Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

13 October 2016*

(Reference for a preliminary ruling — Technical regulations in the gambling sector — Directive 98/34/EC — Concept of 'technical regulation' — Obligation on Member States to notify the European Commission of all draft technical regulations — Inapplicability of rules classifiable as technical regulations not notified to the Commission)

In Case C-303/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Łodzi (Regional Court of Łódź, Poland), made by decision of 24 April 2015, received at the Court on 22 June 2015, in the proceedings

Naczelnik Urzędu Celnego I w Ł.

v

G. M.,

M. S.,

intervening party:

Colin Wiliams sp. z o.o.,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, A. Arabadjiev, C.G. Fernlund, S. Rodin (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 20 April 2016,

after considering the observations submitted on behalf of:

— the Naczelnik Urzędu Celnego I w Ł., by M. Gruszka and M. Ziarko, acting as Agents,

— M., by S. Sołtysik and M. Górski, adwokaci,

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

* Language of the case: Polish.

— the Belgian Government, by L. Van den Broeck, M. Jacobs and C. Pochet, acting as Agents, and by P. Vlaemminck and B. Van Vooren, advocaten,

— the Greek Government, by K. Nasopoulou and S. Lekkou, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and P. Fragoso Martins, acting as Agents,

— the European Commission, by G. Braga da Cruz, A. Szmytkowska, H. Tserepa-Lacombe and A. Stobiecka-Kuik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 the Naczelnik Urzędu Celnego I w Ł. (Director of the Customs Office I in Ł.) and Mr G.M. and Ms M.S. concerning a tax infringement.

Legal context

EU law

3 Article 1 of Directive 98/34 states:

'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 Article 8(1) of the directive reads as follows:

‘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.

...’

Polish law

5 Article 6(1) of the Ustawa o grach hazardowych (Law on Games of Chance), of 19 November 2009 (Dz. U. of 2009, No 201, position 1540), in the version applicable to the main proceedings (‘the Law on Games of Chance’), provides:

‘The organisation of roulette games, card games, dice games and gaming on machines requires a licence to operate a gaming casino.’

6 Article 14(1) of that Law provides:

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

The main proceedings and the question referred for a preliminary ruling

7 Proceedings were brought by the Director of the Customs Office I in Ł. before the Sąd Rejonowy dla Łodzi-Widzewa w Łodzi (the District Court of Łódź, Poland) against Mr M. and Ms S. with respect to their having organised, in the period from 6 July 2012 to 23 January 2013, gaming on machines while not holding a licence to operate a gaming casino under Article 6(1) of the Law on Games of Chance. Such conduct is considered to be an infringement of the provisions of Polish tax law.

8 By order of 13 January 2015, the Sąd Rejonowy dla Łodzi-Widzewa w Łodzi (District Court of Łódź) declared that there was no need to adjudicate on the proceedings brought against Mr M. and Mrs S.

9 In the light of the judgment of 19 July 2012, *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495), that court held that Article 6(1) of the Law on Games of Chance, under which the organisation of gaming on machines requires a licence to operate a gaming casino, was technical in nature, and that, since that article had not been notified to the Commission, the article could not be the basis of proceedings against the persons concerned.

10 The Director of the Customs Office I in Ł. brought an appeal against the order of the Sąd Rejonowy dla Łodzi-Widzewa w Łodzi (the District Court of Łódź) before the referring court.

11 Given that the gaming machines at issue in the main proceedings were purchased in the Czech Republic, that court examined the consequences of a failure to notify Article 6(1) of the Law on Games of Chance to the Commission.

12 First, the referring court is not unaware of the case-law of the Court to the effect that a breach of the obligation to notify technical regulations renders those regulations null and void, with the result that they cannot be relied on against third parties. Second, the referring court recalls the case-law of the Court to the effect that the Member States are free to determine the objectives of their policy on betting and gambling. Further, that court observes that, according to the same case-law, the restrictions imposed must solely be assessed in the light of the objectives pursued by the national authorities of the Member State concerned and the level of protection sought, and they must satisfy the conditions laid down in the case-law of the Court as regards their proportionality.

13 Further, the referring court considers that the case in the main proceedings can be distinguished from the cases that gave rise to the judgments of 30 April 1996, *CIA Security International* (C-194/94, EU:C:1996:172), and 8 September 2005, *Lidl Italia* (C-303/04, EU:C:2005:528), by reason of the fact that the technical provisions that were not notified in those cases concerned regulations in fields that were not subject to the same restrictions as games of chance. The referring court considers that it is, consequently, necessary to interpret Article 8 of Directive 98/34 by determining whether that article can be understood as meaning that, having regard to Article 36 TFEU, it is permissible to assess provisions that are not notified in the light of that article and to refuse to apply provisions that are not notified solely when they do not constitute a restriction that is compatible with Article 36 TFEU.

14 Last, the referring court observes that it is difficult to accept unreservedly that the consequences of failure to notify technical regulations are absolute and that there is no possibility of assessing whether those regulations fall within the boundaries defined in Article 36 TFEU. In the opinion of the referring court, if such regulations are automatically to be inapplicable, the result will be complete liberty to organise games of chance. If the consequences of failure to notify are absolute, that could, in the opinion of that court, also undermine the policies of a Member State in other fields.

15 In those circumstances, the Sąd Okręgowy w Łodzi (Regional Court of Łódź, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 8(1) of Directive 98/34 to be interpreted as meaning that in the event of failure to notify regulations which are considered to be technical regulations, different consequences are possible: as regards regulations which concern the freedoms which are not subject to the restrictions of Article 36 TFEU, the failure to notify must have the consequence that those regulations cannot be applied; whereas, as regards regulations which concern the freedoms which are subject to the restrictions of Article 36 TFEU, the national court, which at the same time is an EU court, may assess whether those regulations, despite the failure to notify them, comply with the requirements of Article 36 TFEU and can be applied?'

Consideration of the question referred for a preliminary ruling

16 It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. With this in mind, the Court of Justice may, where necessary, have to reformulate the questions referred to it (see, to that effect, judgment of 28 April 2016, *Oniors Bio*, C-233/15, EU:C:2016:305, paragraph 30 and the case-law cited). Further, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (order of 14 July 2016, *BASF*, C-456/15, not published, EU:C:2016:567, paragraph 15 and the case-law cited).

17 In that regard, it must be observed that the referring court starts from the premise that a rule such as that stated in Article 6(1) of the Law on Games of Chance falls within the scope of the concept of a 'technical regulation', within the meaning of Directive 98/34, subject to the obligation of notification under Article 8(1) of that directive, the penalty for failure to fulfil that obligation being that such a rule is inapplicable.

18 It must be noted in that context that the concept of a 'technical regulation' extends to four categories of measures, namely, (i) the 'technical specification', within the meaning of Article 1(3) of Directive 98/34; (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 (see judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 70).

19 In that regard, first, it must be borne in mind that the concept of 'technical specification' presupposes that the national measure necessarily refers to the product or its packaging as such and therefore lays down one of the characteristics required of a product. In contrast, where a national measure lays down conditions governing the establishment of undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, those conditions do not constitute technical specifications (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraphs 57 and 59 and the case-law cited).

20 Second, before a condition can be classified within 'other requirements', within the meaning of Article 1(4) of Directive 98/34, a national measure must constitute a 'condition' which can significantly influence the composition or nature of the product concerned or its marketing (see, to that effect, judgment of 19 July 2012, *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 35 and the case-law cited). However, it is necessary to determine whether such a measure is to be deemed a 'condition' relating to the use of the product concerned or whether it

is, rather, a national measure falling within the category of technical regulations referred to in Article 1(11) of Directive 98/34. Whether a national measure falls within one or other of those two categories of technical regulations depends on the scope of the prohibition laid down by that measure (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraphs 73 and 74).

21 Third, the concept of a 'technical regulation', the subject of Article 1(5) of Directive 98/34, covers solely regulations relating to information society services, that is, any service provided at a distance by electronic means and at the individual request of a recipient of services (see, to that effect, judgment of 2 June 2005, *Mediakabel*, C-89/04, EU:C:2005:348, paragraph 19).

22 In the light of those preliminary points, the question referred must be understood to mean that the referring court is seeking to ascertain whether Article 1 of Directive 98/34 must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, falls within the scope of the concept of a 'technical regulation', within the meaning of that directive.

23 First, it is clear that such a provision, which subjects the organisation of roulette games, card games, dice games and gaming on machines to the requirement to hold a licence to operate a gaming casino, does not constitute a 'technical specification', within the meaning of Article 1(3) of Directive 98/34, since it does not refer to a product or its packaging as such and does not lay down one of the required characteristics of a product.

24 Second, that provision cannot be placed in the category of 'rules on [information society] services', within the meaning of Article 1(5) of Directive 98/34, since it does not relate to an 'Information society service', within the meaning of Article 1(2) of that directive.

25 Last, in order to determine whether Article 6(1) of the Law on Games of Chance falls within the scope of either Article 1(4) of Directive 98/34 or Article 1(11) of that directive, it must be ascertained whether such a provision can significantly influence the composition, nature or marketing of the product concerned, in this case gaming machines, as a 'condition' relating to the use of the product concerned, or whether it is a national measure belonging to the category of prohibitions referred to in Article 1(11) of that directive.

26 In that regard, it must be borne in mind that it is Article 14(1) of the Law on Games of Chance that restricts the organisation of roulette games, card games, dice games and gaming on machines to gaming casinos. That provision was notified to the Commission as a 'technical regulation', in view of the fact that the Court has previously held, first, that a national measure which reserves the organisation of certain games of chance to casinos alone constitutes a 'technical regulation', within the meaning of Article 1(11) of Directive 98/34, in so far as it can significantly influence the nature or the marketing of the products used in that context and, second, that a prohibition on operating certain products outside casinos can significantly influence the marketing of those products, by reducing the outlets in which they can be used (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraphs 98 and 99).

27 On the other hand, Article 6(1) of that law, which provides that a licence to operate a gaming casino is required for the organisation of roulette games, card games, dice games and gaming on machines, was not notified.

28 The argument of the Commission, that the close link between the two provisions of national law concerned means that it is impossible to isolate Article 14(1) of the Law on Games of Chance from Article 6(1) of that law, cannot be accepted. As stated by the Advocate General in points 38 to 44 of his Opinion, Article 6(1) of that law and Article 14(1) of that law differ in their function and scope. The description in Article 6(1) of that law, which specifies the authorisation at issue as an authorisation 'to operate a gaming casino', does not alter that conclusion.

29 Accordingly, it must be held that Article 6(1) of the Law on Games of Chance cannot be regarded as falling within the category of 'other requirements', within the meaning of Article 1(4) of Directive 98/34, since the authorisation required by that provision of national law for the organisation of games of chance constitutes a condition imposed with respect to the activity of organising such games, as distinct from Article 14(1) of that law, which imposes conditions with respect to the products concerned by prohibiting their use other than in casinos.

30 Further, in accordance with settled case-law, provisions of national law which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, do not constitute technical regulations within the meaning of Article 1(11) of Directive 98/34 (see, to that effect, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 76 and the case-law cited).

31 Consequently, it is clear that a provision such as Article 6(1) of the Law on Games of Chance does not constitute a 'technical regulation', within the meaning of Directive 98/34.

32 That being the case, there is no need to examine the consequences of failure to fulfil the obligation to notify a technical regulation.

33 It follows from the foregoing that the answer to the question referred is that Article 1 of Directive 98/34 must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, does not fall within the scope of the concept of a 'technical regulation', within the meaning of that directive, that is subject to obligatory notification under Article 8(1) of that directive, the penalty for failure to fulfil that obligation being that such a regulation is inapplicable.

Costs

34 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 (First Chamber) hereby rules:

Article 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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, does not fall within the scope of the concept of a 'technical regulation', within the meaning of that directive, subject to obligatory notification under Article 8(1) of that directive, the penalty for failure to fulfil that obligation being that such a regulation is inapplicable.

[Signatures]