JUDGMENT OF THE COURT (First Chamber)

6 October 2009 (*)

(Failure of a Member State to fulfil obligations – Freedom to provide services – Article 49 EC and Article 36 of the EEA Agreement – Direct taxation – Income tax – Tax exemption restricted to winnings from lotteries and games of chance organised by certain national bodies and entities)

In Case C-153/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 15 April 2008,

Commission of the European Communities, represented by R. Lyal and L. Lozano Palacios, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, E. Levits and J.-J. Kasel (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court declare that, by maintaining in force fiscal legislation taxing winnings from all types of lotteries, games of chance and betting organised outside the Kingdom of Spain, whereas winnings obtained from certain lotteries, games of chance and betting organised within that Member State are exempted from income tax, the Kingdom of Spain has failed to fulfil its obligations under Community law and, in particular, under Article 49 EC and Article 36 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

Legal context

EC Treaty and EEA Agreement

2 Under the first paragraph of Article 49 EC:

‘Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.’

3 Article 36(1) of the EEA Agreement provides:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA (European Free Trade Association) States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.’

National legislation

4 Article 7 of Law No 35/2006 of 28 November 2006 on personal income tax and partially amending legislation on the taxation of corporations, non-residents’ income and wealth (BOE No 285 of 29 November 2006, p. 41734) (‘the law on income tax’), which provides that certain income is exempted from income tax, states:

‘The following income is exempted:

…

(ñ) Winnings from lotteries and betting organised by the public body ‘Loterías y Apuestas del Estado’ (the Spanish public-law body in charge of lotteries and betting) or by bodies or entities of the Comunidades Autónomas (Autonomous Communities), and winnings from draws organised by the Spanish Red Cross or by the Organización Nacional de Ciegos Españoles (the Spanish national association for the blind) (‘ONCE’).

… .’

5 Under other provisions of the law on income tax, in particular Articles 33(1), 45 and 63(1) thereof, winnings from lotteries, games of chance or betting organised by other national or foreign bodies, including those established in other Member States of the European Union or the European Economic Area, are added to the taxable amount and subject to progressive rates of income tax.

Pre-litigation procedure

6 By letter of formal notice of 4 April 2006, the Commission informed the Spanish Government that it regarded the fiscal treatment under the Spanish legislation of winnings from lotteries, games of chance and betting organised outside the Kingdom of Spain as being incompatible with Article 49 EC and Article 36 of the EEA Agreement, in so far as such winnings are subject to income tax, whereas winnings from certain Spanish lotteries and games of chance are exempted therefrom, and invited that government to submit its observations on the matter.

7 In its response, the Spanish Government contended that the exemption at issue applies only in certain cases and is connected with the particular nature of the organising bodies. There is no discrimination

since organisers of lotteries established in Spain are generally in the same situation as those which are not established in that Member State. By way of justification for the exemption at issue, the Spanish Government cited the combating of the harmful effects of that type of activity and the wide discretion enjoyed by the Member States for the purpose of regulating such games of chance.

8 On 15 December 2006, the Commission issued a reasoned opinion inviting the Kingdom of Spain to adopt the measures necessary to comply with that opinion within two months of its receipt.

9 By letter of 22 February 2007, the Spanish Government informed the Commission that it maintained its position. The law on income tax did not discriminate on the basis of the nationality, residence or place of establishment of organisers of lotteries or games of chance and was justified on the grounds of consumer protection and social policy.

10 As the Commission was not satisfied with the Kingdom of Spain's reply, it brought the present action.

The action

Arguments of the parties

11 The Commission claims that, in the light of the Court's case-law on the freedom to provide services and, in particular, Case C-42/02 *Lindman* [2003] ECR I-13519, the law on income tax is discriminatory, because it has the effect of making the provision of services between the Kingdom of Spain and the other Member States more difficult than the provision of services entirely within Spain, and is liable to dissuade persons residing in Spain from participating in lotteries the organisers of which are established in other Member States of the European Union or the European Economic Area. Consequently, that law is contrary to Article 49 EC and Article 36 of the EEA Agreement.

12 It is true that the exemption at issue in the present case does not cover all organisers of lotteries and games of chance established in Spain and is limited to certain specific entities. However, the fact remains that that exemption, since it benefits only entities established in that Member State, is discriminatory in nature.

13 The discretion enjoyed by the Member States to regulate that type of activity does not make it possible to justify the exemption provided for by the law on income tax. Indeed, that law, rather than setting out a number of characteristics required for the granting of favourable tax treatment, restricts that exemption to certain specifically designated entities, even though it allows the provision of similar services by other entities which do not benefit from that favourable tax treatment, including entities of the same kind in Member States other than the Kingdom of Spain or entities pursuing the same objectives as those pursued by the Spanish entities referred to in that law.

14 Furthermore, it is apparent from paragraph 25 of *Lindman* that the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State. However, in the present case, the Kingdom of Spain has provided no information which could justify the exemption in question.

15 The Commission also points out that recourse to a tax exemption measure is not the most appropriate means of attaining the objective pursued by the Kingdom of Spain, which is to discourage games of chance, since that exemption is more likely to encourage individuals to participate in them.

16 With regard to the objectives of preventing money laundering and combating tax evasion, the Commission asserts that it is unable to understand how the tax exemption at issue in this case could help to attain those objectives as the Kingdom of Spain claims. The Commission considers, on the contrary,

that the combating of those activities could, perhaps, justify the removal of the exemption at issue, but in no case its retention. It adds that measures to prevent money laundering already ensure a high level of protection, which makes measures such as those at issue in the present case superfluous.

17 As regards the need to ensure the protection of consumers in accordance with the rules laid down in Spain, the Commission takes the view that it cannot validly be asserted that such protection is jeopardised by the fact that the lotteries in question are organised by entities established in other Member States. Quite apart from the fact that the activities in question are already regulated in each Member State, there are control mechanisms to ensure such protection which are compatible with Community law.

18 In any event, the law on income tax is discriminatory in nature and the justification put forward cannot therefore be accepted.

19 The Kingdom of Spain denies that it has failed to fulfil its obligations, contending, primarily, that the tax exemption at issue does not constitute a discriminatory restriction. That exemption, the scope of which is personal in that it is limited to certain public bodies of the State or of the autonomous communities, the Spanish Red Cross and ONCE, admittedly results in a difference in treatment as regards the bodies and entities who are not covered by it. However, that difference in treatment is neither discriminatory nor contrary to the principle of equal treatment, since the entities which are not covered by that exemption are not in the same situation as those falling within its scope.

20 The Kingdom of Spain points out that the scope of the exemption in question does not extend to all lotteries, games of chance and betting organised in Spain or by entities resident in Spain. Thus, without prejudice to that exemption, winnings distributed in such games of chance organised by residents are subject to the same taxation as those distributed in such games organised by non-residents. Therefore, it cannot be concluded that that exemption discriminates or is liable to discriminate against organisers of lotteries not established in Spain. There is no discrimination against non-resident entities of a similar nature to those listed in the law on income tax, since that law defines the scope of the exemption according to certain specific characteristics and makes no reference to the nationality or the place of establishment of the entities concerned.

21 Contrary to the Commission’s claims, the case-law resulting from *Lindman* is not applicable in the present case since, unlike the Finnish legislation at issue in the case which led to that judgment, the law on income tax, in principle, makes the winnings from lotteries, games of chance and betting subject to income tax regardless of the place where they are organised or the place of residence of their organiser.

22 In the alternative, the Kingdom of Spain argues that, even if the exemption at issue is a restriction on the freedom to provide services, that restriction is, in the light of the specific nature of the activities in question, justified for reasons of social policy, on the grounds of preventing money laundering and combating tax evasion and by objectives of consumer protection.

23 With regard, first, to social policy, the Kingdom of Spain takes the view that, in so far as the legislation at issue in this case is similar to the provisions which the Court had to consider in the cases which led to the judgments in Cases C-275/92 *Schindler* [1994] ECR I-1039, C-124/97 *Läärä* [1999] ECR I-6067 and C-67/98 *Zenatti* [1999] ECR I-7289, the reasoning adopted by the Court in those judgments is applicable in the present case.

24 It is apparent, in particular from those judgments, that the Member States have a broad discretion concerning lotteries and other games of chance for the purpose of protecting consumers and the social order.

25 It is precisely with that in view that the contested exemption was adopted, that is, first, to discourage gambling in general by establishing the principle that that type of income will be taxed and, secondly, to accord preferential treatment to winnings from lotteries and games of chance organised by public bodies in order to finance infrastructure for socially useful purposes.

26 With regard, second, to preventing money laundering and combating tax evasion, the Kingdom of Spain contends that the attainment of those objectives would be seriously compromised if the exemption at issue had to apply to winnings from games organised by certain public or charitable bodies not subject to Spanish legislation, since the tax authorities would be unable to monitor such income in the same way as they do now.

27 With regard, third, to consumer protection, the Kingdom of Spain recalls that, in Spain, the organisation of lotteries, games of chance and betting is an activity subject to legislation which aims to protect participants' rights and interests by ensuring the full application of the legislation in force. Extending the exemption at issue to bodies not subject to the legislation governing the organisation of those forms of gambling would have the effect of reducing the level of consumer protection. That exemption is therefore justified by the need to ensure that consumers are afforded the protection deemed to be appropriate by the Spanish authorities, a ground which has been fully recognised by the Court in its case-law.

Findings of the Court

Existence of unequal treatment on grounds of nationality

28 It should be noted at the outset that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-264/96 ICI [1998] ECR I-4695, paragraph 19; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32, and *Lindman*, paragraph 18).

29 As the Court has already held in relation to the organisation of lotteries, the provisions of the Treaty relating to freedom to provide services apply to activities which enable users, in return for payment, to participate in gaming (see *Lindman*, paragraph 19). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 51).

30 Furthermore, the Court has repeatedly held that whilst it is lawful for a Member State to restrict the grant of tax advantages to bodies pursuing certain of its charitable purposes, a Member State cannot however restrict the benefit of such advantages only to bodies established in that State whose activities are thus capable of absolving it of some of its responsibilities (see, in particular, Case C-318/07 *Persche* [2009] ECR I-0000, paragraph 44).

31 In particular, where a body recognised as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the latter Member State, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in that Member State (see, to that effect, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 40; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 81 and *Persche*, paragraph 49).

32 The Court has held that a body which is established in one Member State but satisfies the requirements

imposed for that purpose by another Member State for the grant of tax advantages is, in respect of the grant by the latter Member State of tax advantages intended to encourage the charitable activities concerned, in a situation comparable to that of bodies recognised as having charitable purposes which are established in the latter Member State (*Persche*, paragraph 50).

33 As the Advocate General pointed out in point 66 of his Opinion, public bodies and entities pursuing social or charitable non-profit-making activities established in Member States other than the Kingdom of Spain and having the same objectives as those of the bodies and entities referred to in Article 7(ñ) of the law on income tax, are in a situation comparable to that of the latter.

34 In those circumstances, it must be concluded that the fiscal exemption provided for in Article 7(ñ) of the law on income tax, since it has the effect of treating winnings distributed by the bodies and entities listed in that provision more favourably, constitutes a discriminatory restriction on freedom to provide services, to the detriment of public bodies and entities pursuing social or charitable non-profit-making activities established in a Member State other than the Kingdom of Spain and having the same objectives as the bodies and entities listed in that provision.

35 That finding applies however only to bodies and entities comparable to those referred to in that provision and cannot apply, contrary to the Commission's claim, to all organisers of lotteries, games of chance and betting established in a Member State other than the Kingdom of Spain. Those organisers are not all in a situation comparable to that of the bodies and entities listed in Article 7(ñ) of the law on income tax. It follows that the Commission's action must be dismissed with regard to the part concerning organisers of lotteries and betting established in a Member State other than the Kingdom of Spain and which are not objectively comparable to those listed in that provision.

Justification for the discrimination

36 First of all, it should be pointed out that, although a certain number of overriding reasons in the public interest have indeed been recognised by the Court's case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve the social order (see, in particular, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56), which may justify a restriction on the freedom to provide services, the fact remains that those objectives cannot be relied upon to justify discriminatory restrictions (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; *Gambelli and Others*, paragraph 65; *Placanica and Others*, paragraph 49, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

37 It is also apparent from the Court's case-law that, to the extent that a restriction, such as that at issue in the present case, is discriminatory, it is compatible with Community law only if it is covered by an express derogating provision, such as Article 46 EC, to which Article 55 EC refers, namely public policy, public security or public health (Case C-388/01 *Commission* v *Italy* [2003] ECR I-721, paragraph 19).

38 Consequently, the restriction at issue in the present case can be justified only provided that the objectives pursued by the Spanish legislature fall within the category of public policy, public security or public health grounds for the purposes of Article 46(1) EC and that it is in conformity with the principle of proportionality. In that regard, it should be added that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 61).

39 With regard, first of all, to the objective of preventing money laundering and combating tax evasion, it

is not necessary to determine whether that objective could fall within the definition of public policy. It need merely be pointed out in that respect that, as is apparent from the Court's case-law, it is not justifiable for the authorities of a Member State to assume, in a general way and without distinction, that bodies and entities established in another Member State are engaging in criminal activity. Furthermore, to exclude in a general way such bodies and entities from the benefit of a tax exemption appears to be disproportionate, as it goes beyond what is necessary to combat crime. There are indeed a number of measures available to monitor their accounts and activities (see, to that effect, *Gambelli and Others*, paragraph 74 and *Centro di Musicologia Walter Stauffer*, paragraph 61).

40 With regard, second, to combating addiction to gambling, although it cannot be excluded that that objective could be regarded as falling within the definition of protection of public health, it is clear in this case, first, that the Kingdom of Spain has adduced no evidence capable of establishing that, in Spain, such an addiction has reached the point amongst the population at which it could be considered to constitute a danger to public health.

41 Next, as the Advocate General pointed out in point 85 of his Opinion, the exemption of winnings is likely to encourage consumers to participate in the lotteries, games of chance and betting able to benefit from such exemption and is therefore not a suitable and coherent means of ensuring the attainment of the objective supposedly pursued.

42 Finally, to the extent that the exemption at issue does not differentiate between the various types of games of chance, the Kingdom of Spain cannot justifiably contend that that exemption aims to channel people's desire to gamble towards certain games which are likely to be less addictive.

43 Concerning, third, to the Kingdom of Spain's argument that the income received by the bodies and entities whose games of chance benefit from the exemption in question is used to finance socially-useful infrastructure and projects, it should be noted that the Court has already held that, although it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services (see, in particular, *Schindler*, paragraph 60, and *Zenatti*, paragraph 36). It is moreover apparent from the Court's case-law that economic grounds are also not included among the grounds in Article 46 EC which could justify a restriction of the freedom to provide services guaranteed by the Treaty (see, in particular, *Commission* v *Italy*, paragraphs 19 and 22, and *Gambelli and Others*, paragraph 61).

44 Concerning, fourth, protection of the social order and of consumers, it should be pointed out that, contrary to the contentions of the Kingdom of Spain, the reasoning adopted by the Court in its judgments in *Schindler*, *Läärä and Others* and *Zenatti* with regard to such justification are not applicable in the present case.

45 Unlike the restrictions at issue in the above cases, the restriction in the present case is not applicable without distinction but is discriminatory in nature. It cannot therefore be justified by overriding reasons relating to the public interest such as the protection of the social order or of consumers.

46 It should be added that, as the Advocate General pointed out, in particular, in points 93 and 104 of his Opinion, the exemption at issue does not in any event serve to achieve, on the one hand, the objective of protecting the social order, since it encourages participation in lotteries and gambling rather than discouraging it, or, on the other hand, the objective of consumer protection, since there is no direct link between the exemption and the administrative measures intended to protect the interests of consumers.

47 It follows that the discrimination at issue in this case is not justified for the purposes of Article 46(1) EC.

48 In so far as the provisions of Article 36 of the EEA Agreement have the same legal scope as the substantially identical provisions of Article 49 EC, the above considerations can be applied mutatis mutandis to that article.

49 On the basis of the above considerations, it must be held that, by maintaining in force fiscal legislation which exempts winnings from lotteries, games of chance and betting organised in the Kingdom of Spain by certain public bodies and entities established in that Member State and pursuing social or charitable non-profit-making activities, without that same exemption being granted to winnings from lotteries, games of chance and betting organised by bodies and entities established in another Member State of the Union or European Economic Area and pursuing the same type of activities, the Kingdom of Spain has failed to fulfil its obligations under Article 49 EC and Article 36 of the EEA Agreement.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 69(3) of those Rules, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since the Commission and the Kingdom of Spain have been partly unsuccessful in their pleas, each party must be ordered to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that, by maintaining in force fiscal legislation which exempts winnings from lotteries, games of chance and betting organised in the Kingdom of Spain by certain public bodies and entities established in that Member State and pursuing social or charitable non-profit-making activities, without that same exemption being granted to winnings from lotteries, games of chance and betting organised by bodies and entities established in another Member State of the European Union or European Economic Area and pursuing the same type of activities, the Kingdom of Spain has failed to fulfil its obligations under Article 49 EC and Article 36 of the Agreement on the European Economic Area of 2 May 1992.**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the Kingdom of Spain to bear their own costs.**

[Signatures]

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* Language of the case: Spanish.