Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 November 2015 [1]

Case C-375/14

Criminal proceedings
against
Rosanna Laezza

(Request for a preliminary ruling from the Tribunale di Frosinone (District Court, Frosinone, Italy))

(Reference for a preliminary ruling — Freedom of establishment and freedom to provide services — Judgment of the Court declaring incompatible with EU law national legislation concerning licences for the activity of collecting bets — Reorganisation of the system through a fresh call for tenders — Reduced term of licences — Free-of-charge transfer of rights to use tangible and intangible assets owned by the licensee which constitute their network for the management and collection of bets — Compatibility with Articles 49 TFEU and 56 TFEU — Relevant factors in the examination of the proportionality of the measure)

1. The present request for a preliminary ruling was made by the Tribunale de Frosinone (District Court, Frosinone), in criminal proceedings brought against Ms Laezza for failure to comply with the Italian legislation governing the collection of bets, concerning an order authorising the preventive seizure of certain items of computer equipment for receiving and transmitting sports bets or bets on other events.

2. It should be noted that the present case comes in the wake of a number of references for a preliminary ruling in which the Court has been requested to rule on the compatibility with EU law of a number of national laws governing the betting and gaming sector, and in particular the Italian legislation on the collection of bets. [2] The present request for a preliminary ruling raises a new issue, however, on which I shall focus my analysis, namely, the compatibility, with Articles 49 TFEU and 56 TFEU and with the principles of equal treatment and effectiveness, of the obligation imposed on new licensees to transfer inter alia, free of charge, items of equipment used in the activity of collecting bets, in the event of the cessation of that activity.

1 — Original language: French.

2 — The present request is submitted in a legal and factual context explored inter alia in the judgments in *Zenatti* (C-67/98, EU:C:1999:514); *Gambelli and Others* (C-243/01, EU:C:2003:597); *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133); *Commission* v *Italy* (C-260/04, EU:C:2007:508); *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80); *Biasci and Others* (C-660/11 and C-8/12, EU:C:2013:550), and, more particularly and recently, *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25). The request also comes into a group of 17 cases currently pending before the Court, all relating to a similar matter (*Tomassi* (C-210/14); *Di Adamo*, (C-211/14); *De Ciantis* (C-212/14); *Biolzi* (C-213/14); *Proia* (C-214/14); *Rosa* (C-433/14); *Mignone* (C-434/14); *Barletta* (C-435/14); *Cazzorla* (C-436/14); *Seminario* (C-437/14); *Carlucci* (C-462/14); *Baldo* (C-467/14); *Pontillo* (C-474/14); *Gaiti and Others* (C-534/14), *Santoro* (C-65/15) and *Conti* (C-504/15)) and is to be read in conjunction with three other cases, also pending before the Court, concerning a different aspect of the Italian legislation applicable to that sector, namely the provisions relating to proof of the financial and economic standing of operators (*Politanò* (C-225/15); *Durante* (C-438/15) and *Manzo* (C-542/15)).

3. Although the case offers at first sight the opportunity to give some guidance on the factors that should be taken into account in an assessment of the proportionality of the restrictive measures adopted by Member States in the betting and gaming sector, it shows, in my view, the extent to which the interpretation sought by the referring court is limited where information concerning the circumstances of the drafting and the procedure for the adoption of those measures is incomplete.

I – **Legal framework**

4. Italian legislation essentially provides that participation in the organising of betting and gaming, including the collection of bets, is subject to possession of a licence and a police authorisation.

5. Under Article 88 of Royal Decree No 773 of 18 June 1931 approving a consolidated version of the laws on public security,[3] as amended by Article 37(4) of Law No 338 of 23 December 2000,[4] a police authorisation is granted only where a licence has been obtained from the State Customs and Monopolies Agency (Agenzia della Dogane e dei Monopoli di Stato, 'the CMA'). That police authorisation entitles holders to collect bets within a particular area. Failure to obtain a licence therefore precludes obtaining a police authorisation. Engaging in the activity of collecting bets in the absence of a licence or police authorisation is punishable as a criminal offence.

6. In 1999, the Italian authorities awarded under a public tendering procedure 1 000 licences for the management of sports betting operations. At the same time, 671 new licences were granted, also by public tender, for the management of bets on competitive horse racing events and 329 existing licences were automatically renewed. Under the legislation in force at that date, operators in the form of joint-stock companies whose shares were quoted on the regulated markets were excluded from participating in tendering procedures since in their case the precise identification of individual shareholders was not possible on an ongoing basis. In *Placanica and Others*, inter alia, such exclusion was declared unlawful under Articles 43 EC and 49 EC.[5]

7. Decree-Law No 223[6] reformed the betting and gaming sector in Italy with the aim of bringing it into line with the requirements under EU law. That decree provided for the award of some 16 300 new betting and gaming licences in addition to the other licences granted in 1999.

8. Following, inter alia, the judgment in *Costa and Cifone*,[7] the betting and gaming sector was again reformed by Decree-Law No 16.[8]

9. So far as the organisation of calls for tender for the award of licences for the collection of bets is concerned, Article 10(9g) and (9h) of the Decree-Law of 2012 provides:

'9g. As part of a reform of the legislation relating to public gambling, including that relating to the collection of bets on sporting events, including horse racing, and non-sporting events, the provisions of the present paragraph have the aim of promoting that reorganisation, through an initial alignment of the expiry dates of the licences for the collection of bets in question, while observing the requirement that the national rules on the selection of persons who, on behalf of the State, collect

3 — GURI No 146 of 26 June 1931.

4 — Ordinary Supplement to GURI No 302 of 29 December 2000.

5 — C-338/04, C-359/04 and C-360/04, EU:C:2007:133.

6 — Decree-Law of 4 July 2006 laying down urgent measures for economic and social revival, for the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion, converted into statute by Law No 248 of 4 August 2006 (GURI No 18 of 11 August 2006).

7 — C-72/10 and C-77/10, EU:C:2012:80.

8 — Decree-Law of 2 March 2012 laying down urgent provisions related to fiscal simplification, improving effectiveness and reinforcing monitoring procedures (GURI No 52 of 2 March 2012, p. 1), converted, after amendment, into statute by Law No 44 of 26 April 2012 (GURI No 99 of 28 April 2012, and Ordinary Supplement to GURI No 85, p. 1 et seq.; consolidated text, p. 23 et seq., 'the Decree-Law of 2012').

bets on sporting events, including horse racing, and non-sporting events, are adjusted to the principles laid down by the judgment in [*Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80)]. To that end, in view of the impending expiry of a group of licences for the collection of those bets, the Independent Authority for the Administration of State Monopolies shall immediately initiate, and in any event by 31 July 2012 at the latest, a call for tenders for the selection of persons who are to collect such bets with due regard, at the very least, to the following criteria:

(a) the possibility of participation for persons already carrying out an activity related to the collection of bets in one of the States of the European Economic Area, as a result of having their legal and operational seat there, on the basis of a valid and effective authorisation issued under the provisions in force in the law of that State and who fulfil the requirements as to reputation, reliability and financial capacity specified by the Independent Authority for the Administration of State Monopolies, account being taken of the provisions in this matter referred to in Law No 220 [9] ..., and in Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011;

(b) the award of a licence, expiring on 30 June 2016, for the collection, exclusively in a physical games network, of bets on sporting events, including horse racing, and non-sporting events, from agencies, up to a maximum of 2 000, whose sole activity is the marketing of public gambling products, without restriction as to the minimum distances between those agencies or with respect to other collection points, which are already active, for identical bets;

(c) provision, as a price component, for a basic contract value of EUR 11 000 for each agency;

(d) the conclusion of a licence agreement whose content is consistent with any other principle laid down by the above-mentioned judgment and with the compatible national provisions in force regarding public gambling;

(e) the possibility of managing agencies in any municipality or province, without numerical limits on a territorial basis or more favourable conditions compared to licensees who are already authorised to collect identical bets or which may, in any event, be favourable to those licensees;

(f) the lodging of deposits consistent with the provisions of Article 24 of Decree-Law No 98 of 6 July 2011, converted, after amendment, into statute by Law No 111 of 15 July 2011.

9h The licensees who are to collect bets referred to in paragraph 9g, whose contracts expire on 30 June 2012, shall continue their collection activities until the date of the conclusion of the licence contracts awarded in accordance with the above paragraph. The following paragraphs are repealed: paragraphs 37 and 38 of Article 24 of Decree-Law No 98 of 6 July 2011 converted, after amendment, into statute by Law No 111 of 15 July 2011, subparagraph (e) of paragraph 287 of Article 1 of Law No 311 of 30 December 2004, and subparagraph (e) of paragraph 4 of Article 38 of [Decree-Law No 223 of 4 July 2006 laying down urgent measures for economic and social revival, for the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion], converted, after amendment, into statute by Law No 248 of 4 August 2006.'

10. The effect of the abovementioned provisions was that licences were awarded with a validity period of 40 months, whereas the licences issued previously had a validity period of between 9 and 12 years.

9 — Law laying down provisions for drawing up the annual and multiannual budget of the State (2011 Stability Law) (legge n. 220 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2011)), of 13 December 2010 (Ordinary Supplement to GURI No 297 of 21 December 2010, 'Law No 220').

11. Under Article 1(77) of Law No 220, as amended:

'In order to ensure a correct balance between public and private interests in the context of the organisation and management of public gaming, in view of the State monopoly in respect of gaming … and of the principles, of the European Union also, with regard to competitive selection, which apply in that sector, and by contributing also to consolidating the bases for improved efficiency and effectiveness of action to combat the spread of irregular or illegal gambling in Italy, for the protection of consumers, in particular minors, for maintaining public order, for discouraging gambling by minors and combating infiltration by organised crime into the betting and gaming sector … the Ministry of the Economy and Finance — the Independent Authority for the Administration of State Monopolies shall take steps without delay to update the standard formula for an agreement giving access to licences for operating and collecting public bets, but not remotely, or at any event by means of a physical network.'

12. Article 1(78)(b)(26) of Law No 220 reads as follows:

'provision for the transfer free of charge, or devolution, of the infrastructure network for the management and collection of bets to the Independent Authority for the Administration of State Monopolies on expiry of the term of the licence, exclusively at the prior request of the latter, communicated at least six months before such expiry, or communicated on the occasion of the decision to revoke or terminate the licence.'

13. The provisions contained in the tendering rules concerning grounds for revocation and termination of the licence are laid down in the draft agreement concerning the relationship under the public betting and gaming licence ('the draft agreement'), in accordance with Article 10(9g) of the Decree-Law of 2012.

14. Those provisions, contained in Article 23(2)(a), (e) and (k) of the draft agreement, concern inter alia cases in which reference is made to a court in respect of offences which the Independent Authority for the Administration of State Monopolies considers are such that they rule out the licensee having the required reliability, professionalism and moral quality; cases in which public bets are organised, operated and collected according to rules and techniques that differ from those laid down in the provisions of laws, regulations and agreements in force, and cases in which the competent bodies establish that the rules for the control of betting and gaming have been infringed.

15. Article 25 of the draft agreement, the provision specifically at issue in the present case, reads:

'… At the express request of the CMA and during the period prescribed by that authority, the licensee shall undertake to transfer free of charge, at the time of the cessation of business owing to the expiry of the final term of the licence or as a result of measures revoking or terminating that licence, to the CMA (or to another licensee identified by that authority using the tendering criteria) the rights to use his tangible and intangible assets to which he owns and which constitute his network for the management and collection of bets, free from the rights and claims of third parties, pursuant to the rules set out in the following paragraphs. 2. The assets forming the subject of the transfer shall be designated in the inventory and its subsequent amendments, according to the provisions of Article 5(1)(e). 3. The transfer operations — which shall take place inter partes between the CMA and the licensee, with appropriate written records being made — shall begin in the six-month period preceding the expiry of the term of the agreement, preserving, during that period, the requirement not to impair the functioning of the system since the assets shall be transferred to the CMA under conditions ensuring continuity of the operation of the electronic communication games network. The costs of any physical transfer of equipment, fittings or any other component of the electronic communication network shall be the licensee's responsibility …'

II – **The facts giving rise to the main proceedings, the question referred and the procedure before the Court**

16. On 5 June 2014, following a check carried out by a team from the Finance Police (Compagnia Guardia di Finanza) of Frosinone (Italy) at the premises of a data transmission centre managed by Ms Laezza and linked by a contractual relationship to Stanleybet Malta Ltd, a Maltese company, those authorities found that the activity of collecting bets was being carried on there without authorisation within the meaning of Article 88 of Royal Decree No 773 of 18 June 1931 approving a single text of the laws on public security, as amended by Article 37(4) of Law No 338 of 23 December 2000.

17. By decision of 10 June 2014, the judge in charge of preliminary investigations at the Tribunale di Cassino (District Court, Cassino) issued an order against Ms Laezza for the preventive seizure of assets used in the collection of bets.

18. Before the referring court, on 7 and 15 November 2013, Ms Laezza submitted an application for annulment of the decision to seize those assets. In addition, like the companies to which the data transmission centre which she manages is connected in the case giving rise to the judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), she sought annulment of the last call for tenders for the award of betting and gaming licences in Italy, claiming that it was discriminatory, and applied for the organisation of a fresh call for tenders.

19. The referring court points out that the Consiglio di Stato (Council of State) referred two similar questions to the Court for a preliminary ruling in the case giving rise to the judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), but considers that the subject-matter of those two questions, in particular the shorter period of validity for the new licences than for previous licences, is not a problem in itself in the light of EU law.

20. That court notes, however, the content of Article 25 of that draft agreement, deemed to be signed by the holders of new licences, which makes it compulsory to transfer free of charge the rights to use the tangible and intangible assets that they own and which constitute their network for the management and collection of bets at the time of the cessation of business owing to the expiry of the final term of the licence or as a result of measures revoking or terminating that licence.

21. According to that court, although that provision, which has no precedent in Italy, is orientated towards the imposition of a penalty in cases of revocation and/or termination of the licence, it appears to put licensees at a particular disadvantage in cases where the free-of-charge transfer is merely triggered by the date on which the final term of the licence happens to expire. In addition, there is the surprising obligation on the licensee to bear all the costs of that free-of-charge transfer.

22. The referring court considers that such a difference in the treatment of old and new licensees does not appear to constitute an overriding reason in the public interest.

23. In those circumstances, the Tribunale di Frosinone (District Court, Frosinone) decided to stay proceedings and to refer the following question to the Court:

‘Must Article 49 [TFEU] et seq. and Article 56 [TFEU] et seq., as supplemented in the light of the principles set out in the judgment in [*Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80)], be interpreted as precluding a provision of national legislation which makes it compulsory to transfer free of charge, at the time of the cessation of business owing to the expiry of the final term of a licence or as a result of measures revoking or terminating that licence, rights to use tangible and intangible property to collect bets and to manage betting and gaming?’

24. Written observations were submitted by Ms Laezza, the Italian and Belgian Governments and the European Commission.

25. A hearing was held on 17 September 2015, in which all those interveners took part.

III – **Assessment**

26. By its question, the referring court asks, essentially, whether a provision of an agreement, imposed on the basis of the Italian legislation governing the system of licences and authorisations in the sports betting sector is compatible with Articles 49 TFEU and 56 TFEU. That provision requires new licensees, upon the set expiry of the licence or in the event of its early revocation or termination, to transfer free of charge, to the licensing authority or to another licensee to be identified by that authority, the rights to use the tangible and intangible assets they own and which constitute their network for the management and collection of bets.

27. First of all, I should like to make clear that the present reference for a preliminary ruling cannot be regarded as seeking to call into question the new licensing system introduced in Italy in 2012 throughout the betting and gaming sector.

28. All that is at issue here is the measure requiring a licensee to transfer free of charge the rights to use a number of items of equipment needed in order to carry out the service to which the license relates in the event of the cessation of business in the circumstances set out in the annex to the licence agreement. In other words, the present proceedings do not concern the reorganisation of the licensing system through an alignment of expiry dates, introduced by the Decree-Law of 2012, examined by the Court in the case giving rise to the judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), but concern a different measure, contained in the draft agreement to be concluded with those to whom licences have been awarded in order to regulate their activity. [10]

29. The Court did, in any event provide in that judgment, some appropriate clarification concerning the system introduced in Italy in the betting and gaming sector following the entry into force of the Decree-Law of 2012.

30. It thus held that Articles 49 TFEU and 56 TFEU and the principles of equal treatment and effectiveness must be interpreted as not precluding national legislation which provides for the organisation of a fresh call for tenders for the award of licences with a period of validity shorter than that of licences awarded previously because of the reorganisation of the system through an alignment of licence expiry dates. [11]

31. In reaching that conclusion, the Court pointed out that national authorities enjoyed a wide measure of discretion when determining what is required in order to ensure consumer protection and the preservation of order in society and — provided that the conditions laid down in the Court's case-law are in fact met — it was for each Member State to assess whether, in the context of the legitimate aims which it pursues, it was necessary to prohibit, wholly or in part, betting and gambling or only to restrict them and, to that end, to lay down more or less strict supervisory rules.

32. The Court also observed that, in that particular context, the reorganisation of the licensing system through an alignment of licence expiry dates could, by providing for a shorter period of validity for the new licences than that for the licences awarded previously, contribute to a coherent pursuit of the legitimate objectives of reducing gambling opportunities or combating criminality linked to betting and gambling and could also satisfy the proportionality requirements. [12]

10 — That clarification seems to me to be all the more important since, in a number of cases pending before the Court at the present moment, the questions raised by the referring court still concern the licensing system introduced by the Decree-Law of 2012 (see the references for a preliminary ruling from the Corte suprema di cassazione (Court of Cassation) in Cases *Tomassi* (C-210/14); *Di Adamo* (C-211/14); *De Ciantis* (C-212/14); *Biolzi* (C-213/14) and *Proia* (C-214/14)).

11 — See judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 55).

12 — See judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraphs 52 and 53).

33. That case thus confirms the case-law of the Court according to which a licensing system may, in certain circumstances, constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes. [13]

34. In the present case, before addressing the substance of the question raised, I should like to say a few words about the jurisdiction of the Court and the admissibility of the question referred.

A – *The jurisdiction of the Court and the admissibility of the question referred*

35. As regards first the jurisdiction of the Court to give a ruling, it would appear from an initial reading of the order for reference that all aspects of the criminal proceedings pending before the referring court are confined to Italy.

36. It should be borne in mind that national legislation such as that at issue in the main proceedings — which applies to Italian nationals and the nationals of other Member States alike — is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms established by the Treaty on the Functioning of the European Union only to the extent that it applies to situations connected with trade between the Member States. [14]

37. In that regard, the order for reference fails to state whether the operator (or betting organiser), with which the applicant in the main proceedings is apparently linked by a contractual relationship, is established in Italy or in another Member State.

38. Despite that failure, I take the view that the Court may, in the light inter alia of the reference to the background to the judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), declare that it has jurisdiction in the present case; as the presence of a cross-border element and hence a connection with EU law cannot be ruled out a priori. It seems that the referring court proceeded from the assumption that the applicant in the main proceedings is linked to an operator from another Member State which does not hold an authorisation as it was unlawfully excluded from the call for tenders launched in 2012.

39. Secondly, although none of the interveners has expressed any real reservations regarding the admissibility of the question referred, the information supplied by the referring court seems to me, in many respects, incomplete and it might, to some extent, be regarded as failing to meet the requirements consistently reiterated by the Court.

40. In particular, I am of the view that the order for reference does not set out, as required by the established case-law of the Court, the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling in connection with the obligation, imposed on new licensees in the measure at issue, to make a free-of-charge transfer. It is essential that the national court provide inter alia, at the very least, some explanation of the reasons for the choice of the provisions of EU law which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute. [15]

13 — See judgment in *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 57).

14 — See, for example, judgment in *Garkalns* (C-470/11, EU:C:2012:505, paragraph 21 and the case-law cited).

15 — See, inter alia, judgment in *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 34 and the case-law cited).

41. In the present case it is not easy to determine the reasons why the measure at issue, requiring the free-of-charge transfer of the rights to use assets which constitutes their network for the collection and management of bets on expiry of the licence agreement, is directly called in question in the main proceedings. The preventive seizure of items of equipment used by the applicant in the main proceedings to collect bets, which is specifically at issue in the criminal proceedings before the referring court, seems to me to have no connection with implementation of that measure.

42. More generally, there are serious grounds for questioning the value in the case in the main proceedings of calling into question the clause imposing, on expiry of the licence agreement, the free-of-charge transfer of the rights to use certain assets required for carrying on the activity of collecting bets.

43. As I shall examine later in this Opinion, unlike the situations at issue in the cases giving rise to the judgments in *Costa and Cifone*[16] and *Stanley International Betting and Stanleybet Malta*,[17] the reorganisation of the system through a fresh call for tenders — in the present case the one arranged following intervention by the legislature by means of the Decree-Law of 2012 — is by no means called in question in its entirety. In that context, it is for the referring court alone to determine whether, in the light of the relevant rules of national law, the measure at issue may indeed have a bearing on the position of Ms Laezza under criminal law.

44. Consequently, the question referred appears to be based on factual representations that are not directly supported by the documents in the main proceedings.

45. In those circumstances, the formal validity of the order for reference may seriously be in doubt and the question referred may, as a result, be regarded as inadmissible. Although it is for the referring court alone to assess, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court, and the stage in the proceedings at which those questions should be referred,[18] the Court must also have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[19]

46. However, the Court may consider, if the referring court were to be interpreted very broadly and on the basis of information contained in the judicial precedents to which that court has expressly made reference, that the question raised in the present case is whether a Member State which seeks to remedy earlier unlawful exclusions by launching a fresh call for tenders, is imposing in that context requirements which confer an additional advantage on existing operators or make it excessively difficult for operators who have been unlawfully excluded to exercise their rights. The referring court's questions are based therefore on the assumption that, for the purposes of imposing a criminal penalty, Ms Laezza cannot be faulted for not holding a licence — and hence a police authorisation — in the context of a call for tenders organised according to rules and conditions that are contrary to EU law.

B – *Substance*

47. It is clear from the observations submitted to the Court that, broadly speaking, there are two differing viewpoints.

16 — C-72/10 and C-77/10, EU:C:2012:80.

17 — C-463/13, EU:C:2015:25.

18 — See, to that effect, inter alia, judgments in *Enderby* (C-127/92, EU:C:1993:859, paragraph 10); *Schmelz* (C-97/09, EU:C:2010:632, paragraph 28) and *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 15).

19 — See, inter alia, judgment in *Les Vergers du Vieux Tauves* (C-48/07, EU:C:2008:758, paragraph 17).

48. According to the first of those viewpoints, held by Ms Laezza and, less strongly, by the Commission, the measure at issue is not compatible with Articles 49 TFEU and 56 TFEU since, inter alia, it contains restrictions which cannot be regarded as being justified by the aim pursued, namely of ensuring continuity of the service of collecting bets whilst channelling the activities of betting and gaming into systems that are controllable, with the objective of preventing their exploitation for criminal and fraudulent purposes. That measure is not, in any event, proportionate.

49. The other point of view, held by the Italian and Belgian Governments, is that that legislation is fully compatible with the provisions of the Treaty, read in the light of the principles of equal treatment and effectiveness. The intervening governments thus contend that the measure at issue, firstly, is not discriminatory (since, inter alia, it is applicable without distinction to all the undertakings which took part in the call for tenders launched in 2012), secondly, is justified by an overriding reason in the public interest and, thirdly, is proportionate to the aim pursued.

50. It is well established, since the judgment in *Schindler*,[20] that, in view of the considerable moral, religious and cultural differences existing between Member States, the area of betting and gaming has remained unharmonised at European level and Member States therefore enjoy broad discretion to choose the level of protection for gamblers and, hence, consumers, which they regard as most appropriate. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their justification on grounds of public interest and their proportionality.[21]

51. According to the analytical framework generally adopted in this connection, we should examine the issue before us in three stages.

52. First, we must determine whether the provision at issue constitutes a restriction on the freedoms enshrined in Articles 49 TFEU and 56 TFEU and, if appropriate, whether that restriction is discriminatory.

53. Secondly, we must try to assess whether the reasons given by the national authorities in order to justify that compulsory free-of-charge transfer are, generally, capable of justifying such a restriction.

54. Thirdly, we must determine whether a measure such as that at issue in the present case must be considered necessary and proportionate in relation to the aims pursued.

55. Although the first two stages in the analysis do not appear to me to raise any particular difficulties, the third does appear to me to be more problematic in view of the lack of information surrounding the circumstances and detailed arrangements concerning the measure at issue.

20 — C-275/92, EU:C:1994:119.

21 — See to that effect, inter alia, the judgment in *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07 EU:C:2009:519, paragraphs 57 to 59 and the case-law cited).

1. The existence of a potential restriction in respect of Articles 49 TFEU and 56 TFEU and of discrimination in that regard. [22]

a) Identification of a restriction

56. The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect *access to the market* for undertakings from other Member States and thereby hinder trade within the European Union. [23]

57. It appears that case-law adopts a very broad definition of what potentially constitutes a 'restriction'.

58. In the betting and gaming sector, measures adopted by Member States which have the effect of precluding or, at any event limiting to various degrees, the right to organise and offer betting and gaming in the territories of the Member States have thus been regarded as restrictions on freedom of establishment and the freedom to provide services. Particularly with regard to the Italian system of State monopolies and licensing in respect of the award of licences for carrying on activities in the betting and gaming sector, the Court has on a number of occasions ruled that it contained such restrictions. [24]

59. In my view, the same conclusion should be drawn in the case of measures that impose certain conditions on undertakings wishing to take part in the call for tenders organised in order to obtain a licence.

60. That seems to me to be the case of the measure at issue, namely the obligation to make the free-of-charge transfer, imposed by Article 25 of the draft agreement applicable to licences granted following the call for tenders launched in 2012.

61. Such a measure appears to place economic operators wishing to engage in the activity of collecting bets at a disadvantage.

62. It seems that the obligation to transfer free of charge the rights to use items of equipment used to collect bets in the event of the cessation of activity, including in the event of the mere expiry of the licence, may be such that it renders the exercise of that economic activity less attractive. The risk that an undertaking may have to transfer, without financial consideration, the rights to use the assets in its possession, thereby preventing it from obtaining a return on its investment, is such that it renders its participation in the 2012 call for tenders less attractive, or may indeed deter it from participating in that call for tenders for the award of a licence.

63. The obligation at issue to make a free-of-charge transfer appears all the more binding and dissuasive (restrictive), because, as is clear from the information contained in Article 25 of the draft agreement, it may be accompanied by additional obligations, such as the potential obligation to hand over the items of equipment referred to free from the rights and claims of third parties, the obligation to pay the costs of the physical transfer of the equipment and any costs incurred by the need to transfer the property in question 'under conditions ensuring continuity of the operation of the electronic communication network'. Similarly, the obligations 'to provide [the authority concerned] with all the data and information needed in order to facilitate transfer of the management', 'to

22 — The question will be examined in the present case with no distinction being drawn between freedom of establishment, on the one hand, and freedom to provide services, on the other hand.

23 — See, to that effect, judgments in *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827, paragraph 45 and the case-law cited) and *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 67).

24 — See, inter alia, judgments in *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 42 and the case-law cited); *Biasci and Others* (C-660/11 and C-8/12, EU:C:2013:550, paragraph 21) and *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80, paragraphs 69 and 70).

include, in agreements to be concluded with its suppliers, a clause providing for the benefit of [the CMA] the option of subrogation and/or renewal of agreements upon their expiry' (together with payment of any consideration needed in order to ensure acceptance of that clause) and, lastly, 'to terminate, at the request of [the CMA], any subordinate or collaborative relationship established in order to implement the licence' — obligations expressly laid down in Article 25(4) to (6) of the draft agreement — increase the particularly restrictive nature of the measure at issue.

64. In conclusion, the measure at issue, which imposes on bidders in the 2012 call for tenders a series of obligations that entail not insignificant economic consequences for them, is likely to influence their decision whether or not to take part in that call for tenders and, thus, potentially constitutes a restriction on freedom of establishment and freedom to provide services.

b) The existence of a restriction imposed in a discriminatory manner

65. Before addressing the matter of the justifications put forward in support of the provision at issue, it is necessary to determine briefly whether the restrictions at issue were imposed in a discriminatory manner. Only restrictions which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest. [25]

66. In the present case, it seems to me clear from the evidence submitted to the Court that the measure at issue is imposed on all operators who wished to take part in the call for tenders launched in 2012, irrespective of their place of establishment.

67. Even if it were necessary to consider, as Ms Laezza implies, with support on this point from the referring court, that the measure at issue is in reality only applicable to new applicants for licenses, which it is for the referring court to determine, that measure does not seem to me to contain also any discrimination in respect of operators not established in Italian territory. Even in that case, the measure at issue should, in my view, be regarded as being applicable without distinction to all the candidates in the call for tenders held in 2012.

2. Justification for the restriction at issue

68. It is settled case-law that restrictions on betting and gaming 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. [26] As regards the Italian legislation relating to betting and gaming, the Court has held previously that the objective of combating criminality linked to betting and gaming is capable of justifying restrictions on fundamental freedoms under those rules. [27]

69. In the present case, it should be noted that Article 25 of the draft agreement contains only a small amount of information concerning the objectives deemed to be pursued by the adoption of the measure at issue, and the latter merely mentions that 'the assets shall be transferred … under conditions ensuring continuity of the operation of the electronic communication network'.

70. Although the referring court expressed the idea that it was probable that that measure 'might impose a penalty', which was unprecedented, the Italian Government, for its part, stated that the measure at issue was, as is clear from various pieces of information contained in Article 25 of the draft agreement and in Article 1(77) of Law No 220, justified by the need to ensure continuity of the lawfully authorised service of collecting bets and thus to combat criminality and the unlawful

25 — See, to that effect, judgment in *Grupo Itevelesa and Others* (C-168/14, EU:C:2015:685, paragraph 72 and the case-law cited).

26 — Judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25, paragraph 48 and the case-law cited).

27 — See judgment in *Biasci and Others* (C-660/11 and C-8/12, EU:C:2013:550, paragraph 23).

collection of bets by preventing an operator who no longer has the necessary authorisation to continue to collect bets. It states in that context that, as the Court has held, betting and gaming involve a particularly high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers. [28]

71. In my view, the objective of continuity of service, with the ultimate aim of combating unlawful collection of bets and criminality, may, overall, represent an overriding reason in the public interest that justifies an obstacle to freedom of establishment and freedom to provide services. It is clear from the case-law of the Court that the objective of combating criminality by making the operators active in the sector subject to control and channelling the activities of betting and gaming into the systems thus controlled is recognised as serving to justify restrictions on fundamental freedoms. [29]

72. Also, as mentioned by the Italian Government, the introduction of a licencing system, the principle of which has been endorsed by the Court, involves the conclusion of licence agreements entailing mutually binding commitments between the licensing authority and the licensee.

73. In such a context, as provided for under various national arrangements, the free-of-charge transfer of certain specified items of property, on the expiry of the licence agreement, is conceivable in some circumstances.

74. That is so, for example, as regards 'returnable assets' ('biens de retour'), a concept under French administrative law, in the case of public service licences. It should be made clear, however, that such assets, which are regarded as being essential for carrying out a public service, are considered to be owned *ab initio* by the administration and are therefore to be returned to it free of charge even if they have been paid for and created by the delegatee. It should also be noted that it is possible for a 'returnable asset' not to exclude compensation in respect of that portion of the asset that has not been written off. [30]

75. It should also be pointed out that whilst that free-of-charge transfer is totally justified economically given the particularly costly, large-scale infrastructure involved that is non-fungible and non-transferable, it is less easy to take that view where the assets involved present no particular difficulties with regard to their acquisition or creation.

76. Supposing, however, that the referring court were to conclude that the true objective of the measure at issue is not continuity of service and combating criminality but simply the maximisation of State revenue; in that situation, as the Court has already held, the objective of maximising public revenue alone cannot permit such a restriction of the freedom to provide services. [31] It is for the national courts to determine whether the legislation of Member States actually serves the aims which might justify it and, where appropriate, whether the restrictions it imposes are disproportionate in the light of those aims. [32] In this connection, it is for the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality. [33]

28 — See judgment in *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80, paragraph 76 and the case-law cited).

29 — Judgment in *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraphs 48 and 49).

30 — For a recent illustration of the rules to which such assets are subject, see, inter alia, judgment of the French Conseil d'État (Assemblée) of 21 December 2012, Commune de Douai No 342788 (ECLI:FR:CEASS:2012:342788.20121221).

31 — See, inter alia, judgment in *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 55).

32 — See judgments in *Gambelli and Others* (C-243/01, EU:C:2003:597, paragraph 75) and *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 58).

33 — See judgment in *Dickinger and Ömer* (C-347/09, EU:C:2011:582, paragraph 54 and the case-law cited).

77. On the other hand, if the referring court were to endorse the legitimate interest grounds put forward by the Italian Government, that court would also have to verify that the obligation to make a free-of-charge transfer meets the requirements of necessity and proportionality stemming from the case-law of the Court.

3. The proportionality of the measure with regard to the alleged public interest objective

78. It should be noted that the order for reference provides little useful information on the conditions for implementing and enforcing the measure at issue. In particular, neither the conditions governing the free-of-charge transfer nor the (discretionary or non-discretionary) nature of the power to order such a measure are mentioned.

79. As I shall revert to later, such information, however, constitutes factors that are relevant and necessary for examining the proportionality of the measure at issue.

80. That requirement is of great importance when discussing questions of interpretation of EU law in relation to an area, such as betting and gaming, in respect of which it is established there is no harmonisation at European level and Member States continue to enjoy broad discretion. In such an area, the national authorities in general — and the national court in particular — are best placed to identify the legitimate objectives that are actually being pursued and the means of attaining them.

81. The little information supplied regarding the circumstances in which the measure at issue is, where appropriate, imposed on the licensee makes it impossible for the Court to provide an answer that is definitive, and therefore useful, to the question raised.

82. In the present case, the referring court has merely stated that, although the obligation laid down in Article 25 of the draft agreement to make a free-of-charge transfer of rights to use the assets does not seem unreasonable in situations in which a licence is revoked or terminated, that would not appear to be so in a situation where the obligation is merely triggered by the date on which the final term of the licence happens to expire, and not misconduct or a breach on the part of the licensee.

83. Furthermore, the order for reference does not contain any details concerning the nature and value of the items of property, the rights for the use of which must, under the measure at issue, be transferred free of charge.

84. Such details would seem to me, however, crucial in order to give an answer to the question raised. In the absence of adequate information concerning the national factual and legal situation, which it is for the national court to supply, the Court can only put forward some general considerations and is left to speculate, which is undesirable.

85. Notwithstanding the absence of such details and since in any event it is for the national court to give a final ruling on the need for the measure at issue and its proportionality, I consider it appropriate to provide the referring court, so far as I am able, with guidance on the factors which it should, where relevant, take into account in its examination.

86. I shall address, first, the matter of the *appropriateness* of the measure at issue, and then, secondly, the matter of its *proportionality*.

87. First, as regards whether the measure at issue is appropriate for achieving the objective or objectives relied on by the Member State (examination of appropriateness), there are grounds for some doubt.

88. In the first place, although it is conceivable that the free-of-charge transfer, to the CMA or to another licensee, of the rights to use tangible and intangible assets which constitute the network for the management and collection of bets, might, in those — probably rare — situations where the licence agreement ends suddenly through termination or revocation, be appropriate for ensuring continuity of service, such does not seem necessarily to be the case in a situation where the licence agreement reaches its set expiry date.

89. To return to the case in the main proceedings, it is clear from the Decree-Law of 2012 (see Article 10(9g)(b)) that the new licences will expire on 30 June 2016. In such circumstances, the requirement of continuity of the authorised activity of collecting bets, which appears to be the reason for the free-of-charge transfer measure at issue, is difficult to understand, since the expiry date for the licence is a fact of which the competent national authority is fully aware.

90. Furthermore, it is for the referring court to establish that the objective of continuity of the operation of authorised betting and gaming networks, with the ultimate aim of channelling demand for betting and gaming towards legitimate systems, assuming the pursuit of that objective is established, is pursued consistently and systematically.

91. Similarly, it is clear from the provision at issue that free-of-charge transfer of the rights to use assets which constitute the network for the management and collection of bets is not imposed systematically, but only '[a]t the express request of the CMA', which, where no clarification is provided in that regard, leaves doubts as to the exact circumstances in which it is imposed and, therefore, as to the appropriateness and transparency of the measure at issue.

92. In that regard, the Italian Government stated in its written observations that the measure at issue merely grants a contractual power to the CMA, which is by no means required to request free-of-charge transfer of the rights to use property to collect bets and manage betting and gaming and must not, in any event, exercise that power arbitrarily. Questioned in that regard at the hearing, the Italian Government stated that it could not provide any further clarification regarding the circumstances in which the CMA has recourse to the measure at issue, since that measure has never been activated.

93. Here again it is for the referring court to establish whether the measure at issue is intended, as the Italian Government maintains, to apply only in extreme, clearly defined, situations in order to ensure that the objectives cited by that Government are pursued. Similarly, it is for that court to establish whether that measure is imposed in specific cases in a non-discriminatory, objective and transparent manner.

94. Secondly, in the event that the national court finds that the obligation to make a free-of-charge transfer at issue contributes to achievement of the public interest objectives relied on by the Italian Government and that that obligation is imposed in a non-discriminatory, objective and transparent manner, the national court must also establish that the measure at issue does not go beyond what is necessary to achieve that objective.

95. First of all, it is for the national court to establish whether the alleged objective of continuity of the activity of collecting bets between the licences awarded in 2012, following the Decree-Law of 2012, and the licences which will be awarded in 2016, could not, in view inter alia of the latter's known expiry date, be achieved by other means such as the launch, in good time, of a fresh call for tenders — and, at the same time, the expeditious award of new licences — indeed, much more simply, by the renewal of licences already awarded, which seems a much more likely way. [34]

34 — In that regard, it should be noted that the licences awarded in 1999 (so-called 'CONI'), which expired on 30 June 2012, were in fact extended, in order to ensure continuity of activities, until July 2013.

96. Next, it will be for the referring court to endeavour, in each case, to take account of the value of the assets to which the obligation to make a free-of-charge transfer relates.

97. If it is found that that value, in particular the value of the computer equipment for managing and collecting bets, is negligible, particularly in view of the EUR 11 000 which tenderers must, in any event, pay as a basic contract value under Article 10(9g)(c) of the Decree-Law of 2012, it may therefore be concluded that the measure at issue is proportionate.

98. In the assessment of the value of those assets, the fact, relied on by the Italian Government, that those assets would be 'written off', in whole or in part, on expiry of the licence, omits, in my view, two fundamental factors. The first is that the measure at issue is designed to be triggered not only on the set expiry date of the licence, but also in the event of forced early termination of the licence. The second is that, even if it were considered that the assets being transferred free of charge had been written off, that would not mean that the licensee concerned would not suffer economic loss, since he would be deprived of the option of disposing of it for valuable consideration on the basis of the market value of those assets.

99. Therefore, it cannot be ruled out that a less restrictive measure, such as a forced transfer, but in return for consideration, might constitute a less restrictive measure which the Italian authorities would be in a position to impose in order to achieve the stated aim of ensuring continuity of the service of collecting bets.

100. It is after consideration of all of those factors that the referring court must rule on the need and proportionality of the measure at issue in the main proceedings. [35]

IV – **Conclusion**

101. In the light of all the above considerations, I suggest that the Court should answer the question raised by the referring court as follows:

Article 49 TFEU et seq. and 56 TFEU et seq. must be interpreted as meaning that they may preclude a clause, contained in a draft licence agreement under the applicable national law, which makes it compulsory for a licensee to transfer free of charge, at the time of the cessation of its business owing to the expiry of the final term of the licence or as a result of measures revoking or terminating that licence, the rights to use tangible and intangible assets which it owns and which constitute the network for the management and collection of bets.

In order to conclude that this is the case, it is incumbent on the referring court inter alia to establish whether that transfer obligation:

— is justified on grounds of legitimate interest, which entails a detailed examination of the grounds put forward in that regard by the licensing authority in support of that measure;

— is such that it contributes to the achievement of the legitimate interest objective pursued, which, where it is established that the licensing authority is pursuing an objective of continuing the operation of authorised betting and gaming networks, requires the court to establish whether that objective is being pursued in a consistent and non-discriminatory manner;

35 — Judgment in *Digibet and Albers* (C-156/13, EU:C:2014:1756, paragraph 40 and the case-law cited).

— is proportionate in respect of the public interest objective pursued, namely that it is not imposed in an arbitrary manner and does not go beyond what is necessary to achieve that objective. Examination of proportionality entails inter alia an examination of the market value of the equipment involved in that transfer.