Case C-353/24

Request for a preliminary ruling

Date lodged:

15 May 2024

Referring court:

Administratīvā rajona tiesa (Latvia)

Date of the decision to refer:

13 May 2024

Applicants:

SIA EUROPARK LATVIA

SKIDATA GmbH

Defendant:

Valsts ieņēmumu dienests (State Tax Administration)

Interveners:

SIA 19 points

SIA Ernst & Young Baltic

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The Administratīvā rajona tiesa

Rīgas tiesu nams

(District Administrative Court, Riga Section)

DECISION

Riga, 13 May 2024

[…] [composition of the court],

in the presence of the representatives for the applicant SIA EUROPARK LATVIA and the representative for the applicant […] SKIDATA GmbH, as well as of the

representatives for the institution acting on behalf of the Republic of Latvia, the Valsts ieņēmumu dienests (State Tax Administration), the representative for the third-party entity SIA 19 points and the representatives for the conformity assessment body SIA Ernst & Young Baltic,

examined at a public hearing the judicial review case arising from the actions brought by SIA EUROPARK LATVIA and the company SKIDATA GmbH, established in Austria, for the annulment of the decision of the State Tax Administration of 2 September 2022.

Subject matter and relevant facts of the dispute in the main proceedings

1 The applicant SIA EUROPARK LATVIA is a commercial company registered in Latvia which provides parking or garage services.

The applicant SKIDATA GmbH is a commercial company registered in Austria which manufactures automated payment devices in Austria and (through subsidiaries and other distributors) imports such devices into 25 Member States of the European Union (including Latvia).

On 30 June and 27 November 2015, the applicant SIA EUROPARK LATVIA bought from a distributor of the co-applicant SKIDATA GmbH automated payment devices manufactured by SKIDATA GmbH, that purchase having included installation and project management costs. During the period from 8 October 2015 and 30 December 2015, eight purchased SKIDATA PARKING.LOGIC devices ('parking pay stations') were registered as parking pay stations in the unified database (register) of the State Tax Administration.

2 As the body responsible for conformity-assessing POS (point-of-sale) terminals, hybrid POS terminals, POS systems, specialised devices and equipment – whereby it tests models of POS terminals, hybrid POS terminals, POS systems, specialised devices and equipment, as well as modifications thereto and software versions thereof, for the purposes of ensuring compliance with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments – SIA Ernst & Young Baltic ('the conformity assessment body'), by letter of 16 May 2022, informed the State Tax Administration of its refusal to issue in respect of the SKIDATA PARKING.LOGIC V29.00 POS system a statement as to the conformity of that system with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments ('the statement of conformity') on the ground that the maintenance service provider for the parking pay stations concerned (an economic operator entered in the unified database (register) of the State Tax Administration prior to taking up its duties), by the name of SIA 19 points, had failed to provide the data prescribed by Paragraph 121.[4](4) of the Ministru kabineta 2014. gada 11. februāra noteikumi Nr. 96 (Council of Ministers Decree No 96 of 11 February 2014; 'the Decree on Use'), namely the source and executable codes for the registered software supporting those parking pay stations.

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3 By decision of the State Tax Administration of 2 September 2022, the final decision in the administrative proceedings instituted before that authority, the aforementioned parking pay stations were removed from the Administration's unified database (register) on the ground that they had not been the subject of a conformity assessment culminating in the issue of a statement of conformity attesting to compliance with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments.

That decision states, inter alia, that the requirement contained in Paragraph 121.[4](4) of the Decree on Use is not to be regarded as a technical requirement and did not need to be notified to the European Commission in accordance with 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 ('Directive 2015/1535'). According to that decision, the technical requirements applicable to electronic devices and equipment are contained in the Ministru kabineta 2014. gada 11. februāra noteikumi Nr. 95 'Noteikumi par nodokļu un citu maksājumu reģistrēšanas elektronisko ierīču un iekārtu tehniskajām prasībām' (Council of Ministers Decree No 95 of 11 February 2014, 'Decree on the technical requirements applicable to electronic devices and equipment for registering taxes and other payments'), which was notified to the European Commission and the Member States.

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4 The applicants – SIA EUROPARK LATVIA and the Austria-registered company SKIDATA GmbH – brought an action before the Administratīvā rajona tiesa (District Administrative Court) for the annulment of the decision of the State Tax Administration.

In their applications, they state, inter alia, that, at the time when the parking pay stations were registered, the legislation in question did not provide that taxable persons using [electronic] devices [for registering taxes and other payments], including parking pay stations, were obliged to submit the source and executable codes for the registered software or for the fiscal memory module of the devices concerned. That obligation was laid down subsequently, in the Decree on Use. According to the applicants, that requirement is a technical requirement which should have been notified to the European Commission in accordance […] with Directive […] 2015/1535 […]. They submit that, since the requirement in question was not notified, the provision concerned was not adopted in accordance with the proper procedure and is not applicable.

The applicants note that, in the context of transactions involving the acquisition of rights to use software, users of parking pay systems normally obtain access to the corresponding executable code (i.e. the right to use it), since they need this in order to be able to perform the software's functions on the computer, but they do not acquire the right to modify or redistribute the corresponding source code. For SKIDATA GmbH, as manufacturer of the parking pay stations at issue, the source code is a trade secret, and SIA EUROPARK LATVIA, as user of those parking

pay stations, cannot legally and independently obtain and distribute (supply) the source code for that registered software, unless the manufacturer of the parking pay stations in question consents to this.

In order to provide the conformity assessment body with the source code for the registered software supporting a parking pay station, the manufacturer of that pay station must submit the source code to the maintenance service provider for such pay stations, who, in turn, submits it to the conformity assessment body, which stores it so that the maintenance service provider can supply the source code for the registered software to the Tax Administration within a period of 24 hours, should this be requested in accordance with Paragraph 129.[4](6) of the Decree on Use.

According to the applicants, the foregoing disproportionately restricts the intellectual property rights (the use thereof) and trade secret rights of manufacturers of parking pay stations in the source codes for the software packages supporting the parking pay stations which they produce.

Legal framework

European Union law

5 Treaty on the Functioning of the European Union

'Article 34: Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35: Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36: The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

6 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 (and Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations) ('Directive 98/34').

Article 1(1): 'product', any industrially manufactured product and any agricultural product, including fish products;

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Article 1(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.

Article 1(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;

Article 1(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.

Article 7: Member States shall communicate to the Commission, in accordance with Article 8(1), all requests made to standards institutions to draw up technical specifications or a standard for specific products for the purpose of enacting a technical regulation for such products as draft technical regulations, and shall state the grounds for their enactment.

Article 8(1): 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.

7 Directive 2015/1535 replacing and repealing Directive 98/34:

Article 1(1)(c): 'technical specification' means a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

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

Article 1(1)(g): ‘draft technical regulation’ means the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.

Article 5[(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.

Latvian law

8 Likums ‘Par nodokļiem un nodevām’ (Law on Taxes and Duties) (‘the Law’):

Article 28.^{1}(4.^{1}) Taxpayers may use electronic devices and equipment that comply with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments which have been subjected to a conformity assessment. Electronic devices and equipment may be maintained by a maintenance service provider having undergone a conformity assessment in accordance with the relevant rules.

9 Decree on Use:

Paragraph 121.^{4}(4): For the purposes of conformity-assessing models of POS terminals, hybrid POS terminals, POS systems, specialised devices and equipment, as well as modifications thereto and the software versions thereof, the maintenance service provider shall provide the [conformity assessment] body with the corresponding technical documentation in the language of the manufacturer, together with a notarially-certified translation in the national language. That technical documentation shall include: the source code (human-readable computer instructions written by a programmer) and the executable code (set of symbols understood by a computer to execute a program compiled by a programmer) of the registered software and of the fiscal memory module.

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Paragraph 121.[5]: Within a period of six months from receipt of the documents referred to in Paragraph 121.[4] of this Decree, the conformity assessment body shall issue to the maintenance service provider a statement as to the conformity of the model of the POS terminal, hybrid POS terminal, POS system, specialised device or equipment in question, or of the modification thereto or [software] version thereof, with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments […] or shall inform it of its refusal to issue such a statement of conformity; it shall also forward this information to the State Tax Administration.

Paragraph 129.[4](6): When registering in the unified database (register) of the State Tax Administration the model of, or modification to, a POS terminal, a hybrid POS terminal, a POS system or a specialised device or piece of equipment maintained by a maintenance service provider, that provider, be it the manufacturer of the equipment or device or an authorised representative of the manufacturer, shall supply the source code for the registered software to the State Tax Administration within 24 hours, should the latter request it.

Paragraph 129.[17](1)(1.2.2): The State Tax Administration shall remove from the unified database (register): POS terminals, hybrid POS terminals, POS systems, and specialised devices and equipment registered in the name of a user: [in the case where] the conditions laid down in the regulations governing the technical requirements applicable to electronic devices and equipment for registering taxes and other payments are not met. The State Tax Administration shall inform the user of such removal from the unified database (register) within 15 working days.

Reasons why the referring court has doubts as to the application and interpretation of EU law

I

Inclusion of the requirement to supply the source code for a registered software package within the concept of technical regulations

10 Technical requirements applicable to electronic devices and equipment for registering payments are not harmonised under EU law. Nonetheless, so far as concerns the free movement of goods in non-harmonised sectors, it is important to respect Articles 34 to 36 of the Treaty on the Functioning of the European Union, the principle of mutual recognition and Directive 2015/1535. [1]

11 The precautionary measures to protect the free movement of goods in the internal market of the European Union were introduced in Directive 98/34/EC. That directive obliges Member States of the European Union to notify draft technical

[1] *Free movement in harmonised and non-harmonised sectors*. Available at: https://single-market-economy.ec.europa.eu/single-market/goods/free-movement-sectors_en.

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regulations and the information relating to them to the European Commission and the other Member States of the European Union for examination.

The European Commission's explanatory documentation states that Directive 98/34 refers to testing and test methods, which cover the technical and scientific methods to be used to evaluate the characteristics of a given product, as well conformity assessment procedures, which are used to ensure that the product conforms with specific requirements. The inclusion of those parameters within the scope of that directive is of utmost importance because testing and conformity assessment procedures can, under certain conditions, have negative effects on trade. [2]

It follows from this that one of the objectives of the aforementioned directive is to afford special protection to the free movement of goods in the form of preventive controls, freedom of movement being one of the foundations of the European Union. As a means of attaining that objective, Directive 98/34 lays down the requirement that Member States communicate any draft technical regulation to the Commission (Article 8(1) thereof). According to the case-law of the Court of Justice of the European Union, in laying down the obligation for Member States to communicate technical regulations, that directive seeks to allow economic operators to make more of the advantages inherent in the internal market by ensuring the regular publication of the technical regulations proposed by the Member States and thus enabling those operators to give their assessment of the impact of those regulations. In the context of the objectives pursued by the aforementioned directive, 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 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. [3]

Failure to fulfil the obligation to notify is considered to be a substantial procedural defect which may render the relevant technical regulations inapplicable and compel the national courts to refuse to enforce them against individuals. [4] The

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2 *European Commission, Directive 93/34/EC – An instrument of co-operation between institutions and enterprises to ensure the smooth functioning of the Internal Market – A guide to the procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, Publications Office, 2005*, p. 18. Available at:

https://op.europa.eu/en/publication-detail/-/publication/6d8a677d-06ab-48b6-ba46-73b8150e6c51.

3 Judgment of the Court of Justice of the European Union of 4 February 2016 in *Criminal proceedings against Sebat Ince*, C-336/14, EU:C:2016:72, paragraphs 82 to 83.

4 Judgment of the Court of Justice of the European Union of 30 April 1996 in *CIA Security International SA and Signalson SA, Securitel SPRL*, C-194/94, EU:C:1996:172, paragraph 54; judgment of 8 September 2005 in *Lidl Italia Srl* v *Comune di Stradella*, C-303/04, EU:C:2005:528, paragraph 23; judgment of 25 April 2010 in *Criminal proceedings against Lars Sandström*, C-433/05, EU:C:2010:184, paragraph 43; judgment of 10 July 2014 in *Lars*

non-applicability which results from the breach of the obligation to notify extends not to all of the provisions of a law which has not been notified but only to the technical regulations contained therein. [5]

On 9 September 2015, Directive 2015/1535 was adopted and Directive 98/34 was repealed. Both Directive 98/34 and Directive 2015/1535 lay down the continued requirement that Member States must notify any draft technical regulation to the Commission.

12 The concept of 'technical regulation' as defined in Article 1(11) of Directive 98/34 encompasses four categories of measures. Those categories are: 1) 'rules on services' within the meaning of Article 1(5) of that directive; 2) 'technical specifications' as defined in Article 1(3) thereof; 3) 'other requirements' as referred to in Article 1(4) thereof; and 4) provisions 'prohibiting the manufacture, importation, marketing or use of a product', as mentioned in Article 1(11) thereof. [6]

In order to determine whether the requirement to supply the source code for a registered software package, compliance with which obligation is a matter of dispute before this court, constitutes a technical regulation, it is necessary to establish whether that requirement is included in one of the aforementioned categories.

13 This court takes the view that, in this case, there is no doubt that parking pay stations are a 'product' within the meaning of Article 1(1) of the aforementioned directive, with the result that the obligation to supply the source code for the registered software supporting those pay stations is not to be regarded as a 'rule on services' (as cited above) within the meaning of Article 1(5) of that directive.

14 In accordance with Article 1(3) of Directive 98/34, 'technical specification' refers to 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,

Ivansson and Others, C-307/13,EU:C:2014:2058, paragraph 48; judgment of 27 October 2016 in *James Elliott Construction Limited* v *Irish Asphalt Limited*, C-613/14, EU:C:2016:821, paragraph 64.

[5] Judgment of the Court of Justice of the European Union of 1 February 2017 in *Município de Palmela* v *Autoridade de Segurança Alimentar e Económica (ASAE) – Divisão de Gestão de Contraordenações*, C-144/16, EU:C:2017:76, paragraph 37 and the case-law cited.

[6] Judgments of the Court of Justice of the European Union of 4 February 2016 in *Criminal proceedings against Sebat Ince*, C-336/14, EU:C:2016:72, paragraph 70; of 13 October 2016 in *Naczelnik Urzedu Celnego I w Ł. v G.M. and M.S.*, C-303/15, EU:C:2016:771, paragraph 18; of 10 July 2014 in *Lars Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 16; of 19 July 2012 in *Fortuna sp. z o.o. and Others* v *Dyrektor Izby Celnej w Gdyni*, Joined Cases C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 27 and the case-law cited.

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packaging, marking or labelling and conformity assessment procedures. In accordance with the case-law of the Court of Justice of the European Union, the concept of 'technical specification' means that the measure introduced must be applicable to the product or its packaging and the requirements must relate to the characteristics required of the product. [7] If observance of that requirement is compulsory *de jure* in the case of marketing, the requirement must be regarded as s 'technical specification'. [8]

In the view of this court, the requirement to supply the source code for a registered software package does not, *prima facie*, require the characteristics of parking pay stations to comply with certain parameters or specify the characteristics which parking ticket dispensers must possess. However, the case-law of the Court of Justice of the European Union does not provide an unequivocal answer to the question as to whether the requirement to supply the source code for a registered software package is to be regarded as a requirement in respect of characteristics that is applicable to parking pay stations (products) in the context of conformity assessment procedures, since such a characteristic (the existence of a source code) is not possessed by all products. Consequently, the requirement that the source code for the registered software of parking pay stations be made available (supplied) to the conformity assessment body could be regarded as a requirement 'in respect of characteristics', since it cannot be imposed on products in which there is no source code present (as a characteristic).

15 As regards the concept of 'other requirements' within the meaning of Article 1(4) of Directive 98/34, these are 'conditions' laid down in rules of law, other than technical specifications, which are imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affect 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. [9]

The application of the requirement laid down in Paragraph 121.4(4) of the Decree on Use is a necessary and enforceable means of ensuring that a conformity assessment body is able to assess the conformity of parking pay stations. In cases

7 Judgment of the Court of Justice of the European Union of 8 March 2001 in *Criminal proceedings against Georgius van der Burg*, C-278/99, EU:C:2001:143, paragraph 20; judgment of 22 January 2002 in *Canal Satélite Digital SL* v *Administración General del Estado and Distribuidora de Televisión Digital SA (DTS)*, C-390/99, EU:C:2002:34, paragraph 45; judgment of 21 April 2005 in *Criminal proceedings against Lars Erik Staffan Lindberg*, C-267/03, EU:C:2005:246, paragraph 57.

8 Judgment of the Court of Justice of the European Union of 20 March 1997 in *Bic Benelux SA* v *Belgian State*, C-13/96, EU:C:1997:173, paragraph 23.

9 Judgment of the Court of Justice of the European Union of 19 July 2012 in *Fortuna sp. z o.o. and Others* v *Dyrektor Izby Celnej w Gdyni*, Joined Cases C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 35 and the case-law cited; judgment of 21 April 2005 in *Criminal proceedings against Lars Erik Staffan Lindberg*, C-267/03, EU:C:2005:246, paragraph 72.

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where the source code for the registered software supporting parking pay stations is not supplied, the conformity assessment body issues a negative conformity assessment and, in turn, the State Tax Administration removes the pay stations in question from its unified database (register), with the result that the parking pay stations concerned cannot be used to register transactions or record payments by cash or other means (for the purposes of monetary and fiscal supervision), a fact which has the effect in practice of restricting sales of such pay stations on the Latvian market, given that undertakings and organisations operating on that market that might use parking pay stations for those purposes have no interest in purchasing pay stations which are not fully usable in their business activities. It follows from this that the requirement to supply the source code for registered software may in practice affect the marketing (or sale) of parking pay stations.

At the same time, the requirement to supply the source code for a registered software package is not intended to protect consumers or the environment, but to put into effect the State scrutiny of compliance with the obligation to register taxes. Nonetheless, the requirement to supply the source code for a registered software package could be classified as a ‘condition’ relating to the use of the product concerned or as a national measure falling within the concept of technical regulations referred to in Article 1(11) of Directive 98/34. Whether a national measure falls within one or other of the categories of such technical regulations depends on the scope of the prohibition laid down by that measure. [10]

It follows from the case-law of the Court of Justice that the third category of technical regulation referred to in Article 1(11) of Directive 98/34, which is essentially concerned with prohibitions on use, presupposes that the provisions of national law at issue have a scope which goes well beyond a limitation to certain possible uses of the product in question and are thus not confined to a mere restriction of its use. [11] The third category, which prohibits the manufacture, importation, marketing or use of a product, must be regarded as a form of technical regulation. [12]

In this case, although the requirement to supply the source code for a registered software package does not include a prohibition on use, in the fields subject to fiscal regulation, it does nonetheless give rise in practice to such a prohibition, when applied in conjunction with Article 28.^{1}(4.^{1}) of the Law.

16 In the light of the foregoing, the requirement to supply the source code for the registered software supporting parking pay stations could be classified as a ‘technical specification’, a ‘condition’ or a ‘prohibition’ within the meaning of

[10] Judgment of the Court of Justice of the European Union of 13 October 2016 in *Naczelnik Urzedu Celnego I w Ł.* v *G.M. and M.S*, C-303/15, EU:C:2016:771, paragraph 20.

[11] Judgment of the Court of Justice of the European Union of 21 April 2005, *Criminal proceedings against Lars Erik Staffan Lindberg*, C-267/03, EU:C:2005:246, paragraph 76.

[12] Ibid., paragraph 54.

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Directive 98/34. The case-law of the Court of Justice of the European Union does not provide a clear answer to the question as to whether such a requirement falls within the concept of 'technical regulations' and, if so, to which category of such regulations it belongs.

Consequently, it is necessary to refer to the Court of Justice of the European Union the question as to whether Article 1(11) of Directive 98/34 must be interpreted as meaning that a rule of law requiring a maintenance service provider to supply the source code for a registered software package and a fiscal memory module to a conformity assessment body may be included within the concept of 'technical regulations' the drafts of which must be notified to the Commission in accordance with Article 8(1) of the aforementioned directive.

II

Whether the requirement to supply the source code for a registered software package is to be regarded as a measure having an effect equivalent to a quantitative restriction on imports

17 As has been mentioned previously, Latvian law requires manufacturers of parking pay stations to supply the source code for the registered software supporting such pay stations so that a conformity assessment can be carried out. If the source code is not supplied, the conformity assessment body refuses to issue the statement of conformity, which refusal in turn forms the basis for the State Tax Administration to adopt the decision that the parking pay stations in question must be removed from its unified database (register) on the ground that they do not meet the technical requirements applicable to electronic devices and equipment for registering taxes and other payments. Non-compliance with the technical requirements applicable to electronic devices and equipment for registering taxes and other payments prevents the parking pay stations concerned from being used to register transactions or record payments by cash or other means, and thus makes it difficult in practice for the parking pay stations of the applicant SKIDATA GmbH to be distributed in Latvian territory.

18 Articles 34 to 36 of the Treaty on the Functioning of the European Union guarantee the free movement of goods, which is one of the fundamental principles of the European Union.

The Court of Justice of the European Union has stated that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. [13] The Court of Justice clarified its reasoning in the judgment in *Cassis de Dijon,* in which it established

[13] Judgment of the Court of Justice of the European Union of 11 July 1974 in *Procureur du Roi v Benoît and Gustave Dassonville*, C-8/74, EU:C:1974:82, and judgment of 15 November 2005 in *Commission of the European Communities* v *Republic of Austria*, C-320/03, EU:C.2005 684, paragraphs 63 to 67.

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the principle that any product legally manufactured and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be allowed onto the market of any other Member State. [14]

Even if a measure is not intended to regulate trade in goods between Member States, the determining factor is its effect, actual or potential, on intra-Community trade. According to that criterion, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect (such as those relating to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply to all products alike, unless their application can be justified by a public-interest objective taking precedence over the requirements of the free movement of goods. [15]

In its case-law, the Court has also treated as measures having equivalent effect, prohibited by Article 28 EC, national provisions making a product lawfully manufactured and marketed in another Member State subject to additional controls, save in the case of exceptions provided for or allowed by Community law. [16]

However, the scope of Article 34 of the Treaty on the Functioning of the European Union is limited by the judgment of the Court of Justice of the European Union in *Keck*, in which it is established that the aforementioned article does not apply to certain trading provisions if they are not discriminatory, which is to say so long as those provisions apply to all relevant traders operating within national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [17] Provided that those conditions are fulfilled, the application of such rules to the

[14] Judgment of the Court of Justice of the European Union of 20 February 1979 in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

[15] Judgment of the Court of Justice of the European Union of 20 February 1979 in *Rewe-Zentral AG v Bundesmonopolverwaltung für Brarnntwein*, C-120/78, EU:C:1979:42, paragraphs 6, 14 and 15; judgment of 26 June 1997 in *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, C-368/95, EU:C:1997:325, paragraph 8; judgment of 11 December 2003 in *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*, C-322/01, EU:C:2003:664, paragraph 67.

[16] Judgment of the Court of Justice of the European Union of 22 January 2002 in *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, C-390/99, EU:C:2002:34, paragraphs 36 and 37; judgment of 8 May 2003 in *ATRAL SA v Belgian State*, C-14/02, EU:C:2003:265, paragraph 65.

[17] Judgment of the Court of Justice of the European Union of 24 November 1993 in *Criminal proceedings against Bernard Keck and Daniel Mithouard*, JC-267/91 and C-268/91, EU:C:1993:905, paragraphs 16 to 17.

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sale of products from another Member State meeting the requirements laid down by that State is not such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. [18] At the same time, measures which have even a minor impact on market access for products are not considered to be trading provisions. [19] Such measures do not fall within the scope of the *Keck* formula and are therefore, automatically, not permissible. [20]

Furthermore, Article 36 of the Treaty on the Functioning of the European Union emphasises that measures must directly affect protectable public interests and must not be any stricter than necessary (principle of proportionality). What is more, the Court of Justice of the European Union recognised in *Cassis de Dijon* that Member States may provide for derogations to which the prohibition of measures having equivalent effect does not apply, on the basis of overriding requirements (relating, inter alia, to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and consumer protection).

The aforementioned judgments of the Court of Justice of the European Union form the framework of the principle of mutual recognition.

19 Since the requirement to supply the source code for the registered software supporting the parking pay stations concerned is imposed on all parking pay stations (whether they are imported or locally manufactured products), that requirement is not discriminatory. [21] In the same way, the requirement to supply the source code for a registered software package – which code is included as such in parking pay station software – does not prohibit the sale of parking pay stations in Latvian territory but simply stipulates that, in fields subject to fiscal regulation, it is necessary to carry out in this regard a conformity assessment procedure in the course of which the source code for the registered software supporting the parking pay stations in question must be supplied, and that procedure must take place regardless of whether one has already been conducted in the country in which those parking pay stations were manufactured (in this instance, there is no information on whether such a requirement is imposed in Austria or in other EU

[18] Judgment of the Court of Justice of the European Union of 24 November 1993 in *Criminal proceedings against Bernard Keck and Daniel Mithouard* (see the judgment in *Keck and Mithouard* cited above, paragraph 17).

[19] Judgment of the Court of Justice of the European Union of 9 July 1997 in *Konsumentombudsmannen (KO)* v *De Agostini (Svenska) Förlag and TV-Shop i Sverige AB*, Joined Cases C-34/95 to C-36/95, EU:C:1997:344, paragraph 43; judgment of 10 February 2009 in *Commission of the European Communities* v *Italian Republic*, C-110/05, EU:C:2009:66, paragraph 58.

[20] Judgment of the Court of Justice of the European Union of 26 April 2012 in *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)* v *Administración del Estado*, C-456/10, EU:C:2012:241, paragraphs 38 to 42.

[21] Judgment of the Court of Justice of the European Union of 16 March 1977 in *Commission of the European Communities* v *French Republic*, C-68/76, EU:C: 1977:48, paragraph 14.

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countries in which the applicant 'SKIDATA GmbH' distributes parking pay stations). As the Latvian Association of Car Park and Garage Operators has recognised, after having assessed the 'certified' parking pay stations available, none of the advanced technical solutions for the management of parking facilities produced by world-renowned manufacturers are currently offered on the Latvian market, which may in practice be down to the fact that parking pay station manufacturers do not wish to supply the source code for their registered software packages, this being an asset of the parking pay station manufacturer that is protected by intellectual property rights – patents (certain software components are protected by patents) and copyright – and trade secret rights. Should the source code for a registered software package supporting parking pay stations be available to third parties, there is a risk that the source code may be used for other purposes, such as creating competing products or modifying the software. However, the Latvian legal system has failed to address the issues surrounding what actions those involved in conformity assessment (the maintenance service provider, the conformity assessment body and, where appropriate, the Tax Administration too) might take in relation to the source code for a registered software package once it has been supplied (such as to test and store it) in order to ensure that it is secure. It is for this reason that the applicant SKIDATA GmbH has also objected to supplying the source code for the registered software package supporting parking pay stations at issue.

This court therefore takes the view that that legislation increases the difficulty and cost of importing parking pay stations to such an extent as to be liable to deter the operators concerned (including the applicant SKIDATA GmbH) from marketing such pay stations in Latvia if they cannot be used to register transactions or record payments by cash and other means (for monetary and fiscal purposes). Consequently, the requirement to supply the source code for a registered software package is not a condition of marketing within the meaning of the aforementioned case-law in *Keck and Mithouard* and might be regarded as a measure having an effect equivalent to a quantitative restriction on imports.

It is therefore necessary to refer to the Court of Justice of the European Union the question as to whether Article 34 of the Treaty on the Functioning of the European Union must be interpreted as meaning that the requirement to supply the source code for a registered software package to a conformity assessment body may be regarded as a measure having an effect equivalent to a quantitative restriction on imports.

20 In the event that the requirement to supply the source code for a registered software package is to be regarded as a measure having an effect equivalent to a quantitative restriction on imports, it falls to be examined whether, given its restrictive effect on trade between Member States, such a requirement can be justified by one of the grounds set out in Article 36 of the Treaty on the Functioning of the European Union or by one of the overriding requirements in the public interest referred to in the case-law of the Court of Justice of the European Union and, if necessary, whether such a restriction is appropriate for

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attaining the objective pursued and does not go beyond what is necessary in order to attain it. [22]

The Court of Justice of the European Union has recognised on a number of occasions that the effectiveness of fiscal supervision may justify legislation that is restrictive of fundamental freedoms (such as the free movement of goods). [23] As is apparent from the preparatory documentation for the Decree on Use, the objective of that decree is to ensure that taxes are paid by avoiding any interference with the software or with the design of payment devices. [24] Consequently, this court draws the inference that the requirement to supply the source code for a registered software package has a legitimate purpose, namely to ensure the existence fiscal supervision and of the corresponding powers of inspection that will prevent a potential failure to register payments or pay taxes. In addition, that requirement seems to be an appropriate means of attaining that objective.

The question nonetheless arises as to whether the requirement to supply the source code for a registered software package is necessary in order to attain the objective pursued. The State Tax Administration has explained that it is the very supply of source and executable codes which ensures that all of the information required is received, given that hidden source code functionalities (in the form of subsets in the executable code that may cause data to be deleted) can be included in the source code by various methods and techniques. At the same time, the need for the aforementioned requirement is put in doubt by the fact that, in other Member States of the European Union, the applicant carries out the relevant checks by subjecting parking pay stations to API (Application Programming Interface) testing, which acts as the link – between SKIDATA GmbH's software application and the software of the conformity assessment body – through which that body obtains all of the payment information it needs. As the applicant has explained, each version of the parking pay station software, and each upgrade to it, is tested both automatically and manually, with database integrity checks as part of that

[22] Judgment of the Court of Justice of the European Union of 19 June 2003 in *Commission of the European Communities* v *Italian Republic*, C-420/01, EU:C:2003:363, paragraph 29; judgment of 5 February 2004 in *Commission of the European Communities* v *Italian Republic*, C-270/02, EU:C:2004:78, paragraph 21.

[23] Judgment of the Court of Justice of the European Union of 28 January 1992 in *Hanns-Martin Bachmann* v *Belgian State*, C-204/90, EU:C:1992:35, paragraph 18; judgment of the Court of Justice of the European Union of 15 June 1997 in *Futura Participations SA and Singer* v *Administration des contributions*, C-250/95, EU:C:1997:239, paragraph 31; judgment of 28 October 1999 in *Skatteministeriet* v *Bent Vestergaard*, C-55/98, EU:C:1999:533, paragraph 23.

[24] Ministru kabineta noteikumu projekta 'Nodokļu un citu maksājumu reģistrēšanas elektronisko ierīču un iekārtu lietošanas kārtība' sākotnējās ietekmes novērtējuma ziņojums (anotācija) [Initial impact assessment report on the draft Council of Ministers Decree laying down 'Rules governing the use of electronic devices and equipment for registering taxes and other payments' (preparatory documentation)]. Available at: https://likumi.lv/wwwraksti/ANOTACIJAS/TAP/2005/FMANOT_160913_KA_LIETOSAN.2850.DOC.

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testing, and the system is also cyclically audited against the PCI DSS (Payment Card Industry Data Security Standards), thus ensuring that the software data is not altered. It is important to note also that the applicant SKIDATA GmbH had agreed to provide the part of the source code that relates to the registration of payments and taxes so that the parking pay stations concerned could be conformity-assessed, but the conformity assessment body would not endorse that approach, requesting instead that the full source code for the software supporting the parking pay stations at issue be provided, a measure which is in practice more restrictive of the rights of the applicant SKIDATA GmbH. It should be noted in this regard that there is nothing in the documentation before this court which raises any concerns as to any possible bath faith on the part of the applicant or the maintenance service provider.

It is therefore necessary to refer to the Court of Justice of the European Union the question as to whether the requirement to supply the source code for a registered software package is a proportionate means of ensuring the effectiveness of fiscal supervision.

Operative part

In accordance with Article 267 of the Treaty on the Functioning of the European Union, the […] Administratīvā rajona tiesa (District Administrative Court)

decides

to make a reference to the Court of Justice of the European Union for a preliminary ruling on the following questions:

(1) Must Article 1(11) 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 be interpreted as meaning that a rule of law requiring a maintenance service provider to supply the source code for a registered software package to a conformity assessment body may be included within the concept of 'technical regulations', the drafts of which must be notified to the Commission in accordance with Article 8(1) of the aforementioned directive?

(2) Must Article 34 of the Treaty on the Functioning of the European Union be interpreted as meaning that the requirement to supply the source code for a registered software package to a conformity assessment body may be regarded as a measure having an effect equivalent to a quantitative restriction on imports?

(3) If the foregoing question is answered in the affirmative, may that measure be regarded as a proportionate means of ensuring the effectiveness of fiscal supervision?

The proceedings are stayed pending a ruling from the Court of Justice of the European Union.

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No appeal shall lie against this decision.

[…]

[signature]

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