Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2012*

(Article 56 TFEU — Restriction on the freedom to provide services — Games of chance — Legislation of a Member State prohibiting the advertising of casinos located in other States if the level of legal protection for gamblers in those States is not equivalent to that ensured at national level — Justification — Overriding reasons in the public interest — Proportionality)

In Case C-176/11,

REFERENCE for a preliminary under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 28 March 2011, received at the Court on 14 April 2011, in the proceedings

HIT hoteli, igralnice, turizem dd Nova Gorica,

HIT LARIX, prirejanje posebnih iger na srečo in turizem dd

v

Bundesminister für Finanzen,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2012,

after considering the observations submitted on behalf of:

— HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd, by R. Vouk, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and P. Vlaemminck, advocaat,

— the Greek Government, by E.-M. Mamouna, acting as Agent,

* Language of the case: German.

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, A. Barros, A. Silva Coelho and P.I. Valente, acting as Agents,

— the European Commission, by G. Braun and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 April 2012,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 This question has been raised in proceedings brought by HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd (collectively 'HIT and HIT LARIX') against the Bundesminister für Finanzen (Federal Minister for Finance; 'the Minister') concerning the latter's rejection of their applications for authorisation to carry out advertising in Austria for casinos which they operate in Slovenia.

Legal context

National legislation

3 In the Federal Law on gaming (Glücksspielgesetz) of 28 November 1989 (BGBl. I, 620/1989, in the version published in BGBl. I, 54/2010; 'the GSpG'), Paragraph 21, which is headed 'Casinos, licence', specifies the conditions for the grant of licences to operate casinos in Austria. It provides, in particular, that the licensee must be a capital company that has a supervisory board and is established in Austria, that the licensee must have share capital of at least EUR 22 million and that, having regard to the circumstances, it must be justifiable to presume that the licensee will operate the licence in the best manner in compliance with the provisions of the GSpG on the protection of gamblers and prevention of money-laundering.

4 Paragraph 25 of the GSpG, headed 'Casino customers', essentially contains a series of measures designed to protect gamblers against the risks connected with gaming such as the development of gambling addiction and incitement to squander money (in particular, limitation of entrance to casinos exclusively to persons who have attained the age of majority, an obligation on the casino's management to request information on gamblers who appear to be addicts from an independent body which provides information on the solvency of persons, an interview with the gambler, if appropriate, in order to ascertain whether his participation in gaming jeopardises the specific minimum income required for his subsistence, a temporary or permanent ban on entry).

5 Paragraph 25 also provides for the possibility for casino customers to bring a direct civil action, within three years from the loss suffered by them, against the casino management which has breached the obligations that are imposed upon it in order to protect gamblers. The casino management's liability in connection with the validity of the gaming contract or with losses due to gambling is governed exhaustively by that paragraph and it is limited to the specific minimum income required for subsistence.

6 Paragraph 56 of the GSpG, headed ‘Permissible advertising’, provides:

‘(1) Licensees and permit holders under this Federal Law shall maintain a responsible attitude in their promotional activities. Compliance with this requirement for a responsible attitude shall be ensured exclusively through supervision by the Federal Minister for Finance and shall not be amenable to enforcement by actions brought under Paragraph 1 et seq. of the Federal Law against unfair competition. The first sentence of the present subparagraph shall not constitute a protective law for the purposes of Paragraph 1311 of the Civil Code.

(2) Casinos from Member States of the European Union or European Economic Area States may promote in Austria visits to their establishments located outside Austria in Member States of the European Union or of the European Economic Area in accordance with the principles established in subparagraph 1 if the casino operator has been granted a permit to that effect by the [ministry]. Such a permit shall be granted where the casino operator demonstrates to the [ministry] that:

1. the licence to operate the casino conforms to the requirements of Paragraph 21 and the casino operates under that licence in the State granting it, that State being a Member State of the European Union or of the European Economic Area, and

2. the legal provisions for the protection of gamblers adopted by that Member State at least correspond to the Austrian provisions.

If the promotional measures do not satisfy the requirements of subparagraph 1, the [ministry] may prohibit advertising by the operator of the casino located outside Austria.’

Facts of the main proceedings and the question referred for a preliminary ruling

7 HIT and HIT LARIX are two public limited companies established in Slovenia. They hold licences in Slovenia to operate certain games of chance there and do in fact offer those services in a number of establishments located in that Member State.

8 HIT and HIT LARIX applied for permits under Paragraph 56 of the GSpG to carry out advertising in Austria for their gaming establishments located in Slovenia, in particular for casinos. By two decisions adopted on 14 July 2009, those applications were rejected by the ministry on the ground that HIT and HIT LARIX had not proved that the Slovenian legal provisions concerning games of chance (‘the Slovenian legislation’) ensured a level of protection for gamblers comparable to the level provided for in Austria, when compliance with such a condition is necessary under Paragraph 56(2)(2) of the GSpG in order for the permits applied for to be capable of being granted.

9 HIT and HIT LARIX brought an action against those decisions refusing a permit, contending essentially that the decisions were adopted in breach of the right freely to provide services which is enjoyed by them under European Union law.

10 Before the referring court, the ministry submits that HIT and HIT LARIX have not established that the Slovenian legislation imposes on the management of casinos a legal obligation to warn and bar gamblers or a monitoring system that are comparable to those existing in Austrian law. Nor is it proven that the Slovenian legislation contains detailed rules concerning the protection of minors in gaming halls or that casino customers can bring an action directly before the Slovenian civil courts if the licensee breaches its obligations.

11 The ministry contends that the obligation owed by the Republic of Austria to protect consumers who are in its territory does not fall away when they are encouraged by advertising to visit casinos located in other Member States which apply standards of protection clearly lower than those in force in

Austria, since both that advertising and the actual visiting of those establishments by Austrian residents attracted by such advertising could have morally and financially harmful consequences both for the individual and for society and thus seriously endanger persons and families resident in Austria and public health. Furthermore, the need to verify whether comparable protective measures exist follows from the requirement for consistency, laid down by European Union law.

12 The referring court makes reference to the Court of Justice's settled case-law and states that, in the light of that case-law, Paragraph 56(2) of the GSpG constitutes, in principle, a restriction on the freedom to provide services within the meaning of Article 56 TFEU. Such a restriction might, however, be justified by overriding reasons in the public interest, provided that it is proportionate.

13 The referring court notes that, according to the Court's case-law, the overriding reasons in the public interest that might justify a restriction on the freedom to provide services include the objectives of national legislation in the area of gambling and betting, which pursue both the protection of the recipients of the services concerned and, more generally, that of consumers, as well as protection of the social order. It adds that, in the absence of harmonised legislation at European level in the area of games of chance, it is for each Member State to define the level of protection for gamblers that it seeks to ensure.

14 In this instance, the referring court does not rule out that the grounds underlying the national legislation at issue may justify the restriction on the freedom to provide services, given the degree of latitude accorded in the matter to the Member States by the Court's case-law.

15 It was in those circumstances that the Verwaltungsgerichtshof (Administrative Court) (Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is legislation of a Member State which permits the domestic advertising of casinos located abroad only where the legal provisions in those foreign locations for the protection of gamblers correspond to the domestic provisions compatible with the freedom to provide services?'

The question referred for a preliminary ruling

The existence of restrictions on the freedom to provide services

16 Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, inter alia, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-9083, paragraph 85 and the case-law cited).

17 More specifically, in the area of advertising for games of chance, the Court has held that national legislation whose effect is to prohibit the promotion in a Member State of gambling organised legally in other Member States constitutes a restriction on the freedom to provide services (see, to this effect, Joined Cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921, paragraphs 33 and 34).

18 Likewise, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services since it impedes the access of consumers resident in Austria to the services offered in casinos located in another Member State, by making the promotion in Austria of those activities subject to an authorisation scheme which requires, in particular, that the operator of

the casino concerned prove that the legal provisions for the protection of gamblers adopted in the Member State where that casino is operated at least correspond to the relevant Austrian legal provisions ('the contested condition').

19 Consequently, it must be held that national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services that is guaranteed by Article 56 TFEU.

Justification of the restriction on the freedom to provide services

20 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 51 TFEU and 52 TFEU, applicable in this area by virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

21 It is clear from the Court's case-law that restrictions on gaming activities may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (see, to this effect, Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, paragraph 55 and the case-law cited).

22 However, the restrictions imposed by the Member States must satisfy the conditions laid down in the case-law of the Court as regards their proportionality, that is to say, be suitable for ensuring attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. It should also be recalled in this connection that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, the restrictions must be applied without discrimination (see, to this effect, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraphs 59 to 61 and the case-law cited).

23 In the case in point, it is not in dispute that the national legislation at issue and, in particular, the contested condition pursue the objective of protecting consumers against the risks connected with games of chance, which, as is clear from paragraph 21 of the present judgment, is capable of constituting an overriding reason in the public interest such as to justify restrictions on the freedom to provide services.

24 In this connection, the Court has repeatedly held that legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57 and the case-law cited).

25 Thus, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58 and the case-law cited).

26 Here, the Austrian Government takes the view that the restriction on the freedom to provide services at issue in the main proceedings is not disproportionate in relation to the objectives pursued. It states that the number of casinos is limited in Austria to a maximum of 15 and casino operators are required to observe strict rules concerning the protection of gamblers, such as the duty to retain details of their

identity for at least five years or the duty of the casino's management to observe a gambler's conduct in order to determine whether the frequency and intensity of his participation in gaming jeopardise the minimum income required for his subsistence.

27 According to the Austrian Government, in practice the application of those preventive rules has resulted in a significant reduction in the number of gamblers, as more than 80 000 persons were subject in 2011 to restrictions or bars on entering Austrian casinos. Therefore, in the absence of the contested condition, gamblers would be further encouraged to cross the border and to incur greater risks in casinos located in other Member States where similar regulatory guarantees of protection in some cases do not exist.

28 In that regard, it is apparent from the contested condition that, in order for a permit to carry out advertising in Austria for casinos established abroad to be granted, the levels of protection for gamblers that exist in the various legal systems concerned must first be compared.

29 Such an authorisation scheme is in principle capable of fulfilling the condition of proportionality if it is limited to making authorisation to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting its residents against the risks connected with games of chance.

30 Such a condition does not appear to constitute an excessive burden for operators given the objective, recognised by the Court as an overriding reason in the public interest, of protecting the population against the risks inherent in games of chance.

31 Since the Member States are free to set the objectives of their policy on games of chance and to define in detail the level of protection sought (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59 and the case-law cited), it must be held that legislation such as that at issue in the main proceedings does not go beyond what is necessary provided that it merely requires, in order for authorisation to carry out advertising to be granted, that it be established that, in the other Member State, the applicable legislation ensures protection against the risks of gaming that is in essence of a level equivalent to that which it guarantees itself.

32 The position would, however, be different, and the legislation would have to be regarded as disproportionate, if it required the rules in the other Member State to be identical or if it imposed rules not directly related to protection against the risks of gaming.

33 In the procedure referred to in Article 267 TFEU, a provision which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court (see Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 46 and the case-law cited).

34 Thus, it is for the referring court to satisfy itself that the contested condition is limited to making authorisation to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting individuals against the risks connected with games of chance.

35 The referring court will, in particular, be able to consider whether Paragraph 56(2)(1) of the GSpG, by the reference which it makes to Paragraph 21 in its entirety, imposes conditions that go beyond consumer protection.

36 In light of the foregoing, the answer to the question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

[Signatures]