Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

22 October 2020*

(Reference for a preliminary ruling – Procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services – Notion of 'technical regulation' – Obligation on Member States to notify the European Commission of all draft technical regulations – Technical regulations which have not been notified cannot be enforced against individuals – Inapplicability to service providers)

In Case C-275/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal de Justiça (Supreme Court, Portugal), made by decision of 21 March 2019, received at the Court on 2 April 2019, in the proceedings

Sportingbet PLC,

Internet Opportunity Entertainment Ltd

v

Santa Casa da Misericórdia de Lisboa,

intervening parties:

Sporting Clube de Braga,

Sporting Clube de Braga – Futebol SAD

THE COURT (Ninth Chamber),

composed of N. Piçarra, President of the Chamber, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2020,

after considering the observations submitted on behalf of:

– Sportingbet PLC, by B. Mendes and S. Ribeiro Mendes, advogados,

– Internet Opportunity Entertainment Ltd, by L. Marçal and M. Mendes Pereira, advogados,

* Language of the case: Portuguese.

– Santa Casa da Misericórdia de Lisboa, by S. Estima Martins, T. Alexandre and P. Faria, advogados,

– the Portuguese Government, by L. Inez Fernandes, J. Gomes de Almeida, A. Pimenta, P. Barros da Costa and A. Silva Coelho, acting as Agents,

– the Belgian Government, by L. Van den Broeck, M. Jacobs and C. Pochet, acting as Agents, and by P. Vlaemminck and R. Verbeke, advocaten,

– the European Commission, by G. Braga da Cruz and M. Jáuregui Gómez, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(11) and Article 8(1) 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 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').

2 The request has been made in proceedings between, on the one hand, Sportingbet PLC and Internet Opportunity Entertainment Ltd ('IOE') and, on the other, Santa Casa da Misericórdia de Lisboa ('Santa Casa') concerning the lawfulness of the online operation by Sportingbet and IOE of games of chance and gambling, and the promotion of that activity in Portugal.

Legal context

EU law

Directive 83/189

3 Article 1 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 (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75) ('Directive 83/189'), provides:

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

(1) "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 terminology, symbols, testing and test methods, packaging, marking or labelling and the production methods and procedures for agricultural products as defined in Article 38(1) of the Treaty and for products intended for human and animal consumption and for medicinal products …

…

(5) "technical regulation", technical specifications, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, except those laid down by local authorities;

…’

4 Article 8(1) of that directive states the following:

‘Member States shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation 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 brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft.

…’

Directive 98/34

5 Article 1 of Directive 98/34 provides:

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

…

(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.

For the purposes of this definition:

– “at a distance” means that the service is provided without the parties being simultaneously present;

– “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

– “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

…

(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” means 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.

…

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

…

(11) "technical regulation", technical specifications and other requirements or rules or 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.

…'

6 Article 8(1) of that directive provides:

'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.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

…'

Directive 98/48

7 Recitals 7 and 8 of Directive 98/48 state:

'(7) Whereas it should be possible to adapt the existing national rules and regulations applicable to services available at the present so as to take account of new Information Society services, either with a view to ensuring that the general interest is better protected or, on the other hand, with a view to simplifying such rules and regulations where their application is disproportionate to the objectives they pursue;

(8) Whereas, without coordination at Community level, this foreseeable regulatory activity at national level might give rise to restrictions on the free movement of services and the freedom of establishment, leading in turn to a refragmentation of the internal market, over-regulation and regulatory inconsistencies'.

Portuguese law

8 Decreto-Lei No 422/89 (Decree-Law No 422/89) of 2 December 1989 (*Diário da República* I, series I-A, No 277, of 2 December 1989), as amended by Decreto-Lei No 10/95 (Decree-Law No 10/95) of 19 January 1995 ('Decree-Law No 422/89'), in Article 3 entitled 'Gaming zones', provides:

'1 – The operation and playing of games of chance or gambling are permitted only in casinos in permanent or temporary gaming zones established by decree-law or, outside of those casinos, in the cases listed in Articles 6 to 8.

2 – For the purposes of operating and playing games of chance or gambling, there shall be gaming zones in the Azores, the Algarve, Espinho, Estoril, Figueira da Foz, Funchal, Porto Santo, Póvoa de Varzim, Tróia and Vidago-Pedras Salgadas.

3 – The minimal distance for competitive protection between casinos in the gaming zones shall be established on a case by case basis in the implementing decree laying down the conditions for granting each concession.

4 – By authorisation from the competent member of the Government, in consultation with the Inspecção-Geral de Jogos (Gaming Inspectorate), concession holders in the gaming zones may opt to operate bingo halls which comply with the regulatory requirements, subject to the same rules applicable to casinos, but outside casinos, provided that those halls are located within the same municipal territory as the casinos.'

9 Article 6 of that decree-law, entitled, 'Operating games on ships and aircraft', provides:

'1 – The member of the Government with responsibility for tourism, in consultation with the Gaming Inspectorate and the Direcção-Geral do Turismo (Directorate-General for Tourism), may authorise, for a fixed period, the operation and playing of games of chance or gambling of any kind on board aircraft or ships registered in Portugal when they are outside national territory.

2 – The operation of games referred to in the preceding paragraph may be awarded only to undertakings which own or charter national ships or aircraft or to undertakings holding a concession from the gaming zones with their authorisation.

3 – The operation and playing of games of chance or gambling authorised in accordance with this article shall be subject to the rules laid down for operating and playing games in casinos, and the specific conditions which must be adhered to shall be laid down by order of the competent member of the Government.'

10 Article 7 of that decree-law, entitled 'Operating non-banked games and gaming machines outside casinos', provides:

'1 – During major tourist events, the competent member of the Government, in consultation with the Gaming Inspectorate and the Directorate-General for Tourism, may authorise the operation and playing of non-banked games outside casinos.

2 – In localities where tourism is the predominant activity, the competent member of the Government, in consultation with the Gaming Inspectorate and the Directorate-General for Tourism, may authorise the operation and playing of gaming machines in hotel or ancillary establishments, with their features and dimensions determined by implementing decree.

3 – The authorisations referred to in the preceding paragraphs may only be granted to a concession holder from the gaming zone whose casino is closest in a straight line to the location where the operation is to take place, notwithstanding the provisions of Article 3(3).

4 – The operation and playing of games in accordance with the preceding paragraphs shall be subject to the rules laid down for operating and playing games in casinos, and the specific conditions which must be adhered to shall be laid down by way of an order.'

11 Article 8 of that decree-law, entitled, 'Bingo games', states:

'Bingo games may also be operated and played in dedicated halls outside the territory of the municipalities where the casinos are located and the adjacent territories, in accordance with the applicable special legislation.'

12 Article 9 of Decree-Law No 422/89, entitled 'Concession rules', provides:

'The right to operate games of chance or gambling shall be reserved to the State and may be exercised only by undertakings which are established as limited liability companies to which the Government has awarded the appropriate concession by administrative contract, save for the situations referred to in Article 6(2).'

13 Decreto-Lei No 282/2003 (Decree-Law No 282/2003) of 8 November 2003 (*Diário da República* I, series-A, No 259, of 8 November 2003), in Article 2 entitled 'Scope', provides:

'The operations referred to in the preceding article shall be undertaken exclusively, over the whole of the national territory including the radio space, the terrestrial hertzian spectrum (analogue, digital and Internet), and any other public telecommunications networks, by Santa Casa … through its Departamento de Jogos (Gaming Department), subject to the statutory provisions governing each of the games and to Decreto-Lei No 322/91 (Decree-Law No 322/91) of 26 August 1991.'

14 Article 3 of Decree-Law No 282/2003, entitled 'Gaming contract', provides:

'1 – The gaming contract shall be concluded directly by the player and the Gaming Department of Santa Casa … whether or not through intermediaries.

2 – A gaming contract is one in which one of the parties, after paying a given sum, receives numbers or predictions with which that party, in return, has the possibility of receiving a prize of a fixed or variable amount, to be paid out by the other party, depending on the outcome of a process based solely or primarily on chance and in accordance with predefined rules.

…'

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

15 Sportingbet is a company which operates, by electronic means, games of chance and variations of such games, pool betting systems and lotteries. That company owns the website 'www.sportingbet.com' which offers its users the possibility of participating in such games. There is a Portuguese language version of that site, which appears automatically for all users located in Portugal.

16 IOE is the undertaking which operates the website www.sportingbet.com, duly appointed by Sportingbet.

17 Sportingbet authorised IOE to register in its name and to use for its benefit the domains 'sportingbet.com' and 'sportingbetplc.com', and the marks Global Sportsbook & Casino sportingbet and sportingbet.

18 Santa Casa is a non-profit legal entity providing administrative services of public benefit which carries on activities in the public interest. The Portuguese Republic granted Santa Casa the exclusive right to operate social games and to organise pool betting systems, in particular by electronic means.

19 Sporting Clube de Braga ('SC Braga') is a sports club which participates in sporting competitions in a number of areas, including football.

20 Sporting Clube de Braga – Futebol SAD ('SC Braga SAD') is a company created in order to handle the professional football side of SC Braga whose team competed in the 2006/2007 season of the Portuguese Premier League championship for professional football.

21 IOE and SC Braga SAD concluded a sponsorship agreement for the sports seasons 2006/2007 and 2007/2008, the purpose of which was to advertise and promote the activities of Sportingbet. That advertising campaign organised by SC Braga and SC Braga SAD arranged to disseminate the Sportingbet logo and an image containing the web address 'www.sportingbet.com'. Those images were disseminated on SC Braga's website, together with a direct link to the Sportingbet website. In addition, SC Braga's professional football team bore the Sportingbet logo on its kit during a friendly match.

22 Santa Casa brought an action against SC Braga, SC Braga SAD, Sportingbet and IOE seeking, inter alia, a declaration that that sponsorship agreement is invalid, a declaration that Sportingbet's operations in Portugal and the advertising of those operations are unlawful, an order that that company desist from operating lotteries and pool betting systems in Portugal, an order prohibiting the defendants from advertising or promoting in any way the website www.sportingbet.com and an order that those defendants indemnify Santa Casa for the losses it suffered as a result of their unlawful activities.

23 At first instance, a judgment was delivered in which Santa Casa's action was upheld in part. In that regard, it was decided, inter alia, to uphold in their entirety Santa Casa's first three claims referred to in the above paragraph and to allow the fourth claim made, but only in respect of Sportingbet and IOE, and not to allow the applicant's claim for damages.

24 Sportingbet and IOE lodged an appeal against the judgment at first instance before the Tribunal da Relação de Guimarães (Court of Appeal, Guimarães, Portugal). However, by judgment of 7 April 2016, that court upheld the decision at first instance.

25 As a result, Sportingbet and IOE each brought an appeal before the referring court to have that judgment set aside. IOE also asked that the Supremo Tribunal de Justiça (Supreme Court, Portugal) make a reference to the Court of Justice for a preliminary ruling.

26 By decision of 16 March 2017, the referring court decided to refer 10 questions to the Court of Justice for a preliminary ruling. By questions 8 to 10, the referring court asked in essence whether the technical rules laid down in the legislation of a Member State, such as Decree-Law No 422/89 and Decree-Law No 282/2003, which that State did not notify to the Commission, are applicable to individuals.

27 By its order of 19 October 2017, *Sportingbet and Internet Opportunity Entertainment* (C-166/17, not published, EU:C:2017:790), the Court held that questions 8 to 10 were manifestly inadmissible on the ground that it was unable to answer those questions due to the lack of information needed for the interpretation of EU law sought.

28 IOE requested that the issues that were the subject matter of questions 8 to 10 submitted in the case which gave rise to that order be submitted again to the Court, but this time including the information missing in the previous request for a preliminary ruling. Santa Casa contended that that new request should be dismissed.

29 The referring court considers that those questions are essential for the resolution of the dispute in the main proceedings and that the answer to those questions remains unclear.

30 In the opinion of the referring court, the question still remains as to whether Article 1(11) of Directive 98/34 must be interpreted as meaning that national legislation by which an exclusive right to organise and operate lotteries and pool betting systems in the entire national territory is extended to all means of electronic communication, in particular the internet, constitutes a 'technical regulation' within the meaning of that provision. That court, like the applicants in the main proceedings, considers that, by virtue of Article 8(1) of Directive 98/34, an affirmative answer to that question would establish an obligation for the Member State at issue to notify the Commission of the relevant national provisions as technical regulations, failing which those provisions may not be applied to individuals.

31 In those circumstances, the Tribunal Supremo de Justiça (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Given that the Portuguese [Republic] did not inform the … Commission of the technical regulations contained in Decree-Law No 422/89 …, should those provisions – more specifically Article 3 … and Article 9 [thereof] – be unenforceable, and can individuals rely on that lack of enforceability?

(2) Given that the Portuguese [Republic] did not inform the … Commission of the technical regulations contained in Decree-Law No 282/2003 …, should those provisions – more specifically Article 2 and Article 3 [thereof] – be unenforceable as against service providers in Portugal?'

The questions referred for a preliminary ruling

Admissibility of the request for a preliminary ruling

32 Santa Casa and the Belgian Government maintain that the questions asked are inadmissible due to the fact that IOE is a company established in a third State, that is to say in Antigua and Barbuda, and that as such it may not rely on the fundamental freedoms or, consequently, Directive 98/34. That company is the only one of the two applicants in the main proceedings which relies on arguments connected with the questions referred for a preliminary ruling.

33 It should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paragraph 55 and the case-law cited).

34 It follows that questions referred by national courts enjoy a presumption of relevance and that the Court may refuse to rule on those questions only where it is apparent that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to those questions (judgment of 19 December 2019, *Junqueras Vies*, C-502/19, EU:C:2019:1115, paragraph 56 and the case-law cited).

35 In the present case, as was recalled in paragraph 29 above, the referring court states that the interpretation of EU sought, in particular of the provisions of Directive 98/34, is needed in order to resolve the dispute before it. By its questions, the referring court in essence seeks to determine whether the provisions of national law referred to in those questions, which establish the exclusive right to organise and operate lotteries and pool betting systems in the entire national territory, covering all electronic means of communication, in particular the internet, fall under the scope of that directive in particular. If they do, that court wishes to ascertain the consequences to be drawn where those provisions come under the notion of 'technical regulation', within the meaning of Article 1(11) of that directive.

36 In those circumstances, in view of the case-law cited in paragraph 34 above, the arguments put forward by Santa Casa and the Belgian Government, which relate more to the applicability of that directive to the dispute in the main proceedings and therefore to the substance of the case, are therefore irrelevant for the purposes of rebutting the presumption of relevance of the questions submitted by the referring court.

37 Consequently, the questions referred for a preliminary ruling are admissible.

Preliminary observations

38 It should be made clear that the first and second questions from the referring court concern, respectively, the provisions of Decree-Law No 422/89 and those of Decree-Law No 282/2003.

39 In view of the dates of entry into force of those decree-laws and of Directives 83/189 and 98/34, it is appropriate to approach the first question from the perspective of the provisions of Directive 83/189 and the second from the perspective of the provisions of Directive 98/34.

The first question

40 By its first question, the referring court asks, in essence, whether it is appropriate to interpret Article 1(5) of Directive 83/189 as meaning that national legislation which provides that the right to operate games of chance is reserved to the State and may be exercised only by undertakings that are established as public limited companies, to which the Member State concerned awards the corresponding concession, and which lays down the conditions and the zones for exercising that activity amounts to a 'technical regulation' within the meaning of that provision. If necessary, it asks whether the fact that that legislation was not communicated to the Commission in accordance with Article 8(1) of that directive makes that legislation unenforceable against individuals.

41 Under Article 1(5) of Directive 83/189, a technical regulation must be understood as covering technical specifications, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing or use in a Member State or a major part thereof, except those laid down by local authorities. Under Article 8(1) of Directive 83/189, Member States must communicate to the Commission any draft technical regulation.

42 Under Article 1(1) of Directive 83/189 a 'technical specification', within the meaning of that directive, is the 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 terminology, symbols, testing and test methods, packaging, marking or labelling (see, to that effect, judgment of 8 March 2001, *van der Burg*, C-278/99, EU:C:2001:143, paragraph 20).

43 Since Articles 3 and 9 of Decree-Law No 422/89 lay down concession rules for operating games of chance or gambling and the conditions and zones for exercising that activity, it does not appear that those provisions relate to the characteristics required for a product, within the meaning of Article 1(1) of Directive 83/189, so that they cannot be classified as 'technical regulations' within the meaning of Article 1(5) of that directive.

44 In those circumstances, the answer to the first question is that Article 1(5) of Directive 83/189 must be interpreted as meaning that national legislation which provides that the right to operate games of chance is reserved to the State and may be exercised only by undertakings that are established as public limited companies, to which the Member State concerned awards the corresponding concession, and which lays down the conditions and the zones for exercising that activity does not amount to a 'technical regulation' within the meaning of that provision.

The second question

45 By its second question, the referring court asks in essence whether Article 1(11) of Directive 98/34, read in conjunction with Article 1(5) of that directive, must be interpreted as meaning that national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a 'technical regulation' within the meaning of the first of those provisions. If necessary, it asks whether the fact that that legislation was not communicated to the Commission in accordance with Article 8(1) of that directive makes that legislation unenforceable against individuals.

46 It must be recalled that the notion of a 'technical regulation' extends to (i) the 'technical specification', within the meaning of Article 1(3) of that directive, (ii) 'other requirements', as defined in Article 1(4) of that directive, (iii) the 'rule on services', covered in Article 1(5) of that directive, and (iv) the 'laws, regulations or administrative provisions of Member States 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', under Article 1(11) of that directive (judgment of 26 September 2018, *Van Gennip and Others*, C-137/17, EU:C:2018:771, paragraph 37).

47 According to Article 1(5) of that directive, 'rules on services' consist of every requirement of a general nature relating to the taking-up and pursuit of the service activities referred to in Article 1(2) of that directive, which include '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'.

48 In that regard, the Court has already held that provisions relating to the prohibition of offering games of chance on the internet, the exceptions to that prohibition, the restrictions placed on offering sporting bets on the internet and the prohibition of broadcasting advertisements for games of chance on the internet may be classified as 'rules on services' for the purposes of Article 1(5) of Directive 98/34, in so far as they concern an 'Information Society service' for the purposes of Article 1(2) of that directive (see, by analogy, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 75).

49 In the present case, the rules laid down in Articles 2 and 3 of Decree-Law 282/2003 specifically refer to Information Society services. In addition, as a result of the award to Santa Casa of the exclusive right to operate games of chance on the internet, those provisions prohibit all economic operators from providing those services, with the exception of Santa Casa.

50 Accordingly, such provisions come under the fourth category covered by the notion of 'technical rule' in Article 1(11) of Directive 98/34, that is to say, 'laws … prohibiting the provision … of a service'.

51 Such an interpretation is consistent with the objective of that directive, as is apparent from recitals 7 and 8 of Directive 98/48 by which Directive 98/34 was amended, of adapting existing national legislation to take account of new information society services and avoiding restrictions on the freedom to provide services and freedom of establishment leading to refragmentation of the internal market (see, to that effect, judgment of 20 December 2017, *Falbert and Others*, C-255/16, EU:C:2017:983, paragraph 34).

52 With regard to the question whether Articles 2 and 3 of Decree-Law No 282/2003 should have been notified to the Commission prior to their adoption, in accordance with the first paragraph of Article 8(1) of Directive 98/34, it should be recalled that the obligation in that provision, that is to say that Member States are to communicate to the Commission any draft technical regulation, was already laid down in Article 8(1) of Directive 83/189, as was the penalty that technical regulations which have not been notified will be inapplicable (judgment of 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraphs 35 and 36).

53 The notification obligation under the first paragraph of Article 8(1) of Directive 98/34 is an essential means for achieving the scrutiny by the European Union aimed at protecting the free movement of services and the freedom of establishment (see, to that effect, judgment of 20 December 2017, *Falbert and Others*, C-255/16, EU:C:2017:983, paragraph 34). A breach of that obligation constitutes a substantial procedural defect in the adoption of the technical regulations concerned and renders those technical regulations inapplicable, so that they are unenforceable against individuals (see, to that effect, judgments of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 67, and of 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraph 36 and the case-law cited). Those 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 (judgment of 10 July 2014, *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 48).

54 Thus, it is apparent from the foregoing that, since they were not communicated to the Commission in accordance with Directive 98/34, the technical regulations provided for in Articles 2 and 3 of Decree-Law No 282/2003 are inapplicable and accordingly are unenforceable against individuals. In that regard, contrary to what Santa Casa and the Belgian Government assert, it is irrelevant that an economic operator may rely on the fundamental freedoms or on that directive.

55 In those circumstances, the answer to the second question is that Article 1(11) of Directive 98/34, read in conjunction with Article 1(5) of that directive, must be interpreted as meaning that national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a 'technical regulation' within the meaning of the first of those provisions, and the failure to communicate that regulation to the Commission, in accordance with Article 8(1) of that directive, makes that legislation unenforceable against individuals.

Costs

56 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 (Ninth Chamber) hereby rules:

1. **Article 1(5) 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, as amended by Council Directive 88/182/EEC of 22 March 1988, must be interpreted as meaning that national legislation which provides that the right to operate games of chance is reserved to the State and may be exercised only by undertakings that are established as public limited companies, to which the Member State concerned awards the corresponding concession, and which lays down the conditions and the zones for exercising that activity does not amount to a 'technical regulation' within the meaning of that provision.**

2. **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 Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, read in conjunction with Article 1(5) of that directive, as amended, must be interpreted as meaning that national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a 'technical regulation' within the meaning of the first of those provisions, and the failure to communicate that regulation to the European Commission, in accordance with Article 8(1) of that directive, as amended, makes that legislation unenforceable against individuals.**

[Signatures]