Case C-231/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 June 2020

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

27 April 2020

Appellant on a point of law:

Josef Ziri

Defendant authority:

Landespolizeidirektion Steiermark (Regional Police Directorate, Steiermark)

Subject matter of the case in the main proceedings

Criminal penalties for infringement of the Glücksspielgesetz (Austrian Law on games of chance); the issue of an accumulation of penalties with no upper limit in the event of high minimum criminal penalties

Subject matter and legal basis of the reference

Compatibility of the unlimited accumulation of fines (including custodial sentences in the event of non-payment and contributions to costs of proceedings) with Article 56 TFEU and Article 49(3) of the Charter of Fundamental Rights in the event of breaches of provisions that are not purely formal in nature

Questions referred

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 of Justice and that examination has revealed that the monopoly system is justified?

2. If Question 1 is answered in the affirmative:

2. 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 Law on games of chance, a fine must be imposed per gaming machine, with no absolute limit on the total fine imposed?

2. 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 Law on games of chance, provides for the mandatory imposition of a minimum penalty of EUR 3 000 per gaming machine?

2. 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 Law on games of chance, 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?

2. 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 Law on games of chance, 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:

3. a) Must Article 49(3) of the Charter of Fundamental Rights of the European Union ('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 Law on games of chance, a fine must be imposed per gaming machine, with no absolute limit on the total fine imposed?

3. 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 Law on games of chance, provides for the mandatory imposition of a minimum penalty of EUR 3 000 per gaming machine?

3. 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 Law on games of chance, 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?

3. 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 Law on games of chance, requires the payment of a contribution to the costs of criminal proceedings amounting to 10% of the fines imposed?

Provisions of EU law cited

Article 56 TFEU; Article 49(3) of the Charter of Fundamental Rights

Provisions of national law cited

Paragraphs 2(1) and (4), 19(1) and (7) and 52 of Law on games of chance (Glücksspielgesetz, 'the GSpG')

Paragraphs 9(1) and (7), 16(1) and (2), 19(1) and (2), 20 and 64(1) and (2) of the 1991 Law on administrative offences (Verwaltungstrafgesetz, 'the VStG')

Article 38 of the Law on the rules of procedure for the administrative courts (Verwaltungsgerichtsverfahrensgesetz, 'the VwGVG')

Court of Justice case-law cited

Judgment of 30 April 2014, Pfleger, C-390/12; judgment of 11 June 2015, Berlington Hungary, C-98/14; judgment of 12 September 2019, Maksimovic et al., C-64/18; order of 19 December 2019, NE/Bezirkshauptmannschaft Hartberg, C-645/18; judgment of 8 September 2010, Markus Stoß et al., C-316/07; judgment of 25 April 2013, Jyske Baak Gibraltar Ltd., C-212/11

Summary of the facts and procedure

1 The questions referred were raised in the context of the review of the penalty imposed by way of a penalty order issued by the relevant authority, under which the appellant was found guilty of ten offences under the Law on games of chance and which, following the partial success of his appeal with regard to the action relating to the sentence before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria, 'the administrative court') which reduced the penalty per offence, is now the subject of an appeals on points of law before the referring court. The questions of EU law referred by way of request for a preliminary ruling to the Court of Justice of the European Union are representative of other cases of appeal on points of law brought before the referring court.

2 By way of administrative penalty, the appellant was found guilty of allowing the company (A GmbH), represented by him as managing director, to make

prohibited lotteries commercially available in a café using a total of ten gaming machines between 30 April and May 2016, thereby committing a total of ten violations of the third offence in point 1 of Paragraph 52(1) of the Law on games of chance. For each violation — that is for each gaming machine — the authority imposed an administrative fine of EUR 10 000 as well as a custodial sentence, in the event of non-payment, of three days (for ten machines, this amounted to a total of EUR 100 000 and 30 days custodial sentence in the event of non-payment) and, in addition, required the appellant to pay a contribution towards the costs of the criminal proceedings of EUR 10 000. In its capacity as the organiser of the games of chance involving the 10 gaming machines, F s.r.o., a company established in Slovakia, received a final and binding penalty order. Seizure of the gaming machines was ordered both against A GmbH and (the Slovakian company) F s.r.o..

3 In appeal proceedings brought by the appellant against the penalty order, the administrative court carried out a general examination of the circumstances of the enactment and implementation of the Law on games of chance and arrived at the conclusion that the restrictions it places on the freedom to provide services were justified. It dismissed the appeal brought by the appellant against the administrative penalty order in the proceedings at first instance, both with regard to the guilty verdict and with regard to the penalty imposed. The appellant lodged an appeal on points of law against that decision to the referring court.

4 In initial appeal proceedings, the decision of the administrative court regarding the criminal proceedings of the appellant was upheld by the referring court in relation to the guilty verdict, but was set aside in relation to the penalty imposed. Subsequently, in a ruling handed down in the appeal proceedings back before it, the administrative court upheld the appellant's appeal in relation to the penalty imposed by applying the third penalty range of Article 52(2) of the Law on games of chance and imposing ten fines of EUR 4 000 each and ten custodial sentences in the event of non-payment of one day each (amounting to a fine totalling EUR 40 000 and ten days' custodial sentences in the event of non-payment). The contribution to costs for the administrative penal proceedings at first instance was fixed at EUR 4 000. The appellant brought the present appeal against the penalty to the referring court.

Summary of the basis for the reference

5 The assessment, by the referring court, of the lawfulness of the penalties imposed by the administrative court depends on whether the provisions of the Law on games of chance that govern the determination of criminal penalties, in conjunction with the provisions of the Law on administrative offences applicable by the administrative court when determining penalties, are compatible with EU law (general principles of limitation of the freedom to provide services and Article 49(3) of the Charter of Fundamental Rights). The decision of the Supreme Administrative Court on the present appeal on points of law depends on the

answers given to the questions of interpretation of European Union law set out in the present request for a preliminary ruling and examined below.

6 The Court of Justice has held that provisions of EU law, in particular the Charter and Article 56 TFEU, were applicable if the organiser of illegal games of chance resided in Austria and the alleged owner of those machines was a company established in the Czech Republic (see judgment C-390/12, Pfleger, para 10, 33 to 36). In the administrative penal proceedings which have given rise to the present appeal, the organiser of the games of chance is a company established in Slovakia; A GmbH, represented by the appellant, made those games available in a café. Furthermore, the Court of Justice also based the existence of a cross-border situation on the fact that it is far from inconceivable that operators established in other Member States have been or are interested in opening amusement arcades in, for instance, Hungary (Case C-98/14 Berlington Hungary, paragraph 27).

7 The Court of Justice has previously held that a provision that prohibits inter alia the operation of gaming machines without prior authorisation of the administrative authorities constitutes a restriction of the freedom to provide services guaranteed by Article 56 TFEU (see inter alia, Pfleger, para. 39); when assessing whether a restriction of the freedom to provide services under the provisions of the Law on games of chance is permissible, the national court must take into account all the evidence as required under EU law (see Pfleger, para. 50). Owing to the guilty verdict, under EU law this appeal only requires an assessment of the proportionality of the imposition of the penalties which had to be imposed for the illegal interference in the monopoly.

8 In its judgment of 12 September 2019 in Case C-64/18 Maksimovic and Others, the Court of Justice ruled on a number of references for a preliminary ruling concerning the proportionality of the relevant Austrian provisions in the field of cross-border labour activity which, on the one hand, provided for the imposition of minimum fines per worker concerned without setting a ceiling on the total amount of such fines and, on the other, for custodial sentences in the event of failure to pay such fines. The Court of Justice held that Article 56 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings which, with regard to non-compliance with labour law obligations on obtaining administrative permits and keeping records on wages, provides for fines to be imposed that must not be lower than a predefined minimum amount, that apply cumulatively in respect of each worker concerned and without an upper limit, that involve an additional contribution to court costs of 20% of the fine imposed if the appeal against the decision imposing those fines is dismissed, and that are replaced by custodial sentences in the event of non-payment (see also CJEU 19 December 2019, NE/Bezirkshauptmannschaft Hartberg, C-645/18).

9 In the present appeal, the examination of the imposition of penalties in respect of several violations of the Law on games of chance now raises the question of how Article 56 TFEU and possibly Article 49(3) of the Charter shall be interpreted for purposes of assessing compatibility with EU law of the third penalty range of

Article 52(2) of the Law on games of chance and Paragraphs 16 and 64(2) of the Law on administrative offences.

Examination of the determination of the penalty in the light of Article 56 TFEU (Question 1):

10 In the appeal proceedings at first instance the administrative court examined the interference in the freedom to provide services in the form of an overall assessment in the light of the criteria laid down by the Court of Justice (see Stoß, C-316/07 paragraph 79; Pfleger, C-390/12, paragraphs 41, 45 56 and 62; Jyske Baak Gibraltar Ltd., C-212/11, paragraphs 62 and 64) and concluded that the provisions of the Law on games of chance, which provide that the operation of gaming machines without the required licence constitutes a punishable offence, were not contrary to EU law.

11 In the examination of the determination of the penalty carried out by the administrative court at second instance, the referring court asks, first, whether as a second step the question of the proportionality of the penalties provided for by law in the event of an infringement of the monopoly needs to be examined in the light of the freedom to provide services or whether such examination (only) needs to be carried out in the light of the domestic constitutional framework.

Examination of the determination of the penalty under Article 49 of the Charter:

12 If the first question is answered in the negative, the referring court goes on to ask whether the legal provisions applicable by the administrative court when reviewing the determination of the penalty are considered to be proportionate within the meaning of Article 49(3) of the Charter.

In the event that Question 1is answered in the affirmative (Questions 2(a) to 2(d)) and in the event that Question 1 is answered in the negative (Questions 3(a) to 3(d)):

13 It should be noted at the outset that, according to settled case-law of the Supreme Administrative Court regarding the Law on games of chance, each of the offences referred to in Paragraph 52(1) constitutes a separate administrative offence for each gaming machine, for which separate penalties must be imposed in accordance with Paragraph 22 of the Law on administrative offences. In the present case, in calculating the fines, the administrative court applied the third penalty range of Paragraph 52(2) of the Law on games of chance, which provides that the first case of making prohibited lotteries commercially available with more than three gaming machines incurs a fine of between EUR 3 000 and EUR 30 000 per gaming machine.

14 The determination of the penalty within the limits of the statutory penalty range is a discretionary choice that must be made in accordance with the criteria laid down by the legislator in Paragraph 19 of the Law on administrative offences (significance and impairment of the protected legal interest, aggravating and

mitigating factors, fault, financial situation). It should also be noted in that regard that, in the present case, the minimum penalty of EUR 3 000 provided for by the Law on games of chance may be reduced by up to half (that is EUR 1 500 per device) in particular cases pursuant to Paragraph 20 of the Law on administrative offences in the event that the mitigating factors significantly outweigh the aggravating factors.

15 Against the background of the aforementioned case-law of the Court of Justice regarding the unlawfulness of imposing minimum penalties, cumulative fines and their conversion into custodial sentences in the event of non-payment for the breach of labour law obligations (see Maksimovic), this raises the question in the present case whether Article 56 TFEU (and, if Article 56 TFEU is found to be inapplicable in this case, Article 49(3) of the Charter) must be interpreted as also precluding legislation such as the third penalty range listed in Paragraph 52(2) of the Law on games of chance; in other words, if the reasoning followed by the Court of Justice in Maksimovic is transferable to legislation which, like point 1 of Paragraph 52(1) of the Law on games of chance, imposes a criminal sanction on organising games of chance without a licence and consequently without supervision, for example, with regard to the protection of players.

16 As the administrative court has pointed out on several occasions in the light of the Court of Justice's case-law on the lawfulness of a monopoly on games of chance, such a provision adequately ensures that the objectives of the legislator are in fact being pursued in a consistent and systematic manner, in particular by defining the regulatory framework for supervision by a public authority in Paragraph 50 of the Law on games of chance: Infringements of the Law on games of chance must be penalised effectively in order to enable the monopoly system combined with a licensing system to succeed given that it would otherwise be ineffective. In fact, compliance with the monopoly (its effectiveness) must be ensured (see Stoß, paragraph 84 et seq.).

17 The referring court believes that the infringements referred to in point 1 of Paragraph 52(1) of the Law on games of chance do not constitute infringements of mere administrative rules that serve administrative purposes. Instead they are aimed at ensuring that the monopoly, which was created legitimately in accordance with EU law, is safeguarded against individuals who do not comply with any rules regarding player protection and do not submit to any supervision (for example, anti-money-laundering provisions, see Paragraph 19(7) of the Law on games of chance). For example, the organisation of prohibited lotteries using gaming machines, which are notorious for having a particularly high potential for addiction and are therefore particularly dangerous, is subject to penalties. The penalty ranges provided for in Paragraph 52(2) of the Law on games of chance are based on the total number of gaming machines involved in each infringement.

18 It should be borne in mind in this context that the procedure for the grant of a licence or an authorisation granted under the Law on games of chance is not merely a measure in which the applicant for the licence is required to satisfy

purely formal requirements. Instead, given the very limited number of licences and/or authorisations available and the high standards required to be met by applicants, it can be assumed that, as a general rule, the operation of games of chance is prohibited and cannot be regarded as the exercise of an activity that is generally permitted and that is guaranteed by the fundamental freedoms. The imposition of severe penalties does not therefore render the exercise of a freedom granted to everyone less attractive; instead it is aimed at effectively preventing the organisation of all types of games of chance by individuals without a licence and/or authorisation and the adverse effects which ensue for the general public interest.

19 The question therefore arises as to whether Article 56 TFEU (and Article 49(3) of the Charter) also precludes a provision whose purpose it is to prevent an illegal act that carries with it a serious social harm. The offences listed in Article 52(1) of the Law on games of chance do not constitute an infringement of a mere registration obligation but rather the impairment of significant public interests whose safeguarding requires severe penalties on general and special preventive grounds in the view of the Austrian legislator.

20 Against the background of that ratio legis, the referring court considers that it is necessary in that regard to examine separately whether Article 56 TFEU (and Article 49(3) of the Charter) precludes the legally prescribed mechanism for determining the penalty, as described below:

Imposition of fines without limit as to amount as well as minimum penalties (Questions 2 (a) and 2 (b) and Questions 3 (a) and 3 (b))

21 First, a fine of at least EUR 3 000 must be imposed for each infringement, i.e. per gaming machine (which, in particular circumstances, may be reduced by half pursuant to Paragraph 20 of the Law on administrative offences). The total fines imposed on the accused are ultimately the result of the number of infringements, that is the number of gaming machines used. With this approach, the Austrian legislator wants to counteract the commercial gains that may be achieved by committing the offence, by making the illegal operation of gaming machines increasingly unattractive and further curbing their use. Consequently, in the typical scenario, where the same fines are set for each infringement, the total fine is the result of multiplying the number of gaming machines by the amount of the individual fine.

22 In view of the minimum penalty applicable in the present case (EUR 3 000 per gaming machine), a large number of machines, as is the case here, result in a minimum fine of EUR 30 000, and, in the case of an ‘amusement arcade’ with approximately 50 gaming machines, in a total minimum fine of EUR 150 000. The explanatory notes on the Austrian bill state that the penalty differentiates between different levels of severity in that, in the event of a violation involving more than three gaming machines, three times the minimum penalty applies. On the one hand, this would penalise the organised scale on which the illegal act is

typically committed and, on the other, the economic gains typically made from the illegal action. Under this penalty model the total fine is, by its very nature, unlimited because it has to depend on the number of gaming machines installed and the law does not set a ceiling for total fines.

Imposition of custodial sentences in the event of non-payment (Questions 2c and 3c)

23 The next question that arises is whether the severity of the illegality and the socially harmful nature of the offences justify the imposition of custodial sentences in the event of non-payment. Custodial sentences are only enforced if neither the person being penalised nor the company liable pay the fines imposed.

24 If a fine is imposed, a custodial sentence in the event of non-payment must be ordered at the same time (Paragraph 16(1) of the Law on administrative offences) which may, in the present case, be no more than two weeks per violation. According to the settled case-law of the referring court, there is an intrinsic link between the calculation of the custodial sentence in the event of non-payment and the fine in the sense that, when calculating the custodial sentence in the event of non-payment, account must be taken of whether the accused committed the offence intentionally or merely negligently. Where there is a significant difference between the amount of the fine and the custodial sentence (with regard to the maximum penalty), sufficient reasons must be provided.

25 The system of custodial sentences in the event of non-payment is intended to ensure that the offence found to have been committed does not go unpunished even where it is impossible to enforce payment of the fine. In the same way as with the imposition of fines, due to the accumulation there is also no statutory ceiling provided with regard to the total number of custodial sentences. The total duration of the custodial sentences in the event of non-payment (provided the respective fines are for the same amount) is also determined by multiplying a custodial sentence imposed in the event of non-payment by the number of offences (gaming machines).

The contribution to costs (Questions 2 (d) and))

26 Finally, the referring court asks whether EU law must be interpreted as precluding a mandatory contribution to the costs of criminal proceedings of 10% of the fines imposed (Paragraph 64(2) of the Law on administrative offences).