ECLI:EU:C:2020:981

Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

3 December 2020 (*)

(Reference for a preliminary ruling – Freedom to provide services – Restrictions – National legislation prohibiting the operation of gambling in certain places – Applicability of Article 56 TFEU – Existence of a cross-border element)

In Case C-311/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 21 March 2019, received at the Court on 16 April 2019, in the proceedings

BONVER WIN, a.s.

v

Ministerstvo financí ČR,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby, S. Rodin (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Szpunar,

Registrar: M. Longar, Administrator,

having regard to the written procedure and further to the hearing on 12 March 2020,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek, O. Serdula, J. Vláčil and T. Machovičová, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and Zs. Wagner, acting as Agents,

– the Netherlands Government, by J.M. Hoogveld and M.K. Bulterman, acting as Agents,

– the European Commission, by L. Armati, P. Němečková and K. Walkerová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2020,

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 between BONVER WIN a.s. and the Ministerstvo financí ČR (Ministry of Finance, Czech Republic) concerning the lawfulness of a decision withdrawing that company's licence to operate betting games in the town of Děčín (Czech Republic).

Legal context

3 Paragraph 50(4) of zákon č. 202/1990 Sb., o loteriích a jiných podobných hrách (Law No 202/1990 on lotteries and other similar games) provides as follows:

'By a binding measure of general application in the form of a decree, a municipality may restrict the operation of betting games …, lotteries and other similar games … solely to the times and places listed in that decree, determine the times and places where the operation of lotteries and other similar games is prohibited, or prohibit their operation entirely within the municipality.'

4 Paragraph 1(1) of obecně závazná vyhláška města Děčín č. 3/2013, o regulaci provozování sázkových her, loterií a jiných podobných her (Municipal Decree No 3/2013 of the town of Děčín on the regulation of the operation of betting games, lotteries and other similar games; 'Municipal Decree No 3/2013'), which was adopted by the town council of Děčín on the basis of Paragraph 50(4) of Law No 202/1990 on lotteries and other similar games, is worded as follows:

'With the exception of casinos in the places listed in Annex 1 to this Decree, it shall be prohibited to operate anywhere within the territory of the town of Děčín:

(a) betting games covered by Paragraph 2(i), (l), (m) and (n) of the Law on Lotteries,

(b) lotteries and other similar games covered by Paragraph 2(j) of the Law on Lotteries,

(c) lotteries and other similar games covered by Paragraph 50(3) of the Law on Lotteries.'

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

5 BONVER WIN is a commercial company established in the Czech Republic which operates betting games.

6 By decision of 22 October 2013, the Ministry of Finance, in accordance with Municipal Decree No 3/2013, withdrew the licence which BONVER WIN had held until then for the operation of betting games in an establishment situated in the town of Děčín, on the ground that the place where that business was operated was not among those listed in Annex 1 to that decree.

7 BONVER WIN lodged an appeal against that decision, which was dismissed by the Minister for Finance on 22 July 2014.

8 BONVER WIN subsequently brought an action before the Městský soud v Praze (Prague City Court, Czech Republic), which dismissed that action. That court held, as regards the argument that the national legislation was incompatible with EU law, that the latter law did not apply to the situation of BONVER WIN, since that company had not exercised its right freely to provide services.

9 BONVER WIN brought an appeal on a point of law before the referring court, claiming that the Městský soud v Praze (Prague City Court) had erred in concluding that EU law did not apply to the case in the main proceedings. It submits that the fact that some of the customers of its establishment in Děčín, a town situated approximately 25 km from the German border, were nationals of other Member States – such fact being supported by a witness statement – means that Article 56 TFEU is applicable.

10 The referring court, which points out that there is a divergence in its case-law on how the provisions of the FEU Treaty relating to the freedom to provide services are to apply to situations comparable to the one at issue in the main proceedings, emphasises that legislation such as that at issue in the main proceedings may give rise to a restriction on the freedom of recipients of services. That court observes, on the one hand, that, as is apparent from the case-law of the Court of Justice, services which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services and such recipients may also include tourists or persons travelling for the purposes of study.

11 On the other hand, it states that such legislation, which is applicable, without distinction, to nationals of that Member State and to those of other Member States, is, as a general rule, capable of falling within the scope of the provisions relating to the fundamental freedoms guaranteed by the FEU Treaty only in so far as it applies to situations connected with trade between Member States.

12 However, the referring court maintains that, while the Court of Justice has clarified how Article 56 TFEU is to apply to situations in which a provider offers its services by telephone or via the internet and to situations relating to groups of tourists who are recipients of services, it has not clearly established whether that article is applicable merely because a group of nationals of another Member State of the European Union may use or do use, in a given Member State, a service which is provided mainly to nationals of the latter Member State. In that regard, the referring court doubts that an occasional visit by a single national of another Member State of the European Union to an establishment providing certain services would mean that Article 56 TFEU is automatically to apply to any national legislation generally governing that national service sector.

13 Moreover, the referring court is uncertain whether, first, it would be appropriate to establish, in the field of the freedom to provide services, a *de minimis* rule – much like the rule which exists in the field of the free movement of goods – based on there being a sufficient link between the legislation at issue and the freedom to provide services. If such a rule were identified, legislation that is applicable without distinction to all providers pursuing their activity in the Member State concerned and which has a marginal impact on trade between Member States would not fall within the scope of Article 56 TFEU. Second, the referring court asks whether it is necessary to transpose, in the context of the freedom to provide services, the guidance provided in the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), and to exclude from the scope of Article 56 TFEU measures which are applicable without distinction and which

affect in the same manner, in law and in fact, all service providers pursuing their activity within the national territory.

14 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 56 [TFEU et seq.] apply to national legislation (a binding measure of general application in the form of a municipal decree) prohibiting a certain service in part of one municipality, simply because some of the customers of a service provider affected by that legislation may come or do come from another Member State of the European Union?

If so, is a mere assertion of the possible presence of customers from another Member State sufficient to trigger the applicability of Article 56 TFEU, or is the service provider obliged to prove the actual provision of services to customers who come from other Member States?

(2) Is it of any relevance to the answer to the first question that:

(a) the potential restriction on the freedom to provide services is significantly limited in both geographical and substantive terms (potential applicability of a *de minimis* exception);

(b) it does not appear that the national legislation regulates in a different manner, in law or in fact, the position of entities providing services primarily to citizens of other Member States of the European Union, on the one hand, and that of entities focusing on a domestic clientele, on the other?’

Consideration of the questions referred

15 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether and, if so, under what conditions Article 56 TFEU must be interpreted as meaning that it applies to the situation of a company established in a Member State which has lost its licence to operate games of chance following the entry into force, in that Member State, of legislation determining the places in which it is permitted to organise such games, which is applicable without distinction to all service providers operating in that Member State, regardless of whether those services are provided to nationals of that Member State or to those of other Member States, where that company claims that some of its customers come from a Member State other than the Member State in which it is established.

16 When answering those questions, it should be noted that national legislation such as that at issue in the main proceedings – which applies without distinction to the nationals of the various Member States – is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms established by the FEU Treaty only to the extent that it applies to situations connected with trade between the Member States (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 24, and order of 4 June 2019, *Pólus Vegas*, C-665/18, not published, EU:C:2019:477, paragraph 17).

17 The provisions of the FEU Treaty on the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State (see, to that effect, judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited).

18 That said, it should be borne in mind 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 (judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 51 and the case-law cited). That includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, with tourists having to be regarded as recipients of services (see, to that effect, judgments of 31 January 1984, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 16; of 2 February 1989, *Cowan*, 186/87, EU:C:1989:47, paragraph 15; and of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 52).

19 In that regard, first, the Court has previously held that services which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 56 TFEU (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 26 and the case-law cited).

20 Second, it is irrelevant that the restriction on a provider of services is imposed by the Member State of origin. It is apparent from the case-law of the Court that the freedom to provide services covers not only restrictions laid down by the State of destination but also those laid down by the State of origin (see, to that effect, judgment of 10 May 1995, *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 30).

21 As the Advocate General emphasised in point 50 of his Opinion, the Treaty treats restrictions imposed on providers of services and restrictions imposed on recipients of services in the same manner. Therefore, once the situation falls within the scope of Article 56 TFEU, both the recipient and the provider of a service may rely on that article.

22 Thus, the Court has previously held that the right freely to provide services may be relied on by an undertaking as against the State in which it is established if the services are provided for persons established in another Member State (see, to that effect, judgment of 10 May 1995, *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 30 and the case-law cited).

23 However, it should be borne in mind that, on a question being referred by a national court in connection with a situation confined in all respects within a single Member State, the Court of Justice cannot, where the referring court does not indicate something other than that the legislation in question applies without distinction to nationals of the Member State concerned and those of other Member States, consider that the request for a preliminary ruling on the interpretation of the provisions of the FEU Treaty on the fundamental freedoms is necessary to enable that court to give judgment in the case pending before it. The specific factors that allow a link to be established between the subject or circumstances of a dispute, confined in all respects within a single Member State, and Article 56 TFEU must be apparent from the order for reference (judgment of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 54, and order of 4 June 2019, *Pólus Vegas*, C-665/18, not published, EU:C:2019:477, paragraph 21).

24 It is also apparent from the Court's case-law that a cross-border situation cannot be presumed to exist on the sole ground that EU citizens from other Member States may avail themselves of such

service opportunities (see, to that effect, order of 4 June 2019, *Pólus Vegas*, C-665/18, not published, EU:C:2019:477, paragraph 24).

25 In the present case, it follows that a mere assertion by a service provider that some of its customers come from a Member State other than that in which it is established is not sufficient to establish the existence of a cross-border situation capable of falling within the scope of Article 56 TFEU. In order to make a reference to the Court of Justice for a preliminary ruling concerning the situation of that service provider, a national court must demonstrate in the order for reference that that assertion is well founded.

26 As regards the possible relevance of the number of customers from another Member State, it is necessary to reject, as the Advocate General has suggested in point 82 of his Opinion, the idea that a *de minimis* rule should be introduced in the field of the freedom to provide services.

27 Thus, it should be noted that circumstances such as the number of foreign customers who have used a service, the volume of services provided or the limited scope, in both geographical and substantive terms, of the potential restriction on the freedom to provide services have no bearing on the applicability of Article 56 TFEU.

28 In particular, it is apparent from settled case-law that the freedom covered by that article may be relied upon both in situations where there is a single recipient of services (see, to that effect, judgment of 2 February 1989, *Cowan*, 186/87, EU:C:1989:47, paragraphs 15 and 20) and in those where there is an uncertain number of recipients of services using an uncertain number of services performed by a provider established in another Member State (see, to that effect, judgments of 10 May 1995, *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 22, and of 6 November 2003, *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraphs 54 and 55).

29 As the Advocate General observed, in essence, in point 80 of his Opinion, to make the applicability of Article 56 TFEU dependent on a quantitative criterion would jeopardise the uniform application of that article within the European Union, which means that such a criterion cannot be accepted.

30 In addition, the referring court's point of view that a measure of general application prohibiting, subject to certain exceptions which it specifies, the operation of games of chance in a municipality of a Member State, which affects in the same manner, in law or in fact, all providers established in that Member State, regardless of whether those services are provided to nationals of that Member State or to those of other Member States, falls outside the material scope of Article 56 TFEU cannot be accepted.

31 The Court has previously held that national legislation which restricts the right to operate games of chance or gambling to certain places is capable of constituting a barrier to the freedom to provide services which is caught by Article 56 TFEU (see, to that effect, judgment of 11 September 2003, *Anomar and Others*, C-6/01, EU:C:2003:446, paragraphs 65 and 66).

32 In the present case, it is apparent from the request for a preliminary ruling that the town of Děčín, which is located approximately 25 km from the German border, is a place that is enjoyed by German nationals and that BONVER WIN has, in the context of the national proceedings, provided evidence which seeks to demonstrate that some of its customers were persons from other Member States, which means that it cannot be argued that the existence of foreign customers is purely hypothetical.

33 Therefore, subject to verification by the referring court of the evidence provided by BONVER WIN, it is apparent from all the foregoing considerations that Article 56 TFEU applies in a situation such as the one at issue in the main proceedings.

34 However, that finding is without prejudice to the potential compatibility of the national legislation at issue in the main proceedings with that article. The Court has not been asked whether that article precludes such legislation and does not have any relevant information enabling it to provide guidance to the referring court in that regard.

35 In the light of those findings, the answer to the questions asked by the referring court is that Article 56 TFEU must be interpreted as meaning that it applies to the situation of a company established in a Member State which has lost its licence to operate games of chance following the entry into force, in that Member State, of legislation determining the places in which it is permitted to organise such games, which is applicable without distinction to all service providers operating in that Member State, regardless of whether those services are provided to nationals of that Member State or to those of other Member States, where some of its customers come from a Member State other than the Member State in which it is established.

Costs

36 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 (Fourth Chamber) hereby rules:

Article 56 TFEU must be interpreted as meaning that it applies to the situation of a company established in a Member State which has lost its licence to operate games of chance following the entry into force, in that Member State, of legislation determining the places in which it is permitted to organise such games, which is applicable without distinction to all service providers operating in that Member State, regardless of whether those services are provided to nationals of that Member State or to those of other Member States, where some of its customers come from a Member State other than the Member State in which it is established.

[Signatures]

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* Language of the case: Czech.