



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 October 2021 *

(Reference for a preliminary ruling – Freedom to provide services – Article 56 TFEU – Games of chance – Making prohibited lotteries available – Penalties – Proportionality – Minimum-level fines – Accumulation – No limit – Custodial sentence in the event of non-payment – Proportional contribution to the costs of proceedings – Article 49(3) of the Charter of Fundamental Rights of the European Union)

In Case C-231/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 27 April 2020, received at the Court on 3 June 2020, in the proceedings

MT

v

Landespolizeidirektion Steiermark,

THE COURT (Second Chamber),

composed of A. Arabadjiev, President of the First Chamber, acting as President of the Second Chamber, I. Ziemele (Rapporteur), T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- MT, by P. Ruth and D. Pinzger, Rechtsanwälte,
- the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,
- the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and by P. Vlaemminck, advocaat, and M. Thibault, avocate,

* Language of the case: German.

- the Hungarian Government, by B.R. Kissné, M.Z. Fehér and G. Koós, acting as Agents,
 - the Portuguese Government, by P. Barros da Costa, A. Silva Coelho and L. Inez Fernandes, acting as Agents,
 - the European Commission, by G. Braun, L. Malferrari and L. Armati, 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 of Article 56 TFEU and Article 49(3) of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between MT and the Landespolizeidirektion Steiermark (Regional Police Directorate, Styria, Austria) concerning penalties imposed on MT for infringements consisting of making prohibited lotteries commercially available.

Legal context

The GSpG

- 3 Paragraph 2, entitled 'Lotteries', of the Glücksspielgesetz (Federal Law on games of chance) of 28 November 1989 (BGB1. 620/1989), in the version applicable to the main proceedings ('the GSpG'), provides:

'(1) Lotteries are games of chance

1. which an operator arranges, organises, offers or makes available,
2. in which gamblers or other persons make a payment (stake) in connection with participating in the game, and
3. in which the prospect of a payment (payout) is provided by the operator, gamblers or other persons.

...

(4) Prohibited lotteries are lotteries for which no licence or authorisation under the present Federal law has been granted, and which are not excluded from the Federal State's monopoly on games of chance pursuant to Paragraph 4.

...'

4 Paragraph 52 of the GSpG, entitled ‘Provisions relating to administrative penalties’, reads as follows:

‘(1) An administrative offence, punishable by a fine imposed by the administrative authorities of up to EUR 60 000 in the cases covered by point 1 and up to EUR 22 000 in the cases covered by points 2 to 11, is committed where:

1. a person, for the purpose of participation from national territory, arranges, organises or makes available in the course of business prohibited lotteries within the meaning of Paragraph 2(4), or participates in them as an operator within the meaning of Paragraph 2(2);

...

(2) In the event of an infringement of point 1 of subparagraph 1 by means of a maximum of three gaming machines or other objects which infringe the legislation, the use of each gaming machine or other object which infringes the legislation shall be punishable by a fine of between EUR 1 000 and EUR 10 000 in the case of a first infringement, or between EUR 3 000 and EUR 30 000 in the case of a repeated infringement; in the event of an infringement by means of more than three gaming machines or other objects which infringe the legislation, the use of each gaming machine or other object which infringes the legislation shall be punishable by a fine of between EUR 3 000 and EUR 30 000 in the case of a first infringement, or a fine of between EUR 6 000 and EUR 60 000 in the case of a repeated infringement.’

The VStG

5 Paragraph 9 of the Verwaltungsstrafgesetz ‘Law on administrative offences, BGBl. 52/1991), in the version applicable to the main proceedings (‘the VStG’), entitled ‘Specific cases of liability’, provides:

‘(1) As regards compliance by legal persons with administrative provisions ..., unless provided otherwise by administrative provisions and in so far as authorised agents have not been appointed (subparagraph 2), the person who is required to represent the company in relation to third parties shall be regarded as liable.

...

(7) Legal persons ... and the natural persons referred to in subparagraph 3 shall be jointly and severally liable for fines imposed on persons required to represent the company in relation to third parties or on an authorised agent, for other damage expressed in money, and for the costs of proceedings.’

6 Paragraph 16 of the VStG, entitled ‘Custodial sentence in lieu of a fine’, provides:

‘(1) If a fine has been imposed, a custodial sentence in lieu of a fine should be set at the same time in the event that the fine cannot be recovered.

(2) The custodial sentence in lieu of a fine may not exceed the maximum custodial sentence imposed for the administrative offence and, where no custodial sentence or any other provision is provided for, it may not exceed two weeks. A custodial sentence in lieu of a fine in of more

than six weeks is unlawful. Such a sentence must be determined in accordance with the provisions for determining the penalty, regardless of Paragraph 12.

...'

- 7 Paragraph 19 of the VStG, entitled 'Determination of the penalty, reads as follows:

'(1) The penalty shall be determined in accordance with the importance of the legal interest protected and the seriousness of the harm to that interest arising from the infringement.

...'

- 8 Paragraph 20 of the VStG, entitled 'Exceptional mitigation of the penalty', provides:

'If there are clearly more mitigating factors than aggravating factors or if the alleged perpetrator of the infringement is a minor, the minimum penalty may be reduced by half.'

- 9 Paragraph 64 of the VStG, entitled 'Costs of penalty proceedings', provides:

'(1) Any decision imposing a penalty shall make the sanctioned person liable to pay a contribution to the costs of the penalty proceedings.

(2) The amount of that contribution shall be 10% of the penalty for (administrative) proceedings, but shall not be less than EUR 10; where a custodial sentence is imposed, one day of detention shall be equal to the sum of EUR 100 for the purposes of calculating the costs of the proceedings. ...

...'

Law on the rules of procedure of the administrative courts

- 10 Paragraph 38 of the Verwaltungsgerichtsverfahrensgesetz (Law on the rules of procedure of the administrative courts, BGBl. I, 33/2013), in the version applicable to the dispute in the main proceedings, provides for the application of the provisions, inter alia, of the VStG in proceedings before the administrative courts.

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

- 11 From 30 April to 3 May 2016 the company represented by MT made 10 gaming machines available for commercial purposes in a particular establishment. The organiser of the games of chance at issue was a company established in Slovakia.
- 12 In accordance with Paragraph 9 of the VStG, the applicant in the main proceedings was found guilty by an administrative decision of the offences in the third case of point 1 of Paragraph 52(1) of the GSpG committed by that company. Pursuant to Paragraph 52(2) of that law, the administrative enforcement authority imposed an administrative penalty on him of EUR 10 000 for each offence and, on the basis of Paragraph 16 of the VStG, applicable in administrative proceedings under Paragraph 38 of the Law on the rules of procedure of the administrative courts, in the version applicable to the dispute in the main proceedings, a custodial sentence in lieu of a fine

of three days, that is to say, a total fine of EUR 100 000 and a custodial sentence in lieu of a fine of 30 days for the 10 gaming machines. Pursuant to Paragraph 64(2) of the VStG, it also ordered him to pay EUR 10 000 as a contribution to the costs of the proceedings.

- 13 That decision was the subject of an appeal before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria), which was dismissed.
- 14 The applicant in the main proceedings brought a first appeal on points of law against the judgment of that court before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). The latter court upheld the earlier judgment as regards the finding of guilt, but set it aside as regards the decision on the penalty.
- 15 After the case had been referred back to it, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) reduced the amount of the fine to EUR 4 000 for each infringement and set a custodial sentence in lieu of a fine of one day, that is to say a total fine for the 10 gaming machines of EUR 40 000 and a 10-day custodial sentence in lieu of a fine. It also set the contribution to the costs of the proceedings at EUR 4 000.
- 16 The applicant in the main proceedings brought a fresh appeal on points of law before the referring court against the determination of that penalty.
- 17 The referring court observes that, in the appeal on points of law brought before it, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) examined, in the first set of proceedings, the adverse effect on the freedom to provide services caused by the monopoly system at issue, by carrying out an overall assessment in the light of the criteria established by the Court, and reached the conclusion that the provisions of the GSpG criminalising the organisation of automated games of chance without the requisite licence were not contrary to EU law.
- 18 The referring court notes, however, that its assessment of the lawfulness of the penalty depends on whether the provisions of the GSpG, in conjunction with those of the VStG, which must be applied by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) for the purposes of determining the sentence are compatible with Article 56 TFEU and, as the case may be, with Article 49(3) of the Charter.
- 19 In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
 - ‘(1) In the context of criminal proceedings that are being conducted in order to protect a monopoly system, must the national court or tribunal examine the applicable criminal penalty rule in the light of the freedom to provide services if it has previously examined the monopoly system in accordance with the guidance provided by the Court ... and that examination has revealed that the monopoly system is justified?
 - (2) If Question 1 is answered in the affirmative:
 - (a) Must Article 56 TFEU be interpreted as precluding a national provision according to which, by way of sanction for making prohibited lotteries commercially available contrary to [the GSpG], a fine must be imposed per gaming machine, with no absolute limit on the total fine imposed?

- (b) Must Article 56 TFEU be interpreted as precluding a national provision which, by way of sanction for making prohibited lotteries commercially available contrary to [the GSpG], provides for the mandatory imposition of a minimum penalty of EUR 3 000 per gaming machine?
 - (c) Must Article 56 TFEU be interpreted as precluding a national provision which, by way of sanction for making prohibited lotteries commercially available contrary to [the GSpG], provides for a custodial sentence in the event of non-payment per gaming machine, with no absolute limit on the total number of custodial sentences imposed?
 - (d) Must Article 56 TFEU be interpreted as precluding a national provision which, in the event of a penalty being imposed for making prohibited lotteries commercially available contrary to the [GSpG], requires the payment of a contribution to the costs of criminal proceedings amounting to 10% of the fines imposed?
- (3) If Question 1 is answered in the negative:
- (a) Must Article 49(3) of the [Charter] be interpreted as precluding a national provision according to which, by way of sanction for making prohibited lotteries commercially available contrary to the [GSpG], a fine must be imposed per gaming machine, with no absolute limit on the total fine imposed?
 - (b) Must Article 49(3) of the Charter be interpreted as precluding a national provision which, by way of sanction for making prohibited lotteries commercially available contrary to the [GSpG], provides for the mandatory imposition of a minimum penalty of EUR 3 000 per gaming machine?
 - (c) Must Article 49(3) of the Charter be interpreted as precluding a national provision which, by way of sanction for making prohibited lotteries commercially available contrary to the [GSpG], provides for a custodial sentence in lieu of a fine per gaming machine, with no absolute limit on the total number of custodial sentences imposed?
 - (d) Must Article 49(3) of the Charter be interpreted as precluding a national provision which, in the event of a penalty being imposed for making prohibited lotteries commercially available contrary to the [GSpG], requires the payment of a contribution to the costs of criminal proceedings amounting to 10% of the fines imposed?

Consideration of the questions referred

The first question

Admissibility

- 20 The applicant in the main proceedings submits that the first question is hypothetical, on the ground that, in the context of the main proceedings and contrary to what is suggested by the wording of that question, the referring court has not itself reviewed the monopoly system at issue in accordance with the criteria laid down by the Court.
- 21 It must be recalled that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case 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. Consequently, where the questions submitted concern the

interpretation of a rule of EU law, the Court is in principle bound to give a ruling (judgments of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 20, and of 2 April 2020, *Coty Germany*, C-567/18, EU:C:2020:267, paragraph 23 and the case-law cited).

- 22 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court 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 object, 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 (judgments of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 21, and of 2 April 2020, *Coty Germany*, C-567/18, EU:C:2020:267, paragraph 24 and the case-law cited).
- 23 In the present case, as noted in paragraph 17 above, the referring court states that the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria), assessed the compatibility with EU law of the provisions of the GSpG which criminalise the organisation of automated games of chance where the required licence has not been issued. In the light of that finding, which it is not for the Court to call into question in proceedings based on Article 267 TFEU, the referring court seeks to ascertain whether it is specifically required, in its examination of the lawfulness of the penalty imposed on the applicant in the main proceedings when applying the provisions of the GSpG, in conjunction with those of the VStG, to assess that penalty in the light of Article 56 TFEU. It cannot therefore be disputed that the compliance of the referring court's subsequent decision with EU law depends on the answer to the question referred, which is therefore not hypothetical.
- 24 It follows that the first question is admissible.

Substance

- 25 By its first question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as meaning that, in proceedings concerning the imposition of penalties for infringement of a monopoly in the sector of games of chance, a national court, hearing an assessment of the lawfulness of a penalty imposed for such an infringement, must specifically assess whether the penalties laid down by the applicable legislation comply with Article 56 TFEU, where the establishment of such a monopoly system has already been held to be compatible with that provision.
- 26 The Austrian and Belgian Governments and, in essence, the Hungarian Government submit that there is no need to carry out a separate examination of the national rules on penalties designed to ensure compliance with the monopoly in the light of Article 56 TFEU, since, in principle, they have already been examined in the context of the overall assessment of the circumstances surrounding the adoption and implementation of the restrictive legislation at issue. By contrast, the Portuguese Government, the European Commission and, in essence, MT, argue that such rules must be examined separately in the light of that provision and, in particular, the principle of proportionality.
- 27 In that regard, it should be noted that the Court has already held, with regard to legislation of a Member State which makes the pursuit in that State of an activity in the betting and gaming sector subject, inter alia, to the obligation to obtain a licence and a police authorisation and laying down criminal penalties for failure to comply with the legislation at issue, that the restrictive measures imposed by the national legislation should be examined in turn, including the penalties laid down

by that legislation, in order to determine in each case in particular whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (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, paragraphs 40 and 49). The Court has since referred to that requirement repeatedly (judgments of 8 September 2010, *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 93; of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 22; and order of 18 May 2021, *Fluctus and Others*, C-920/19, not published, EU:C:2021:395, paragraph 29).

- 28 It follows that a national court, hearing an assessment of the lawfulness of a penalty imposed for infringement of a monopoly in the sector of games of chance, must specifically assess whether that restriction complies with Article 56 TFEU (see, to that effect, judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 33), even if the other restrictions surrounding the establishment of that monopoly have already been held to be compatible with that provision.
- 29 It is indeed apparent from the Court's case-law that when reviewing whether restrictive legislation complies with Article 56 TFEU, the national court is required to carry out a global assessment of not only the circumstances in which that legislation was adopted, but also its implementation (see, to that effect, judgments of 30 June 2016, *Admiral Casinos & Entertainment*, C-464/15, EU:C:2016:500, paragraph 31, and of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 52 and the case-law cited), which necessarily includes the system of penalties specifically laid down by that legislation, which was the basis for the penalty decision adopted.
- 30 The referring court noted in that regard that the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) in the main proceedings held that, in the light of the criteria established by the Court, the provisions of the GSpG which criminalise the organisation of automatic games of chance without the necessary licence did not contravene EU law.
- 31 For its part, the Austrian Government stated that the conclusion reached by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria) was in line with the settled case-law of the highest courts in Austria which, in such an examination, systematically take account of the provisions on penalties laid down in Paragraph 52 of the GSpG, the purpose of which is to combat illegal gambling in an effective manner.
- 32 However, the referring court, first, has not stated whether the assessment in question touched specifically on that paragraph. Secondly, in any event, it is apparent from the file before the Court that the penalties imposed on the applicant in the main proceedings were determined not only on the basis of Paragraph 52 of the GSpG, but also of Paragraphs 16 and 64 of the VStG, applicable to proceedings before administrative courts, which, along with any decision to hand down a penalty, provide for the imposition of a custodial sentence in lieu of a fine and of a contribution to the costs of the administrative penalty proceedings.
- 33 As to the fact that such penalties are laid down by the general provisions of the VStG and not the GSpG, it must be borne in mind that such penalties must, in each individual case, having regard to the actual rules for determining them, comply with EU law and respect the fundamental freedoms guaranteed by that law (see, to that effect, judgments of 6 March 2007, *Placanica and Others*,

C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 68; of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 61; and of 11 February 2021, *K. M. (Sanctions imposed on the master of a vessel)*, C-77/20, EU:C:2021:112, paragraph 36 and the case-law cited).

- 34 Therefore, the penalty system at issue in the main proceedings must be assessed in the light of Article 56 TFEU.
- 35 In the light of the foregoing considerations, the answer to the first question is that Article 56 TFEU must be interpreted as meaning that, in proceedings concerning the imposition of penalties for infringement of a monopoly in the sector of games of chance, a national court, hearing an assessment of the lawfulness of a penalty imposed for such an infringement, must specifically assess whether the penalties laid down by the applicable legislation comply with Article 56 TFEU, having regard to the actual rules for determining those penalties.

The second question

- 36 By its second question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding a national provision which, in cases where prohibited lotteries have been made commercially available, makes it mandatory to:
- impose a minimum fine per unauthorised gaming machine, with no limit on the total amount of the fines imposed;
 - impose a custodial sentence in lieu of a fine per unauthorised gaming machine, with no limit on the total length of the custodial sentences imposed; and
 - contribute to the costs of proceedings amounting to 10% of the fines imposed.
- 37 As a preliminary point, it must be borne in mind that although legislation on penalties in the sector of games of chance is a matter for which the Member States are responsible, the Court has consistently held that European Union law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by EU law (see, to that effect, judgments of 8 July 2010, *Sjöberg and Gerdin*, C-447/08 and C-448/08, EU:C:2010:415, paragraph 49, and of 19 November 2020, *ZW*, C-454/19, EU:C:2020:947, paragraph 27 and the case-law cited).
- 38 In accordance with the settled case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions on that freedom (judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 30 and the case-law cited).
- 39 In that regard, national legislation imposing penalties on the service provider concerned for non-compliance with obligations which, as such, constitute restrictions on the freedom to provide services, such as the legislation at issue in the main proceedings, is likely to render the exercise of that freedom less attractive and, consequently, constitutes a restriction on the freedom to provide services (see, to that effect, judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraphs 33 and 34).
- 40 That being said, it is also apparent from the well-established case-law of the Court that national measures which are liable to restrict or to render less attractive the exercise of the fundamental freedoms guaranteed by the FEU Treaty may be permitted where they serve overriding reasons in

the public interest, are appropriate for attaining their objective, and do not go beyond what is necessary to attain that objective (judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 35 and the case-law cited).

- 41 The Court has also stated that the Member States are free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (see, to that effect, judgment of 8 July 2010, *Sjöberg and Gerdin*, C-447/08 and C-448/08, EU:C:2010:415, paragraph 39).
- 42 Furthermore, it is apparent from the Court's case-law that, where a Member State relies on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the freedom to provide services, such justification, provided for by EU law, must be interpreted in the light of the general principles of EU law, in particular the fundamental rights henceforth guaranteed by the Charter. Thus the national rules in question can fall under the exceptions provided for only if they are compatible with the fundamental rights the observance of which is ensured by the Court (judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 35 and the case-law cited).
- 43 In that regard, it must be held, first, that since EU law permits Member States to derogate from Article 56 TFEU and to impose restrictions on the provision of services of games of chance, and, to the extent that those restrictions serve overriding reasons in the public interest, are appropriate for attaining their objective, and do not go beyond what is necessary to attain that objective, the imposition of administrative or criminal penalties in order to enforce those restrictions must be regarded as serving the same overriding reasons in the public interest as the restrictions in question.
- 44 Secondly, it must be held that, as a matter of principle, the imposition of administrative or criminal penalties for infringing restrictive legislation on the provision of services of games of chance is capable of ensuring compliance with that legislation and that, therefore, that imposition is appropriate for attaining the objective pursued in that respect.
- 45 Thirdly, the severity of the penalties imposed must also be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while not going beyond what is necessary to attain that objective (see, to that effect, judgment of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraph 26 and the case-law cited), such a requirement resulting inter alia from the principle of proportionality of penalties set out in Article 49(3) of the Charter (see, to that effect, judgment of 20 March 2018, *Menci*, C-524/15, EU:C:2018:197, paragraph 55).
- 46 As regards, in the first place, the imposition of a minimum fine per unauthorised gaming machine, such a penalty does not appear, in itself, to be disproportionate given the seriousness of the infringements at issue, since the illegal supply of gaming machines, being inherently outside the control of the administrative authorities and in respect of which compliance with measures imposed by law to protect players cannot be verified, is capable, as the Austrian Government observes, of having particularly serious harmful effects on society; as the Court has already pointed out, lotteries are an incitement to spend which may have damaging individual and social consequences (judgment of 24 March 1994, *Schindler*, C-275/92, EU:C:1994:119, paragraph 60; see, also, to that effect, judgments of 6 March 2007, *Placanica and Others*, C-338/04, C-359/04

and C-360/04, EU:C:2007:133, paragraph 47; of 3 June 2010, *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraph 27; and of 15 September 2011, *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 45).

- 47 As regards the amount of that minimum fine, it is for the national court, for the purpose of assessing its proportionality, to take account of the relationship between the amount of the fine that may be imposed and the economic benefit derived from the infringement committed, in order to deter offenders from committing such an infringement (see, to that effect, judgment of 11 February 2021, *K.M. (Sanctions imposed on the master of vessel)*, C-77/20, EU:C:2021:112, paragraph 49). It must, however, ensure, taking account of all the circumstances of the case, that the minimum amount thus imposed is not disproportionate to that benefit.
- 48 As regards the fact that the national legislation at issue in the main proceedings does not provide for a limit on the total amount of fines imposed, it is true that the imposition of a minimum fine, combined with an unlimited cumulative amount of fines where the infringement concerns several unauthorised gaming machines, may lead to sizeable financial penalties being imposed.
- 49 However, as was observed by both the referring court, relying on the reasons set out in the government bill which introduced the amounts of the penalties at issue in Paragraph 52(2) of the GSpG, and the Austrian and Belgian Governments, and the Commission, such a measure makes it possible, inter alia, to counter the economic benefit which the infringements thus penalised might provide, and accordingly render the illegal supply decreasingly attractive, with the result that, in itself, that measure does not infringe the principle of proportionality. However, it is also for the national court to ensure that the total amount of the fines imposed is not disproportionate in relation to that benefit.
- 50 As regards, in the second place, the imposition of a custodial sentence in lieu of a fine, it must be held that the imposition of such a penalty likewise does not appear, in itself, to be disproportionate in the light of the nature and gravity of the infringements at issue, since it seeks, as the Austrian Government observes, to ensure that those infringements can actually be punished if it is not possible to recover the fine.
- 51 It should nevertheless be pointed out that such a penalty must, in each individual case, be justified on sound grounds of public interest (see, to that effect, ECtHR, 19 January 2021, *Lacatus v. Switzerland*, ECLI:CE:ECHR:2021:0119JUD001406515, § 110), since it is particularly onerous considering the implications for the person concerned (see, to that effect, judgment of 12 September 2019, *Maksimovic and Others*, C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723, paragraph 45 and the case-law cited).
- 52 In the present case, it is apparent from the order for reference that, in the case of infringements such as those at issue in the main proceedings, the custodial sentence in lieu of a fine may not exceed a maximum of two weeks per infringement.
- 53 In that regard, it must be stated that, since each gaming machine or object infringing the legislation is capable of providing grounds for the imposition of such a custodial sentence and the applicable legislation does not provide for any limit on the total duration of custodial sentences in lieu of a fine which may be imposed, the accumulation of such penalties may lead to the imposition of a custodial sentence in lieu of a fine that is of considerable length, which might

not be commensurate with the seriousness of the infringements found, for which the applicable legislation makes provision only for fines. It is for the referring court to determine whether such is the case, in the light of the length of the custodial sentence in lieu of a fine actually imposed.

- 54 In that context, the Austrian Government observed that there is no general minimum threshold for custodial sentences in lieu of a fine, since such a penalty has to be commensurate with the fine imposed.
- 55 However, such a factor cannot be of decisive influence since a custodial sentence in lieu of a fine cannot comply with the principle of proportionality merely because the authorities of a Member State may, at their sole discretion, reduce its length (see, by analogy, judgment of 3 March 2020, *Google Ireland*, C-482/18, EU:C:2020:141, paragraph 53).
- 56 In the third place, as regards the imposition of a contribution to the costs of proceedings amounting to 10% of the fines imposed, it must be borne in mind that, according to the case-law of the Court, the levying of court costs contributes, in principle, to the proper functioning of the judicial system, since such a levy constitutes a source of funding for the judicial activities of the Member States (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruleci*, C-205/15, EU:C:2016:499, paragraph 49 and the case-law cited). It cannot therefore be considered that the imposition of such a contribution, in itself, infringes the principle of proportionality.
- 57 It is, however, for the referring court to satisfy itself, when setting the actual amount of the contribution to those costs, in so far as such a contribution is established on the basis of a percentage of the amount of the fine imposed and having regard to the absence of a limit to that fine, that it is not excessive in the light of the actual cost of those proceedings and does not infringe the right of access to a tribunal enshrined in Article 47 of the Charter (see, to that effect, judgment of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 48).
- 58 In the light of the foregoing considerations, the answer to the second question is that Article 56 TFEU must be interpreted as not precluding a national provision which, in cases where prohibited lotteries have been made commercially available, makes it mandatory to:
- impose a minimum fine per unauthorised gaming machine, with no limit on the total amount of the fines imposed, to the extent that the total amount of the fines imposed is not disproportionate to the economic benefit which the infringements thus penalised might provide;
 - impose a custodial sentence in lieu of a fine per unauthorised gaming machine, with no limit on the total length of the custodial sentences in the event of non-payment imposed, to the extent that the length of the custodial sentence in lieu of a fine actually imposed is not excessive in the light of the seriousness of the infringements found; and
 - contribute to the costs of proceedings amounting to 10% of the fines imposed, to the extent that that contribution is neither excessive in the light of the actual cost of such proceedings nor infringes the right of access to a tribunal enshrined in Article 47 of the Charter.

The third question

- 59 In light of the answer given to the first question, there is no need to answer the third question.

Costs

- 60 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 (Second Chamber) hereby rules:

- 1. Article 56 TFEU must be interpreted as meaning that, in proceedings concerning the imposition of penalties for infringement of a monopoly in the sector of games of chance, a national court, hearing an assessment of the lawfulness of a penalty imposed for such an infringement, must specifically assess whether the penalties laid down by the applicable legislation comply with Article 56 TFEU, having regard to the actual rules for determining those penalties.**
- 2. Article 56 TFEU must be interpreted as not precluding a national provision which, in cases where prohibited lotteries have been made commercially available, makes it mandatory to:**
 - impose a minimum fine per unauthorised gaming machine, with no limit on the total amount of the fines imposed, to the extent that the total amount of the fines imposed is not disproportionate to the economic benefit which the infringements thus penalised might provide;**
 - impose a custodial sentence in lieu of a fine per unauthorised gaming machine, with no limit on the total length of the custodial sentences imposed, to the extent that the length of the custodial sentence in lieu of a fine actually imposed is not excessive in the light of the seriousness of the infringements found; and**
 - contribute to the costs of proceedings amounting to 10% of the fines imposed, to the extent that that contribution is neither excessive in the light of the actual cost of such proceedings nor infringes the right of access to a tribunal enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.**

[Signatures]