Case C-711/19

Request for a preliminary ruling

Date lodged:

25 September 2019

Referring court:

Verwaltungsgerichtshof (Supreme Administrative Court, Austria)

Date of the decision to refer:

3 September 2019

Appellants on a point of law:

Admiral Sportwetten GmbH

Novomatic AG

AKO Gastronomiebetriebs GmbH

Defendant authority:

Magistrat der Stadt Wien (Vienna City Administration), Department 6

[…]

[File reference] […]

3 September 2019

The Supreme Administrative Court, […] with regard to the appeal on a point of law of 1. Admiral Sportwetten GmbH, 2. Novomatic AG, both of Gumpoldskirchen, and 3. AKO Gastronomiebetriebs GmbH of Vienna, […] against the judgment of the Federal Finance Court of 23 August 2018, ZI. RV/7400063/2017, concerning betting terminal duty (defendant authority before the Federal Finance Court: Vienna City Administration Department 6), made the following

Order:

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is 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 to be interpreted as meaning that the provisions of the Vienna Betting Terminal Duty Law 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 Vienna Betting Terminal Duty Law within the meaning of Directive (EU) 2015/1535 mean that a duty such as the betting terminal duty may not be levied?

Grounds:

1 A. Subject matter and proceedings to date

2 The first appellant on a point of law installs betting terminals, the second appellant on a point of law owns those betting terminals, and the **[Or. 2]** third appellant on a point of law is the proprietor of premises used for operating betting terminals.

3 By way of several submissions from August 2016, the first appellant on a point of law informed the defendant authority that it was going to operate a betting terminal in Vienna at a site owned by the third appellant on a point of law. It was requested that the duty be fixed at € 0 because, in its opinion, there was no liability for tax.

4 By decision of 31 October 2016, the Vienna City Administration fixed the betting terminal duty in respect of the appellants on a point of law for September 2016 and October 2016 at, in each case, € 350 (per month and betting terminal), in accordance with their respective capacity as installer or owner of the betting terminal or proprietor of the premises used for operating the betting terminal.

5 By further decisions of 2 January 2017 and 24 July 2017, the Vienna City Administration fixed the betting terminal duty for the period from November to December 2016 and January to June 2017 (€ 350 per month and betting terminal in each case).

6 The appellants on a point of law lodged appeals against those decisions. In summary, they claimed that the provisions concerning betting terminals contained in the Wiener Wettterminalabgabegesetz (Vienna Betting Terminal Duty Law, WWAG) were 'Technical Regulations' within the meaning of the Gesetz über internationale Informationsverfahren und Notifizierungen auf dem Gebiet technischer Vorschriften (Law on international procedures for the provision of information and notifications in the field of technical regulations, WNotifG) and Directive (EU) 2015/1535 of the European Parliament and of the Council of

9 September 2015. In the view of the appellants on a point of law, the Commission had not been informed of those technical regulations, which meant that they were unenforceable against individuals. They claimed this had the effect that the betting terminal duty had been wrongly imposed.

7 The Federal Finance Court dismissed the appeals as unfounded by the judgment contested before the Supreme Administrative Court. **[Or. 3]**

8 The Federal Finance Court came to the conclusion, with more detailed reasoning, that the provisions of the WWAG were not technical regulations within the meaning of the WNotifG or Directive 2015/1535. There was therefore no notification obligation under the WWAG. This meant that the WWAG was enforceable against the appellants on a point of law; the betting terminal duty had been correctly imposed.

9 The Constitutional Court declined to give judgment on the appeal lodged against that judgment by the appellants on a point of law.

10 B. Relevant provisions of national law

11 The Vienna Betting Terminal Duty Law (WWAG), a provincial law, in the original version applicable in the present case, LGB1. No 32/2016 , reads, in extract, as follows:

‘Subject of duties

Paragraph 1. A betting terminal duty is to be paid for the operation of betting terminals in the territory of the city of Vienna.

Definitions

Paragraph 2. 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.

2. Bookmaker: a person whose profession is to accept bets.

3. Totalisator: a person whose profession is to broker bets.

Level of the duty

Paragraph 3. The duty for the operation of betting terminals shall be EUR 350 per betting terminal and calendar month started.

[…]

Penalties

Paragraph 8. (1) 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 **[Or. 4]** until the person subject to taxation rectifies the self-assessment or the fiscal authority fixes the duty by way of official decision. […]'

12 In the reasoning of the preparatory documents relating to this law (LG — 00689-2016/0001/LAT), the following was stated in particular:

'The ability to operate betting terminals simply and anonymously leads to a high level of readiness to use amongst the potential customers, which may be further increased through additional offers from the installers. With regard to these particular circumstances, it is therefore appropriate to subject betting terminals to specific taxation, in order to inhibit this form of betting, especially since this area is also to be considered from the perspective of gambling addiction with all of its negative social consequences.

Betting terminals present an increased risk of addiction compared to in-person betting outlets. This mainly lies in the fact that the lack of personal contact breaks down the inhibition threshold for participation in betting and therefore makes it easier to participate in betting. Participation in betting via a betting terminal leads to increased betting behaviour overall. This is also attributable to the fact that the technical possibilities of betting terminals allow a far greater range of betting opportunities to be made available to customers. At the same time, betting terminals enable multiple bets to be placed one after the other at relatively short intervals.

A betting terminal duty of EUR 350 per betting terminal and calendar month started should therefore be introduced for the operation of betting terminals in the territory of the city of Vienna. […]

The operation of betting terminals forms the object of the duty.

[…] The [legal] wording 'enables direct participation in a bet' is intended to clarify that those technical devices where only personnel of the particular undertaking can enter bets for the customer do not constitute betting terminals within the meaning of the law (for example in tobacconist's shops, where the bet is exclusively entered by the sales personnel and the bet acceptance counter is not freely available to customers).

It may be inferred from the definitions that the object of the tax is not linked to the concept of a betting terminal and the other definitions of the draft Vienna Betting Law and differs from that **[Or. 5]** in the Fees Law 1957 to the effect that the operation of betting terminals, rather than the conclusion of a betting contract, is the object of the tax. […]

With regard to the level of duty, reference is made to the judgment of the Constitutional Court of 5 December 2011, B 533/11, Constitutional Court ruling

19.580/2011. In that judgment, it was stated inter alia that the legislature is not to be opposed where, instead of prohibiting the installation of gaming machines for gambling, it seeks to inhibit the installation of machines or gambling by increasing the tax burden. To the extent that potential gamblers are thereby prevented from gambling due to its lack of appeal, that is precisely the legislature's intention, which is not to be subject to challenge under constitutional law. This reasoning can be applied to the betting terminal duty. […]'

13 The law on the conclusion and brokerage of bets (Vienna Betting Law), in the original version applicable here, LGBl. No 26/2016, regulates the commercial conclusion (bookmaker bet) and the commercial brokerage (totalisator bet) of bets on the occasion of sporting events and the commercial brokerage of such bets and betting customers (Paragraph 1 of the abovementioned law). In Paragraph 2 point 8, it contains its own definition of 'betting terminal', which differs slightly from that of the Betting Terminal Duty Law. The law then contains extensive provisions on the requirements of authorisation to act as a betting trader. Paragraph 13 of that law contains more detailed provisions concerning betting terminals.

14 The Vienna Betting Law was notified in accordance with the provisions of Directive (EU) 2015/1535 (notification number: 2015/602/A).

15 The Wiener Notifizierungsgesetz (Vienna Notification Law, WNotifG) LGB1. No 28/1996 (; — in the current version (LGB1. No 36/2016) — implements Directive (EU) 2015/1535 (Paragraph 7 WNotifG). It essentially contains definitions corresponding to that directive. **[Or. 6]**

16 C. Explanations of the questions referred

17 1. Relevance of the questions referred

18 Under Paragraph 3 WWAG, the duty for the operation of betting terminals is to be € 350 per betting terminal and calendar month started. It is undisputed that this situation exists in the present case in the periods concerned and the appellants on a point of law are subject to taxation within the meaning of the WWAG in their respective capacity (operator, owner or proprietor of the premises used for operating the betting terminal). The appellants on a point of law have not been successful before the Constitutional Court in relation to their objections based on domestic constitutional law. Under domestic law, the tax liability at issue therefore exists.

19 However, the appellants on a point of law claim that the tax liability conflicts with EU law. In this respect, it remained undisputed in the proceedings that the draft of the WWAG — unlike that of the Vienna Betting Law — was not notified in accordance with Commission Directive 2015/1535.

20 If the provisions of the WWAG are — as claimed by the appellants on a point of law — technical regulations within the meaning of Directive 2015/1535 and to the

extent that a breach of the notification obligation could mean that the betting terminal duty may not be levied, the appellants on a point of law would, however not be capable of being liable to pay tax. The decision of the Supreme Administrative Court therefore depends on the questions mentioned.

21 2. The first question referred

22 It should firstly be noted that — as far as the Supreme Administrative Court is able to establish — there are no rulings by the Court of Justice to date on Directive 2015/1535 which is to be interpreted in the present case (a request for a preliminary ruling on that directive obviously exists in respect of Case C-727/17). However, the Supreme Administrative Court assumes that, in this respect, reference is to be made to the case-law on predecessor directives, which that directive served to codify (see Recital 1 of the directive). **[Or. 7]**

23 According to the established case-law of the Court of Justice on the predecessor directives, the concept of a 'technical regulation' extends to four categories of measures, namely (i) the 'technical specifications', within the meaning of Article 1(3) of Directive 98/34 (Article 1(1)(c) of Directive 2015/1535; also see in this respect the correlation table in Annex IV to the directive); (ii) 'other requirements', as defined in Article 1(4) of that directive (now Article 1(1)(d)); (iii) the 'rule on services', covered in Article 1(5) of that directive (now Article 1(1)(e)), 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 (now Article 1(1)(f); see, recently, Court of Justice, 26 September 2018, *Van Gennip and Others*, C-137/17, paragraph 37, with further references; also see Opinion of 13 December 2018, *VG Media*, C-299/17, paragraph 19).

24 a) 'Technical specifications'

25 This concept presupposes that the national measure necessarily refers to the product or its packaging as such and therefore lays down one of the characteristics required of a product, such as the dimensions, the sales description, labelling or marking (see Court of Justice, 8 March 2001, *van der Burg*, C-278/99, paragraph 20; Court of Justice, 21 April 2005, *Lindberg*, C-267/03, paragraph 57; Court of Justice, *Van Gennip and Others*, paragraph 38; also see Court of Justice, 10 July 2014, *Ivansson*, C-307/13, paragraphs 19 *et seq.*). General provisions are not to be assessed as such technical specifications (see, once again, Court of Justice, *Ivansson*, paragraphs 21 and 22).

26 Admittedly, the WWAG refers to 'products' (betting terminals) which are involved in the activity (see, for instance, Court of Justice, 4 February 2016, *Ince*, C-336/14, paragraph 71). However, specific characteristics of betting terminals are not regulated by the WWAG, unlike in the Vienna Betting Law. The WWAG merely describes the functions performed by the betting terminal; 'descriptions'

are involved in this respect (see, in this regard, Court of Justice, 13 October 2016, *M. and S.*, C-303/15, paragraph 28), rather than 'provisions'. The **[Or. 8]** Supreme Administrative Court therefore assumes that no technical specifications are present.

27 b) 'Other requirements'

28 Before a condition can be classified within 'other requirements' (on the reasoning for the introduction of this category, see in more detail Court of Justice, 21 April 2005, *Lindberg*, C-267/03, paragraphs 61 *et seq.*), a national measure must constitute a 'condition' which can significantly influence the composition or nature of the product concerned or its marketing (see Court of Justice, 13 October 2016, *M. and S.*, C-303/15, paragraph 20, with further references; also Court of Justice, 4 February 2016, *Ince*, C-336/14, paragraph 72). The prohibition on issuing, extending or amending authorisations for activity relating to gaming on low-prize machines outside casinos is such as to directly affect trade in low-prize gaming machines, and therefore the marketing thereof (see Court of Justice, 19 July 2012, *Fortuna and Others*, C-213/11 *inter alia*, paragraph 36; also see Court of Justice, 11 June 2015, *Berlington Hungary*, C-98/14, paragraph 99).

29 In the present case, there is no prohibition in this respect, but merely taxation. However, as is apparent from the explanations in the preparatory documents relating to this law, this taxation (in any case also) serves to 'inhibit this form of betting'. In addition to fiscal objectives, it was therefore obviously also the intent of the legislature to prevent gamblers from gambling, even though the number of betting terminals operating in Vienna subsequently remained essentially constant at around 2 000 units.

30 It therefore does not appear in any case to be excluded that the taxation of the operation of betting terminals is to be assessed as a requirement in particular for protecting consumers (gamblers) concerning the life cycle of the product (betting terminals) after it has been placed on the market and which can significantly influence the marketing of the betting terminal.

31 It could certainly also be in question whether a measure within the meaning of Article 1(6) of the Directive is involved here. However, if the protection of workers is claimed in this connection **[Or. 9]**, if only 'in particular', it at least appears not to be obvious that gamblers are also supposed to be protected with regard to a possible gambling addiction in this respect.

32 c) 'Rules on services'

33 For classification under this category, these rules must be aimed 'specifically' at electronic information society services. This must be determined in the light of both the stated reasons and the wording of the rule. In this respect, it is sufficient that the rule pursues that aim or object in certain of its provisions (see Court of Justice, 20 December 2017, *Falbert*, C-255/16, paragraph 32). A national provision, which provides for sanctions in the event of unauthorised gaming,

constitutes a technical regulation if that provision expressly and specifically concerns online gaming services (see, once again, Court of Justice, *Falbert*, paragraph 37).

34 In this respect, the WWAG provides for sanctions only in the case of tax evasion or failure to notify. However, with the standardisation of tax liability in respect of the operation of betting terminals, it is (also) aimed at inhibiting the conclusion of bets via this distribution channel (see above regarding the 'other requirements'). In this respect, an assessment of the WWAG as a general requirement for the provision of an information society service does not in any event appear to be excluded. It also does not appear to be excluded that these provisions of the WWAG are to be assessed as regulation of those services, namely the provision of information on, firstly, betting opportunities and secondly, the conclusion of bets, both of which are directly connected with the operation of betting terminals. The situation does not appear to be comparable with the making of a plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers (Annex I, paragraph1(c) of the directive), as the betting terminal is operated by the customer him or herself, albeit usually in the presence (of a representative) of the proprietor of the premises in which the betting terminal is located. **[Or. 10]**

35 With regard to whether such an assessment is once again excluded for instance by Article 1(6) of the Directive, reference may be made to the above observations (on the 'other requirements').

36 d) Regulations within the meaning of the fourth category

37 Classification according to this category (on the introduction of this category, see once again Court of Justice, 21 April 2005, *Lindberg*, C-267/03, paragraph 73) requires that regulations prohibit the manufacture, importation, marketing or use of a product or the provision or use of a service (see Court of Justice, 9 June 2011, *Intercommunale Intermosane*, C-361/10, paragraph 13; Court of Justice, 10 July 2014, *Ivansson*, C-307/13, paragraph 16).

38 As the WWAG contains absolutely no prohibition in this sense, the Supreme Administrative Court is of the opinion that this law does not fall within this category. In particular, not even Paragraph 8 WWAG provides for any prohibition of the activities mentioned, but rather it provides for sanctions in the case of tax evasion or failure to notify.

39 e) '*De facto* regulations'

40 If a regulation which is not to be assessed as a technical regulation refers to other regulations which are themselves to be regarded as technical regulations, the first-mentioned regulation is to be assessed as a '*de facto* technical regulation' (see Court of Justice, 10 July 2014, *Ivansson*, C-307/13, paragraph 31).

41 In the opinion of the Supreme Administrative Court, it is sufficient in this regard to point out that the WWAG contains no reference to other regulations, in particular the Vienna Betting Law (also see in this regard Court of Justice, 11 June 2015, *Berlington Hungary*, C-98/14, paragraphs 96 and 97).

42 3. The second question referred

43 According to the established case-law of the Court of Justice (on predecessor directives; differently — on an even earlier regulation — Court of Justice, 13 July 1989, *Enichem Base*, C-380/87, paragraphs 22 and 23), breach of the notification obligation renders the **[Or. 11]** 'technical regulations' concerned inapplicable, so that they are unenforceable against individuals (see Court of Justice, 30 April 1996, *CIA Security International*, C-194/94, paragraph 54; Court of Justice, 26 September 2000, *Unilever Italia*, C-443/98, paragraphs 49 *et seq.*; Court of Justice, 10 July 2014, *Ivansson*, C-307/13, paragraph 48; Court of Justice, 4 February 2016, *Ince*, C-336/14, paragraph 68: only the technical regulations contained therein, not the other provisions of a law, are inapplicable; also see Opinion of 13 December 2018, *VG Media*, C-299/17, paragraph 2; but also see Court of Justice, 16 June 1998, *Lemmens*, C-226/97, paragraphs 35 *et seq.*).

44 Overall, the interpretation of EU law does not appear to be so obvious as to leave no scope for any reasonable doubt (see Court of Justice, 4 October 2018, *Commission v French Republic*, paragraph 110).

45 The questions are therefore referred to the Court of Justice with a request for a preliminary ruling pursuant to Article 267 TFEU.

[Signatures and official seal]