

Case C-73/23**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:**

10 February 2023

Referring court:

Court of First Instance of Liège (Belgium)

Date of the decision to refer:

30 January 2023

Applicant:

Chaufontaine Loisirs SA

Defendant:

État belge

1. Subject matter and circumstances of the dispute:

- 1 The Law of 1 July 2016 made online gambling, that is to say, gambling provided electronically, specially subject to VAT by repealing in its regard the exemption regime enjoyed by gambling and lotteries in general.
- 2 An action for annulment of that special derogation was subsequently brought before the Constitutional Court alleging infringement of the national rules on competences and a breach in particular of the principle of fiscal neutrality governing the VAT Directive in that the law creates a disparity between the VAT regimes applicable to online gaming and betting, on the one hand, and ‘terrestrial’ gaming and betting and online and ‘terrestrial’ lotteries, on the other hand.
- 3 The Constitutional Court upheld the pleas alleging infringement of the national rules on competences and took the view that there was no need to examine the other pleas in law, in particular, the plea alleging infringement of the principle of fiscal neutrality, since they could not lead to a more extensive annulment.

- 4 The Constitutional Court therefore annulled the provisions in question of the Law of 1 July 2016 with effect from 21 May 2018, stating that the taxes paid for the period from 1 July 2016 to 21 May 2018 were maintained in view of the budgetary and administrative difficulties which would arise from their repayment (see judgments of 22 March 2018, 34/2018; and of 8 November 2018, 155/2018).
- 5 The applicant operates an online casino. It requests reimbursement of a principal amount of EUR 640 478 825 which it paid in VAT on online gambling and betting which occurred between 1 July 2016 and 22 May 2018.
- 6 By decision of 1 December 2020, the administration rejected that request on the ground that the conditions for bringing an action for reimbursement were not fulfilled.
- 7 The applicant then brought the matter before the referring court.

2. Provisions relied on:

Treaty on the Functioning of the European Union

- 8 Article 267 provides:

‘The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties,

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

...

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

...

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

- 9 Article 135(1)(i) reads as follows:

‘1. Member States shall exempt the following transactions:

[...]

(i) betting, lotteries and other forms of gambling, subject to the conditions and limitations laid down by each Member State;

[...].

3. Arguments of the parties:

A. *The applicant*

10 The applicant maintains, first, that the VAT at issue was levied in breach of the principle of fiscal neutrality governing the VAT Directive. It criticises, next, the maintenance for the period in question of the effects of the annulled law.

11 The applicant challenges the difference in treatment between products (including lotteries) offered online by Loterie Nationale (exempt from VAT) and gambling and betting offered online by various private economic operators (subject to VAT).

12 The applicant states that gambling and lottery games are in competition on the same market. Moreover, it points out that Loterie Nationale, beside a wide range of lotteries, offers on its website online gaming and betting similar to the games provided by other online operators, and that that similarity is confirmed by the scientific literature, in particular as regards addiction to those games. It finally points out that Loterie Nationale advertises very aggressively, given the lack of control over it.

13 It cites various judgments of the Court of Justice, including the judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544) recalling the scope of the principle of fiscal neutrality:

‘28. In the second place, the Member States must observe the principle of fiscal neutrality, which precludes treating similar supplies, which are thus in competition with each other, differently for VAT purposes (judgment of 27 April 2006, Solleveld and van den Hout-van Eijnsbergen, C-443/04 and C-444/04, EU:C:2006:257, paragraph 39 and the case-law cited).

[...]

47. The principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (judgments of 11 September 2014, K, C-219/13, EU:C:2014:2207, paragraph 24, and of 9 March 2017, Oxycure Belgium, C-573/15, EU:C:2017:189, paragraph 30).’

14 It concludes that that difference in treatment infringes the principle of neutrality, in that those two supplies of services are similar because:

- they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable,
- the differences between them do not have a significant influence on the decision of the average consumer to use one or the other of those services.

- 15 Next, the applicant complains that the État belge (Belgian State) maintained the effects of the repealed provisions from 1 July 2016 to 21 May 2018. It recalled before the administration that, in the judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544), the Court of Justice held that a ‘national court may not make use of a national provision empowering it to maintain certain effects of a measure which has been annulled in order to maintain temporarily the effect of national provisions’.
- 16 The retroactive maintenance of the annulled provisions by the Constitutional Court does not pursue a legitimate aim and does not meet public interest requirements which may alone justify the interference in principle. Moreover, such interference is disproportionate in that it disturbs the balance between the interests of the parties concerned.
- 17 According to the case-law of the Court of Justice, the impossibility for a taxable person to obtain reimbursement of VAT paid to the State resulting from an infringement of EU law constitutes an interference which does not pursue a legitimate aim, is not proportionate and infringes the right of ownership established in Article 1 of the First Additional Protocol to the European Convention on Human Rights.

B. The Belgian State

- 18 The Belgian State considers that lotteries are not similar to online gambling and that, therefore, the principle of fiscal neutrality has not been infringed.
- 19 In its view, lotteries constitute a distinct category of gambling, in particular for the following reasons:
- Under Belgian law, the Law of 7 May 1999 on gambling, betting, gambling establishments and the protection of gamblers does not apply to lotteries because they have been expressly excluded by the legislature from its scope under Article 3*bis* of that law. Lotteries are covered by the loi du 31 décembre 1851 sur les loteries (Law of 31 December 1851 on lotteries) and the loi du 22 juillet 1991 relative à la Loterie nationale (Law of 22 July 1991 on Loterie Nationale).
 - Under Belgian law, Loterie Nationale, a public establishment, enjoys a statutory monopoly in the organisation of lotteries. However, the corporate purpose of Loterie Nationale also relates to the organisation of all forms of gambling and betting.

- Gambling and betting services offered online by economic operators governed by private law are monitored by the Gambling Commission. Loterie Nationale is under the control of the Belgian State. In particular, Loterie Nationale must conclude a management contract with the Belgian State (Article 14 of the Law of 19 April 2002). That management contract imposes various obligations on Loterie Nationale, a body operating in the public interest. It is established that Loterie Nationale is responsible for organising lotteries, competitions, gambling and betting in the public interest and in accordance with commercial methods (see Article 3(3) of the Law of 19 April 2002).
 - The management contract lays down the detailed rules for calculating and paying the monopoly annuity, special contributions and the percentage of pre-tax profits, which is levied annually:
 - for the purpose of financing aid programmes for developing countries ('Loterie Nationale Subsidy'),
 - for public service purposes defined in meetings of the Council of Ministers,
 - and for the annual allocation to the Caisse nationale des calamités (National Disaster Fund), the King Baudouin Foundation and the Fonds belge de survie (Belgian Survivor Fund).
 - The legal framework of Loterie Nationale imposes various measures for the protection of individuals (informing the general public of the actual chances of winning for each type of product offered and organising information campaigns on the economic, social and psychological risks associated with addiction to gambling).
 - Moreover, according to the Belgian State, the rate of redistribution – representing the proportion of money paid back to players on all stakes – is significantly different for lottery games (low rate of player return: between 50% and 60%) compared to other games of chance (high rate of return: 95% and higher).
- 20 The Belgian State recalls the discretionary power of Member States to exempt certain categories of games and to subject others to VAT.
- 21 As regards the maintenance of the effects of the annulled legislation, the applicant relies, in the view of the tax authority, on an incomplete reading of the operative part of the judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544), which reads as follows: 'a national court may not make use of a national provision empowering it to maintain certain effects of a measure which has been annulled in order to maintain temporarily the effect of national provisions which it has found incompatible with Directive 2006/112 until they are made to comply with that directive, with a view, first, to limiting the risks of legal uncertainty resulting from the retroactive effect of that annulment and, secondly, to avoiding the application of a national scheme which predates those

provisions and is incompatible with that directive’ (emphasis added by the tax authority).

- 22 In the present case, although the Constitutional Court annulled the provisions in question, it did so because of the infringement of rules of national law and not because it considered them to be incompatible with the VAT Directive.
- 23 The tax authority submits that the provisions annulled by the Constitutional Court do not constitute a defective transposition of the VAT Directive.

4. Findings of the Court:

A. The first plea based on the principle of fiscal neutrality

- 24 In its judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others v Ministerraad* (C-297/17, ECLI:EU:C:2019:544, paragraphs 28 and 47), the Court of Justice recalled the scope of the principle of fiscal neutrality:

‘In the second place, the Member States must observe the principle of fiscal neutrality, which precludes treating similar supplies, which are thus in competition with each other, differently for VAT purposes (judgment of 27 April 2006, *Solle veld and van den Hout-van Eijnsbergen*, C-443/04 and C-444/04, EU:C:2006:257, paragraph 39 and the case-law cited).

...

The principle of fiscal neutrality precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (judgments of 11 September 2014, *K*, C-219/13, EU:C:2014:2207, paragraph 24; and of 9 March 2017, *Oxycure Belgium*, C-573/15, EU:C:2017:189, paragraph 30)’.

- 25 In his Opinion in *The English Bridge Union* (C-90/16, EU:C:2017:464, point 19), Advocate General Szpunar summarised the principle of neutrality in the context of the exemption for gaming as follows: ‘In *Rank Group*, the Court held that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of the principle of fiscal neutrality in the context of the exemption for gaming laid down in Article 135(1)(i) of the VAT Directive. The question whether the activity in question constituted “betting, lotteries and other forms of gambling” therefore depended on a market-orientated approach: if customers regard the services as similar, they need to be taxed the same way’.
- 26 Article 135(1)(i) of Directive 2006/112 left broad discretion to the Member States as regards the exemption or taxation of gambling services, since it allows those States to fix the conditions and the limitations to which entitlement to that

exemption may be made subject. The power of the Member States to fix the conditions and limitations for the exemption from VAT provided for by that provision allows them to exempt from that tax only certain forms of gambling.

- 27 In its judgment of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119, paragraphs 60 and 61), on the freedom to provide services, the Court stated that ‘secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield’.

- 28 In its order of 18 May 2021, *Fluctus and Others* (C-920/19, not published, EU:C:2021:395), also delivered in relation to the freedom to provide services, the Court of Justice held that: ‘Article 56 TFEU must be interpreted as not precluding a dual system of organisation of the market for games of chance on the sole ground that the advertising practices of the holder of the monopoly on lottery products and casino games aim at encouraging active participation in gambling, for example by trivialising gambling, by conferring on it a positive image because revenues derived from it are used for activities in the public interest or by increasing its attractiveness by means of enticing advertising messages holding out the tantalising prospect of major winnings’.
- 29 In its judgment of 10 November 2011, *The Rank Group* (C-259/10 and C-260/10, EU:C:2011:719, paragraphs 49 to 51), delivered on that occasion in relation to VAT, the Court of Justice also pointed out, with regard to the comparability of bingo and slot machines, that ‘it follows that the differences in the legal systems relied on by the referring courts are of no relevance to the assessment of the comparability of the games concerned.

That outcome is not called into question by the fact that, in certain exceptional cases, the Court has accepted that, having regard to the specific characteristics of the sectors in question, differences in the regulatory framework or the legal regime governing the supplies of goods or services at issue, such as whether or not a drug is reimbursable or whether or not the supplier of a service is subject to an obligation to provide a universal service, may create a distinction in the eyes of the consumer, in terms of the satisfaction of his own needs (Case

C-481/98 *Commission v France*, paragraph 27, and Case C-357/07 *TNT Post UK* [2009] ECR I-3025, paragraphs 38, 39 and 45).

Having regard to the foregoing considerations, the answer to question 1(a) in Case C-259/10 and to the first question in Case C-260/10 is that, where there is a difference in treatment of two games of chance as regards the granting of an exemption from VAT under Article 13B(f) of the Sixth Directive, the principle of fiscal neutrality must be interpreted as meaning that no account should be taken of the fact that those two games fall into different licensing categories and are subject to different legal regimes relating to control and regulation’.

- 30 In its judgment of 10 June 2010, *Leo-Libera* (C-58/09, EU:C:2010:333), delivered in relation to VAT, the Court of Justice, on that occasion, pointed out that: ‘35. That principle cannot, if it is not to deprive Article 135(1)(i) of Directive 2006/112 and the broad discretion which that provision grants to Member States of all effectiveness, be interpreted as precluding one form of gambling from being exempt from the payment of VAT while another form of gambling is not, in so far, however, as the two forms of gambling are not in competition with one another’.
- 31 In the present case, in the light of the Court of Justice’s case-law, it is difficult to interpret EU law, which justifies referring the first two questions for a preliminary ruling.
- 32 Those questions are broader than the first question referred on 18 November 2022 by the same court of first instance of Liège (Case C-741/22) relating to the difference in treatment between online lotteries offered by Loterie Nationale and other online games of chance offered by private operators.
- 33 The present reference for a preliminary ruling relates to the difference in treatment between gambling provided online and, first, gambling not provided online (first question) and, secondly, lotteries whether or not provided online (second question).

B. The second plea relating to the maintenance of the effects of the annulled law

- 34 It is apparent from the parties’ submissions that the interpretation of EU law raises difficulties in several respects.
- 35 First, in its judgment of 27 June 2019, *Belgisch Syndicaat van Chiropraxie and Others* (C-597/17, EU:C:2019:544, paragraphs 59 and 60), the Court of Justice recalled in these terms the conditions for a Member State to maintain the effects of a provision contrary to EU law:

‘Even assuming that overriding considerations of legal certainty were capable of leading, by way of exception, to a provisional suspension of the ousting effect which a directly applicable rule of EU law has on national law that is contrary

thereto, such a suspension must be excluded from the outset in this case, in so far as the referring court has not mentioned any concrete evidence capable of establishing specific potential legal uncertainty (see, by analogy, judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 67).

In particular, merely referring to the budgetary and administrative problems which might arise from the annulment of the contested provisions in the case in the main proceedings is not sufficient to establish overriding considerations of legal certainty (see, by analogy, judgments of 18 October 2012, *Mednis*, C-525/11, EU:C:2012:652, paragraph 44, and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 111).'

- 36 If it transpires, in the present case, that the repealing of the VAT exemption only in respect of online gambling in fact infringes the principle of neutrality in VAT law (see first plea in law), the question arises whether the effects of that repeal were not maintained in breach of EU law, in that they were maintained 'in view of the budgetary and administrative difficulties which repayment of taxes already paid would cause' even though the annulment results from an infringement of national law and not of EU law.
- 37 Secondly, in the judgment of 10 April 2008, *Marks & Spencer* (C-309/06, EU:C:2008:211), the Court of Justice held that 'where a Member State has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption ... have been subject to tax at the standard rate, the general principles of [EU] law, including [the principle] of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them'.
- 38 In the present case, the question arises whether the taxpayer is also entitled to repayment of taxes maintained in breach of the VAT Directive and the principle of fiscal neutrality.
- 39 Finally, in so far as the repeal of the VAT exemption at issue was annulled because it infringed rules of national law, it must also be ascertained whether, as a 'court or tribunal against whose decisions there is no judicial remedy under national law', the Constitutional Court was nonetheless required to make a reference to the Court of Justice in accordance with the third paragraph of Article 267 TFEU.
- 40 The court will refer on these points the fifth, fourth and third questions for a preliminary ruling.

5. Questions referred for a preliminary ruling:

- 41 The court refers to the Court of Justice the following questions for a preliminary ruling:

(1) Do Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of fiscal neutrality permit a Member State to exclude from the benefit of the exemption contained in that provision only gambling which is provided electronically while gambling which is not provided electronically remains exempt from VAT?

(2) Do Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of fiscal neutrality permit a Member State to exclude from the benefit of the exemption contained in that provision only gambling which is provided electronically to the exclusion of lotteries which remain exempt from VAT whether or not they are provided electronically?

(3) Does the third paragraph of Article[2]67 of the Treaty on the Functioning of the European Union permit a higher court to decide to maintain the effects of a provision of national law which it annuls because of an infringement of national law without ruling on the infringement of EU law which was also raised before it, and, therefore, without referring for a preliminary ruling the question of the compatibility of that provision of national law with EU law or asking the Court about the circumstances in which it could decide to maintain the effects of that provision in spite of its incompatibility with EU law?

(4) If the answer to one of the previous questions is in the negative, could the Constitutional Court maintain the past effects of the provisions which it annulled because of their incompatibility with national rules on the division of powers when those provisions were also incompatible with Council VAT Directive 2006/112/EC, in order to prevent budgetary and administrative difficulties from arising from reimbursement of taxes already paid?

(5) If the answer to the previous question is in the negative, can the taxable person be reimbursed the VAT which it has paid on the actual gross margin on the gaming and betting which it operates on the basis of provisions incompatible with Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and the principle of fiscal neutrality?