

## **Case law relating to Directive (EU) 2015/1535**

The document is a summary of the most pertinent European Court of Justice cases in relation to the scope and applicability of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. It serves as a guide for Member State representatives, industry and citizens. The document is not exhaustive and there may be other cases relevant in this field. The document consists of three main sections and relevant cases are listed in reverse chronological order.

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## I. SCOPE OF APPLICATION OF DIRECTIVE (EU) 2015/1535

### **a. Technical regulations**

*Judgment of 3 December 2020, C-62/19, Star Taxi app, EU:C:2020:980*

To be qualified as a “technical regulation” under the Single Market Transparency Directive, a national measure should not only be considered as rules on information society services, but also be binding de jure or de facto, in particular, for the provision of the service concerned or its use, in a Member State or a significant part of it.

*Judgment of 22 October 2020, C-275/19, Sportingbet and Internet Opportunity Entertainment, EU:C:2020:856*

Article 1(5) of Council Directive 83/189/EEC, as amended by Council Directive 88/182/EEC, must be interpreted as meaning that national legislation which provides that the right to operate games of chance is reserved to the State and may be exercised only by undertakings that are established as public limited companies, to which the Member State concerned awards the corresponding concession, and which lays down the conditions and the zones for exercising that activity does not amount to a ‘technical regulation’ within the meaning of that provision.

Article 1(11) of Directive 98/34/EC, as amended by Directive 98/48/EC, read in conjunction with Article 1(5) of that directive, as amended, must be interpreted as meaning that national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a ‘technical regulation’ within the meaning of the first of those provisions, and the failure to communicate that regulation to the European Commission, in accordance with Article 8(1) of that directive, as amended, makes that legislation unenforceable against individuals.

*Judgment of 28 May 2020, ECO-WIND Construction, Case C-727/17, EU:C:2020:393, paragraphs 32 to 50*

- A technical specification, within the meaning of Directive (EU) 2015/1535, presupposes that the national measure prescribing it refers to the product or its packaging as such and that it therefore lays down one of the characteristics required of that product. A legislation which merely regulates the installation of wind turbines by laying down a mandatory minimum distance requirement that must be complied with for their installation does not refer to a product as such, in this case the wind generator, and, therefore, does not lay down one of the characteristics required of that product within the meaning of the Directive. Such legislation cannot fall within the category of ‘technical specifications’ within the meaning of the Directive.
- The category ‘other requirements’ includes legislation which lays down a condition capable of significantly influencing the composition, nature or marketing of a product. It covers the requirements arising from consideration of the life cycle of the product in question after it has been placed on the market and relating, in particular, to its use. The requirement that the installation of a wind turbine is subject to the condition of a minimum distance between it and buildings with a residential function has no direct connection with the composition, nature or marketing of a product such as a wind generator. In that regard, even if that requirement were to lead to a restriction of the locations suitable for the installation of wind turbines, and therefore that it had an effect on the marketing of wind generators, that effect would not be

sufficiently direct for that requirement to fall within the category of ‘other requirements’. The case is therefore distinguishable from the cases in which the legislation at issue concerning the prohibition on issuing, renewing or amending authorisations for gaming activities outside casinos imposed conditions liable to affect the marketing of gaming machines and, therefore, was capable of directly affecting the trade in those machines.

- The category of ‘laws, regulations or administrative provisions of the Member States prohibiting the manufacture, importation, marketing or use of a product’ presupposes that the measure at issue has a scope that goes clearly beyond a limitation to certain uses of the product at issue and that it is not confined to a mere restriction on its use. That category is particularly intended to cover national measures which leave no room for any use that could reasonably be made of the product concerned other than a purely marginal one. The requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance from buildings with a residential function does not constitute a technical regulation which must be notified under Article 5 of Directive (EU) 2015/1535, except if that requirement leads to a de facto prohibition on the marketing of wind generators, leaving room only for a purely marginal use of wind generators.

***Judgment of 26 September 2018, Van Gennip and Others, Case C-137/17, EU:C: 2018:771***

- National provisions making the marketing of products subject to the condition that the buyer is in possession of an authorisation do not fall within the concept of ‘technical regulation’ within the meaning of Directive (EU) 2015/1535.

***Judgment of 1 February 2017, Município de Palmela, Case C-144/16, EU:C:2017:76, paragraph 23***

- Constitutes a technical regulation within the meaning of Directive 98/34 a provision laying down safety requirements imposed on a product, for the purpose of protecting consumers, which affect its life cycle after it has been placed on the market and significantly influence the composition and marketing of such a product. That provision falls within the category of ‘other requirements’ within the meaning of both Article 1(3) of Directive 83/189 and Article 1(4) of Directive 98/34.
- Regulation imposing to display, in several locations in the play and recreation area, information on the maximum capacity of that area does not constitute a technical regulation within the meaning of Directive 98/34.

***Judgment of 27 October 2016, James Elliott Construction, Case C-613/14, EU:C:2016:821, paragraph 72***

- National provisions specifying, unless the parties agree otherwise, implied contractual terms concerning merchantable quality and fitness for purpose of the products sold are not ‘technical regulations’, within the meaning of Article 1(11) of Directive 98/34.

***Judgment of 13 October 2016, M. and S., Case C-303/15, EU:C:2016:771, paragraphs 23 to 31***

- Provisions of national law which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, do not constitute technical regulations within the meaning of Article 1(11) of Directive 98/34.

- A national measure which reserves the organisation of certain games of chance to casinos alone constitutes a ‘technical regulation’, within the meaning of Article 1(11) of Directive 98/34, in so far as it can significantly influence the nature or the marketing of the products used in that context and, second, that a prohibition on operating certain products outside casinos can significantly influence the marketing of those products, by reducing the outlets in which they can be used. A provision which subjects the organisation of roulette games, card games, dice games and gaming on machines to the requirement to hold a licence to operate a gaming casino, does not constitute a ‘technical specification’, within the meaning of Article 1(3) of Directive 98/34, since it does not refer to a product or its packaging as such and does not lay down one of the required characteristics of a product. That provision cannot be placed in the category of ‘rules on [information society] services’, within the meaning of Article 1(5) of Directive 98/34, since it does not relate to an ‘Information society service’, within the meaning of Article 1(2) of that directive.

***Judgment of 11 June 2015, Berlington Hungary and Others, Case C-98/14, EU:C:2015:386, paragraphs 42 and 98-99***

- The provisions of national legislation that introduce a five-fold increase in the flat-rate tax to be paid on slot machines operated in amusement arcades and, in addition, introduce a proportional tax on that activity, do not constitute ‘technical rules’ within the meaning of Directive 98/34.
- The provisions of national legislation that prohibit the operation of slot machines outside casinos constitute ‘technical rules’ within the meaning of Directive 98/34, in so far as it can significantly influence the nature or the marketing of those machines.

***Judgment of 10 July 2014, Ivansson and Others, Case C-307/13, EU:C:2014:2058, paragraphs 30-31, 46 to 50***

- A reference to more detailed administrative rules constituting ‘technical specifications’ or ‘other requirements’ is likely to confer the status of ‘de facto technical regulation’ to the draft notification.
- The date finally chosen by the national authorities for the entry into force of a national measure is subject to the obligation of communication to the Commission, as laid down in the third subparagraph of Article 8(1) of Directive 98/34, where a change to the timetable for the implementation of that national measure was made, and was significant in nature, which it is for the national court to ascertain.
- A “significant” shortening of the timetable originally chosen by the national authorities for the entry into force and the implementation of a technical regulation is subject to the obligation of communication to the Commission, as laid down in the third subparagraph of Article 8(1) of Directive 98/34. The failure to make such a communication would render that national measure inapplicable, such that it could not be enforced against individuals.

***Judgment of 19 July 2012, Fortuna and others, Case C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraphs 25 and 40***

- National provisions which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on low-prize machines anywhere other than in casinos and gaming arcades are capable of constituting ‘technical regulations’, in so far as it is established that those provisions constitute conditions which can significantly influence the nature or the marketing of the product concerned.

- A measure which permits only gaming casinos to organise gaming on machines must be classified as a ‘technical regulation’ within the meaning of Article 1(11) of Directive 98/34.

***Judgment of 9 June 2011, Intercommunale Interomosane and Fédération de l'industrie et du gaz, Case C-361/10, EU:C:2011:382, paragraphs 11 to 20***

***Judgment of 14 April 2011, Vlaamse Dierenartsenvereniging VZW and Janssens, joined Cases C-42/10, C-45/10 and C-57/10, EU:C:2011:253, paragraphs 69, 70***

- Directive 98/34 does not apply to pet passports which cannot be classified as ‘products’ (it cannot be object to commercial transactions).  
- National provisions concerning the pet passport and relating to its use as proof of identification and registration of dogs, and to the use of self-adhesive stickers to amend the identity details of the owner and the animal, on the one hand, and to those relating to the determination of a unique number for cats and ferrets, on the other, do not constitute technical regulations within the meaning of Article 1 of Directive 98/34 which, in accordance with Article 8 thereof, must be communicated in advance to the Commission.

***Judgment of 8 November 2007, Schwibbert, Case C-20/05, EU:C:2007:652, paragraph 45***

- National provisions introducing the obligation to affix a distinctive sign on products for the purposes of marketing them in the Member State concerned constitute a technical regulation which, if not notified to the Commission, cannot be invoked against an individual.

***Judgment of 26 October 2006, Commission v Greece, Case C-65/05, EU:C:2006:673, paragraph 11***

- Measures prohibiting the installation of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, and the use of games on computers in undertakings providing internet services, and make the operation of such undertakings subject to the issue of a special authorisation, must be considered to be technical regulations within the meaning of Article 1(11) of Directive 98/34.

***Judgment of 8 September 2005, Lidl Italia, Case C-303/04, EU:C:2005:528, paragraph 14***

- A national legislative provision which includes a prohibition on the marketing of products which are not manufactured from certain materials constitutes a technical regulation.

***Judgment of 21 April 2005, Lindberg, C-267/03, EU:C:2005:246, paragraphs 80, 85, 95***

- Redefining in national legislation a service connected with the design of a product can constitute a technical regulation which must be notified, if that new legislation does not merely reproduce or replace, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of Directive 83/189 in the Member State concerned, have been duly notified.  
- The replacement of a licence requirement by a prohibition in national law may be a significant factor with regard to the obligation to notify.

- The greater or lesser value of the product or service or the size of the market for the product or service are factors which are not relevant as regards the obligation to notify provided for by the directive.
- National provisions which entail a prohibition on the organisation of games of chance using certain gaming machines are liable to constitute a technical regulation within the meaning of Directive 83/189 where it is established that the scope of the prohibition at issue leaves no room for any use which can reasonably be expected of the product concerned other than a purely marginal one or, if that is not the case, where it is established that that prohibition may significantly influence the composition or nature of the product or its marketing.

***Judgment of 6 June 2002, Sapod Audic, Case C-159/00, EU:C:2002:343, paragraphs 30, 39***

- A provision of national law laying down an obligation to identify packaging constitutes a technical regulation to be notified insofar as it implies an obligation to mark or label that packaging.

***Judgment of 8 March 2001, Van der Burg, Case C-278/99, EU:C:2001:143, paragraph 20***

- A regulation which merely prohibits commercial advertising and does not lay down the characteristics required of a product does not constitute a technical specification within the meaning of Directive 83/189 and therefore cannot be regarded as a technical regulation falling within the scope of that directive.

***Judgment of 22 January 2001, Canal Satélite Digital, Case C-390/99, EU:C:2002:34, paragraphs 47, 48***

- A national rule which requires operators of conditional-access services to enter the equipment, decoders or systems for the digital transmission and reception of television signals by satellite which they propose to market in a register and to obtain prior certification for those products before being able to market them constitutes a technical regulation.
- National provisions whereby Member States comply with binding Community measures which result in the adoption of technical specifications will be no duty of notification under Directive 83/189, but only to the extent that the national legislation at issue transposes the binding Community measures.

***Judgment of 16 November 2000, Donkersteeg, Case C-37/99, EU:C:2000:636, paragraphs 21, 30 to 34***

- So far as agricultural products are concerned, a technical specification is one contained in a document which lays down the characteristics required of a product or its production method or procedures.
- A national provision which does not lay down a rule defining a 'characteristic required' of the products concerned nor a production method or procedure for those agricultural products is not a technical specification within the meaning of Directive 83/189 and cannot be a technical regulation for the purpose of that directive.
- A provision of national law which merely requires disinfectant containers or appropriate cleaning facilities for disinfecting footwear to be provided on pig farms, does not concern production in the strict sense of the agricultural product under consideration and is not a technical regulation.

- The provision imposing precise and detailed rules concerning vaccination is a technical specification, given that rules on vaccination are linked to the production, in the strict sense, of the agricultural product concerned. However, if the provision does not impose restriction on the marketing or use of the products not complying with the vaccination rules, it does not constitute a technical regulation to be notified before being adopted.

***Judgment of 12 October 2000, Snellers, Case C-314/98, EU:C:2000:557, paragraphs 37 to 40***

- Technical specifications for the purposes of Directive 83/189 must refer to the product as such. A regulation which lays down criteria for establishing the date on which a vehicle is deemed to have been first authorised for use on the public highway, for the purposes of drawing up a registration certificate, does not define any characteristic required of the product as such and therefore cannot therefore be classified as technical regulations falling within the scope of that directive and need not be notified.

***Judgment of 26 September 2000, Unilever, Case C-443/98, EU:C:2000:496, paragraphs 26-30***

- A provision which governs labelling indicating the origin of olive oil contains rules which must be classified as 'technical specifications' within the meaning of Directive 98/34.
- When the EU Directive leaves the Member States sufficient room for manoeuvre, national measures adopted on the basis of such a Directive cannot be regarded as national provisions conforming to a binding Community act within the meaning of the first indent of Article 10(1) of Directive 83/189.

***Judgment of 3 June 1999, Colim, Case C-33/97, EU:C:1999:274, paragraphs 22, 27 to 30, 36***

- A national measure which reproduces or replaces, without adding new or additional specifications, existing technical regulations which, if adopted after the entry into force of Directive 83/189, have been duly notified to the Commission, cannot be regarded as a "draft" technical regulation or, consequently, as subject to the notification obligation.
- Rules of a Member State under which, in order for products to be marketed in that State, one or more specified languages must be used for mandatory labelling particulars, instructions for use or guarantee certificates, could be regarded as amounting to 'requirements applicable to the product as regards terminology, symbols ... packaging, marking or labelling' within the meaning of Article 1(1) of Directive 83/189 and, therefore, as constituting a technical regulation within the meaning of that directive. However, it is necessary to distinguish between the obligation to convey certain information about a product to a consumer, which is carried out by affixing particulars to the product or adding documents to it such as instructions for use and the guarantee certificate, and the obligation to give that information in a specified language. Unlike the first obligation, which concerns the product directly, the second is intended merely to specify the language in which the first must be carried out. The obligation to express information which traders are obliged to communicate to the purchasers or to the end-user in a specified language does not in itself constitute a 'technical regulation' within the meaning of Directive 83/189, but an ancillary rule necessary in order for the information to be effectively communicated.
- While language requirements imposed on labelling, instructions for use or guarantee certificates are not technical regulations within the meaning of the Directive, they do constitute a barrier to intra-Union trade in so far as products coming from other Member States have to be given different labelling involving additional packaging costs.

***Judgment of 11 May 1999, Albers, Joined Cases C-425/97 to 427/97, EU:C:1999:243, paragraphs 16 to 24***

- Rules intended to prevent the administration of specific substances to fattening cattle constitute technical specifications within the meaning of Directive 83/189. Since they are issued by the national administrative authorities, apply to the whole national territory and are binding on their addressees, they are technical regulations within the meaning of Directive 83/189.

***Judgment of 16 June 1998, Lemmens, Case C-226/97, EU:C:1998:296, paragraphs 19-21, 24-26***

- Directive 83/189 applies to technical regulations irrespective of the grounds on which they were adopted. Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, it does not follow that technical regulations within the meaning of Article 1 thereof are excluded from the notification requirement because they fall within the scope of criminal law, or that the scope of the Directive is limited to products intended to be used otherwise than in connection with the exercise of public authority.
- National provisions regarding the breath-analysis apparatus to be used by the police for measuring alcohol content, constitutes a technical regulation which should, prior to its adoption, have been notified to the Commission in accordance with Article 8 of the Directive.

***Judgment of 7 May 1998, Commission v Belgium, Case C-145/97, EU:C:1998:212, paragraph 12***

- Under Article 8 of the Directive Member States must communicate not only the draft text containing the technical regulations but also the text of the basic legislative or regulatory provisions principally and directly concerned. The aim of that provision is to enable the Commission to have as much information as possible in order to enable it to exercise as effectively as possible the powers conferred on it by the Directive.

***Judgment of 20 March 1997, Bic Benelux, Case C-13/96, EU:C:1997:173, paragraphs 20 to 26***

- An obligation to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause constitutes a technical specification within the meaning of Directive 83/189, and the national enactment introducing it is a technical regulation within the meaning of the same Directive.
- The fact that a national measure was adopted in order to protect the environment or that it does not implement a technical standard which may itself constitute a barrier to free movement does not mean that the measure in question cannot be a technical regulation within the meaning of Directive 83/189.
- Since the marking requirement can in no way be regarded as exclusively a fiscal accompanying measure, it does not therefore constitute a requirement linked to a fiscal measure for the purposes of the third indent of the second subparagraph of Article 1(9) of Directive 83/189, as amended by Directive 94/10.

***Judgment of 17 September 1996, Commission v Italy, Case C-289/94, EU:C:1996:330, paragraphs 32, 36, 43-44, 51***



- The concept of technical specification includes production methods and procedures for medicinal products, as defined in Article 1 of Directive 65/65, since extension of the scope of Directive 83/189 by Directive 88/182.
- The decree concerning the quality of the waters intended for the cultivation of edible lamellibranch molluscs must be regarded as a technical regulation subject to the notification requirement, given the very close correlation between the quality of waters used for such cultivation and the marketing of the products concerned, and given that compliance with them has a direct impact on the marketing of the goods, in the sense that only goods produced in line with these technical rules may be marketed.
- There must be a direct link between a binding Community act and a national measure in order to qualify as an implementing measure exempt from the notification requirement under the first indent of Article 10(1).

***Judgment of 16 September 1996, Commission v Italy, Case C-279/94, EU:C:1996:396, paragraphs 30, 34, 38-42***

- A new technical regulation must produce distinct legal effects compared with the existing rules.
- In view of the objective of Article 8 of the Directive, which is to enable the Commission to have as much information as possible on the content, scope and general context of any draft technical regulation, it is incumbent on the Member States to communicate the full text containing the technical regulations; consequently, the full text must be notified, but only the technical regulations which it contains are subject to the standstill obligation.
- Provision prohibiting the marketing and use of asbestos constitutes a technical regulation to be notified at the draft stage.
- Provision laying down limits for the concentration of inhalable asbestos fibres at workplaces, since it does not define a characteristic required of a product, it does not in principle fall within the definition of a technical specification and consequently cannot be regarded as a technical regulation which has to be notified to the Commission, except when the limits have consequences as regards the characteristics of the product in question.
- Member States have the obligation to notify the full text of the draft act, including the provisions which do not constitute technical regulations, in order to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context.

***Judgment of 30 April 1996, CIA Security International SA, Case C-194/94, EU:C:1996:172, paragraphs 30, 54 and 55***

- A rule must be classified as a technical regulation within the meaning of Directive 83/189 if it requires the undertakings concerned to apply for prior approval of their equipment, even if the administrative rules envisaged have not been adopted.

***Judgment of 11 January 1996, Commission v Netherlands, Case C-273/94, EU:C:1996:4, paragraphs 13 to 15***

- The national act applying to a specific product a derogation from another technical regulation already in existence concerning the same product constitutes a technical regulation within the meaning of Directive 83/189 since it establishes alternative technical specifications the observance of which is compulsory, de jure or de facto, when that product is marketed or used. Anyone who wishes to derogate from the existing rule is under an obligation to comply with the alternative specifications in order to produce or place on the market the product in question

- The notification obligation does not depend on the presumed effects of the technical regulation in question on trade between Member States. Instead, the objective of the procedure is to establish whether there is any risk of creating a barrier and whether it could be justified in the light of EU legislation. Consequently, even rules liberalising the arrangements for the products concerned must be notified.

***Judgment of 1 June 1994, Commission v Germany, Case C-317/92, EU:C:1994:212, paragraphs 25 and 26***

- A rule is classified as a technical regulation for the purposes of Directive 83/189 if it has legal effects of its own. If, under domestic law, the rule merely serves as a basis for enabling administrative regulations containing rules binding on interested parties to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive. The fact that the enabling provision has already been communicated to the Commission is no dispensation from the obligation to give notification of the provisions implementing it. It is not the enabling provision which contains the technical specification but, possibly, the implementing measures.
- Application to given products of a technical regulation which previously only applied to other products constitutes a technical regulation and must be notified.
- A measure restricting the expiry-dates which may be indicated on the packaging of products constitutes a technical regulation within the meaning of Directive 83/189.

**b. Information society services**

***Judgment of 3 December 2020, C-62/19, Star Taxi app, EU:C:2020:980***

- a service consisting in putting taxi passengers directly in touch, by means of an electronic application, with taxi drivers constitutes an ‘information society service’ where that service is not indissociably linked to the taxi transport service so that it does not form an integral part of that taxi transport service;
- a national regulation should not be considered as specifically aimed at regulating information society services, if it makes no mention of the information society and applies to all kinds of ‘dispatching’ services without distinction, whether provided by telephone or by IT application.

***Judgment of 22 October 2020, C-275/19, Sportingbet and Internet Opportunity Entertainment, EU:C:2020:856***

Article 1(11) of Directive 98/34/EC, as amended by Directive 98/48/EC, read in conjunction with Article 1(5) of that directive, as amended, must be interpreted as meaning that national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a ‘technical regulation’ within the meaning of the first of those provisions, and the failure to communicate that regulation to the European Commission, in accordance with Article 8(1) of that directive, as amended, makes that legislation unenforceable against individuals.

***Judgment of 19 December 2019, Airbnb Ireland, Case C-390/18, EU:C:2019:1112***

An intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term

accommodation, while also providing a certain number of services ancillary to that intermediation service, must be classified as an ‘information society service’ in the meaning of Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535.

The four conditions laid down in Article 1(1)(b) of Directive 2015/1535 to consider a service as an information society service (‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’) are cumulative.

***Judgment of 12 September 2019, VG Media, Case C-299/17, EU:C:2019:716, paragraphs 32 to 38***

- A provision of national law which prohibits only commercial operators of internet search engines and commercial service providers that similarly publish content from making newspapers or magazines or parts thereof (excluding individual words and very short text excerpts) available to the public, constitutes a ‘technical regulation’ within the meaning of Directive 98/34/EC, the draft of which is subject to prior notification to the Commission pursuant to the Directive, as amended by Directive 98/48.
- In order, for a provision, to be considered as “specifically aimed at information society services having regard to both its statement of reasons and its operative part”, it is not required that ‘the specific aim and object’ of all of the rule in question be to regulate information society services, as it is sufficient that the rule pursues that aim or object in some of its provisions.
- Even where it is not apparent solely from the wording of a national rule that it is aimed, at least in part, at regulating information society services specifically, that object may be gleaned from the stated reasons given for the rule, as they appear, in accordance with the relevant national rules of interpretation in that regard, inter alia from the travaux préparatoires for the rule.
- It is apparent from recitals 7 and 8 of Directive 98/48, by which Directive 98/34 was amended, that the purpose of Directive 94/48 was to adapt existing national legislation to take account of new information society services and avoid restrictions on the freedom to provide services and freedom of establishment leading to ‘refragmentation of the internal market’. It would, however, run counter to that objective to exclude a rule, the aim and object of which is in all probability to regulate online services relating to newspapers or magazines, from classification as a rule specifically targeting such services within the meaning of Article 1(5) of Directive 98/34 on the sole ground that its wording not only refers to online services, but also to services provided offline.
- Technical rules on intellectual property are not expressly excluded from the scope of Article 1(5) of Directive 98/34, unlike those forming the subject matter of European legislation in the field of telecommunications services or financial services. Provisions of national intellectual property legislation may constitute a ‘technical regulation’ subject to notification pursuant to Article 8(1) of that directive.

***Judgment of 10 April 2018, Uber France, Case C-320/16, EU:C:2018:221, paragraphs 18 to 28***

- A provision of national law that lays down criminal penalties for the organisation of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorised to do so, concerns a ‘service in the field of transport’ in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service. Such a service is excluded from the scope of application of Directive 2015/1535.

***Judgment of 20 December 2017, Asociación Profesional Elite Taxi, Case C-434/15, EU:C:2017:981, paragraph 48***

- An intermediation service the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ (and not an information society service).

***Judgment of 20 December 2017, Falbert and Others, Case C-255/16, EU:C:2017:983, paragraphs 27 to 30***

- A national provision which provides for criminal sanctions where an unauthorised offer is made of gaming, lotteries or betting on the national territory, does not constitute a technical regulation within the meaning of Directive 2015/1535, subject to the notification obligation under Article 8(1) of that directive.

- However, a national provision which provides for sanctions in the event of advertising for unauthorised gaming, lotteries or betting, does constitute a technical regulation within the meaning of Directive 2015/1535, subject to the notification obligation under Article 8(1) of that directive, as it is clear from the travaux préparatoires for that provision of national law that its object and purpose was to extend a pre-existing prohibition on advertising to cover online gaming services, which it is for the national court to determine.

***Judgment of 2 February 2016, Ince, Case C-336/14, EU:C:2016:72, paragraphs 75-76, 79, 84***

- National provisions prohibiting the offering games of chance on the internet, the exceptions to that prohibition, the restrictions placed on offering sporting bets via telemedia services, and the prohibition of broadcasting advertisements for games of chance on the internet or via telecommunications equipment can be considered as ‘rules on services’ in the meaning of Article 1.5 of Directive 98/34, in so far as they concern an ‘Information Society service’ within the meaning of Article 1.2 of that directive.

- National provisions which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of an activity subject to prior authorisation or the impossibility of issuing such an authorisation to private operators, do not constitute technical regulations within the meaning of Directive 98/34.

- The draft of regional legislation which maintains in force, throughout the region concerned, the provisions of legislation common to the various regions of a Member State that has expired is subject to the notification obligation laid down in Article 8(1) of Directive 98/34, in so far as that draft contains technical regulations, within the meaning of Article 1 of that directive.

- Such an obligation is not called into question by the fact that the common legislation had previously been notified to the Commission at the draft stage pursuant to Article 8(1) of Directive 98/34 and that the rules laid down in the regional draft are identical in content to the rules laid down in the national regulation, given that they differ in their temporal and territorial scope.

- The obligation, imposed by the third subparagraph of Article 8(1) of Directive 98/34 on Member States, to ‘communicate the draft again’ if significant changes are made to it, relates only to the situation in which significant changes are made, during the national legislative procedure, to a draft technical regulation after that draft has been notified to the Commission.

- Provisions introducing the obligation to obtain an authorisation to organise or collect sporting bets and the impossibility of issuing such an authorisation to private operators do not constitute

‘technical regulations’ within the meaning of Article 1.11 of that directive. National provisions which merely lay down conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of that provision.

### **c. Fiscal measures**

#### ***Judgment of 8 October 2020, C-711/19, Admiral Sportwetten and Others, EU:C:2020:812***

- A national tax rule that provides for taxation of the operation of betting terminals does not constitute a ‘technical regulation’ within the meaning of that article.
- Tax legislation, which is not accompanied by any technical specification or any other requirement with which it is purportedly intended to ensure compliance, cannot be described as a ‘de facto technical regulation.’
- In order for a national measure to fall within the concept of ‘technical specification’, that measure must necessarily refer to the product or its packaging as such and thus lay down one of the characteristics required of a product.

#### ***Judgment of 20 March 1997, Bic Benelux, Case C-13/96, EU:C:1997:173, paragraphs 20 to 26***

- An obligation to affix specific distinctive signs to products which are subject to a tax levied on them on account of the environmental damage which they are deemed to cause constitutes a technical specification within the meaning of Directive 83/189, and the national enactment introducing it is a technical regulation within the meaning of the same Directive.
- The fact that a national measure was adopted in order to protect the environment or that it does not implement a technical standard which may itself constitute a barrier to free movement does not mean that the measure in question cannot be a technical regulation within the meaning of Directive 83/189.
- Since the marking requirement can in no way be regarded as exclusively a fiscal accompanying measure, it does not therefore constitute a requirement linked to a fiscal measure for the purposes of the third indent of the second subparagraph of Article 1(9) of Directive 83/189, as amended by Directive 94/10.

### **d. Obligation to re-notify**

#### ***Judgment of 10 July 2014, Ivansson and Others, Case C-307/13, EU:C:2014:2058, paragraphs 30-31, 46 to 50***

- The date finally chosen by the national authorities for the entry into force of a national measure is subject to the obligation of communication to the Commission, as laid down in the third subparagraph of Article 8(1) of Directive 98/34, where a change to the timetable for the implementation of that national measure was made, and was significant in nature, which it is for the national court to ascertain.
- A “significant” shortening of the timetable originally chosen by the national authorities for the entry into force and the implementation of a technical regulation is subject to the obligation of communication to the Commission, as laid down in the third subparagraph of Article 8(1) of Directive 98/34. The failure to make such a communication would render that national measure inapplicable, such that it could not be enforced against individuals.

***Judgment of 31 January 2013, Belgische Petroleum Unie and Others, Case C-26/11, EU:C:2013:44, paragraph 50***

- Article 8 of Directive 98/34 read in conjunction with Article 10(1), must be interpreted as not requiring notification of draft national legislation where, after having been notified pursuant to the first subparagraph of Article 8(1), the draft was amended to take account of the Commission's observations on it and the amended draft was then communicated to the Commission.

***Judgment of 15 April 2010, Sandström, Case C-433/05, EU:C:2010:184, paragraph 47***

- Amendments made to a draft technical regulation already notified to the Commission pursuant to the first subparagraph of Article 8(1) of Directive 98/34, which contain, in relation to the notified draft, merely a relaxation of the conditions of use of the product in question and which, therefore, reduce the possible impact of the technical regulation on trade, are not a significant alteration of the draft for the purposes of the third subparagraph of Article 8(1) of that directive. Such amendments are not, therefore, subject to the obligation of prior notification.

<b>II. CASES OF NON-NOTIFICATION OR ADOPTION BEFORE THE END OF THE STANDSTILL PERIOD (INAPPLICABILITY)</b>
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***Judgment of 30 April 1996, CIA Security International SA, Case C-194/94, EU:C:1996:172, paragraphs 54 and 55***

- Directive 83/189 is to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals. Individuals may rely on Articles 8 and 9 of Directive 83/189 before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.

***Judgment of 16 September 1997, Commission v Italy, C-279/94, EU:C:1997:396, paragraphs 40 and 41***

- Even though Article 8(1) of Directive 83/189 requires the entire draft of a law containing technical regulations to be communicated to the Commission, the non-applicability which results from the breach of that obligation extends not to all of the provisions of such a law, but only to the technical regulations contained therein.

***Judgment of 16 June 1998, Lemmens, Case C-226/97, EU:C:1998:296, paragraphs 34 to 37***

- Council Directive 83/189 is to be interpreted as meaning that breach of the obligation imposed by Article 8 thereof to notify a technical regulation on breath-analysis apparatus does not have the effect of making it impossible for evidence obtained by means of such apparatus, authorised in accordance with regulations which have not been notified, to be relied upon against an individual charged with driving while under the influence of alcohol. The use of the product by the public authorities is not liable to create an obstacle to trade which could have been avoided if the notification procedure had been followed.

***Judgment of 26 September 2000, Unilever, Case C-443/98, EU:C:2000:496, paragraphs 44, 49 to 51***

- The breach of the obligations of postponement of adoption set out in Article 9 of the Directive 98/34 constitutes a substantial procedural defect such as to render technical regulations inapplicable. In civil proceedings between private individuals concerning contractual rights and obligations, application of technical regulations adopted in breach of Article 9 of the Directive may have the effect of hindering the use or marketing of a product which does not conform to those regulations.

***Judgment of 6 June 2002, Sapod Audic, Case C-159/00, EU:C:2002:343, paragraphs 50, 53***

- The inapplicability of a technical regulation which has not been notified to the Commission in accordance with Article 8 of Directive 98/34 may be invoked in legal proceedings between individuals concerning, inter alia, contractual rights and duties. It is then for the national court to refuse to apply that provision, the question of the conclusions to be drawn from the inapplicability of that national provision as regards the severity of the sanction under the applicable national law, such as nullity or unenforceability of a contract, being a question governed by national law. That conclusion is, however, subject to the condition that the

applicable rules of national law are not less favourable than those governing similar domestic actions and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Union law.

***Judgment of 31 January 2013, Belgische Petroleum Unie and Others, Case C-26/11, EU:C:2013:44, paragraph 50***

- Failure to observe the obligation to notify constitutes a substantive procedural defect such as to render the technical regulations in question inapplicable and therefore unenforceable against individuals.

***Judgment of 10 July 2014, Ivansson and Others, Case C-307/13, EU:C:2014:2058, paragraphs 47 to 50***

- A “significant” shortening of the timetable originally chosen by the national authorities for the entry into force and the implementation of a technical regulation is subject to the obligation of communication to the Commission, as laid down in the third subparagraph of Article 8(1) of Directive 98/34. The failure to make such a communication would render that national measure inapplicable, such that it could not be enforced against individuals.

***Judgment of 11 June 2015, Berlington Hungary and Others, Case C-98/14, EU:C:2015:386, paragraphs 107 to 110***

- Articles 8 and 9 of Directive 98/34 are not intended to confer rights on individuals, in such a way that their infringement by a Member State gives rise to a right of individuals to obtain from that Member State compensation for the damage suffered as a result of that infringement on the basis of EU law.

***Judgment of 16 July 2015, UNIC and Uni.co.pel, Case C-95/14, EU:C:2015:492, paragraphs 29-30***

- A technical regulation cannot be applied if it has not been notified in accordance with Article 8(1) of Directive 98/34, or if, though notified, it has been adopted and implemented before the end of the three month standstill period required under Article 9(1) of that directive.  
- The failure to respect that standstill period is a material procedural defect rendering the technical regulation at issue inapplicable and unenforceable against individuals.

***Judgment of 2 February 2016, Ince, Case C-336/14, EU:C:2016:72, paragraphs 67-68***

- A breach of the notification obligation laid down in Article 8(1) of Directive 98/34 constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against an individual in the context of criminal proceedings.  
- Even though Article 8(1) of Directive 98/34 requires the entire draft of a law containing technical regulations to be communicated to the Commission, the non-applicability which results from the breach of that obligation extends not to all of the provisions of such a law, but only to the technical regulations contained therein.



***Order of 21 April 2016, Beca Engineering, Case C-285/15, EU:C:2016:295, paragraph 37***

- The breach of the notification obligation of technical regulations laid down in Article 8 of Directive 98/34 renders the concerned technical regulations inapplicable, so that they are unenforceable against individuals and individuals can invoke Article 8 of Directive 98/34 before the national courts. The national judge is required to refuse to apply a national technical regulation which has not been notified in accordance with the Directive.

***Judgment of 1 February 2017, Município de Palmela, Case C-144/16, EU:C:2017:76, paragraphs 35 to 38***

- Article 8(1) of Directive 98/34 must be interpreted as meaning that the penalty of unenforceability of a technical regulation which has not been notified applies only to that technical regulation and not to the entire legislative text in which it is contained.

***Judgment of 12 September 2019, VG Media, Case C-299/17, EU:C:2019:716, paragraph 39***

- The inapplicability of a technical regulation that has not been notified in accordance with that provision may be relied upon in proceedings between individuals.

<b>III. FAILURE OF A MEMBER STATE TO FULFIL ITS OBLIGATIONS</b>
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***Judgment of 8 October 2020, Union des industries de la protection des plantes, Case C-514/19, EU:C:2020:803***

The communication, under Article 5 of Directive (EU) 2015/1535, of a national measure prohibiting the use of certain active substances falling within the scope of Regulation (EC) No 1107/2009 must be regarded as the official provision of information on the need to take emergency measures within the meaning of Article 71(1) of that regulation, where:

- that communication contains a clear presentation of the evidence showing, first, that those active substances are likely to constitute a serious risk to human or animal health or to the environment and, second, that that risk cannot be satisfactorily controlled without the adoption, as a matter of urgency, of the measures taken by the Member State concerned, and where
- the European Commission failed to ask that Member State whether that communication must be treated as the official provision of information under Article 71(1) of that regulation.

The Commission cannot, in the light of the objective of protecting human and animal health and the environment, as referred to in recital 8 of that regulation, dismiss any relevance, for the purposes of applying Article 71(1), of a communication of a draft technical regulation under Article 5 of that directive where the information contained in that communication is sufficient to enable that institution to understand that the Member State concerned should have notified it under Article 71(1) of that regulation. That condition is satisfied where the communication concerned refers, first, to the existence of a risk associated with an approved active substance or an authorised plant protection product which the notified draft technical regulation is intended to control and, second, to the fact that it is impossible to control that risk without adding, as a matter of urgency, additional measures to the legislation in force.

***Judgment of 4 June 2009, Commission v Greece, Case C-109/08, EU:C:2009:346***

- By not amending Articles 2(1) and 3 of Law No 3037/2002, laying down a prohibition, subject to the criminal and administrative penalties set out in Articles 4 and 5 of that law, on the

installation and operation on all public or private premises, apart from casinos, of all electrical, electromechanical and electronic games, including all computer games, in accordance with Articles 28 EC, 43 EC and 49 EC and Article 8 of Directive 98/34/EC, the Hellenic Republic has not taken all the measures necessary to comply with the judgment of the Court of 26 October 2006 in Case C-65/05 Commission v Greece and has thus failed to fulfil its obligations under Article 228 EC.

***Judgment of 8 September 2005, Commission v Portugal, Case C-500/03, EU:C:2005:515***

- By adopting Ministerial order No 783/98 without notifying it, at the draft stage, to the Commission, Portugal has failed its obligations under Article 8 of Directive 98/34/EC.

***Judgment of 14 July 1994, Commission v Netherlands, Case C-52/93, EU:C:1994:301***

- By adopting an amendment to the PVS regulation on quality standards for flower bulbs without notifying it to the Commission at the draft stage, the Netherlands failed to fulfil its obligations under Article 8 of the Directive.

***Judgment of 14 July 1994, Commission v Netherlands, Case C-61/93, EU:C:1994:302***

- By adopting decrees concerning kilowatt-hour meters, the strength requirements for soft drinks bottles and the composition, classification, packaging and labelling of pesticides, without notifying them to the Commission at the drafting stage, the Netherlands failed to fulfil its obligations under Article 8 of the Directive.

***Judgment of 2 August 1993, Commission v Italy, Case C-139/92, EU:C:1993:346***

- By failing to communicate, at the draft stage, Ministerial Decree No 514/87 for the definition and verification of the maximum output, the construction and installation of engines for pleasure craft Italy failed to fulfil its obligations under the Directive.