Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

22 October 2014*

(Reference for a preliminary ruling — Freedom to provide services — Restrictions — Tax legislation — Income from winnings from games of chance — Difference in taxation between winnings obtained abroad and those from national casinos)

In Joined Cases C-344/13 and C-367/13,

REQUESTS for preliminary rulings under Article 267 TFEU from the Commissione tributaria provinciale di Roma (Italy), made by decision of 28 May 2013, received at the Court on 24 June and 1 July 2013, in the proceedings

Cristiano Blanco (C-344/13),

Pier Paolo Fabretti (C-367/13)

v

Agenzia delle Entrate — Direzione Provinciale I di Roma — Ufficio Controlli,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader (Rapporteur), E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Blanco and Mr Fabretti, by M. Rosa and S. Cristaldi, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and by G. De Bellis, avvocato dello Stato,

— the Belgian Government, by L. Van den Broeck and by J.-C. Halleux, acting as Agents, and by P. Vlaemminck and R. Verbeke, advocaten,

— the European Commission, by D. Recchia and W. Roels, acting as Agents,

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

* * Language of the cases: Italian.

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 46 and 49 EC, now Articles 52 and 56 TFEU.

2 The requests were made in the context of two disputes between Messrs Blanco and Fabretti, respectively, on the one hand, and the Agenzia delle Entrate — Direzione Provinciale I di Roma — Ufficio Controlli ('the Agenzia'), on the other, concerning their notices of assessment.

Legal context

EU law

3 Article 2(1)(3)(f) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15) provides that that directive applies to casinos.

Italian law

4 Article 67(1)(d) of Decree No 917 of the President of the Republic approving the Consolidated Law on Income (decreto del Presidente della Republica n. 917 — Approvazione del testo unico delle transom sui redditi) of 22 December 1986 (ordinary supplement to GURI No 302 of 31 December 1986), in the version in force at the material time in the main proceedings ('the DPR 917/86'), treats 'winnings from lotteries, prize competitions, gaming and betting organised for the public, and also prizes from contests or lotteries' in the same way as other income, which is included as such in the basis of assessment for income tax.

5 Article 69(1) of that decree specifies that prizes and winnings referred to in Article 67(1)(d) thereof 'shall constitute income as to the full amount charged during the tax period, without any deduction'.

6 The first paragraph of Article 30 of Decree No 600 of the President of the Republic establishing common rules on the determination of income tax (ordinary supplement to GURI No 268 of 16 October 1973), provides:

'... winnings from lotteries, contests, prize draws and betting paid out by the State, by public or private legal persons and by persons listed in Article 23(1) of this decree shall be subject to taxation at source, with the possibility of recovery, excluding cases in which other provisions already require taxation at source. Taxation at source shall not apply if the total value of the prizes … does not exceed ITL 50 000 [EUR 25.82]; if it exceeds this limit, the amount is entirely subject to taxation at source.'

7 That provision does not apply to winnings paid out by Italian casinos since, under the seventh paragraph of Article 30 of that decree, the taxation of winnings paid out by those casinos is included in the tax on performances, now the tax on entertainment, introduced by Legislative Decree No 60 of 26 February 1999 (GURI No 59 of 12 March 1999, p. 5).

8 In addition, pursuant to Article 3 of Decree No 640 of the President of the Republic on the tax on performances (decreto del Presidente della Republica n. 640 — Imposta sugli spettacoli) of 26 October 1972 (Ordinary Supplement GURI No 292 of 11 November 1972), as amended by Legislative Decree

No 60 of 26 February 1999, the casinos required to pay the tax on entertainment are excluded from the obligation to recover the tax from spectators, from participants and from gamblers. The basis of assessment of that tax comprises the amount of entry fees paid by the public, the actual daily positive difference between the sums collected from gaming and the sums paid out to gamblers by way of winnings, and any other proceeds linked to the operation of gaming.

The disputes in the main proceedings and the question referred

Case C-344/13

9 On 1 December 2011, the Agenzia served Mr Blanco with three notices of assessment in which he is accused of failing to file income tax returns for all tax periods in the years between 2007 and 2009, and of failing to declare the sum of EUR 410 227 in 2007, the sum of EUR 25 969 in 2008, and the sum of EUR 46 028 in 2009, those sums corresponding to winnings obtained from casinos located in other Member States and in third countries. The Agenzia maintains that those sums ought to have been included in Mr Blanco's taxable income because they constitute 'other income' within the meaning of Article 67(1)(d) of the DPR 917/86. Accordingly, Mr Blanco was subjected to a tax adjustment of EUR 488 703.16 for the 2007 tax year, of EUR 23 919.86 for the 2008 tax year and of EUR 41 291.89 for the 2009 tax year, by way of personal income tax, tax increases and penalties.

10 Mr Blanco has brought several actions against those tax assessments. Those actions were joined because of their connected subject-matter and because Mr Blanco was the applicant in the main proceedings. Mr Blanco believes, firstly, that the information on which the Agenzia relies should be treated with caution in so far as it is from a website which uses only the gross winnings and ignores a number of factors which affect those winnings, such as the practice of 'stacking', losses and expenses. Secondly, he claims that the tax assessments infringe, in particular, the principle prohibiting double taxation laid down in international agreements with reference to Article 2 of the Model Tax Convention on Income and on Capital developed by the Organization for Economic Cooperation and Development (OECD), the principle of the freedom to provide services under Article 56 TFEU, the principle of non-discrimination established by Article 21 of the Charter of Fundamental Rights of the European Union, and Articles 18 and 49 TFEU. Mr Blanco alleges discriminatory treatment on the ground that the winnings made in Italy are exempt from the requirement to be declared and do not fall under income tax as they are subject, at source, to the substitute tax on entertainment and on the ground that the winnings made in other Member States, having already been taxed at source in those Member States, should not be taxed in Italy.

11 In that regard, Mr Blanco refers to the case, which he categorises as being similar, which gave rise to the judgment in *Lindman* (C-42/02, EU:C:2003:613), in which the Court ruled that Article 49 EC precludes legislation of a Member State under which winnings from games of chance organised in other Member States are considered income taxable under income tax, while winnings from games of chance organised in the Member State in question are not taxable. He believes that the Commissione tributaria provinciale di Roma ('the referring court') should disapply the national legislation because of its discriminatory nature linked, in particular, to its incompatibility with Article 56 TFEU.

12 The Agenzia disputes the merits of the action before the referring court and asks that it be dismissed. It claims to have acted in accordance with current legislation and refers generally to the more detailed discussion contained in the notice of assessment, in which it indicated that for the tax periods in question the applicant in the main proceedings had failed to file a tax return.

13 The referring court dismisses the plea of double taxation as it considers that it is necessary to distinguish between the tax which the casino has to pay and the tax which the winner has to pay: the tax contributions made by the casino and by the winner are paid on the basis of different taxation measures.

14 Although the referring court concedes that there is a difference in tax treatment according to whether the winnings from games have been obtained in Italy or in another Member State, that difference in treatment constitutes prohibited discrimination only if there are no reasons which justify such a difference.

15 The referring court states that, according to the case-law of the Court, such a difference in treatment could be considered to be justified if it was covered by an express derogating provision, such as Article 52 TFEU to which Article 62 TFEU refers, and was intended to guarantee public order, public security or public health, while remaining consistent with the principle of proportionality and appropriate for ensuring effective attainment of the objective in a consistent and systematic manner.

16 According to the referring court, the Italian legislation is not so much seeking to protect national casinos as to discourage the practices of money laundering and 'self-laundering' of capital abroad and to limit the flow of capital abroad or the arrival in Italy of capital whose origin cannot be controlled.

17 The referring court considers it necessary for the Court to carry out a precise assessment of the reasons that led the national legislature to adopt such legislation, and that the Italian Government could be able to explain why it decided to tax winnings resulting from games of chance obtained abroad.

18 In those circumstances, the Commissione tributaria provinciale di Roma decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it incompatible with Article [56 TFEU] for persons resident in Italy to be required to declare for tax purposes, and be liable for tax on, winnings obtained from casinos in Member States of the European Union, as provided for by Article 67(1)(d) of [the DPR 917/86], or must this be regarded as justified on grounds of public policy, public security or public health, pursuant to Article [52 TFEU]?'

Case C-367/13

19 On 6 December 2011, the Agenzia served Mr Fabretti with a notice of assessment for 2009 in which it claimed payment of the sum of EUR 45 327.48 on grounds that he had failed to declare the sum of EUR 52 000 which he had won playing poker in a casino situated in another Member State.

20 Mr Fabretti disputes that assessment on identical grounds to those set out by Mr Blanco, and he brought an action against that tax assessment. The Agenzia puts forward arguments analogous to those that it made against Mr Blanco.

21 The Commissione tributaria provinciale di Roma (Provincial Tax Court of Rome) justified — in analogous terms to its first decision giving rise to Case C-344/13 — the need for a reference for a preliminary ruling. It decided to stay proceedings and to submit a question for a preliminary ruling identical to the one made in that reference.

22 By order of the President of the Court of 11 July 2013, Cases C-344/13 and C-367/13 were joined for the purposes of the written and oral procedure and the judgment.

The question referred for a preliminary ruling

23 By its question, the referring court asks, in essence, whether Articles 52 and 56 TFEU must be interpreted as precluding legislation of a Member State according to which winnings from games of chance obtained in its national casinos are not subject to income tax, whereas those obtained in other Member States are, and whether reasons of public policy, public security or public health can justify such a difference in treatment.

24 As a preliminary point, it should be noted that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with EU law (see, to that effect, *Lindman*, EU:C:2003:613, paragraph 18 and case-law cited).

25 In the first place, the referring court asks whether the national legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services.

26 In that regard, it must be borne in mind that the freedom to provide services under Article 56 TFEU requires not only the elimination of all discrimination on grounds of nationality against providers of services established in other Member States, but also the abolition of any restriction — even if it applies without distinction to national providers of services and to those from other Member States — which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services (see, inter alia, judgment in *Dirextra Alta Formazione*, C-523/12, EU:C:2013:831, paragraph 21 and case-law cited).

27 As the Court has already held, the provisions of the FEU Treaty on the freedom to provide services apply to an activity which enables people to participate in gambling in return for remuneration (judgment in *Zenatti*, C-67/98, EU:C:1999:514, paragraph 24 and case-law cited). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (judgment in *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, EU:C:2009:519, paragraph 51 and case-law cited).

28 In the main proceedings, it follows from the findings of the referring court and the observations of the Italian Government that the national legislation makes winnings made in casinos situated in Italy subject to a taxation at source which consists in taxing those casinos. More specifically, winnings obtained in national casinos are subject to a deduction calculated according to the difference between the sums collected for the games and those paid to players for their winnings. The Italian Government states that the winnings made in casinos located in Italy are exempt from income tax in order to avoid double taxation of the same sums upstream on the casino and downstream on the gambler.

29 By contrast, winnings from games of chance obtained in casinos established abroad are treated as income. That income must be included in the income tax return and therefore must be subject to income tax.

30 Thus, that national legislation, by restricting the benefit of a tax exemption only to winnings from games obtained in the Member State at issue, makes the provision of services constituted by the organisation of gambling for remuneration subject to different tax arrangements depending on whether that service is carried out in that Member State or in other Member States (see, to that effect, judgment in *Laboratoires Fournier*, C-39/04, EU:C:2005:161, paragraph 15 and case-law cited).

31 Moreover, as noted by the applicants in the main proceedings and by the European Commission, a difference in tax treatment, under which only the winnings from games obtained in another Member State are considered to be taxable income, reduces the attractiveness of going to another Member State with the objective of playing games of chance. In fact, the recipients of the services in question, who reside in the Member State where such a difference in treatment prevails, are dissuaded from participating in such games, the organisers of which are established in another Member State, in view

of the importance for them of being able to obtain tax exemptions (see, by analogy, judgments in *Vestergaard*, C-55/98, EU:C:1999:533, paragraph 21, and *Commission* v *Denmark*, C-150/04, EU:C:2007:69, paragraph 40 and case-law cited).

32 The fact that gaming providers established in that Member State are taxed as organisers of gambling does not rid the legislation at issue of its manifestly discriminatory character, since that tax is not, as the referring court observes, analogous to the income tax charged on winnings from taxpayers' participation in games of chance organised in other Member States (see, to that effect, judgment in *Lindman*, EU:C:2003:613, paragraph 22).

33 Therefore, national legislation such as that at issue in the main proceedings gives rise to a discriminatory restriction on the freedom to provide services as guaranteed by Article 56 TFEU in relation to not only service providers but also the recipients of those services.

34 In the second place, it must be ascertained whether that discriminatory restriction may be justified.

35 The referring court and the Italian Government observe that the national legislation at issue in the main proceedings has the objective of preventing money laundering and 'self-laundering' of capital abroad and of limiting the flow of capital abroad or the arrival in Italy of capital whose origin is particularly uncertain.

36 As the Italian Government has observed, the Court has repeatedly stated that the 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 harmonisation in the field at EU level, 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 (see, inter alia, judgments in *Stanleybet International and Others*, C-186/11 and C-209/11, EU:C:2013:33, paragraph 24, and *Digibet and Albers*, C-156/13, EU:C:2014:1756, paragraph 24).

37 However, although the Court has already recognised a certain number of overriding reasons in the public interest which may justify a restriction on the freedom to provide services, including consumer protection, action against fraud and prevention of social problems linked to gambling, those objectives cannot be relied upon to justify discriminatory restrictions (judgment in *Commission* v *Spain*, C-153/08, EU:C:2009:618, paragraph 36 and case-law cited).

38 Thus, a discriminatory restriction is compatible with EU law only if it falls under an express derogation, such as Article 52 TFEU to which Article 62 TFEU refers, and which aims to guarantee public policy, public security and public health (see, to that effect, inter alia, judgments in *Commission* v *Germany*, C-546/07, EU:C:2010:25, paragraph 48 and case-law cited, and *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 79).

39 Consequently, national legislation, such as that at issue in the main proceedings, can be justified only insofar as it pursues objectives corresponding to the grounds of public policy, public security or public health within the meaning of Article 52 TFEU. In addition, the restrictions imposed by the Member States must satisfy the conditions of proportionality. Thus, national legislation is appropriate for guaranteeing attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, to that effect, judgments in *Engelmann*, C-64/08, EU:C:2010:506, paragraph 35, and *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 43 and case-law cited).

40 The identification of the objectives in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, a matter within the jurisdiction of the referring court. It is also for the referring court, while taking account of the information provided by the Court,

to determine whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law as regards their proportionality (see, to that effect, judgment in *Pfleger and Others*, EU:C:2014:281, paragraphs 47 and 48 and case-law cited).

41 As regards, first of all, the objectives invoked by the Italian Government relating to the prevention of money laundering and the need to limit the flow of capital abroad or the arrival in Italy of capital whose origin is uncertain, it suffices for the Court, without needing to determine whether those objectives could fall within the definition of public policy, to point out, first of all, that, as is apparent from the Court's case-law, it is not justifiable for the authorities of a Member State to assume, in a general way and without distinction, that bodies and entities established in another Member State are engaging in criminal activity (see, to that effect, judgment in *Commission* v *Spain*, EU:C:2009:618, paragraph 39 and case-law cited).

42 Next, it should be noted that, as observed by the European Commission, the Italian Government does not adduce evidence that, even if the proceeds of organised crime in Italy are high, they have been made totally or predominantly outside Italy.

43 Furthermore, to exclude in a general way the benefit of a tax exemption appears to be disproportionate, as it goes beyond what is necessary to combat money laundering, other methods being available to the Member States in this respect, such as Directive 2005/60 which aims to combat money laundering and which applies to casinos under Article 2(1)(3)(f) thereof.

44 Finally, it cannot be excluded that action against compulsive gambling falls within the protection of public health (see, to that effect, judgment in *Commission* v *Spain*, EU:C:2009:618, paragraph 40 and case-law cited) and is capable, as such, of justifying a discriminatory restriction on the freedom to provide services.

45 In fact, as the Belgian Government observes, the Court has consistently noted the particular nature of the gambling sector, where, unlike the establishment of free, undistorted competition in a traditional market, the presence of that kind of competition in that very specific market, that is to say, between several operators authorised to run the same games of chance, is liable to have a detrimental effect owing to the fact that they would be led to compete with each other in inventiveness in making what they offer more attractive than their competitors and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction (see, inter alia, judgments in *Pfleger and Others*, EU:C:2014:281, paragraph 46 and case-law cited, and in *Digibet and Albers*, EU:C:2014:1756, paragraph 31 and case-law cited).

46 However, in circumstances such as those at issue in the main proceedings, the taxation by a Member State of winnings from casinos in other Member States and the exemption of such winnings from casinos situated on its territory are not a suitable and coherent means of ensuring the attainment of the objective of combatting compulsive gambling, as such an exemption is in fact likely to encourage consumers to participate in games of chance which allow them to benefit from such an exemption (see, to that effect, judgment in *Commission* v *Spain*, EU:C:2009:618, point 41).

47 It follows that the discrimination at issue in the main proceedings is not justified under Article 52 TFEU.

48 Therefore, it follows from all the foregoing that the answer to the question submitted for a preliminary ruling is that Articles 52 and 56 TFEU must be interpreted as precluding legislation of a Member State which subjects winnings from games of chance obtained in casinos in other Member States to income tax and exempts similar income from that tax if it is obtained from casinos in its national territory.

Costs

49 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 52 and 56 TFEU must be interpreted as precluding legislation of a Member State which subjects winnings from games of chance obtained in casinos in other Member States to income tax and exempts similar income from that tax if it is obtained from casinos in its national territory.

[Signatures]