



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 June 2017*

(Reference for a preliminary ruling — Freedom to provide services — Restrictions — Conditions for the award of a concession for the organisation of online games of chance — Practical impossibility of obtaining such a licence for private operators established in other Member States)

In Case C-49/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), made by decision of 9 December 2015, received at the Court on 27 January 2016, in the proceedings

Unibet International Ltd.

v

Nemzeti Adó- és Vámhivatal Központi Hivatala,

THE COURT (First Chamber),

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

Advocate General: M. Szpunar,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2016,

after considering the observations submitted on behalf of:

- Unibet International Ltd., by A. Jádi-Németh and A. Kovács, ügyvédek,
- the Hungarian Government, by M.Z. Fehér and G. Koós and by E.E. Sebestyén, acting as Agents,
- the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, assisted by P. Vlaemminck, R. Verbeke and J. Van den Bon, advocaten,
- the Portuguese Government, by L. Inez Fernandes and M. Figueiredo and by A. Silva Coelho, acting as Agents,
- the European Commission, by H. Tserepa-Lacombe and L. Havas, acting as Agents,

* Language of the case: Hungarian.

after hearing the Opinion of the Advocate General at the sitting on 5 April 2017,
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 Unibet International Ltd. ('Unibet'), a Maltese company, and Nemzeti Adó- és Vámhivatal Központi Hivatala (Central National Treasury and Customs Authority, Hungary, 'the Hungarian tax authority'), concerning decisions taken by that authority ordering the temporary closure of access to Unibet's websites, accessible through the Internet domains hu.unibet.com and hul.unibet.com.

Legal context

Hungarian law

The legislation in force on 25 June 2014

– Law on games of chance

- 3 Article 1(3) to (5) of the szerencsejáték szervezéséről szóló 1991. évi XXXIV. törvény (Law No XXXIV of 1991 on games of chance), as in force on 25 June 2014 ('Law on games of chance'), provided:

'(3) The following shall be regarded as an activity of organising games of chance within the meaning of Article 1(1)(i) of the koncesszióról szóló 1991. évi XVI. törvény (Law No XVI of 1991 on concessions, 'the Law on concessions'):

...

(e) the organisation of online games of chance,

...

(4) The activity of organising games of chance that allow participation, from Hungarian territory, by means of telecommunications systems or equipment, may be carried on solely in accordance with the provisions of the present Law.

(5) The publication of offers to participate in games of chance organised by means of telecommunications systems or [of] equipment shall require a licence issued by the State tax authorities. Financial institutions and providers of telecommunications services may not contribute to the publication or acceptance of offers to participate in games of chance if they do not hold a licence, nor may they provide technical support for them.'

4 Article 2(2a) and (3) of that law provided:

‘(2a) In order to provide services involving online games of chance, a licence issued by the national tax authority shall be required. Online games of chance services shall fall within the scope of the present Law in the following cases:

- (a) the online games of chance are organised in Hungarian territory, or
- (b) the intended user of the service participates in the online games of chance in Hungarian territory, or
- (c) the service is addressed to persons within Hungarian territory, in particular when the service is available in Hungarian or is advertised in Hungarian territory.

(3) The national tax authority shall grant a licence to any person meeting the personal, substantive and economic requirements necessary for the safe and professional management of games of chance.’

5 Under Article 3 of that law:

‘(1) An activity of organising non-liberalised games of chance

- (a) may be carried out by an economic body wholly owned by the Hungarian State, established to carry out on a regular basis an activity of organising games of chance (“State operator of games of chance”), or by a commercial company owned exclusively by the State operator of games of chance, or by an economic operator in which the State has a majority holding;
- (b) by a concession contract. The State may temporarily assign to third parties the right to carry on this activity by means of a concession contract.

...’

6 Article 4(1) to (6) of the Law on games of chance provided:

‘(1) For the conclusion of concession contracts, the Minister shall issue a public call for tenders in accordance with Article 5(1) of the Law on concessions.

...

(6) Pursuant to Article 10/C(2) of the Law on concessions, the Minister may, without issuing a public call for tenders, conclude a concession contract with a trustworthy operator of games of chance within the meaning of the present Law.’

7 Article 5(1) of that law provided:

‘In the event of a public call for tenders being issued in accordance with Article 5(1) of the Law on concessions, the Minister may conclude the concession contract with the successful tenderer.’

8 Article 29/D of that law was worded as follows:

‘The commercial company exclusively owned by the State operator of games of chance or the economic operator in which the State has a majority holding, referred to in Article 3(1)(a), and the concessionaire company, referred to in Article 3(1)(b), must have minimum equity capital of HUF 200 million [approximately EUR 620 000].’

9 Under Article 36(1) of the Law on games of chance:

‘The national tax authority shall exercise administrative control over the organisation of games of chance. In that context, it shall monitor continuously whether the activity satisfies the rules of law, the licences and the plans for games.’

10 Article 36/G(1) and (2) of that law provided:

‘(1) The national tax authorities shall order temporary blocking of access to data published by means of electronic telecommunications networks (hereinafter, for the purposes of this chapter, ‘electronic data’), the disclosure or publication of which constitutes illegal organisation of games of chance.

(2) Temporary blocking of access shall entail the temporary blocking of access to electronic data. The national tax authority shall order the temporary blocking of access to electronic data for a period of 90 days.

...’

11 Article 37(30) of that law provided:

“A trustworthy operator of games of chance” shall mean an operator of games of chance which is a transparent organisation within the meaning of Article 3(1)(1) of the nemzeti vagyronról szóló 2011. évi CXCVI. törvény (Law No. CXCVI of 2011 on national resources) and

- (a) which has fulfilled all obligations to declare and pay, tax and parafiscal charges of more than HUF 500 000 [approximately EUR 1 550], registered by the national tax authority, without ever falling into arrears for more than 90 days in the fulfilment of those obligations;
- (b) against whose bank account the tax authority has not issued an order to recover a debt of more than HUF 500 000 [approximately EUR 1 550] and which, in the conduct of its business, has not been the subject of enforcement proceedings for an amount exceeding HUF 500 000 [approximately EUR 1 550];
- (c) which has never committed, in the conduct of its business and in the context thereof, any infringement for which a fine exceeding HUF 5 000 000 [approximately EUR 15 550] could have been imposed;
- (d) which has carried on the activity of organising games of chance in Hungary for at least 10 years; and
- (e) which has fully complied with the rules concerning identification of players and the associated data processing, when it is subject to such an obligation.’

– *Law on concessions*

12 Article 4(1) of the Law on concessions provided:

‘The State or the local authorities shall launch a tendering procedure in order to conclude concession contracts, save in the case of the contractual extension provided for in Article 12(3) of Law CXCVI of 2011 on national resources, and the conclusion of a contract provided for in Article 10/C of the present Law. The call for tenders shall be open, except when, for reasons of national defence and security, a restricted procedure is required.

...'

13 Article 5(1) of that law provided:

'The Minister for the relevant sector shall be empowered to initiate and decide upon the call for tenders and to conclude the concession contract in agreement with the Minister responsible for the monitoring of national resources.

...'

14 Under Article 10/C(1) to (6) of that law:

'(1) The concession contract may also be concluded, in accordance with the present article, with a trustworthy operator of games of chance as defined in the Sectoral Law.

(2) The Minister for the sector may decide not to issue a public call for tenders for the award of a concession if the concession contract can be concluded with a trustworthy operator of games of chance.

(3) In order to carry on the activity of organising games of chance, a trustworthy operator of games of chance shall submit a tender. In its tender, it shall indicate the situation of the units — within the meaning of the Law on games of chance — which it intends to operate and give an undertaking to pay, for each one of them, an annual concession fee equivalent to at least double the concession fee determined in the General Budget Law in force.

(4) The Minister for the sector shall decide whether to accept the tender within the 30 days following receipt of the written tender of the trustworthy operator of games of chance. If the tender is accepted, he shall within a period of 30 days conclude the concession contract with the person that submitted it.

(5) Under the concession contract concluded in accordance with this article, the concessionaire may operate a maximum of five units.

(6) The provisions of the present Law and of the Law on games of chance shall be applicable, additionally, both to the concession contract and to the concessionaire.

...'

15 Article 11(1) of the Law on concessions provided:

'If the concession contract is not concluded under Article 10/C, the person or entity acting on behalf of the State or the local authority may conclude the concession contract only with the successful tenderer. The successful tenderer shall be the tenderer having submitted the tender complying with the specified requirements that is, as a whole, the most advantageous to the State or local authority.

...'

16 Article 21(1) of that law read as follows:

'If, by virtue of a special rule, the exercise of an activity subject to a concession requires an administrative licence, the concessionaire company shall be entitled to carry on that activity only if it is in possession of such a licence.

...'

The legislation in force on 29 August 2014

– The amended Law on games of chance

- 17 Article 3(3) of the Law on games of chance, as in force on 29 August 2014 ('Law on games of chance'), provided:

'Organisation of lotteries and betting — except betting on horses, online games of chance and bet brokerage — shall be reserved exclusively to the State operator of games of chance.'

- 18 Article 29/D(1) and (2) of the amended Law on games of chance provided:

'(1) The commercial company exclusively owned by the State operator of games of chance or the economic operator in which the State has a majority holding, referred to in Article 3(1)(a), and the concessionaire company, referred to in Article 3(1)(b), or the trustworthy operator of games of chance, must have minimum equity capital of a value equivalent to HUF 50 000 000 [(approximately EUR 155 000)].

(2) The concessionaire company mentioned in paragraph 1 — regard being had to the provisions of Article 20(1) of the Law [on concessions, as in force on 29 August 2014, "the amended Law on concessions"] — shall also be entitled to operate as a commercial company established abroad.

...'

- 19 Paragraph 37(31) of that law provided:

'For the purposes of online games of chance, a trustworthy operator of games of chance shall mean an operator of games of chance which is a transparent organisation within the meaning of Article 3(1)(1) of Law CXCVI of 2011 on national resources and

- (a) which has fulfilled all the obligations to declare and pay tax and parafiscal charges of more than the equivalent of HUF 500 000 [(approximately EUR 1 550)], registered by the State tax authority or by the tax authorities of the State in which the operator of games of chance is established or which has issued a licence for the activity of organising games of chance, without ever falling into arrears for more than 90 days in the fulfilment of those obligations;
- (b) against whose bank account the State tax authority which issued the licence for the activity of organising games of chance has never issued an order to recover a debt of more than HUF 500 000 [(approximately EUR 1 550)] and which, in the conduct of its business, has not been the subject, in the State which issued the licence for the activity of organising games of chance, of enforcement proceedings for an amount exceeding HUF 500 000 [(approximately EUR 1 550)];
- (c) which has never, in the conduct of its business and in the context thereof, committed, in the State which issued the licence for the activity of organising games of chance, any infringement for which a fine exceeding the equivalent of HUF 5 000 000 [(approximately EUR 15 500)] was imposed;
- (d) which has, for at least three years, carried on the activity of organising games of chance in the State which issued the licence for the activity of organising games of chance, and
- (e) which has fully complied with the rules concerning identification of players and the associated data processing, in the State which granted the licence to carry out an activity of organising games of chance, when it is subject to such an obligation.

If the operator of games of chance holds or has held a licence for the activity of organising games of chance in several States, it must prove that the conditions laid down in paragraphs (a) to (e) are fulfilled for one of those States.'

– *The amended Law on concessions*

20 Article 10/C(3a) of the amended Law on concessions read as follows:

'The provisions of paragraph 3 above shall apply to the submission of tenders relating to online games of chance, subject to the following provisions:

- (a) only a trustworthy operator within the meaning of Article 37(31) of the [amended Law on games of chance] may submit a tender;
- (b) the tender must indicate, for each type of game, the annual fee for the concession, of an amount that corresponds at least to the reference fee for type of game determined in the General Budget Law; and
- (c) any person submitting a tender without being established in Hungary or without possessing a Hungarian licence for the activity of organising games of chance shall append to it a certificate recording that it satisfies the requirements of Article 37(31) of [the amended Law on games of chance], issued by the authority in the State in which it is established or by the authority of the State which issued the licence to carry on the activity of organising games of chance, together with an official translation thereof into Hungarian.'

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

21 Unibet is a company established in Malta whose business consists in particular of organising online games of chance. To that end, it holds licences issued by the national authorities of several Member States. Following investigations, carried out in the summer of 2014, of the content of Hungarian-language Internet sites operated by Unibet on the Internet domains hu.unibet.com and hul.unibet.com, the Hungarian tax authority found that those sites allowed access to content which constitute games of chance within the meaning of the Hungarian legislation on games of chance, whereas Unibet did not have the necessary licence in Hungary.

22 As a result of that infringement, the Hungarian tax authority decided, first, to order the temporary blocking of access from Hungary to the Unibet websites and, second, imposed a fine on Unibet.

23 Unibet then brought an action before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary), seeking the annulment of those decisions on the ground that the Hungarian legislation on the basis of which they were adopted is contrary to Article 56 TFEU. It takes the view that, taking account of the conditions laid down by that legislation, it is in practice impossible to obtain the status of a concessionaire, whereas such a status constitutes the precondition for the issue of a licence to organise online games of chance. According to Unibet, it was impossible for it to conclude the concession contract under one of the procedures laid down by the national legislation.

24 Unibet submits, first, that the Minister for the Economy did not issue a public call for competition for the purpose of concluding a concession contract, thus depriving it of that first procedure. Second, as regards the second procedure for making an offer to the Minister with a view to concluding a concession contract reserved for 'trustworthy' operators within the meaning of the Hungarian legislation, Unibet claims that it was not authorised to submit a tender on the date of the first decision since it did not satisfy the legal criteria allowing it to be classified as a 'trustworthy' operator

of games of chance within the meaning of the national legislation. Furthermore, when the second decision was adopted, due to the date of the entry into force of the regulation amending the definition of a 'trustworthy' operator of games of chance, it did not have sufficient time to draw up a detailed tender.

- 25 According to the Hungarian tax authority, the Hungarian legislation does not infringe Article 56 TFEU. The lack of a public call for tenders for the award of concession contracts does not mean that the Hungarian legislation infringes EU law, for, if there had been such a call for tenders, Unibet could have submitted a tender. Furthermore, on the date that the second decision was adopted, it was open to Unibet to prove that it was a 'trustworthy' operator of games of chance, within the meaning of the national legislation, which would have enabled it to submit a tender to the Minister with a view to concluding a concession contract. The Hungarian tax authority specified that a ministerial decree was going to be adopted in order to supplement the provisions of the Law on games of chance with regard to online gambling.
- 26 The Hungarian tax authority also indicated that, since the decree to be made falls within the scope of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37), its notification to the Commission was an indispensable prerequisite for its entry into force. According to the tax authority, even if the Hungarian legislation were to be held to be incompatible with EU law, it could not be asserted that games of chance may be organised in Hungary without any licence or restriction.
- 27 The referring court asks whether, in the light of the case-law of the Court of Justice on the interpretation of Article 56 TFEU in the area of games of chance, national legislation such as the Hungarian legislation, which has not created a monopoly situation on the gambling market and which gives market participants the theoretical possibility of entering the Hungarian online market for games of chance but whose effective implementation continues to deprive, in practice, market participants of the opportunity of offering their services, may be consistent with the provisions of Article 56 TFEU.
- 28 According to that court, operators of games of chance had, at the time of the facts at issue in the main proceedings, two possibilities of concluding a concession contract for the organisation of online games of chance. It notes that the first possibility, namely the issuing of a public call for competition by the Minister for the Economy, was not used by the Minister for the Economy throughout the period at issue. As regards the second possibility, namely the submission of a tender for the conclusion of a concession contract, the referring court states that only an operator who could be classified as a 'trustworthy operator of games of chance', within the meaning of the legislation in force on 25 June 2014, was authorised to submit such a tender. However, under that legislation, on the date of the adoption of the first decision to block Unibet's websites, operators who could not show ten years' provision of services in Hungary did not fall within the scope of 'trustworthy operator of games of chance'. Consequently, according to that court, Unibet was excluded from the online market for games of chance. Furthermore, the referring court is of the view that, because of the short period of time between 15 July 2014, the date on which the definition of 'trustworthy operator' was amended, meaning that Unibet could possibly fall within the scope of that concept, and 29 August 2014, the date that the second decision blocking Unibet's websites was adopted, Unibet was prevented from submitting a detailed tender.
- 29 Accordingly, that court asks whether, in the light of Article 56 TFEU, the lack of detailed rules relating to the technical conditions required for the award of licences for the organisation of online games of chance may justify the exclusion, in practice, of an operator of online games of chance from the award procedure, even though the national legislation provides that the award of licences is theoretically possible. It also asks whether such a lack of detailed technical rules can nevertheless justify the administrative penalties imposed by the competent authorities on operators of games of chance who could not in practice obtain the licences required for the organisation of online games of chance.

30 In those circumstances, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Must Article 56 TFEU be interpreted as precluding a national measure pursuant to which the law of a Member State, by means of issuing a call for tenders for the award of a concession or receiving a tender submitted in order to obtain such a concession, as the case may be, guarantees the theoretical possibility that any operator fulfilling the legal requirements — including an operator established in another Member State — may obtain a concession for the provision of non-liberalised online games of chance, through either a public call for tenders or of the submission of a tender, where the Member State in question does not in fact call for tenders for the award of a concession and the service provider likewise, in practice, has no opportunity of submitting a tender, and where the authorities of the Member State declare that the service provider infringed legal rules by providing the service without holding a licence based on the concession and impose on that provider the administrative penalty provided for in the legislation (temporary blocking of access and the imposition of a fine in the event of repeated infringements)?
- (2) Does Article 56 TFEU prevent a Member State from introducing provisions of higher rank, from the point of view of domestic law, that offer operators of online games of chance the theoretical possibility of providing online games of chance on a cross-border basis, where, for want of any lower-ranking implementing provisions in the Member State, those operators cannot in fact obtain the administrative licences necessary for the provision of the service?
- (3) In so far as the court hearing the main proceedings may declare, in the light of the answers given to the foregoing questions, that the Member State's measure is contrary to Article 56 TFEU, is that court acting in a manner compatible with EU law if it considers to be contrary to Article 56 TFEU not only the infringement of legal rules found by the decisions of the authorities of the Member State, on the ground that the service was provided without a licence, but also the administrative penalty imposed for that infringement (temporary blocking of access and fine)?

Consideration of the questions referred

The first and second questions

- 31 By its first and second questions, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding legislation, such as that at issue in the main proceedings, which introduces a system of concessions and licences for the organisation of online games of chance under which operators may conclude a concession contract and, on the basis thereof, obtain a licence for the organisation of online games of chance, either by participating in a call for tenders for the conclusion of a concession contract organised by the Minister for the Economy or by making an offer to the Minister for the conclusion of a concession contract, the latter possibility being open to 'trustworthy' operators of games of chance within the meaning of the national legislation.
- 32 It should be borne in mind that Article 56 TFEU requires the abolition of any restriction on the freedom to provide services, even if it applies without distinction to national providers of services and to providers from other Member States, if the restriction is liable to prohibit, impede, or render less advantageous the activities of service providers established in another Member State where they lawfully provide similar services (see to that effect, 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).

- 33 In that regard, the Court has already held that national legislation which prohibits the organisation of games of chance without the prior authorisation of the administrative authorities constitutes a restriction of the freedom to provide services guaranteed by Article 56 TFEU (see, to that effect, judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 39 and the case-law cited).
- 34 Therefore, it must be held that national legislation, such as that at issue in the main proceedings, which introduces a system of concessions and licences for the organisation of games of chance constitutes a restriction of the freedom to provide services within the meaning of Article 56 TFEU.
- 35 It is appropriate to examine whether that restriction may nevertheless be justified.
- 36 As regards justifications which may be accepted where internal measures restrict the freedom to provide services, the Court has held on numerous occasions that the objectives pursued by national legislation in the area of gambling and betting, considered as a whole, usually concern the protection of the recipients of the services in question, and of consumers more generally, as well as the protection of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services.
- 37 Moreover, it is undisputed that it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary wholly or partially to prohibit activities concerning the organisation of games of chance, or only to restrict them and to lay down more or less strict supervisory rules for that purpose, the need for and the proportionality of the measures thus adopted having to be assessed solely in relation to the objectives pursued and the level of protection which the national authorities concerned seek to ensure (see, to that effect, judgment of 8 September 2010, *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 46 and the case-law cited).
- 38 In the present case, it is clear from the written observations submitted to the Court that Hungary relies, in general terms, on consumer protection objectives and risks to public order and public health in order to justify the measures at issue in the main proceedings.
- 39 The Court has already held that those objectives may be such as to justify restrictions of fundamental freedoms in the sector of games of chance. A certain number of overriding reasons in the public interest have been recognised by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gaming, as well as the general need to preserve public order (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 46).
- 40 Nevertheless, it is settled case-law that the restrictions imposed by Member States must satisfy the principle of proportionality and that national legislation is appropriate for achieving the objective invoked only if the means used are consistent and systematic (judgments of 6 March 2007, *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 48 and 53, and 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 63).
- 41 Thus, for such legislation to be justified, even though it derogates from a fundamental freedom, it is clear from the case-law of the Court 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 (see, to that effect, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 55 and the case-law cited).
- 42 In addition, the public authorities which grant the concessions are required to comply with the obligation of transparency. Accordingly, without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of

interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed (see, to that effect, judgment of 9 September 2010, *Engelmann*, C-64/08, EU:C:2010:506, paragraphs 49 and 50).

- 43 Moreover, 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 and precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 77 and the case-law cited).
- 44 As regards, in the first place, national legislation such as that in force on 25 June 2014, it must be held that a rule of a Member State, such as that at issue in the main proceedings, according to which trustworthy operators of games of chance must have carried out, for a period of at least 10 years in the territory of that Member State, an activity of organisation of games of chance, creates a difference in treatment in that it puts operators of games of chance established in other Member States at a disadvantage compared to the national operators concerned who may fulfil that condition more easily.
- 45 The mere fact of putting forward an objective of general interest cannot suffice to justify such a difference in treatment. In the absence of a reason why it is necessary to have carried out an activity of the organisation of games of chance in the territory of the host Member State rather than that of another Member State in order to achieve the objectives put forward, and to have done so for at least 10 years, such a rule must be regarded as discriminatory and contrary to Article 56 TFEU.
- 46 As regards, in the second place, national legislation such as that in force on 29 August 2014, the obligation to have carried out an activity of organising games of chance for three years in a Member State does not create an advantage for operators established in the host Member State and could be justified by a general interest objective. However, it is important that the rules in question are applied transparently to all tenderers. It should accordingly be borne in mind that the obligation of transparency, which is a corollary of the principle of equality, is essentially intended to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, so as to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure (judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, paragraph 87).
- 47 That requirement is not satisfied by national legislation such as that at issue in the main proceedings, whose conditions governing the exercise of the powers of the Minister for the Economy which it sets in such a procedure and technical conditions having to be fulfilled by operators of games of chance when submitting their tenders, were not defined with sufficient precision.
- 48 Consequently, the answer to the questions referred is that Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which introduces a system of concessions and licences for the organisation of online games of chance, if it contains discriminatory rules with regard to operators established in other Member States or if it lays down rules which are not discriminatory but which are applied in a manner which is not transparent or are implemented in such a way as to prevent or hinder an application from certain tenderers established in other Member States.

The third question

- 49 By its third question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding penalties, such as those at issue in the main proceedings, imposed for infringement of national legislation introducing a system of concessions and licences for the organisation of games of chance, if such national legislation proves to be contrary to Article 56 TFEU.
- 50 In that regard, it is sufficient to recall that, where a restrictive system has been established for games of chance and that system is incompatible with Article 56 TFEU, an infringement of the system by an economic operator cannot give rise to penalties (*Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 64 and the case-law cited.)
- 51 The answer to the third question is that Article 56 TFEU must be interpreted as precluding penalties, such as those at issue in the main proceedings, imposed for the infringement of national legislation introducing a system of concessions and licences for the organisation of games of chance, if such national legislation proves to be contrary to Article 56 TFEU.

Costs

- 52 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 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which introduces a system of concessions and licences for the organisation of online games of chance, if it contains discriminatory rules with regard to operators established in other Member States or if it lays down rules which are not discriminatory but which are applied in a manner which is not transparent or are implemented in such a way as to prevent or hinder an application from certain tenderers established in other Member States.**
- 2. Article 56 TFEU must be interpreted as precluding penalties, such as those at issue in the main proceedings, imposed for the infringement of national legislation introducing a system of concessions and licences for the organisation of games of chance, if such national legislation proves to be contrary to Article 56 TFEU.**

[Signatures]