ECLI:EU:C:2017:985

Provisional text

JUDGMENT OF THE COURT (First Chamber)

20 December 2017 (*)

(Reference for a preliminary ruling — Freedom to provide services, freedom of establishment, free movement of capital and freedom to conduct a business — Restrictions — Award of new licences for the online operation of gaming — Principles of legal certainty and protection of legitimate expectations — Judgment of the Constitutional Court — Whether or not the national court is obliged to refer a question to the Court of Justice for a preliminary ruling)

In Case C-322/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 4 February 2016, received at the Court on 7 June 2016, in the proceedings

Global Starnet Ltd

v

Ministero dell'Economia e delle Finanze,

Amministrazione Autonoma Monopoli di Stato,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev, S. Rodin (Rapporteur) and E. Regan, Judges,

Advocate General: N. Wahl,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2017,

after considering the observations submitted on behalf of:

– Global Starnet Ltd, by B. Carbone, C. Barreca, S. Vinti and A. Scuderi, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and P.G. Marrone, avvocati dello Stato,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by P. Vlaemminck and R. Verbeke, advocaten,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, A. Silva Coelho and P. de Sousa Inês, acting as Agents,

– the European Commission, by L. Malferrari and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 June 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 26, 49, 56, 63 and 267 TFEU, Article 16 of the Charter of Fundamental Rights of the European Union and the general principle of the protection of legitimate expectations.

2 The request has been made in proceedings between Global Starnet Ltd and the Ministero dell'Economia e delle Finanze (Ministry of the Economy and Finance, Italy) and the Amministrazione Autonoma Monopoli di Stato (Autonomous Administration of State Monopolies, Italy, 'AAMS') concerning the setting of the conditions applicable for the online operation of gaming using entertainment and recreation machines and the procurement notice concerning the award of the concession relating to the constitution and operation of the online management network for gaming using such machines.

Legal context

3 Article 1(78)(b) of legge n. 220, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2011) (Law No 220 laying down provisions for the establishment of the annual and long-term State budget (2011 Stability Law)) of 13 December 2010 (Ordinary Supplement to GURI No 297 of 21 December 2010, 'Law No 220/2010)) provides as follows:

' ...

(4) throughout the term of the concession, debt shall be maintained within the limits of a ratio ... which shall not exceed the value laid down by decree of the Ministry of Economy and Finance;

...

(8) operations which entail subjective modification of the concession holder shall be subject to prior authorisation by the AAMS, failing which the concession will be revoked; subjective modification of the concession holder means any operation carried out by the concession holder

involving a merger, division, transfer of an undertaking, change of company registered office or company object, or winding-up of the company, with the exception, however, of sales operations or placing of the concession holder's shares on a regulated market;

(9) operations which involve a transfer of shareholdings, including those conferring control, which are held by the concession holder and may lead, in the course of the exercise or operation performed, to a reduction in the capital adequacy ratio determined by decree of the Ministry of the Economy and Finance, shall be subject to prior authorisation by the AAMS, without prejudice to the licence holder's obligation, in such circumstances, failing which the concession will be revoked, to adjust the abovementioned ratio by means of a capital increase or other operations or instruments for the purpose of that adjustment within six months of the date on which the accounts were approved;

...

(17) extra profits from the activities referred to in subsection 6 may be used for purposes other than those of the investments linked to activities covered by concessions only with the prior authorisation of AAMS;

...

(23) sanctions in the form of penalties shall be provided for in the event of a breach, which is attributable to the concession holder, of the contractual clauses giving access to the concession, including an involuntary breach; the penalties shall be on a scale according to the severity of the breach, with due regard for the principles of proportionality and the effectiveness of penalties;

...

(25) a concession holder who ceases his activity, on expiry of the concession period, shall continue the ordinary administration in respect of the management and operation of the collection activities for [stakes relating to] the gaming covered by the concession, until that management and operation is transferred to the new concession holder;

...'

4 By virtue of Article 1(79) of that law, concession holders for the operation of public gaming not conducted online are required to sign an addendum to the concession agreement in order to make that agreement compatible with the provisions of the law referred to in the preceding paragraph.

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 The AAMS granted Global Starnet the concession to launch and operate the online management network for legal gaming using entertainment and recreation machines and activities relating thereto on the basis of a provision providing for the award of that type of concession to existing concession holders, such as Global Starnet, outside of the selection procedures provided for for other gaming operators.

6 By Law No 220/2010, the requirements to be met in order to obtain concessions for the organisation and management of public gaming were altered in such a way that those conditions became less favourable for Global Starnet. By virtue of that law, the AAMS adopted the decree

relating to the setting of the applicable conditions for the online management of gaming using entertainment and recreation machines and the procurement notice concerning the award of the concession relating to the constitution and operation of the online management network for gaming on such machines.

7 Global Starnet appealed against those two administrative acts before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy).

8 That court having rejected its action, Global Starnet brought an appeal before the Consiglio di Stato (Council of State, Italy) claiming, first, that the principle of protection of legitimate expectations had been infringed, given that Law No 220/2010 authorised the insertion of conditions for the exercise of a concession holder's activity for the organisation and management of public gaming which essentially amend the existing concession agreement. Next, it maintained that the principle of equal treatment had been infringed, in so far as it finds itself at a disadvantage compared with new competitors who have not incurred debt and that that law is incompatible with the principles of EU law which require the removal of any barrier to the development of the free movement of goods and the freedom to provide services. Finally, Global Starnet submitted that the contested provisions of Law No 220/2010 are unconstitutional in so far as they are contrary to the freedom to conduct a business and that the procurement notice concerning the award of the concession relating to the constitution and operation of the online management network for gaming using entertainment and recreation machines is unlawful because it could lead to the exclusion of Global Starnet from the contract award procedure.

9 On 2 September 2013, the Consiglio di Stato (Council of State) upheld Global Starnet's appeal in part in its interim ruling. It ruled, in particular, that that company had been forced to participate in the new selection procedure even though, by virtue of the legislation in force on the date of the concession agreement, of which it is a beneficiary, even though a selection procedure for existing concession holders was unnecessary and that a less favourable agreement was unlawfully imposed on that company after it had made an investment in reliance on the fact that the initial concession would continue seamlessly, an agreement which at the same time enabled access for new competitors.

10 On the initiative of the referring court which raised the question of the constitutionality of Article 1(79) of Law No 220/2010, the Corte costituzionale (Constitutional Court, Italy), by its judgment No 56/2015 of 31 March 2015 ruled that the principle of protection of legitimate expectations and legal certainty are values protected by the Italian constitution, but not in absolute terms from which there can be no derogation. As regards public-service concessions, that court held that the possibility of public intervention leading to alteration of the original requirements must be considered inherent in the contractual concession relationship from the start, which is all the more likely to be the case in a field as sensitive as that of public gaming, which calls for the specific, ongoing attention of the national legislature. Therefore, neither those values nor the freedom to conduct a business have been infringed. Furthermore, the constraints imposed by the provisions at issue, in the present case, constitute a minimum measure for restoration of the principle of equal treatment of operators, fully justified by the situation of the existing concession holder, who enjoys an advantage in so far as he has not had to take part in the new selection procedure. In addition, the provisions in question are thus neither manifestly inconsistent with the objectives laid down by the national legislature, nor disproportionate to the content and nature of the contractual concession relationship, nor do they entail unacceptable additional charges. Finally, the Corte costituzionale (Constitutional Court) held that the supposed loss of all or part of the capital invested is at worst merely an indirect consequence of the management constraints imposed by the contested provisions and lies, as such, outside the sphere of protection of the right to be compensated.

11 Following that judgment of the Corte costituzionale (Constitutional Court), which examined Article 1(79) of Law No 220/2010 in the light of the provisions of the Italian Constitution, the content of which is, according to the referring court, equivalent in essence to the corresponding provisions of the treaty, the referring court found it necessary to submit a request for a preliminary ruling to the Court of Justice.

12 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. May Article 267(3) TFEU be interpreted as meaning that the court of final instance is not unconditionally obliged to refer a question on the interpretation of EU law for a preliminary ruling if, in the course of the proceedings in question, the Corte costituzionale (Constitutional Court) assessed the [constitutionality] of the national rules, in essence on the basis of the regulatory parameters which the Court is being asked to interpret, even though they are formally different in that they derive from provisions of the Constitution rather than from provisions of the Treaties?

2. In the alternative, if the Court should answer the question on the interpretation of Article 267(3) TFEU to the effect that reference for a preliminary ruling is mandatory: do the provisions and principles set out in Articles [26, 49, 56 and 63 TFEU] and Article 16 ... of the Charter of Fundamental Rights, and the general principle of the protection of legitimate expectations [which is among the fundamental principles of the European Union, as stated by the Court in the judgment of 14 March 2013 in *Agrargenossenschaft Neuzelle* (C-545/11, EU:C:2013:169)] preclude the adoption and application of national regulations [Article 1(78)(b) subsections 4, 8, 9, 17, 23 and 25, of Law No 220/2010] which lay down new requirements and obligations for concession holders in the sector of the online operation of legal gaming, including existing concession holders, by means of an addendum to the existing agreement (and without any period for gradual compliance?'

Consideration of the questions referred

The first question

13 By its first question, the referring court asks, in essence, whether Article 267(3) TFEU must be interpreted as meaning that a national court against whose decisions there is no judicial remedy is not required to refer a question for a preliminary ruling concerning the interpretation of EU law if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law.

14 At the outset, it should be noted that the national court, before referring a question to the Court for a preliminary ruling, raised, before the Corte costituzionale (Constitutional Court), the question whether the provisions of national law which are also the subject of the second question referred are constitutional. The Corte costituzionale (Constitutional Court) ruled, in reply to that question, on the compatibility of those provisions, not with EU law but with the provisions of the Italian Constitution, that the referring court regarded as constituting, in essence, the same regulatory parameters as Articles 26, 49, 56 and 63 TFEU and Article 16 of the Charter of Fundamental Rights as well as the principles of legal certainty and protection of legitimate expectations.

Admissibility

15 The Italian Government maintains that the first question is inadmissible in reliance on the following arguments.

16 In the first place, a national court giving a final ruling has a duty first to assess the question in order to ensure that the parties do not abuse the procedure. In the second place, it has no reason to consider whether it must comply with the interpretation of the Corte costituzionale (Constitutional Court) since judgments of that Court rejecting questions of constitutionality do not bind national courts. In the third place, the referring court, for it considered that the question of the constitutionality of national law was relevant for the purposes of settling the dispute and, therefore, referred questions to the Corte costituzionale (Constitutional Court), held that the national rules at issue were compatible with EU law. In the fourth place, the first question is purely hypothetical and therefore inadmissible, for the referring court was required to refer a question on the possible conflict of the rules at issue in the main proceedings with EU law to the Corte costituzionale (Constitutional Court) before referring that question to the Court of Justice for a preliminary ruling.

17 In that regard, it must be borne in mind that, in the context of the cooperation between the Court and the national courts established in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need of a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, when the question put by the national court concerns the interpretation of EU law, the Court is, in principle, bound to give a ruling. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 July 2016, *Muladi*, C-447/15, EU:C:2016:533, paragraph 33).

18 In the present case, it is not obvious that the interpretation of EU law sought is unrelated to the actual facts of the main action or its purpose, or that the problem is, by its nature, hypothetical.

19 Furthermore, in the light of the abovementioned case-law, whether or not the referring court is bound by the interpretation of the Corte costituzionale (Constitutional Court) of the national legislation at issue or whether it was required to refer a question to that court concerning the interpretation of EU law is irrelevant for the purposes of assessing the admissibility of the first question.

20 It follows that the first question is admissible.

Substance

21 It should be noted that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right, or escape the obligation under Article 267 TFEU, to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law exercising the right conferred on it by Article 267 TFEU to refer to the Court questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of

national law was compatible with that EU law (judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 34 and the case-law cited).

22 The Court has concluded from all the above considerations that the functioning of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU requires, as does the principle of primacy of EU law, the national court to be free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality (judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 35 and the case-law cited).

23 It follows from the foregoing considerations that the effectiveness of EU law would be impaired and the effectiveness of Article 267 TFEU diminished if, as a result of there existing a procedure for review of constitutionality, the national court were precluded from referring questions to the Court for a preliminary ruling and immediately applying EU law in a manner consistent with the Court's decision or case-law (judgment of 4 June 2015, *Kernkraftwerke Lippe-Ems*, C-5/14, EU:C:2015:354, paragraph 36 and the case-law cited).

24 Furthermore, although it is true that the procedure laid down in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the former provides the latter with the points of interpretation of EU law necessary in order for them to decide the disputes before them, the fact remains that when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of EU law is raised before it (see judgment of 9 September 2015, *Ferreira da Silva e Brito and Others,* C-160/14, EU:C:2015:565, paragraph 37 and the case-law cited).

25 The fact that the Corte costituzionale (Constitutional Court) gave a ruling on the compatibility of the provisions of national law, which are also the subject of the second question referred for a preliminary ruling, with the provisions of the Italian Constitution which the referring court regarded as constituting, in essence, the same regulatory parameters as Articles 26, 49, 56 and 63 TFEU and Article 16 of the Charter of Fundamental Rights has no bearing on the obligation, laid down in Article 267 TFEU, to refer questions concerning the interpretation of EU law to the Court of Justice.

26 In the light of all the foregoing, the answer to the first question is that Article 267(3) TFEU must be interpreted as meaning that a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law.

The second question

27 By its second question, the referring court asks, in essence, whether Articles 26, 49, 56 and 63 TFEU, Article 16 of the Charter of Fundamental Rights, and the principle of protection of legitimate expectations must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes on persons who are already concession holders in the sector of the online operation of legal gaming, new conditions for the exercise of their activity by means of an addendum to the existing agreement.

28 In the present case, Article 1(78)(b), subsections 4, 8, 9, 17, 23 and 25, of Law No 220/2010, imposed on existing concession holders six new conditions for carrying out their activity. They entail, respectively, the obligation to keep debt within the limits of a ratio not exceeding a value determined by decree; a requirement for prior authorisation by the AAMS for operations liable to entail modifications concerning the concession holder, failing which the concession will be revoked; a requirement for prior authorisation by the AAMS for the transfer of shareholdings held by the concession holder that may lead to a reduction in the financial adequacy ratio determined by decree, without prejudice to the concession holder's obligation, in such circumstances, failing which the concession will be revoked, to adjust that ratio by means of a capital increase or other operations or instruments for the purpose of making that adjustment; a requirement for prior authorisation by the AAMS for the use of extra profits from certain activities for purposes other than those covered by the concession; the imposition of sanctions, in the form of penalties on a scale according to the severity of the breach, with due regard for the principles of proportionality and the effectiveness of penalties in the case of breach of contractual clauses which may be attributed to the concession holder, including in the event of an involuntary breach, and the obligation on the part of the concession holder to continue the ordinary administration of the activities covered by the concession until the transfer of its management and operation to a new concession holder.

Preliminary observations

29 It should be noted that, when a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it (see order of 28 September 2016, *Durante*, C-438/15, not published, EU:C:2016:728, paragraph 14 and the case-law cited).

30 That being said, the Court has ruled that legislation of a Member State which makes the exercise of an economic activity subject to a licensing requirement and specifies situations in which the licence is to be withdrawn, constitutes an obstacle to the freedoms guaranteed by Articles 49 and 56 TFEU (judgment of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraph 22 and the case-law cited).

31 Furthermore, as regards the applicability of Articles 34 and 35 TFEU, it should be noted that the business of operating gaming machines, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, cannot come within the scope of those articles relating to the free movement of goods (judgment of 11 September 2003, *Anomar and Others*, C-6/01, EU:C:2003:446, paragraph 56).

32 Moreover, as regards the applicability of Article 63 TFEU, failing any evidence to the contrary submitted by the referring court, any restrictive effects of the national legislation at issue in the main proceedings on the free movement of capital and payments are merely the inevitable consequences of any restrictions imposed on the freedoms guaranteed under Articles 49 and 56 TFEU.

33 Finally, as regards Article 26 TFEU, it must be observed that it follows from the case-file before the Court that the case in the main proceedings does not concern the competence of the European Union or of its institutions to adopt the measures laid down in that Article.

34 It follows that the second question must be answered only in so far as concerns Articles 49 and 56 TFEU, Article 16 of the Charter of Fundamental Rights and the principle of protection of legitimate expectations.

The restrictions of freedoms guaranteed by Articles 49 and 56 TFEU

35 It must be borne in mind that all measures that prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 and 56 TFEU must be regarded as restrictions of the freedom of establishment and/or the freedom to provide services (see judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 45 and the case-law cited).

36 In the present case, the new conditions for the exercise of their activity imposed on existing concession holders by Article 1(78)(b), subsections 4, 8, 9, 17, 23 and 25, of Law No 220/2010, as set out in paragraph 28 of the present judgment, may render the exercise of the freedoms guaranteed by Articles 49 and 56 TFEU less attractive or even impossible, in so far as those conditions may prevent them obtaining a return on their investment.

37 Consequently, those measures constitute restrictions of the freedoms guaranteed by Articles 49 and 56 TFEU.

38 It must be examined whether those restrictions may nevertheless be justified.

The justification for the restrictions of the freedoms guaranteed by Articles 49 and 56 TFEU

– *The existence of overriding reasons in the public interest*

39 It must be borne in mind that legislation on betting and gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. Failing any harmonisation on the issue at EU level, the Member States enjoy a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate (see, to that effect, judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 39 and the case-law cited).

40 The Member States are, therefore, free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that the Member States impose must satisfy the conditions laid down in the case-law of the Court as regards, inter alia, their justification by overriding reasons in the general interest and their proportionality (judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 40 and the case-law cited).

41 In the present case, as is apparent from the text of the national provisions at issue, as the Advocate General points out in point 43 of his Opinion, the aim of those provisions is to improve the profitability and financial soundness of the concession holders and enhance their respectability and reliability, and to combat criminality.

42 Given the particular nature of the situation linked to betting and gambling, such objectives may be reasons of overriding public interest capable of justifying restrictions of fundamental freedoms, such as those at issue in the main proceedings (see, to that effect, judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraphs 42 and 43).

43 In any event, identification of the objectives in fact pursued by the national legislation falls within the jurisdiction of the referring court (see, to that effect, judgment of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraph 35).

44 Moreover, it should be noted that, when a Member State relies on overriding requirements in the public interest in order to justify rules liable to obstruct the exercise of the freedom of establishment and the freedom to provide services, such justification must also be interpreted in the light of the general principles of EU law, in particular the fundamental rights now guaranteed by the Charter of Fundamental Rights. Thus, the national legislation in question can fall under one of the justifications provided for only if it is compatible with those principles and those rights (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 74 and the case-law cited).

45 In the present case, the referring court asks whether the principles of legal certainty and the protection of legitimate expectations, and the freedom to conduct a business laid down in Article 16 of the Charter of Fundamental Rights, preclude national legislation, such as that at issue in the main proceedings referred to in paragraph 28 of the present judgment, which imposes on persons who are already concession holders in the sector of the online operation of legal gaming, new conditions for the exercise of their activity by means of an addendum to the existing agreement.

– *The principle of the protection of legitimate expectations*

46 It must be pointed out that the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, inter alia, that rules of law be clear, precise and predictable in their effect, especially when they may have adverse consequences on individuals and undertakings (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited).

47 However, a trader may not place reliance on there being no legislative amendment whatever, but can call into question only the arrangements for the implementation of such an amendment (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 78 and the case-law cited).

48 In that regard, it should be noted that the national legislature must provide a transitional period of sufficient length to enable traders to adapt or a reasonable compensation system (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 85 and the case-law cited).

49 While it is indeed for the referring court to assess, in the light of the case-law referred to in the preceding paragraphs, by making an overall assessment of all the relevant circumstances, whether the national legislation at issue in the main proceedings is consistent with the principle of the protection of legitimate expectations, it must be noted that it is apparent from the order for reference that Law No 220/2010 laid down a period of 180 days from its entry into force for the introduction of the new conditions established by that law subject to the signature of an addendum to the agreement; that period appears, in principle, to be sufficient in order to enable concession holders to adapt to those conditions.

– *The freedom to conduct a business*

50 As the Court has previously held, examination of the restriction represented by national legislation from the point of view of Articles 49 and 56 TFEU also covers possible limitations of the

exercise of the rights and freedoms laid down in Articles 15 to 17 of the Charter of Fundamental Rights, so that a separate examination of the freedom to conduct a business is not necessary (see, to that effect, judgments of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 60, and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 91).

The proportionality of the restriction of the freedoms guaranteed by Articles 49 and 56 TFEU and on the freedom to conduct a business

51 As regards the proportionality of the measures laid down in Article 1(78)(b), subsections 4, 8, 9, 17, 23 and 25, of Law No 220/2010, it is to be determined whether those measures are suitable for ensuring the attainment of the objectives pursued and do not go beyond what is necessary in order to achieve them, in particular ensuring that the national legislation at issue in the main proceedings genuinely reflects a concern to attain those objectives consistently and systematically (judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 44).

52 In that connection, it should be recalled that it is for the referring court, taking account of the indications given by the Court, to verify, in an overall assessment of all the circumstances, whether the restrictions at issue in the main proceedings satisfy the conditions set out in the Court's case-law concerning their proportionality (judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 49 and the case-law cited).

53 It should be noted that the measures laid down in Article 1(78)(b), subsections 8, 9 and 17, of Law No 220/2010 require prior authorisation by the AAMS for operations capable of entailing alterations concerning the concession holder, the transfer of shareholdings held by the concession holder that may lead to a reduction in the financial adequacy ratio determined by decree, and the use of extra profits from certain activities for purposes other than those covered by the concession, respectively.

54 It is for the national court to ascertain whether the criteria circumscribing the discretion of the AAMS to give prior authorisation are apt for ensuring the attainment of the objectives pursued and do not go beyond what is necessary in order to achieve those objectives.

55 Furthermore, the measures laid down in Article 1(78)(b), subsections 4 and 9, of Law No 220/2010, namely, respectively, the obligation to keep debt within the limits of a ratio not exceeding a value determined by decree and a requirement for prior authorisation by the AAMS for the transfer of shareholdings held by the concession holder that may lead to a reduction in the financial adequacy ratio determined by decree would appear to be useful for the purposes of ensuring a certain financial capacity on the part of the operator and guaranteeing that that operator is capable of meeting the obligations arising from the launch and operational use of the online management network for gaming.

56 The referring court has to be sure that the debt ratio, as regards the first of those measures, and the financial adequacy ratio, as regards the second, do not go beyond what is necessary in order to achieve that objective.

57 Furthermore, it must be observed that the measures laid down in Article 1(78)(b), subsections 8 and 17, of Law No 220/2010, that is to say, respectively, the requirement for prior authorisation by the AAMS for operations capable of entailing alterations concerning the concession holder, failing which the concession will be revoked, and the requirement for prior authorisation by the AAMS for the use of extra profits from certain activities for purposes other than those covered by

the concession, can, since they are capable of preventing criminal organisations influencing the activities at issue in the main proceedings and money laundering, be useful in combating criminality and do not go beyond what is necessary in order to achieve that objective.

58 The measure laid down in subsection 25 of Article 1(78)(b) of Law No 220/2010, namely, the obligation for the concession holder, when he ceases his activity, to continue the ordinary management of the activities covered by the concession until the transfer of its management and operation to the new concession holder, is capable of ensuring the continuation of the lawful activity of collecting bets in order to curb the growth of parallel illegal activities and, therefore, may well contribute to combating crime (see, to that effect, judgment of 28 January 2016, *Laezza*, C-375/14, EU:C:2016:60, paragraphs 33 and 34).

59 However, it is for the referring court to ascertain whether a measure less onerous for the concession holder would have allowed the same objective to be achieved, allowing for the concession holder being obliged to provide the services covered by the concession for a potentially indefinite period at a loss in order to contribute to the general interest.

60 As regards the measure laid down in Article 1(78)(b), subsection 23, of Law No 220/2010, namely, the imposing of sanctions in the form of penalties, in the case of breach of contractual clauses which may be attributed to the concession holder, including in the event of an involuntary breach, it should be noted that penalties are not compatible with EU law if the conditions determining their application are themselves contrary to EU law (see, to that effect, judgment of 6 March 2007, *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 69). The penalties must not go beyond what is strictly necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (see, to that effect, judgment of 5 July 2007, *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410 paragraph 54).

61 In order to assess whether a penalty is consistent with the principle of proportionality, account must be taken, inter alia, of the nature and the degree of seriousness of the infringement which the penalty is intended to sanction and of the means of establishing the amount of the penalty (see, to that effect, judgments of 8 May 2008, *Ecotrade*, C-95/07 and C-96/07, EU:C:2008:267, paragraphs 65 to 67; and of 20 June 2013, *Rodopi-M 91*, C-259/12, EU:C:2013:414, paragraph 38).

62 In the present case, under Article 1(78)(b), subsection 23, of Law No 220/2010, the penalties must be ‘on a scale according to the severity of the breach, with due regard for the principles of proportionality and the effectiveness of penalties’. It does not therefore follow, either from that wording or from the case-file before the Court, that the penalties provided for in that provision are contrary to EU law.

63 Furthermore, it should be noted that the Court has previously held that the imposition of a system of strict liability is not disproportionate in relation to the objectives pursued if that system is such as to encourage the persons concerned to comply with the provisions of a regulation and where the objective pursued is a matter of public interest that may justify the introduction of such a system (judgment of 9 February 2012, *Urbán*, C-210/10, EU:C:2012:64, paragraph 48).

64 Likewise, a system, such as that at issue in the main proceedings, in which a penalty may be imposed, even in the event of an involuntary breach, in the case of breach of contractual clauses that may be attributed to the concession holder, is not contrary to EU law.

65 It follows from all the foregoing, that the answer to the second question is that Articles 49 and 56 TFEU and the principle of protection of legitimate expectations must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which imposes on persons who are already concession holders in the sector of the online operation of legal gaming, new conditions for the exercise of their activity by means of an addendum to the existing agreement, inasmuch as the referring court considers that that legislation may be justified by overriding reasons relating to the general interest, is suitable for ensuring the attainment of the objectives pursued, and does not go beyond what is necessary in order to achieve those objectives.

Costs

66 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 (First Chamber) hereby rules:

1. **Article 267(3) TFEU must be interpreted as meaning that a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law.**

2. **Articles 49 and 56 TFEU and the principle of protection of legitimate expectations must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which imposes on persons who are already concession holders in the sector of the online operation of legal gaming, new conditions for the exercise of their activity by means of an addendum to the existing agreement, inasmuch as the referring court considers that that legislation may be justified by overriding reasons relating to the general interest, is suitable for ensuring the attainment of the objectives pursued, and does not go beyond what is necessary in order to achieve those objectives.**

[Signatures]

* Language of the case: Italian.