

Case C-695/21

Request for a preliminary ruling

Date lodged:

19 November 2021

Referring court:

Nederlandstalige rechtbank van eerste aanleg Brussel (Belgium)

Date of the decision to refer:

8 November 2021

Appellants:

Recreatieprojecten Zeeland BV

Casino Admiral Zeeland BV

Supergame BV

Respondent:

Belgische Staat

[...]

**NEDERLANDSTALIGE
RECHTBANKVAN EERSTE
AANLEG BRUSSEL
(BRUSSELS COURT OF FIRST
INSTANCE (DUTCH-
SPEAKING))**

[...]

[...]

In the case [...]

The company BV RECREATIEPROJECTEN ZEELAND [...]

appellant,

[...]

v:

The **BELGISCHE STAAT (BELGIAN STATE)** [...]

Respondent;

[...]

In the case [...]

CASINO ADMIRAL ZEELAND BV [...]

appellant,

[...]

v:

The **BELGISCHE STAAT** [...]

Respondent;

[...]

In the case [...]

The **BV SUPERGAME** [...]

appellant,

[...]

v:

The **BELGISCHE STAAT** [...]

Respondent;

[...]

** ** *

[...] [Course of the national procedure]

1. Facts, antecedents and claims.

1.1.

[...] *The first appellant* [...] is the operator of the games of chance establishment 'Casino Admiral Sluis'.

[...] *The second appellant* [...] is the operator of the games of chance establishment 'Casino Admiral Hulst'.

[...] *The third appellant* [...] is the operator of the games of chance establishment 'Casino Admiral Heerle'.

[...]

1.2.

Each of the aforementioned games of chance establishments is established in the Netherlands.

From 3 December 2018 to 25 June 2019 the establishment of the first appellant was advertised in Belgian territory by means of physical carriers.

This was also the case for the establishments of the second and third appellants from 20 March 2019 to 2 April 2019.

By separate decisions of 11 December 2020 of the kansspelcommissie (Gaming Commission), an administrative fine of EUR 6 500 was imposed on the first appellant pursuant to Article 15/3 of the Kansspelwet (Law on Betting and Gaming), a fine of EUR 3 000 on the second appellant and a fine of EUR 2 800 on the third appellant, in each case for the infringement of Article 4, § 2 of the Wet van 7 mei 1999 op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de spelers (Law of 7 May 1999 on games of chance, betting, games of chance establishments and the protection of players; 'the Kansspelwet').

1.3.

By their respective applications lodged on 15 January 2021, the appellants brought the present appeals against the aforementioned decisions of 11 December 2020.

[...]

On the substance, they claim, in essence and principally, that the contested decisions should be annulled.

1.4.

[...]

[The respondent] contests, essentially and principally, the merits of the appellants' claims.

2. Joinder.

[The cases are joined] [...]

3. Admissibility.

[The appeals are admissible] [...]

4. The merits.

4.1.

By the contested decisions of 11 December 2020, the Gaming Commission, which is a body of the respondent, imposed an administrative fine on the appellants, pursuant to Article 15/3 of the *Kansspelwet*, for their alleged infringements of Article 4, § 2 of the *Kansspelwet*.

The relevant text of Article 4, § 2 of the *Kansspelwet* reads as follows:

'It is prohibited [...] for any person to advertise a [...] games of chance establishment [...] when the person concerned is aware that it concerns the operation of a game of chance or games of chance establishment which is not licensed under this Law.'

In other words, this provision introduces a general ban – barring ignorance on the part of the offender – on advertising in respect of games of chance establishments, the only exception being the games of chance establishments licensed by the Gaming Commission.

It is not disputed that, during the periods in question, the appellants advertised in Belgium the gaming establishments operated by them in the Netherlands.

Nor is it disputed that no licence was issued by the Belgian Gaming Commission to those Netherlands establishments.

A material breach of Article 4, § 2 of the *Kansspelwet* is therefore established in respect of each of the appellants.

However, the appellants submit in the context of their respective appeals that the advertising ban laid down in Article 4, § 2 of the Kansspelwet is contrary to the free movement of services guaranteed by Article 56 of the Treaty on the Functioning of the European Union of 25 March 1957 (TFEU), so that consequently that provision of national law should be disapplied.

4.2.

It is obvious that the territorial scope of the Kansspelwet is limited to the territory of the Belgian State.

This does not only mean that the aforementioned advertising ban only applies to Belgian territory.

It also means that the Gaming Commission can only issue licences to games of chance establishments established in Belgian territory.

In addition, the Kansspelwet does not make provision for an operator of a foreign games of chance establishment to obtain authorisation from the Belgian authorities, by way of derogation from the general advertising ban, to advertise that activity in Belgium.

4.3.

It follows from the foregoing that there is de facto no possibility whatsoever for the appellants to advertise, in Belgium, their games of chance establishments established in the Netherlands.

On the one hand, their establishments are not established in Belgium, so that no licence for their operation as such can be obtained from the Belgian Gaming Commission. Consequently, those establishments cannot, by operation of law, be covered by the exception which Article 4, § 2 of the Kansspelwet itself provides to the advertising ban which it introduces.

On the other hand, there is no provision in Belgian law for a licence which would permit games of chance establishments established abroad to be advertised in Belgium, for which the appellants could apply.

In other words, as a general principle, under Belgian national legislation there is a general ban on the advertising of games of chance establishments. Establishments that are established and licensed in Belgium benefit from an exception to that ban by operation of law. Such establishments may be advertised in Belgium. Games of chance establishments established outside Belgium, on the other hand, are and remain – irrespective, for example, of their licensed or unlicensed status in the country of establishment – subject to the advertising ban in Belgium. For such establishments, there is no possibility of a derogation from the general advertising ban.

Whether such a regulation in respect of the operators of games of chance establishments established in EU Member States other than Belgium is compatible with the principle of the free movement of services, is at least a legitimate question which requires further examination.

4.4.

It is not disputed that the advertising ban in respect of games of chance establishments laid down in Article 4, § 2 of the Kansspelwet constitutes a restrictive measure in relation to the freedom to provide services, as referred to in Article 56 TFEU. Indeed, the ban on advertising, in Belgium, gambling establishments established in another Member State constitutes, both for the operators of those establishments and for their potential customers, an obstacle to the use of the services in question by Belgian residents.¹

It is thus necessary to determine whether this restrictive measure is justified by an overriding reason in the public interest, which requires that this measure be suitable for achieving the objective pursued and that it does not go beyond what is necessary in order to achieve that objective.²

The advertising ban provided for in Article 4, § 2 of the Kansspelwet of 7 May 1999 was introduced by Article 6 of the Wet van 10 januari 2010 tot wijziging van de wetgeving inzake kansspelen (Law of 10 January 2010 amending the legislation on games of chance).

It is clear from the parliamentary preparation relating to this change in the law that, in general, the Belgian legislature, in its own words, aims to implement a gambling policy with the following objectives:

- player protection,
- financial transparency and control of financial flows,
- the monitoring of gaming, and
- the identification and monitoring of operators.³

¹ cf., inter alia, CJEU, judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Baw International*, C-42/07, EU:C:2009:519, <http://curia.europa.eu/>.

² *Ibid.*

³ Wetsontwerp tot wijziging van de wet van 7 mei 1999 op de kansspelen, de kansspelinrichtingen en de bescherming van de spelers, van het Wetboek van de met inkomstenbelastingen gelijkgestelde belastingen, van de wet van 26 juni 1963 betreffende de aanmoediging van de lichamelijke opvoeding, de sport en het openluchtlevens en het toezicht op de ondernemingen die wedstrijden van weddenschappen op sportuitslagen inrichten, van de wet van 19 april 2002 tot rationalisering van de werking en het beheer van de Nationale Loterij (Draft Law amending the Law of 7 May 1999 on games of chance, games of chance establishments and player protection, the Code on taxes equated with income taxes, the Law of

The Belgian legislature evidently proceeds on the assumption that people generally have a need to gamble. Based on the notion of so-called ‘channelling’, it seeks to regulate games of chance in such a way as to combat the illegal supply of games of chance and instead lead the player to a legal supply of games of chance which is permitted to a limited extent.⁴

According to the Belgian legislature, limiting supply to a regulated number of providers of games of chance or gambling games, with their own specific products, contributes to curbing participation in games of chance, which in turn protects players from gambling addiction.⁵

It is indisputable that the protection of consumers against the adverse effects of games of chance, including the risk of gambling addiction, constitutes an overriding reason in the public interest.⁶

In concrete terms, there is no factor whatsoever, let alone any evidence, to render plausible the appellants’ contention that the real purpose of the advertising ban at issue here is simply the protection of the interests of the Belgian Treasury by directing Belgian players towards games of chance establishments located in Belgium rather than to those established abroad. It should be rejected out of hand.

4.5.

The remaining question is therefore whether the advertising ban in question, as laid down in Article 4, § 2 of the Kansspelwet, is proportionate in relation to the objective pursued.

It becomes clear from the parliamentary preparation relating to the relevant amendment of the Kansspelwet in 2010 that the legislature was prompted to make these amendments largely because of the desire to regulate the phenomenon of internet gambling which was then on the rise. Specifically also with regard to the advertising ban that was introduced, the Explanatory Memorandum to the draft law in question only refers to the operation of websites and online casinos.⁷

26 June 1963 on the promotion of physical education, sports and outdoor life, as well as the monitoring of enterprises that organise sports betting contests, the Law of 19 April 2002 rationalising the operation and management of the National Lottery, *Parl.St. (Parliamentary Documents)* Kamer (Belgian House of Representatives), 2008-09, No 1992/001, 4.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ cf., inter alia, CJEU, judgment of 6 March 2007, *Placanica*, Joined Cases C-338/04, C-359/04 and C-360/04, EU:C:2007:133, <http://curia.europa.eu/>; CJEU, judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Baw International*, C-42/07, EU:C:2009:519, <http://curia.europa.eu/>.

⁷ Draft Law amending the Law of 7 May 1999 on games of chance, games of chance establishments and player protection, the Code on taxes equated with income taxes, the Law of

Games of chance establishments located abroad are not explicitly mentioned in this context.

Nevertheless, it could be argued that the present advertising ban contributes to limiting access to games of chance to which consumers residing in Belgium are exposed. In practical terms, there is of course nothing to prevent those consumers from travelling to foreign gaming establishments and participating in the games available there. It is reasonable to assume, however, that the lack of publicity for such establishments will to some extent dim their appeal.

The Belgian legislature clearly opts for a system of limiting the supply of games of chance in order to curb participation in such games, with the aim of preventing excessive gambling and gambling addiction. It is obvious that the more the (potentially) gambling-prone consumer is confronted with advertisements for games of chance, the more he or she will be tempted to actually indulge in such games. In that sense, it could be argued that limiting the amount of advertising serves the objective pursued.

On the other hand, it could equally be argued that the same principle applies to a general advertising ban which would apply without exception to all games of chance establishments established in Belgium. Such a measure would also result in a limitation of the temptations to which the (potentially) gambling-prone consumer would be exposed.

In other words, the question arises as to the possibly discriminatory nature of national legislation which, in pursuit of a perfectly legitimate aim, allows a limited and controlled number of – exclusively domestic – gaming establishments to benefit from an exception to the general advertising ban in Belgium in relation to their activities, whereas it is impossible for all similar establishments established in another EU Member State, without distinction, to benefit from such an exception.

It is true that the regulation of games of chance is an area in which there are significant moral, religious and cultural differences between the Member States, which means that, in the absence of Community harmonisation, it is for each Member State to assess, in accordance with its own system of values, what is necessary to protect the interests in question.⁸ However, this freedom obviously

26 June 1963 on the promotion of physical education, sports and outdoor life, as well as the monitoring of enterprises that organise sports betting contests, the Law of 19 April 2002 rationalising the operation and management of the National Lottery, *Parl.St. (Parliamentary Documents)* Kamer (Belgian House of Representatives), 2008-09, No 1992/001, 4.

⁸ cf., inter alia, CJEU, judgment of 8 July 2010, *Sjöberg*, Joined Cases C-447/08, C-448/08, EU:C:2010:415, <http://curia.europa.eu/>; CJEU, judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Baw International*, C-42/07, EU:C:2009:519, <http://curia.europa.eu/>.

does not go so far as to allow the Member States to act in a discriminatory manner in this regard.⁹

The rechtbank (Court of First Instance) considers that the answer to the question of how Article 56 TFEU should be interpreted is necessary to enable it to rule on the present appeals. Indeed, if the national legislation concerning the advertising ban in relation to games of chance is deemed to be discriminatory, it cannot be applied in order to impose on the appellants the administrative sanctions complained of.

Since there is still the option of lodging an appeal in cassation against the interim judgment of this rechtbank,¹⁰ this rechtbank is not deemed to be sitting in final instance within the meaning of the third paragraph Article 267 TFEU.

Nevertheless, as things stand at present, the rechtbank considers it appropriate, before ruling on the merits of the case, to refer the question below regarding the interpretation of Article 56(1) TFEU to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267(2) TFEU.

FOR THOSE REASONS,

THE RECHTBANK,

[...]

Adjudicating at last instance [...] [Irrelevant for answering the question]

Refers the following question to the Court of Justice of the European Union for a preliminary ruling:

Must Article 56(1) TFEU be interpreted as precluding the national legislation of a Member State from allowing the operators of a limited and controlled number of licensed games of chance establishments in its territory to benefit from an exception to a generally applicable advertising ban in respect of such establishments, unless it also provides for the possibility of the operators of games of chance establishments located in other Member States also being allowed to benefit from the same exception to the advertising ban in its territory in respect of their establishments?

⁹ cf., inter alia, CJEU, judgment of 22 June 2017, *Unibet International Ltd*, C-49/16, EU:C:2017:491, <http://curia.europa.eu/>; CJEU, judgment of 4 February 2016, *Ince*, C-336/14, EU:C:2016:72, <http://curia.europa.eu/>.

¹⁰ Article 15/7, § 3 of the Kansspelwet of 7 May 1999.

[Closing formula and signatures] [...]

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