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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

2 March 2023 (\*)

(Reference for a preliminary ruling – Freedom to provide services – Article 56 TFEU – Restrictions on the freedom to provide services – Games of chance – Legislation of a Member State laying down a general ban on advertising by gaming establishments – Automatic derogation from that ban for establishments holding an operating licence issued by the authorities of that Member State – No possibility of derogation for establishments located in another Member State)

In Case C-695/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Brussels Court of First Instance (Dutch-speaking), Belgium), made by decision of 8 November 2021, received at the Court on 19 November 2021, in the proceedings

**Recreatieprojecten Zeeland BV,**

**Casino Admiral Zeeland BV,**

**Supergame BV**

v

**Belgische Staat,**

THE COURT (Seventh Chamber),

composed of F. Biltgen (Rapporteur), acting as President of the Chamber, N. Wahl and J. Passer, Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 16 November 2022,

after considering the observations submitted on behalf of:

- Recreatieprojecten Zeeland BV, Casino Admiral Zeeland BV and Supergame BV, by T. Bauwens and J. Bocken, advocaten,
- the Belgian Government, by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents, and by J. De fauw, G. Ryelandt, M. Ryś, R. Verbeke and P. Vlaemminck, advocaten,
- the Czech Government, by O. Serdula, M. Smolek and J. Vlácil, acting as Agents,
- the Portuguese Government, by P. Barros da Costa, C. Chambel Alves, P. de Sousa Inês and S. Veiga, acting as Agents,
- the Finnish Government, by H. Leppo, acting as Agent,
- the Norwegian Government, by K. Hallsjø Aarvik, F. Bergsjø, S. Hammersvik and K. Moe Winther, acting as Agents,
- the European Commission, by L. Armati, P.-J. Loewenthal and M. Mataija, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 The request has been made in proceedings brought by Recreatieprojecten Zeeland BV, Casino Admiral Zeeland BV and Supergame BV, which are three operators of gaming establishments in the Netherlands, against the Belgische Staat (Belgian State) concerning fines which were imposed on them by the Kansspelcommissie (Gaming Commission, Belgium) for the advertising in Belgian territory of their establishments.

## **Belgian legal context**

3 Article 4(1) and (2) of the Wet op de kansspelen, de weddenschappen, de kansspelinstellingen en de bescherming van de spelers (Law on games of chance, betting, gaming establishments and the protection of players) of 7 May 1999 (*Belgisch Staatsblad*, 30 December 1999, p. 50040; ‘the Law on games of chance’), as amended by the Wet tot wijziging van de wetgeving inzake kansspelen (Law amending the legislation relating to games of chance) of 10 January 2010 (*Belgisch Staatsblad*, 1 February 2010, p. 4309), provides:

‘Paragraph 1. It is prohibited for any person to operate ... a gaming establishment in any form, in any place and in any direct or indirect manner whatsoever, without a licence granted in advance by the Gaming Commission in accordance with the present Law and subject to the exceptions laid down by law.

Paragraph 2. It is prohibited for any person ... to advertise ... a gaming establishment ... when the person concerned is aware that the operation of ... a gaming establishment which is not licensed under this Law is involved.’

4 The explanatory memorandum to the draft law which led to the Law amending the legislation relating to games of chance of 10 January 2010 contained the following passage:

‘The objectives of Belgian policy on games of chance are centred around player protection, financial transparency and control of flows of money, the monitoring of gaming and the identification and monitoring of organisers.

The regulation of games of chance is based on the “notion of channelling”. In order to meet the clear gaming needs of people, illegal supply is combated by the licensing of a “limited” legal supply of gaming.

... By limiting the legal supply, one of the pillars of that policy is addressed, namely protecting players from gambling addiction.’

5 Article 15/3(1) of the Law on games of chance, as amended by the Wet tot wijziging van de wet van 7 mei 1999 op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de spelers, en tot invoeging van artikel 37/1 in de wet van 19 april 2002 tot rationalisering van de werking en het beheer van de Nationale Loterij (Law amending the Law of 7 May 1999 on games of chance, betting, gaming establishments and the protection of players and inserting Article 37/1 in the Law of 19 April 2002 relating to rationalisation of the operation and management of the National Lottery) of 7 May 2019 (Belgisch Staatsblad, 15 May 2019, p. 46589), provides:

‘Without prejudice to the measures provided for in Article 15/2, the [Gaming] Commission shall, in the event of infringement of [Article] 4 ..., impose an administrative fine on the perpetrators.’

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

6 Recreatieprojecten Zeeland (between 3 December 2018 and 25 June 2019) and Casino Admiral Zeeland and Supergame (between 20 March and 2 April 2019) advertised in Belgium their respective establishments located in the Netherlands, near the Belgian border, by means of communication on physical media.

7 On 11 December 2020, the Gaming Commission, in accordance with Article 15/3 of the Law on games of chance, as amended by the Law of 7 May 2019, imposed an administrative fine on each of the applicants in the main proceedings for infringement of Article 4(2) of that law, which prohibits advertising for gaming establishments that do not hold a licence granted by the Gaming Commission.

8 The applicants in the main proceedings brought an action challenging those fines before the referring court, submitting that that advertising ban is contrary to the freedom to provide services, as guaranteed in Article 56 TFEU.

9 The referring court observes, first, that the Gaming Commission cannot grant an operating licence to establishments located outside Belgian territory. Second, Belgian law does not provide for the possibility for operators of establishments such as the applicants in the main proceedings to be authorised to advertise in Belgium their gaming establishments located in another Member State. In addition, there is, in Belgium, a general ban on advertising gaming establishments. However, gaming establishments that are established in Belgium and hold an operating licence there benefit automatically from an exception to that ban. Thus, such establishments may in fact be advertised in

Belgium. By contrast, gaming establishments established in another Member State are and remain in any event subject to the ban on advertising in Belgium.

10 The referring court is uncertain whether national legislation such as that at issue in the main proceedings is discriminatory since, even though that legislation pursues a legitimate objective such as the prevention of excessive gambling and gambling addiction, a derogation from the general advertising ban in Belgium is granted to a limited and controlled number of – exclusively domestic – gaming establishments in relation to their activities, whereas all similar establishments established in another Member State are, without distinction, unable to obtain such a derogation.

11 In those circumstances, the *Nederlandstalige rechtbank van eerste aanleg Brussel* (Brussels Court of First Instance (Dutch-speaking), Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the first paragraph of Article 56 TFEU be interpreted as precluding the national legislation of a Member State from allowing the operators of a limited and controlled number of licensed gaming establishments in its territory to benefit from an exception to a generally applicable advertising ban in respect of such establishments, unless it also provides for the possibility of the operators of gaming establishments located in other Member States also being allowed to benefit from the same exception to the advertising ban in its territory in respect of their establishments?’

### **Consideration of the question referred**

12 By its question the referring court asks, in essence, whether the first paragraph of Article 56 TFEU must be interpreted as precluding legislation of a Member State which grants the operators of a limited and controlled number of gaming establishments located on the territory of that Member State an automatic derogation from the advertising ban generally applicable to such establishments, without providing for the possibility for operators of gaming establishments located in another Member State to obtain a derogation for the same purposes.

13 In order to answer that question, it should be pointed out, first of all, that Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (judgments of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 51, and of 3 December 2020, *BONVER WIN*, C-311/19, EU:C:2020:981, paragraph 18).

14 Next, legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of EU harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 57 and the case-law cited).

15 It is, moreover, undisputed that, in the context of legislation which is compatible with the FEU Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling falls within the margin of discretion which the national authorities

enjoy (judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 21 and the case-law cited).

16 Finally, the Court has stated that, in the matter of games of chance, it is in principle necessary to examine separately for each of the restrictions imposed by the national legislation whether, in particular, it is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 22 and the case-law cited).

17 In the present instance, it is not disputed that the national legislation at issue in the main proceedings lays down a ban, without any possibility of a derogation, prohibiting gaming establishments that do not hold an operating licence issued by the Gaming Commission from advertising in Belgium. Since the Gaming Commission can issue such a licence only to gaming establishments located in Belgium, that national legislation has the effect of prohibiting the advertising in that Member State of all gaming establishments located in the other Member States.

18 In the area of advertising for games of chance, the Court has already held that national legislation whose effect is to prohibit the promotion in a Member State of gambling organised legally in other Member States constitutes a restriction on the freedom to provide services (judgment of 12 July 2012, *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 17 and the case-law cited).

19 Thus, in the present instance, the national legislation at issue in the main proceedings constitutes such a restriction.

20 It is clear from the Court's case-law that the freedom to provide services entails the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is to be provided (judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 35).

21 In the present instance, the national legislation at issue in the main proceedings allows a gaming establishment to advertise in Belgium only if it is located on Belgian territory and accordingly holds an operating licence resulting in automatic authorisation to advertise.

22 In that regard, it is clear from settled case-law that a system of concessions and licences for the organisation of games of chance must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily (judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 38 and the case-law cited).

23 Whilst it is not disputed in the present instance that a licence to operate a gaming establishment on Belgian territory is issued on the basis of objective criteria which are known in advance, the fact remains that, according to the information provided by the referring court – which is for the latter to verify – the restriction at issue in the main proceedings, namely the absolute impossibility for a gaming establishment located in another Member State to obtain a licence in order to advertise in Belgium, essentially stems from the fact that that establishment is established outside Belgian territory. It follows that a restriction of that kind is discriminatory.

24 Whilst a discriminatory restriction may possibly be justified on grounds of public policy, public security or public health, provided for in Article 52 TFEU (see, to that effect, judgment of

28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 39 and the case-law cited), it cannot be justified by overriding reasons in the public interest, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve the social order (see, to that effect, judgment of 6 October 2009, *Commission v Spain*, C-153/08, EU:C:2009:618, paragraph 36 and the case-law cited).

25 In the present instance, it is apparent from the request for a preliminary ruling that the objectives of Belgian policy on games of chance are centred around player protection, financial transparency and control of flows of money, the monitoring of gaming and the identification and monitoring of organisers. It is apparent in addition from the written and oral observations of the Belgian Government that that policy is also justified by objectives relating to consumer protection and to combating fraud and illegal gambling activities.

26 In that regard, first of all, in so far as the objectives thereby put forward constitute overriding reasons in the public interest, they cannot be relied upon to justify a restriction on the freedom to provide services that is discriminatory, as has been pointed out in paragraph 24 of the present judgment.

27 Next, assuming that the justification relating to consumer protection is in fact concerned with fighting gambling addiction and that that fight is covered by the concept of ‘protection of public health’ for the purposes of Article 52 TFEU, it is to be pointed out that, in order for a discriminatory restriction such as that at issue in the main proceedings to be capable of being authorised, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued (see, to that effect, judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 42 and the case-law cited).

28 It is evident that such a restriction, which amounts to granting only gaming establishments located on the territory of the Member State concerned and holding an operating licence in that connection the possibility of advertising in that Member State, goes beyond what may be regarded as proportionate, since less restrictive measures enabling the objectives relied on by the Belgian Government to be attained exist (see, to that effect, judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 43), such as authorising establishments located in another Member State to advertise provided that the legal provisions adopted and subject to monitoring in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the Member State concerned (see, to that effect, judgment of 12 July 2012, *HIT and HIT LARIX*, C-176/11, EU:C:2012:454, paragraph 36).

29 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that the first paragraph of Article 56 TFEU must be interpreted as precluding legislation of a Member State which grants the operators of a limited and controlled number of gaming establishments located on the territory of that Member State an automatic derogation from the advertising ban generally applicable to such establishments, without providing for the possibility for operators of gaming establishments located in another Member State to obtain a derogation for the same purposes.

## **Costs**

30 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 (Seventh Chamber) hereby rules:

**The first paragraph of Article 56 TFEU must be interpreted as precluding legislation of a Member State which grants the operators of a limited and controlled number of gaming establishments located on the territory of that Member State an automatic derogation from the advertising ban generally applicable to such establishments, without providing for the possibility for operators of gaming establishments located in another Member State to obtain a derogation for the same purposes.**

[Signatures]

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\* Language of the case: Dutch.

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