Reports of Cases

ORDER OF THE COURT (Eighth Chamber)

7 June 2018*

(Reference for a preliminary ruling — Article 53(2) and Article 94 of the Rules of Procedure of the Court of Justice — Lack of sufficient information concerning the factual and regulatory background to the dispute in the main proceedings and the reasons justifying the need for an answer to the question referred for a preliminary ruling — Manifest inadmissibility)

In Case C-589/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria, Austria), made by decision of 16 November 2016, received at the Court on 21 November 2016, in the proceedings

Mario Alexander Filippi,

Christian Guzy,

Martin Klein,

Game Zone Entertainment AG,

Shopping Center Wels Einkaufszentrum GmbH,

Martin Manigatterer,

Play For Me GmbH,

ATG GmbH,

Fortuna Advisory Kft.,

Christian Vöcklinger,

Gmalieva s.r.o.,

PBW GmbH,

Felicitas GmbH,

Celik KG,

Finanzamt Linz,

* Language of the case: German.

Klara Matyiko

intervening parties:

Landespolizeidirektion Oberösterreich,

Bezirkshauptmann von Eferding,

Bezirkshauptmann von Ried im Innkreis,

Bezirkshauptmann von Linz-Land,

THE COURT (Eighth Chamber),

composed of J. Malenovský (Rapporteur), President of the Chamber, M. Safjan and D. Šváby, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Filippi, Mr Manigatterer, Play For Me GmbH, ATG GmbH, Mr Vöcklinger, Gmalieva s.r.o., PBW GmbH, Felicitas GmbH and Celik KG, by F. Maschke, Rechtsanwalt,

– Game Zone Entertainment AG, by M. Paar and H. Zwanzger, Rechtsanwälte,

– Fortuna Advisory Kft., by G. Schmid and R. Hochstöger, Rechtsanwälte,

– the Austrian Government, by G. Hesse, acting as Agent,

– the European Commission, by G. Braun and H. Tserepa-Lacombe, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, in accordance with Article 53(2) of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 56 et seq. TFEU, as read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the context of proceedings instituted by the managers of brasseries, cafés or service stations regarding administrative sanctions of a criminal nature imposed on them for the operation, without authorisation, of gaming machines.

Legal context

3 Paragraph 38a of the Verwaltungsgerichtshofgesetz (Law on the Supreme Administrative Court) of 1985 (BGBl. 10/1985), in the version applicable to the disputes in the main proceedings ('the VwGG'), is worded as follows:

'(1) If a significant number of appeals on a point of law are pending before the [Verwaltungsgerichtshof (Supreme Administrative Court, Austria)] in which legal issues of the same kind are to be resolved or there is reason to believe that a significant number of such appeals will be filed, the [Verwaltungsgerichtshof (Supreme Administrative Court)] may issue an order accordingly. Such an order shall contain:

1. the legal provisions applicable to the proceedings;

2. the legal issues to be resolved on the basis of these legal provisions;

3. the reference to the appeals on a point of law which will be dealt with by the [Verwaltungsgerichtshof (Supreme Administrative Court)].

The orders shall be made by the competent Chamber in accordance with how responsibilities are allocated.

(2) In so far as the legal provisions referred to in the order under Paragraph 38a(1) also consist, at a minimum, of laws, of international treaties of a political nature or which amend or supplement laws, or of international treaties amending the legal bases of the European Union, the Federal Chancellor or the competent state governor or, in all other cases, the competent central authority of the Federal state or *Land* shall be required to publish such orders without delay.

(3) The publication of the order under Paragraph 38a(1) shall have the following effects, as of the date on which publication occurs:

1. In cases in which an administrative court has to apply the legal provisions mentioned in the order and determine a legal issue mentioned therein:
   (a) Only such actions may be taken or directions and decisions made which cannot be affected by the ruling of the [Verwaltungsgerichtshof (Supreme Administrative Court)] or do not finally resolve the issue and in respect of which suspension is precluded.
   (b) The period of time within which to lodge an appeal on a point of law shall not start to run; where a period of time within which to lodge an appeal on a point of law has already started to run, it shall be suspended.
   (c) The period of time within which to bring an application for the fixing of a time limit and the periods of time for adopting a decision provided for in federal legislation or that of the *Länder* shall be suspended.

2. In all proceedings for the purposes of Paragraph 38a(1) pending before the [Verwaltungsgerichtshof (Supreme Administrative Court)] which are not mentioned in the order under Paragraph 38a(1):

   Only such actions may be taken or directions and decisions made which cannot be affected by the ruling of the [Verwaltungsgerichtshof (Supreme Administrative Court)] or do not finally resolve the issue and in respect of which suspension is precluded.

(4) In its ruling the [Verwaltungsgerichtshof (Supreme Administrative Court)] shall summarise its legal view in one or more legal rules which, in accordance with Paragraph 38a(2), shall be published without delay. As of the date of publication, a period of time within which to lodge an appeal on a point of law that had been suspended shall begin to run again and the other effects of Paragraph 38a(3) shall cease.'

4 Paragraph 42(4) of the VwGG specifies:

'The [Verwaltungsgerichtshof (Supreme Administrative Court)] may rule on the substance of the case if the state of the proceedings so permits and if the decision on the substance is in the interests of simplicity, expediency and cost savings. In that event, it shall determine the relevant facts and, for that purpose, it can also instruct the administrative court to supplement the inquiry into the proceedings.'

5 Under Paragraph 63 of the VwGG:

'(1) If the [Verwaltungsgerichtshof (Supreme Administrative Court)] has allowed an appeal on a point of law, the administrative courts and the administrative authorities are obliged, in the cases concerned, with the legal means available to them, to establish without delay the legal position which accords with the legal view of the [Verwaltungsgerichtshof (Supreme Administrative Court)].

(2) In a finding in which the [Verwaltungsgerichtshof (Supreme Administrative Court)] has itself ruled on the substance of the case, it shall also specify the court or the administrative authority responsible for enforcing the ruling. The enforcement proceedings shall be governed by the provisions otherwise applicable to that court or administrative authority.'

6 Paragraph 86a of the Verfassungsgerichtshofgesetz (Law on the Constitutional Court) of 1953 (BGBl. 85/1953), in the version applicable to the disputes in the main proceedings ('the VfGG'), provides as follows:

'(1) If a significant number of administrative complaints are pending before the [Verfassungsgerichtshof (Constitutional Court, Austria)] in which legal issues of the same kind are to be resolved or there is reason to believe that a significant number of such complaints will be filed, the [Verfassungsgerichtshof (Constitutional Court)] may issue an order accordingly. Such an order shall contain:

1. the legal provisions applicable to the proceedings;

2. the legal issues to be resolved on the basis of these legal provisions;

3. the reference to the administrative complaints which will be dealt with by the [Verfassungsgerichtshof (Constitutional Court)].

(2) In so far as the legal provisions referred to in the order under Paragraph 86a(1) also consist, at a minimum, of laws, of international treaties of a political nature or which amend or supplement laws, or of international treaties amending the legal bases of the European Union, the Federal Chancellor or the competent state governor or, in all other cases, the competent central authority of the Federal state or *Land* shall be required to publish such orders without delay.

(3) The publication of the order under Paragraph 86a(1) shall have the following effects, as of the date on which publication occurs:

1. In cases in which an administrative court has to apply the legal provisions mentioned in the order and determine a legal issue mentioned therein:
   (a) Only such actions may be taken or directions and decisions made which cannot be affected by the ruling of the [Verfassungsgerichtshof (Constitutional Court)] or do not finally resolve the issue and in respect of which suspension is precluded.
   (b) The period of time within which to lodge an administrative complaint shall not start to run; where a period of time within which to lodge an administrative complaint has already started to run, it shall be suspended.

2. In all proceedings for the purposes of Paragraph 86a(1) pending before the [Verfassungsgerichtshof (Constitutional Court)] which are not mentioned in the order under Paragraph 86a(1):

   Only such actions may be taken or directions and decisions made which cannot be affected by the finding of the [Verfassungsgerichtshof (Constitutional Court)] or do not finally resolve the issue and in respect of which suspension is precluded.

(4) In its ruling the [Verfassungsgerichtshof (Constitutional Court)] shall summarise its legal view in one or more legal rules which, in accordance with Paragraph 86a(2), shall be published without delay. As of the date of publication, a period of time within which to lodge an administrative complaint that had been suspended shall begin to run again and the other effects of Paragraph 86a(3) shall cease.'

7 Paragraph 87 of the VfGG specifies:

'(1) The ruling shall state whether a constitutionally guaranteed right of the complainant's has been violated by the ruling against which the complaint has been brought or his or her rights have been violated by virtue of the application of an unlawful regulation, an unlawful publication with respect to the re-proclamation of a law (international treaty), an unconstitutional law or an unlawful international treaty and, in such a case, shall set aside the ruling against which the complaint has been brought.

(2) If the [Verfassungsgerichtshof (Constitutional Court)] has allowed an administrative complaint, the administrative courts and the administrative authorities are obliged, in the cases concerned, with the legal means available to them, to establish without delay the legal position which accords with the legal view of the [Verfassungsgerichtshof (Constitutional Court)].

(3) Where the [Verfassungsgerichtshof (Constitutional Court)] refuses to deal with an administrative complaint or dismisses the administrative complaint, it shall, if the applicant has filed an application in that regard and the application was filed within two weeks of service of the decision of the [Verfassungsgerichtshof (Constitutional Court)], state that the complaint is assigned to the [Verwaltungsgerichtshof (Supreme Administrative Court)] under Paragraph 144(3) of the Constitution.'

The actions in the main proceedings and the question referred for a preliminary ruling

8 Managers of brasseries, cafés or service stations, suspected of having installed one or more gaming machines in their premises without the administrative authorisation required by the Glücksspielgesetz (Law on gaming machines) (BGBl. 620/1989), in the version applicable to the disputes in the main proceedings ('the GSpG'), were the subject of checks carried out by officials of the finance police and federal police, resulting in the provisional seizure of those machines which were being operated without that authorisation.

9 Those provisional seizures were confirmed, fines were imposed on the managers concerned and the gaming machines were confiscated.

10 The parties to the main proceedings challenged those measures before the referring court, the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria, Austria).

11 It is apparent from the order for reference that both the Verfassungsgerichtshof (Constitutional Court) and the Verwaltungsgerichtshof (Supreme Administrative Court) found by decisions of 15 October and 16 March 2016, respectively, that the monopoly in respect of games of chance introduced by the GSpG was not contrary to EU law.

12 The referring court points out that, in contrast, following actions brought under the Bundesgesetz gegen den unlauteren Wettbewerb 1984 (Federal law against unfair competition of 1984) (BGBl. 448/1984), in the version applicable to the disputes in the main proceedings, taken by monopoly holders against undertakings providing, without administrative authorisation, gaming facilities governed by the GSpG, the Oberster Gerichtshof (Supreme Court of Austria), in its decision of 30 March 2016, concluded that the GSpG is incompatible with EU law.

13 The referring court also states that, in the judicial protection system provided for under the Austrian Constitution, any party to proceedings before an administrative court may lodge an appeal before the Verwaltungsgerichtshof (Supreme Administrative Court) or refer an administrative complaint to the Verfassungsgerichtshof (Constitutional Court) against the judgment of the administrative court. The European Court of Human Rights has repeatedly found, however, that the Verwaltungsgerichtshof (Supreme Administrative Court) and the Verfassungsgerichtshof (Constitutional Court) are not tribunals within the meaning of Article 6 ECHR given, in the case of the Verfassungsgerichtshof (Constitutional Court), the limited scope of a referral and, as regards the Verwaltungsgerichtshof (Supreme Administrative Court), the fact that it is bound by the findings of fact or the assessment of the evidence presented at first instance or, moreover, that it has failed in practice to meet the procedural safeguards provided for in Article 6 ECHR.

14 Furthermore, the referring court considers that the appellate court must be able to decide the case before it otherwise than was decided by the lower court, in so far as it concerns both the collection of evidence and its assessment and the conduct of adversarial proceedings, in particular in the form of a public hearing. Otherwise, a result which is consistent in all respects with the principle of a fair trial under Article 6(1) ECHR or Article 47 of the Charter could not be guaranteed.

15 The referring court considers that, in the context of the proceedings which gave rise to the decision of the Verwaltungsgerichtshof (Supreme Administrative Court) of 16 March 2016 and that of the Verfassungsgerichtshof (Constitutional Court) delivered on 15 October 2016, the principle of a fair trial was not observed. The Verwaltungsgerichtshof (Supreme Administrative Court) accepted the facts as established by the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria) and on that basis made an assessment to the contrary without taking any investigatory measures itself, although that possibility would have been available to it under Paragraph 42(4) of the VwGG. As regards the Verfassungsgerichtshof (Constitutional Court), it relied exclusively on the findings made as to the facts by the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria) without having gathered any evidence itself or, at a minimum, having heard contrary arguments as to the substance of the case. Moreover, no public hearing was held in either of these two cases.

16 In those circumstances, the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 47 of the [Charter] in conjunction with Article 56 et seq. TFEU to be interpreted as meaning that, in cases in which it is necessary to make an assessment of consistency, national provisions (such as Paragraph 86a(4) of the Verfassungsgerichtshofgesetz (VfGG), Paragraph 38a(4) of the Verwaltungsgerichtsgesetz (VwGG), Paragraph 87(2) of the VfGG or Paragraph 63(1) of the VwGG) are incompatible with those provisions of EU law where — as part of an overall system which in practice has the effect that supreme courts do not carry out any autonomous assessment of the facts or weighing of evidence, and in numerous cases which are in the same position in terms of the question of law raised make only a single decision on the facts in one of those cases and on that basis dismiss all the other appeals *in limine* — they permit, or do not reliably exclude, that judicial (within the meaning of Article 6(1) of the European Convention on Human Rights (ECHR) or Article 47 of the Charter) decisions — in particular those made in relation to core areas of EU law, such as for example

access to markets or free trade — can then be precluded by decisions of institutions of higher instance which for their part do not comply with the requirements of Article 6(1) [ECHR] or Article 47 of the Charter, without a prior reference to the Court of Justice for a preliminary ruling?'

Admissibility of the request for a preliminary ruling

17 By virtue of Article 53(2) of the Rules of Procedure of the Court of Justice, where a reference for a preliminary ruling is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

18 That provision must be applied in the present case.

19 According to settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, in particular, judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 16 and the case-law cited).

20 The need to provide an interpretation of EU law which will be of use to the national court means that the national court must define the factual and legal context of the questions it is asking or, at the very least, explain the assumptions of fact on which those questions are based (see, in particular, judgment of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraph 18 and the case-law cited).

21 In that regard, it should be recalled that, under Article 94 of the Rules of Procedure, the reference for a preliminary ruling must contain:

'(a) 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;

…

(c) 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.'

22 Moreover, it is apparent from point 22 of the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1) that a reference for a preliminary ruling must be 'sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings'.

23 In the present case, the request for a preliminary ruling manifestly does not satisfy those requirements.

24 Indeed, as regards, in the first place, the requirements referred to in Article 94(a) of the Rules of Procedure, it must be stated that, even if the present reference for a preliminary ruling makes it possible to determine the subject matter of the disputes in the main proceedings, the factual background of these disputes is essentially absent.

25 As regards, in the second place, with regard to the requirements referred to in Article 94(c) of the Rules of Procedure and, first of all, the requirement that the reference for a preliminary ruling must contain a statement of the reasons which prompted the referring court to inquire into the

interpretation or validity of certain provisions of EU law, it must be recalled that the referring court is seeking an interpretation of Article 47 of the Charter, as read in conjunction with Article 56 et seq. TFEU.

26 In that regard, it must be recalled that Article 51(1) of the Charter provides that the provisions of the Charter are addressed to the Member States only when they are implementing EU law. Article 6(1) TEU, like Article 51(2) of the Charter, specifies that the provisions of the Charter do not extend in any way the scope of EU law beyond the competences of the Union as defined in the Treaties (order of 10 November 2016, *Pardue*, C-321/16, not published, EU:C:2016:871, paragraph 18 and the case-law cited).

27 It follows that the question referred by the national court must be understood as referring to the interpretation of Article 56 et seq. TFEU, as read in the light of Article 47 of the Charter.

28 Yet, in the present case, there is nothing in the order for reference that sets out with the necessary precision and clarity the reasons which led the referring court to inquire into the interpretation of Article 56 et seq. TFEU in the context of the disputes in the main proceedings. Moreover, the link between EU law and the national legislation applicable to the disputes in the main proceedings is not explained.

29 Admittedly, the referring court refers to the Court's settled case-law according to which it is for national courts to verify that national legislation such as that at issue in the main proceedings is consistent with its objectives (see, to that effect, judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 49).

30 In that regard, it submits that, with respect to games of chance, the national legislation at issue in the main proceedings cannot be regarded as meeting this consistency requirement inasmuch as, in particular, the Verwaltungsgerichtshof (Supreme Administrative Court) and the Verfassungsgerichtshof (Constitutional Court) confine themselves to accepting the facts, and their assessment, as established by the lower courts and thus do not engage in a genuine verification of consistency, although the decisions given by the lower courts are determined in accordance with the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court) and the Verfassungsgerichtshof (Constitutional Court).

31 Nevertheless, the referring court does not set out the grounds on which it considers that the national legislation at issue in the main proceedings — which assigns jurisdiction in a complementary manner between, on the one hand, the lower courts, by investing them with powers to establish and evaluate the facts and, on the other hand, the higher courts, by limiting their jurisdiction to examining legal matters or to questions relating to fundamental rights — does not, as a result, meet in a consistent manner the objectives it aims to pursue in the area of games of chance.

32 Moreover, with regard to the requirement laid down in Article 94(c) of the Rules of Procedure concerning the information on the national legislation applicable to the dispute in the main proceedings, it should be pointed out that, while the present request for a preliminary ruling sets out the content of certain provisions of the Law on the Supreme Administrative Court and the Law on the Constitutional Court, it does not indicate in a sufficiently clear manner how such provisions could apply in the disputes before the referring court and which are the subject of the request.

33 Consequently, the requirement laid down in Article 94(c) of the Rules of Procedure according to which a link must be established between the provisions of EU law in question and the national legislation applicable to the dispute in the main proceedings is not satisfied.

34 According to the settled case-law of the Court, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (judgment of 27 September 2017, *Puškár*, C-73/16, EU:C:2017:725, paragraph 123).

35 For all practical purposes, it should be added that, if it appears that the assessments made by a national court are not in conformity with EU law, EU law requires that a different national court which is in domestic law unconditionally bound by the interpretation of EU law made by the first court must, of its own motion, refuse to apply the rule of domestic law which requires it to comply with the interpretation of EU law according to that first court (order of 15 October 2015, *Naderhirn*, C-581/14, not published, EU:C:2015:707, paragraph 35).

36 That is true in particular where, as a result of having to follow a rule of national law, a national court, in dealing with the cases pending before it, would be prevented from taking due account of the fact that it follows from a judgment of the Court of Justice that a provision of national law must be held to be contrary to EU law and ensuring that the primacy of EU law is duly guaranteed, by taking all measures required to that end (order of 15 October 2015, *Naderhirn*, C-581/14, not published, EU:C:2015:707, paragraph 36).

37 Having regard to all the foregoing considerations, it must be held that, pursuant to Article 53(2) of the Rules of Procedure of the Court, the present request for a preliminary ruling is manifestly inadmissible.

Costs

38 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 (Eighth Chamber) hereby orders:

The request for a preliminary ruling made by the Landesverwaltungsgericht Oberösterreich (Regional Administrative Court of Upper Austria, Austria) by decision of 16 November 2016 is manifestly inadmissible.

[Signatures]