Downloaded via the EU tax law app / web

Provisional text

JUDGMENT OF THE COURT (First Chamber)

12 September 2024 (*)

(Reference for a preliminary ruling – Taxation – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 135(1)(i) – Exemptions – Betting, lotteries and other forms of gambling – Conditions and limits – Principle of fiscal neutrality – Maintenance of the effects of a piece of national legislation – Entitlement to refund – Unjust enrichment – State aid – Article 107(1) TFEU – Application for a refund of the tax in the form of damages)

In Case C?741/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), made by decision of 18 November 2022, received at the Court on 2 December 2022, in the proceedings

Casino de Spa SA,

Ardent Betting SA,

Ardent Finance SA,

Artekk SRL (taken over by Circus Belgium SA),

Circus Belgium SA,

Circus Services SA,

Gambling Management SA,

Games Services SA,

Gaming1 SRL,

Guillemins Real Estate SA,

Immo Circus Wallonie SA,

Mr Joker SRL,

Pres Carats Sports SA,

Pro Sécurité SRL,

Royal Namur SA,

Euro 78 SRL,

Lucky Bet SRL,

Reflex SA,

Slots SRL,

Winvest SRL,

Parction SA,

Ardent Casino Belgium SA,

Ardent Casino International SA,

Ardent Namur Immo SA,

Odds Sportbar SRL,

HQ1 SRL,

Tour de Baschamps SRL,

v

État belge (SPF Finances),

interested parties:

État belge (SPF Justice),

La Chambre des Représentants,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, T. von Danwitz, A. Kumin and I. Ziemele, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Casino de Spa SA, Ardent Betting SA, Ardent Finance SA, Artekk SRL (taken over by Circus Belgium SA), Circus Belgium SA, Circus Services SA, Gambling Management SA, Games Services SA, Gaming1 SRL, Guillemins Real Estate SA, Immo Circus Wallonie SA, Mr Joker SRL, Pres Carats Sports SA, Pro Sécurité SRL, Royal Namur SA, Euro 78 SRL, Lucky Bet SRL, Reflex SA, Slots SRL, Winvest SRL, Parction SA, Ardent Casino Belgium SA, Ardent Casino International SA, Ardent Namur Immo SA, Odds Sportbar SRL, HQ1 SRL and Tour de Baschamps SRL, by V. Lamberts and M. Levaux, avocats,

– the Belgian Government, by S. Baeyens, P. Cottin and C. Pochet, acting as Agents, and by V. Ramognino, avocat, and by P. Vlaemminck, advocaat,

– the Czech Government, by L. Halajová, M. Smolek and J. Vlá?il, acting as Agents,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

– the European Commission, by A. Armenia, J. Carpi Badía, and M. Herold, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, Articles 107 and 267 TFEU, the principles of fiscal neutrality and effectiveness and Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2 The request has been made in proceedings between Casino de Spa SA and 26 other applicants, on the one hand, and the État belge (SPF Finances) (Federal Public Finance Service, Belgium), on the other, concerning a decision relating to the value added tax (VAT) payable for the period from 1 July 2016 to 21 May 2018, as well as fines and late interest payments in relation to that VAT payable.

Legal context

European Union law

3 Article 135(1)(i) of Directive 2006/112 provides:

‘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.’

Belgian law

4 Article 1(14) of the code de la taxe sur la valeur ajoutée (Value Added Tax Code) (*Moniteur belge* of 17 July 1969, p. 7046), as amended by the loi-programme du 1er juillet 2016 (Programme-Law of 1 July 2016),was worded as follows:

‘For the purposes of this Code, the following definitions shall apply:

1° “games of chance or gambling”:

(a) games, under whatever name, which offer the chance to win prizes or awards in cash or in kind, and in which the players cannot intervene either at the beginning, during or at the end of the game, and the winners are determined solely by luck or by any other circumstance due to chance;

(b) games, under whatever name, which offer participants in a competition of any kind the chance to win prizes or awards in money or in kind, unless the competition leads to the conclusion of a contract between the winners and the organiser of that competition;

2° “lotteries”: every circumstance which permits the purchase of lottery tickets, to compete for prizes or awards in cash or in kind, where the winners are determined by luck or by any other circumstances due to chance, over which they cannot exercise any influence.’

5 Article 44(3) of the Value Added Tax Code, as amended by the Programme-Law of 1 July 2016, provides:

‘The following shall also be exempt from the tax:

…

13°

(a) lotteries;

(b) other forms of gambling, with the exception of those provided electronically as referred to in Article 18(1)(2)(16)’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 Casino de Spa and the other applicant companies in the main proceedings form the VAT group Gaming Ardent and offer online gambling.

7 That activity was exempt from VAT in Belgium until 1 July 2016, when provisions were adopted repealing the VAT exemption for online gambling other than lotteries.

8 Those provisions were annulled by the Cour constitutionnelle (Constitutional Court, Belgium), by judgment of 22 March 2018, on account of the infringement of rules allocating powers between the Federal State of Belgium and the Belgian regions laid down by Belgian law. In that judgment, that court did not examine the other pleas put forward before it, in particular those alleging infringement of Directive 2006/112, the principle of fiscal neutrality and Articles 107 and 108 TFEU, taking the view that those pleas could not lead to a more extensive annulment of those provisions. In that judgment, that court also decided to maintain the effects of those provisions by referring to the budgetary and administrative difficulties which the refund of taxes already paid would cause.

9 In a judgment of 8 November 2018, the Cour constitutionnelle (Constitutional Court) stated that the effects of the provisions repealing the VAT exemption for online gambling other than lotteries, which it annulled by its judgment of 22 March 2018, were maintained in respect of taxes which had been paid for the period from 1 July 2016 to 21 May 2018.

10 Following those judgments, in the part of its VAT return for September 2019, relating to the VAT adjustments in its favour, the VAT group Gaming Ardent entered an amount of EUR 29 328 371.20, which corresponds to the amount of VAT paid for the period from 1 July 2016 to 21 May 2018, and requested a refund of a balance of VAT of EUR 15 581 402.06.

11 On 5 December 2019, an assessment was issued by the Belgian tax authority, in which they stated that that request was contrary to the judgments of the Cour constitutionnelle (Constitutional Court) of 22 March and 8 November 2018 and that, consequently, the VAT group Gaming Ardent owed an amount of EUR 29 328 370.36 in respect of VAT, plus fines and interest payments.

12 Following an objection lodged by the VAT group Gaming Ardent against that assessment, the amount of the fines imposed on it was reduced.

13 On 12 October 2020, the VAT group Gaming Ardent brought an action before the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), which is the referring court, against a decision of 14 August 2020 concerning the VAT due for the period from 1 July 2016 to 21 May 2018, fines and late interest payments. It claims, in the alternative, that the Belgian State is liable on account of fault on the part of the Cour constitutionnelle (Constitutional Court), in that that court decided to maintain the effects of the provisions which it annulled and, in the further alternative, the liability of the Belgian State on account of a fault on the part of the legislature.

14 In those circumstances, the tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 135(1)(i) of [Directive 2006/112] and the principle of neutrality be interpreted as precluding a Member State from using different treatment for online lotteries offered by Loterie Nationale [(the Belgian national lottery)], a public establishment, which are exempt from [VAT], and other online games of chance offered by private operators, which are subject to [VAT], assuming that they are similar supplies?

(2) In answering the previous question, in order to determine whether there are two similar categories which are in competition with each other and which require the same treatment for the purposes of [VAT], or whether there are separate categories which allow for different treatment, must the national court consider only whether or not the two forms of games are in competition with each other from the point of view of the average consumer, in the sense that services are similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where 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 (alternative criterion), or must it take into account other criteria such as the existence of a discretionary power on the part of the Member State to exempt certain categories of games from VAT and to subject others to it, the fact that lotteries belong to a distinct category of games, referred to in Article 135(1)(i) of [Directive 2006/112], the different legal frameworks which apply to Loterie Nationale and to other games of chance, the different supervisory authorities or the societal and gambler protection objectives pursued by the legislation applicable to Loterie Nationale?

(3) Must the principle of sincere cooperation set out in Article 4(3) TEU, read in conjunction with Article 267 TFEU, the provisions of [Directive 2006/112] and, where applicable, the principle of effectiveness, be interpreted as meaning that they allow the constitutional court of a Member State to maintain – on its own initiative and without a reference for a preliminary ruling under Article 267 TFEU – on the basis of a provision of national law – in this case Article 8 of the loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle (Special Law of 6 January 1989 on the Constitutional Court) – the retrospective effect of national provisions on [VAT] which were found to be contrary to the national Constitution and were annulled on that ground and whose non-conformity with EU law was also relied on in support of the action for annulment before the national court, without, however, that complaint having been examined by the latter, on the general ground of “budgetary and administrative difficulties which repayment of taxes already paid would cause”, thus completely depriving taxable persons subject to VAT of the right to reimbursement of the VAT collected in breach of EU law?

(4) If the answer to the preceding question is in the negative, do the same provisions and

principles, interpreted, in particular, in the light of the judgment of 10 April 2008 *Marks & Spencer*, [(C?309/06, EU:C:2008:211)], under which the general principles of Community law, including that of fiscal neutrality, give a trader who has made supplies a right to recover the sums mistakenly claimed in respect of them (judgment of 10 April 2008, *Marks & Spencer*, C?309/06[, EU:C:2008:211)]), require the Member State concerned to refund to the taxable persons the VAT collected in breach of EU law where, as in the present case, it subsequently follows from a judgment of the Court of Justice, in response to questions referred for a preliminary ruling, that the annulled national provisions are not in conformity with [Directive 2006/112] and that the decision of the Constitutional Court to maintain the retrospective effect of the provisions annulled by it is not in conformity with EU law?

(5) Does the different treatment introduced by Articles 29, 30, 31, 32, 33 and 34 of the loi-programme du 1er juillet 2016 (Programme Law of 1 July 2016), which were annulled by Constitutional Court judgment No 34/2018 of 22 March 2018, but the effects of which were maintained after that date in respect of the taxes already paid for the period from 1 July 2016 to 21 May 201[8], between lotteries, whether terrestrial or online, and other online games and forms of betting create a selective advantage in favour of the operators of those lotteries and thus aid granted by the Belgian State or through Belgian State resources which distorts or threatens to distort competition by favouring certain undertakings, which is incompatible with the internal market within the meaning of Article 107 TFEU?

(6) If the answer to the preceding question is in the affirmative, does the obligation on the Member States to safeguard the rights of individuals affected by the unlawful implementation of the aid in question, in accordance with, inter alia, the judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, [(C?368/04, EU:C:2006:644)], the principle of sincere cooperation and the general principles of Community law, including that of fiscal neutrality, which give a trader who has made supplies a right to recover the sums mistakenly charged in respect of them (judgment of 10 April 2008, *Marks & Spencer*, (C?309/06[, EU:C:2008:211]), allow taxable persons who have been charged VAT on the basis of unlawful State aid to recover the equivalent of the tax paid in the form of damages for the loss suffered?’

The application to reopen the oral part of the procedure

15 After the Advocate General delivered her Opinion at the sitting on 25 April 2024, the applicants in the main proceedings, by letter received at the Court Registry on 30 May 2024, requested the Court to order the reopening of the oral part of the procedure.

16 In support of that request, the applicants in the main proceedings submit that the Opinion addresses a question of law relating to the recognition of direct effect in Article 135(1)(i) of Directive 2006/112 which was not submitted to the Court by the referring court and on which the applicants have therefore been unable to submit their observations. They also disagree with the Advocate General’s Opinion on that point.

17 In that regard, it should be noted that, in accordance with Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not yet been debated between the parties.

18 It must also be borne in mind that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the parties to submit observations in response to the Advocate General's Opinion (judgment of 31 January 2023, *Puig Gordi and Others*, C?158/21, EU:C:2023:57, paragraph 37 and the case-law cited).

19 Furthermore, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning which led thereto. Consequently, a party's disagreement with the Advocate General's Opinion, irrespective of the questions that he or she examines in his or her Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure (judgment of 31 January 2023, *Puig Gordi and Others*, C?158/21, EU:C:2023:57, paragraph 38 and the case-law cited).

20 In the present case, the Court considers, after hearing the Advocate General, that it has all the information necessary to give a ruling.

21 In particular, in the light of the case-law referred to in paragraph 19 above, it should be noted that, contrary to the submissions of the applicants in the main proceedings in support of their request for the reopening of the oral part of the procedure, in so far as the fourth question referred for a preliminary ruling concerns the effects which must be attributed to Article 135(1)(i) of Directive 2006/112 before a national court, the referring court necessarily asked the Court of Justice whether that provision should be recognised as having direct effect. It follows that the applicants had the opportunity to put forward their point of view in that regard.

22 Consequently, the Court considers that it is not necessary to order the reopening of the oral part of the procedure.

Consideration of the questions referred

The first and second questions

23 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, must be interpreted as precluding national legislation which differentiates between, on the one hand, the purchase of lottery tickets online and, on the other hand, participation in other forms of gambling offered online, by excluding the latter from the VAT exemption applicable to the former.

24 According to Article 135(1)(i) of Directive 2006/112, betting, lotteries and other forms of gambling are exempt from VAT, subject to the conditions and limitations laid down by each Member State.

25 It is apparent from the actual wording of that provision that it leaves a broad discretion to the Member States as regards the exemption or the taxation of the transactions concerned since it allows those States to fix the conditions and the limitations to which entitlement to that exemption may be made subject (see, by analogy, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 40 and the case-law cited).

26 In addition, the Court has stated that the exercise of the discretionary power of the Member States to fix conditions and limitations on the VAT exemption provided for under that provision

allows those States to exempt from that tax only certain forms of betting and gaming (judgment of 24 October 2013, *Metropol Spielstätten*, C?440/12, EU:C:2013:687, paragraph 29 and the case-law cited).

27 However, when the Member States exercise their power under that provision to lay down the conditions and limitations of the exemption and, therefore, to determine whether or not transactions are subject to VAT, they must respect the principle of fiscal neutrality inherent in the common system of VAT (judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 41 and the case-law cited).

28 According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 32 and the case-law cited).

29 In order to determine whether two supplies of services are similar, account must be taken of the point of view of the average consumer, avoiding artificial distinctions based on insignificant differences (see, to that effect, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 43 and the case-law cited).

30 Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 44 and the case-law cited).

31 In other words, it is necessary to determine whether the services at issue are interchangeable from the point of view of the average consumer. If that is the case, a difference in treatment for VAT purposes might affect the consumer’s choice, which, in turn, would indicate an infringement of the principle of fiscal neutrality (see, to that effect, judgment of 3 February 2022, *Finanzamt A*, C?515/20, EU:C:2022:73, paragraph 45 and the case-law cited).

32 In that regard, it is necessary to take account of not only the differences in the characteristics of the services at issue and the use of those services which are, therefore, inherent to those services, but also the differences relating to the context in which those services are supplied, to the extent that those contextual differences may create a distinction in the eyes of the average consumer, in terms of the satisfaction of his or her own needs, and may, therefore, influence that consumer’s decision (see, to that effect, judgment of 9 September 2021, *Phantasialand*, C?406/20, EU:C:2021:720, paragraphs 41 and 42 and the case-law cited).

33 Thus, the Court has held that cultural factors, such as customs or traditions, may be relevant in the context of such an examination (see, to that effect, judgment of 9 September 2021, *Phantasialand*, C?406/20, EU:C:2021:720, paragraph 44).

34 Moreover, the Court has stated, as regards gambling, that differences relating to the minimum and maximum stakes and prizes, the chances of winning, the formats available and the possibility of interaction between the player and the game are liable to have a considerable influence on the decision of the average consumer, as the attraction of games of chance lies chiefly in the possibility of winning (see, to that effect, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 57).

35 Such factors may thus be relevant in determining whether the online purchase of lottery

tickets and participation in other forms of gambling offered online are similar.

36 Although it is for the referring court alone to assess, in the light of the considerations set out in paragraphs 28 to 35 above, whether those services are similar, it is for the Court to provide some useful indications in that regard to enable the referring court to decide the case before it (see, to that effect, judgment of 20 June 2024, *GEMA*, C?135/23, EU:C:2024:526, paragraph 32).

37 In particular, it should be noted that cultural factors and differences relating to the minimum and maximum stakes and winnings and the chances of winning may create a distinction, in the eyes of the average consumer, between lotteries and other forms of gambling.

38 Furthermore, it is apparent from the order for reference that, in accordance with the national legislation at issue in the main proceedings, first, unlike other forms of gambling, in which the abilities of the player, such as skill or knowledge, may have an influence on the likelihood of winning, in the context of lotteries within the meaning of that legislation, the winners are determined solely by chance, without their abilities exercising any influence in that regard. Secondly, in that context, since the winner is determined on a specific date, the period between the purchase of the lottery ticket and the result may be significant.

39 Lotteries, as defined by the national legislation at issue in the main proceedings, are accordingly characterised by a combination of a waiting period for the determination of winners and the complete absence of influence of the abilities of players on the outcome of the game.

40 Such objective differences in relation to other forms of gambling appear likely to have a considerable influence on the decision of the average consumer to use one or other category of games, which it is, however, for the referring court to ascertain.

41 On the other hand, it must be borne in mind that the identity of the providers, the legal form by means of which they exercise their activities, the licensing category the games concerned fall into and the applicable legal regime relating to control and regulation are, as a rule, irrelevant to the assessment of the comparability of those categories of games (see, by analogy, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraphs 46 and 51).

42 Similarly, the objectives pursued by the national legislation at issue in the main proceedings and the fact that the lotteries are expressly referred to in Article 135(1)(i) of Directive 2006/112 are, in principle, irrelevant in the context of such an examination, since those factors do not appear capable of giving rise to a difference, in the eyes of the average consumer, in terms of the satisfaction of his or her own needs.

43 In the light of the considerations set out in paragraphs 28 to 42 above, it seems, at first glance, that the services taken into consideration in those paragraphs are not similar, which means that a difference in treatment such as that at issue in the main proceedings is compatible with the principle of fiscal neutrality. It is nevertheless for the referring court to ascertain specifically, in the light of all relevant evidence, whether that legislation infringes that principle.

44 Consequently, the answer to the first and second questions is that Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, must be interpreted as not precluding national legislation which differentiates between, on the one hand, the purchase of lottery tickets online and, on the other hand, participation in other forms of gambling offered online, by excluding the latter from the VAT exemption applicable to the former, provided that the objective differences between those two categories of gambling are liable to have a considerable influence on the decision of the average consumer to use one or other of those categories of

games.

The third question

45 By its third question, the referring court asks, in essence, whether the principle of sincere cooperation, as enshrined in Article 4(3) TEU, read in conjunction with Article 267 TFEU, Directive 2006/112 and the principle of effectiveness, must be interpreted as meaning that a national court against whose decisions there is no judicial remedy may make use of a national provision empowering it to maintain the effects of national provisions which it has held to be incompatible with the higher-ranking rules of its national law, without examining a claim that those provisions are also incompatible with that directive.

46 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 16 May 2024, *Toplofikatsia Sofia (Concept of the defendant's domicile)*, C?222/23, EU:C:2024:405, paragraph 63 and the case-law cited).

47 The Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the legislation and the principles of EU law that require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 21 March 2024, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Possibility of adjustment in the case of incorrect rate)*, C?606/22, EU:C:2024:255, paragraph 20 and the case-law cited).

48 In the present case, although the third question concerns the obligations which EU law imposes on a national court against whose decisions there is no judicial remedy, it is apparent from the order for reference that that question is referred by a national court of first instance, which is uncertain as to the consequences of the possible incompatibility with Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, of a national provision which has been annulled by the constitutional court of its Member State on the ground of infringement of higher-ranking rules of its national law, the effects of which have been maintained by that constitutional court.

49 In that context, it thus appears that the referring court is called upon, in the main proceedings, not to rule directly on the conduct of the constitutional court of its Member State, but, where necessary, to draw the appropriate inferences from the incompatibility of that national provision with EU law in a dispute between a taxable person and a tax authority concerning the amount of VAT payable by that taxable person.

50 In those circumstances, it is necessary to reformulate the third question referred for a preliminary ruling to the effect that, by that question, the referring court asks, in essence, whether the principle of sincere cooperation as enshrined in Article 4(3) TEU and the principle of the primacy of EU law require the national court to disapply the national provisions held to be incompatible with Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, the existence of a judgment of the national constitutional court deciding to maintain the effects of those national provisions being irrelevant in that regard.

51 It is clear from the settled case-law of the Court that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law, and that such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (judgment of 5 October

2023, *Osteopathie Van Hauwermeiren*, C?355/22, EU:C:2023:737, paragraph 27 and the case-law cited).

52 Therefore, where the authorities of the Member State concerned find that national legislation is incompatible with EU law, while they retain the choice of the measures to be taken, they must ensure that national law is brought into line with EU law as soon as possible, and that the rights which individuals derive from EU law are given full effect (judgment of 5 October 2023, *Osteopathie Van Hauwermeiren*, C?355/22, EU:C:2023:737, paragraph 28 and the case-law cited).

53 It should also be recalled that, in accordance with the principle of the primacy of EU law, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means (judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C?430/21, EU:C:2022:99, paragraph 53 and the case-law cited).

54 Article 135(1)(i) of Directive 2006/112 has direct effect (see, by analogy, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraphs 69 and the case-law cited).

55 It is true that, as has been pointed out in paragraph 25 above, that provision leaves the Member States a broad discretion when adopting legislation laying down the conditions and fixing the limitations of the VAT exemption provided for in that provision.

56 That being so, the fact that the Member States have, under a provision of a directive, a margin of discretion does not preclude judicial review from being carried out in order to ascertain whether the national authorities have exceeded that discretion (see, to that effect, judgments of 9 October 2014, *Traum*, C?492/13, EU:C:2014:2267, paragraph 47; of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C?205/20, EU:C:2022:168, paragraph 30; and of 27 April 2023, *M.D. (Ban on entering Hungary)*, C?528/21, EU:C:2023:341, paragraph 98).

57 The limits of that margin of discretion result, in particular, from the principle of fiscal neutrality. Accordingly, the Court has held previously that, where the conditions or limitations which a Member State imposes on the exemption from VAT for games of chance or gambling are contrary to the principle of fiscal neutrality, that Member State cannot rely on such conditions or limitations to refuse an operator of such games the exemption which he or she may legitimately claim under Directive 2006/112 (see, to that effect, judgment of 10 November 2011, *The Rank Group*, C?259/10 and C?260/10, EU:C:2011:719, paragraph 68).

58 It must also be borne in mind that only the Court may, in exceptional cases, on the basis of overriding considerations of legal certainty, allow the temporary suspension of the ousting effect of a rule of EU law with respect to national law that is contrary thereto. Such a restriction on the temporal effects of the interpretation of that law, made by the Court, may be granted only in the actual judgment ruling upon the interpretation requested (judgment of 5 October 2023, *Osteopathie Van Hauwermeiren*, C?355/22, EU:C:2023:737, paragraph 30 and the case-law cited).

59 The primacy and uniform application of EU law would be undermined if national courts had the power to give provisions of national law primacy in relation to EU law contravened by those provisions, even temporarily (judgment of 5 October 2023, *Osteopathie Van Hauwermeiren*,

C?355/22, EU:C:2023:737, paragraph 31 and the case-law cited).

60 The principle of primacy accordingly obliges the national court to disapply national provisions held to be contrary to EU law having direct effect, even where the national constitutional court has previously deferred the date on which those provisions, held to be unconstitutional, are to lose their binding force (see, to that effect, judgment of 19 November 2009, *Filipiak*, C?314/08, EU:C:2009:719, paragraph 85).

61 The Court has also stated that the national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with European Union law (judgment of 5 October 2010, *Elchinov*, C?173/09, EU:C:2010:581, paragraph 30).

62 Having regard to the foregoing considerations, the answer to the third question is that the principle of sincere cooperation as enshrined in Article 4(3) TEU and the principle of the primacy of EU law require the national court to disapply the national provisions held to be incompatible with Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, the existence of a judgment of the national constitutional court deciding to maintain the effects of those national provisions being irrelevant in that regard.

The fourth question

63 By its fourth question, the referring court asks, in essence, whether the principle of sincere cooperation, as enshrined in Article 4(3) TEU, read in conjunction with Article 267 TFEU, Directive 2006/112, the principle of effectiveness and the general principles of EU law, in particular the principle of fiscal neutrality, must be interpreted as conferring on a taxable person a right to a refund of the amount of VAT collected in a Member State in breach of Article 135(1)(i) of that directive.

64 In the present case, it is apparent from the order for reference that, by its fourth question, the referring court asks whether, if it were to find that Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, precludes the national legislation at issue in the main proceedings, the applicants in the main proceedings would have a right to a refund of the amount of VAT paid on the basis of that legislation.

65 That question must therefore be understood as concerning the interpretation of the rules of EU law on recovery of amounts wrongly paid (see, by analogy, judgment of 6 September 2011, *Lady & Kid and Others*, C?398/09, EU:C:2011:540).

66 In those circumstances, and in the light of the case-law referred to in paragraphs 46 and 47 above, it is necessary to reformulate the fourth question referred for a preliminary ruling to the effect that, by that question, the referring court asks, in essence, whether the rules of EU law on recovery of amounts wrongly paid must be interpreted as meaning that they confer on a taxable person a right to a refund of the amount of VAT collected in a Member State in breach of Article 135(1)(i) of Directive 2006/112.

67 It is settled case-law that the right to a refund of taxes levied by a Member State in breach of the rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law prohibiting such taxes, as interpreted by the Court. A Member State is, therefore, in principle required to repay charges levied in breach of EU law (judgment of 28 September 2023, *Administra?ia Jude?ean? a Finan?elor Publice Bra?ov (Transfer of the right to reimbursement)*

, C?508/22, EU:C:2023:715, paragraph 34 and the case-law cited).

68 It appears from this that the right to the recovery of sums unduly paid helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it (judgment of 16 May 2013, *Alakor Gabonatermel? és Forgalmazó*, C?191/12, EU:C:2013:315, paragraph 24 and the case-law cited).

69 However, by way of exception, such a refund may be refused where it entails unjust enrichment of the persons concerned. The protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of EU law where it is established that the person required to pay such charges has actually passed them on to other persons (see, to that effect, judgments of 16 May 2013, *Alakor Gabonatermel? és Forgalmazó*, C?191/12, EU:C:2013:315, paragraph 25, and of 21 March 2024, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Possibility of correction in the event of an incorrect rate)*, C?606/22, EU:C:2024:255, paragraphs 34 and 35).

70 That exception must nevertheless be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person (see, to that effect, judgment of 2 October 2003, *Weber's Wine World and Others*, C?147/01, EU:C:2003:533, paragraph 95).

71 Accordingly, even where it is established that the burden of the charge levied though not due has been passed on to third parties, the refund of that charge to the taxable person of the amount thus passed on does not necessarily entail that taxable person's unjust enrichment, since even where the charge is wholly incorporated in the price, the taxable person may suffer as a result of a fall in the volume of that taxable person's sales (see, to that effect, judgments of 6 September 2011, *Lady & Kid and Others*, C?398/09, EU:C:2011:540, paragraph 21, and of 21 March 2024, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Possibility of correction in the event of an incorrect rate)*, C?606/22, EU:C:2024:255, paragraph 28).

72 It must also be borne in mind that the existence and the measure of unjust enrichment which the refund of a charge levied though not due from the point of view of EU law would entail for a taxable person can be established only following an economic analysis which takes account of all the relevant circumstances (see, to that effect, judgments of 10 April 2008, *Marks & Spencer*, C?309/06, EU:C:2008:211, paragraph 43, and of 21 March 2024, *Dyrektor Izby Administracji Skarbowej w Bydgoszczy (Possibility of correction in the event of an incorrect rate)*, C?606/22, EU:C:2024:255, paragraph 38).

73 It follows that the answer to the fourth question is that the rules of EU law on the recovery of amounts wrongly paid must be interpreted as meaning that they confer on a taxable person a right to a refund of the amount of VAT collected in a Member State in breach of Article 135(1)(i) of Directive 2006/112, provided that that refund does not entail the unjust enrichment of that taxable person.

The sixth question

74 By its sixth question, which it is appropriate to examine before the fifth question, the referring court asks, in essence, whether the obligation on Member States to ensure that the rights of individuals affected by the unlawful implementation of State aid are safeguarded, the principle of sincere cooperation and the general principles of EU law, in particular the principle of fiscal neutrality, must be interpreted as meaning that a taxable person may receive an amount equivalent to VAT paid in the form of damages, where the exemption from that tax from which

other operators have benefited constitutes unlawful State aid.

75 In the present case, it is apparent from the order for reference that the sixth question concerns the State aid scheme and, more specifically, the obligations of the national courts when they find that the VAT exemption from which certain operators have benefited constitutes State aid paid without having given the prior notification required by Article 108(3) TFEU.

76 In those circumstances, and in the light of the case-law recalled in paragraphs 46 and 47 above, it is necessary to reformulate the sixth question referred for a preliminary ruling to the effect that, by that question, the referring court asks, in essence, whether Article 108(3) TFEU must be interpreted as meaning that, where the VAT exemption from which certain operators have benefited constitutes unlawful State aid, a taxable person who has not benefited from such an exemption may receive, in the form of damages, an amount equivalent to the VAT paid.

77 In that regard, it should be noted that, it is true that it is the task of the national courts to ensure that all appropriate action is taken, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision, the essence of their task being, consequently, to adopt the appropriate measures to cure the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the European Commission’s decision is made (judgment of 5 March 2019, *Eesti Pagar*, C?349/17, EU:C:2019:172, paragraph 89 and the case-law cited).

78 In addition, a national court may be required to rule on an application for compensation for the damage caused by reason of the unlawful nature of the aid (judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C?368/04, EU:C:2006:644, paragraph 56).

79 Accordingly, in fulfilling their tasks, national courts may be required to uphold claims for compensation for damage caused by the unlawful State aid to competitors of the beneficiary (judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C?387/17, EU:C:2019:51, paragraph 56).

80 That being said, if, having regard to the rules of EU law in relation to State aid, an exemption from a tax is unlawful, that is not capable of affecting the lawfulness of the actual charging of that tax, so that a person liable to pay that tax cannot rely on the argument that the exemption from which other persons have benefited constitutes State aid in order to avoid payment of that tax (see, to that effect, judgments of 5 October 2006, *Transalpine Ölleitung in Österreich*, C?368/04, EU:C:2006:644, paragraph 51, and of 3 March 2020, *Vodafone Magyarország*, C?75/18, EU:C:2020:139, paragraph 24).

81 If a national court were to take the view that the VAT exemption from which certain operators have benefited constitutes State aid, the grant, in the form of damages paid, to a taxable person who has paid that tax, of an amount equivalent to the VAT paid, would have the precise effect of enabling that taxable person to avoid payment of that tax.

82 Consequently, the answer to the sixth question is that Article 108(3) TFEU must be interpreted as meaning that, where the VAT exemption from which certain operators have benefited constitutes unlawful State aid, a taxable person who has not benefited from such an exemption cannot receive, in the form of damages, an amount equivalent to the VAT that that taxable person paid.

The fifth question

83 By its fifth question, the referring court asks, in essence, whether Article 107 TFEU must be interpreted as meaning that the exemption from VAT of the purchase of lottery tickets and the exclusion of other forms of gambling offered online from such an exemption constitute State aid incompatible with the internal market.

84 It is apparent from the order for reference that that question is raised in the context of an action brought by a taxable person seeking to recover, in the form of damages, the equivalent of the VAT which that taxable person has paid. In addition, it is not apparent from that decision that that question has another purpose.

85 It follows from the answer to the sixth question that, where the VAT exemption from which certain operators have benefited constitutes State aid, a taxable person who has not benefited from such an exemption cannot receive, in the form of damages, an amount equivalent to the VAT that that taxable person paid.

86 Therefore, in view of the answer given to the sixth question, there is no need to answer the fifth question.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Article 135(1)(i) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with the principle of fiscal neutrality,**

must be interpreted as not precluding national legislation which differentiates between, on the one hand, the purchase of lottery tickets online and, on the other hand, participation in other forms of gambling offered online, by excluding the latter from the value added tax exemption applicable to the former, provided that the objective differences between those two categories of gambling are liable to have a considerable influence on the decision of the average consumer to use one or other of those categories of games.

2. **The principle of sincere cooperation as enshrined in Article 4(3) TEU and the principle of the primacy of EU law require the national court to disapply the national provisions held to be incompatible with Article 135(1)(i) of Directive 2006/112, read in conjunction with the principle of fiscal neutrality, the existence of a judgment of the national constitutional court deciding to maintain the effects of those national provisions being irrelevant in that regard.**

3. **The rules of EU law on the recovery of amounts wrongly paid must be interpreted as meaning that they confer on a taxable person a right to a refund of the amount of the value added tax collected in a Member State in breach of Article 135(1)(i) of Directive 2006/112, provided that that refund does not entail the unjust enrichment of that taxable person.**

4. **Article 108(3) TFEU must be interpreted as meaning that, where the value added tax (VAT) exemption from which certain operators have benefited constitutes unlawful State aid, a taxable person who has not benefited from such an exemption cannot receive, in the form of damages, an amount equivalent to the VAT that that taxable person paid.**

[Signatures]

* Language of the case: French.