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ECLI:EU:C:2016:60

JUDGMENT OF THE COURT (Third Chamber)

28 January 2016 (\*)

(Reference for a preliminary ruling — Articles 49 TFEU and 56 TFEU — Freedom of establishment — Freedom to provide services — Betting and gaming — Judgment of the Court of Justice which declared the national rules on licences for the collection of bets incompatible with EU law — Reorganisation of the system by way of a new call for tenders — Free-of-charge transfer of the rights to use tangible and intangible assets owned by licensees and which constitute their network for the management and collection of bets. — Restriction — Overriding reasons in the public interest — Proportionality)

In Case C-375/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Frosinone (District Court, Frosinone, Italy), made by decision of 9 July 2014, received at the Court on 6 August 2014, in criminal proceedings against

**Rosanna Laezza,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Second Chamber, acting as President of the Third Chamber, A. Arabadjiev, C. Toader (Rapporteur), E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2015,

after considering the observations submitted on behalf of:

- Ms R. Laezza, by D. Agnello, R. Jacchia, A. Terranova, F. Ferraro and M. Mura, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Marrone and S. Fiorentino, avvocati dello Stato,
- the Belgian Government, by J. Van Holm, L. Van den Broeck and M. Jacobs, acting as Agents, and P. Vlaemminck, B. Van Vooren and R. Verbeke, advocaten,
- the European Commission, by E. Montaguti and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2015,  
gives the following

### **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU and 56 TFEU.

2 The request has been made in criminal proceedings brought against Ms Laezza for failing to comply with the Italian legislation governing the collection of bets.

### **Legal context**

3 Article 10(9g) and (9h) of Decree-Law No 16 laying down urgent measures related to fiscal simplification, improving effectiveness and reinforcing monitoring procedures (decreto-legge — Disposizioni urgenti in materia di semplificazioni tributarie, di efficientamento e potenziamento delle procedure di accertamento) of 2 March 2012 (GURI No 52 of 2 March 2012) converted, after amendment, into statute by Law No 44 of 26 April 2012 (Ordinary Supplement to the GURI No 99 of 28 April 2012) (‘Decree-Law 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 bets on sporting events, including horse racing, and non-sporting events, are adjusted to the principles laid down by the judgment of 16 February 2012 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 [now the Customs and Monopolies Agency, Agenia delle dogane e dei Monopoli, ‘the CMA’] shall immediately, or in any event by 31 July 2012 at the latest,

launch 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 [CMA], account being taken of the provisions in this matter referred to in Law No 220 [laying down provisions for drawing up the annual and multiannual budget of the State (Stability Law 2011) (legge n. 220 — Disposizioni per la formazione del bilancio annual e pluriennale dello State [legge di stabilita' 2011) of 13 December 2010 (Ordinary Supplement to the GURI No 297 of 21 December 2010), as amended by Law No 111 of 15 July 2011 ('the Stability Law 2011')] and by 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 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 of the Court of Justice of the European Union of 16 February 2012 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.'

4 On the basis of the provisions of Decree-Law 2012 cited above, licences of 40 months were issued, whereas licenses issued previously had been for a period of between 9 and 12 years.

5 Under Article 1(77) of the Stability Law 2011:

‘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 CMA] 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.’

6 According to Article 1(78)(b)(26) of the Stability Law 2011, the licence agreement must contain a clause providing for ‘the transfer free of charge or the devolution of the infrastructure network for the management and collection of bets to the [CMA] 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.’

7 The draft licence agreement, annexed to the call for tenders organised in 2012 (‘the draft agreement’), sets out the grounds for revocation and termination of licences.

8 Thus, according to Article 23(2)(a), (e) and (k) of the draft agreement, licences may be revoked or terminated, inter alia, if there is a reference to a court for offences that the CMA regards as proving the lack of reliability, professionalism and moral quality required of licensees, in cases in which public bets are organised, operated and collected according to rules and techniques that differ from those laid down by the laws, regulations and agreements in force, or in the case of infringements established by the competent bodies which lay down the rules for the control of betting and gaming.

9 Article 25 of the draft agreement provides:

‘1. 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 chosen by that authority following a competitive tendering procedure) the rights to use the tangible and intangible assets 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.

...'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

10 Stanley International Betting Ltd, a company incorporated in the United Kingdom and its Maltese subsidiary Stanleybet Malta Ltd, are engaged in the collection of bets in Italy, through operators known as 'data transmission centres' ('DTCs'). For about 15 years, DTC owners have carried on their activities in Italy on the contractual basis of a mandate, without any licence or police authorisation.

11 A check carried out on 5 June 2014 by the Customs and Financial Police (Guardia di Finanza) in Frosinone (Italy) at the premises of a DTC managed by Ms Laezza and affiliated to Stanleybet Malta Ltd, which brought to light the unauthorised collection of bets at that centre, resulted in the seizure of certain computer equipment which had been used for receiving and transmitting those bets.

12 By decision of 10 June 2014, the judge responsible for preliminary investigations at the Tribunale di Cassino (District Court, Cassino) validated that seizure and issued a preventive attachment order with respect to that equipment.

13 Before the referring court, Ms Laezza lodged an application seeking to have that decision set aside. In that application, Ms Laezza also referred to the action brought by the companies of the Stanley Group, to which the DTC she manages is affiliated, against the call for tenders organised on the basis of Article 10(9g) and (9h) of Decree-Law 2012 for the award of gaming licences in Italy, on the ground that it is discriminatory.

14 The referring court observes that the Consiglio di Stato (Council of State) has already referred two questions to the Court of Justice for a preliminary ruling concerning, *inter alia*, the shorter period of validity of the new licences as compared with the old licences in the case which gave rise to the judgment in *Stanley International Betting and Stanleybet Malta* (C-463/13, EU:C:2015:25), but considers that EU law does not preclude the national provision which lays down that period of validity.

15 However, the referring court points out that Article 25 of the draft agreement imposes the obligation on licensees to transfer free of charge, at the time of the cessation of the business owing to the expiry of the licence or as a result of measures revoking or terminating that licence, the rights to use tangible and intangible assets which they own and which constitute their network for the management and collection of bets.

16 According to that court, although the existence of such a provision, which is without legislative precedent in Italy, may be justified in terms of imposing a penalty, where the cessation of business results from a decision revoking or terminating the licence, it appears especially disadvantageous where the cessation of business occurs solely as a result of the expiry of the licence period. In addition the licensee is obliged to bear all the costs of the free-of-charge transfer.

17 The referring court doubts that such a difference in treatment between old and new licensees can be justified by an overriding reason in the public interest.

18 In those circumstances, the Tribunale di Frosinone (District Court, Frosinone) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘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 law which makes it compulsory for licensees 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 assets which they own and which constitute their network for the management and collection of bets?’

### **The question referred for a preliminary ruling**

19 By its question, the referring court asks essentially whether Articles 49 TFEU and 56 TFEU must be interpreted as meaning that they preclude a national provision, such as that at issue in the main proceedings, which makes it compulsory for licensees to transfer free of charge, at the time of the cessation of business as a result of the expiry of the licence period or as a result of measures revoking or terminating that licence, the rights to use tangible and intangible assets which they own and which constitute their network for the management and collection of bets.

20 As a preliminary point, it should be made clear, as the Advocate General observed in points 27 and 28 of his Opinion, that the present case is concerned only with the compatibility with EU law of Article 25 of the draft agreement, and cannot be regarded as being intended to call into question, in its entirety, the new licensing system put in place in Italy in 2012 in the betting and gaming sector.

*The existence of a restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU*

21 In the first place, it must be recalled that all measures which prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 TFEU and 56 TFEU must be regarded as restrictions on the freedom of establishment and/or the freedom to provide services (judgment in *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 45 and the case-law cited).

22 The Court has already ruled that legislation of a Member State which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the licence is to be withdrawn, constitutes an obstacle to the freedoms thus guaranteed by Articles 49 TFEU and 56 TFEU (judgment in *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 46 and the case-law cited).

23 In the present case, as the Advocate General noted in points 62 and 63 of his Opinion, a national provision, such as that at issue in the main proceedings, which requires the licensee to transfer free of charge the rights to use equipment for the collection of bets at the time of the cessation of business, including the situation in which the cessation of business is due solely to the expiry of the final term of the licence, may render the exercise of that activity less attractive. The risk that an undertaking may have to transfer, without financial consideration, the rights to use the assets in its possession may prevent it from obtaining a return on its investment.

24 Therefore, it must be held that the national provision at issue in the main proceedings constitutes a restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU.

*The alleged discriminatory nature of the restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU*

25 In the second place, although the Court has already recognised a certain number of overriding reasons in the public interest which may justify a restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU, those objectives cannot be relied upon to justify discriminatory restrictions (see, to that effect, judgment in *Blanco and Fabretti*, C-344/13 and C-367/13, EU:C:2014:2311, paragraph 37).

26 If the restrictive provision at issue in the main proceedings is discriminatory, it may be justified only on the grounds of public interest, public safety or public health, laid down in Articles 51 TFEU and 52 TFEU, which do not include combatting criminality linked to betting and gaming or ensuring the continuity of the lawful activity of collecting bets relied on in the present case (see, by analogy, judgment in *Servizi Ausiliari Dottori Commercialisti*, C-451/03, EU:C:2006:208, paragraph 36 and the case-law cited).

27 In that connection, Ms Laezza submits that the provision at issue in the main proceedings is discriminatory as it establishes a difference in treatment between operators having obtained a licence at the time of the call for tenders organised on the basis of Article 10(9g) and (9h) of Decree-Law 2012, on one hand, and operators having obtained

a licence at the time of the previous calls for tender, on the other hand, since the latter were able to benefit, before possibly being required to transfer free of charge the rights to use equipment for collecting bets on the expiry of the licence, from a longer writing-off period in respect of that equipment.

28 However, as the Advocate General observes in essence in points 66 and 67 of his Opinion, it seems clear from the evidence submitted to the Court that the measure at issue in the main proceedings applies without distinction to all the operators who have taken part in the call for tenders launched in 2012 on the basis of Article 10(9g) and (9h) of Decree-Law 2012, irrespective of their place of establishment.

29 Thus, the fact that the Italian authorities decided, at a given moment, to change the conditions under which all authorised operators carry on their business of collecting bets in Italy does not appear relevant for the determination of whether the provision at issue in the main proceedings is discriminatory.

30 However, it is for the national court to determine, after an overall examination of all the circumstances surrounding the new tender procedure, whether that provision is discriminatory.

*The justification for the restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU*

31 Thirdly, it must be determined whether the restriction on the freedoms guaranteed by Articles 49 TFEU and 56 TFEU, constituted by the provision at issue in the main proceedings, may be allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for under Articles 51 TFEU and Article 52 TFEU, which are also applicable in the area of freedom to provide services by virtue of Article 62 TFEU or, if the referring court finds that that provision is applied in a non-discriminatory manner, whether it is justified by overriding reasons in the public interest (see, to that effect, judgment in *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 22 and the case-law cited), such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (judgment in *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 21 and the case-law cited).

32 In that connection, as regards the Italian legislation relating to betting and gambling, the Court has held previously that the objective of combating criminality linked to betting and gambling is capable of justifying restrictions on fundamental freedoms under those rules (see, to that effect, judgment in *Biasci and Others*, C-660/11 and C-8/12, EU:C:2013:550, paragraph 23).

33 In the present case, the Italian Government submits that the provision at issue in the main proceedings is justified, as part of the objective of combating criminality linked to betting and gambling, by the interest in ensuring the continuation of the lawful activity of collecting bets in order to curb the growth of parallel illegal activities.



34 Such an objective may be a reason of overriding public interest capable of justifying a restriction on fundamental freedoms, such as that at issue in the main proceedings.

35 In any event, the identification of the objectives in fact pursued by the national legislation is within the jurisdiction of the referring court (see, to that effect, judgment in *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 47).

*The proportionality of the restriction on freedoms guaranteed by Articles 49 TFEU and 56 TFEU*

36 Fourthly, it must be determined whether the restriction at issue in the main proceedings is suitable for ensuring the attainment of the objective pursued and does not go beyond what is necessary in order to achieve that objective, given that such restrictive national legislation fulfils that condition only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, to that effect, judgment in *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 22 and the case-law cited).

37 In that connection, it should be recalled that it is for the referring court, taking account of the indications given by the Court of Justice, to verify, in an overall assessment of the circumstances surrounding the grant of the new licences, whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law concerning their proportionality (see, to that effect, judgment in *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 40 and the case-law cited).

38 Regarding the question whether the restriction at issue in the main proceedings is suitable to ensure the attainment of the objective pursued, the referring court must examine, inter alia, as the Advocate General observed in points 91 to 93 of his Opinion, whether the fact that the transfer free of charge to the CMA or to another licensee of the rights to use tangible and intangible assets owned by the licensee and which constitute his network for the management and collection of bets is not imposed systematically, but only '[a]t the express request of the CMA', affects the ability of the provision at issue in the main proceedings to attain the objective pursued.

39 As far as concerns the question whether that provision goes further than is necessary in order to attain the objective pursued, it is conceivable that, in the case of expiry or revocation of the licence agreement concerned as a penalty, 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 is proportionate.

40 By contrast, that is not necessarily the case, as the Advocate General noted in point 88 of his Opinion, where the cessation of business occurs solely because the licence expires.

41 In the case where the licence agreement, which was concluded for a substantially shorter period than that of agreements concluded before the adoption of Decree-Law 2012 reaches its set expiry date, the fact that such a compulsory transfer is free of charge seems to be contrary to the requirement of proportionality, particularly where the objective of continuity of the authorised activity of the collection of bets could be attained by less restrictive measures, such as a compulsory transfer, but in return for payment of the market price of the assets concerned.

42 Thus, as the Advocate General observed, in points 96 and 97 of his Opinion, in the examination of the proportionality of the provision at issue in the main proceedings, the referring court must also take account of the market value of the assets which are the subject of the compulsory transfer.

43 Moreover, it must be underlined that the lack of transparency of the provision at issue in the main proceedings is likely to undermine the principle of legal certainty. That provision, which provides that the transfer free of charge 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', does not specify the conditions and detailed rules pursuant to which such an express request must be made. The conditions and detailed rules of a call for tenders, such as that at issue in the main proceedings, must be drawn up in a clear, precise and unequivocal manner (see, to that effect, judgment in *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 92 and the operative part).

44 Having regard to all of those considerations, the answer to the question referred is that Articles 49 TFEU and 56 TFEU must be interpreted as precluding a restrictive national provision, such as that at issue in the main proceedings, which requires a licensee to transfer, free of charge, on the cessation of business as a result of the expiry of the final term of the licence, the rights to use tangible and intangible assets which he owns and which constitute his network for the management and collection of bets, in so far as that restriction goes beyond what is necessary to attain the objective actually pursued by that provision, which is for the referring court to verify.

### **Costs**

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Third Chamber) hereby rules:

**Articles 49 TFEU and 56 TFEU must be interpreted as precluding a restrictive national provision, such as that at issue in the main proceedings, which requires a licensee to transfer, free of charge, on the cessation of business as a result of the expiry of the final term of the licence, the rights to use tangible and intangible assets**

**which he owns and which constitute his network for the management and collection of bets, in so far as that restriction goes beyond what is necessary to attain the objective actually pursued by that provision, which is for the referring court to verify.**

[Signatures]

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\* Language of the case: Italian.

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