Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

30 June 2016*

(Reference for a preliminary ruling — Article 56 TFEU — Freedom to provide services — Games of chance — Legislation of a Member State prohibiting, on pain of criminal penalties, the operation of low-prize gaming machines ('kleines Glücksspiel') where no licence has been granted by the competent authority — Restriction — Justification — Proportionality — Assessment of proportionality on the basis of both the objective of the legislation at the time of its adoption and its effects when implemented — Effects empirically and definitely determined)

In Case C-464/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court, Austria), made by decision of 26 August 2015, received at the Court on 2 September 2015, in the proceedings

Admiral Casinos & Entertainment AG

v

Balmatic Handelsgesellschaft mbH,

Robert Schnitzer,

Suayip Polat KG,

Ülkü Polat,

Attila Juhas,

Milazim Rexha,

THE COURT (Seventh Chamber),

composed of C. Toader (Rapporteur), President of the Chamber, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: German.

after considering the observations submitted on behalf of:

— Admiral Casinos & Entertainment AG, by M. Aixberger, Rechtsanwalt,

— Balmatic Handelsgesellschaft mbH, Suayip Polat KG, R. Schnitzer, Ü. Polat, A. Juhas and M. Rexha, by P. Ruth, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and by B. Van Vooren and P. Vlaemminck, advocaten,

— the Czech Government, by M. Smolek, T. Müller and J. Vláčil, acting as Agents,

— the Estonian Government, by K. Kraavi-Käerdi, acting as Agent,

— the Greek Government, by E. Tsaousi and A. Dimitrakopoulou, acting as Agents,

— the French Government, by D. Colas and R. Coesme, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, P. de Sousa Inês and A. Silva Coelho, acting as Agents,

— the European Commission, by G. Braun and H. Tserepa-Lacombe, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 The request has been made in proceedings brought by Admiral Casinos & Entertainment AG ('Admiral Casinos') against Balmatic Handelsgesellschaft mbH, Suayip Polat KG, Robert Schnitzer, Ülkü Polat, Attila Juhas and Milazim Rexha for an order requiring them to cease the unlawful operation of gaming machines in Austria.

Legal context

Austrian law

The Federal Law on games of chance

3 The Glücksspielgesetz (Federal Law on games of chance) of 28 November 1989 (BGBl. 620/1989), in the version applicable to the main proceedings ('the GSpG'), provides, at Paragraph 2, entitled 'Lotteries':

'(1) Lotteries are games of chance

1. which an operator arranges, organises, offers or makes available, and

2. in which gamblers or other persons make a payment (stake) in order to participate in the game of chance, and

3. in which the prospect of a payment (payout) is provided by the operator, gamblers or other persons.

…

(3) There is a gaming-machine lottery where the decision on the outcome of the game is taken not centrally but by a mechanical or electronic device incorporated in the gaming machine itself …

(4) Prohibited lotteries are lotteries for which no licence or authorisation under the present Federal law has been granted, and which are not excluded from the Federal State's monopoly of games of chance provided for in Paragraph 4.'

4 Under Paragraph 3 of the GSpG, 'Monopoly of games of chance', the right to organise games of chance is reserved to the Federal State.

5 Paragraphs 4 and 5 of the GSpG provide, however, for exceptions from that monopoly for gaming-machine lotteries, the regulation of which is reserved to the provincial legislatures.

6 Paragraph 5 of the GSpG provides, inter alia, that each of the nine provinces may grant a third party, by means of a licence, the right to operate lotteries using gaming machines, in accordance with the minimum requirements of a public policy nature, set out in detail in that provision, concerning applicants for authorisation and special accompanying measures for the protection of gamblers.

The Criminal Code

7 In addition to administrative penalties that may be imposed under the GSpG, the organisation of games of chance for commercial purposes by a person who does not hold a licence may also give rise to criminal proceedings. In accordance with Paragraph 168(1) of the Strafgesetzbuch (Criminal Code), 'any person who organises a game in which winning and losing depend exclusively or predominantly on chance or which is expressly prohibited, or who promotes a meeting organised with a view to such a game taking place, in order to obtain a pecuniary advantage for himself or another person from that organisation or meeting' commits an offence. The penalties are imprisonment for up to 6 months or a fine of up to 360 daily rates. Under Paragraph 168(2) of the code, 'any person who participates in such a game in the course of a business' is liable to the same penalties.

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

8 Admiral Casinos, a company governed by Austrian law, is authorised, in the province of Lower Austria, to operate games of chance in the form of lotteries using gaming machines.

9 The defendants in the main proceedings are companies and natural persons operating, in the province of Lower Austria, cafés and petrol stations in which such machines are installed.

10 The operators of those machines are two companies whose seats are in the Czech Republic and Slovakia respectively. In return for payment, the defendants in the main proceedings granted those companies the right to install gaming machines in their establishments. Those defendants hold no authorisation, in Austria, to operate games of chance in the form of gaming-machine lotteries.

11 The actions brought before the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court, Austria) by Admiral Casinos seek an order that the defendants in the main proceedings be required to cease to operate or enable the operation of gaming machines, since they do not have the necessary administrative authorisation to do so.

12 The defendants contend, in essence, that their activity is lawful as the GSpG and the State monopoly on games of chance are in breach of EU law, in particular Article 56 TFEU concerning the freedom to provide services.

13 It is apparent from the order for reference that the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court) is following the case-law of the three highest Austrian courts, according to which the GSpG is — in the light of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281) — compatible with Article 56 TFEU, given that that law genuinely meets the concern of the legislature to reduce gambling and combat gambling-related crime.

14 The referring court does not, however, concur with the interpretation given to the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281) by the Oberster Gerichtshof (Supreme Court Austria), which held that the assessment of the proportionality of the national legislation has to be based on developments found to have occurred in the area of games of chance since the legislation was adopted.

15 According to the referring court, various factors which are not easy to evaluate may influence the effects of the legislation concerned following its adoption, such as population increase, the economic situation, immigration, etc. It considers that it should not be possible to call into question at a later stage — by means of an *ex-post* assessment of the developments that have occurred since the legislation concerned was adopted — the fact that that legislation was, at the time of its adoption, found by the highest courts to comply with EU law.

16 The referring court has doubts in particular about the interpretation to be given to the German word ‘tatsächlich’ (‘genuinely’ in the English-language version and ‘véritablement’ in the French-language version) in paragraph 56 of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281), which states that Article 56 TFEU must be interpreted as precluding national legislation where that legislation does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a systematic and consistent manner. The referring court is also uncertain as to whether that word should be interpreted in a way which confirms the interpretation of the Oberster Gerichtshof (Supreme Court), according to which it is necessary to examine not only the objectives of the legislation at issue in the main proceedings but also its effects, which must be empirically and definitely determined, in the context of an *ex-post* assessment of proportionality.

17 In those circumstances, the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 56 TFEU to be interpreted as meaning that, in a review of the proportionality of a rule of national law which provides for a monopoly in the market for games of chance, the validity of that rule under EU law depends not only on the objective which it pursues but also on its effects, as definitely and empirically determined?’

Consideration of the question referred

Jurisdiction

18 The Austrian Government challenges the jurisdiction of the Court to answer the question referred, in particular because, in its view, the disputes in the main proceedings do not contain any cross-border elements.

19 In that connection, it should be recalled that, although, in view of the division of responsibilities in the preliminary ruling procedure, it is for the national court alone to determine the subject matter of the questions which it proposes to refer to the Court, the latter will, in exceptional circumstances, examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see judgment of 9 November 2010 in *Volker und Markus Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 39).

20 That is the case, in particular, where the problem referred to the Court is purely hypothetical or where the interpretation of an EU rule which is sought by the national court has no relation to the actual facts of the main action or to its purpose. Thus, the Court does not have jurisdiction to reply to a question raised where it is obvious that the provision of EU law referred to the Court for interpretation is incapable of applying (see judgment of 1 October 2009 in *Woningstichting Sint Servatius*, C-567/07, EU:C:2009:593, paragraph 43 and the case-law cited).

21 It is true that the provisions of the FEU Treaty on the freedom to provide services do not apply to situations which are confined in all respects within a single Member State (see, by analogy, judgment of 17 July 2008 in *Commission* v *France*, C-389/05, EU:C:2008:411, paragraph 49).

22 In that regard, it should be recalled that, while national legislation such as that at issue in the main proceedings — which applies without distinction to Austrian operators and to operators whose seat is in another Member State — is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms guaranteed by the FEU Treaty only to the extent that it applies to situations connected with trade between the Member States, it is far from inconceivable that operators established in Member States other than the Republic of Austria have been or are interested in operating gaming machines in that Member State (see, to that effect, judgments of 19 July 2012 in *Garkalns*, C-470/11, EU:C:2012:505, paragraph 21, and 13 February 2014 in *Sokoll-Seebacher*, C-367/12, EU:C:2014:68, paragraph 10).

23 In the present case, as can be seen from paragraphs 8 to 10 of this judgment, although both the applicant and the defendants in the main proceedings are undertakings or persons whose establishment or residence is in the Republic of Austria, it is nevertheless the case that — whilst they are not defendants in the main proceedings — the operators of the gaming machines at issue in the main proceedings are two companies whose seats are in the Czech Republic and Slovakia respectively: the defendants have, in return for payment, granted those companies a right to install gaming machines in their establishments.

24 In those circumstances, the Court has jurisdiction to reply to the first question.

Substance

25 By its question, the referring court asks whether Article 56 TFEU must be interpreted as meaning that a review of the proportionality of restrictive national legislation in the area of games of chance must be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation — assessed after its adoption — which must be empirically and definitely determined.

26 In the first place, it is necessary to make clear that the words 'effects as empirically and definitely determined', which appear in the question referred for a preliminary ruling, rest — as is apparent from the order for reference — on the legal significance of the word 'tatsächlich', used in the German-language version of paragraph 56 of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281).

27 In that regard, it must be observed that, in a significant number of languages, the versions of that word in paragraph 56 of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281) are closer to the meaning which the word has in the French-language version of that judgment. The German word which is equivalent to 'véritablement' is in fact 'wirklich' rather than 'tatsächlich': that view is confirmed, inter alia, by the Spanish ('verdaderamente'), English ('genuinely'), Lithuanian ('tikrai'), Polish ('rzeczywiście'), Portuguese ('verdadeiramente'), Romanian ('cu adevărat') and Finnish ('todellisuudessa') versions of the word in question in paragraph 56.

28 The Court observes, however, that, having regard to the context of settled and well-established case-law in which it has been used, the German word 'tatsächlich' must, in the present case, be understood as being analogous to the word 'wirklich', as the two terms appear to be interchangeable in that context. Thus, whilst it is true that the Court used the word 'tatsächlich' in paragraph 98 of its judgment of 8 September 2010 in *Stoß and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504), that paragraph nevertheless refers to an earlier, settled line of authority, deriving from paragraph 37 of the judgment of 21 October 1999 in *Zenatti* (C-67/98, EU:C:1999:514) and paragraph 53 of the judgment of 6 March 2007 in *Placanica and Others* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133), which, in the German-language versions, used the word 'wirklich'. Likewise, the German and French versions of paragraph 36 of the judgment of 24 January 2013 in *Stanleybet and Others* (C-186/11 and C-209/11, EU:C:2013:33) use, in the same context, the words 'wirklich' and 'véritablement' respectively.

29 It follows that the mere use of the word 'genuinely' ('véritablement') in paragraph 56 of the judgment of 30 April 2004 in *Pfleger and Others* (C-390/12, EU:C:2014:281) cannot be interpreted as an indication to national courts that they should ascertain 'empirically and definitely' whether the national legislation has had certain effects following its adoption.

30 In the second place, consideration should be given to the question whether the referring court must, when reviewing the proportionality of restrictive national legislation in the area of games of chance, take into account not only the objective of that legislation at the time when the legislation was adopted, but also the effects of the legislation, assessed after its adoption.

31 In that regard, it should be borne in mind that, in paragraph 52 of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281), which concerned the same legislation as that at issue in the main proceedings, the Court held that the national court must carry out a global assessment of the circumstances in which restrictive legislation, such as that at issue in the main proceedings, was adopted and implemented.

32 The Court thus held that the assessment of proportionality cannot be confined to an analysis of the situation as it was at the time when the legislation concerned was adopted but must also take into account the — necessarily later — stage of implementation of that legislation.

33 In paragraph 56 of the judgment of 30 April 2014 in *Pfleger and Others* (C-390/12, EU:C:2014:281), the Court also held that Article 56 TFEU must be interpreted as precluding national legislation where that legislation does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner.

34 It follows from the use of the words 'in a consistent and systematic manner' that the legislation concerned must meet the concern to reduce opportunities for gambling or to fight gambling-related crime not only at the time of its adoption, but also thereafter.

35 Moreover, in paragraphs 65 and 66 of the judgment of 15 September 2011 in *Dickinger and Ömer* (C-347/09, EU:C:2011:582), the Court also held that, in an assessment of proportionality, it is for the referring court to examine, amongst other things, the development of the commercial policies of authorised operators and the state of criminal and fraudulent activities related to gambling, as at the date of the facts in the main proceedings.

36 The Court therefore holds that, in a review of proportionality, the approach taken by the referring court must be dynamic rather than static in the sense that it must take account of the way in which circumstances have developed following the adoption of the legislation concerned.

37 In view of all the foregoing considerations, the answer to the question referred is that Article 56 TFEU must be interpreted as meaning that a review of the proportionality of restrictive national legislation in the area of games of chance must be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation, assessed after its adoption.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Seventh Chamber) hereby rules:

Article 56 TFEU must be interpreted as meaning that a review of the proportionality of restrictive national legislation in the area of games of chance must be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation, assessed after its adoption.

[Signatures]