



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

22 March 2018 *

(Reference for a preliminary ruling — Payment services — Directive 2007/64/EC — Article 3(e) and (o) — Article 4(3) — Annex — Point 2 — Scope — Operation of multifunctional terminals enabling cash withdrawals in gaming arcades — Consistency of the practice of the national authorities in bringing prosecutions — Confiscation of sums obtained by means of an unlawful activity — Charter of Fundamental Rights of the European Union — Article 17)

In Case C-568/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Nürtingen (Local Court, Nürtingen, Germany), made by decision of 2 November 2016, received at the Court on 10 November 2016, in the criminal proceedings against

Faiz Rasool,

other party:

Rasool Entertainment GmbH,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, E. Levits, A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Rasool, by S. Kauder, R. Steiner and R. Karpenstein, Rechtsanwälte,
- Rasool Entertainment GmbH, by S. Keck, Rechtsanwalt,
- the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and P. Vlaemminck, R. Verbeke and J. Van den Bon, advocaten,
- the European Commission, by T. Scharf and H. Tserepa-Lacombe, acting as Agents,

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

* Language of the case: German.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(e) and (o) and Article 4(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1), read in conjunction with point 2 of the annex to the directive, and of Article 17 of the Charter of Fundamental Rights of the European Union.
- 2 The request has been made in criminal proceedings against Mr Faiz Rasool, in his capacity as manager of Rasool Entertainment GmbH ('RE'), for installing multifunctional terminals enabling cash withdrawals in gaming arcades operated by that company, without being authorised to provide payment services under the German legislation transposing Directive 2007/64.

Legal context

EU law

- 3 Directive 2007/64 was repealed and replaced by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ 2015 L 337, p. 35), with effect from 13 January 2018. However, in view of the date of the facts at issue in the main proceedings, regard should be had to Directive 2007/64. Recitals 6, 20, 22, 26, 36 and 54 of that directive state:

'(6) ... it is not appropriate for that legal framework to be fully comprehensive. Its application should be confined to payment service providers whose main activity consists in the provision of payment services to payment service users. Nor is it appropriate for it to apply to services where the transfer of funds from the payer to the payee or their transport is executed solely in bank notes and coins or where the transfer is based on a paper cheque, paper-based bill of exchange, promissory note or other instrument, paper-based vouchers or cards drawn upon a payment service provider or other party with a view to placing funds at the disposal of the payee. ...

...

- (20) As consumers and enterprises are not in the same position, they do not need the same level of protection. While it is important to guarantee consumers' rights by provisions which cannot be derogated from by contract, it is reasonable to let enterprises and organisations agree otherwise.

...

...

- (22) Consumers should be protected against unfair and misleading practices in line with Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the Internal Market [(OJ 2005 L 149, p. 22)] as well as Directive 2000/31/EC of the European Parliament and 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)] and Directive

2002/65/EC of the European Parliament and the Council of 23 September 2002 concerning the distance marketing of consumer financial services [(OJ 2002 L 271, p. 16), as amended by Directive 2005/29]. ...

...

- (26) This Directive should provide for the consumer's right to receive relevant information free of charge before he is bound by any payment service contract. The consumer should also be able to request prior information as well as the framework contract, on paper, free of charge at any time during the contractual relationship, so as to enable him to compare payment service providers' services and their conditions and in case of any dispute verify his contractual rights and obligations. ...

...

- (36) This Directive should lay down rules for a refund to protect the consumer when the executed payment transaction exceeds the amount which could reasonably have been expected. ...

...

- (54) Since it is necessary to review the efficient functioning of this Directive and to monitor progress on the establishment of a single payment market, the Commission should be required to produce a report three years after the end of the transposition period of this Directive. With regard to the global integration of financial services and harmonised consumer protection ... focal points of the review should be the possible need to expand the scope of application with regard to non-EU currencies ...'

- 4 In accordance with Article 1(1) of Directive 2007/64:

'This Directive lays down the rules in accordance with which Member States shall distinguish the following six categories of payment service provider:

...

- (d) payment institutions within the meaning of this Directive;

...'

- 5 Article 3 of that directive provided in points (e) and (o) respectively that it was not to apply to 'services where cash is provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of the payment transaction through a payment for the purchase of goods or services' or to 'services by providers to withdraw cash by means of automated teller machines acting on behalf of one or more card issuers, which are not a party to the framework contract with the customer withdrawing money from a payment account, on condition that these providers do not conduct other payment services as listed in the Annex'.
- 6 Article 4(3) of the directive provided that, for the purposes of the directive, "payment service" means any business activity listed in the Annex' to the directive.
- 7 Under Article 4(4) of the directive, "payment institution" means a legal person that has been granted authorisation in accordance with Article 10 to provide and execute payment services throughout the [EU]'. ...

- 8 Article 4(14) of the directive provided that “‘payment account” means an account held in the name of one or more payment service users which is used for the execution of payment transactions’.
- 9 Under Article 10(1) of the directive, the Member States are to require payment institutions which intend to provide payment services to obtain authorisation as a payment institution before commencing the provision of payment services.
- 10 Point 2 of the annex to the directive defined as ‘payment services’ inter alia ‘services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account’.

German law

- 11 Directive 2007/64 was transposed into German law in particular by the Gesetz über die Beaufsichtigung von Zahlungsdiensten (Law on the supervision of payment services) of 25 June 2009. Paragraph 1(1) of that law classifies as ‘payment service providers’ credit institutions, electronic money institutions, the Federal State, the *Länder* and municipalities, and the European Central Bank, the Deutsche Bundesbank and the other central banks in the European Union. Under Paragraph 1(1)(5), undertakings which, although not themselves included among those entities, provide payment services commercially or to an extent requiring a commercially organised business operation are also payment service providers. Those undertakings are regarded as ‘payment institutions’.
- 12 Under Paragraph 1(10) of that law, an operation in which ‘cash is provided by the payee to the payer as part of a payment transaction following an explicit request by the payment service user just before the execution of the payment transaction through a payment for the purchase of goods or services’ is not a payment service. The exception in Article 3(o) of Directive 2007/64 appears, moreover, in equivalent wording, in Paragraph 1(10)(14) of the law.
- 13 Under the first sentence of Paragraph 8(1) of that law, a payment institution must obtain written authorisation from the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Institute for Supervision of Financial Services, Germany) in order to provide payment services in German territory.
- 14 Under Paragraph 31(1) of that law, any person who provides payment services without the authorisation provided for in Paragraph 8(1) of the law commits a criminal offence.
- 15 Paragraph 73 of the Strafgesetzbuch (Criminal Code) provides:
- ‘1. If an unlawful act has been committed and the principal or a secondary participant has acquired anything with a view to the act or from the act, the court shall order it to be forfeited. This shall not apply to the extent that the act has given rise to a claim of the injured party, satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained from the act.
2. The forfeiture order shall extend to the benefits received. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the object obtained, or as a replacement for its destruction, damage to it or dispossession of it, or on the basis of an acquired right.’

The dispute in the main proceedings and the questions referred

- 16 Mr Rasool is the manager of RE, which operates two gaming arcades in Germany equipped with slot machines. Until the end of 2012, RE made available to customers of the gaming arcades multifunctional terminals which enabled them to exchange banknotes for coins and to withdraw cash by using a bank card and the associated personal identification number (PIN) issued by their bank.
- 17 The operations and transactions performed with the aid of those terminals were managed by TeleCash, a company acting as an external service provider ('the network operator'). The network operator owned the multifunctional terminals and leased them to RE.
- 18 Until May 2011 the cash withdrawal service was operated in the following manner. The network operator, after the PIN code was entered, checked that the customer's bank account had sufficient funds and, if it did, allowed the cash to be withdrawn. The network operator also ensured that on each occasion RE was reimbursed amounts corresponding to the sums withdrawn by customers. RE for its part did not receive any remuneration in return for making the multifunctional terminals available, and it paid the network operator EUR 0.13 per transaction and a fixed monthly remuneration of EUR 48. In short, the only activity of RE consisted in loading the multifunctional terminals with cash.
- 19 From June 2011, following an amendment to national legislation, in order to be able to continue supplying the cash withdrawal service without holding an authorisation as a payment service provider, RE partly changed the method of functioning of the multifunctional terminals installed in the gaming arcades, so that they offered a 'cash back' option. With this method, customers could no longer withdraw money from the multifunctional terminals unless they ordered at the same time a voucher for EUR 20 allowing them to put coins in the slot machines. That amount was debited to the customers' accounts by their banks, in addition to the amount of cash withdrawn.
- 20 Since it took the view that even with this method of operation RE should be classified as a 'payment institution' requiring authorisation as such, the Staatsanwaltschaft Stuttgart (Public Prosecutor's Office, Stuttgart, Germany) brought criminal proceedings against Mr Rasool, in his capacity as manager of RE, for intentionally providing payment services without authorisation, contrary to Paragraph 8 of the Law on the supervision of payment services. On the basis of Paragraph 73 of the Criminal Code, it applied for forfeiture of all the sums credited to RE by the various banks of the customers who had made withdrawals. Those sums amounted to EUR 1 096 290. By judgment of 11 March 2015, the referring court, the Amtsgericht Nürtingen (Local Court, Nürtingen, Germany) acquitted Mr Rasool, on the ground that he had not provided payment services within the meaning of the Law on the supervision of payment services.
- 21 The Stuttgart Public Prosecutor's Office appealed on a point of law against that judgment to the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart, Germany), which by judgment of 18 March 2016 set aside the referring court's judgment of 11 March 2015, on the ground in particular that, although the operation of the multifunctional terminals was not the main activity of RE, it could not avoid the obligation to obtain authorisation under Paragraph 8(1) of the Law on the supervision of payment services. The case was therefore remitted to the referring court.
- 22 In those circumstances, that court considers, first, that the activity carried on by RE falls within the exception in Article 3(o) of Directive 2007/64, in particular because RE was not a 'party to the framework contract with the customer withdrawing money from a payment account' within the meaning of that provision and had not concluded any contract with the banks of its customers withdrawing money by means of the multifunctional terminals. The court further considers that no requirement of consumer protection appears to justify the obligation for RE to obtain authorisation to provide payment services, since all that company does is load the multifunctional terminals with cash.

- 23 Secondly, the referring court considers that in any event, after the change to the ‘cash back’ system, RE’s activity falls within the scope of Article 3(e) of Directive 2007/64, and that consequently that activity is not subject to authorisation.
- 24 Thirdly, the referring court asks the Court whether the service offered by RE can be categorised as a ‘payment service’, in particular in so far as the activities of that company enable cash withdrawals from a payment account within the meaning of point 2 of the annex to Directive 2007/64.
- 25 The referring court observes in this respect that the loading of the multifunctional terminals with cash by RE indeed offered customers of the gaming arcades the material possibility of withdrawing cash. However, in its opinion, the term ‘enabling’ in point 2 of the annex to Directive 2007/64 cannot cover activities, such as those carried out by RE in the present case, that are purely ancillary to the payment services provided by a bank, namely those enabling an account to be opened and operations to be performed from the account by means of a bank card, and by a company, such as the network operator, which links the multifunctional terminals to the customers’ bank accounts.
- 26 In addition, the referring court is uncertain whether the activity of which RE is accused may be categorised as a ‘payment service’, since it was a service provided free of charge to the customers of the gaming arcades. Such a free service is purely ancillary to RE’s main activity, namely the operation of the gaming arcades, so that it does not satisfy the condition in Article 4(3) of Directive 2007/64 that the provider’s activity must be a business activity.
- 27 Fourthly, the referring court is uncertain whether the prosecution brought by the Stuttgart Public Prosecutor’s Office might not infringe the principles identified in the Court’s case-law according to which intervention by the State in the field of games of chance is not justified where the Member State concerned does not pursue a consistent and systematic policy corresponding to an overriding requirement such as the protection of consumers. Moreover, those prosecutions are arbitrary, in so far as the unlawful provision of a money withdrawal service, such as that said to have been offered by RE, is only very rarely the subject of criminal proceedings.
- 28 Fifthly and lastly, the referring court is uncertain whether the Stuttgart Public Prosecutor’s Office could, having regard to the principle of legal certainty guaranteed by EU law, apply on the basis of Paragraph 73 of the Criminal Code for forfeiture of all the sums dispensed to customers of the gaming arcades via the multifunctional terminals.
- 29 In those circumstances, the Amtsgericht Nürtingen (Local Court, Nürtingen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.
- ‘(1) Must Article 3(o) of [Directive 2007/64] be interpreted as meaning that the possibility of withdrawing cash in a gaming arcade holding a concession from the State by means of a [bank] card and PIN from a cash terminal which is also a change machine, where the technical processing relating to the bank and the account is carried out by an external service provider [such as the network operator] and the cash is dispensed to the customer only when the network operator, after checking whether the account is in funds, sends an authorisation code to the terminal, whereas the arcade operator merely loads the multifunctional change machine with cash and receives from the bank holding the account of the customer withdrawing money a credit corresponding to the amount withdrawn, is an activity within the meaning of Article 3(o) of the directive and is consequently not subject to authorisation?’

- (2) If the activity described in Question 1 is not an activity within the meaning of Article 3(o) [of Directive 2007/64]:

Must Article 3(e) of [Directive 2007/64] be interpreted as meaning that the possibility described in Question 1 of withdrawing cash with a PIN is an activity within the meaning of that provision if, simultaneously with the cash withdrawal, a voucher worth EUR 20 is generated for encashment with the arcade supervisor in order to have the supervisor feed coins into a slot machine?

If the activity described in Questions 1 and 2 is not an activity excluded from the scope of the directive by Article 3(o) and/or (e):

- (3) (a) Must point 2 of the annex to [Directive 2007/64] be interpreted as meaning that the activity of the gaming arcade operator described in Questions 1 and 2 is a payment service subject to authorisation even though the gaming arcade operator does not operate any account of the customer withdrawing cash?
- (3) (b) Must Article 4(3) of [Directive 2007/64] be interpreted as meaning that the activity of the gaming arcade operator described in Questions 1 and 2 is a payment service within the meaning of that provision if the gaming arcade operator provides the service free of charge?

If the Court considers the activity described to be a payment service subject to authorisation:

- (4) Must EU law and [Directive 2007/64] be interpreted as precluding criminal penalties for the operation of a cash terminal in a case with the characteristics of the present case if cash terminals of the same kind were or are operated without authorisation in numerous gaming arcades with State concessions and in casinos which are State concessions and in some cases also operated by the State, and the competent authorisation and supervisory authority does not raise any objections?

If the answer to Question 4 is also in the negative:

- (5) Must [Directive 2007/64] and the EU law principles of legal certainty and legal clarity and Article 17 of the [Charter of Fundamental Rights] be interpreted as precluding, in a case with the characteristics of the present case, an administrative and judicial practice ordering the surrender to the public purse (“forfeiture”) of the sums of money received by the gaming arcade operator, via a service effected by the network operator, from the banks of the customers who with card and PIN withdrew the cash loaded by the operator and/or vouchers to play the slot machines, even though all the credits correspond only to the amounts received by customers from the machines in cash and vouchers to play the slot machines?

Consideration of the questions referred

Question 3

- ³⁰ By its third question, which should be considered first, the referring court essentially asks whether Article 4(3) of Directive 2007/64, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is a ‘payment service’ within the meaning of that directive, where the operator provides the service free of charge, he does not carry out any operation on those customers’ payment accounts, and the activities he performs on that occasion are confined to making the terminals available and loading them with cash.

- 31 Article 4(3) of Directive 2007/64, read in conjunction with point 2 of the annex to the directive, categorises as a 'payment service' a business activity enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account.
- 32 In the present case, without it being necessary to establish whether or not the service at issue in the main proceedings, given that it is said to have been provided free of charge, constituted a business activity of RE, it must be observed that, according to the order for reference, RE did no more than lease and install the multifunctional terminals in its gaming arcades and load them with cash.
- 33 While those actions were preliminary steps linked to the operations performed on the payment accounts of the customers of the gaming arcades, it is apparent from the order for reference that those operations were carried out by an external provider, namely the network operator. It was the network operator who operated the link between the multifunctional terminals and the bank accounts of those customers, by recognition of their bank card and PIN code, thus making the withdrawal of cash possible.
- 34 In those circumstances, it cannot be found that a service such as that offered by RE by means of the multifunctional terminals enabled 'cash withdrawals from a payment account' within the meaning of point 2 of the annex to Directive 2007/64. Moreover, there is no information before the Court to show that on the occasion of that service RE carried out 'all the operations required for operating a payment account' within the meaning of that provision.
- 35 That consideration is supported, first, by an interpretation of the context of Article 4(3) of Directive 2007/64 and point 2 of the annex to that directive.
- 36 According to recital 6 of Directive 2007/64, the directive does not effect a complete harmonisation in the field of payment services. Thus its application should, as stated in that recital, be confined to payment service providers whose 'main activity' consists in the provision of payment services to payment service users.
- 37 However, subject to the assessment of the referring court in this respect, the documents before the Court show that RE's main activity was the operation of gaming arcades and that, in that context, the operations concerning the multifunctional terminals formed part of a service that was purely ancillary to that activity.
- 38 Secondly, since RE did not perform any operation relating to the accounts of the customers of the gaming arcades, requirements of the protection of consumers as recipients of payment services, apparent from recitals 20, 22, 26, 36 and 54 of Directive 2007/64, do not justify the categorisation as a 'payment service' within the meaning of that directive of a cash withdrawal service such as that offered by RE.
- 39 Having regard to all the above considerations, the answer to Question 3 is that Article 4(3) of Directive 2007/64, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is not a 'payment service' within the meaning of that directive, where the operator does not carry out any operation on those customers' payment accounts and the activities he performs on that occasion are confined to making the terminals available and loading them with cash.

Questions 1, 2, 4 and 5

- 40 In view of the answer to Question 3, there is no need to answer Questions 1, 2, 4 and 5.

Costs

- ⁴¹ 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 (Fifth Chamber) hereby rules:

Article 4(3) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, read in conjunction with point 2 of the annex to the directive, must be interpreted as meaning that a cash withdrawal service offered by a gaming arcade operator to his customers by means of multifunctional terminals in those arcades is not a ‘payment service’ within the meaning of that directive, where the operator does not carry out any operation on those customers’ payment accounts and the activities he performs on that occasion are confined to making the terminals available and loading them with cash.

[Signatures]