



## Reports of Cases

### JUDGMENT OF THE COURT (Ninth Chamber)

8 October 2020 \*

(Reference for a preliminary ruling – Directive (EU) 2015/1535 – Article 1 – Procedure for the provision of information in the field of technical regulations and of rules on Information Society services – Definition of ‘technical regulation’ – Games of chance – Local duty on the operation of betting terminals – Tax rule – European Commission not notified – Enforceability against the taxpayer)

In Case C-711/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 3 September 2019, received at the Court on 25 September 2019, in the proceedings

**Admiral Sportwetten GmbH,**

**Novomatic AG,**

**AKO Gastronomiebetriebs GmbH**

v

**Magistrat der Stadt Wien, Magistratsabteilung 6,**

THE COURT (Ninth Chamber),

composed of D. Šváby, acting as President of the Chamber, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Admiral Sportwetten GmbH, Novomatic AG and AKO Gastronomiebetriebs GmbH, by W. Schwartz, Rechtsanwalt,
- the Magistrat der Stadt Wien, Magistratsabteilung 6, by S. Bollinger, acting as Agent,
- the Austrian Government, by J. Schmoll and C. Drexel, acting as Agents,

\* Language of the case: German.

- the Belgian Government, by L. Van den Broeck, J.-C. Halleux and S. Baeyens, acting as Agents, and by P. Vlaemminck and R. Verbeke, *avocats*,
- the Polish Government, by B. Majczyna, acting as Agent,
- 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 European Commission, by M. Jauregui Gomez and M. Noll-Ehlers, 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 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).
- 2 The request has been made in proceedings between Admiral Sportwetten GmbH, Novomatic AG and AKO Gastronomiebetriebs GmbH (together, ‘Admiral and Others’) and Magistrat der Stadt Wien (Vienna City Administration; ‘the Vienna City Administration’) concerning the payment of betting terminal duty (‘the duty at issue’).

### **Legal context**

#### ***European Union law***

- 3 Article 1(1)(b) to (f) of Directive 2015/1535 is worded as follows:

‘1. For the purposes of this Directive, the following definitions apply:

...

- (b) “service” means 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:

- (i) “at a distance” means that the service is provided without the parties being simultaneously present;
- (ii) “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;
- (iii) “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex I;

- (c) “technical specification” means 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.

...

- (d) “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;
- (e) “rule on services” means a requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), 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.

...

- (f) “technical regulation” means 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 7, 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.

De facto technical regulations shall include:

- i) laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions;
- ii) voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications;
- iii) technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

...’

4 Article 5(1) of that directive provides:

‘1. Subject to Article 7, 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 those grounds have not already been made clear in the draft.

...

With respect to the technical specifications or other requirements or rules on services referred to in point (iii) of the second subparagraph of point (f) of Article 1(1) of this Directive, the comments or detailed opinions of the Commission or Member States may concern only aspects which may hinder trade or, in respect of rules on services, the free movement of services or the freedom of establishment of service operators and not the fiscal or financial aspects of the measure.'

- 5 An 'indicative list of services not covered by the second subparagraph of point (b) of Article 1(1)' is set out in Annex I to that directive. Paragraph 1(d) of that annex provides:

'1. Services not provided "at a distance"

Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices:

...

(d) electronic games made available in a video arcade where the customer is physically present.'

#### *Austrian law*

- 6 Paragraph 1 of the Gesetz über die Einhebung einer Wettterminalabgabe, Wiener Wettterminalabgabegesetz (Law on the Levying of a Betting Terminal Duty, the Betting Terminal Duty Law of the Province of Vienna) of 4 July 2016 (LGBI. I, 32/2016; 'the WWAG'), in force at the material time, provides:

'A betting terminal duty is to be paid for the operation of betting terminals in the territory of the city of Vienna.'

- 7 According to Paragraph 2(1) of that law, entitled 'Definitions':

'For the purposes of this law, the following definitions shall apply:

- (1) "Betting terminal": a betting outlet at a particular location, which is linked via a data connection to a bookmaker or totalisator and enables a person to participate directly in a bet;

...'

- 8 Paragraph 3 of that law, entitled 'Level of the duty', reads as follows:

'The duty for the operation of betting terminals shall be EUR 350 per betting terminal and calendar month started.

...'

- 9 Paragraph 8(1) of the WWAG provides:

'Actions or omissions by which the duty is evaded are to be punished as administrative offences with fines of up to EUR 42 000; if the fine is not paid, up to six weeks' imprisonment for default of payment is to be imposed. The evasion lasts until the person subject to taxation rectifies the self-assessment or the fiscal authority fixes the duty by way of official decision. ...'

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

- 10 Admiral and Others carry out activities connected to the operation of betting terminals. More specifically, Admiral Sportwetten installs such terminals, Novomatic owns those terminals and AKO Gastronomiebetriebs is the owner of premises used for operating betting terminals.
- 11 From August 2016, Admiral and Others approached the Vienna City Administration in order to have the duty at issue fixed at EUR 0 on the ground that there was no tax liability.
- 12 By decision of 31 October 2016, the Vienna City Administration fixed the amount of the betting terminal duty payable by Admiral and Others for September and October 2016 at EUR 350 per month and per terminal. By decisions of 2 January and 24 July 2017, the same amount was fixed for November to December 2016 and January to June 2017.
- 13 Admiral and Others each brought an action against those decisions, arguing that the provisions concerning betting terminals in the WWAG were technical regulations, the draft of which must be immediately communicated to the Commission in accordance with Article 5(1) of Directive 2015/1535.
- 14 On 23 August 2018, the actions were dismissed by the Bundesfinanzgericht (Federal Finance Court, Austria), which held that those provisions were not technical regulations. The Verfassungsgerichtshof (Constitutional Court, Austria) declined to hear the appeal against that decision, brought before it by Admiral and Others.
- 15 On 23 August 2018, Admiral and Others lodged an appeal on a point of law (*Revision*) against the decision of the Bundesfinanzgericht (Federal Finance Court) before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).
- 16 In that context, the referring court observes that, should the provisions of the WWAG be classified as ‘technical regulations’ within the meaning of Directive 2015/1535, the failure to comply with the obligation of prior communication of those provisions to the Commission would have the effect of prohibiting the levying of the duty at issue and that, as a result, it would have to find that the appellants on a point of law have no tax liability.
- 17 As regards the definition of ‘technical regulation’ within the meaning of Article 1(1)(f) of Directive 2015/1535, the referring court considers that, while the WWAG refers to betting terminals, it does not regulate the specific characteristics of betting terminals, so that it does not constitute a ‘technical specification’.
- 18 Citing the Court’s case-law on the ‘other requirements’ category, the referring court observes that, although the WWAG does not contain any prohibitions, the fact remains that the purpose of that law, in addition to taxation, is to inhibit that type of betting, so that, having regard to the objective of protecting consumers, it cannot be ruled out that it concerns the life cycle of the product after it has been placed on the market, such as to affect directly the marketing of betting terminals. As it is, the referring court notes that the number of those terminals in Vienna remains essentially unchanged.
- 19 Regarding the ‘rules on services’ category, the referring court observes that that category relates solely to Information Society services. According to that court, it is conceivable that, for the same reasons as those put forward in relation to the ‘other requirements’ category, the provisions of the WWAG can constitute ‘rules on services’, in so far as they can relate to the provision of information on betting opportunities and the placing of bets, which is directly connected with the operation of betting terminals.

- 20 As far as concerns the ‘prohibitions’ category, the referring court is of the opinion that the provisions of the WWAG do not fall within that category in so far as they do not contain any prohibition, but provide for penalties in the case of acts or omissions the effect of which is to avoid that tax.
- 21 Lastly, regarding the ‘de facto technical regulations’ category, the court points out that the WWAG contains no reference to other rules, including the Gesetz über den Abschluss und die Vermittlung von Wetten, Wiener Wettengesetz (Law on the conclusion and brokerage of bets, Betting Law of the Province of Vienna) of 13 May 2016 (LGBL. 26/2016), as amended by the Gesetz, mit dem das Gesetz über den Abschluss und die Vermittlung von Wetten (Wiener Wettengesetz) geändert wird (Law amending the Law on the conclusion and brokerage of bets (Betting Law of the Province of Vienna)) of 6 August 2019 (LGBL. 43/2019; ‘the WW’), with the result that it does not fall within that category.
- 22 Moreover, were the provisions of the WWAG to be classified as ‘technical regulations’ within the meaning of Directive 2015/1535, the referring court raises the question of whether, having regard to the Court’s case-law, the failure to observe prior communication of the draft WWAG under Article 5(1) of Directive 2015/1535 means that that law is unenforceable against individuals.
- 23 In those circumstances the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 1 of Directive [2015/1535] to be interpreted as meaning that the provisions of the [WWAG] which provide for taxation of the operation of betting terminals are to be assessed as “technical regulations” within the meaning of that provision?
- (2) Does the failure to notify the provisions of the [WWAG] within the meaning of Directive ... 2015/1535 mean that a duty such as the betting terminal duty may not be levied?’

## Consideration of the questions referred

### *The first question*

- 24 By its first question, the referring court asks, in essence, whether Article 1 of Directive 2015/1535 must be interpreted as meaning that a national tax rule that provides for taxation of the operation of betting terminals constitutes a ‘technical regulation’ within the meaning of that article.
- 25 In order to answer that question, it must be borne in mind that the concept of ‘technical regulation’ covers four categories of measures, namely (i) ‘technical specifications’ within the meaning of Article 1(1)(c) of Directive 2015/1535, (ii) ‘other requirements’ as defined in Article 1(1)(d) of that directive, (iii) ‘rules on services’ referred to in Article 1(1)(e) 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’ within the meaning of Article 1(1)(f) of that directive (see, in respect 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), judgment of 12 September 2019, *VG Media*, C-299/17, EU:C:2019:716, paragraph 25 and the case-law cited).



- 26 It must be stated, in the first place, that in order for a national measure to fall within the first category of technical regulations, referred to in Article 1(1)(c) of Directive 2015/1535, namely 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, to that effect, judgment of 12 September 2019, *VG Media*, C-299/17, EU:C:2019:716, paragraph 26 and the case-law cited).
- 27 In the present case, as is apparent from the documents in the case file submitted to the Court, the technical specifications of the betting terminals are regulated not by the WWAG but by the WW, a law that was communicated to the Commission in accordance with Directive 2015/1535.
- 28 Thus, Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, merely gives a definition of what must be understood by ‘betting terminal’ in order to establish the scope of the duty at issue, that is, the operation of those terminals, without, however, establishing the characteristics required of those terminals and despite the fact that it goes on to describe them.
- 29 In those circumstances, a rule such as that resulting from Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, does not constitute a ‘technical specification’ within the meaning of Article 1(1)(c) of Directive 2015/1535.
- 30 In the second place, regarding the concept of ‘other requirements’ within the meaning of Article 1(1)(d) of Directive 2015/1535, it must be borne in mind that that concept 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.
- 31 In the present case, none of the documents in the case file permit the inference that Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, includes a condition that can significantly influence the composition or nature of the betting terminals or their marketing. Those provisions, as previously noted in paragraph 28 above, merely establish the scope of the duty at issue.
- 32 In those circumstances, a rule such as that resulting from Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, does not fall within the ‘other requirements’ category within the meaning of Article 1(1)(d) of Directive 2015/1535.
- 33 In the third place, regarding the ‘rules on services’ category, it must be noted that it is apparent from Article 1(d) of Annex I to Directive 2015/1535 that ‘electronic games made available in a video arcade where the customer is physically present’, such as betting games made available by means of the terminals in question in the main proceedings, are services not provided at a distance.
- 34 However, the ‘rules on services’ category referred to in Article 1(1)(e) of Directive 2015/1535, read in conjunction with Article 1(1)(b) of that directive, presupposes, *inter alia*, that there is a service that is provided at a distance.
- 35 As a result, a rule such as that at issue in the main proceedings concerning a service not provided at a distance does not fall within the ‘rules on services’ category.
- 36 In the fourth place, regarding the ‘technical regulations’ category, covered by Article 1(1)(f) of Directive 2015/1535, it should be borne in mind that it concerns 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. Regarding, more specifically, prohibitions on use, the Court has previously held that those prohibitions include measures the scope

of which goes well beyond a limitation to certain possible uses of the product in question and are thus not confined to a mere restriction of its use (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 76).

- 37 In the present case, Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, does not contain any prohibition, with the result that it does not fall within that category of technical regulations. The fact that Paragraph 8(1) of the WWAG provides for administrative penalties for failure to comply with the obligation to pay the duty at issue does not call into question that finding. The penalties provided for in that provision are not imposed in respect of the goods in question in the main proceedings nor the service of organising betting games, but on the person subject to the duty at issue.
- 38 Furthermore, it must be added that, regarding de facto technical regulations within the meaning of Article 1(1)(f)(iii) of Directive 2015/1535, the Court has previously held that tax legislation, which is not accompanied by any technical specification or any other requirement with which it is purportedly intended to ensure compliance, cannot be described as a ‘de facto technical regulation’ (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 97).
- 39 In the present case, it cannot be claimed that Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, constitutes a tax measure affecting the consumption of goods or services by encouraging compliance with those technical specifications, other requirements or rules on services, in so far as nothing in the wording of that provision shows that the obligation to pay that duty is intended to ensure compliance with the technical regulations on betting terminals which, in turn, are set out in another law, that is, the WW. Moreover, that national law does not include technical specifications, other requirements or rules on services.
- 40 It follows that a rule such as that resulting from Paragraph 1 of the WWAG, read in conjunction with Paragraph 2(1) thereof, does not fall within the ‘technical regulations’ category within the meaning of Article 1(1)(f) of Directive 2015/1535.
- 41 Consequently, having regard to all the foregoing considerations, the answer to the first question is that Article 1 of Directive 2015/1535 must be interpreted as meaning that a national tax rule that provides for taxation of the operation of betting terminals does not constitute a ‘technical regulation’ within the meaning of that article.

### ***The second question***

- 42 In the light of the answer given to the first question, there is no need to answer the second question.

### **Costs**

- 43 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:

**Article 1 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services must be interpreted as meaning that a national tax rule that provides for taxation of the operation of betting terminals does not constitute a ‘technical regulation’ within the meaning of that article.**

[Signatures]