Case C-70/22

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:

1 February 2022

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

27 January 2022

Appellant:

Viagogo AG

Respondents:

Autorità per le Garanzie nelle Comunicazioni

Autorità Garante della Concorrenza e del Mercato

Intervening party:

Ticketone SpA

Subject matter of the main proceedings

Appeal lodged by Viagogo AG against a judgment by which the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy; 'the TAR Lazio') dismissed its action against a decision of the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy) imposed on it an administrative fine for having offered for sale admission tickets for entertainment activities at a price higher than the nominal price of the authorised primary market.

Subject matter and legal basis of the request

Interpretation, on the one hand, of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal

Market and, on the other, the principle of proportionality and of restrictions on competition and the freedom to provide services, in the light of Articles 56, 102 and 106 TFEU and Article 16 of the Charter of Fundamental Rights of the European Union, in particular.

Legal basis of the reference: Article 267 TFEU.

Questions referred for a preliminary ruling

(1) Does Directive 2000/31/EC, and in particular Articles 3, 14 and 15 thereof, in conjunction with Article 56 TFEU, preclude the application of legislation of a Member State on sales of tickets for events on the secondary market which has the effect of barring the operator of a hosting platform operating in the EU, such as the appellant in the present case, from supplying to third-party users services advertising the sale of tickets for events on the secondary market, reserving that activity solely to sellers, event organisers or other persons authorised by the public authorities to issue tickets on the primary market through certified systems?

(2) In addition, does Article 102 TFEU, in conjunction with Article 106 thereof, preclude the application of legislation of a Member State on the sale of tickets for events which reserves all services relating to the secondary market for tickets (and brokering in particular) solely to sellers, event organisers or other persons authorised to issue tickets on the primary market through certified systems, by barring from that activity information society service providers which intend to operate as a hosting provider for the purposes of Articles 14 and 15 of Directive 2000/31/EC, in particular where, as in the present case, such a reservation has the effect of allowing an operator which is dominant on the primary market for the distribution of tickets to extend its dominance over brokering services on the secondary market?

(3) For the purposes of European legislation and Directive 2000/31/EC in particular, can the notion of passive hosting provider be used only in the absence of any activity involving the filtering, selection, indexing, organisation, cataloguing, aggregation, evaluation, use, modification, extraction or promotion of the contents published by users, deemed to be illustrative indicators which do not all have to coexist since they are to be regarded in their own right as indicating business management of the service and/or the adoption of a technique for assessing user behaviour to increase their loyalty, or is it for the referring court to assess the relevance of those circumstances so that, if one or more of them exists, the neutrality of the service which leads to classification as passive hosting provider may be regarded as overriding?

Provisions of European Union law relied on

Articles 3, 14 and 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Principle of proportionality; restrictions on competition and the freedom to provide services (Articles 56, 102 and 106 TFEU).

Article 16 of the Charter of Fundamental Rights of the European Union.

Provisions of national law relied on

Article 1 of Law No 232 of 11 December 2016, as subsequently amended and supplemented, under which:

'*Paragraph 545: In order to counter tax avoidance and evasion, and also to ensure consumer protection and guarantee public order, the sale ... of admission tickets for entertainment activities carried out by a person other than the owners, even on the basis of an appropriate contract or agreement, of the systems for issuing them is to be punished, save where the act concerned does not constitute an offence ..., by administrative fines of between EUR 5 000 and EUR 180 000 and also, where the action is carried out through electronic communication networks, in accordance with the procedures laid down in paragraph 546, by removal of the contents, or, in the most serious cases, by shutting down the website through which the infringement was committed, without prejudice to actions for damages. ... In any event, the sale at a price equal to or lower than the nominal price of admission tickets to an entertainment activity carried out by a natural person on an occasional basis shall not be punished, provided that it is not for commercial purposes.*

...

Paragraph 545 quater: *Primary resale websites, authorised box offices or the official event websites shall ensure the possibility of reselling named admission tickets and shall ensure adequate visibility and publicity for resale, acting as brokers and changing dates ... . A ticket thus resold to natural persons must be transferred at the nominal price and without increases, without prejudice to the possibility ... of charging reasonable handling costs alone ... . [The above sites] shall also allow the name on the ticket to be changed free of charge by altering the personal details of the consumer, charging reasonable handling costs alone ...'.*

Ministerial Decree of 12 March 2018 implementing the above provisions. Article 3: '*1. In order to increase the efficiency and computer security of sales of admission tickets via automated ticketing systems, owners of issuing systems shall ensure that the sale ... through electronic communications networks of admission*

tickets for entertainment activities [takes place] exclusively through computer systems which, as they are capable of distinguishing access effected by a natural person from access effected by an automated programme, prevent a purchase by that programme and are capable of identifying the purchaser.

2. The technical specifications for the implementation of the computer systems referred to in paragraph 1, for which the persons entitled request a suitability certificate from the Revenue Authority, shall be defined by decision of the Director of the Revenue Authority, adopted after obtaining the agreement of the Communications Regulatory Authority, within one hundred and twenty days from the date of publication of this decree. The procedures and time limits for applying those technical specifications shall be laid down in the same decision'.

Articles 16 and 17 of Legislative Decree No 70 of 9 April 2003, which transposed Directive 2000/31/EC into national law.

Succinct presentation of the facts and procedure in the main proceedings

1 Following a number of complaints lodged by companies operating in the musical events organisation sector, companies selling tickets for music events on the primary market and trade associations, the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority) carried out checks on the 'viagogo.it' site run by the applicant, a company incorporated under Swiss law.

2 At the end of that procedure, that authority imposed on the appellant, by Decision No 104/20/CONS of 16 March 2020 ('the contested decision'), an administrative fine of EUR 3 700 000 for having offered for sale, between March and May 2019, tickets for concerts and shows at prices higher than the nominal prices on the authorised primary sales sites, in breach of Article 1(545) of Law No 232/2016.

3 The company concerned brought an action for annulment of that decision before the TAR Lazio, which was dismissed by the judgment now under appeal before the referring court.

The essential arguments of the parties in the main proceedings

4 The appellant claims that the judgment of the TAR and, consequently, the contested decision, should be annulled, on, inter alia, the following grounds:

- misunderstanding of the nature of the activity carried on by the appellant, who was wrongly classified as an active hosting provider, with the result that action prohibited by law was wrongly imputed to it; infringement of Articles 3, 14 and 15 of Directive 2000/31/EC and Articles 16 and 17 of Implementing Legislative Decree No 70/2003;

- infringement of Article 1(545) and (545 *quinquies*) of Law No 232/2016, as subsequently amended and supplemented;

- failure to state reasons for the judgment as regards the incompatibility of the contested decision and the legislation on which it is based with European Union law, Directive 2000/31/EC in particular, with the prohibition of restrictions on competition and with the freedom to provide services (Articles 56, 102 and 106 TFEU), and with Article 16 of the Charter of Fundamental Rights of the European Union.

Succinct presentation of the reasoning in the request for a preliminary ruling

(a) Classification of the hosting activity carried on by the appellant company

5 Firstly, the referring court recalls that, in 2017, another authority (the Autorità garante della concorrenza e del mercato (National Competition Authority)), imposed on the appellant an administrative fine for an unfair commercial practice consisting in, in particular: *(i)* failure to indicate the sector or row of the ticket on offer; *(ii)* failure to provide information on the nominal value of the ticket, indicating only the price offered by the seller; *(iii)* indicating the scarcity of the ticket sought on account of demand; and *(iv)* use of the phrase 'Viagogo-Sito ufficiale' (Official Viagogo site), likely to confuse the consumer as to the actual nature of the offers on the site, in relation to tickets at higher prices than those offered by the official reseller. That decision was annulled by judgment No 4359 of 2019 of the same referring court, which found essentially that the company in question was a 'passive' hosting provider in nature and as such not liable for the unfair practices alleged against it.

6 The referring court considers that the assessments contained in that earlier judgment may provide useful information also in the present case since both the decision at issue in that case and the contested decision concern the same activity of the appellant company, whose legal classification as an active or passive hosting provider is one of the points at issue between the appellant and the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority).

7 In that regard, the referring court recalls the main aspects of that distinction and the relevant effects, in particular under Legislative Decree No 70/2003, Directive 2000/31/EU transposed by it, and the relevant case-law.

7.1 Generally, the internet service provider is the person which organises the offer to its users of internet access and the services connected with the use thereof, which may consist, specifically, in activities involving (i) mere conduit, (ii) caching, and (iii) hosting.

7.2 In relation to that latter activity, the case-law of the Court of Justice distinguishes between two types of hosting provider. On the one hand, there is the

'passive' hosting provider who engages in an activity involving the provision of services of a mere technical and automatic nature, as a result of which that service provider has neither knowledge of nor control over the information which is transmitted or stored by the persons to whom he or she provides his services. On the other, there is the 'active' hosting provider, whose activity is not limited to those mentioned above, but also covers the contents of the service supplied (judgment of the Court of Justice of 7 August 2018, [*SNB-REACT*, C-521/17, EU:C:2018:639], paragraphs 47 and 48).

7.3 Since computer-related offences are in fact made possible by the activity of the internet service providers, it is necessary to include them in the liability and/or, at least, the actions to prevent and remove those offences.

7.4 The choice made by the European Union legislature, and, consequently, the national legislature, was to add to existing legislation on liability in tort or delict (Article 2043 of the Italian Civil Code) and, more generally, the ordinary rules on civil liability, certain additional special provisions on the liability of internet service providers, which is 'graduated' having regard to the technical aspects of the activity for financial gain which is performed.

7.5 In that context, national case-law has ruled out liability on the part of the hosting provider where there is no manipulation of the data stored, as occurs in the case of 'passive' hosting. On the other hand, the aspects capable of demarcating 'active' hosting have been identified, including activity involving the filtering, selection, indexing, organisation, cataloguing, aggregation, evaluation, use, modification, extraction or promotion of contents published by users, effected through business management of the service, as well as the adoption of a technique for assessing user behaviour to increase their loyalty.

7.6 In the view of the referring court – which is seeking from the Court of Justice confirmation of that position set out in the third question referred – the aspects listed above are necessarily illustrative and do not necessarily all have to exist, regard being had also to technological developments. What matters, in its view, is that there must be action which, in essence, has the effect of supplementing and enhancing in a non-passive manner consumption of the content by users and the specific assessment of that circumstance is in any event a matter for the court adjudicating on the substance.

(b) Restrictions on competition and the freedom to provide services

8 Secondly, the referring court raises, in the first and second questions referred, certain doubts as to the application of the principle of proportionality of restrictions on competition and the freedom to provide services, restrictions which it considers to exist in the present case.

9 In particular, the appellant acts in the European Union through a single web platform which operates as a marketplace for the resale of tickets between users. This is, in particular, the secondary market for tickets, which involves, on the

supply side, any person in possession of a ticket and intending to sell it, with the exception of primary ticket organisers or sellers, and, on the demand side, users looking for a ticket on the secondary market, generally because it is no longer available on the primary market or is available only at unaffordable prices.

10 Under Italian law, and in particular Article 1(545) and (545 *quater*) of Law No 232/2016, the sale of tickets on the secondary market is lawful only if it takes place on an occasional basis, that is to say by consumers and not for financial gain, at prices not exceeding the nominal prices printed on the ticket. The only exception allowed is for primary market operators authorised to change the name on the ticket, without altering the price thereof and adding charges, other than handling costs. Those provisions, which are backed up by administrative fines and criminal penalties where the acts constitute an offence, pursue the objective of countering tax avoidance and tax evasion, consumer protection and guaranteeing public order. In brief, operators are prohibited, with the sole exception mentioned, from engaging in the secondary market for commercial purposes.

11 In that context, the referring court regards as relevant the doubts raised by the appellant, which submits that such a restrictive measure is not capable of distinguishing between economic actions or activities which are detrimental from those which are not detrimental to the public good which it protects. More specifically, the wording of the provision is such as to extend also to hosting providers, irrespective of their classification as 'active' or 'passive', and is therefore capable, in abstract terms, of prohibiting any exercise of economic activity altogether, in both its lawful and its possibly unlawful manifestations.

12 Furthermore, the legislation at issue should be assessed in the light of Article 106 TFEU, in so far as it grants 'special or exclusive' rights to primary market operators, which are the only persons able to operate on the secondary market.

13 Finally, the referring court emphasises that, in its view – contrary to the submissions made by the respondent Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority) – the non-EU nationality of the appellant company and the fact that the web platform is hosted on Microsoft Azure servers in the United States of America do not preclude the reference being made to the Court of Justice since those territorial factors do not effect a decisive factor, namely that of the operation of that company in the countries of the European Union by supplying information society service to European users and consumers in relation to events which take place in the territory of the EU.