

Case C-720/23

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:

23 November 2023

Referring court:

Tribunal Superior de Justicia de la Comunidad Valenciana (Spain)

Date of the decision to refer:

26 September 2023

Applicants:

Asociación Española de Fabricantes de Máquinas Recreativas y de Juego (Aseseam)

Asociación de Empresarios de Máquinas Recreativas de la Comunidad Valenciana (Andemar CV)

Asociación Provincial de Empresas Comercializadoras de Empresas de Máquinas Recreativas y de Azar de Alicante (Apromar-Alicante)

Federación Empresarial de Hostelería de Valencia

Defendant:

Conselleria de Hacienda y Modelo Económico de la Generalitat Valenciana

Subject matter of the main proceedings

Regulation of gaming – Legislation adopted by an Autonomous Community with the objective of regulating gaming – Moratorium on the award of new licences or permits for Type B machines (slot machines) for a maximum period of five years

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – Compatibility of national legislation with Articles 26, 49 and 56 TFEU – Suitability, necessity and proportionality – Existence of less restrictive measures – Equal treatment – Distortion of competition

Questions referred for a preliminary ruling

1. Must Articles 26, 49 and 56 TFEU be interpreted as precluding national legislation such as that set out in Article 9 of Decreto 97/2021 ('Decree 97/2021') in so far as such legislation makes it impossible to renew licences for the operation of Type B machines that existed prior to the entry into force of Ley 1/2021 (Law 1/2021), following its entry into force, and the tenth transitional provision of Ley 1/2020, de 11 de julio de la Generalitat Valenciana, de regulación del juego y de prevención de la ludopatía en la Comunidad Valenciana (Law 1/2020 of 11 July 2020 of the Regional Government of Valencia on the regulation of gaming and the prevention of gambling addiction in the Autonomous Community of Valencia), establishing a moratorium of five years from the entry into force of that law on the award of new licences or permits for gaming establishments and on the award of licences for the operation of Type B machines, because such restrictions are incompatible with the principles referred to above of freedom to conduct a business and freedom of establishment, as well as freedom to carry on activities and access to the markets?

2. Irrespective of the answer to the above question, must Articles 26, 49 and 56 TFEU be interpreted as precluding national legislation such as that set out in Article 9 of Decreto 97/2021 and the tenth transitional provision of Law 1/2020 on the regulation of gaming and the prevention of gambling addiction in the Autonomous Community of Valencia, in so far as they have a detrimental impact only on the private sector (hospitality and similar undertakings where they are installed and, indirectly, on the manufacturers of such Type B machines) on whom restrictions on their operation are imposed, but which do not apply to public gaming and betting establishments, which are exempt from such restrictions because of the type of bets and games they promote?

Do the principles of market unity and of equal and uniform treatment and non-discrimination between and for the actors of the gaming sector preclude such provisions of national legislation? Does the situation described constitute an advantage that is damaging to or distorts competition in the sector?

Provisions of European Union law relied on

TFEU, Articles 26, 49, 56, 106(1) and 107(1)

Provisions of national law relied on

Law 1/2020

The tenth transitional provision of Law 1/2020 of 11 June 2020 of the Regional Government of Valencia on the regulation of gaming and the prevention of gambling addiction in the Autonomous Community of Valencia, ‘Law 1/2020’ provides:

‘For a maximum period of five years from the entry into force of this law, new licences for gaming establishments, as well as new licences for the operation of Type B or amusement machines with winnings, intended for installation in hospitality or similar premises, shall be suspended.

...

During that period, the ministry responsible for gaming must coordinate a study that analyses the social and public health impact of existing gaming facilities (specific gaming premises and gaming machines in hospitality premises). Based on the outcome of that study, the ministry responsible for gaming must propose the limitations on the permissible number and distribution of gaming premises and Type B or amusement machines with winnings in hospitality or similar premises in the region of Valencia, taking into account public health, population, socio-economic and territorial criteria.’

Decree 97/2021

Decreto 97/2021, de 16 de julio, del Consell, de medidas urgentes para la aplicación de la Ley 1/2020, de 11 de junio, de la Generalitat Valenciana de regulación del juego y de prevención de la ludopatía en la Comunidad Valenciana (Decree 97/2021 of 16 July 2021 of the Consell on urgent measures for the application of Law 1/2020 of 11 June 2020 of the Regional Government of Valencia on the regulation of gaming and the prevention of gambling addiction in the Autonomous Community of Valencia, ‘the contested decree’) is the regulatory provision against which the applicants have brought the present action.

Article 9 of the contested decree is worded as follows:

‘1. ‘The installation of Type B or amusement machines with winnings in hospitality or similar premises may only be authorised when the relevant licence has been obtained or requested prior to the entry into force of the law.’

2. The documentation referred to in Article 27(2) of the Reglamento de Máquinas Recreativas y de Azar (Regulation of amusement and gaming machines), adopted pursuant to Decreto 115/2006, de 28 de julio, del Consell (Decree 115/2006 of 28 July 2006 of the Consell (Government of the Autonomous Community of Valencia)) must be attached to the installation licence application

stating that the premises in which the machine is to be installed is not a bar or cafeteria located inside teaching, health, social or youth centres or sports facilities.

3. Irrespective of the reason for which it takes place, the replacement of Type B gaming machines or amusement machines with winnings in the establishments referred to in the first paragraph of the tenth transitional provision of Law 1/2020 shall under no circumstances involve an increase in the period for which the operating licence was issued in respect of the machine to be replaced. The licence for the replacement machine may only be valid until the date of expiry of validity of the operating licence of the machine replaced.

4. Following the entry into force of this decree it will not be possible to authorise the installation, in hospitality or similar premises, of Type B or amusement machines with winnings that come from casinos, bingo halls, gaming arcades or the vessels referred to in Article 45(4) of Law 1/2020.

Brief presentation of the facts and procedure in the main proceedings

- 1 The applicants in the main proceedings have brought an appeal against the contested decree, published in the Official Gazette of the Government of Valencia of 4 August 2021. In particular, they challenge Article 9 of the decree.

The essential arguments of the parties in the main proceedings

- 2 The applicants submit that the intention in relation to Type B gaming machines is to terminate the licences obtained prior to the entry into force of Law 1/2020, as their periods of validity come to an end. That affects gaming machines in hospitality premises and, indirectly, machine manufacturers. They argue that it amounts to the total blocking of access to gaming activity in the Autonomous Community of Valencia, infringing Articles 49 and 56 TFEU.
- 3 The defendant argues that the contested decree complies with the abovementioned provisions of the TFEU.

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

- 4 The Court of Justice has laid down limits on the discretion granted to Member States to determine the objectives and instruments of gaming policies, by requiring that restrictions imposed by national authorities meet the following requirements:
 - (a) They must apply, in all cases, in a non-discriminatory manner.
 - (b) They must be consistent and suitable for securing the attainment of the objectives invoked by the national authorities.

- (c) They must be proportionate and must not go beyond what is necessary to attain the objective or objectives on which their adoption is based.
- (d) The national authorities may not act in an arbitrary manner and are subject, in particular, to a transparency obligation, to which there are certain exceptions.
- 5 With regard to the prohibition on discrimination, it must be pointed out that the prohibition on discrimination on the grounds of nationality is an EU value and a fundamental principle of EU law. That explains why the Court of Justice has shown itself to be particularly rigorous when requiring that any restrictions imposed by Member States do not discriminate on grounds of nationality, and such restrictions are only considered lawful when they impact without distinction all those concerned who are established in any Member State. In that connection, the Court of Justice has held that domestic legislation is incompatible with EU law in certain disputes relating to the taxation of gaming. To that effect, in its judgment of 13 November 2003, *Lindman* (C-42/02, EU:C:2003:613), the Court of Justice held that Finnish tax legislation that granted an exemption from tax for winnings from lotteries organised in Finland, while it made winnings obtained in other Member States, specifically Sweden, subject to tax, was discriminatory.
- 6 Of greater importance is the issue raised in the judgment of 9 September 2010, *Engelmann* (C-64/08, EU:C:2010:506), which examined the compatibility with EU law of Austrian legislation requiring concessionaires operating casinos to adopt the legal form of a public limited company and requiring them to have their company seat in Austria. The Court of Justice held that that latter obligation restricted freedom of establishment within the meaning of Article 49 TFEU and discriminated against operators with their company seat in other Member States.
- 7 With regard to the consistency of restrictions with the objectives of gaming policy, the power granted to Member States to establish the objectives of their national gaming policies also includes the power to determine the measures necessary in order to attain the objective pursued. In order to do that, Member States have discretion that, while being broad, is not unlimited. In accordance with the requirement for consistency, national regulations that establish restrictions on or obstacles to the internal market are required to be consistent with the objective pursued and capable of being justified in the light of the objective on which the restriction in question is based. In general, national legislation is appropriate for guaranteeing attainment of the objective invoked only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.
- 8 The Court of Justice has held that it is for national courts to assess the coherence and consistency of national legislation, indicating that they must evaluate whether the measures are appropriate for the objectives of public interest providing the grounds for such measures. To that end, such an assessment must be carried out by adopting a process in which, first, the objectives pursued by the national authorities of the Member State in question are taken into consideration as a whole, and, second, each of the restrictions imposed by the national legislation are

examined separately in order to determine whether they are appropriate for guaranteeing attainment of the objectives invoked.

- 9 The Court of Justice usually holds that the measures adopted by national authorities are consistent. However, on some occasions, it has openly questioned the consistency of restrictions imposed, as in the judgment of 6 November 2003, *Gambelli and Others* (C-243/01, EU:C:2003:597), in which it stated that ‘in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings’. It also held that the decision adopted by the Italian authorities to automatically renew, without a competitive procedure, the licences required in order to manage and operate betting on horse races was not consistent with the objective of preventing fraudulent or criminal activities by gaming operators.
- 10 In its judgment of 8 September 2010, *Stoß and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504), the Court of Justice questioned the consistency of public monopolies on sports betting put in place by the Länder of Hesse and Baden-Württemberg with the objective of preventing incitement to squander money on gambling and fighting addiction to gambling. In that regard, it agreed with the position taken by the referring courts, which questioned whether such a monopoly was consistent with the objectives pursued by the legislation.
- 11 The reasoning in the judgment of 3 June 2010, *Ladbrokes Betting & Gaming and Ladbrokes International* (C-258/08, EU:C:2010:308) is highly enlightening. That judgment analyses the compatibility with EU law of Dutch legislation conferring exclusive rights to organise or promote games of chance on a single operator. In the case in question, the Hoge Raad der Nederlanden (Supreme Court, the Netherlands) expressed certain doubts regarding the consistent and systematic nature of legislation that, despite having the objectives of consumer protection, the curbing of gambling addiction and the prevention of fraud, permitted holders of exclusive rights to expand the range of games of chance they offered and to use advertising to make their offer more attractive. The Court of Justice held that the simultaneous existence of two objectives (consumer protection and the prevention of fraud and crime within games of chance) makes it necessary to find a fair balance between the two. As already indicated in the judgment of 6 March 2007, *Placanica* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133), the development of a policy of controlled expansion effectively designed to channel the propensity to gamble into activities that are lawful is consistent with the objective of preventing fraud and crime.
- 12 In order to do so, authorised operators must be a reliable and attractive alternative to illegal gambling, and therefore they must be able to offer an extensive range of games, carry out advertising on a certain scale and use new distribution

techniques. However, such a policy of controlled expansion in the betting and gaming sector is difficult to reconcile with the objective of protecting consumers from gambling addiction, and therefore such a policy cannot be regarded as being consistent unless the scale of unlawful activity is significant and the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful and not to increase the proceeds of authorised games of chance, which is merely an incidental beneficial consequence.

13 With regard to proportionality, it extends to the content and limits of fundamental rights. Such an aspect, namely a limit on public intervention, means that the principle of proportionality includes the following elements:

(a) suitability, which requires the measures adopted at State level to be appropriate for the attainment of the objective pursued;

(b) necessity, which requires that there be no other less restrictive measure for the attainment of the desired objective and, if there are various alternatives, for the least restrictive one to be chosen;

(c) proportionality *stricto sensu*, pursuant to which the advantages of the measure for the public interest must in all cases be greater than the detriment caused to other rights.

14 The case-law of the Court of Justice on games of chance has emphasised that the necessity and proportionality of the measures adopted by a Member State must be assessed solely in relation to the objectives pursued and the level of protection which the national authorities concerned seek to ensure. In that regard, the Court of Justice considers that the criterion of proportionality does not require a restrictive measure to correspond to a view shared by all Member States concerning the means of protecting the legitimate interest.

15 It is therefore extraordinarily complicated to draw general conclusions concerning the proportionality of restrictions imposed in particular cases by Member States, since the impact of the specific circumstances of each case in this matter is significant and the Court of Justice notes that it is the judicial authorities of the Member State in question that must assess proportionality.

16 Initially, the Court of Justice opted not to analyse in great detail the proportionality of specific measures, refraining from making express decisions on that aspect. To that effect, in the judgment of 24 March 1994, *Schindler* (C-275/92, EU:C:1994:119), it did not consider the monopoly on lotteries put in place by UK law to be disproportionate. However, starting with the *Gambelli* case and, in particular, the *Placanica* judgment, the Court of Justice has been making a more detailed and systematic examination of the issue and, on occasions, even questions the proportionality of certain measures imposed by Member States. In *Placanica*, the Court of Justice held that the requirement for a police authorisation was entirely commensurate with the objective pursued (preventing the involvement of operators in criminal or fraudulent activities). However, in both

Placanica and *Gambelli*, the prohibition on companies whose shares are quoted on the regulated markets of other Member States being holders of a sports betting concession was held to be disproportionate, on the grounds that such a measure went beyond what was necessary to achieve the objective of preventing the involvement of gaming operators in criminal or fraudulent activities. In particular, the Court of Justice pointed out that less restrictive methods existed.

- 17 Such an increased involvement on the part of the Court of Justice in assessing the proportionality of restrictions imposed by national regulations on games of chance has led it to cast doubt upon compliance with that requirement in subsequent judgments. Thus, in the judgment of 13 September 2007, *Commission v Italy* (C-260/04, EU:C:2007:508), it held that the renewal by the Italian authorities, without a competitive procedure, of licences to operate betting on horse races was disproportionate.
- 18 Such a more detailed and exhaustive approach has not prevented the Court of Justice from upholding the proportionality of other restrictions imposed in the area by national authorities. In that regard, it is worth noting its support for the Dutch system of exclusive licences for operating sports betting in the judgment of 3 June 2010, *Sporting Exchange* (C-203/08, EU:C:2010:307), in which it emphasised that the decision to authorise just one operator simplifies supervision and prevents strong competition from arising between operators and resulting in an increase in gambling addiction.
- 19 To conclude the analysis of the present question, it is worth examining the guidelines and indications addressed to the national authorities in the *Stoß* judgment, in relation to the monopoly on sports betting established by various German Länder. The Court of Justice points out, first, that the institution of a monopoly does not require the authorities of the Member State to demonstrate, before the monopoly in question is instituted, that they have carried out a study on the proportionality of that measure. It also adds that a system of authorising just one operator (monopoly or exclusive rights) simplifies supervision of the supply of games of chance and offers better guarantees of effectiveness than systems where private operators operate in competition with each other. Despite the advantages offered by the above regulation model, the Court of Justice recalls that the institution of a monopoly is a highly restrictive measure, and that it is only justified when the objective is to offer a particularly high level of consumer protection; it therefore stresses that the legislative framework must ensure that the holder of the monopoly is able to pursue the objective by means of a supply that is quantitatively modest and qualitatively focused on the said objective and is subject to rigorous control by the public authorities.
- 20 In the present case, in order to assess the compatibility of the contested decree with EU law, it is necessary to examine the following elements: (a) the principle of proportionality, in relation to the appropriateness, suitability and necessity of the measures and their non-discriminatory nature; (b) the principles of freedom to conduct a business, of establishment and access to the market and to carry on

activities; (c) the principle of market unity and equal treatment irrespective of whether the economic operator is public or private, with a prohibition on any type of advantage that distorts competition or favours the public sector; and (d) in connection with the prohibition on discrimination, a ban on advantages that distort competition or are disguised forms of State monopoly.

- 21 It appears that the five-year moratorium, following the entry into force of Law 1/2020, on the award of new licences for the operation of Type B machines (slot machines) may be inconsistent with those principles and requirements, because such a moratorium over such a long period constitutes a form of denial of the right to carry on a lawful activity.
- 22 Such a moratorium involves removing the ability to renew existing operating licences and the covert reduction in licence numbers and thus, over time, will result in the complete elimination of gaming machines from hospitality premises. Undoubtedly, that amounts to removing the opportunity to carry on a lawful activity that is linked to the right to the free establishment of undertakings and the free market, in so far as it prevents the operation of slot machines which, under an arbitrary decision, are being eliminated, despite being lawful, contrary to the principle of proportionality and the rights guaranteed by Articles 26, 49 and 56 TFEU.
- 23 Finally, with regard to equal treatment and the consistency of the restrictions imposed, in the *Gambelli* case the Court of Justice stated: ‘in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.’
- 24 Such guidelines, which outlaw discrimination of any kind, have not been complied with in the present case, since restrictions apply only to activities carried out in privately owned gaming establishments, and not to those carried out in public establishments (State lotteries, pools and sports betting, the lottery run by ONCE, the Spanish National Organisation for the Blind, and so forth). It appears that restrictions of such a type, being imposed only on activities carried out in privately owned establishments, lead to the distortion of competition and a tendency towards a State monopoly on gaming. Such a situation also has an impact on the free movement of capital and goods throughout the territory of the EU, as a result of the restrictions in force in Spain in that regard.