Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

27 April 2023*

(Reference for a preliminary ruling – Electronic commerce – Directive 2000/31/EC – Article 1 – Scope – Article 2(c) – Concept of 'established service provider' – Article 3(1) – Provision of information society services by a provider established on the territory of a Member State – Company established on the territory of the Swiss Confederation – Inapplicability *ratione personae* – Article 56 TFEU – Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Scope – Prohibition of restrictions on the cross-frontier provision of services not exceeding 90 days per calendar year – Provision of services in Italy for a period exceeding 90 days – Inapplicability *ratione personae* – Article 102 TFEU – Nothing in the order for reference enabling a link to be established between the dispute in the main proceedings and any abuse of a dominant position – Inadmissibility)

In Case C-70/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 27 January 2022, received at the Court on 1 February 2022, in the proceedings

Viagogo AG

v

Autorità per le Garanzie nelle Comunicazioni (AGCOM),

Autorità Garante della Concorrenza e del Mercato (AGCM),

intervening party:

Ticketone SpA,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún, President of the Chamber, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

* Language of the case: Italian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Viagogo AG, by E. Apa, E. Foco, M.V. La Rosa, E. Marasà, M. Montinari and I. Picciano, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by R. Guizzi and F. Varrone, avvocati dello Stato,

– the European Commission, by M. Angeli, S. Kalėda, U. Małecka and L. Malferrari, 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, first, of Articles 3, 14 and 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), read in conjunction with Article 56 TFEU, and, secondly, of Articles 102 and 106 TFEU.

2 The request has been made in proceedings between, on the one hand, Viagogo AG, a company established in Geneva (Switzerland), and, on the other hand, the Autorità per le Garanzie nelle Comunicazioni (AGCOM, Communications Regulator, Italy) and the Autorità Garante della Concorrenza e del Mercato (AGCM, Competition and Market Authority, Italy) concerning a fine of EUR 3 700 000 imposed on Viagogo by AGCOM.

Legal context

The EC-Switzerland Agreement

3 The European Community and its Member States, of the one part, and the Swiss Confederation, of the other, signed seven agreements on 21 June 1999 in Luxembourg (Luxembourg), including the Agreement on the free movement of persons (OJ 2002 L 114, p. 6; 'the EC-Switzerland Agreement'). By Decision of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (2002/309/EC, Euratom) (OJ 2002 L 114, p. 1), those agreements were approved on behalf of the Community. They entered into force on 1 June 2002.

4 Article 1 of the EC-Switzerland Agreement, entitled 'Objective', provides:

'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:

…

(b) to facilitate the provision of services in the territory of the Contracting Parties, and in particular to liberalise the provision of services of brief duration …'

5 Article 5 of the EC-Switzerland Agreement, entitled 'Persons providing services', is worded as follows:

'1 Without prejudice to other specific agreements between the Contracting Parties specifically concerning the provision of services …, persons providing services, including companies in accordance with the provisions of Annex I, shall have the right to provide a service in the territory of the other Contracting Party for a period not exceeding 90 days' of actual work in a calendar year.

…'

6 Under Article 15 of the EC-Switzerland Agreement, entitled 'Annexes and Protocols', the annexes and protocols to that agreement are to form an integral part thereof.

7 Article 17 of Annex I to the EC-Switzerland Agreement, entitled 'Persons providing services', states:

'With regard to the provision of services, the following shall be prohibited under Article 5 of this Agreement:

(a) any restriction on the cross-frontier provision of services in the territory of a Contracting Party not exceeding 90 days of actual work per calendar year;

…'

8 According to Article 18 of Annex I, the provisions of Article 17 of that annex are to apply to companies formed in accordance with the law of a Member State of the Community or the Swiss Confederation and having their registered office, central administration or principal place of business in the territory of a Contracting Party.

9 Article 21 of Annex I provides:

'1 The total duration of provision of services under Article 17(a) of this Annex, whether continuous or consisting of successive periods of provision, may not exceed 90 days of actual work per calendar year.

…'

European Union law

10 Under recital 19 of Directive 2000/31:

‘The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; … the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; …’

11 Article 1 of that directive, entitled ‘Objective and scope’, is worded as follows:

‘1 This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

…

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.’

12 Article 2 of Directive 2000/31, entitled ‘Definitions’, provides:

‘For the purpose of this Directive, the following terms shall bear the following meanings:

(a) “information society services”: services within the meaning of Article 1(2) 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)] as amended by Directive 98/48/EC [of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18)];

(b) “service provider”: any natural or legal person providing an information society service;

(c) “established service provider”: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

…’

13 Article 3 of that directive, entitled ‘Internal market’, states:

‘1 Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…’

Italian law

14 La Legge n. 232 – Bilancio di previsione dello Stato per l'anno finanziario 2017 e bilancio pluriennale per il triennio 2017-2019 (Law No 232 on the estimated State budget for the financial year 2017 and multiannual budget for the three-year period 2017-2019) of 11 December 2016 (GURI No 297 of 21 December 2016, Ordinary Supplement to GURI No 57), in the version applicable to the dispute in the main proceedings ('the 2016 Law'), contains Article 1, paragraph 545 of which provides as follows:

'In order to counter tax avoidance and evasion, and also to ensure consumer protection and guarantee public order, the sale or any other form of placement of admission tickets for entertainment activities effected by a person other than the owners of the systems for issuing those tickets, even on the basis of an appropriate contract or agreement, shall be punished – save where the act concerned constitutes a criminal offence – by the prohibition of such conduct and by administrative fines of between EUR 5 000 and EUR 180 000; furthermore, where the conduct in question is carried out through electronic communication networks, in accordance with the procedures laid down in paragraph 546, the punishment shall also be by removal of the contents, or, in the most serious cases, by shutting down the website through which the infringement was committed, without prejudice to actions for damages. [AGCOM] and the other competent authorities shall carry out the necessary investigations and interventions, acting on their own initiative or on a report from the persons concerned. In any event, no penalty shall be imposed on the sale or any other form of placement of admission tickets for entertainment activities carried out by a natural person on an occasional basis, provided that it does not have a commercial purpose.'

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

15 Viagogo, which has its registered office and tax domicile in Geneva, operates websites based on the intermediation between consumers for the resale of admission tickets for entertainment activities and sporting events. Once their tickets have been purchased from official issuers, such as the organisers of the performance or event concerned or the authorised distributors ('the primary market'), some people wish to resell them. Viagogo was created in order to bring together supply and demand on the market for the sale of second-hand tickets ('the secondary market').

16 Given the speed with which tickets available on the primary market cease to be available, in particular due to the use of automated purchasing programmes by some users, the number of people looking for tickets, in particular for high-profile performances or events, has continued to grow and the websites dedicated to the secondary market concerned are very successful.

17 In that context, Viagogo pre-selects, on the websites which it operates by means of a platform hosted in the United States, a number of performances or events. Ticket holders, by choosing the performance or event corresponding to those tickets, may offer them for sale on those websites. Viagogo brings together potential sellers and purchasers, by offering ancillary services such as telephone and e-mail assistance, price suggestion based on software and an automated system for promoting tickets for certain performances or events.

18 Since the phenomenon described in paragraph 16 above has reached proportions judged to be worrying in Italy, in particular because of the easy opportunity to use the operation of such websites in order to launder money derived from illegal activities, and since the price at which tickets are sold on the secondary market no longer bears any relation to the price at which those

tickets are offered on the primary market, the Italian legislature has implemented a policy designed to curb that phenomenon, in particular through the adoption of Article 1(545) of the 2016 Law.

19 Following a number of complaints by companies operating in the music events sector, companies selling tickets for music events on the primary market and trade associations, AGCOM carried out checks on the 'www.viagogo.it' site operated by the Viagogo.

20 Following those checks, by Decision No 104/20/CONS of 16 March 2020 AGCOM imposed an administrative fine of EUR 3 700 000 on Viagogo. Viagogo had been accused of committing 37 infringements by means of that website and a link to it on a social network, consisting in the sale between March and May 2019 of tickets for concerts and performances, without Viagogo being the owner of the systems for issuing those tickets, at prices higher than the nominal prices indicated on the authorised sales sites.

21 Viagogo brought an action for annulment of that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), which dismissed that action. It lodged an appeal against the judgment at first instance in the main proceedings before the Consiglio di Stato (Council of State, Italy), the referring court.

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

'(1) Does Directive [2000/31], and in particular Articles 3, 14 and 15 thereof, in conjunction with Article 56 TFEU, preclude the application of legislation of a Member State on sales of tickets for events on the secondary market which has the effect of barring the operator of a hosting platform operating in the [European Union], such as the appellant in the present case, from supplying to third-party users services advertising the sale of tickets for events on the secondary market, reserving that activity solely to sellers, event organisers or other persons authorised by the public authorities to issue tickets on the primary market through certified systems?

(2) In addition, does Article 102 TFEU, in conjunction with Article 106 thereof, preclude the application of legislation of a Member State on the sale of tickets for events which reserves all services relating to the secondary market for tickets (and brokering in particular) solely to sellers, event organisers or other persons authorised to issue tickets on the primary market through certified systems, by barring from that activity information society service providers which intend to operate as a hosting provider for the purposes of Articles 14 and 15 of Directive [2000/31], in particular where, as in the present case, such a reservation has the effect of allowing an operator which is dominant on the primary market for the distribution of tickets to extend its dominance over brokering services on the secondary market?

(3) For the purposes of European legislation and Directive [2000/31] in particular, can the notion of "passive hosting provider" be used only in the absence of any activity involving the filtering, selection, indexing, organisation, cataloguing, aggregation, evaluation, use, modification, extraction or promotion of the contents published by users, deemed to be illustrative indicators which do not all have to coexist since they are to be regarded in their own right as indicating business management of the service and/or the adoption of a technique for assessing user behaviour to increase their loyalty, or is it for the referring court to assess the

relevance of those circumstances so that, if one or more of them exists, the neutrality of the service which leads to classification as passive hosting provider may be regarded as overriding?'

Admissibility of the request for a preliminary ruling

23 In the first place, it should be borne in mind that, in order to be admissible, a request for a preliminary ruling must be necessary in order for the referring court to decide on the dispute before it (judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799 paragraph 30 and the case-law cited), which presupposes that the provisions of EU law to which that request relates are applicable to that dispute.

24 In that regard, first, it must be noted that the three questions referred by the national court concern the interpretation of Directive 2000/31. However, that directive is not applicable *ratione personae* to the dispute in the main proceedings.

25 In accordance with Article 1 thereof, Directive 2000/31 seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services 'between the Member States'. This presupposes, therefore, for that directive to be applicable *ratione personae*, that the services in question are provided by service providers established on the territory of a Member State, as stated in Article 3(1) of the directive.

26 In that regard, Article 2(c) of Directive 2000/31 defines 'established service provider' as a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. Article 2(c) further states that the presence and use of the technical means and technologies required to provide the service concerned do not, in themselves, constitute an establishment of the provider.

27 In that respect, it follows from the case-law that since application of Article 3(1) and (2) of Directive 2000/31 is thus subject to the identification of the Member State in whose territory the information society service provider concerned is actually established, it is for the national court to ascertain whether that provider is actually established in the territory of a Member State. In the absence of such establishment, the mechanism laid down in Article 3(2) of Directive 2000/31 does not apply (judgment of 15 March 2012, *G*, C-292/10, EU:C:2012:142, paragraph 71 and the case-law cited).

28 Similarly, the prohibition, for reasons falling within the coordinated field, of restrictions on the freedom to provide services, which Directive 2000/31 deals with, relates only, according to the express wording of Article 3(2) of that directive, to services 'from another Member State'.

29 Admittedly, pursuant to the Agreement on the European Economic Area (EEA) of 2 May 1992 (OJ 1994 L 1, p. 3), the European Economic Area (EEA) Joint Committee, by Decision No 91/2000 of 27 October 2000 amending Annex XI (telecommunications services) to the EEA Agreement (OJ 2001 L 7, p. 13), extended the scope of Directive 2000/31 to the EEA, with the result that that directive also covers the States party to that agreement. However, the Swiss Confederation is not among them. Furthermore, no decision has been adopted by the EU-Switzerland Joint Committee, set up under the EC-Switzerland Agreement, with a view to extending the application of that directive to that third State.

30 It is not disputed that Viagogo is established in Geneva and has its registered office and centralises its economic activity there, notwithstanding the fact that it deploys its websites in versions accessible in various Member States of the European Union and, in particular, in Italy. The services in question are, therefore, provided from a third State by a company governed by the law of that third State.

31 It follows that, contrary to what the referring court assumes, Directive 2000/31 cannot be relied on by the applicant in the main proceedings. Since all the questions referred by that court relate to that directive, the request for a preliminary ruling is inadmissible in its entirety.

32 Secondly, moreover, it must be stated, as regards the first question, that Viagogo cannot rely on Article 56 TFEU either.

33 That article, save where an international treaty or agreement so provides, is not applicable to a company established in a State outside the European Union, even if that company provides services which nationals of certain Member States or companies established in the territory of those States may obtain (see, to that effect, judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 36 and the case-law cited).

34 In the present case, the scope of the EC-Switzerland Agreement does not allow Viagogo to rely on the application of Article 56 TFEU, since the particular feature of that agreement is to provide, as regards the treatment of service providers, established in Switzerland, like providers established on the territory of a Member State, for a time limitation of 90 days per calendar year.

35 Thus, Article 1 of the EC-Switzerland Agreement makes provision, in particular, 'to liberalise the provision of services of brief duration', with Article 5(1) of that agreement granting Swiss service providers 'the right to provide a service in the territory of the other Contracting Party for a period not exceeding 90 days' of actual work in a calendar year.' Annex I to the EC-Switzerland Agreement, which, according to Article 15 of that agreement, forms an integral part of it, includes Article 17 which prohibits 'any restriction on the cross-frontier provision of services in the territory of a Contracting Party not exceeding 90 days of actual work per calendar year'. Furthermore, Article 18 of that annex stipulates that the provisions of Article 17 of that annex are to apply to companies formed in accordance with the law of a Member State of the Community or the Swiss Confederation and having their registered office, central administration or principal place of business in the territory of a Contracting Party. Lastly, Article 21 of that same annex states that those 90 days correspond to the total duration of provision of services, whether continuous or consisting of successive periods of provision.

36 However, in the present case, it is apparent from the documents before the Court that Viagogo provides services for a longer duration than that provided for by the EC-Switzerland Agreement.

37 First of all, by its very nature, a service provider carrying out its activity exclusively through websites confers on that activity an almost continuous, even permanent, character. In particular, with regard to an offer concerning the announcement of the sale of tickets for a given performance or event, potential purchasers will be able to come forward at any time via the website concerned. In that regard, it is not apparent from the information provided by the referring court that the website operated by the applicant in the main proceedings has, since its creation, ceased to operate at any time, as confirmed by the Italian Government, which states that 'the intermediary service on the secondary market has been provided [by Viagogo] continuously throughout the calendar year'.

38 Next, it is apparent from the evidence put forward at first instance in the main proceedings that Viagogo had already been penalised by AGCOM in 2016 and that its activity did not appear to be limited in time.

39 Lastly, AGCOM's decision of 16 March 2020, which relates specifically to the months of March to May 2019, that is to say, 92 days, refers to a period exceeding the maximum duration of 90 days laid down in the EC-Switzerland Agreement. In addition, it is apparent from the judgment at first instance in the main proceedings that the last sale that was the subject of AGCOM's inspection took place on 7 September 2019, that is to say, in any event, well beyond the 90 days provided for in the EC-Switzerland Agreement.

40 Viagogo does not, therefore, fall within the scope *ratione personae* of Article 56 TFEU and, consequently, cannot rely on infringement of that article in the context of the dispute in the main proceedings, with the result that the first question, in so far as it concerns the interpretation of that article, is also inadmissible on that ground.

41 In the second place, the second and third questions lead the Court to recall, for the sake of completeness, its case-law according to which a question referred for a preliminary ruling by a national court is inadmissible where the latter does not provide the Court with the factual or legal material necessary to give a useful answer (judgment of 2 July 2015, *Gullotta and Farmacia di Gullotta Davide & C.*, C-497/12, EU:C:2015:436, paragraph 26).

42 Thus, at no point in the request for a preliminary ruling does the referring court state, as regards the second question, the reasons which prompted it to inquire about the interpretation of Articles 102 and 106 TFEU, or the relationship between those articles and, in particular, the Law of 2016, contrary to the requirements laid down in Article 94(c) of the Rules of Procedure of the Court of Justice.

43 In particular, as regards Article 102 TFEU et seq., and more specifically the existence of a possible abuse of a dominant position, no reference is made by the referring court to the constituent elements of a dominant position for the purposes of Article 102 TFEU in the context of the main proceedings (see, to that effect, judgment of 12 December 2013, *Ragn-Sells*, C-292/12, EU:C:2013:820, paragraph 41). Nothing is said about what that abuse of a dominant position would be or how the 2016 Law would be likely to lead to it (see, to that effect, judgment of 2 July 2015, *Gullotta and Farmacia di Gullotta Davide & C.*, C-497/12, EU:C:2015:436, paragraph 25).

44 As regards the third question, the hypothetical nature of which is evident, it must be borne in mind that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, in particular, judgments of 16 December 1981, *Foglia*, C-244/80, EU:C:1981:302, paragraph 18, and of 20 January 2005, *García Blanco*, C-225/02, EU:C:2005:34, paragraph 28 and the case-law cited).

45 Accordingly, in the light of all the foregoing considerations, the request for a preliminary ruling is inadmissible.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy), made by decision of 27 January 2022, is inadmissible.

[Signatures]