technical specification' within the meaning of Article 1(3) of Directive 98/34, since it falls within the requirements applicable to the products concerned as regards marking or labelling. Therefore, since observance of that specification is compulsory *de jure* for marketing those products, the specification constitutes a 'technical regulation' within the meaning of Article 1(11) of that directive (see, to that effect, Case C-13/96 *Bic Benelux* [1997] ECR I-1753, paragraph 23).
- 38 Under Article 8 of Directive 98/34, 'Member States shall immediately communicate to the Commission any draft technical regulation'. In the event of non-compliance with that obligation, the technical regulation remains unenforceable against individuals, as has been noted in paragraph 33 of this judgment. It is necessary therefore to ascertain whether, in the present case, the Member State has fulfilled its obligations under Article 8 of Directive 98/34. If it has not, the technical regulation at issue would be unenforceable against Mr Schwibbert.
- 39 The Società Italiana degli Autori ed Editori and the Italian Government claim that the obligation to affix the distinctive sign 'SIAE' to media containing intellectual works was already provided for in respect of paper media under the 1941 Law — some considerable time before the entry into force of the relevant Community directives — and that the statutory amendments introduced after their entry into force, in 1987 and 1994 respectively, did no more than bring the legislation into line with technological progress, merely including new media within the scope of that obligation. Accordingly, those statutory amendments did not have to be notified to the Commission.

40 In the present case, the documents submitted to the Court appear to show that the obligation to affix the distinctive sign 'SIAE' became applicable to the media at issue in the main proceedings, namely CDs of works of figurative art, in 1994 by virtue of Legislative Decree No 685. Accordingly, that obligation should have been communicated to the Commission by the Italian Republic because it arose after the introduction, by Directive 83/189, of the procedure for the provision of information in the field of technical standards and regulations. Nevertheless, as has been pointed out in paragraph 23 of this judgment, it is for the referring court to ascertain whether the obligation at issue had in fact been brought into Italian law at that point.

41 In so far as the obligation to affix the distinctive sign 'SIAE' was extended to products such as those at issue in the main proceedings after the implementation of Directive 83/189, it must be borne in mind that, according to settled case-law, the aim of the second part of the first subparagraph of Article 8(1) of Directive 98/34 is to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by the Directive (see, in particular, *CIA Security International*, paragraph 50; Case C-279/94 *Commission v Italy* [1997] ECR I-4743, paragraph 40; and Case C-145/97 *Commission v Belgium* [1998] ECR I-2643, paragraph 12).

42 Similarly, according to the third subparagraph of Article 8(1) of Directive 98/34, 'Member States shall communicate the draft again ... if they make changes to the draft that have the effect of significantly altering its scope ...'. The inclusion of new media, such as CDs, within the scope of the obligation to affix the distinctive sign 'SIAE' must be regarded as such a change (see, to that effect, Case C-317/92 *Commission v Germany* [1994] ECR I-2039, paragraph 25, and *Lindberg*, paragraphs 84 and 85).

- 43 The Commission stated in its written observations and at the hearing, without being contradicted by the Italian Republic in that regard, that that change was not communicated to the Commission by the Italian Republic.
- 44 According to the case-law of the Court, failure to observe the obligation to notify constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against individuals (see, in particular, *CIA Security International*, paragraph 54, and *Lemmens*, paragraph 33). Individuals may rely on that inapplicability before the national court which must decline to apply a national technical regulation which has not been notified in accordance with Directive 98/34 (see, in particular, *CIA Security International*, paragraph 55, and *Sapod Audic*, paragraph 50).
- 45 In view of those points, it must be held that Directive 98/34 is to be interpreted as meaning that national provisions such as those at issue in the main proceedings — in so far as such provisions introduced, after the implementation of Directive 83/189, the obligation to affix the distinctive sign ‘SIAE’ to CDs of works of figurative art for the purposes of marketing them in the Member State concerned — constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

Costs

- 46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that national provisions such as those at issue in the main proceedings — in so far as such provisions introduced, after the implementation of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, the obligation to affix the distinctive sign ‘SIAE’ to compact discs of works of figurative art for the purposes of marketing them in the Member State concerned — constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

[Signatures]