Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 July 2012*

(Internal market — Directive 98/34/EC — Technical standards and regulations — Procedure for the provision of information in the field of technical standards and regulations — Low-prize gaming machines — Prohibition of the amendment, extension and issue of operating authorisations — Concept of 'technical regulation')

In Joined Cases C-213/11, C-214/11 and C-217/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Gdańsku (Poland), made by decisions of 16 November 2010, received at the Court on 9 and 11 May 2011, in the proceedings

Fortuna sp. z o.o. (C-213/11),

Grand sp. z o.o. (C-214/11),

Forta sp. z o.o. (C-217/11)

v

Dyrektor Izby Celnej w Gdyni,

THE COURT (Third Chamber),

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

Advocate General: N. Jääskinen,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

— Fortuna sp. z o.o., Grand sp. z o.o. and Forta sp. z o.o., by K. Budnik, adwokat,

— the Polish Government, by M. Szpunar, B. Majczyna and D. Lutostańska, acting as Agents,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and P. Vlaemminck and R. Verbeke, avocaten,

* Language of the case: Polish.

— the Portuguese Government, by L. Inez Fernandes and A.P. Barros, acting as Agents,

— the European Commission, by G. Zavvos and K. Herrmann, acting as Agents,

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

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Council Directive 2006/96/EC of 20 November 2006 (OJ 2006 L 363, p. 81) ('Directive 98/34').

2 The references have been made in proceedings brought by Fortuna sp. z o.o. ('Fortuna'), Grand sp. z o.o. ('Grand') and Forta sp. z o.o. ('Forta') against the Dyrektor Izby Celnej w Gdyni (Director of the Customs Chamber, Gdynia; 'the DICG') concerning the latter's refusal to amend, extend or issue, as the case may be, authorisations to organise and carry out an activity relating to gaming on low-prize machines.

Legal context

European Union law

3 Article 1(1) to (5) and (11) 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;

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

…

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;

5. “rule on services”, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

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.

…’

4 The first and third subparagraphs of Article 8(1) of Directive 98/34 provide:

‘Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

…

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.’

National law

5 Until 31 December 2009, the organisation and pursuit of activities in the field of gaming on low-prize machines were governed by the Law on gaming and totalisator betting (ustawa o grach i zakładach wzajemnych) of 29 July 1992 (Dz. U. 2004, No 4, heading 27), as amended (‘the Law on gaming and totalisator betting’).

6 Article 2(2b) of that Law provided:

‘Gaming on low-prize machines is gaming on mechanical, electromechanical and electronic devices with a prize in cash or in kind, in which the value of a single prize may not be more than the equivalent of [EUR] 15 and the value of the maximum stake for one game may not be more than [EUR] 0.07.’

7 Under the provisions of the Law on gaming and totalisator betting, in order to be able to operate such machines their owners had to obtain authorisations from the fiscal authority with competence for the locality. Authorisations were issued to the machines’ owners for a period of six years and could, upon application by the holder, be extended for a further period of six years.

8 Article 7(1a) of the Law on gaming and totalisator betting provided:

'The organisation of gaming on low-prize machines is authorised solely at sites for gaming on low-prize machines.'

9 Article 30 of the Law on gaming and totalisator betting stated:

'Sites for gaming on low-prize machines may be located in catering, commercial or service establishments at a distance of at least 100 metres from schools, educational establishments, care establishments and places of worship.'

10 The Law on games of chance (ustawa o grach hazardowich) of 19 November 2009 (Dz. U. No 201, heading 1540; 'the Law on games of chance'), which replaced the Law on gaming and totalisator betting, entered into force on 1 January 2010.

11 Article 14(1) of the Law on games of chance states:

'The organisation of roulette games, card games, dice games and gaming on machines shall be permitted only in gaming casinos.'

12 Article 129 of the Law on games of chance provides:

'1. Activity relating to gaming on low-prize machines or on machines in gaming arcades on the basis of authorisations issued before the date on which this Law enters into force shall be carried on until those authorisations expire, by the persons to whom they were issued, in accordance with the previous provisions, unless provided otherwise in this Law.

2. Procedures concerning the issue of authorisations to carry on an activity relating to gaming on low-prize machines or to gaming on machines organised in gaming arcades which were commenced and not concluded before the date on which this Law enters into force shall be discontinued.

3. "Gaming on low-prize machines" shall mean gaming on mechanical, electromechanical and electronic devices with prizes in cash or in kind, in which the value of a single prize may not be more than PLN 60 and the value of the maximum stake for one game may not be more than PLN 0.50.'

13 Article 135 of the Law on games of chance states:

'1. The authorisations referred to in Article 129(1) may be amended, in accordance with the rules laid down in this Law relating to the amendment of licences and authorisations issued to persons carrying on an activity as provided for in Article 6(1) to (3), by the authority competent for issuing authorisations on the date preceding the date on which this Law enters into force, subject to paragraphs 2 and 3. Articles 56 and 57 shall apply *mutatis mutandis*.

2. No alteration of the places where gaming is organised may result from amendment of an authorisation, except if the number of sites at which gaming on low-prize machines is carried out is reduced.

…'

14 Under Article 138(1) of the Law on games of chance, the authorisations referred to in Article 129(1) of that Law may not be extended.

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

15 The applicants in the main proceedings are companies whose economic activity includes the organisation and running of gaming on machines. For those purposes, Fortuna, Grand and Forta purchase gaming machines on the European Union market.

16 Fortuna possesses the statutory authorisation required for such an activity, which was issued to it on 1 November 2003 for a period of six years and then extended by a decision of 14 September 2009. That authorisation concerns a large number of gaming sites. Fortuna submitted an application for amendment of its authorisation with regard to determination of one of the places where gaming is organised. By a decision of 3 February 2010, confirmed by a subsequent decision of 14 April 2010, the DICG did not grant the application, citing Article 135(2) of the Law on games of chance, which prohibits any alteration of the places where gaming is organised by way of amendment of the authorisation except if the number of the sites at which gaming on low-prize machines is carried out is reduced.

17 Grand possessed the statutory authorisation required for the organisation and running of gaming on machines, issued on 6 August 2004 for a period of six years. The authorisation likewise related to a large number of gaming sites. Grand submitted an application for extension of its authorisation, for a fresh period of six years. By a decision of 24 February 2010, confirmed by a subsequent decision of 18 May 2010, the DICG did not grant the application, citing Article 138(1) of the Law on games of chance, which prohibits the extension of authorisations for carrying on an activity relating to gaming on low-prize machines.

18 On 10 December 2008, Forta submitted an application for authorisation to organise and run gaming on low-prize machines in the territory of the province of Pomerania. That application, which related initially to 112 sites for gaming on low-prize machines, finally concerned 80 sites. By a decision of 12 February 2010, confirmed by a subsequent decision of 19 April 2010, the DICG, applying Article 129(2) of the Law on games of chance, determined that there was no longer any need to continue the procedure in question. That provision requires the discontinuance of procedures commenced and not concluded before the entry into force of that new Law that concern applications lodged under the Law on gaming and totalisator betting for authorisations to carry on an activity relating to gaming on low-prize machines or to gaming on machines organised in gaming arcades.

19 The applicants in the main proceedings each brought an action against the decisions concerning them before the Wojewódzki Sąd Administracyjny w Gdańsku (Regional Administrative Court, Gdańsk), submitting that the provisions of the Law on games of chance cannot be relied upon by the authorities in support of their decisions, as that Law was not notified to the Commission although it contains ‘technical regulations’ within the meaning of Directive 98/34. The applicants in the main proceedings also submitted that the restrictions that result from that Law as regards the running of gaming on low-prize machines lead to a major restriction on trade in those machines within the European Union. Indeed, the prohibition on amending and extending earlier authorisations and the prohibition on issuing new authorisations to operate such machines render the latter in practice redundant.

20 The referring court states that the case-law of the Court of Justice relating to the free movement of goods and the freedom to provide services so far as concerns games of chance allows it to conduct an independent assessment as to whether the regime resulting from the Law on games of chance is compatible with those freedoms. On the other hand, the referring court is uncertain whether the provisions of that Law may be relied upon against an individual when they were not notified to the Commission under the procedure prescribed by Directive 98/34.

21 It was in those circumstances that the Wojewódzki Sąd Administracyjny w Gdańsku decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

In Case C-213/11:

'Must Article 1(11) of Directive [98/34] be interpreted as meaning that a "technical regulation", the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, includes a legislative provision which prohibits the amendment of authorisations for activity relating to gaming on low-prize machines in respect of a change in the place at which that gaming is organised?'

In Case C-214/11:

'Must Article 1(11) of Directive [98/34] be interpreted as meaning that a "technical regulation", the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, includes a legislative provision which prohibits the extension of authorisations for activity relating to gaming on low-prize machines?'

In Case C-217/11:

'Must Article 1(11) of Directive [98/34] be interpreted as meaning that a "technical regulation", the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, includes a legislative provision which prohibits the issue of authorisations for activity relating to gaming on low-prize machines?'

22 By order of the President of the Court of 9 June 2011, Cases C-213/11, C-214/11 and C-217/11 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the questions referred

23 By its questions, the referring court asks, in essence, whether Article 1(11) of Directive 98/34 must be interpreted as meaning that national provisions, such as those of the Law on games of chance, which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on low-prize machines anywhere other than in casinos and gaming arcades constitute 'technical regulations', within the meaning of that provision, the drafts of which must be the subject of communication as provided for in the first subparagraph of Article 8(1) of the directive.

24 A preliminary point to note is that the Court has already held that measures which prohibit the use of all electrical, electromechanical and electronic games on all public and private premises apart from casinos must be considered to be technical regulations within the meaning of Article 1(11) of Directive 98/34 (Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341, paragraph 61).

25 Accordingly, a measure, such as Article 14(1) of the Law on games of chance, which permits only gaming casinos to organise gaming on machines must be classified as a 'technical regulation' within the meaning of Article 1(11) of Directive 98/34.

26 Following that preliminary point, it should be noted that it is settled case-law that Directive 98/34 is designed to protect, by means of preventive monitoring, the free movement of goods, which is one of the foundations of the European Union, and that this control serves a useful purpose in that technical regulations falling within the scope of that directive may constitute obstacles to trade in goods between Member States, such obstacles being permissible only if they are necessary to satisfy compelling requirements relating to the public interest (see Case C-194/94 *CIA Security International* [1996] ECR

I-2201, paragraphs 40 and 48; Case C-303/04 *Lidl Italia* [2005] ECR I-7865, paragraph 22; and Case C-361/10 *Intercommunale Intermosane and Fédération de l'industrie et du gaz* [2011] ECR I-5079, paragraph 10).

27 In this context, it should be recalled that, according to the Court's case-law, it follows from Article 1(11) of Directive 98/34 that the concept of 'technical regulation' covers - apart from the category of rules on information society services within the meaning of Article 1(2) and (5) of that directive, a category which is not, however, affected by the main proceedings given that the national provisions at issue in those cases relate to low-prize gaming machines as 'products' within the meaning of Article 1(1) - three categories, namely (i) the 'technical specification' within the meaning of Article 1(3) of the directive, (ii) 'other requirements', as defined in Article 1(4) of the directive, and (iii) the prohibition of the manufacture, importation, marketing or use of a product, referred to in Article 1(11) of the directive (see Case C-267/03 *Lindberg* [2005] ECR I-3247, paragraph 54; Case C-20/05 *Schwibbert* [2007] ECR I-9447, paragraph 34; and *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, paragraph 11).

28 First of all, in order for a national measure to fall within the first category of technical regulations that is referred to in Article 1(11) of Directive 98/34, that is to say, within the concept of 'technical specification', that measure must necessarily refer to the product or its packaging as such and thus lay down one of the characteristics required of a product (see *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, paragraph 15).

29 Suffice it to state that the transitional provisions in the Law on games of chance relate to authorisations to carry on an activity relating to gaming on low-prize machines. They do not refer to the low-prize gaming machines or their packaging as such and thus do not lay down their characteristics.

30 Consequently, the national provisions at issue in the main proceedings do not contain technical specifications within the meaning of Directive 98/34.

31 Next, it is apparent from the Court's case-law that the third category of technical regulations that is referred to in Article 1(11) of Directive 98/34, concerning a prohibition inter alia on use, requires the national provisions at issue to have a scope which goes well beyond a limitation to certain possible uses of the product in question and not to be confined to a mere restriction of its use (see *Lindberg*, paragraph 76).

32 Indeed, this third category is 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 (*Lindberg*, paragraph 77).

33 In that regard, whilst the transitional provisions in the Law on games of chance at issue in the main proceedings admittedly contain prohibitions as regards the issue, extension and amendment of authorisations to carry on an activity relating to gaming on low-prize machines, it is to be observed that, under Article 129(1) of that Law, activity relating to gaming on low-prize machines on the basis of authorisations issued before the entry into force of that Law is continued, by the persons to whom they were issued, in accordance with the previous provisions until the authorisations expire.

34 Thus, such a provision enables the activity relating to gaming on low-prize machines and, therefore, the use of machines for such gaming to be continued beyond the entry into force of the Law on games of chance. It is clear that, in such a context, the transitional provisions in that Law cannot be regarded as national measures which leave no room for any use of low-prize gaming machines other than a purely marginal one.

35 Finally, the Court has held that, in order to be classified as 'other requirements' within the meaning of Article 1(4) of Directive 98/34, the national measures in question must constitute 'conditions' which can significantly influence the composition, the nature or the marketing of the product concerned (see, to this effect, *Lindberg*, paragraph 72, and *Intercommunale Intermosane and Fédération de l'industrie et du gaz*, paragraph 20).

36 In that regard, it is to be observed that the transitional provisions in the Law on games of chance impose conditions liable to affect the marketing of low-prize gaming machines. The prohibition on issuing, extending or amending authorisations for activity relating to gaming on low-prize machines outside casinos is such as to directly affect trade in low-prize gaming machines.

37 In that context, it is for the referring court to verify whether such prohibitions, the observance of which is compulsory *de jure* for the use of low-prize gaming machines, can significantly influence the nature or the marketing of those machines (see, to this effect, *Lindberg*, paragraph 78).

38 In the course of the verification required to be carried out by the referring court, it will have to take account, in particular, of the fact that the reduction in authorised sites for gaming on low-prize machines is accompanied by a restriction on the maximum number of gaming casinos and of gaming machines that can be used in them.

39 Also, the referring court will have to verify whether the low-prize gaming machines are capable of being programmed or reprogrammed in order to be used in casinos as gaming machines that would allow higher prizes and consequently present a greater risk of addiction of the user to gaming (see, to this effect, *Lindberg*, paragraph 79), which could significantly affect their nature.

40 In the light of all the foregoing, the answer to the questions referred is that Article 1(11) of Directive 98/34 must be interpreted as meaning that national provisions, such as those of the Law on games of chance, which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on low-prize machines anywhere other than in casinos and gaming arcades are capable of constituting 'technical regulations', within the meaning of that provision, the drafts of which must be the subject of communication as provided for in the first subparagraph of Article 8(1) of the directive, in so far as it is established that those provisions constitute conditions which can significantly influence the nature or the marketing of the product concerned, which is a matter for the referring court to determine.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Council Directive 2006/96/EC of 20 November 2006, must be interpreted as meaning that national provisions, such as those of the Law on games of chance (ustawa o grach hazardowich) of 19 November 2009, which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on low-prize machines anywhere other than in casinos and gaming arcades are capable of constituting 'technical regulations', within the meaning of that provision, the drafts of which must be the subject of communication as provided for in the first

subparagraph of Article 8(1) of the directive, in so far as it is established that those provisions constitute conditions which can significantly influence the nature or the marketing of the product concerned, which is a matter for the referring court to determine.

[Signatures]