Case C-437/20

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:

17 September 2020

Referring court:

Tribunale di Parma (Italy)

Date of the decision to refer:

8 November 2019

Criminal proceedings against:

ZI

TQ

Subject matter of the action in the main proceedings

Criminal proceedings brought against ZI and TQ for failure to comply with the Italian legislation governing the activity of collecting bets.

Subject matter and legal basis of the request

Pursuant to the second paragraph of Article 267 TFEU, the interpretation is sought of Directive 2014/24/EU on public procurement, the principles of freedom of establishment, non-discrimination and safeguarding of competition, and of Articles 49, 52, 56 and 106 TFEU, in order to determine whether they preclude rules of national law involving:

– an extremely tight deadline for the completion of administrative and tax formalities in order to qualify for the ‘regularisation’ provided for operators pursuing the activity of collecting bets on behalf of foreign bookmakers without the necessary licences and authorisations;

– a general extension ‘*sine die*’ – in the absence of a new invitation to tender for licences for the pursuit of betting and gaming activities which the State should have launched in order to comply with the case-law of the Court of Justice – for

operators who have already obtained a licence as a result of previous invitations to tender or because of the regularisation.

Questions referred

(1) Does the EU law enshrined in the provisions of Directive 2014/24/EU on procurement and also applicable to the 'betting and gaming' sector preclude the extension of licences already awarded under previous invitations to tender declared unlawful by the Court of Justice of the European Union, granted by the Italian legislature through the Agenzia delle Dogane e dei Monopoli (Italian Customs and Monopolies Agency) by means of Circolare 9 giugno 2016 (Circular of 9 June 2016)?

(2) Do the principles of freedom of establishment, non-discrimination and safeguarding of competition laid down in Articles 49, 56 and 106 TFEU preclude national legislation which – in the absence of any tendering procedure and by means of the direct-award mechanism, implemented via an endogenous administrative organisational measure – seals off a national market with an extension '*sine die*' of previous licences issued by means of invitations to tender, the normal deadline for the expiry of which had already been set for 30 June 2016?

(3) Do the rights enshrined in Articles 49, 52 and 106 TFEU preclude Article 1(926) and (932) of Legge 208/2015 (Law 208/2015) by reason of the wholly inadequate and thus unjustifiably restrictive time limits imposed for the fulfilment of the administrative and financial obligations resulting from the application submitted by the company Phoenix International Ltd for 900 licences?

(4) Do Articles 49, 56 and 106 TFEU preclude national legislation amended by the Circular of 9 June 2016 which, by failing to set a firm deadline, recognises all licences – including those already declared unlawful by successive rulings of the Court of Justice of the European Union – as valid in the national market, thereby preventing the entry of new foreign operators or the emergence and expansion of existing operators such as Phoenix International Ltd?

(5) Do the principles of equality, equal treatment and non-discrimination set out in Articles 2 and 3 TEU and in Article 10 TFEU preclude the admission, after the deadline of 30 June 2016 set by legge di stabilità n. 208/2015 (Stability Law No 208/2015), of only three new centres, while excluding the remaining 847?

Provisions of EU law cited

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Articles 49, 52, 56 and 57 TFEU – freedom to provide services and right of establishment within the European Union

Principles of equal treatment, non-discrimination and safeguarding of competition

Provisions of national law cited

Article 1(643) of Legge del 23 dicembre 2014, n. 190 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Law No 190 of 23 December 2014 – Rules for establishing the annual and multiannual State budget) ('Legge stabilità per il 2015' ('2015 Stability Law'))

Article 1(926) of Legge del 28 dicembre 2015, n. 208 (Law No 208 of 28 December 2015) – Rules for establishing the annual and multiannual State budget ('2016 Stability Law')

Circolare dell'Agenzia delle Dogane e dei Monopoli del 9 giugno 2016 (Circular of the Italian Customs and Monopolies Agency of 9 June 2016)

Article 88 of Regio Decreto 18 giugno 1931, n. 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 of 18 June 1931 approving a single text of the laws on public security)

Article 4 of Legge 13 dicembre 1989, n. 401 – Interventi nel settore del giuoco e delle scommesse clandestini e tutela della correttezza nello svolgimento di manifestazioni sportive (Law No 401 of 13 December 1989 on gaming, clandestine betting and the lawful organisation of sporting events)

Outline of the facts and the main proceedings

1 On 12 January 2016, criminal proceedings were brought before the referring court (Tribunale di Parma) (District Court, Parma, Italy) against ZI and TQ – the owner and employee, respectively, of a data transmission centre ('DTC') – who were charged with pursuing an organised activity for the collection of bets on behalf of a foreign operator without the necessary licence and police authorisation required in Italy.

2 Counsel for ZI and TQ contended that the accused persons should be acquitted, raising doubts as to whether the applicable national legislation on the granting of licences for the operation of gaming or betting activities is compatible with EU law, both with regard to the principles governing public procurement under Directive 2014/24/EU, and with regard to the freedom of establishment, free movement of services, safeguarding of competition and non-discrimination.

Succinct presentation of the reasons for the request for a preliminary ruling

3 In order to provide the reasons for its request for a preliminary ruling, the referring court begins with a reconstruction of legislative and case-law developments in the matter.

4 In Italy, the organising of games of chance, including the online collection of bets taken by any person in Italy or abroad, is reserved in principle for the State. A licence must be obtained from the State before police authorisation is then applied for.

5 Under Article 4(4-bis) of Law No 401/1989, it is an offence to engage in such activities in the absence of the abovementioned licences. This is therefore a 'blank' criminal-law provision, since the constituent elements of the offence depend on the licensing regulations applicable '*ratione temporis*'.

The 1999, 2006 and 2012 invitations to tender and EU and national case-law

6 The three invitations to tender for the award of such licences held to date by the Italian Government, in 1999, in 2006 ('the Bersani invitation to tender') and in 2012 ('the Monti invitation to tender'), respectively, were declared contrary to several principles of EU law, in particular in the judgments of the Court of Justice of 6 November 2003, *Gambelli and Others* (Case C-243/01); of 6 March 2007, *Placanica and Others* (Joined Cases C-338/04, C-359/04 and C-360/04); and of 16 February 2012, *Costa and Cifone* (Joined Cases C-72/10 and C-77/10).

7 First, with regard to the 1999 invitation to tender, the Court of Justice held that the criminal-law provision contained in Article 4 of Law No 401/1989 amounted to a restriction on the freedom of establishment and the freedom to provide services, but that it was for the national court to determine whether, taking account of the detailed rules for its application, it actually served aims which might justify it, and whether the restrictions which it imposed were disproportionate in the light of those aims (judgment of 6 November 2003, *Gambelli and Others*, Case C-243/01).

8 Subsequently, the Corte di Cassazione (Court of Cassation, Italy) confirmed that that criminal-law provision was not incompatible with the principles of EU law, as its aim was to exercise control on grounds of public policy, which justified a restriction of those principles.

9 The Court of Justice later found that, by limiting access to the organising of bets to licence holders only, the Italian legislation was effectively pursuing an economic interest rather than seeking to safeguard public policy. Nevertheless, the Court of Justice formally left it to the national court to determine whether the national licensing system contributed to public-policy objectives (judgment of 6 March 2007, *Placanica and Others*, Joined Cases C-338/04, C-359/04 and C-360/04).

10 Abandoning its previously adopted position, the Corte di Cassazione has since upheld the principle that criminal penalties cannot be imposed on persons who have pursued, without authorisation, the activity of collecting bets, where it is established that such persons were acting on behalf of companies which, in the Member State in which they are established, lawfully pursue that activity, having obtained the necessary authorisation, even if they are not licensed in Italy because they did not or could not participate in the relevant invitation to tender in view of the restrictions imposed by the law in force.

11 Second, with regard to the 'Bersani invitation to tender' provided for by decreto legge 4 luglio 2006, n. 223 (Decree-Law No 223 of 4 July 2006 (converted by legge 4 agosto 2006, n. 248 (Law No 248 of 4 August 2006)), in order to open up the market to new operators by means of a new invitation to tender for the award of licences, the Court of Justice found that that invitation to tender infringed EU law, in so far as it protected the commercial position of existing operators by imposing a minimum distance between the establishments of new licence holders and those of existing operators (judgment of 16 February 2012, *Costa and Cifone*, Joined Cases C-72/10 and C-77/10; similarly, judgment of 12 September 2013, *Biasci and Others*, Joined Cases C-660/11 and C-8/12).

The Corte di Cassazione in turn confirmed that the betting and gaming sector was overregulated in Italy, creating objective and subjective barriers to the pursuit of such activity, and that the rules were liable to hinder the full implementation of the principles enshrined in EU law in the matter of freedom of establishment and protection of competition. Such a restriction, however, is justified on grounds of public policy provided that it is proportionate, transparent and does not discriminate against entities from other Member States.

12 Third, decreto legge 2 marzo 2012, n. 16 (Decree-Law No 16 of 2 March 2012), converted into legge n. 44/2012 (Law No 44/2012), provided for a new invitation to tender for licensing purposes ('the Monti invitation to tender'). This allowed the participation of persons who pursue the activity of collecting bets in one of the Member States of the European Economic Area where they have their registered office or principal place of business, on the basis of licences issued in accordance with the legal provisions in force in the relevant State, and who meet the integrity, reliability and financial criteria defined by the Italian Customs and Monopolies Agency.

13 Following that invitation to tender, 2 000 licences, expiring on 1 July 2016, were obtained by Lottomatica, Snai, Cogetech, Hbg, Sisal, Codere, Cirsa, Matica and B Plus Gioco Legale Limited.

The regularisation

14 The Italian legislature, partly in order to address the shortcomings of the Monti invitation to tender pointed out by the Court of Justice, introduced, by means of legge n. 190/2014 (Law No 190/2014) (the '2015 Stability Law'), Article 1(643),

and legge n. 208/2015 (Law No 208/2015) (the '2016 Stability Law'), Article 1(926), a regularisation arrangement under which establishments which, as of 30 October 2014, collected bets on behalf of foreign bookmakers without having an Italian licence or police authorisation could regularise their activities, provided that:

– they agreed to full tax regularisation by paying the single tax due;

– they made a payment on account of EUR 10 000 for each DTC for which the regularisation was requested, payable by 31 January 2016;

– they provided the Italian Customs and Monopolies Agency with the personal and business details of the owner of the DTC linked to the applicant bookmaker by completing a special form ('Annex C'), which would be treated as an application for police authorisation.

15 The operators applying for such regularisation would be entitled to pursue gaming or betting activities until the deadline of 1 July 2016, and any notices of assessment and penalty notices previously issued would be cancelled.

Failure to launch a new invitation to tender and the general extension 'sine die'

16 The date of 1 July 2016, according to the system proposed by the legislature, should have represented a 'watershed' between a system partly incompatible with EU law and a new system in which access to the market would be in accordance with EU law.

17 Article 1(932) of Law No 208/2015 required all licences for the collection of bets on sporting events to be awarded by means of a new invitation to tender to be launched on 1 May 2016, on the basis of an '*open, competitive and non-discriminatory procedure*'.

18 However, the invitation to tender was not launched at the time planned. Consequently, on 9 June 2016, the Italian Customs and Monopolies Agency issued a circular addressed to all licence holders and network owners authorising, in the interests of public policy, tax revenue and continued employment, the continuation '*sine die*' of the activity of collecting bets by all parties already authorised (following previous national invitations to tender or as a result of the amnesty).

The position of the accused persons ZI and TQ

19 The DTC of which ZI and TQ are, respectively, owner and employee is linked to the Maltese operator Phoenix International Ltd.

20 Phoenix International Ltd applied for regularisation. However, by the deadline of 31 January 2016, it had only been able to make the payments and declarations referred to in Annex C for 50 of the 900 DTCs that needed to be regularised.

21 Having been unable to regularise the remaining 850 DTCs, on 31 January 2016 it requested and obtained from the Italian Customs and Monopolies Agency a period of 60 days in which to do so. On 31 March 2016, Phoenix International Ltd submitted the Annexes C containing the details of the remaining 850 DTCs, but without making the corresponding payments necessary to qualify for regularisation. A few months later (around mid-June 2016), the company arranged payment for three DTCs, which were added to the list of the 50 already authorised. Ultimately, therefore, 847 DTCs did not secure regularisation.

22 The accused persons argue before the referring court that the regularisation procedure was actually a barrier to accessing the market, since the Italian Customs and Monopolies Agency did not issue the implementing provisions laid down in Article 1(926) of Law No 208 of 28 December 2015 until 15 January 2016, and yet, despite this, it did not change the deadline by which the formalities had to be completed, which the law had set for 31 January 2016. Therefore, Phoenix International Ltd had only 15 days in which to complete the procedure for the 900 DTCs linked to it, and succeeded in doing so for only a handful of them.

The questions referred for a preliminary ruling

23 The referring court accepts the arguments of the defence and finds that the actions of the Italian Customs and Monopolies Agency appear discriminatory against the Maltese operator Phoenix International Ltd and potentially detrimental to the freedom of establishment, the safeguarding of competition and the rules on public procurement, for two reasons.

24 First, due to the tight deadline for participating in the 2016 regularisation, which is the subject of the *third and fifth questions referred for a preliminary ruling*.

25 Such a deadline is incompatible with EU law, and in particular with the guidance contained in various judgments of the Court of Justice as to the non-discriminatory nature that any procedure for extending existing licences must have (see, inter alia, judgment of 13 September 2007, C-260/04, *Commission* v *Italy*, paragraph 29).

26 Second, due to the general extension '*sine die*' of the pursuit of betting and gaming activities granted to operators who had been authorised – following previous national invitations to tender or by participating in the regularisation – to operate until the deadline of 30 June 2016. The Italian Customs and Monopolies Agency had granted that extension after acknowledging the failure to launch the invitation to tender for new licences, which the State ought to have launched in order to comply with the case-law of the Court of Justice and with EU law, which

is the subject of *the first, second and fourth questions referred for a preliminary ruling*.

27 With regard to operators licensed under previous invitations to tender, which the Court of Justice has held to be incompatible with EU law in the abovementioned judgments, such an extension amounts to the direct award of a service, contrary to the principles on public procurement set out in Directive 2014/24/EU.

28 Lastly, the requirements referred to in the abovementioned circular on the contested extension, particularly those of a fiscal and employment nature, do not constitute overriding reasons in the general interest justifying the restriction of a fundamental freedom guaranteed by the Treaty.