JUDGMENT OF THE COURT (Fourth Chamber)

13 September 2007 *

In Case C-260/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 17 June 2004,

Commission of the European Communities, represented by K. Wiedner, C. Cattabriga and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I. M. Braguglia, acting as Agent, and G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

supported by:

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, E. Juhász, R. Silva de Lapuerta, G. Arestis (Rapporteur) and J. Malenovský, Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 29 March 2007

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic has failed to fulfil its obligations under the EC Treaty and has, in particular, infringed the general principle of transparency and the publication requirement resulting from Articles 43 and 49 EC.

Legal context

National legislation

2 In Italy, horse-race betting and gaming operations were originally run exclusively by the Unione Nazionale per l'Incremento delle Razze Equine (National Union for the Improvement of Horse Breeding, 'UNIRE'), which had the option of operating the services of collecting and taking bets directly or delegating them to third parties. The UNIRE entrusted the operation of those services to bookmakers.

3 Law No 662 of 23 December 1996 (ordinary supplement to the GURI No 303, of 28 December 1996) subsequently assigned responsibility for the organisation and management of horse-race betting and gaming to the Ministry of Finance and the Ministry of Agriculture, Food and Forestry Resources, which were authorised either

to operate the activity directly or through public bodies, companies or bookmakers appointed by them. Paragraph 78 of Article 3 of Law No 662 states that there is to be a reorganisation, by way of regulation, of the organisational, functional, fiscal and penal aspects of horse-race betting and gaming, as well as the sharing out of revenue from such betting.

4 In implementation of Article 3 of Law No 662, the Italian Government adopted Presidential Decree No 169 of 8 April 1998 (GURI No 125 of 1 June 1998, 'Decree No 169/1998'), which provided in Article 2 that the Ministry of Finance, in agreement with the Ministry of Agricultural and Forestry Policy, was to award licences for horse-race betting operations to natural persons or companies fulfilling the relevant conditions by means of calls for tender organised in accordance with Community rules. As a transitional measure, Article 25 of Decree No 169/1998 provided for an extension of the period of validity of the licences granted by UNIRE until 31 December 1998, or, if it proved impossible to organise calls for tender by that date, the end of 1999.

5 A Ministerial Decree of 7 April 1999 (GURI No 86 of 14 April 1999) subsequently approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. Whereas 671 new licences were put out to tender, the directive of the Ministry of Finance of 9 December 1999 provided for the renewal of UNIRE's 329 'old licences'. In implementation of that directive, the decision of the Ministry of Finance of 21 December 1999 (GURI No 300 of 23 December 1999, 'the contested decision') renewed the said licences for a period of six years starting 1 January 2000.

6 Decree-Law No 452 of 28 December 2001 (GURI No 301 of 29 December 2001), converted after amendment into Law No 16 of 27 February 2002 (GURI No 49 of 27 February 2002), subsequently provided that the 'old licences' were to be

reallocated in accordance with Decree No 169/1998, that is, by way of a Community call for tenders, and that they would remain valid until that reallocation had been finalised.

7 Finally, Decree-Law No 147 of 24 June 2003 extending time-limits and emergency provisions in budgetary matters (GURI No 145 of 25 June 2003), now Law No 200 of 1 August 2003 (GURI No 178 of 2 August 2003, 'Law No 200/2003'), provides in Article 8(1) that the financial status of each licence holder has to be assessed in order to resolve the problem of 'the guaranteed minimum', a levy which every licence holder had to pay to UNIRE irrespective of the actual amount of revenue generated during the year, which had proven to be excessive and had led to an economic crisis in the horse-race betting sector. In implementation of that law, the special commissioner appointed by UNIRE adopted decision No 107/2003 of 14 October 2003, which extended the period of validity of the licences that had already been granted until the deadline for the last payment, set for 30 October 2011, and, in any event, until the date on which the new licences are allocated by means of a call for tenders, in order to take the necessary steps to calculate the amounts to be paid by the licence holders.

Facts and the pre-litigation procedure

8 Following a complaint lodged by a private operator in the horse-race betting sector, on 24 July 2001 the Commission sent the Italian authorities a letter of formal notice pursuant to Article 226 EC, drawing their attention to the incompatibility of the Italian system of granting licences for horse-race betting operations, and, in particular, the renewal by the contested decision of the 329 old licences granted by UNIRE without a competitive tendering procedure, with the general principle of transparency and the requirement of publication resulting from Articles 43 and 49 EC. In response, the Italian Government announced, by letters dated 30 November 2001 and 15 January 2002, respectively, the bill for and the adoption of Law No 16 of 27 February 2002

9 Since the Commission was not satisfied with the implementation of the provisions of that law, it issued a reasoned opinion on 16 October 2002 in which it asked the Italian Republic to adopt the necessary measures to comply with the reasoned opinion within two months of its receipt. By letter of 10 December 2002, the Italian Government responded that it had to conduct a detailed assessment of the financial status of existing licence holders before issuing calls for tenders.

10 Since it received no further information concerning the completion of that assessment and the launching of a call for tenders for the purposes of reallocating the licences at issue, the Commission decided to bring the present action.

11 The Kingdom of Denmark and the Kingdom of Spain intervened in support of the Italian Republic.

The action

12 The Commission puts forward a single ground in support of its action. It submits that, by renewing UNIRE's 329 old licences for horse-race betting operations without inviting any competing bids, the Italian Republic has failed to fulfil its obligations under the Treaty and has, in particular, infringed the general principle of transparency and the publication requirement resulting from Articles 43 and 49 EC.

13 The Commission states in its application that, under Community law, the award of licences for horse-race betting operations in Italy must be considered to be a public service concession. As such, it does not fall within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). However, it is clear from the case-law of the Court, and particularly the judgment in *Telaustria and Telefonadress* (Case C-324/98 [2000] ECR I-10745), that national authorities which award such licences must observe the principles of non-discrimination and transparency in order to ensure a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

14 The Commission points out in this respect that the Italian Government failed to comply with those principles when it renewed UNIRE's 329 existing licences without inviting competing bids. In the Commission's opinion, only the circumstances and reasons provided for in Articles 45 and 46 EC permit derogations from these principles. The justifications cited by the Italian Government are not among those expressly covered by Articles 45 and 46 EC and, in any event, the Italian Government has not shown the need for, and the proportionality of, the derogations in the light of the objectives pleaded.

15 In its defence, the Italian Government submits that Law No 200/2003 and Decision No 107/2003 are in conformity with the requirements of Community law concerning public service concessions. According to the Italian Government, the extension of UNIRE's old licences was justified by the need to ensure continuity, financial stability and a proper return on past investments for licence holders as well as the need to discourage recourse to clandestine activities, until the existing licences could be reallocated on the basis of tendering procedures. Such justifications constitute overriding requirements relating to the public interest

which may justify derogations from the principles of the Treaty, including the obligation to open up the services market to competition.

16 The Danish Government takes issue with the Commission's interpretation of the Court's judgment in *Teleaustria and Telefonadress*, cited above, as regards the scope of the requirement of transparency in circumstances such as those of the present case. The Spanish Government puts forward considerations relating to the specific features of the authorisation and organisation of gambling activities which, it asserts, the Commission has failed to take into account.

17 It should be noted at the outset that the Italian Government does not deny that Law No 200/2003 and Decision No 107/2003 took effect after expiry of the time-limit laid down in the reasoned opinion.

18 In that regard it must be remembered that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, in particular, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40, and Case C-514/03 *Commission* v *Spain* [2006] ECR I-963, paragraph 44).

19 Therefore, the provisions of Law No 200/2003 and Decision No 107/2003 cannot be of relevance for the purposes of determining whether the Italian Republic has failed to fulfil its obligations. It follows that the present action is concerned solely with a review of the contested decision.

20 As the Commission rightly observed, the Italian Government has not denied, either during the pre-litigation procedure or in the course of these proceedings, that the award of licences for horse-race betting operations in Italy constitutes a public service concession. That classification was accepted by the Court in *Placanica and Others* (Joined Cases C-338/04, C-359/04 and C-360/04 [2007] ECR I-1891), in which it interprets Articles 43 and 49 EC in relation to the same national legislation.

21 It is common ground that public service concessions are excluded from the scope of Directive 92/50 (see Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 42).

22 The Court has held that, notwithstanding the fact that public service concession contracts are, as Community law stands at present, excluded from the scope of Directive 92/50, the public authorities concluding them are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the grounds of nationality, in particular (see, to that effect, *Telaustria and Telefonadress*, paragraph 60; Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16; and *Parking Brixen*, paragraph 46).

23 The Court then stated that the provisions of the Treaty applying to public service concessions, in particular Articles 43 and 49 EC, and the prohibition of discrimination on grounds of nationality are specific expressions of the principle of equal treatment (see, to that effect, *Parking Brixen*, paragraph 48).

24 In that regard, the principles of equal treatment and non-discrimination on grounds of nationality imply, in particular, a duty of transparency which enables the

concession-granting public authority to ensure that those principles are complied with. That obligation of transparency which is imposed on the public authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed (see, to that effect, *Telaustria and Telefonadress*, paragraphs 61 and 62, as well as *Parking Brixen*, paragraph 49).

25 In the present case, it must be observed that the complete failure to invite competing bids for the purposes of granting licences for horse-race betting operations does not accord with Articles 43 and 49 EC, and, in particular, infringes the general principle of transparency and the obligation to ensure a sufficient degree of advertising. The renewal of the 329 old licences without a call for tenders precludes the opening up to competition of the licences and review of the impartiality of the procurement procedures.

26 In those circumstances, it is necessary to consider whether the renewal may be recognised as an exceptional measure, as expressly provided for in Articles 45 EC and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 60, and *Placanica and Others*, paragraph 45).

27 On that point, a certain number of reasons of overriding general interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order (*Placanica and Others*, paragraph 46).

28 Although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought,

the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).

29 It should therefore be examined whether the renewal of the licences without inviting any competing bids is suitable for achieving the objective pursued by the Italian Republic and does not go beyond what is necessary in order to achieve that objective. In any case, the renewal must be applied without discrimination (see, to that effect, *Gambelli and Others*, paragraphs 64 and 65, and *Placanica and Others*, paragraph 49).

30 It is common ground that the Italian Government approved the plan to reinforce the network of outlets collecting and taking bets on horse-races with a view to increasing the number of betting shops across the whole of Italy from 329 to 1 000. To carry out that plan, 671 new licences were awarded on completion of a tendering procedure, but the 329 existing old licences were renewed without competing bids having being invited.

31 In that connection, the Italian Government has not relied on any derogation, such as the ones expressly provided in Article 45 and 46 EC. By contrast, the Italian Government justifies its renewal of the licences without a tendering procedure by the need, in particular, to discourage the development of clandestine activities for collecting and allocating bets.

32 However, the Italian Government has not explained in its defence the basis on which it was necessary not to invite competing bids and has not submitted arguments to dispute the infringement alleged by the Commission. In particular, the Italian Government has not explained how the renewal of the existing licences without

inviting any competing bids could prevent the development of clandestine activities in the horse-race betting sector, and has simply submitted that Law No 200/2003 and Decision No 107/2003 are in conformity with the requirements of Community law concerning public service concessions.

33 In that regard it is for the competent national authorities to show, first, that their legislation addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement relating to the general interest as laid down in the case-law and, second, that that legislation conforms to the principle of proportionality (see, to that effect, Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, paragraph 47; Case C-38/03 *Commission* v *Belgium*, not published in the ECR, paragraph 20, and Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 29).

34 Accordingly, it must be stated that the renewal of UNIRE's old licences without putting them out to tender was not an appropriate means of attaining the objective pursued by the Italian Republic, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities.

35 In addition, as regards the grounds of an economic nature put forward by the Italian Government, such as the need to ensure continuity, financial stability and a proper return on past investments for licence holders, suffice it to point out that those cannot be accepted as overriding reasons in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48, and Case C-388/01 *Commission* v *Italie* [2003] ECR I-721, paragraph 22).

36 It follows that none of the overriding reasons in the general interest pleaded by the Italian Government to justify the renewal of the 329 old licences without any competing bids being invited can be accepted.

37 Therefore, the Commission's application is well founded.

38 It follows from the above that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic failed to fulfil its obligations under Articles 43 and 49 EC and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.

Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs and the Italian Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by renewing 329 licences for horse-race betting operations without inviting any competing bids, the Italian Republic failed to fulfil its obligations under Articles 43 and 49 EC and, in particular, infringed the general principle of transparency and the obligation to ensure a sufficient degree of advertising.**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]