

Case C-120/24

Request for a preliminary ruling

Date lodged:

15 February 2024

Referring court:

Lietuvos vyriausiasis administracinis teismas (Lithuania)

Date of the decision to refer:

14 February 2024

Applicant at first instance and appellant:

‘Unigames’ UAB

Defendant at first instance and respondent:

Lošimų priežiūros tarnyba prie Lietuvos Respublikos finansų ministerijos

[...]

LIETUVOS VYRIAUSIASIS ADMINISTRACINIS TEISMAS

(Supreme Administrative Court of Lithuania)

ORDER

14 February 2024

[...]

The Chamber, in extended composition, of the Supreme Administrative Court of Lithuania [...] [composition of the court] [...], has examined, at a sitting of the court under the written appeal procedure, the administrative case concerning the appeal lodged by the appellant, the private limited liability company Unigames, against the judgment of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania) of 10 August 2022 in the administrative case relating to the action brought by the appellant [...] against the respondent, the Lošimų priežiūros tarnyba prie Lietuvos Respublikos finansų ministerijos

(Gambling Supervisory Authority under the Ministry of Finance of the Republic of Lithuania), seeking the annulment of an order.

The Chamber, in extended composition,

has established as follows:

I.

- 1 The present case concerns a dispute between the appellant, the private limited liability company Unigames, which has been granted licence No 0118 to operate gambling activities with category B machines ('the appellant'), and the respondent, the Gambling Supervisory Authority under the Ministry of Finance of the Republic of Lithuania ('the respondent' or 'the Authority'), concerning Tarnybos direktoriaus 2022 m. gegužės 19 d. įsakymas Nr. DIE-314 „Dėl atlikto UAB „Unigames“ neplaninio specialiojo patikrinimo pagal 2021 m. spalio 14 d. pavedimą patikrinti Nr. PT-36-(7.3)“ (Order No DIE-314 of the Director of the Authority of 19 May 2021 concerning the unscheduled special inspection of 'Unigames' UAB carried out pursuant to inspection order No PT-36-(7.3) of 14 October 2021) ('the Order').

Legal framework. European Union law

- 2 Article 5(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 (codification) ('Directive 2015/1535') states:

'1. Subject to Article 7, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned to the Commission, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft technical regulation again to the Commission under the conditions set out in the first and second subparagraphs of this paragraph if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

....’

- 3 Article 1(1)(b) of Directive 2015/1535 defines ‘service’ as meaning ‘any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

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

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

- 4 Article 1(1)(e) of Directive 2015/1535 states that ‘rule on services’ means a ‘requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point (b), in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

For the purposes of this definition:

- (i) 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;
- (ii) 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’.

- 5 A ‘technical regulation’ is defined in Article 1(1)(f) of Directive 2015/1535 as ‘technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations shall include:

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

This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list drawn up and updated, where appropriate, by the Commission, in the framework of the Committee referred to in Article 2.

The same procedure shall be used for amending this list'.

Legal basis. National law

- 6 Article 10(19) of the Lietuvos Respublikos azartinių lošimų įstatymas (Law of the Republic of Lithuania on gambling (in the version of Law No XIV-337 of 20 May 2021, which is relevant to the present administrative case; 'the Law on gambling') states: 'In the Republic of Lithuania, it shall be prohibited to encourage participation in gambling by disseminating information or by performing acts of persuasion in any form and by any means, including special events, trial games, promotions, discounts, gifts and similar incentives operated by the gambling operator itself, for the purpose of encouraging participation in gambling or remote gambling.'
- 7 Article 10(19) of the Law on gambling, in the version in force until the amendment made by the Law of 20 May 2021 (in the version of Law No XII-1734 of 21 May 2015), stated that 'in the Republic of Lithuania, it shall be prohibited to encourage participation in gambling in the following ways:
 - (1) by granting the player the right to receive gifts from the gambling operator on an immediate basis or within a certain period following participation in gambling;

(2) by operating games or competitions, trial games, lotteries and other events that encourage participation in gambling, including remote gambling, outside of gambling venues or the gambling operator's website.'

Relevant facts

- 8 The following information was recorded by specialists from the Inspection Unit of the Authority when they checked the appellant's website at <https://uniclub.lt/>: 'Spearhead Explosion 43 New Games!', 'ELK machines. 25 gaming machines!', 'The hottest games', 'Turbo payouts. Payout in seconds!', '24/7 deposits/payouts. Revolut is here', 'Choose from 1000+ casino games', '... click on the Bet Builder offer and combine different events in the same matches! With us, this tool is valid for a wide range of sports and combinations! ...', 'Cash out! Payouts before the end of a match!', 'Our experience, convenience, quality and innovation are what set us apart', 'Our gambling portal is extremely convenient and easy to use. Everything is designed for you to relax and have a great time', 'Casino games from top developers', 'Fast deposits and payouts', and so on. That information was considered by the respondent to be an infringement of the prohibition on encouraging participation in gambling (Article 10(19) of the Law on gambling).
- 9 The unscheduled inspection of the appellant, on a proposal by the Director of the Authority, revealed irregularities and led to the adoption the Order [...], which: (1) finds that the appellant's infringement has not been remedied as of the date of adoption of the Order, since the appellant's website continues to publish information intended to draw attention to the appellant's offer and to encourage gambling by means of promotional phrases or words, or intended to draw attention to the appellant's credibility, the exclusivity of the appellant's website, or the features of the appellant's services, constituting an infringement of the prohibition on encouraging participation in gambling (Article 10(19) of the Law on gambling); (2) finds that the information recorded and published on the appellant's website between 13 October 2021 [...] and 3 February 2022 encouraged visitors to the appellant's website to participate in remote gambling, in breach of Article 10(19) of the Law on gambling; (3) confirms the commission's conclusion and imposes a fine of EUR 12 662 on the appellant for the infringement found by the commission; (4) warns the appellant of a possible suspension of its licence to operate category B gambling machines as a result of the infringement found; (5) requires the appellant to remedy the infringement by no later than 20 June 2022; and (6) informs the appellant that it is under an obligation to pay the fine imposed by the respondent to the State budget within three months of the date of receipt of the Order [...]. In the event of an appeal against the Order [...], the fine must be paid within three months of the date on which the court decision that dismisses the appeal becomes final.
- 10 [...] [repeated information]
- 11 The court of first instance upheld the Authority's position and dismissed the appellant's action by decision of 10 August 2022. That court did not accept the

appellant's arguments that the procedure for the adoption of Article 10(19) of the Law on gambling had been infringed – according to that court, the prohibition on encouraging gambling was not newly introduced into the Law on gambling, since it was included in the Law and was in force prior to the amendment to Article 10(19) of the Law on gambling, but the wording of the prohibition related to the identification of the specific types and means of encouraging gambling that are prohibited. The court concluded that the Lietuvos standartizacijos departamentas (Lithuanian Standards Board) was not under an obligation to notify the European Commission in accordance with the requirements of Directive 2015/1535 before the legislature adopted the amendment to Article 10(19) of the Law on gambling, and therefore also rejected as unfounded the appellant's arguments that Article 10(19) of the Law on gambling could not be applied to it.

- 12 By its appeal, the appellant requests that the judgment of the court of first instance be set aside and that a new judgment be adopted upholding the appellant's action and annulling the Order.
- 13 In its response to the appellant's appeal, the respondent [...] requests that the appeal be dismissed and that the judgment of the court of first instance be left unaltered.

The Chamber, in extended composition,

finds as follows:

II.

- 14 In view of the fact that, following the amendment to the Law on gambling, the European Commission was not notified of the new version of Article 10(19) of the Law on gambling, which sets out the prohibition on encouraging participation in gambling, the present administrative proceedings raise questions as to the interpretation of Articles 1(1)(f) and 5(1) of Directive 2015/1535 in the circumstances of the present case. [...] [obligation of the Supreme Administrative Court of Lithuania to make the request pursuant to the third paragraph of Article 267 TFEU]

The classification of the regulation laid down in Article 10(19) of the Law on gambling as a 'technical regulation' within the meaning of Article 1(1)(f) of Directive 2015/1535

- 15 In accordance with the first subparagraph of Article 5(1) of Directive 2015/1535, Member States are immediately to communicate to the Commission any draft technical regulation, except in the cases referred to therein. That obligation to communicate the draft in advance applies only where it relates to a technical regulation within the meaning of Article 1(1)(f) of that directive (judgment of the Court of Justice of 3 December 2020, *Star Taxi App SRL*, C-62/19, EU:C:2020:980, paragraph 58). In the case-law of the Court of Justice, the failure of a Member State to comply with the obligation to communicate such a draft in

advance renders the ‘technical regulation’ concerned unenforceable against individuals, whether in criminal proceedings (see judgment of the Court of Justice of 4 February 2016, *Sebat Ince*, C-336/14, EU:C:2016:72, paragraph 84) or in proceedings between individuals (see judgment of the Court of Justice, *James Elliott Construction*, C-613/14, EU:C:2016:821, paragraph 64 and the case-law cited). In the light of the foregoing, in the present administrative case, it is first necessary to ascertain whether a provision such as that set out in Article 10(19) of the Law on gambling (in the version relevant to the present case) constitutes a ‘technical regulation’ within the meaning of Article 1(1)(f) of Directive 2015/1535.

- 16 Article 1(1)(f) of Directive 2015/1535 mentions four categories of technical regulations: (i) a ‘technical specification’; (ii) ‘other requirements’; (iii) ‘rules on services’; and (iv) ‘the laws, regulations and 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’. The present Chamber, in extended composition, has no doubt that the provision in the relevant version of Article 10(19) of the Law on gambling does not fall, in the present case, within the categories of ‘technical specification’ or ‘other requirements’, inasmuch as, in the first case, the national measure must refer to the product or its packaging, and, in the second case, it must lay down a condition capable of significantly influencing the composition, nature or marketing of a product (see judgment of the Court of Justice of 28 May 2020, *Syndyk Masy Upadłości ECO-WIND Construction S.A. w upadłości*, C-727/17, EU:C:2021:492, EU:C:2020:393, paragraphs 32, 36 and 40 and the case-law cited). In so far as the issue raised in the present case does not concern products, doubts remain as to whether the national provision at issue in the present administrative case can be classified as a ‘rule on services’ or as a ‘law of a Member State prohibiting the provision or use of a service, or establishment as a service provider’, since the national provisions at issue may, in essence, relate to gambling operation services, which are subject to the prohibition on encouraging participation in such gambling, or may be understood as a prohibition on independent activity to encourage gambling, which constitutes unilateral activity on the part of the gambling operator and which does not meet the conditions of a ‘service’ laid down in Article 1(1)(b) of Directive 2015/1535, since it does not satisfy the criterion of being ‘at the individual request of a recipient of services’.
- 17 Since Directive 2015/1535 repealed 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 the relevant provisions of Directive 2015/1535 have essentially the same scope as that of the relevant provisions of Directive 98/34/EC, the Court’s case-law on that directive is also applicable, in principle, to Directive 2015/1535 (see, by analogy, judgment of the Court of Justice of 17 June 2021, *Mircom International Content Management & Consulting (M.I.C.M.) Limited*, C-597/19, EU:C:2021:492, EU:C:107:393, paragraph 107 and the case-law cited). The Court of Justice, in its assessment of the rules applicable to gambling in Germany, has already clarified

that some of the provisions of the Treaty on gaming may be categorised as ‘rules on services’, in so far as they concern an ‘Information Society service’ within the meaning of Article 1.2 of Directive 98/34. Those provisions include the prohibition of offering games of chance on the internet laid down in Paragraph 4(4) of the Treaty on gaming, the exceptions to that prohibition listed in Paragraph 25(6) of that treaty, the restrictions placed on offering sporting bets via telemedia services under Paragraph 21(2) of that treaty, and the prohibition of broadcasting advertisements for games of chance on the internet or via telecommunications equipment pursuant to Paragraph 5(3) of that treaty (see judgment of the Court of Justice of 4 February 2016, *Sebat Ince*, C-336/14, EU:C:2016:72, paragraph 75). The present Chamber, in extended composition, notes that, in the Republic of Lithuania, it is not prohibited to offer (operate) online gambling, but it is not permitted to disseminate information or to perform acts of persuasion in order to encourage participation in such gambling in any form and by any means. In that respect, the national provisions specify the conditions for the provision of gambling and impose a prohibition on the promotion of gambling services.

- 18 In the light of the circumstances of the present case, the question before the Chamber, in extended composition, is whether the regulation laid down in Article 10(19) of the Law on gambling, in so far as it relates to information published on the website of a gambling operator, may be classified as a ‘technical regulation’ on the ground that it falls within the category of ‘rules on services’ within the meaning of Article 1(1)(e) of Directive 2015/1535. It is true that 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 judgment of the Court of Justice of 20 December 2017, *Bent Falbert*, C-255/16, EU:C:2017:983, paragraph 27). However, in the circumstances of the present case, doubt remains as to whether the regulation laid down in Article 10(19) of the Law on gambling, in so far as it relates to the information published by a gambling operator on its own website, in fact meets all the conditions of a ‘service’ within the meaning of Article 1(1)(b) of Directive 2015/1535. Bearing in mind that a gambling operator provides a gambling service to a visitor on its website, it is natural that the website provides relevant information about gambling, including information that encourages the visitor to obtain the gambling service. In those circumstances, the Chamber, in extended composition, has doubts as to whether the fact that a person accesses a gambling operator’s website, which contains certain information about gambling, in order to obtain the gambling service in question means that the service is provided by means of the transmission of data at the request of the person concerned, that is to say, ‘at the individual request of a recipient of services’.
- 19 The Chamber, in extended composition, therefore considers it necessary to refer to the Court of Justice for clarification as to whether a national provision such as that laid down in Article 10(19) of the Law on gambling constitutes a ‘technical regulation’ within the meaning of Article 1(1)(f) of Directive 2015/1535, in so far

as it relates to information about gambling published on the website of a gambling operator.

The national legislative practice, where an amendment to a regulation is not notified to the European Commission

- 20 If the answer to the first question confirms that Article 10(19) of the Law on gambling in fact constitutes a ‘technical regulation’, the question whether it should have been notified pursuant to Article 5(1) of Directive 2015/1535 is also relevant to the case. The case-law of the Court of Justice has clarified that, 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 the Court of Justice of 20 December 2017, *Bent Falbert*, C-255/16, EU:C:2017:983, paragraph 23 and the case-law cited). It is important that the economic operators of a Member State be informed of draft technical regulations adopted by another Member State and of their temporal and territorial scope, so as to enable them to be apprised of the extent of the obligations that may be imposed on them and to anticipate the adoption of those texts by adapting, if necessary, their products or services in a timely manner (see judgment of the Court of Justice of 4 February 2016, *Sebat Ince*, C-336/14, EU:C:2016:72, paragraph 83). The Chamber, in extended composition, notes that the prohibition in the wording of Article 10(19) of the Law on gambling that was in force until 1 July 2021 had a limited scope of application, which, although it did not change territorially or temporally, has been substantially revised by subsequent amendments. The version of the Law in force until 1 July 2021 included *expressis verbis* a prohibition on the operation of games or competitions, trial games, lotteries and other events that encourage participation in gambling, including remote gambling, outside of gambling venues or the gambling operator’s website. However, the prohibition thus formulated did not include the mere publication of information about gambling on the gambling operator’s website, which implies that the new wording of Article 10(19) of the Law on gambling restricted the use of marketing measures that are based on customer engagement and thus extended the scope of the prohibition on encouraging gambling that had been applied previously.
- 21 The Chamber, in extended composition, therefore has doubts as to the consequences to be drawn by the national administrative and judicial authorities from a finding that the obligation under EU law to notify a technical regulation has been disregarded during the legislative process, as in the present case, where the amendments to that law constitute ‘technical regulations’ within the meaning of Article 1(1)(f) of Directive 2015/1535 [...]. The Chamber, in extended composition, raises the question whether Directive 2015/1535 must be interpreted as meaning that a provision of national legislation such as the Law on gambling, the provisions of which must be notified pursuant to Article 5(1) of Directive 2015/1535 where they are regarded as ‘technical regulations’ within the meaning

of Article 1(1)(f) of that directive, is unenforceable against economic operators in proceedings to establish liability for administrative offences if the amendments made to the provision, which is regarded as a technical regulation, have not been notified but the text of the law as previously adopted was notified.

- 22 In those circumstances, in order to dispel the doubts that have arisen as to the interpretation and application of the provisions of EU law relevant to the legal relationships at issue in the present dispute, it is appropriate to request the Court of Justice to interpret the EU provisions in question. An answer to the questions set out in the operative part of the present order is crucial for the present case because it would make it possible, in particular, to ascertain the actual content of the EU provisions and to ensure the primacy of EU law.

In the light of the foregoing considerations [...], [...] [reference to provisions of procedural law] the present Chamber

orders as follows:

[...] [standard procedural wording]

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

(1) Does a national provision such as that laid down in Article 10(19) of the Lietuvos Respublikos azartinių lošimų įstatymas (Law of the Republic of Lithuania on gambling) constitute a ‘technical regulation’ within the meaning of Article 1(1)(f) 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, in so far as it relates to information about gambling published on the website of a gambling operator?

(2) Must Directive 2015/1535 be interpreted as meaning that a provision of national legislation such as the Law of the Republic of Lithuania on gambling, the provisions of which must be notified pursuant to Article 5(1) of Directive 2015/1535 where they are regarded as ‘technical regulations’ within the meaning of Article 1(1)(f) of that directive, is rendered unenforceable against economic operators in proceedings to establish liability for administrative offences if the amendments made to the provision, which is regarded as a technical regulation, have not been notified but the text of the law as previously adopted was notified?

[...]

[...]

[standard procedural wording and composition of the court]