Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

22 September 2022 *

(References for a preliminary ruling – Freedom of establishment – Restrictions – Betting and gambling – Licences for the management of games played on gaming machines – National legislation imposing a levy on licence holders – Principle of the protection of legitimate expectations)

In Joined Cases C-475/20 to C-482/20,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 31 August 2020, received at the Court on 28 September 2020, in the proceedings

Admiral Gaming Network Srl (C-475/20),

Cirsa Italia SpA (C-476/20),

Codere Network SpA (C-477/20),

Gamenet SpA (C-478/20),

NTS Network SpA (C-479/20),

Sisal Entertainment SpA (C-480/20),

Snaitech SpA, formerly Cogetech SpA (C-481/20),

Snaitech SpA, formerly Snai SpA (C-482/20),

v

Agenzia delle Dogane e dei Monopoli,

Ministero dell'Economia e delle Finanze (C-475/20, C-477/20),

Presidenza del Consiglio dei Ministri (C-475/20, C-477/20, C-481/20),

IGT Lottery SpA, formerly Lottomatica Holding Srl (C-475/20),

Se. Ma. di Francesco Senese (C-481/20),

* Language of the case: Italian.

with the participation of:

Lottomatica Videolot Rete SpA (C-475/20),

Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons) (C-476/20, C-478/20, C-480/20, C-482/20) **and Others**,

THE COURT (Second Chamber),

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

Advocate General: A. Rantos,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 27 January 2022,

after considering the observations submitted on behalf of:

– Admiral Gaming Network Srl and Codere Network SpA, by F. Cardarelli and F. Lattanzi, avvocati,

– Cirsa Italia SpA and Gamenet SpA, by C. Barreca and F. Tedeschini, avvocati,

– NTS Network SpA, by C. Barreca, F. Tedeschini and A. Tortora, avvocati,

– Sisal Entertainment SpA and Snaitech SpA, by A. Lauteri and L. Medugno, avvocati,

– IGT Lottery SpA and Lottomatica Videolot Rete SpA, by S. Fidanzia and A. Gigliola, avvocati,

– Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori (Codacons), by M. Servino, avvocata,

– the Italian Government, by G. Palmieri, acting as Agent, and by P.G. Marrone and G. Palatiello, avvocati dello Stato,

– the European Commission, by L. Armati and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2022,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 49 and 56 TFEU, as well as the principle of the protection of legitimate expectations.

2 The requests have been made in proceedings between Admiral Gaming Network Srl (Case C-475/20), Cirsa Italia SpA (Case C-476/20), Codere Network SpA (Case C-477/20), Gamenet SpA (Case C-478/20), NTS Network SpA (Case C-479/20), Sisal Entertainment SpA (Case C-480/20) and Snaitech SpA, formerly Cogetech SpA and Snai SpA (Cases C-481/20 and C-482/20), companies operating in the betting and gambling sector, on the one hand, and the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) ('the ADM') and other Italian authorities, on the other, concerning the reduction of the fees to which operators engaging in the organised activity of collecting bets by means of gaming machines are entitled.

Legal context

3 Articles 1 to 3 of decreto legislativo n. 496 – Disciplina delle attività di giuoco (Legislative Decree No 496 laying down the rules governing gaming activities) of 14 April 1948 (GURI No 118 of 22 May 1948) provide:

'1. The organisation and operation of games of skill and pools, for which a reward of any kind is paid and for participation in which the payment of a stake representing a sum of money is requested, shall be reserved to the State.

2. The organisation and operation of the activities referred to in the preceding article shall be entrusted to the Ministry of Finance, which may ensure the management thereof either directly or through natural or legal persons who provide sufficient guarantees as to their suitability. In this second scenario, the amount of the commissions payable to the managers and the other rules concerning management shall be laid down in special agreements …

3. The proceeds derived from the operation of the activities referred to in the preceding articles must be paid to a special section on revenue of the Ministry of Finance.'

4 The Italian Republic entrusted the management of the gaming sector to the ADM pursuant to Article 8 of decreto-legge n. 282 – Disposizioni urgenti in materia di adempimenti comunitari e fiscali, di riscossione e di procedure di contabilità (Decree-Law No 282 laying down urgent rules regarding compliance with Community and tax obligations, collection, and accounting procedures) of 24 December 2002 (GURI No 301 of 24 December 2002).

5 Article 110(6) of regio decreto n. 773 – Approvazione del testo unico delle leggi di pubblica sicurezza (Royal Decree No 773 approving the consolidated version of the Laws on Public Security) of 18 June 1931 (GURI No 146 of 26 June 1931), in the version applicable to the disputes in the main proceedings ('Royal Decree No 773 of 18 June 1931'), provides:

'The following machines shall be considered suitable for lawful gaming:

(a) those which, having a certificate of conformity with the provisions in force issued by the Ministry of Economy and Finance … and having been compulsorily connected to the telematics network referred to in Article 14-bis(4) of Presidential Decree No 640 of 26 October 1972 … are activated by the introduction of metallic money or special means of electronic payment …, in which, besides the element of chance, there are also elements of skill …, where the cost of a game does not exceed one euro and the minimum duration of a game is four seconds, and which pay out winnings in cash, with the value of each cash prize

not exceeding EUR 100, paid by the machine. Winnings, calculated by the machine in a non-predetermined manner over a total cycle of no more than 140 000 games must be not less than 75% of the amounts played. In any event, those machines may not reproduce the game of poker or the fundamental rules thereof;

(b) those which are part of the telematics network referred to in Article 14-bis(4) of Presidential Decree No 640 of 26 October 1972 … and which are activated exclusively when there is a connection to a processing system of that network. For such machines, the following shall be defined by regulation of the Ministry of Economy and Finance …:
(1) the cost of each game and the way in which this is to be paid;
(2) the minimum percentage of the takings to be assigned to winnings;
(3) the maximum amount of winnings and the way in which these are to be collected;
(4) the immutability and security specifications, relating also to the processing system to which those machines are connected;
(5) the solutions to be adopted on the machines to encourage responsible gaming;
(6) the classification and characteristics of the public establishments and other places authorised to collect bets in which the machines referred to in this point may be installed.'

6 Article 14-bis(4) of decreto del Presidente della Repubblica, n. 640 – Imposta sugli spettacoli (Presidential Decree No 640 regarding the tax on entertainment) of 26 October 1972 (GURI No 292 of 11 November 1972, Ordinary Supplement to GURI No 2) provides, as regards the management of those machines, that they must compulsorily be connected to a telematics network of the administration created for that purpose, and that 'one or more licence holders [of that network] shall be selected, by 30 June 2004 at the latest, by means of a public tendering procedure in accordance with national and Community legislation', with each licence holder managing the network and the machines connected to that network for which it is responsible in exchange for a fee.

7 In accordance with that provision, a procedure for the selection of licence holders was initiated by means of a call for tenders (GURI No 95, Special Series No 5 of 12 August 2011, p. 40), paragraph II 1.5 of which provides, regarding the licence holder's fee:

'… In connection with the activities covered by the licence, the licence holder has an obligation to make available to the Treasury and the [Amministrazione Autonoma dei Monopoli di Stato (Autonomous Administration of State Monopolies, Italy)] the sums provided for by way of the [prelievo erariale unico (single Treasury levy)], the licence fee, and the security deposit as a percentage of the stakes collected. The licence holder is entitled to a fee corresponding to the difference between the amount derived from the collection of stakes and the sums referred to above, on the one hand, and the winnings to be paid out, calculated on the basis of the minimum limits laid down by the legislation in force, and the amounts payable to third parties responsible for collecting stakes, on the other'.

8 Article 14 of legge n. 23 – Delega al Governo recante disposizioni per un sistema fiscale più equo, trasparente e orientato alla crescita (Law No 23 – Delegation to the government laying down rules for a fairer, more transparent and growth-oriented tax system) of 11 March 2014 (GURI No 59 of 12 March 2014), in the version applicable to the disputes in the main proceedings ('Law No 23 of 11 March 2014'), provides:

'1. The government is authorised to implement, by means of the legislative decrees referred to in Article 1, the reorganisation of the provisions in force relating to public gaming, reorganising all

the rules in force into a code of provisions on gaming, without prejudice to the organisational model based on the system of licences and permits, in so far as this is indispensable for the protection of legitimate expectations, public policy and public security, for the balancing of the interests of the Treasury against local interests and against wider interests relating to public health, for the prevention of money laundering, and in order to guarantee the regular payment of tax levies on gaming.

2. The reorganisation referred to in paragraph 1 shall be carried out in accordance with the following principles and guidelines:

…

(g) revision of the commissions and fees payable to licence holders and other operators according to a progressivity criterion connected with stake collection volumes;

…'

9 Article 1(649) of legge n. 190 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2015) (Law No 190 laying down rules for the preparation of the annual and multiannual State budget (2015 Stability Law)) of 23 December 2014 (GURI No 300 of 29 December 2014, Ordinary Supplement to GURI No 99) ('the 2015 Stability Law') imposed an annual levy of EUR 500 million on State resources made available, by way of fees, to licence holders and other operators managing gaming and collecting stakes on behalf of the State. That provision is worded as follows:

'For the purpose of contributing to the improvement of public finance objectives, and in anticipation of a more organic reorganisation of the amount of the commissions and fees payable to licence holders and other supply chain operators within the networks for the collection of stakes on behalf of the State, in implementation of Article 14(2)(g) of [Law No 23 of 11 March 2014], the reduction, on an annual basis, starting from 2015, in the State resources made available, by way of fees, to the licence holders and other persons who, in accordance with their respective competences, are engaged in the management and collection of stakes using the machines referred to in Article 110(6) of [Royal Decree No 773 of 18 June 1931] shall be set at EUR 500 million. Consequently, from 1 January 2015:

(a) the entire amount of the stakes collected using the machines referred to above, net of the winnings paid out, shall be paid to licence holders by supply chain operators. Licence holders shall communicate to [the ADM] the names of the supply chain operators who do not make such payment, including for the purposes of a possible subsequent complaint to the competent judicial authority;

(b) licence holders, in performing the public duties assigned to them, in addition to what is ordinarily paid to the State by way of taxes and other charges payable under the legislation in force and on the basis of licensing agreements, shall also pay annually the sum of EUR 500 million, by April and October of each year; each licence holder shall pay a share in proportion to the number of machines allocated to it as at 31 December 2014. The number of machines referred to in Article 110(6)(a) and (b) of [Royal Decree No 773 of 18 June 1931] allocated to each licence holder, as well as the way in which the payment is to be made, shall be

established by a decision of the Director of [the ADM], adopted by 15 January 2015 at the latest, subject to checks. By a similar decision, provision shall be made, from 2016, subject to regular checks, for potential amendments to the number of machines referred to above;

(c) licence holders, in performing the public duties assigned to them, shall divide the sums remaining, available as commissions and fees, among other supply chain operators, renegotiating the contracts relating thereto and paying the commissions and fees due exclusively in view of the conclusion of the renegotiated contracts.'

10 By decreto n. 388, prot. n. 4076/RU, del Direttore dell'Agenzia delle dogane e dei monopoli (Decree No 388, prot. n. 4076/RU, of the Director of the ADM) of 15 January 2015 [('Decree No 388 of 15 January 2015')], the number of machines connected with each licence holder on 31 December 2014 was noted and the resulting sums due were written off, in exchange for a dividing of the burden of the levy according to the number of machines connected with each licence holder. According to Article 3 of that decree, each licence holder was required to pay 40% of its share before 30 April 2015, and the remaining 60% before 31 October 2015.

11 Article 1(920) and (921) of legge n. 208 – Disposizioni per la formazione del bilancio annuale et pluriennale dello Stato (legge di stabilità 2016) (Law No 208 laying down rules for the preparation of the annual and multiannual State budget (2016 Stability Law)) of 28 December 2015 (GURI No 302 of 30 December 2015, Ordinary Supplement to GURI No 70) ('the 2016 Stability Law'), by repealing Article 1(649) of the 2015 Stability Law, limited the scope of that provision, and thus the levy, to 2015 ('the 2015 levy'). That provision is worded as follows:

'920. Paragraph 649 of Article 1 of [the 2015 Stability Law] is repealed.

921. Paragraph 649 of Article 1 of [the 2015 Stability Law] is to be interpreted as meaning that the reduction, on an annual basis, in the State resources made available, by way of fees, to licence holders and other persons who, in accordance with their respective competences, are engaged in the management and collection of stakes using the machines referred to in Article 110(6) of [Royal Decree No 773 of 18 June 1931] applies to each supply chain operator in proportion to its involvement in the distribution of the fees, on the basis of the corresponding contractual arrangements, taking into account the duration of those arrangements in 2015.'

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

12 The appellants in the main proceedings are companies active in the gaming sector using the machines for lawful gaming referred to in Article 110(6) of Royal Decree No 773 of 18 June 1931. Those companies were selected as licence holders of the network for the collection of stakes on behalf of the State at the end of the selection procedure referred to in paragraph 7 of the present judgment. Each of them brought an action before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy) for annulment of Decree No 388 of 15 January 2015, on the ground that it significantly reduced their profit margin and was unlawful, given that the provisions it was implementing infringed either EU law or the Italian Constitution.

13 The Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio) referred a question to the Corte costituzionale (Constitutional Court, Italy) regarding the constitutionality of Article 1(649) of the 2015 Stability Law introducing [an] annual levy. That court, by Judgment

No 125 of 8 May 2018, referred that question back to the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio) because of the legislative amendment made, during the proceedings, by Article 1(920) and (921) of the 2016 Stability Law.

14 In view of that legislative amendment, the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio) waived its doubts as to the constitutionality and conformity with EU law of the [provision] in question, and dismissed the actions of the appellants in the main proceedings as to the substance.

15 Those appellants each brought an appeal before the Consiglio di Stato (Council of State, Italy).

16 The referring court has doubts as to the compatibility with EU law of the national legislative provisions concerned.

17 First, it considers that the measure imposed by Article 1(649) of the 2015 Stability Law, as repealed and interpreted by Article 1(920) and (921) of the 2016 Stability Law, has had the effect of subjecting the appellants in the main proceedings to an economic levy. This is a restriction on the freedoms guaranteed by Articles 49 and 56 TFEU. It also considers that the 2015 levy has had a retroactive effect, inasmuch as it was imposed in 2015 and affected income earned in 2014.

18 The referring court has doubts as to whether the 2015 levy can be regarded as having been inspired by overriding reasons in the public interest. Indeed, its adoption seems to have been motivated exclusively by the economic need to increase the State's tax revenue, as can be seen from Article 1(649) of the 2015 Stability Law, which emphasises that the purpose of that levy was 'contributing to the improvement of public finance objectives'.

19 Secondly, the referring court indicates that the 2015 levy seems to have been adopted in breach of the principle of the protection of legitimate expectations. That measure has had an impact on ongoing licensing relations. It has also made economic conditions considerably more burdensome and was unforeseeable for a careful and attentive entrepreneur.

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

'(1) Is the introduction of a provision, such as that contained in Article 1(649) of [the 2015 Stability Law], which reduces commission and fees only in respect of a specific and limited category of operator, namely operators of games played on gaming machines, and not in respect of all operators in the gaming sector, compatible with the exercise of the freedom of establishment guaranteed by Article 49 TFEU and with the exercise of the freedom to provide services guaranteed by Article 56 TFEU?

(2) Is the introduction of a provision such as the abovementioned provision contained in Article 1(649) of [the 2015 Stability Law], which for economic reasons alone reduced the fee agreed to in a licensing agreement concluded between a company and an Italian State authority during the term of that agreement, compatible with the EU-law principle of the protection of legitimate expectations?'

Procedure before the Court

21 By a request for clarification of 16 November 2020, the Court of Justice asked the referring court to clarify its position regarding certain elements which could be decisive for the admissibility of its requests for a preliminary ruling.

22 By document of 17 December 2020, the referring court replied to that request, indicating, in essence, first of all, that the appellants in the main proceedings had been awarded the licences in question in connection with a tendering procedure which was open to all undertakings in the Union. Next, while it is true that all the appellants in the main proceedings are Italian companies, four of them are wholly controlled by companies in other Member States. At least one undertaking in another Member State is a manager responsible for the collection of gaming stakes via a permanent establishment located in Italy. Lastly, the breach of the principle of the protection of legitimate expectations caused by the 2015 levy has given rise to reverse discrimination against the licence holders affected by that levy, to the benefit of all operators of comparable games played online, which include numerous undertakings in other Member States of the European Union. That levy thus indirectly – or even directly – affects the financial results of companies in other Member States which are active on the Italian gaming market.

23 By decision of 26 January 2021, the President of the Court joined the present cases for the purposes of the written and oral parts of the procedure and of the judgment.

Consideration of the questions referred

Admissibility

24 In its written observations, the European Commission has expressed doubts as to the usefulness of the questions referred for the resolution of the disputes in the main proceedings following the repeal of the 2015 Stability Law.

25 In that regard, it should be borne in mind that, in the context of the relationship of cooperation between the Court of Justice and the national courts established 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 question submitted concerns the interpretation of EU law, the Court is in principle required to give a ruling. The Court may refuse to rule on a question referred by a national court for a preliminary ruling 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 (judgment of 23 November 2021, *IS (Illegality of the order for reference)*, C-564/19, EU:C:2021:949, paragraphs 60 and 61 and the case-law cited).

26 In this instance, it should be noted that Article 1(649) of the 2015 Stability Law referred to in the questions referred for a preliminary ruling, although repealed in 2016 and – accordingly – applicable only in 2015, constitutes, albeit in the version interpreted retroactively by Article 1(920) and (921) of the 2016 Stability Law, the basis of the 2015 levy. Moreover, if it is found that that provision has infringed the freedoms guaranteed by Articles 49 and 56 TFEU,

that finding is such as to entail a finding by the referring court that that levy is unlawful. Therefore, it does not appear that the interpretation of EU law that is sought bears no relation to the actual facts of the disputes in the main proceedings or their purpose; nor does it appear that the problem is hypothetical.

27 For its part, the Italian Government has called in question the admissibility of the first question referred, arguing that the referring court, in breach of Article 94 of the Rules of Procedure of the Court of Justice, (i) did not state the reasons why the reduction of fees and commissions might infringe Articles 49 and 56 TFEU as a result of being applied only to operators of games played on gaming machines and not to other operators in the gaming sector in Italy and (ii) did not, in that regard, provide a comparative assessment of those different categories of operator permitting an assessment of the difference in treatment thus relied on.

28 In that regard, it should be borne in mind that, as can be seen from Article 94(a) and (c) of the Rules of Procedure, the request for a preliminary ruling must contain, inter alia, 'a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based', as well as 'a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings'.

29 However, in view of the spirit of judicial cooperation which governs relations between national courts and the Court of Justice in the context of preliminary-ruling proceedings, the fact that the referring court did not make certain initial findings does not necessarily mean that the request for a preliminary ruling, or one of the questions contained therein, is inadmissible if the Court, in the light of the information contained in the case file, considers that it is in a position to provide a useful answer to the referring court (see, to that effect, judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 42 and the case-law cited).

30 In this instance, although it would admittedly have been desirable for the referring court to set out in greater detail the reasons which led it to consider that the provisions of EU law concerned by its first question might have been infringed in the present cases, it can be inferred from the information contained in the requests for a preliminary ruling that only the holders of licences for the management of games played on gaming machines and their downstream contractors – and not the other actors in the gaming sector, such as operators of online games – are affected by the 2015 levy. Accordingly, neither the fact that the referring court failed to identify and describe precisely the other different categories of operator in the gaming sector, nor the fact that that court failed to provide more detailed explanations regarding the extent to which such a restriction, affecting the scope of that levy, may play a role in determining whether it must be found, in this instance, that Articles 49 and 56 TFEU have been infringed, precludes either a sufficient understanding of the context in which the referring court's questions were raised and the connections which may exist between those provisions of EU law and the legislation at issue in the main proceedings or the Court of Justice providing that court with a certain minimum amount of information capable of guiding it in the application of those provisions which it may, where appropriate, be called upon to carry out in the context of the cases before it in the main proceedings.

31 It follows that the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State) are admissible.

Substance

The first question

32 By its first question, the referring court asks, in essence, whether Articles 49 and 56 TFEU are to be interpreted as precluding a piece of national legislation, such as that set out in Article 1(649) of the 2015 Stability Law, which, for reasons exclusively relating to the improvement of public finances, imposes a levy the effect of which is to reduce the commissions of a limited category of operator in the gaming sector, namely licence holders responsible for the management of games played on gaming machines.

33 It should be borne in mind that, according to settled case-law, all measures that prohibit, impede or render less attractive the exercise of the freedoms guaranteed by Articles 49 and 56 TFEU must be regarded as restrictions on the freedom of establishment and/or the freedom to provide services (see, to that effect, judgment of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 35 and the case-law cited).

34 In this instance, it is apparent from the information provided by the referring court that, by Article 1(649) of the 2015 Stability Law, in 2015 the Italian Republic imposed on licence holders in the area of the gaming sector concerned with games played on gaming machines, by means of the 2015 levy, an overall reduction in the fees made available to those licence holders under licensing agreements of EUR 500 million; a reduction divided among them in proportion to the number of machines controlled by each licence holder as at 31 December 2014, with each licence holder then dividing its share between itself and its own downstream contractors in proportion to the involvement of each in the distribution of the fees.

35 Furthermore, it is apparent from, inter alia, the information set out in paragraph 22 of the present judgment that the licence holders affected by the 2015 levy include Italian companies controlled by companies established in other Member States.

36 In that regard, it should be borne in mind that freedom of establishment, which Article 49 TFEU grants to nationals of the Member States and which includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 45 and the case-law cited).

37 Freedom of establishment thus covers, in particular, the situation where a company established in a Member State creates a subsidiary in another Member State. The same is true, in accordance with settled case-law, where such a company or a national of a Member State acquires a holding in the capital of a company established in another Member State allowing it or him or her to exert a definite influence on the company's decisions and to determine its activities (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 46 and the case-law cited).

38 As the information before the Court does not enable it to determine with sufficient precision the extent to which Article 56 would also be likely to be concerned by the situations at issue in the main proceedings, it is necessary, in this instance, to give priority to examining the questions expressed by the referring court in the light of Article 49 TFEU alone.

39 The Italian Government disputes that the 2015 levy was capable of constituting a restriction on the freedom guaranteed by that provision, given that the amount of that levy was too low to have such an effect.

40 However, it should be borne in mind that a restriction on a fundamental freedom is, in principle, prohibited by the FEU Treaty even if it is of limited scope or minor importance (judgment of 3 December 2014, *De Clercq and Others*, C-315/13, EU:C:2014:2408, paragraph 61 and the case-law cited).

41 That being so, it should be observed that the 2015 levy is in the nature of a tax measure, as the Italian Government emphasised in, inter alia, its observations, and as is apparent from the expression 'tax levies on gaming' used in Article 14(1) of Law No 23 of 11 March 2014.

42 In that regard, it must admittedly be recalled at the outset that, although direct taxation falls within the competence of the Member States, it is settled case-law that they must nonetheless exercise that competence consistently with EU law and, in particular, the fundamental freedoms guaranteed in the FEU Treaty (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 34).

43 In that context, however, the Court has held that, in the absence of harmonisation at EU level, the disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions on the freedom of movement (see, to that effect, judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 47, and of 9 September 2021, *Real Vida Seguros*, C-449/20, EU:C:2021:721, paragraph 38). The Court has thus noted, in particular, that measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 56 TFEU (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 36 and the case-law cited). Similarly, measures, the only effect of which is to create additional costs in respect of the service in question and which, whether the service is purely internal or is carried out by an operator controlled by a company established in another Member State, affect that service in a similar way, do not fall within the scope of Article 49 TFEU.

44 It is not apparent from the documents before the Court in the present cases (although it is nonetheless for the referring court to verify this) that the 2015 levy has given rise to discrimination between licence holders in the area of the gaming sector concerned with games played on gaming machines, according less favourable treatment to cross-border situations as compared with internal situations; nor, moreover, is it apparent to what extent that levy could have given rise to reverse discrimination – assuming such discrimination is prohibited by national law – according less favourable treatment to internal situations as compared with cross-border situations.

45 It also is not clear (although it is once again for the referring court to verify this) that that levy could have had the effect of hindering the profitable operation of gaming machines by existing licence holders, thus favouring other areas of the gaming sector, in particular that of online gaming; nor is it clear how, in such a scenario, cross-border situations would have been discriminated against as compared with internal situations (see, in that regard, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraphs 39 to 41).

46 In that context, it is for the national court to determine whether, either within the area of the gaming sector concerned with games played on gaming machines, or between that area and other areas of the gaming sector, the Italian Republic, by means of the 2015 levy imposed on operators of games played on gaming machines, introduced discriminatory treatment of cross-border situations as compared with internal situations, in view of the freedom guaranteed by Article 49 TFEU.

47 It is only in the event of such a finding of a restriction on that freedom that the issue of whether that restriction may be justified arises.

48 Regarding such a justification, it should be borne in mind that legislation on betting and gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. Failing any harmonisation on the issue at EU level, the Member States enjoy a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate (judgment of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 39 and the case-law cited).

49 The Member States are, therefore, free to set the objectives of their policy on betting and 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, inter alia, their justification by overriding reasons in the public interest and their proportionality (judgment of 20 December 2017, *Global Starnet*, C-322/16, EU:C:2017:985, paragraph 40 and the case-law cited). In so far as they meet this requirement, restrictions on betting and gambling may thus be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 48 and the case-law cited).

50 In this instance, Article 14(1) of Law No 23 of 11 March 2014 empowered the Italian Government ‘to implement … the reorganisation of the provisions in force relating to public gaming, reorganising all the rules in force into a code of provisions on gaming, without prejudice to the organisational model based on the system of licences and permits, in so far as this is indispensable for the protection of legitimate expectations, public policy and public security, for the balancing of the interests of the Treasury against local interests and against wider interests relating to public health, for the prevention of money laundering, and in order to guarantee the regular payment of tax levies on gaming’.

51 Article 14(2) of that law required that reorganisation to be carried out in accordance with certain principles and guidelines consisting in, inter alia, according to point (g) of that provision, ‘revision of the commissions and fees payable to licence holders and other operators according to a progressivity criterion connected with stake collection volumes’.

52 However, Article 1(649) of the 2015 Stability Law explains that the contribution requested of license holders by way of the 2015 levy is 'for the purpose of contributing to the improvement of public finance objectives, and in anticipation of a more organic reorganisation of the amount of the commissions and fees payable to licence holders and other supply chain operators within the networks for the collection of stakes on behalf of the State, in implementation of Article 14(2)(g) of [Law No 23 of 11 March 2014]'.

53 It therefore seems to follow from the wording of Article 1(649) of the 2015 Stability Law that the 2015 levy was introduced without the Italian legislature making any reference to an overriding reason in the public interest, such as consumer protection and the prevention of both fraud and addiction to gambling, as that provision refers exclusively to the improvement of public finances.

54 However, although the fact that a restriction on betting and gambling activities incidentally benefits the budget of the Member State concerned does not mean that the restriction may not be justified in so far as it, from the outset, in fact pursues objectives relating to overriding reasons in the public interest (see, to that effect, judgments of 21 October 1999, *Zenatti*, C-67/98, EU:C:1999:514, paragraph 36, and of 6 November 2003, *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 62), which it is for the national court to verify, the objective of maximising public revenue alone cannot, by contrast, permit a restriction on the freedom to provide services (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 60 and the case-law cited).

55 It follows that, in so far as there is a restriction on the freedom guaranteed by Article 49 TFEU as a result of the imposition of the 2015 levy, that restriction does not appear to be justified.

56 However, the Italian Government has argued, in particular at the hearing, that the 2015 levy, through the reduction of operators' revenues entailed thereby, also pursued the objective of discouraging the infiltration, by criminal organisations, of the comparatively particularly lucrative area of the gaming sector concerned with games played using gaming machines. In view of the continued growth of that area of the gaming sector and certain characteristics peculiar thereto, that levy also had the objective of protecting players' health from effects associated with betting and gambling.

57 In so far as, in the context of the examination which it must carry out, the referring court finds that the 2015 levy indeed primarily pursued, notwithstanding the wording of Article 1(649) of the 2015 Stability Law as recalled in paragraph 52 of the present judgment, [objectives relating to overriding reasons in the public interest], it will then be for that court to determine whether the restriction imposed by that levy satisfied the conditions laid down in the case-law of the Court of Justice regarding its proportionality, that is to say, whether it was suitable for ensuring attainment of the objectives pursued and did not go beyond what was necessary in order to attain those objectives. It should also be recalled in this connection that national legislation is suitable for ensuring attainment of the objectives relied on only if it in fact reflects a concern to attain them in a consistent and systematic manner (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 64 and the case-law cited).

58 In those circumstances, the answer to the first question is that Article 49 TFEU must be interpreted as meaning that, in so far as it is established that a piece of national legislation imposing a levy the effect of which is to reduce the commissions of licence holders responsible

for the management of games played on gaming machines entails a restriction on the freedom guaranteed by that provision of the FEU Treaty, such a restriction cannot be justified by objectives exclusively based on considerations relating to the improvement of public finances.

The second question

59 By its second question, the referring court asks, in essence, whether the principle of the protection of legitimate expectations is to be interpreted as precluding a piece of national legislation, such as that set out in Article 1(649) of the 2015 Stability Law, which, during the term of a licensing agreement between a company and the administration of the Member State concerned, reduces the fee agreed to in that agreement.

60 As a preliminary point, regarding the applicability of that principle, it should be borne in mind that, where a Member State relies on overriding reasons in the public interest in order to justify rules which are liable to obstruct the exercise of a freedom guaranteed by the FEU Treaty, such justification must also be interpreted in the light of the general principles of EU law, in particular the general principle of the protection of legitimate expectations. Thus, the national rules in question can fall under the exceptions provided for only if they are in line with that principle (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraphs 74 and 75 and the case-law cited).

61 It follows that, assuming that the referring court concludes that the 2015 levy gives rise to a restriction on the freedom of establishment guaranteed in Article 49 TFEU, and that it undertakes, as a result, to verify whether that restriction is proportionate in accordance with the case-law referred to in paragraph 57 of the present judgment, it will also be for that court, in that context, to take into account the requirements stemming from the principle of the protection of legitimate expectations.

62 According to settled case-law, the principle of the protection of legitimate expectations may be relied on by any economic operator on whose part national authorities have created reasonable expectations. However, where a prudent and circumspect economic operator could have foreseen the adoption of a measure likely to affect his, her or its interests, he, she or it cannot plead that principle if the measure is adopted. Moreover, economic operators cannot justifiably claim a legitimate expectation that an existing situation which may be altered by the national authorities in the exercise of their discretionary power will be maintained (judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 42 and the case-law cited).

63 By contrast, pursuant to that principle, such operators remain justified in calling into question the arrangements for the implementation of such amendments (see, to that effect, judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 78 and the case-law cited).

64 In that regard, the Court has thus, for example, already noted that an economic operator who has made costly investments in order to comply with the scheme adopted previously by the legislature could see his, her or its interests considerably affected by the withdrawal of that scheme before the date announced, all the more so if that withdrawal takes place suddenly and unforeseeably, without leaving him, her or it enough time to adapt to the new legal situation (see judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 87).

65 It is for the referring court to determine whether a piece of national legislation is compatible with the principle of the protection of legitimate expectations, as the Court of Justice, when giving a ruling under Article 267 TFEU, has jurisdiction only to provide the national court with all the criteria for the interpretation of EU law which may enable it to determine the issue of compatibility. The referring court may take into account, for that purpose, all relevant factors which are apparent from, in particular, the terms, objectives or general scheme of the legislation concerned (judgment of 15 April 2021, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others*, C-798/18 and C-799/18, EU:C:2021:280, paragraph 43 and the case-law cited).

66 In that regard, it should be noted that paragraph II 1.5 of the call for tenders referred to in paragraph 7 of the present judgment provides that 'the licence holder is entitled to a fee corresponding to the difference between the amount derived from the collection of stakes and the sums [provided for by way of the prelievo erariale unico (single Treasury levy), the licence fee and the security deposit as a percentage of the stakes collected] referred to above, on the one hand, and the winnings to be paid out, calculated on the basis of the minimum limits laid down by the legislation in force, and the amounts payable to third parties responsible for collecting stakes, on the other'.

67 Although licence holders cannot entertain any legitimate expectations that the amounts of the different levies and charges thus identified in paragraph II 1.5 of that call for tenders will remain stable over time and deducted from the amount derived from collection, the fact remains that, according to the documents before the Court (it is for the referring court to verify this), that call for tenders does not contain any provision relating to the possibility of imposing a levy exclusively for economic and tax reasons.

68 As regards Law No 23 of 11 March 2014, which the Italian Government claims announced the 2015 levy to a significant extent, it should be observed that that levy does not seem to have been determined in the context of the reorganisation of licence holders' commissions which the Italian Government was empowered to carry out under that law. As is expressly apparent from Article 1(649) of the 2015 Stability Law, that levy was implemented 'in anticipation of' that reorganisation and thus a priori outside it. It is also apparent from the documents before the Court that that reorganisation was not carried out, because of the expiry of the authorisation periods.

69 In addition, the lack of connection between the 2015 levy and Law No 23 of 11 March 2014 appears to be reflected by the fact that, unlike the 'progressivity criterion connected with stake collection volumes' which was to apply in the context of the reorganisation provided for, Article 1(649) of the 2015 Stability Law established the levy at issue at a fixed level, which was thus not connected with stake collection volumes, and divided it among licence holders on the basis of the number of machines managed by each of them; a dividing which was thus also not connected with each of their stake collection volumes.

70 Regarding, lastly, the argument of the appellants in the main proceedings that the 2015 levy had retroactive effect, it should be observed that that levy, adopted on 23 December 2014, was intended to reduce licence holders' commissions 'starting from 2015' (see Article 1(649) of the 2015 Stability Law) and that it provided for payments by April and October 2015. Accordingly, the 2015 levy did not have retroactive effect.

71 However, it is true that the date of its adoption, the amount thereof, and the fact that the burden of that levy was divided in proportion to the number of gaming machines allocated to each licence holder as at 31 December 2014 appear to have been such as to have been capable of affecting, at short notice and, according to the statements made in the orders for reference, to a significant extent, the financial forecasts of those licence holders. In that regard, it will be, where appropriate, for the referring court to assess the exact extent of the impact which such a temporary levy may have had on the profitability of the investments made by licence holders, as well as to assess whether and to what extent those licence holders have been deprived, as a result of, as the case may be, the sudden and unforeseeable nature of that levy, of the time necessary to enable them to adapt to that new situation.

72 In those circumstances, the answer to the second question is that, in so far as Article 49 TFEU is applicable to such a national measure, the principle of the protection of legitimate expectations must be interpreted as not precluding, in principle, a piece of national legislation which temporarily reduces, during the term of licensing agreements concluded between companies and the administration of the Member State concerned, the license holders' commissions agreed to in those agreements, unless it appears, in view of the extent of the impact of that reduction on the profitability of the investments made by licence holders and in view of the possible suddenness and unforeseeable nature of that measure, that those licence holders were not given the time necessary to adapt to that new situation.

Costs

73 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 49 TFEU must be interpreted as meaning that, in so far as it is established that a piece of national legislation imposing a levy the effect of which is to reduce the commissions of licence holders responsible for the management of games played on gaming machines entails a restriction on the freedom guaranteed by that provision of the FEU Treaty, such a restriction cannot be justified by objectives exclusively based on considerations relating to the improvement of public finances.**

2. **In so far as Article 49 TFEU is applicable, the principle of the protection of legitimate expectations must be interpreted as not precluding, in principle, a piece of national legislation which temporarily reduces, during the term of licensing agreements concluded between companies and the administration of the Member State concerned, the license holders' commissions agreed to in those agreements, unless it appears, in view of the extent of the impact of that reduction on the profitability of the investments made by licence holders and in view of the possible suddenness and unforeseeable nature of that measure, that those licence holders were not given the time necessary to adapt to that new situation.**

[Signatures]