Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 7 July 2016[1]

Case C-303/15

Naczelnik Urzędu Celnego I w Ł.
v
G.M. and M.S.

(Request for a preliminary ruling from the Sąd Okręgowy w Łodzi (Regional Court of Łódź, Poland))

(Notification procedure for technical regulations — Technical regulations in the gambling sector — Obligation for Member States to notify draft technical regulations to the Commission — Consequences of failure to notify)

I – Introduction

1. Under Polish law, only holders of an authorisation to operate a gaming casino may organise roulette games, card games, dice games and gaming on machines ('the Authorisation Requirement'). Moreover, roulette games, card games, dice games and gaming on machines may only be organised in gaming casinos ('the Location Restriction').

2. The respondents in the main proceedings have been charged with operating slot machines in bars without authorisation. In their defence, they argue that the Authorisation Requirement constitutes a 'technical regulation' within the meaning of Directive 98/34/EC[2] that was not notified to the Commission. Therefore, it cannot be invoked against them by the Polish authorities.

3. That the Authorisation Requirement was not notified to the Commission is not disputed. In its question, the national court seeks clarification of the consequences of that failure to notify. However, before considering those consequences, a preliminary issue must be addressed, namely: does the Authorisation Requirement constitute a 'technical regulation' at all? If not, then no notification obligation arises in the first place.

4. In accordance with the request of the Court of Justice, this Opinion shall be confined to an analysis of that preliminary issue and the general question it raises: to what extent should authorisation regimes for certain types of activities, that is services, be considered as falling under the notification obligation for 'technical regulations' applicable to products, that is, goods?

1 — Original language: English

2 — Directive 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). The words 'and of rules on Information Society services' were inserted into the title of the directive by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34 (OJ 1998 L 217, p. 18).

II – Legal framework

A – *EU law*

1. Directive 98/34

5. Article 1 contains a number of relevant definitions:

‘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.’

6. Article 8(1) of Directive 98/34 provides that:

‘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.

…’

B – *National law*

7. Article 6(1) of the Polish Law on Games of Chance [3] provides that:

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

8. Article 14(1) of the Law on Games of Chance [4] provides that:

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

III – Facts, procedure and questions referred

9. G.M. and M.S., the respondents in the main proceedings, were indicted for having operated slot machines in bars in Poland without possessing the required licence to operate a gaming casino pursuant to the Authorisation Requirement in Article 6(1) of the Law on Games of Chance.

10. The national court held at first instance that the Authorisation Requirement constitutes a ‘technical regulation’ within the meaning of Directive 98/34. In the light of the fact that the Authorisation Requirement was not communicated to the Commission, the first instance national court concluded that it could not be applied to the respondents. In coming to its conclusion, it referred to the judgment of the Court in *Fortuna*. [5] In the *Fortuna* case, the Court held, among other things, that Article 14(1) of the Law on Games of Chance (that is, the Location Restriction) constitutes a ‘technical regulation’.

11. The judgment of the first instance court was appealed by the competent Polish authority (Naczelnik Urzędu Celnego I w Łodzi (Director of the Customs Office I in Łódz) (‘the NUC’) before the Sąd Okręgowy w Łodzi (Regional Court of Łódz). The latter is aware of the case-law in which the Court has held that failure to fulfil the obligation to communicate ‘technical regulations’ to the

3 — Dz. U. of 2009, No° 201, Act 1540.

4 — As applicable at the relevant time. The text of that provision has since been modified.

5 — Judgment of 19 July 2012 in *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495).

Commission has the result that such regulations cannot be invoked against individuals.[6] However, the national court questions whether the same reasoning should apply to the Authorisation Requirement given the particular nature of the sector concerned (games of chance). In the light of those doubts, the national court decided to stay proceedings and refer the following question to the Court:

'Is 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 (OJ 1998 L 204, p. 37) to be interpreted as meaning that in the event of failure to communicate 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 of the Treaty on the Functioning of the European Union, the failure to communicate 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 of the Treaty, the national court, which at the same time is an EU court, may assess whether those regulations, despite the failure to communicate, comply with the requirements of Article 36 of the Treaty and can be applied?'

12. Written observations have been submitted by the NUC, which is the appellant in the main case; G.M., one of the respondents in the main case; the Commission; and the Polish, Belgian, Greek and Portuguese Governments. The NUC, G.M., the Polish and Belgian Governments and the Commission presented oral arguments at the hearing held on 20 April 2016.

IV – Assessment

A – *Introduction*

13. In accordance with the request of the Court of Justice, this Opinion shall be confined to an analysis of the preliminary issue of whether the Authorisation Requirement constitutes a 'technical regulation' at all.

14. I am of the view that it does not. Two alternative routes are suggested to the Court by which it may arrive at that conclusion.

15. The *first* route proceeds as follows: after setting out the different categories of 'technical regulation' under Directive 98/34 (Section B) and a concise overview of the pertinent case-law of the Court (Section C.1), it is suggested that prior authorisation requirements are not 'technical regulations' (Section C.2). To the extent that the Authorisation Requirement can be separated from the Location Restriction, it is my view that the former is not a 'technical regulation' which would need to be notified even if the latter is such a regulation requiring notification (Section C.3).

16. The *second* route (Section E) would perhaps take the Court further. However, it is in my view worth the ride. This alternative line of argument invites the Court to reconsider the ongoing creeping expansion of the notion of 'other requirements' to the regulation of services generally, and to prior authorisation regimes for services particularly. If unchecked, that expansion is likely to lead to a de facto general notification obligation being imposed on services as well, with the only basis for that expansion being that rules on services are likely to have some tangential impact on products that are being used for providing those services. In my opinion, such an evolution is problematic. It ought to be avoided.

6 — See, for example, judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246).

B – *The different categories of 'technical regulation'*

17. The concept of 'technical regulation' under Article 1(11) of Directive 98/34 covers four categories of measures. Those categories are (i) 'technical specification[s]' as defined in Article 1(3) of the directive, (ii) 'other requirements', as defined in Article 1(4) of the directive, and (iii) 'provisions … prohibiting the manufacture, importation, marketing or use of a product', referred to in Article 1(11) of the directive. In addition, there are also (iv) certain rules and restrictions relating to information society services,[7] but which are not relevant in the present case.

18. As regards (i), the Authorisation Requirement at issue in the present case does not fall within this category since it does not refer to products used in the context of games of chance or their packaging as such and thus does not 'lay down their characteristics'.[8]

19. As regards (iii), in order to fall within this category, a national measure must have a scope which goes well beyond a limitation on certain possible uses of the product in question and is intended to cover measures which leave no room for any use which can reasonably be made of the product other than a purely marginal one.[9] This is not the case with the Authorisation Requirement. It does not completely prohibit the use of any products but submits their use to preconditions.

20. As regards (ii), that category covers, in particular, measures aimed at protecting consumers and affecting the life cycle of a product. The scope of that category is less clear and is discussed in detail in the following section.

C – *The notion of 'other requirements' and authorisation regimes*

1. Case law on 'technical regulations' in the gambling sector

21. There are several cases in which this Court has considered the application of Directive 98/34 to the gambling sector: *Lindberg*,[10] *Commission* v *Greece*,[11] *Fortuna*,[12] *Berlington*,[13] and *Ince*.[14] These are all relevant to the interpretation of the notion of 'other requirements'. They will be outlined briefly below.

a) *Lindberg*

22. The *Lindberg* case concerned a prohibition in Sweden on the organisation of games of chance using specific types of gaming machines (lyckohjulsspel (wheel of fortune)). In its judgment, the Court held that the prohibition in issue could constitute an 'other requirement' or a measure 'prohibiting the manufacture, importation, marketing or use of a product'. In order to fall into the latter category, the

7 — Information society services are the only types of services which directly come within the scope of Directive 98/34 (defined in Article 1(2), (5) and (11) thereof).

8 — Judgments of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246, paragraphs 59 and 60); and 19 July 2012 in *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 29).

9 — Judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246, paragraph 77).

10 — Judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246).

11 — Judgment of 26 October 2006 in *Commission* v *Greece* (C-65/05, EU:C:2006:673).

12 — Judgment of 19 July 2012 in *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495).

13 — Judgment of 11 June 2015 in *Berlington Hungary and Others* (C-98/14, EU:C:2015:386).

14 — Judgment of 4 February 2016 in *Ince* (C-336/14, EU:C:2016:72).

prohibition must 'leave no room for any use which can reasonably be expected of the product concerned other than a purely marginal one'. In order to constitute an 'other requirement', the measure would need to significantly influence the composition or nature of the product or its marketing. The classification of the measure was ultimately left to the national court. [15]

23. In the *Lindberg* case, the Court was also asked whether it made any difference that the prohibition replaced a licence requirement. The Court held that, had the national measure been a licence requirement rather than a prohibition, it would not have constituted a 'technical regulation'. In doing so the Court quoted its case-law according to which 'national provisions which merely lay down conditions governing the establishment of undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations'. [16]

b) *Commission* v *Greece*

24. The subject matter of this infringement action was a Greek law imposing a broad prohibition on electrical and electronic games outside casinos. The Court held that the prohibition amounted to a 'technical regulation'. [17] Although it did not say so explicitly, the Court appears to have considered that the Greek measure had a significant influence on marketing and constituted an 'other requirement' within the meaning of Article 1(11) of Directive 98/34. [18] This is supported by the later judgment in *Berlington* (see below) where the Court held that a prohibition on operating slot machines outside casinos amounted to an 'other requirement', referring to *Commission* v *Greece*. [19]

c) *Fortuna*

25. The *Fortuna* case also concerned the Polish Law on Games of Chance, the same law that forms the subject matter of the present case. In its judgment in *Fortuna*, the Court held that the Location Restriction, contained in Article 14(1) of the Polish Law on Games of Chance, which permits only gaming casinos to organise gaming on machines, constitutes a 'technical regulation'. Again, although not stated explicitly, it appears that the Location Restriction was considered to have a significant influence on marketing and, for that reason, amounted to an 'other requirement'. [20]

26. *Fortuna* also concerned certain transitional provisions in the Law on Games of Chance. Those transitional provisions basically imposed a standstill in relation to existing authorisations to carry on activities relating to gaming on low-prize machines (in other words, prohibited the issue of new authorisations or the extension or amendment of existing authorisations). The Court held that the transitional provisions imposed conditions liable to affect the marketing of low-prize gaming machines. As such, they could constitute 'other requirements' to the extent that they significantly influenced the nature or the marketing of those machines. Assessment of that latter condition was left to the national court. This stands in contrast to the Location Restriction, in relation to which the Court ruled (implicitly) on the notion of 'significant influence' and did not leave that to the national court.

15 — Judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246, paragraphs 77 and 78).

16 — Judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246, paragraphs 87 and 88).

17 — In its pleadings in that case, Greece did not contest that the measure was a non-notified 'technical regulation'. The Court referred to the *Lindberg* judgment generally as an authority for its conclusion that the measure amounted to a 'technical regulation'. Judgment of 26 October 2006 in *Commission* v *Greece* (C-65/05, EU:C:2006:673, paragraph 61).

18 — As opposed to an outright prohibition on use. However, the Commission's written pleadings in that case imply that the Commission considered that the measure was a prohibition on use.

19 — Moreover, the possibility for games to be organised in certain locations appears to constitute more than just a 'marginal use', and therefore would not amount to a prohibition within the meaning of Article 1(11) of Directive 98/34. See in this regard point 19 above and Opinion of Advocate General Jacobs in *Lindberg* (C-267/03, EU:C:2004:819, paragraphs 63 to 65) which gives the example of a games machine being used as a doorstop as a 'marginal use'.

20 — See footnotes 18 and 19 above and the accompanying text.

d) *Berlington*

27. *Berlington* concerned a five-fold increase in taxes applying to slot machines and a prohibition on operating slot machines outside casinos. In its judgment, the Court held that the tax increase did not constitute a '*de facto* technical regulation', since it was not accompanied by any other 'technical specification' or 'other requirement'. [21]

28. The Court also explicitly confirmed that the restriction on the organisation of certain games of chance to casinos 'only constitutes a "technical regulation" within the meaning of Article 1(11) of the directive, in so far as it can significantly influence the nature or the marketing of the products used in that context … However, a prohibition on operating slot machines outside casinos … can significantly influence the nature or the marketing of those machines … by reducing the outlets in which they can be used'. [22]

e) *Ince*

29. The *Ince* case concerned a provision of the German State Treaty on Gaming that regulated the organisation and intermediation of sporting bets. The State Treaty was considered to contain certain provisions that could be categorised as 'rules on services' within the meaning of Article 1(5) of Directive 98/34. However, other provisions in the State Treaty such as those 'introducing the obligation to obtain an authorisation to organise or collect sporting bets' did not constitute 'technical regulations'. In coming to this conclusion, the Court repeated the formulation used in *Lindberg* on authorisations (see point 23 above).

2. Authorisation regimes are not 'other requirements'

30. *Lindberg* and *Ince* both state clearly that prior authorisation regimes do not constitute 'technical regulations'. Therefore, *a fortiori*, they do not constitute 'other requirements' within the meaning of Article 1(4) of Directive 98/34.

31. The origin of this statement can ultimately be traced back to the Court's judgment in *CIA Security*. [23] In that case, the Court was asked whether the requirement under Belgian law for prior authorisation to operate a security firm [24] was a 'technical regulation' under Directive 83/189/EEC, [25] the predecessor of Directive 98/34. The Court held that it was not, since the notion of 'technical specification' (at the core of the definition of technical regulation under Directive 83/189) does not apply to provisions 'laying down conditions governing the establishment of security firms'. [26]

32. The ruling in *CIA Security* that a prior authorisation regime does not constitute a 'technical regulation' has since been explicitly applied in the context of Directive 98/34 (using the wording quoted at paragraph 23). [27] It is therefore clearly relevant to how 'other requirements' should be interpreted under the new Directive. Hereafter, I refer to the rule excluding prior authorisation schemes from the scope of 'technical regulations' as the 'the CIA authorisation exception'.

21 — Judgment of 11 June 2015 in *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 93 to 97).

22 — Judgment of 11 June 2015 in *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 98 and 99).

23 — Judgment of 30 April 1996 in *CIA Security International* (C-194/94, EU:C:1996:172).

24 — The requirement was worded as follows: 'Only persons with prior authorisation from the Home Affairs Ministry may operate a security firm. Authorisation shall be granted only if the firm meets the requirements laid down in this Law and the conditions concerning financial means and technical equipment prescribed by royal decree …'.

25 — Council Directive 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).

26 — See also judgment of 8 March 2001 in *van der Burg* (C-278/99, EU:C:2001:143, paragraph 20), which held that 'marketing methods' (in casu, rules on advertising) do not fall within the scope of 'technical regulation'.

27 — First, in the judgment of 22 January 2002 in *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraph 45).

33. The *Fortuna* case arguably brought the CIA authorisation exception into question. In *Fortuna*, the Court acknowledged that certain transitional provisions in the Law on Games of Chance could constitute 'other requirements'.

34. That *Fortuna* overruled the CIA authorisation exception is one of the arguments put forward by the Commission in its written and oral pleadings. The Commission argues that the Authorisation Requirement constitutes a 'technical regulation' in light of the judgment in *Fortuna*.[28]

35. I disagree. I do not consider that *Fortuna* was intended to overrule the CIA authorisation exception. According to the CIA authorisation exception, *prior authorisation requirements* are not 'technical requirements'. By contrast, *Fortuna* concerned a *standstill on authorisations* — in other words, authorisations were required, but for the standstill period, none would be granted.[29] The situations in *Fortuna* and in the present case can therefore be distinguished.

36. Moreover, the fact that *Fortuna* was not intended to bring into question the CIA authorisation exception is confirmed by the later judgment in *Ince*, which explicitly applied that exception.[30]

37. Finally, as a more general observation, a lot rides on the qualification of a measure as a 'technical regulation'. If the measure is not a 'technical regulation', it need not be notified. If it is, it must be notified, or be unenforceable. With apologies for the gambling pun, in this 'high stakes' context, the CIA authorisation exception has the great merit of being a clear and easily applicable rule. Revoking it and subjecting authorisation schemes to a test of whether they have a 'significant influence' on the composition, nature or marketing of a product has huge implications in terms of legal certainty. That could not have been, in my view, the intention of the Court in *Fortuna*.

3. Application to the present case

38. The Authorisation Requirement states that 'the organisation of roulette games, card games, dice games and gaming on machines requires a licence to operate a gaming casino'. If the words 'to operate a gaming casino' had been absent from this sentence, there is no doubt in my mind that the CIA authorisation exception would have applied in this case. The provision would fall outside the notions of 'other requirement' and 'technical regulation' more generally.

39. The descriptive, qualifying words 'to operate a gaming casino' muddy the waters. The Commission argues in substance that those words create a 'close link' between the Authorisation Requirement and the Location Restriction. Since the latter is a 'technical regulation', as stated in *Fortuna*, the must the former be also.

40. I disagree for the following reasons.

28 — Judgment of 19 July 2012 in *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495, specifically paragraph 36 et seq.).

29 — Or extended or amended.

30 — Paragraph 76 of judgment of 4 February 2016 in *Ince* (C-336/14, EU:C:2016:72) reads: '… the provisions introducing the obligation to obtain an authorisation to organise or collect sporting bets and the impossibility of issuing such an authorisation to private operators, these do not constitute "technical regulations" … National provisions which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of that provision.'

41. First, prior authorisation regimes for services of the type concerned here will often have substantive conditions and limitations attached to them. [31] Those substantive conditions and limitations may well amount to 'technical regulations' and should be notified as such. However, I do not consider that those conditions and limitations automatically 'infect' the authorisation requirement itself. [32] Indeed, to the contrary, the practical value of the CIA authorisation exception would be compromised and the scope of the notification requirement in Directive 98/34 could be expanded in a potentially considerable way. As mentioned above, such a development could bring into doubt the validity of a range of prior authorisation regimes for services, creating significant legal uncertainty.

42. Second, it was confirmed by the NUC at the hearing that there are not separate procedures for obtaining an authorisation or 'preliminary permit' under Article 6(1) of the Law on Games of Chance and obtaining a licence to operate a particular gaming casino under Article 14(1) of that law. However, it was equally confirmed by the NUC that the Authorisation Requirement and the Location Restriction are not one and the same. It is, for example, possible to find a breach of the Location Restriction by *ex post* auditing without the automatic withdrawal of the operator's authorisation.

43. Moreover, at the hearing, the Polish Government stated that the Location Restriction in Article 14(1) should not be considered as an element of the authorisation procedure at all. Rather the Location Restriction, in combination with the Criminal Code, aims at sanctioning the organisation of games of chance, for example, in bars or restaurants.

44. In the light of these observations, it appears clear to me that the Authorisation Requirement and Location Restriction have different scopes and functions, and both cannot simply be treated as 'technical regulations' because there is an alleged 'close link' between them.

45. Third, the Commission's main concern with the Authorisation Requirement is that it explicitly refers to the Location Restriction, with the words 'to operate a gaming casino'. However, it is unclear to me whether those words mean that there are additional geographical or other limitations in the Authorisation Requirement, going beyond the Location Restriction. Ultimately, that is a question of interpretation of national law, to be left to the national court. [33] Without second guessing that interpretation, if the national court were to conclude that the words 'to operate a gaming casino' do not impose limitations going beyond the Location Restriction, the Authorisation Requirement should not be considered to be a 'technical regulation'.

46. The purpose of the notification requirement in Directive 98/34 is 'preventive monitoring to protect the free movement of goods' [34] that is, to allow for *ex ante* review of potential restrictions on the free movement of goods. The Location Restriction has been notified and reviewed. Notification of other provisions that simply refer to the Location Restriction, which appears to be the case for the Authorisation Requirement, would not further the purpose of the directive. [35]

31 — For example, in the present case, Article 15(1) of the Law on Games of Chance imposes limits on the number of casinos that can be opened in a given area in relation to the number of inhabitants.

32 — See, by analogy, judgment of 8 March 2001 in *van der Burg* (C-278/99, EU:C:2001:143, paragraph 21). That case concerned a prohibition on advertising of radio equipment not fulfilling certain specifications and having obtained prior approval. The Court held that the existence of a 'direct relationship' between the prohibition and the technical requirements the radio equipment had to fulfil was insufficient to bring the prohibition within the scope of the directive.

33 — I understand that there is significant national case-law in this area, which may clarify the relationship between Articles 6(1) and 14(1) of the Law on Games of Chance. Review of that body of case-law is not a task for this Court, and the present Opinion is based on the written and oral submissions of the parties in this case.

34 — See, for example, judgments of 20 March 1997 in *Bic Benelux* (C-13/96, EU:C:1997:173, paragraph 19), and 6 June 2002 in *Sapod Audic* (C-159/00, EU:C:2002:343, paragraph 34). See also recitals 2 to 7 of Directive 98/34.

35 — The existence of relationships and links between different provisions in national laws is commonplace, and it is often not possible to understand isolated provisions without reading them in the context of the full legislative text. It is for that reason that draft technical regulations must be notified along with the entire draft legislative instrument (judgment of 16 September 1997 in *Commission* v *Italy* (C-279/94, EU:C:1997:396, paragraphs 39 to 41)). However, such interconnectedness does not transform those other provisions into technical regulations.

47. By analogy, there is established case-law that there is no obligation under Directive 98/34 to notify a national measure 'which reproduces or replaces, without adding new or additional specifications, existing technical regulations which … have been duly notified'. [36]

48. In summary, the fact that Article 6(1) of the Law on Games of Chance creates the Authorisation Requirement but simultaneously refers to the Location Restriction is not helpful. However, from there to bring the Authorisation Requirement within the scope of Directive 98/34, with all the implications that that entails, is in my opinion, not justified.

D – *Conclusion*

49. In the light of the above, and subject to the national court's interpretation of the link between Article 6(1) and 14(1) of the Law on Games of Chance, I would envisage that a national rule, such as the Authorisation Requirement provided for in Article 6(1) of the Law on Games of Chance, does not constitute a 'technical regulation' within the meaning of Directive 98/34.

E – *Alternative approach*

50. Notwithstanding the above, and should the Court conclude that the Authorisation Requirement and Location Restriction cannot be separated in the way I propose, or that the CIA authorisation exception must be revisited more generally in light of *Fortuna*, a fuller consideration of the definition of 'technical regulation' and specifically 'other requirements' becomes necessary.

1. 'Other requirements' — critique

51. I have strong misgivings about the expansion of the notion of 'other requirements' to prior authorisation regimes for services, as is essentially being proposed in the present case. I set out my main concerns below.

52. First, there is a risk of excessive and unpredictable expansion of the scope of the notification requirement.

53. A measure constitutes an 'other requirement' if it is 'imposed on products' and affects the 'conditions of use' of that product in a way that can 'significantly influence' its 'marketing'.

54. Measures regulating the provision of services will always have some indirect influence on goods. The provision of any service involves the use of products at some point. Taxi drivers use cars, operators of radio stations use sound equipment, accountants use calculators, and lawyers use pens, paper and occasionally law books. Furthermore, everybody uses computers for virtually every kind of service provided today. In all of these cases, it may always be argued that subjecting a given service to an authorisation requirement will reduce the number of service providers, thus indirectly reducing the amount of products used for providing them, thus impacting the sales of those products. In a nutshell, subjecting provision of each of the services mentioned above to prior authorisation will in some tangential way impact on the consumption of the products used.

55. Does that mean that the prior authorisation regimes in all of those cases constitute 'other requirements' that are notifiable? The answer, in my view, should clearly be 'no'. But where then is the line to be drawn?

36 — See, for example, judgment of 3 June 1999 in *Colim* (C-33/97, EU:C:1999:274, paragraph 22); in the field of gambling law, see Opinion of Advocate General Jacobs in *Lindberg* (C-267/03, EU:C:2004:819, point 46).

56. It was stated at the hearing by G.M. that sales of games machines had significantly dropped since the introduction of the Authorisation Requirement.

57. However, the meaning of 'other requirement' cannot be reduced to a question of volume of trade. This is first and foremost because the definition of 'other requirement' explicitly refers to 'marketing' (not trade) and includes other important conditions, in particular that the measures are 'imposed on products'. It is also because prior authorisation regimes for services will always affect the volume of trade in some products. Making a requirement to notify contingent on an *ex ante* assessment of whether the measure will have a significant influence on trade is, in my view, a recipe for either excessive legal uncertainty as to which measures are in fact notifiable [37] or simply an invitation to notify absolutely everything to the Commission. [38] One need look no further than the *Fortuna* case itself for evidence of this legal uncertainty. That case has led to a number of conflicting national judgments on how the 'significant influence' test should be applied. [39]

58. Second, the knock-on effects of an incorrect assessment of the obligation to notify are a further reason to maximise legal certainty in the definition of the notion of 'technical regulation'. This is particularly the case given the 'direct and serious consequences' [40] that the unenforceability of certain rules can have on relationships between private parties, that is, entities unconnected with the failure to notify in the first place. The *CIA Security* judgment quoted above exemplifies this point. That case concerned a civil dispute between two private parties. The fact that one of those parties was prevented from invoking in its defence a 'technical regulation' because it had not been notified materially affected the outcome of that dispute. [41]

59. Third, apart from its impact on private law relationships, Member States have a history of failing to notify measures and that failure has been invoked in rather unexpected circumstances, outside of any discernible connection to the original scope of application of the national measure concerned. For example, failure to notify a measure has been invoked in order to avoid criminal liability. [42]

37 — As pointed out by Advocate General Jacobs, 'any need for a prior assessment of the effect of a measure would make it less easy to determine which measures are concerned' (see Opinion of Advocate General Jacobs in *Lindberg* (C-267/03, EU:C:2004:819, at paragraph 35)). Analogous concerns are often expressed in the context of Article 34 TFEU and the use of a 'market access test' to determine the applicability of that provision. See, for example, Gormley, L., 'Two years after Keck', *Fordham International Law Journal*, No 19, 1996, pp. 882 to 883; and Snell, J., 'The notion of market access: a concept or a slogan', *Common Market Law Review*, Vol. 47, 2010, pp. 437 to 459.

38 — The Commission acknowledged at the hearing that at least the latter scenario was undesirable.

39 — See, for example, judgment of Wojewódzki Sąd Administracyjny, Gdańsk (Regional Administrative Court of Gdansk) of 19 November 2012 (III SA/Gd 546/12), holding that Articles 129, 135 and 138 of the Law on Games of Chance (the transitional provisions referred to in *Fortuna*) are technical regulations since they significantly influence the nature or marketing of the relevant products (low-prize games machines). This ruling was overturned by the Naczelny Sąd Administracyjny (Supreme Administrative Court) in a judgment of 5 November 2015 (II GSK 1632/15) on the basis that the transitional provision did not change the parties' legal situation (holding also that Article 6 of the Law on Games of Chance did not constitute a technical regulation). See judgment Wojewódzki Sąd Administracyjny, Szczecin (Regional Administrative Court of Szczecin) of 9 October 2015 (II SA/Sz 396/15), holding that Article 135 of the Law on Games of Chance is not a technical regulation. Wojewódzki Sąd Administracyjny, Wrocław (Regional Administrative Court of Wrocław) of 4 October 2013 (III SA/Wr 373/13), upheld in Case II GSK 181/14 of 25 November 2015.

40 — Opinion of Advocate General Jacobs in *Sapod Audic* (C-159/00, EU:C:2002:25, point 47).

41 — See also judgments of 6 June 2002 in *Sapod Audic* (C-159/00, EU:C:2002:343), and 26 September 2000 in *Unilever* (C-443/98, EU:C:2000:496).

42 — See, for example, judgment of 16 June 1998 in *Lemmens* (C-226/97, EU:C:1998:296). In that case, failure to notify technical regulations in relation to breathalysers was argued to render inadmissible evidence in a criminal case on drink driving.

60. The consequences of failing to notify outlined above have not met with universal acclaim, to say the least.[43] Expanding the notion of 'other requirements' to include requirements that focus mainly on services (and not goods), in particular prior authorisation regimes and location requirements,[44] is only likely to increase the occurrence of such scenarios.

61. Fourth, in the 1980s the Court was faced with a serious case of 'free movement creep'. All kinds of national measures regulating the way in which products were marketed were being argued in national courts as having an impact on trade. In reality many of the national measures concerned sought not to regulate the goods themselves but rather the way they were being marketed.[45] Part of this Court's response to such cases was *Keck*.[46]

62. I see a similar pattern in the cases concerning Directive 98/34. To avoid 'notification creep' in the context of Directive 98/34, the scope of 'other requirements' should not be allowed to expand unchecked into the field of services based on the fact that national measures relating to the provision of services may have indirect effects on trade in products.

63. Admittedly, there are differences between 'free movement creep' under the TFEU and 'notification creep' under Directive 98/34. Notably, under Directive 98/34, in order to constitute a notifiable 'other requirement', a measure must be capable of having a *significant influence* on marketing. This is in contrast with the absence of any de minimis threshold in the context of Article 34 TFEU.[47]

64. However, 'significant influence' is a very elastic term which creates additional problems rather than offering a concrete solution. Two types of problems stand out in particular: conceptual and operational.

65. Conceptually, the decision as to whether or not a national legal provision has to be notified logically ought to be made when that provision is being drafted. To predict at that moment whether it will or will not have a 'significant influence' on marketing may be difficult. Thus, in my view, the assessment of whether a provision has certain characteristics meaning that it must be notified should be based *primarily* on an assessment of the normative quality of the provision. It ought to be possible, in most cases, to assess the existence of such characteristics *ex ante* and independently of the hypothetical, future operation of the provision.

66. To that conceptual element is added the operational or functional problem. In practical terms, it will be difficult for a national court, faced with a plea based on non-notification, to reasonably assess 'significant influence' in an objective way and with an acceptable degree of confidence. The existence of reliable quantitative data relating to the relevant national measure is not a given and, even where quantitative data is available, the threshold of 'significant' influence remains elusive.[48] Predictions about the future evolution of the relevant national measure or approaches based on intuition quickly take us into the realms at best of hypothesis, at worst, of crystal ball gazing. The picture is further

43 — Michael Dougan, 'Case C-390/99, Canal Satélite Digital; Case C-159/00, Sapod Audic v. Eco-Emballages', *Common Market Law Review*, Vol. 40, 2003, pp. 193 to 218; Weatherill, S., 'A Case Study in Judicial Activism in the 1990s: The Status before National Courts of Measures Wrongfully Un-notified to the Commission' *in Judicial Review in European Union Law*, (eds. O'Keeffe, D., and Bavasso, A.), Kluwer Law International, The Netherlands, 2000, p. 481.

44 — The provision of many services can be subject to location requirements, for example, taxi services (which can include limitations on zones or specific locations such as airports), pharmacies, and many others.

45 — See, for example, judgments of 23 November 1989 in *B & Q* (C-145/88, EU:C:1989:593); 14 July 1981 in *Oebel* (155/80, EU:C:1981:177); and 11 July 1985 in *Cinéthèque and Others* (60/84 and 61/84, EU:C:1985:329).

46 — Judgment of 24 November 1993 in *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905).

47 — Judgments of 5 April 1984 in *van de Haar and Kaveka De Meern* (177/82 and 178/82, EU:C:1984:144, paragraphs 12 to 14), and 14 December 2004 in *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799). Although some judgments hint at such a threshold being introduced through the back door, see for example judgment of 28 April 2009 in *Commission* v *Italy* (C-518/06, EU:C:2009:270, paragraphs 66 to 70).

48 — For example, would an estimated 10% reduction in sales volume be sufficient? (such was the estimated reduction resulting from the United Kingdom rules on Sunday trading — see judgment of 23 November 1989 in *B & Q* (C-145/88, EU:C:1989:593, paragraph 7)).

complicated first, by the prospect of a measure becoming notifiable due to evolution in trade patterns and secondly, by the fact that notifiability of substantively similar rules is likely to vary from one Member State to another based on differing trade patterns of the product concerned at a national level. [49]

67. Fifth and finally, there is another significant difference between the notification obligation under Directive 98/34 and Articles 34 and 36 TFEU, which points to the need for increased caution when dealing with the former: under the directive, once a measure is classified as an 'other requirement', no justification is possible. No balancing exercise is conducted. If the measure has not been notified, it is simply unenforceable. This contrasts with the situation under Articles 34 and 36 TFEU where restrictions on free movement can at least potentially be justified. [50]

68. The more severe, automatic consequences of failure to notify under the directive should make one doubly wary of an expansive reading of the notion of 'other requirement'. Such an expansive reading could also lead to a rather paradoxical situation where measures that are considered to fall outside Article 34 TFEU entirely are nonetheless notifiable and inapplicable as a result of failure to notify. [51]

69. In the light of the above considerations, this case seems to be an opportune moment to reconsider the meaning of 'other requirements' under Directive 98/34 in the context of measures regulating services, which may have an impact on goods.

2. Proposed approach to the interpretation of 'other requirements'

a) Text, system and purpose

70. The starting point and main consideration when interpreting the notion of 'other requirements' in the present context is that Directive 98/34 is very much focused on measures relating to goods and the free movement of goods, not services.

71. Its predecessor, Directive 83/189, provided for an obligation to notify draft 'technical regulations' relating to products only. Indeed, even now, the only types of 'technical regulations', which relate specifically to services and which are notifiable under Directive 98/34, are information society services. [52] Thus, other types of services could be understood as being, systematically, excluded from its scope of application. Or, more precisely, other types of services may be brought within the scope of Directive 98/34 only indirectly and residually, as a result of their impact on goods.

72. This focus on goods is confirmed by a detailed textual, systemic and purposive reading of Directive 98/34.

49 — See similar concerns in relation to Article 34 TFEU: Snell, 'The notion of market access: a concept or a slogan', *Common Market Law Review*, Vol. 47, 2010, pp. 437 to 472, particularly on p. 459.

50 — Indeed, it is essentially the inability to carry out any justification or balancing exercise under Directive 98/34 (as opposed to Articles 34 and 36 TFEU) that prompted the present request for a preliminary ruling.

51 — For example, the Court has held on a number of occasions that restrictions on the locations from which products may be sold have been held capable of falling outside Article 34 TFEU (see, for example, *Commission* v *Greece*, *Banchero* and *TK-Heimdienst*: judgment of 29 June 1995 in *Commission* v *Greece*, C-391/92, EU:C:1995:199, at paragraphs 11 to 15 (prohibition on the sale of processed milk for infants outside pharmacies held to restrict volume of trade but not to fall within the free movement rules of the Treaty); judgment of 14 December 1995 in *Banchero*, C-387/93, EU:C:1995:439, paragraph 44 (limitation of retail of tobacco products to licensed outlets does not bar access or impede access for imports more than domestic products does not fall within the free movement rules of the Treaty); and judgment of 13 January 2000 in *TK-Heimdienst*, C-254/98, EU:C:2000:12 (limitation of geographical areas of operation of bakers, butchers and grocers held to be a certain selling arrangement but falling within the free movement rules due to greater impact on imports)).

52 — The original text of the directive did not contain any references to services with the exception of recital 2, which also makes clear that the directive is focused on the free movement of goods ('Whereas the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured; whereas, therefore, the prohibition of quantitative restrictions on the movement of goods and of measures having an equivalent effect is one of the basic principles of the Community').

73. Article 1(4), introduces 'other requirements' as requirements '*imposed on a product*'. Those requirements must 'affect the life cycle [of the product]'. Examples given in the text of Article 1(4) include 'conditions of use, recycling, reuse or disposal' of the product, where these can significantly influence its 'composition', 'nature' or 'marketing'. Thus, the wording of that provision screams: 'product, product, product!'

74. In particular, by definition, 'other requirements' must be 'imposed on products', *not* on services using those products. It is correct that a rule imposed on *services* can have a significant impact on the use of related goods. However, the issue of 'significant influence' on products is dealt with under a separate, additional condition contained in the definition of 'other requirement'. Reading the words 'imposed on products' meaning 'directly or indirectly imposed on products', is tantamount to ignoring the words 'imposed on products'. [53]

75. The centrality of products to the notion of 'other requirements' is confirmed by the iterative references to the need for measures to somehow impact the physical characteristics of the product (namely, its composition, its nature, how it is disposed of or how it is recycled).

76. It is true that the word 'marketing' could in theory be read as implying a broader reading of the provision, for example, where the measure has a quantitative impact on sales only, and the product itself is otherwise unaffected. However, on a more systemic reading of the entire definition of 'other requirements', in the context of the directive as a whole, this is not the case. The word 'marketing' cannot be read as an open invitation to squeeze into the notion of 'other requirements' all kinds of regulations that relate primarily to the provision of services, which happen to make use of products in spite of the wording of the four preceding lines of the definition.

77. In my view, the reference to 'marketing' in Article 1(4) of Directive 98/34 should be read, in line with the rest of the definition and the text of the Directive as a whole, as a reference to marketing related measures potentially having an *impact on the physical characteristics of the product*, such as labelling or presentation. This is in contrast to other measures potentially affecting trade in the product, for example, rules relating to conditions of sale. [54]

78. As the Commission's explanatory memorandum, accompanying its proposal for Directive 94/10 pointed out, extending the scope of Directive 83/189 made it possible to include rules which are '*liable to have an effect on the product and may cause distortion of the market*'. [55] The words, 'effect on the product' here again reflect the centrality of the product to the notion of 'technical regulation', and the requirement that the measure not only affect sales, but also the product itself. Moreover, the words 'distortion of the market' are in my view naturally read as referring to a concern about discrimination between competing goods as opposed to restrictions on market access. The original Commission proposal introducing the relevant wording therefore also supports the more 'product-focused' reading of the notion of 'other requirements' being proposed here, which necessitates some kind of 'backlash' or 'recoil' on the characteristics of the product itself.

53 — Cf. Opinion of Advocate General Jacobs in *Lindberg* (C-267/03, EU:C:2004:819, points 54 to 59).

54 — See by analogy, Opinion of Advocate General Campos Sánchez-Bordona in *James Elliott Construction* (C-613/14, EU:C:2016:63, points 87 to 94), which concluded that an implied contractual term that products must be of merchantable quality did not amount to a 'technical regulation'. See also above, footnotes 26 and 32 on advertising restrictions.

55 — COM(92) 491 final, point 18. Directive 94/10 introduced the definition of 'other requirement'. See Directive 94/10/EC of the European Parliament and the Council of 23 March 1994 materially amending for the second time Directive 83/189 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1994 L 100, p. 30).

b) Centre of gravity and exceptions for bans and for impact on products

79. In the light of the foregoing, I propose the following approach which focuses on the centre of gravity of the national measure when interpreting and applying the notion of 'other requirements' under Directive 98/34, subject to limited exceptions. It proceeds in three successive steps.

80. First, national measures primarily 'imposed on products' are 'other requirements' within the meaning of Article 1(4), provided the other conditions of that provision are met.

81. Second, by contrast, national measures primarily imposed on services (or establishment) do not fall, *in principle*, within the notion of 'other requirements'. These include, in particular, national measures restricting the way products are marketed or used by service providers. They include, for example, (i) authorisation requirements and other eligibility criteria for establishment or provision of services,[56] (ii) restrictions on where services are provided from,[57] and, (iii) advertising of services.[58]

82. However, third, national rules which, prima facie, are imposed on services may fall (back) within the notion of 'other requirements' *in specific circumstances* and provided the other conditions of Article 1(4) are met, notably when:

— the national measure involves a *total* prohibition on a service and this results in a specific good not being used at all or where the good only has very marginal uses in other contexts;[59] or

— the national measure relating primarily to the provision of services necessarily affects the life cycle of the product in a way that *has an impact on its physical characteristics* (for example, restrictions on the use of a product in the provision of a service that necessarily imply a requirement to alter a product's composition, labelling, or presentation). In such cases there is a clear backlash or recoil on the product itself.[60]

83. In order to ensure maximum legal certainty and minimise situations where national authorities and courts are required to decide whether a national measure must be notified based on the rather elusive notion of 'significant influence on marketing', the CIA authorisation exception should be clearly confirmed. In other words, prior authorisation regimes do not amount to 'technical regulations', unless they fall within one of the specific situations outlined in paragraph 82 above.

84. The approach proposed here recognises that national measures imposed on the provision of services can affect the free movement of goods and may fall within the scope of both of those freedoms[61] (unless one is purely ancillary to the other).[62] However, it also reflects the textual, systemic and purposive aspects of the notion of 'other requirements' in Article 1(4) which confirm its clear

56 — Reflecting the CIA authorisation exception (for example, licensing of taxi drivers).

57 — As recognised in several judgments of the Court as amounting to certain selling arrangements (see above, footnote 51). Examples include a restriction on the sale of certain products to pharmacies or operation of gaming activities in casinos.

58 — See judgment of 8 March 2001 in *van der Burg* (C-278/99, EU:C:2001:143), where rules on marketing methods were held not to constitute technical regulations.

59 — Such cases would, in any event, normally fall under the notion of total prohibition under Article 1(11) of Directive 98/34.

60 — I underline that the types of measure envisaged here are 'imposed on services' and not products. For that reason, as the Court has previously held, they would not fall within the notion of 'technical specification' under Article 1(3) of Directive 98/34 despite their impact on the physical characteristics of the goods. See judgment of 21 April 2005 in *Lindberg* (C-267/03, EU:C:2005:246, in particular paragraph 59).

61 — Judgment of 11 September 2003 in *Anomar and Others* (C-6/01, EU:C:2003:446, paragraph 55).

62 — That is, unless the goods aspects element is purely accessory to the services element or vice versa. See in this regard judgments of 4 October 2011 in *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631, paragraph 78 et seq.); 24 March 1994 in *Schindler* (C-275/92, EU:C:1994:119, paragraph 24); and 22 January 2002 in *Canal Satélite Digital* (C-390/99, EU:C:2002:34, paragraphs 29 to 32).

focus on products (notably the requirement in the text itself that the measure be 'imposed on products'). The centre of gravity combined with the limited exceptions approach also has the advantage of enhancing legal certainty. This is key element given the grave consequences of failure to notify.

3. Application to the present case

85. The Authorisation Requirement is *not* imposed on products.[63] In principle, it does not constitute an 'other requirement'. The CIA authorisation exception supports that conclusion.

86. The reference to the Location Restriction may be arguably seen as changing the nature of the Authorisation Requirement. It may therefore allow for consideration of the specific circumstances in paragraph 82. However, none of the specific circumstances outlined in that paragraph, which would justify overriding the prima facie conclusion based on the centre of gravity of the national measure, appear to apply. The ultimate conclusion on that is for the national court to verify. However on the facts submitted to the Court, the Authorisation Requirement appears to have no discernible impact on the physical characteristics of the products concerned.

4. Conclusion

87. In the light of the above, I do not consider that the Authorisation Requirement constitutes an 'other requirement' or more generally a 'technical regulation' within the meaning of Directive 98/34.

V – Conclusion

88. In the light of the foregoing, I recommend that in replying to the questions of the Sąd Okręgowy w Łodzi (Regional Court of Łódź, Poland), the Court should hold that a national rule, such as the Authorisation Requirement provided for in Article 6(1) of the Law on Games of Chance, does not constitute a 'technical regulation' within the meaning 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.

63 — Since it imposes restrictions on the organisation of games, not on the products used in the organisation of those games.