Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 25 April 2024[1]

Case C-73/23

Chaudfontaine Loisirs SA
v
État belge, represented by the Ministre des Finances,
Interested party:
État belge, represented by the Ministre de la Justice

(Request for a preliminary ruling from the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium))

(Reference for a preliminary ruling – Tax law – Value added tax – Directive 2006/112/EC – Article 135(1)(i) – Exemption of gambling – Direct effect of the exemption – Differentiation between online gambling and analogue gambling – Differentiation between various kinds of online gambling (lotteries and other forms of online gambling) – Inadmissibility of questions referred for a preliminary ruling – Temporary maintenance in force of national law without prior reference for a preliminary ruling)

I. Introduction

'*By gaming we lose both our time and treasure – two things most precious [in] life …*' (Owen Feltham, English writer, 1602-1668).

1. Although these and other dangers of gambling are generally recognised, Article 135(1)(i) of Directive 2006/112/EC on the common system of value added tax ('the VAT Directive')[2] has always exempted betting, lotteries and other forms of gambling. At first sight, the European Union appears to seek to promote gambling in terms of VAT. However, that exemption only applies 'subject to the conditions and limitations laid down by each Member State'.

2. Belgium has opted no longer to exempt online gambling (except online lotteries) from VAT since 1 July 2016. Other forms of gambling, however, remain exempt from VAT. Online gambling providers in Belgium consider this selective exemption to be an infringement of the principle of neutrality. In the similar case of *Casino de Spa and Others* (C-741/22),[3] they also consider the exemption of other gambling providers to be an unlawful State aid. In the end, a

[1] Original language: German.

[2] Council Directive of 28 November 2006 (OJ 2006 L 347, p. 1) in the versions applicable to the years in dispute (2016 to 2018).

[3] See, in that respect, my Opinion of the same date.

VAT exemption for online gambling is to be derived directly from EU law. This can only be successful in so far as the VAT Directive has direct effect in that respect, that is to say if that exemption already derives from it.

3. Although the Court has dealt with the different taxation of various types of gambling in VAT law on several occasions in the past,[4] recent case-law gives cause to consider in depth the direct effect of Article 135(1)(i) of the VAT Directive in such a situation (selective exemption of individual types of gambling). At the same time, the Court has the opportunity to clarify whether and to what extent the principle of neutrality precludes a selective exemption of individual types of gambling.

II. Legal framework

A. European Union law

4. Article 135(1)(i) of the VAT Directive governs the exemption of gambling from tax and is worded as follows:

'1. Member States shall exempt the following transactions:

…

(i) betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State.'

B. Belgian law

5. Originally, transactions relating to non-lottery gambling were also exempt from VAT in Belgium. Articles 29 to 34 of the Programme Law of 1 July 2016 annulled that exemption. As a result, those transactions became taxable, while 'conventional' types of gambling and all lotteries (online and 'analogue') remained exempt from tax.

6. However, the Cour constitutionnelle (Constitutional Court, Belgium) annulled the provisions in question of the Programme Law of 1 July 2016 with effect from 21 May 2018 on account of the infringement of national rules on competences. It stated that the taxes already paid for the period from 1 July 2016 to 21 May 2018 would nevertheless be maintained in view of the budgetary and administrative difficulties which would arise from their reimbursement.

III. Facts and preliminary ruling procedure

7. Chaudfontaine Loisirs SA ('the applicant') operates an 'online casino'. It requests reimbursement of a principal amount of EUR 640 478.82 which it paid in VAT on online gambling and betting occurring between 1 July 2016 and 21 May 2018.

[4] See, in particular: judgments of 24 October 2013, *Metropol Spielstätten* (C-440/12, EU:C:2013:687); of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489); of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719); of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333); of 13 July 2006, *United Utilities* (C-89/05, EU:C:2006:469); of 17 February 2005, *Linneweber and Akritidis* (C-453/02 and C-462/02, EU:C:2005:92); and of 11 June 1998, *Fischer* (C-283/95, EU:C:1998:276).

8. By decision of 1 December 2020, the administration rejected that request on the ground that the conditions for reimbursement were not fulfilled. The applicant then brought the matter before the referring court.

9. The applicant maintains, first, that the VAT at issue was levied in breach of the principle of fiscal neutrality governing the VAT Directive. It complains, next, that the effects of the annulled law were maintained for the period in question. The defendant Belgian State, on the other hand, recalls the discretionary power of Member States to exempt certain categories of games from and to subject others to VAT. Furthermore, the provisions annulled by the Cour constitutionnelle (Constitutional Court), which were ordered to be maintained in force for a limited period, do not constitute a defective transposition of the VAT Directive.

10. The tribunal de première instance de Liège (Court of First Instance, Liège, Belgium) seised of the action stayed the proceedings and referred the following five questions to the Court of Justice for a preliminary ruling under Article 267 TFEU:

'(1) Do Article 135(1)(i) of [the VAT Directive] and the principle of fiscal neutrality permit a Member State to exclude from the benefit of the exemption contained in that provision only gambling which is provided electronically while gambling which is not provided electronically remains exempt from VAT?

(2) Do Article 135(1)(i) of [the VAT Directive] and the principle of fiscal neutrality permit a Member State to exclude from the benefit of the exemption contained in that provision only gambling which is provided electronically (to the exclusion of lotteries, which remain exempt from VAT whether or not they are provided electronically)?

(3) Does the third paragraph of Article 267 of the Treaty on the Functioning of the European Union permit a higher court to decide to maintain the effects of a provision of national law which it annuls because of an infringement of national law without ruling on the infringement of EU law which was also raised before it, and, therefore, without referring for a preliminary ruling the question of the compatibility of that provision of national law with EU law or asking the Court about the circumstances in which it could decide to maintain the effects of that provision in spite of its incompatibility with EU law?

(4) If the answer to one of the previous questions is in the negative, could the constitutional court maintain the past effects of the provisions which it annulled because of their incompatibility with national rules on the division of powers when those provisions were also incompatible with [the VAT Directive], in order to prevent budgetary and administrative difficulties from arising from reimbursement of taxes already paid?

(5) If the answer to the previous question is in the negative, can the taxable person be reimbursed the VAT which it has paid on the actual gross margin on the gaming and betting which it operates on the basis of provisions incompatible with [the VAT Directive] and the principle of fiscal neutrality?'

11. The applicant, the Kingdom of Belgium, Portugal, the Czech Republic and the European Commission submitted written observations in the proceedings before the Court. In accordance with Article 76(2) of the Rules of Procedure of the Court of Justice, the Court did not consider it necessary to hold a hearing.

IV. Legal assessment

12. The five questions can essentially be broken down into two sets.

13. Since the applicant in the main proceedings is challenging the levying of VAT on its services under national law, Questions 1, 2 and 5 relate to whether the applicant's services are exempt from VAT under Article 135(1)(i) of the VAT Directive and the applicant is to be reimbursed the tax paid in breach of EU law despite the maintenance in force of national law to the contrary. This requires that an exemption for online gambling arises directly from the VAT Directive on which the applicant can rely (B).

14. Questions 3 and 4, on the other hand, relate to whether the Constitutional Court in Belgium was able to order the maintenance in force of national law without a prior reference for a preliminary ruling, which is why the tax arose under national law in the first place. This raises the question as to the admissibility of those two questions (A).

A. Admissibility of Questions 3 and 4

15. Questions 3 and 4 are admissible in preliminary ruling proceedings only if the answer to them is necessary and relevant in order to give judgment in the main proceedings.

16. In principle, it is solely for the national court before which the dispute has been brought to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Questions concerning the interpretation of a rule of EU law enjoy a presumption of relevance.[5] The Court may refuse to rule on a question only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[6]

17. Even on the basis of the abovementioned presumption, Questions 3 and 4 are inadmissible in this case. The main proceedings concern the reimbursement of a tax which may have been paid in breach of EU law (or more precisely, in breach of the directive). The national statute was, although it had to be annulled for reasons of national law, also declared by the competent national court to be maintained in force for a certain period of time on reasons of national law (the order that it be temporarily maintained in force).

18. National law thus requires taxation that may infringe the VAT Directive. Whether the applicant remains obliged to pay the VAT already paid for the period from 1 July 2016 to 21 May 2018 therefore results solely from the interpretation of the VAT Directive (and thus from the answer to Questions 1, 2 and 5). Whether the Belgian Constitutional Court could or even should have made a reference to the Court of Justice before ordering that the law be maintained in force is irrelevant.

[5] See judgments of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraphs 27 and 28), and of 9 July 2020, *Santen* (C-673/18, EU:C:2020:531, paragraphs 26 and 27 and the case-law cited).

[6] See judgments of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 28), and of 9 July 2020, *Santen* (C-673/18, EU:C:2020:531, paragraph 27 and the case-law cited).

19. Furthermore, it is not clear why an infringement of Article 267 TFEU by *one* court, namely the Constitutional Court, should have a bearing on the decision of *another* court, which referred the decisive questions of EU law to the Court of Justice for a preliminary ruling. The dissatisfaction with the conduct of the Belgian Constitutional Court in not making a reference for a preliminary ruling and the interpretation of Article 267 TFEU that is sought consequently bears no relation to the dispute in the main proceedings. Questions 3 and 4 are therefore inadmissible.

20. Lastly, the referring court does not inform the Court of Justice of what the Belgian Constitutional Court can and may actually examine. If its *national* power of review is limited, for example, to compliance with the national rules on competence, a reference for a preliminary ruling can hardly be considered. Therefore, the Court of Justice does not have the necessary information to be able to examine an infringement of Article 267 TFEU. For this reason too, Questions 3 and 4 are inadmissible. Consequently, only Questions 1, 2 and 5 need to be answered.

B. The exemption of online gambling pursuant to the VAT Directive (Questions 1, 2 and 5)

21. In the main proceedings, the applicant objects to the taxation of its online gambling services under national law (maintained in force). This appears to be unambiguous and cannot be interpreted in conformity with EU law. Therefore, the interpretation of Article 135(1)(i) of the VAT Directive is only relevant if that article has direct effect (1). Essentially, the applicant takes the view that its services should be treated in precisely the same way as other exempt gambling services. That could possibly also result from the principle of neutrality of VAT (2).

1. Direct effect of the exemption?

22. According to settled case-law, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the Member State where the Member State has failed to implement the directive in domestic law within the period prescribed or where it has failed to implement the directive correctly. [7]

23. A provision of EU law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. [8] On the other hand, a provision is conditional if it involves the application of national provisions determining the actual scope of the conditions under which EU law is applicable. [9] It is sufficiently precise where it sets out an obligation in unequivocal terms. [10]

24. In the light of this settled case-law, Article 135(1)(i) of the VAT Directive is neither unconditional nor sufficiently precise. It provides that gambling is to be exempted 'subject to the conditions and limitations laid down by each Member State'. It does not make clear which forms

7 Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 26), and of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraph 13 and the case-law cited).

8 Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 27), and of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 49 and the case-law cited).

9 See, expressly, judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraph 50).

10 Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 28), and of 1 July 2010, *Gassmayr* (C-194/08, EU:C:2010:386, paragraph 45 and the case-law cited).

of gambling specifically are to be exempted and therefore an obligation is not imposed on the Member State in unequivocal terms. On the contrary, it follows from the wording that only certain forms (chosen by the Member States) of gambling can be exempted.

25. Nor is that obligation unconditional because, according to the clear wording of Article 135(1)(i) of the VAT Directive, it is qualified by 'the conditions and limitations laid down by each Member State'. Consequently, the exemption of gambling requires, in its implementation or effects, the taking of a measure by the Member States.

26. It is probably for that reason that the Court [11] expressly ruled in 2010 that 'Article 135(1)(i) of [the VAT Directive] must be interpreted as meaning that the exercise of the discretionary power of the Member States to fix conditions and limitations on the exemption from value added tax provided for by that provision allows those States to exempt from that tax only certain forms of gambling'. It subsequently confirmed that interpretation on two occasions. [12]

27. However, if – following the Court's interpretation – Article 135(1)(i) of the VAT Directive allows Member States to exempt only *certain* forms of gambling, the same applies in this case as the Court of Justice has ruled on other tax exemptions. In so far as the Member States only had to exempt *certain* services (as in Article 132(1)(n) and (m) of the VAT Directive), those provisions have no direct effect. [13]

28. The expression 'certain forms of gambling' in the Court's decision [14] indicates that that provision does not impose an obligation on Member States to make a general exemption for 'all' services that constitute gambling. [15] To interpret Article 135(1)(i) of the VAT Directive as meaning that, notwithstanding the use of the word 'certain', Member States are obliged to exempt 'all' forms of gambling would be liable to extend the material scope of the exemption. That would also be contrary to the Court's case-law stating that the exemptions in the VAT directive are to be interpreted strictly. [16]

29. The very fact that Article 135(1)(i) of the VAT Directive allows Member States to exempt only 'certain' [17] forms of gambling militates against the direct effect of Article 135(1)(i) of the VAT Directive. [18]

30. The only (earlier) decision of the Court of Justice which, by contrast, attributed direct effect to the predecessor provision in Article 13(B)(f) of the Sixth [Council] Directive 77/388 [of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1)] in order to

[11] Judgment of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333, operative part).

[12] Judgment of 24 October 2013, *Metropol Spielstätten* (C-440/12, EU:C:2013:687, paragraph 29), and, similarly, judgment of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 53).

[13] Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013), and of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117).

[14] Judgment of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333, operative part).

[15] To that effect, judgment of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 30)

[16] To that effect, judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 34); of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraph 17 and the case-law cited); and of 21 March 2013, *PFC Clinic* (C-91/12, EU:C:2013:198, paragraph 23).

[17] Judgment of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333, operative part).

[18] See, to that effect, judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, paragraph 36), and of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, paragraphs 14, 16, 23 and 24).

prevent the application of rules of national law which are incompatible with that provision, [19] has, in my view, been superseded by the more recent case-law on the direct effect of VAT exemptions [20] and VAT options [21] and by the decision of the Court of Justice from 2010. [22]

31. This is also convincing in terms of substance. That is because the exemption of gambling in Article 135(1)(i) of the VAT Directive is not linked to any particular evaluation under EU law. According to the Court, that exemption is merely based on practical considerations, in that gambling transactions do not lend themselves easily to the application of VAT. Unlike in the case of certain public interest services supplied in the social sector, there is no desire here to afford those activities more advantageous VAT treatment. [23] It is more likely that that exemption reflects a compromise between the then six Member States, some of which already had special gambling laws and therefore taxed individual forms of gambling. By the exemption subject to the conditions and limitations of the Member States, they were able to retain their gambling laws and avoid double levying of VAT.

32. In any case, it is not possible to see any reason why such an exemption should have direct effect for purely technical reasons (impractical levying or avoidance of double taxation) under the conditions and within the limitations of the individual Member States. There is therefore no need for a particularly extensive assumption of a direct effect of that exemption. The fact therefore remains that that exemption has no direct effect.

33. However, if the applicant cannot in any event rely directly on the exemption laid down in Article 135(1)(i) of the VAT Directive in this case, there is no need to answer Questions 1, 2 and 5. It is then for the Commission to bring infringement proceedings against Belgium if it believes that the taxation of the applicant (and other online gambling operators) infringes the VAT Directive. However, no such concerns are evident from the Commission's observations.

2. Infringement of the principle of neutrality?

34. The principle of fiscal neutrality is of no assistance to the applicant in this regard either. A Member State must also comply with the principle of fiscal neutrality when exercising its options or discretion. [24] First, that cannot lead to the direct effect of an insufficiently precise or

[19] Judgment of 17 February 2005, *Linneweber und Akritidis* (C-453/02 and C-462/02, EU:C:2005:92, point 2 of operative part). Along similar lines, although not in the operative part, judgment of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraphs 68 and 6[9]), it being less about the taxable person relying on a provision of a directive and more about the Member State not relying on its national law to the contrary. Whether this is really a question of the primacy of EU law and covered by the case-law of the Court of Justice on the (exceptional) direct effect of directives in favour of the individual is, however, somewhat questionable.

[20] Judgments of 10 December 2020, *Golfclub Schloss Igling* (C-488/18, EU:C:2020:1013, point 1 of operative part), and of 15 February 2017, *British Film Institute* (C-592/15, EU:C:2017:117, operative part).

[21] On the Member States' option under Article 11 of the VAT Directive to regard several taxable persons as a single taxable person – judgment of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, point 3 of operative part).

[22] Judgment of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333, operative part), confirmed by judgments of 24 October 2013, *Metropol Spielstätten* (C-440/12, EU:C:2013:687, paragraph 29.), and of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 53).

[23] Judgments of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 39); of 14 July 2011, *Henfling and Others* (C-464/10, EU:C:2011:489, paragraph 29); of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333, paragraph 24); and of 13 July 2006, *United Utilities* (C-89/05, EU:C:2006:469, paragraph 23).

[24] Judgments of 9 September 2021, *Phantasialand* (C-406/20, EU:C:2021:720, paragraph 36); of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 46); and of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 28).

conditionally worded provision of a directive. Secondly, that principle 'merely' precludes that similar goods or services which are in competition with each other are treated differently for VAT purposes. [25]

35. Goods or services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable. In addition, the differences between them must not have a significant influence on the decision of the average consumer to use one or the other of those goods, [26] and those supplies can therefore, from the point of view of the average consumer, be exchanged one for the other. [27] The assessment as to whether goods or services are similar from the point of view of a consumer entails by definition a degree of discretion.

36. In connection with the adoption of tax measures, the Court recognises that the *EU legislator* is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. As a result, it must be granted broad discretion, so that judicial review must be limited to manifest errors. [28] In particular, the Court cannot substitute its own assessment for that of the EU legislator. [29]

37. In the light of the Court's most recent case-law, the same applies in relation to the review of the discretion of *national legislators*. The Court thus increasingly points out the fact that the European Union is composed of States which respect and share the values referred to in Article 2 TEU. [30] The values referred to in Article 2 TEU, on which the European Union is founded, include in particular the principle of democracy. According to that principle, it is the democratically legitimised legislator that is primarily responsible for discharging the discretion to make legislative decisions.

38. Consequently, where EU law grants such discretion to a Member State, it is the elected parliament of that Member State that is primarily responsible for exercising it. The powers of other bodies to review that parliamentary decision-making discretion are therefore, *by definition*, limited. They cannot substitute their own view as to the similarity of goods or services for that of the body democratically legitimised to form it. This applies to national courts just as much as to the courts of the European Union.

[25] Judgments of 19 December 2019, *Segler-Vereinigung Cuxhaven* (C-715/18, EU:C:2019:1138, paragraph 36); of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 47); of 9 March 2017, *Oxycure Belgium* (C-573/15, EU:C:2017:189, paragraph 30); of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 32); and of 6 May 2010, *Commission* v *France* (C-94/09, EU:C:2010:253, paragraph 40).

[26] Judgments of 3 February 2022, *Finanzamt A* (C-515/20, EU:C:2022:73, paragraph 44); of 9 September 2021, *Phantasialand* (C-406/20, EU:C:2021:720, paragraph 38); of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 48); of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 31); and of 27 February 2014, *Pro Med Logistik and Pongratz* (C-454/12 and C-455/12, EU:C:2014:111, paragraph 54).

[27] See, expressly, judgment of 9 September 2021, *Phantasialand* (C-406/20, EU:C:2021:720, paragraph 39). The judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 33), speaks of interchangeable.

[28] Judgment of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraph 54). See also, to that effect, judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 123), and of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 35).

[29] See further, expressly to this effect, judgment of 17 October 2013, *Billerud Karlsborg and Billerud Skärblacka* (C-203/12, EU:C:2013:664, paragraph 35).

[30] Judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 42 and 43); of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 63); and of 25 July 2018, *Minister for Justice and Equality (Defects in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 35). On taking account of the principle of democracy when interpreting directives, see also judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraph 41).

39. On that basis, the Court may also, as a general rule, find the principle of neutrality to have been infringed by the democratically legitimised legislator only if it has clearly exceeded its decision-making discretion. This is the case, however, only if, from the point of view of the average consumer, the goods or services taxed at different rates are all but identical and could therefore readily be substituted for each other, [31] as the Commission also submits. It is only then that there is a distortion of competition between the providers of those goods or services which is no longer compatible with the principle of neutrality.

40. For that reason, the Court has thus far been generally reluctant to find an infringement of the principle of neutrality, where, for example the Member States apply a reduced rate of tax, or an exemption from tax, only to fresh pastry goods and cakes (but not to those which exceed a certain best-before date [32]), only to mobile fairground entertainers (but not to stationary amusement parks [33]), not to all medicinal products (but only to certain ones, depending, inter alia, on how they are used [34]), only to taxis (but not to all forms of passenger transport by car [35]), or only to printed books (but not to books on other physical media [36]).

41. In the light of this limited power of review of the Court, there is no manifest exceeding of decision-making discretion in this case. The differently taxed services (online gambling or non-lottery online gambling, on the one hand, and 'analogue' gambling or online lotteries, on the other) differ – contrary to the view taken by the applicant – from the point of view of an average consumer in several respects.

42. For example, online gambling differs from 'analogue' gambling in terms of location (anytime and anywhere versus specific locations); the effort required to start such gambling (no effort, as possible anytime and anywhere via smartphone, versus physical movement to a specific location required); the lack of 'social control' of gambling in private which is possible at any time; the potential for addiction or the danger of gambling that is available and easily accessible at any time, and also the way in which the gambling is carried out (click on the computer versus physical action on a slot machine or even interaction with a person (for example. a croupier) on site). A visit to an 'analogue' casino can be described more as an 'event', whilst a 'visit' to a website ('online casino') can be described more as 'gambling on the internet'.

43. Having regard solely to the content of the service (in this case the satisfaction of a gaming need) is therefore of no assistance. Instead, the external factual and legal context must also be included in the point of view of an average consumer. [37] The same applies in relation to any objectives that a parliamentary body may be pursuing by differentiation. The principle of neutrality of VAT does not prohibit objectively justified differentiations.

44. The fact that the medium (online versus 'analogue') is a significant criterion for differentiation from the point of view of the EU legislator is, moreover, demonstrated by the provisions of the VAT Directive, some of which also differentiate according to whether a service is provided

[31] Judgment of 9 September 2021, *Phantasialand* (C-406/20, EU:C:2021:720, paragraph 39: 'In other words, it is necessary to determine whether the goods and services at issue are interchangeable from the point of view of an average consumer.')

[32] Judgment of 9 November 2017, *AZ* (C-499/16, EU:C:2017:846, paragraph 36).

[33] Judgment of 9 September 2021, *Phantasialand* (C-406/20, EU:C:2021:720, paragraph 48).

[34] Judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraph 49).

[35] Judgment of 27 February 2014, *Pro Med Logistik and Pongratz* (C-454/12 and C-455/12, EU:C:2014:111, paragraph 60).

[36] Judgment of 11 September 2014, *K* (C-219/13, EU:C:2014:2207, paragraph 34).

[37] Possibly different in this respect, judgment of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraph 47 et seq., but without giving more detailed reasons). However, that judgement did not concern the distinction between online and offline activities, which the Commission also rightly points out.

electronically (see, inter alia, the place of taxation (special provision in Article 58 of the VAT Directive) or the tax rate (Article 98(3) of the VAT Directive excludes certain reduced tax rates for services which are provided electronically)). All of this would be unnecessary if electronic and 'analogue' transactions were readily interchangeable.

45. Consequently, it is not sufficient for different types of gambling to satisfy a comparable gambling need (or a comparable gambling addiction) in order to find an infringement of the principle of neutrality. Nor is it sufficient that one or the other consumer may switch from one type of gambling to another, so that a certain degree of competition between the different providers cannot be ruled out. The decisive factor is whether the legislator considers that the two services can, from the point of view of the average consumer, (obviously) be exchanged one for the other.

46. As a result of the circumstances of the use of the services and the associated different risks of gambling, 'online' and 'analogue' gambling can therefore also be taxed differently – as the Commission, the Czech Republic, Portugal and Belgium submit.

47. The distinction in Belgium between online lotteries and other forms of online gambling too cannot be called into question. Lotteries are a special type of gambling that is usually organised according to a specific programme in return for a fixed stake with the prospect of winning certain cash or non-cash prizes. The outcome is based on chance and is usually announced publicly. In that type of gambling – as the Commission rightly points out – the activity is limited to the purchase of a lottery ticket and in that respect differs from other forms of online gambling which are based on repeated activities of the player, who immediately learns of his or her good fortune (or more often bad fortune) and reacts spontaneously. As Belgium submits, the gaming element is missing in that case. There are also differences in the minimum and maximum permitted stakes, prizes and the chances of winning. [38]

48. Furthermore, the history of lotteries and also certain (historical) tax laws of the Member States show a traditional separation between lotteries and other kinds of gambling. [39] This indicates that for an average consumer, a lottery has probably always been something different from gambling in a casino or on a slot machine. It can therefore hardly be claimed that online lotteries and other forms of online gambling can, from the point of view of the average consumer, be exchanged one for the other. An infringement of the principle of neutrality is also not apparent in this regard.

3. Interim conclusion

49. Article 135(1)(i) of the VAT Directive has no direct effect. Even if Article 135(1)(i) of the VAT Directive did have direct effect, Belgium's differentiation between gambling which is provided electronically and gambling which is not provided electronically would not constitute an infringement of the principle of neutrality of VAT. The same applies in relation to the differentiation between gambling which is provided electronically and lotteries which are carried out electronically. In the absence of an infringement of EU law, EU law therefore does not require that the VAT owed under national law must be reimbursed to the applicant.

[38] The Court has previously stated that they are relevant factors: judgment of 10 November 2011, *Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraphs 57 and 58).

[39] For example in Germany, the Rennwett- und Lotteriegesetz (Law on Racing Bets and Lotteries), which contains special provisions on the taxation of public lotteries in Paragraph 26 et seq. In Austria, the Glücksspielgesetz (Law on Games of Chance) also contains special rules on lotteries in Paragraphs 6 to 12a. France likewise taxes lottery draws differently from horse-race betting or casinos.

V. Conclusion

50. I therefore propose that the questions referred by the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium) be answered as follows:

(1) Article 135(1)(i) of the VAT Directive has no direct effect. It is neither unconditional nor sufficiently precise.

(2) The principle of neutrality of VAT does not preclude a differentiation between gambling which is provided electronically and gambling which is not provided electronically. Instead, there are objective reasons for this and for the differentiation between gambling which is provided electronically and lotteries which are organised electronically.