31 mai. Nr. 4. 1918 Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer [avtaleloven].

§ 33. Selv om en viljeserklæring ellers maatte ansees for gyldig, binder den ikke den, som har avgit den, hvis det paa grund av omstændigheter, som forelaa, da den anden part fik kundskap om erklæringen, og som det maa antages, at han kjendte til, vilde stride mot redelighet eller god tro, om han gjorde erklæringen gjældende.

§ 36. En avtale kan helt eller delvis settes til side eller endres for så vidt det ville virke urimelig eller være i strid med god forretningsskikk å gjøre den gjeldende. Det samme gjelder ensidig bindende disposisjoner.

Ved avgjørelsen tas hensyn ikke bare til avtalens innhold, partenes stilling og forholdene ved avtalens inngåelse, men også til senere inntrådte forhold og omstendighetene for øvrig.

Reglene i første og annet ledd gjelder tilsvarende når det ville virke urimelig å gjøre gjeldende handelsbruk eller annen kontraktrettslig sedvane.

Høyesterett – dom

(Tromsø Sparebankdommen) Avtaleloven § 33 m.v. – gyldigheten av kausjonserklæring.

Avsagt: **13.01.1984 i sak Rt-1984-28**

A hadde undertegnet en selvskyldnerkausjonserklæring for et firmas kassekreditt (kr. 300.000) i en bank. Firmaet gikk senere konkurs. Høyesterett antok at kausjonserklæringen var ugyldig etter avtaleloven § 33, og at den iallfall ville rammes av ulovfestede regler om lojalitet i kontraktsforhold. Man fant at A ikke ville avgitt kausjonserklæringen hvis han hadde hatt kjennskap til de faktiske forhold, og at banken burde forstått dette. I denne forbindelse ble det bl.a. lagt vekt på at kassekreditten var åpnet 1/2 år før kausjonserklæringen ble avgitt, at kassekreditten da var betydelig overtrukket, og at en annen selvskyldnerkausjon ikke var blitt avgitt. Uttalelser om bankens opplysningsplikt i forhold til de krav som måtte stilles til A's undersøkelsesplikt. – A ble under dissens (4–1) tilkjent saksomkostninger for alle retter.

Dommer Holmøy: Saken gjelder spørsmålet om distriktslege Kåre Kristoffersen, Andenes, er ansvarlig som selvskyldnerkausjonist for en kassekreditt på 300000 kroner med tillegg av renter og omkostninger som Varesenteret A/S, samme sted, hadde i Tromsø Sparebank.

På samme måte som herredsretten og lagmannsretten legger jeg til grunn at Kristoffersen ble feilinformert og villedet av Ludvigsen om forhold som måtte være av vesentlig betydning for hans vurdering av om han ville påta seg kausjonsansvar for Varesenterets kassekreditt.
Side 34
Jeg slutter meg også for øvrig i det vesentlige til herredsrettens og lagmannsrettens

bevisvurdering. Jeg finner det dog ikke tvilsomt at Kristoffersen ikke ville undertegnet noen kausjonserklæring dersom han hadde hatt kjennskap til de faktiske forhold. Jeg sikter i denne forbindelse først og fremst til at kassekreditten var åpnet for et halvt år siden da Kristoffersen avgav sin kausjonserklæring, at den da hadde vært overtrukket i ca to måneder, og at Ludvigsens far ikke hadde kausjonert.

Videre mener jeg – og for så vidt i strid med de tidligere retter – at Tromsø Sparebank burde forstått at Kristoffersen ikke ville stillet seg som selvskyldnerkausjonist dersom han hadde hatt kjennskap til disse forhold.

Det har i saken vært anført at Tromsø Sparebank ikke opptrådte i strid med vanlig bankpraksis ved å åpne kassekreditten før de avtalte sikkerheter var stillet, at det ikke er noe ekstraordinært ved at en kassekreditt overtrekkes, og at overtrekk av en kassekreditt i seg selv ikke er noen indikasjon på at debitor er i økonomiske vanskeligheter. Det er også anført at en kausjonist i alminnelighet ikke kan påberope seg som en relevant forutsetning at en annen kausjon blir avgitt. Jeg går ikke inn på noen generell vurdering av de momenter jeg her har nevnt. I denne sak er forholdene slik at banken etter min mening ikke kan bygge noen rett på Kristoffersens kausjonserklæring når den ikke foretok seg noe for å bringe på det rene om Kristoffersen hadde fått opplysninger som banken burde forstått måtte være relevante for hans vurdering. Jeg mener for min del at kausjonserklæringen er ugyldig etter avtaleloven § 33, men iallfall vil den rammes av ulovfestede regler om lojalitet i kontraktsforhold.

Selv om det som hevdet er vanlig bankpraksis at en bank tillater at en kassekreditt åpnes før den betingede sikkerhet er stillet, vil jeg peke på at banken i dette tilfelle tok en risiko ved å åpne kassekreditten. Ifølge en revisorerklæring som er ny for Høyesterett, hadde Varesenteret fra og med 1976 hatt betydelige underskudd, og selskapet var ved utgangen av juni 1978 insuffisient og med stor sannsynlighet også insolvent. Den sannsynlige årsak til at banken åpnet kassekreditten før sikkerhetene var stillet, finner jeg ikke grunn til å gå inn på.

Videre peker jeg på at det i dette tilfelle tok ekstraordinært lang tid før den avtalte sikkerhet ble stillet, og det til tross for at banken purret flere ganger, skriftlig og muntlig. Banken måtte etter hvert forstå at Varesenteret hadde økonomiske vanskeligheter og hadde store problemer med å skaffe de avtalte sikkerheter, bortsett fra de sikkerheter som skulle stilles av Ludvigsen selv og hans ektefelle. Banken måtte også forstå at Ludvigsen etter hvert var kommet i en alvorlig pressituasjon. Dette må gjelde selv om man ser bort fra Ludvigsens uttalelser om at banken truet med å melde fra om forholdet, blant annet til Bankinspeksjonen. Spesielt vanskelig måtte situasjonen være for Ludvigsen og Varesenteret etter at kassekreditten var overtrukket.

For så vidt angår utviklingen av kassekreditten, vil jeg for øvrig nevne at kontoen fra mai måned var betydelig overtrukket. Det er opplyst at bankens revisor påtalte forholdet med de manglende sikkerheter. Da banken mottok Kristoffersens kausjonserklæring i slutten

av juni, kunne banken for lengst ha brakt kassekreditten til forfall. I ettertid må situasjonen vurderes slik at tapet for banken allerede var oppstått da den mottok Kristoffersens kausjonserklæring. Selv om dette ikke stod klart for banken da den mottok kausjonserklæringen, forelå det på denne tid så vidt alarmerende signaler at banken ikke uten videre kunne stole på at Ludvigsen hadde gitt Kristoffersen de opplysninger han som kausjonist måtte ha krav på å bli kjent med.

Tromsø Sparebank har lagt vesentlig vekt på den rekommanderte melding den sendte Kristoffersen den 22. desember 1977. Det må legges til grunn, og er også erkjent av banken, at Kristoffersen ikke leste meldingen, og derfor heller ikke fikk den underretning som banken ville gi. Jeg tilføyer i denne forbindelse at Kristoffersen har gitt en forklaring på hvorfor han ikke kom til å lese denne melding som subjektivt må anses plausibel i den situasjon som forelå. Jeg viser til hans anførsler i lagmannsrettens dom. – Men selv om det forutsettes at Kristoffersen hadde lest meldingen, hadde han etter min mening likevel ikke fått slik informasjon at hans kausjonserklæring kunne anses gyldig. Jeg peker i denne forbindelse på at meldingen var positivt uriktig for så vidt den kan synes å gi uttrykk for at Kristoffersen allerede hadde stillet selvskyldnerkausjon. For en adressat som vitterlig ikke hadde stillet noen kausjon, måtte en slik melding virke forvirrende. Etter min mening var meldingen også uklar, særlig for dem som ikke har spesiell innsikt i hvordan slike meldinger utformes. Når det dessuten tas i betraktning at det gikk over et halvt år før Kristoffersen avgav noen kausjonserklæring, og kassekreditten i denne tid ble betydelig overtrukket, kan banken ikke anses for å ha oppfylt sin informasjonsplikt ved den rekommanderte melding.

[...]

Hvilke krav det skal stilles til bankens opplysningsplikt, må vurderes i forhold til de krav som må stilles til Kristoffersens undersøkelsesplikt. Selv om det som utgangspunkt må forutsettes at en kausjonist selv må undersøke og vurdere debitors økonomiske situasjon, og om det er stillet annen sikkerhet, kan dette forhold ikke være avgjørende i denne sak. Av de momenter som jeg har redegjort for, og som begrunner en opplysningsplikt for banken, peker jeg i denne forbindelse særlig på at bankens tap i realiteten var oppstått da banken mottok kausjonserklæringen. I en slik situasjon er det mindre grunn til å

beskytte banken enn om det hadde vært spørsmål om kausjon for et mulig fremtidig tap. Videre peker jeg på at i forholdet mellom banken og Kristoffersen er det banken som klart utpeker seg som den profesjonelle part.

[...]

Jeg stemmer for denne

dom:

Kåre Kristoffersen frifinnes. . [...]

Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814,

§ 110 c.

Det paaligger Statens Myndigheder at respektere og sikre Menneskerettighederne.

Nærmere Bestemmelser om Gjennemførelsen af Traktater herom fastsættes ved Lov .

21 mai. Nr. 30. 1999

Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven).

§ 1. Lovens formål er å styrke menneskerettighetenes stilling i norsk rett.

§ 2. Følgende konvensjoner skal gjelde som norsk lov i den utstrekning de er bindende for Norge:

1. Europarådets konvensjon 4. november 1950 om beskyttelse av menneskerettighetene og de grunnleggende friheter som endret ved ellevte protokoll 11. mai 1994 og fjortende protokoll 13. mai 2004, med følgende tilleggsprotokoller:
   a. Protokoll 20. mars 1952,
   b. Fjerde protokoll 16. september 1963 om beskyttelse av visse rettigheter og friheter som ikke allerede omfattes av konvensjonen og av første tilleggsprotokoll til konvensjonen,
   c. Sjette protokoll 28. april 1983 om opphevelse av dødsstraff,
   d. Syvende protokoll 22. november 1984,
   e. Trettende protokoll 21. februar 2002 om avskaffelse av dødsstraff under enhver omstendighet,
2. De forente nasjoners internasjonale konvensjon 16. desember 1966 om økonomiske, sosiale og kulturelle rettigheter,
3. De forente nasjoners internasjonale konvensjon 16. desember 1966 om sivile og politiske rettigheter med følgende tilleggsprotokoller:
   a) Valgfri protokoll 16. desember 1966,
   b) Annen valgfri protokoll 15. desember 1989 om avskaffelse av dødsstraff.
4. De forente nasjoners internasjonale konvensjon 20. november 1989 om barnets rettigheter med følgende tilleggsprotokoller:
   a) Valgfri protokoll 25. mai 2000 om salg av barn, barneprostitusjon og barnepornografi,
   b) Valgfri protokoll 25. mai 2000 om barn i væpnet konflikt
5. De forente nasjoners internasjonale konvensjon 18. desember 1979 om avskaffelse av alle former for diskriminering av kvinner med tilleggsprotokoll 6. oktober 1999.

§ 3. Bestemmelsene i konvensjoner og protokoller som er nevnt i § 2 skal ved motstrid gå foran bestemmelser i annen lovgivning.

§ 4. De konvensjoner og protokoller som er nevnt i § 2, kunngjøres i Norsk Lovtidend på ett originalspråk og i norsk oversettelse.

Avtale om Det europeiske økonomiske samarbeidsområde (EØS)

Art 11. Kvantitative importrestriksjoner og alle tiltak med tilsvarende virkning skal være forbudt mellom avtalepartene. (Roma-traktaten, art. 28)

Art 13. Bestemmelsene i artikkel 11 og 12 skal ikke være til hinder for forbud eller restriksjoner på import, eksport eller transitt som er begrunnet ut fra hensynet til offentlig moral, orden og sikkerhet, vernet om menneskers og dyrs liv og helse, plantelivet, nasjonale skatter av kunstnerisk, historisk eller arkeologisk verdi eller den industrielle eller kommersielle eiendomsrett. Slike forbud eller restriksjoner må dog ikke kunne brukes til vilkårlig forskjellsbehandling eller være en skjult hindring på handelen mellom avtalepartene. (Roma-traktaten, art. 30)

OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 December 2006

Case C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos

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.

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.

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.

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. 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. 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. The '*Keck* exception' does not cover *product-related rules*, which relate to the characteristics of products. 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.

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 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. 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.

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. 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.

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 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. 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.

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.

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.

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 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.

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. 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. 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. The Court has also repeatedly stressed that protection of the environment constitutes one of the essential objectives of the Community.

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. 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.

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.

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, 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.

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.

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.