

Case C-311/19

Request for a preliminary ruling

Date lodged:

16 April 2019

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of the decision to refer:

21 March 2019

Appellant:

BONVER WIN, a. s.

Defendant:

Ministerstvo financí

...

ORDER

The Nejvyšší správní soud (Supreme Administrative Court) ... [composition of the Extended Chamber] in the case of the applicant: **BONVER WIN** a.s., established in ... Ostrava [(Czech Republic)], ... versus the defendant: **Ministerstvo financí** (the Ministry of Finance), of ... Prague 1 [(Czech Republic)], against the decision of the Minister of Finance of 22 July 2014 ... in the appeal on a point of law brought by the applicant against the judgment of the Městský soud v Praze (Prague City Court) of 15 June 2016 ...

has decided:

I. To **refer** the following questions to the Court of Justice of the European Union for a preliminary ruling:

- 1) Does Article 56 et seq. of the Treaty on the Functioning of the European Union apply to national legislation (a binding measure of general application in the form of a municipal decree) prohibiting a certain service in part of one municipality, simply because some of the

customers of a service provider affected by that legislation may come or do come from another Member State of the European Union?

If so, is a mere assertion of the possible presence of customers from another Member State sufficient to trigger the applicability of Article 56 of the Treaty on the Functioning of the European Union, or is the service provider obliged to prove the actual provision of services to customers who come from other Member States?

- 2) Is it of any relevance to the answer to the first question that:**
- (a) the potential restriction on the freedom to provide services is significantly limited in both geographical and substantive terms (potential applicability of a *de minimis* exception);**
 - (b) it does not appear that the national legislation regulates in a different manner, in law or in fact, the position of entities providing services primarily to citizens of other Member States of the European Union, on the one hand, and that of entities focusing on a domestic clientele, on the other?**

II. ... [national procedure]

Grounds:

I. Subject matter of the proceedings

- [1] The applicant ('the appellant') is a Czech commercial company which operated games of chance in the town of Děčín under a licence granted by the defendant, the Ministry of Finance. [Or. 2]
- [2] Decree No 3/2013 of the ... municipality of Děčín on the regulation of the operation of betting games, lotteries and other similar games, a binding measure of general application, prohibited the operation of betting games, lotteries and other similar games within the meaning of Zákon č. 202/1990 Sb., o loteriích a jiných podobných hrách (Law No 202/1990 on lotteries and other similar games, 'the Law on Lotteries') throughout the territory of the municipality of Děčín, allowing an exception for casinos situated in the places listed in Annex 1 to the decree. As a result, licensed operators of lotteries and betting games were in breach of the law unless their premises were located at one of the addresses listed in the annex to the municipal decree.
- [3] By a decision of 22 October 2013, on the basis of Paragraph 43(1) of the Law on Lotteries, the defendant withdrew the appellant's licence to operate games of chance at Kamenická 657/155, Děčín. In the grounds for the decision, the defendant stated that this licence did not comply with Municipal Decree No 3/2013. The appellant challenged the defendant's decision by way of an

administrative appeal, which was dismissed by a decision of the Minister of Finance of 22 July 2014.

- [4] The appellant brought an action against that decision before the Městský soud v Praze (Prague City Court), which dismissed the application. In the grounds for its judgment, the court *inter alia* rejected the argument that the national rules were contrary to EU law. It held that EU law does not apply to this situation, as the appellant is not a person making use of the freedom to provide services in the present case.
- [5] The appellant brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court) against the judgment of the Městský soud v Praze. The appellant alleged that the Městský soud v Praze had erred in failing to apply EU law. The provisions of Municipal Decree No 3/2013 of the town of Děčín and the provisions of the Law on Lotteries (in particular, Paragraph 43(1) in conjunction with Paragraph 50(4)) are, in the appellant's opinion, contrary to EU law. The appellant referred in particular to the judgment of the Court of Justice in *Berlington Hungary and Others*, C-98/14, according to which measures adopted by the Member States in regard to restrictions on the operation of lotteries in their territory must fulfil the criteria relating to proportionality defined by the Court in paragraph 92 of that judgment. The appellant submitted that the regulation of lotteries in the Czech Republic does not fulfil those criteria: national regulation of lotteries is not systematic or coherent, since it allows municipalities to take an entirely arbitrary approach when issuing binding measures of general application in the form of decrees, without imposing any rules or safeguards on them.
- [6] Referring to paragraphs 25 and 26 of the judgment of the Court of Justice in *Berlington Hungary*, the appellant pointed out that 'some of the customers' who had been visiting lottery premises in Děčín and used the lotteries concerned as a service were citizens of other EU Member States. Therefore the appellant was providing services to those persons within the meaning of Article 56 TFEU. The appellant substantiated this assertion with a solemn declaration by a person with detailed knowledge of the situation at the premises concerned, and also suggested that this person be examined as a witness. In addition, the appellant put forward a number of other pleas, which do not need to be reproduced for the purpose of referring questions for a preliminary ruling.
- [7] In its response to the appeal, the defendant maintained, *inter alia*, that EU law does not apply to purely national situations and that the argument concerning foreign customers is irrelevant.
- [8] The Fifth Chamber of the Nejvyšší správní soud, following a preliminary assessment of the case, seeks to challenge the previous case-law of the Nejvyšší správní soud. Therefore it referred the case to the Extended Chamber of the Nejvyšší správní soud. The Fifth Chamber stated that in general, in cases such as the appellant's, the Nejvyšší správní soud had discerned no 'EU element', so that the operator of lotteries and other similar games was not entitled to rely in these

proceedings on EU law, in particular on the freedom to provide services. However, in a supplementary pleading to the original application and in the appeal on a point of law, the appellant submitted that EU law was applicable, since some of its customers were nationals of other EU Member States, to whom the appellant was providing services within the meaning of Article 56 TFEU. Moreover, Děčín is about 25 km from the German border and is a popular place for the provision of services [Or. 3] to German citizens. Therefore there can be no doubt as to the existence of a cross-border element. This argument led the Fifth Chamber to refer the matter to the Extended Chamber.

- [9] The Fifth Chamber considers that EU law is applicable to the case precisely because some of the appellant's customers are citizens of other EU Member States. Where an appellant has asserted that it also provides services to nationals of other EU Member States, the applicability of EU law cannot be precluded by nothing more than a statement that the legal relationship concerned is an exclusively national one unconnected with trade between Member States. Indeed, it is clear from the judgment in *Berlington Hungary* that when some of the customers are nationals of other EU Member States, this is not an exclusively national matter; rather, it constitutes the provision of cross-border services for the purposes of Article 56 TFEU. Therefore the fact that the appellant is a Czech legal entity offering services in the Czech Republic does not preclude the applicability of EU law to the present case.
- [10] The Fifth Chamber points out that, while regulation of gambling is not subject to harmonisation at EU level, the fact remains that the Member States must comply with EU law, in particular with the primary law provisions on freedom to provide services. At the same time, it must be borne in mind that the Court of Justice does not apply a *de minimis* rule when assessing whether a certain restriction on the fundamental freedoms of the internal market falls within the scope of EU law. The Court has consistently held that the Treaty on the Functioning of the European Union applies to any restriction on a fundamental freedom, even if it is of limited scope or minor importance.
- [11] In the light of the above conclusions and in particular of the ... case-law of the Court of Justice, the Fifth Chamber considers that it is unnecessary to refer the question of whether the present case involves an EU element to the Court of Justice. To that extent, it is covered by the doctrine of *acte éclairé*. However, other chambers of the Nejvyšší správní soud have concluded otherwise in comparable cases, holding that EU law was not applicable even to a case where services were also provided partly to citizens of other EU Member States. The Fifth Chamber therefore referred the matter to the Extended Chamber of the Nejvyšší správní soud, with a view to the latter modifying the previous case-law.
- [12] In response to the transfer of the case to the Extended Chamber, the appellant proposed that the Extended Chamber refer a question to the Court of Justice for a preliminary ruling and clarify whether or not EU law is applicable.

II. Relevant EU law and national legislation

- [13] Article 56 TFEU provides that ‘within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended’.
- [14] Under Paragraph 50(4) of the Law on Lotteries, applicable in 2013, a municipality may adopt a binding measure of general application in the form of a decree stipulating that betting games, lotteries and similar games may be operated only in places and at times provided for in the decree, or it may specify in what places in the municipality and at what times the operation of those lotteries and other similar games is prohibited, or it may entirely prohibit the operation of lotteries and other similar games throughout the municipality. At the same time, the Law on Lotteries defines betting games, lotteries and other similar games.
- [15] Under the Law on Lotteries, municipalities are entitled to regulate the operation of gambling by binding measures of general application issued under their autonomous powers. Under those powers they can impose a total ban on gambling within the municipality, license it selectively or issue a general licence. The choice of a specific form of regulation is a policy decision at the discretion of the municipality, exercising its right to self-government. Some municipalities make use of their discretion under the Law on Lotteries, [Or. 4] either by imposing a complete ban or, more frequently, by a selective ban (as the town of Děčín did in the present case), while others choose not to regulate gambling at all.
- [16] Responsibility for monitoring whether the municipality has remained within the bounds of the discretion in policy-making allowed by constitutional principles and by relevant EU law (if it is applicable to the case) falls primarily within the scope of the Ministry of the Interior’s supervision of municipalities’ exercise of their autonomous powers. The lawfulness and constitutionality of a decree which is a binding measure of general application may also be reviewed by the administrative courts — as, indeed, in the present case — or by the Ústavní soud (Constitutional Court).
- [17] Pursuant to Paragraph 50(4) of the Law on Lotteries, the town of Děčín issued Municipal Decree No 3/2013 on the regulation of the operation of betting games, lotteries and other similar games. The decree banned the operation of betting games, lotteries and other similar games throughout the town as a whole in accordance with the Law. At the same time, Annex 1 to the decree listed the precise addresses in Děčín where the operation of casinos would be permitted.
- [18] The previous case-law of the Nejvyšší správní soud has concluded that EU law governing the freedom to provide services within the EU is not applicable to the above type of regulation, even where some of the customers of the casinos or similar undertakings are nationals of other EU Member States.

III. Analysis of the questions referred for a preliminary ruling

- [19] In the present case, the Nejvyšší správní soud is faced with the question of whether EU law — specifically, the rules governing the freedom to provide services within the EU (Article 56 et seq. TFEU) — is applicable simply because some of the customers of the appellant’s casino are citizens of other EU Member States.
- [20] For the reasons set out below, the Extended Chamber of the Nejvyšší správní soud considered it necessary to refer a question to the Court of Justice for a preliminary ruling.
- [21] The freedom to provide services, guaranteed by EU law, applies not only to service providers but also to customers (cf. *Cowan*, 186/87, EU:C:1989:47 and subsequent case-law). The Extended Chamber observes that the central issue of the dispute in the present case is that of possible restrictions on *customers’* freedom to receive services. The appellant is a Czech limited company with its registered office in the Czech Republic, therefore no objection has arisen of possible restrictions on freedom to provide services from the provider’s point of view.
- [22] The Extended Chamber accepts that it may flow from the case-law of the Court of Justice that Article 56 et seq. TFEU is applicable to the present case. Persons established in a Member State who travel to another Member State as tourists or on a study trip must be regarded as recipients of services for the purposes of EU law (*Commission v Spain*, C-211/08, EU:C:2010:340, paragraph 51 and the case-law cited).
- [23] In *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, the Court of Justice first noted that a number of the customers of the applicants in the main proceedings were European Union citizens holidaying in Hungary (paragraph 25) and then stated (paragraph 26): ‘Services which a provider carries out without moving from the Member State in which he is established for recipients established in other Member States constitute the provision of cross-border services for the purposes of Article 56 TFEU’. The Court also cites its earlier case-law (the judgments in *Alpine Investments*, C-384/93, EU:C:1995:126, paragraphs 21 and 22; *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 53; and *Commission v Spain*, C-211/08, EU:C:2010:340, paragraph 48).
- [24] National legislation such as the Czech legislation regulating lotteries and betting games — which applies without distinction to Czech nationals and to nationals of other Member States — may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty on the Functioning of the European Union only to the extent that it applies to situations connected [Or. 5] with trade between the Member States (see, to that effect, the judgments in *Anomar and Others*, C-6/01, EU:C:2003:446, paragraph 39, and *Garkalns*, C-470/11, EU:C:2012:505, paragraph 21).

- [25] Most cases decided by the Court of Justice in this connection have had a cause of action with a significant ‘cross-border’ element.
- [26] In the *Alpine Investments* case, the provision of services in relation to commodities futures contracts was offered by telephone from the Netherlands not only to customers in the Netherlands, but also to those in other EU Member States; national regulation had prohibited this offer of services, including to other Member States. The Court concluded that EU law ‘covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established’ (paragraph 22).
- [27] In *Gambelli*, the Court of Justice concluded by analogy that EU law also relates to the services which a provider established in a Member State offers via the internet — and so without moving — to recipients in another Member State (cross-border offer of services over the internet). Any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services (paragraph 54).
- [28] In *Berlington Hungary*, the Court of Justice, while pointing out that a number of the customers of the applicants in the main proceedings were European Union citizens holidaying in Hungary (paragraph 25), also held that EU law covers situations in which ‘it is far from inconceivable that operators established in Member States other than Hungary have been or are interested in opening amusement arcades in Hungary’ (paragraph 27).
- [29] However, it is evident that the case-law of the Court of Justice on the freedom to provide services has not yet clearly stated whether EU law, including Article 56 et seq. TFEU, is applicable simply because a service provided in a Member State primarily for nationals of that Member State is also being used or may also be used by a group of citizens of another EU Member State.
- [30] This problem leads the Extended Chamber to refer the *first question* for a preliminary ruling. If, in the proceedings before a national court, there is a claim of possible conflict with the rules on freedom to provide services under EU law, who is obliged to demonstrate the existence of a cross-border element, which makes Article 56 et seq. TFEU applicable, and to what extent are they required to do so? Is a party’s assertion (typically) that citizens of other Member States visit or may visit its premises sufficient to trigger the applicability of the provisions of the Treaty? Or is the party concerned obliged to demonstrate the fact? And can a visit by one customer from another Member State be sufficient?
- [31] The Extended Chamber observes that it cannot agree with the hypothetical conclusion that a chance visit by just one single citizen of another EU Member State to premises providing any kind of services could (in theory) automatically trigger the applicability of Article 56 TFEU to any national legislation regulating that service sector in general at the national level. If that were the case, there

would probably be no premises in the Czech Republic subject to national rules that would not be covered by Article 56 TFEU. Indeed, there are probably no premises anywhere in Europe today — essentially of any kind — whose services are not used by some foreign customers, at least from time to time.

- [32] By its *second question* referred for a preliminary ruling, the Extended Chamber also asks whether considerations and principles existing in other (related) areas of EU law might not be relevant to assessment of the first question.
- [33] One line of discussion could be whether a *de minimis* rule — such as exists, for instance, in the areas of competition law, public aid or public procurement (the last in the form of an EU threshold for the scope/value [Or. 6] of the contract) — should also be introduced in connection with the freedom to provide services. Does the withdrawal of a licence to operate a gambling establishment at just one address in one small Czech town, potentially leading to a customer from another Member State being unable to come to the premises concerned, really constitute a threat to or a restriction on the freedom to provide services and thus should be a matter of interest to EU law and the Court of Justice?
- [34] The Extended Chamber adds that even in cases which would be potentially *de minimis* from the point of view of EU law, it would naturally still be incumbent upon Member States' courts to ensure that restrictions on the right to conduct business and provide services, as in the present case, were not arbitrary and discriminatory. However, national law provides sufficient support for national courts to achieve this. Administrative courts are of course also ready to safeguard the rules of EU law; however, before those rules can be applied, it must first be established that there is a sufficient link with the freedom to provide services throughout the EU. The Extended Chamber does not see such a link in the present case.
- [35] The Extended Chamber also wishes to draw an appropriate observation from the judgment in *Keck and Mithouard*, C-267/91 and C-268/91, EU:C:1993:905, although it is aware that the judgment concerns the free movement of goods rather than of services. The Extended Chamber considers that the application of national provisions prohibiting or regulating a specific service in a certain territory cannot fall within the scope of Article 56 TFEU simply because a number of the service provider's customers are from another EU Member State, so long as, of course, those national provisions apply to all relevant entities operating within the national territory. Similarly, national legislation must regulate in the same manner, in law and in fact, entities providing services primarily to citizens of other EU Member States, on the one hand, and entities focusing on a domestic clientele, on the other (cf., *mutatis mutandis*, paragraph 16 of the judgment in *Keck and Mithouard*).
- [36] The Extended Chamber is convinced that, where such (non-discriminatory) conditions are met, the application of rules to prohibit or regulate gambling at municipal level, as in the present case, does not fall within the scope of Article 56

et seq. TFEU. The Extended Chamber recalls that in the present case the operator — a Czech legal entity — is banned from operating games of chance in only part of a town of some 50 000 inhabitants. The operation of gambling is still permitted in part of the town explicitly mentioned in the municipal decree. There is nothing in the present case to indicate that the decree, as a binding measure of general application, would have a different effect, in law or in fact, on entities providing services primarily to citizens of other EU Member States (the Extended Chamber observes that there is also no assertion on the part of the appellant that it provides services *mainly* to foreign customers).

IV. Conclusion

[37] The Nejvyšší správní soud therefore submits the following questions to the Court of Justice of the European Union for a preliminary ruling:

1) Does Article 56 et seq. TFEU apply to national legislation (a binding measure of general application in the form of a municipal decree) prohibiting a certain service in part of one municipality, simply because some of the customers of a service provider affected by that legislation may come or do come from another EU Member State?

If so, is a mere assertion of the possible presence of customers from another Member State sufficient to trigger the applicability of Article 56 TFEU, or is the service provider obliged to prove the actual provision of services to customers who come from other Member States?

2) Is it of any relevance to the answer to the first question that:

a) the potential restriction on the freedom to provide services is significantly limited in both geographical and substantive terms (potential applicability of a *de minimis* exception); [Or. 7]

b) it does not appear that the national legislation regulates in a different manner, in law or in fact, the position of entities providing services primarily to citizens of other Member States of the European Union, on the one hand, and that of entities focusing on a domestic clientele, on the other?

[38] ... [national procedure]

... [national procedure]

Brno, 21 March 2019

... [signature]

...