



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

20 December 2017^{* i}

(Reference for a preliminary ruling — Information procedure in the field of technical rules and regulations — National legislation clarifying or introducing a prohibition on unauthorised offering of gaming, lotteries and betting and introducing a prohibition on unauthorised offering of advertising for gaming, lotteries and betting)

In Case C-255/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Københavns byret (Copenhagen District Court, Denmark), made by decision of 19 April 2016, received at the Court on 2 May 2016, in the criminal proceedings

Bent Falbert,

Poul Madsen,

JP/Politikens Hus A/S,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General : M. Bobek,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2017,

after considering the observations submitted on behalf of:

- Messrs Madsen and Falbert and JP/Politikens Hus A/S, by S. MacMahon Baldwin and M. Dittmer, Advokater,
- the Danish Government, by M. Wolff and by N. Lyshøj, C. Thorning and J. Nymann-Lindegren, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes and M. Figueiredo and by A. Silva Coelho and P. de Sousa Inês, acting as Agents,
- the Romanian Government, by L. Lițu and R.H. Radu, acting as Agents,

^{*} Language of the case: Danish.

– the European Commission, by H. Tserepa-Lacombe, Y. Marinova and L. Grønfeldt and by U. Nielsen and G. Braga da Cruz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(1), (2), (5) and (11) and Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').
- 2 The request has been made in the context of criminal proceedings brought against Messrs Bent Falbert and Poul Madsen and also against JP/Politikens Hus A/S, who are being prosecuted for having published advertising for online gaming services offered without authorisation granted by the competent authority in the Danish newspaper *Ekstra Bladet* and on that newspaper's websites.

Legal context

European Union law

- 3 Article 1 of Directive 98/34 provides:

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

- (1) "product", any industrially manufactured product and any agricultural product, including fish products;
- (2) "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously present;
- "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.
- "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

...

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

...

For the purposes of this definition:

- a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,
- a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

...

- (11) “technical regulation”, technical specifications and other requirements or rules 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.

De facto technical regulations include:

- 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,

...

- 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 8(1) of that directive 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.’

Danish law

- 5 Paragraph 10 of the lov om visse spil, lotterier og væddemål (Law on certain gaming, lotteries and betting) ('the Law on gaming'), in the version thereof applicable to the main proceedings, as resulting from lov nr 204 om ændring af loven om visse spil, lotterier og andre love og om ophævelse af lov om væddemål i forbindelse med heste- og hundevæddeløb (Law No 204 amending the Law on certain gaming, lotteries and betting and other laws and repealing the Law on horse and dog race betting) of 26 March 2003 ('the amending legislation'), is worded as follows:

'1. A fine or imprisonment of up to six months shall be imposed on whoever, intentionally or through gross negligence,

(1) offers gaming, lotteries or betting in Denmark without holding a licence under Paragraph 1,

(2) brokers participation in gaming, lotteries or betting that is not covered by a licence under Paragraph 1.

...

3. A fine shall be imposed on whoever, intentionally or through gross negligence,

...

(3) advertises gaming, lotteries or betting, that is not covered by a licence under Paragraph 1.'

- 6 Under Paragraph 1(1) of the Law on gaming, the Minister for Taxation may issue a licence for gaming, lotteries and betting which, under Paragraph 2(1) thereof, may be granted to only one company.

- 7 The statement of reasons leading to the enactment of the amending legislation set out the objectives pursued by Paragraph 10(3)(3) of the Law on gaming as follows:

'It is proposed to prohibit advertising of those games, lotteries and betting, not authorised by law.

That amendment corresponds to the prohibition currently found in Paragraph 12(3) of the Law on horse race betting and adds clarification to Paragraph 10(4) of the Law on betting and lotteries.

That prohibition is aimed at protecting gaming operators licensed by the Danish authorities against competition from companies not having such a licence and who therefore cannot legally market or distribute gaming in Denmark.

Advertising for the purposes of the present law is to be understood as comprising all forms of announcement or communication of information on the activities and the commercial offering of gaming operators.

However, this prohibition shall not apply to editorial references in printed or digital media.

This prohibition applies irrespective of the media used. Advertising shall therefore be prohibited in printed media, on the radio, on television and on digital media, in the form of advertising banners, for example.

Advertising for the activities of gaming operators, including their websites, addresses, etc., shall also be prohibited under Paragraph 10(3)(3).'

The main proceedings and the question referred for a preliminary ruling

- 8 Messrs Falbert and Madsen are, respectively, the former and current chief editor of the Danish newspaper *Ekstra Bladet*, the owner of which is JP/Politikens Hus.
- 9 The defendants in the main proceedings are being prosecuted in criminal proceedings before the referring court for offences under, inter alia, Paragraph 10(3)(3) of the Law on gaming, due to their having published advertisements in the newspaper *Ekstra Bladet* and on that newspaper's websites, such as 'www.ekstrabladet.dk' and 'www.ekstrabladet.tv', for bookmaking firms offering gaming and betting in Denmark, without those firms having been issued a licence.
- 10 The referring court is uncertain as to whether the amending legislation should be categorised as a 'technical regulation' within the meaning of Directive 98/34 and therefore ought to have been notified to the Commission under Article 8(1) thereof.
- 11 That court states that it is necessary in particular to determine whether, as maintained by the defendants in the main proceedings before it, the amending legislation should be held to be a 'rule on services' within the meaning of Article 1(5) of Directive 98/34, inasmuch as it is specifically aimed at information society services.
- 12 That court observes in that regard that, prior to the entry into force of the amending legislation, only the offering of gaming in Denmark by non-Danish operators through physical distribution channels was prohibited, and that the purpose and aim of that legislation, as is apparent from the relevant *travaux préparatoires*, was to extend the prohibition to cover non-Danish operators offering gaming in Denmark over the Internet.
- 13 As the amending legislation was aimed at extending the pre-existing prohibition to new services, such as online gaming, the referring court takes the view that the law does not concern, in a merely 'implicit or incidental' manner, offers of online gaming and the associated advertising. On the contrary, it is legislation governing access to new information society services in respect of which Directive 98/34 requires notification to the Commission, as is evident from the relevant *travaux préparatoires*. It is of no import in that regard that under the amending legislation the distribution of gaming, whether online or offline, was prohibited.
- 14 In those circumstances, the Københavns byret (District Court, Copenhagen, Denmark) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does this case involve a rule that must be notified under Article 8(1), cf. Article 1(2), (5), and (11) of [Directive 98/34], assuming the following:

- (a) amending legislation is to be introduced amending the Law on certain gaming, lotteries and betting (lov om visse spil, lotterier og væddemål), under which a provision is to be introduced on sentencing inter alia for whoever intentionally or through gross negligence "offers gaming, lotteries or betting in Denmark without holding a licence pursuant to Paragraph 1", and for whoever intentionally or through gross negligence "advertises gaming, lotteries or betting not covered by a licence under Paragraph 1",

and

- (b) the remarks on the draft amending legislation indicate that the purpose of the abovementioned sentencing provisions is to clarify or introduce a prohibition on gaming offered online by gaming companies outside Denmark and directly targeting the Danish market, partly by prohibiting advertising for, inter alia, gaming offered online by gaming companies outside Denmark, inasmuch as the same remarks it is stated that there is no doubt that, under the rules prevailing

before the amendments, gaming measures are unlawful if a gaming company outside Denmark makes use of sales channels in which the gaming device is actually physically sold within the borders of Denmark; there is, however, greater doubt as to whether gaming from outside Denmark aimed at gaming participants in Denmark but actually physically situated outside Denmark is also covered by the provision; and it is therefore necessary to have clarified whether those forms of gaming are covered. It is further apparent from the remarks that it is suggested to introduce an advertising ban on gaming, lotteries and betting which are not licensed under that law, and that the amendment complies with the current prohibition in Paragraph 12(3) of the Law on horserace betting (hestevæddeløbsloven) but is a clarification of Paragraph 10(4) of the [now repealed] Law on betting and lotteries (Tips- og lottoloven). The remarks further state that the purpose of the prohibition is to protect gaming providers holding a licence from the Danish authorities against competition from companies that do not hold such a licence and who therefore cannot lawfully offer or broker gaming in Denmark.'

Consideration of the question referred

- 15 By its question referred, the referring court seeks guidance on whether Article 1 of Directive 98/34 must be interpreted as meaning that a technical regulation within the meaning of that provision, which is subject to the notification obligation under Article 8(1) of that directive, includes a national provision such as that at issue in the main proceedings, which provides for sanctions where a person offers gaming, lotteries or betting in Denmark without authorisation, and also in the case of advertising for unlicensed gaming, lotteries or betting.
- 16 It should be remembered in that regard that, according to settled case-law, national provisions that merely lay down the conditions governing the establishment or provisions 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, inter alia, judgments of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 76, and 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraph 26).
- 17 In the present case, the view expressed by the Advocate General in points 31 and 32 of his Opinion, to the effect that a national provision such as Paragraph 10(1), point 1, of the Law on gaming, inasmuch as it provides for sanctions for the marketing of games of chance without prior authorisation, must be held to be a 'provision making the exercise of a business activity subject to prior authorisation' as interpreted in the case-law referred to in the preceding paragraph.
- 18 Consequently, such a provision does not come within the definition of 'technical regulation' as referred to in Article 1 of Directive 98/34.
- 19 As to the question whether Paragraph 10(3)(3) of the Law on gaming, which provides for sanctions for the advertising of services for unauthorised games of chance, constitutes a 'technical regulation' within the meaning of Article 1 of Directive 98/34, subject to the notification obligation under Article 8(1) of that directive, it should be noted first of all that although there is a close connection between Paragraph 10(1) point 1, of the Law on gaming, providing for sanctions for the marketing of games of chance without prior authorisation, and Paragraph 10(3)(3) of the Law on gaming, providing for sanctions for activities marketing unauthorised games of chance, it does not automatically follow that the latter provision must be held to be a provision making the exercise of a business activity subject to prior authorisation as interpreted in the case-law referred to in paragraph 16 of this judgment. Although there is a close connection between such provisions, they differ in function and scope (see, to that effect, judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 28).

- 20 Next, it should be noted that there is nothing in the file submitted to the Court indicating whether the amending legislation, by which Paragraph 10(3)(3) of the Law on gaming was introduced, providing for sanctions for services relating to unauthorised games of chance, introduced an amendment to earlier rules on gaming, inter alia by extending their scope to cover online gaming offered by non-Danish gaming operators or whether that law instead merely refined or clarified those earlier rules.
- 21 It should be noted in that regard, firstly, that the question whether the prohibition on advertising of unauthorised games, as provided for in Paragraph 10(3)(3) of the Law on gaming, in particular with regards to online games of chance offered by non-Danish gaming operators, was already provided for by the earlier rules on gaming, with the result that the question whether the amending legislation merely clarified that prohibition or whether instead the prohibition was introduced in the Law on gaming by the amending legislation, is a question of national law falling within the jurisdiction of the referring court (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 83).
- 22 Secondly, it should be remembered that it is only if the amending legislation introduced the prohibition on advertising unauthorised gaming into Paragraph 10(3)(3) of the Law on gaming, in particular with regards to online games of chance offered by non-Danish gaming operators, that the draft legislation that led to the enactment of the amending legislation ought to have been subject to the notification obligation under Article 8(1) of Directive 98/34.
- 23 In order for new national legislation to be held to be a technical regulation having to be notified under Directive 98/34, it must not be limited to reproducing or replacing, without adding technical specifications or other new or additional requirements, existing technical regulations which have been duly notified to the Commission (see, to that effect, judgment of 21 April 2005, *Lindberg*, C-267/03, EU:C:2005:246, paragraph 85).
- 24 If the amending legislation did introduce a prohibition on advertising of unauthorised gaming into Paragraph 10(3)(3) of the Law on gaming, inter alia by extending its scope to cover online gaming offered by non-Danish operators, it becomes necessary to consider whether that provision constitutes a ‘technical regulation’ within the meaning of Directive 98/34.
- 25 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 (judgments of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 70, and 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 18).
- 26 In the present case, it must be considered firstly whether Paragraph 10(3)(3) of the Law on gaming may be held to be a ‘technical regulation’ coming under the category of ‘rules on services’ within the meaning of Article 1(5) of Directive 98/34.
- 27 It should be borne in mind that, under Article 1(2) of that directive, the concept of a ‘technical regulation’ 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 judgments of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 21, and 1 February 2017, *Município de Palmela*, C-144/16, EU:C:2017:76, paragraph 28).

- 28 It should be noted in that regard that, in principle, Paragraph 10(3)(3) of the Law on gaming concerns two types of services being, on the one hand, advertising services, which are immediately sanctioned under that provision and, on the other, gaming services covered by the prohibition on advertising and which are the principal subject-matter of the Law on gaming, read as a whole.
- 29 Both advertising services and gaming services, in so far as they are provided, inter alia, by electronic means (online), constitute ‘Information Society services’ within the meaning of Article 1(2) of Directive 98/34 and the rules relating thereto which may accordingly be held to be ‘rules on services’ within the meaning of Article 1(5) of Directive 98/34.
- 30 It should also be noted, however, that, in order to be categorised as a ‘rule on services’, the definition in Article 1(5) of Directive 98/34 requires that rule to be ‘specifically’ aimed at Information Society services.
- 31 In the present case, it is apparent from the order for reference that the referring court is seeking guidance as to whether Paragraph 10(3)(3) of the Law on gaming may be regarded as being ‘specifically’ aimed at information society services when, inter alia, the wording of that provision does not refer explicitly to information society services and does not draw any distinction between services provided offline and services provided online. That court adds, however, that the *travaux préparatoires* for the amending legislation appear to indicate that the law was aimed, inter alia, at extending that provision to cover online services.
- 32 It should be noted in that regard, firstly, that under the first indent of Article 1(5) of Directive 98/34, the question whether a rule is aimed specifically at information society services must be determined in the light of both the stated reasons and the wording of the rule. Under that same provision, moreover, it is not required that ‘the specific aim and object’ of all of the rule in question be to regulate information society services, as it is sufficient that the rule pursue that aim or object in certain of its provisions.
- 33 Consequently, if it is not apparent solely from the wording of a national rule that it is aimed, at least in part, at regulating specifically information society services – such as in the present case, where the wording does not draw any distinction between services provided offline and services provided online – that object may nevertheless be gleaned quite readily from the stated reasons given for the rule – again as in the present case under the relevant national rules of interpretation, which allow for inter alia the *travaux préparatoires* for the rule to provide guidance.
- 34 Secondly, as observed by the Advocate General in point 63 of his Opinion, it is apparent from recitals 7 and 8 of Directive 98/48, by which Directive 98/34 was amended, that the object was to adapt existing national legislation to take account of new information society services and avoid restrictions on the freedom to provide services and freedom of establishment leading to ‘refragmentation of the internal market’.
- 35 It would, however, run counter to that objective to exclude a rule, in respect of which the *travaux préparatoires* stated clearly that its aim and object were to extend an existing rule in order to cover information society services, from classification as a rule aimed specifically at such services within the meaning of Article 1(5) of Directive 98/34 on the sole ground that the operative part of that rule makes no express reference to those services but instead covers them through a broader definition of services covering both services provided online and services provided offline.
- 36 It follows that a national provision such as Paragraph 10(3)(3) of the Law on gaming constitutes a technical regulation that must be notified to the Commission before being enacted, as it is clear from the *travaux préparatoires* for that provision that its aim and object was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

- 37 In the light of all the foregoing considerations, the answer to the question referred is that Article 1 of Directive 98/34 must be interpreted as meaning that a national provision such as that at issue in the main proceedings, which provides for criminal sanctions where an unauthorised offer is made of gaming, lotteries or betting on the national territory, does not constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive. However, a national provision such as that at issue in the main proceedings, which provides for sanctions in the event of advertising for unauthorised gaming, lotteries or betting, does constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive, as it is clear from the *travaux préparatoires* for that provision of national law that its object and purpose was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

Costs

- 38 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 national provision such as that at issue in the main proceedings, which provides for criminal sanctions where an unauthorised offer is made of gaming, lotteries or betting on the national territory, does not constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive. However, a national provision such as that at issue in the main proceedings, which provides for sanctions in the event of advertising for unauthorised gaming, lotteries or betting, does constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive, as it is clear from the *travaux préparatoires* for that provision of national law that its object and purpose was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

[Signatures]

i — The wording of paragraph 35 of this document has been modified after it was first put online.