Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 20 September 2012[1]

Joined Cases C-186/11 and C-209/11

Stanleybet International Ltd (C-186/11),
William Hill Organization Ltd,
William Hill Plc,and
Sportingbet Plc (C-209/11)
v
Ypourgos Oikonomias kai Oikonomikon,
Ypourgos Politismou,
Intervener: Organismos Prognostikon Agonon Podosfairou AE (OPAP)

(Reference for a preliminary ruling from the Symvoulio tis Epikrateias (Greece))

(Articles 49 and 56 TFEU — Grant of an exclusive right to run, manage, organise and operate games of chance to a single undertaking, in the form of a public limited company quoted on the stock exchange — Expansion of the supply — Justification — Objectives of the reduction of betting and gaming opportunities and the combating of criminality by making the operators active in the sector subject to control and channelling betting and gaming into the systems thus controlled — Principle of proportionality — Requirement that the objectives defined are pursued in a consistent and systematic manner — Admissibility of, and possible conditions for, a transitional period during which the national legislation concerned, if it is found to be incompatible with EU law, could be maintained in force)

I – Introduction

1. By two separate orders of 21 January 2011, the Symvoulio tis Epikrateias (Council of State, Greece) referred questions to the Court of Justice for a preliminary ruling under Article 267 TFEU on the interpretation of Articles 49 and 56 TFEU with regard to national legislation which grants the exclusive right to run, manage, organise and operate games of chance to a single undertaking which has the form of a public limited company and is listed on the stock exchange.

2. The references were made in proceedings between, first, as regards Case C-186/11 *Stanleybet International Ltd* ('Stanleybet'), *William Hill Organisation Ltd and William Hill plc* (jointly referred to as 'William Hill') and secondly, as regards Case C-209/11 *Sportingbet plc* ('Sportingbet'), of the one part, and the Ypourgos Politismou (Minister for culture), the Ypourgos Oikonomias kai Oikonomikon (Minister for Economic Affairs and Finance) and the Organismos Prognostikon Agonon Podosfairou AE ('OPAP'), of the other part, concerning the tacit rejection by the Greek authorities of the applications lodged by the aforementioned companies and applicants in the main proceedings seeking the grant of licences to run, organise and operate games of chance in Greece.

1 — Original language: English.

II – National legal context

A – *Law No 2433/1996 (A' 180)*

3. It is apparent from the explanatory memorandum for Law No 2433/1996, which established the State monopoly in the sector at issue in the main proceedings, that the principal objective of that legislation is to crack down on illicit betting, which 'in recent years has taken the form of an epidemic in our country', whilst the need to increase income for sport is a secondary objective. In addition, the explanatory memorandum states that 'it is considered necessary to impose a form for every kind of betting … in order to increase the effectiveness in our country of the crackdown on illicit bets, which inter alia have the direct effect of exporting currency because the companies which currently organise illicit gaming in Greece cooperate with foreign companies and also take such bets on their behalf'.

4. Articles 2 and 3 of that Law are worded as follows:

'Article 2

1. A presidential decree … shall authorise the issue of a form for betting with "fixed or variable winnings" on all manner of individual or team sports and on events whose nature is conducive to betting … [OPAP] is designated as administrator of the form concerned ...

2. Anyone who organises a bet without being so entitled … shall be liable to a term of imprisonment ...

Article 3

1. The annual costs of advertising the gaming ... which OPAP organises or is to organise in the future shall be divided proportionally between OPAP and the other bodies which participate in the rights deriving from each OPAP game …

5. OPAP shall be entitled to use up to 10% of the advertising space at national, municipal and community stadiums and gymnasiums for advertising hoardings for its products without being required to make any payment …'

B – *Presidential Decree No 228/1999*

5. Presidential Decree No 228/1999 was adopted pursuant to Article 2(1) of Law No 2414/1996. It provides in Articles 1 and 2 that a public limited company is incorporated under the name Organismos Prognostikon Agonon Podosfairou AE ('OPAP AE'), that the company is to operate in the public interest on the basis of the rules of the private economy and that the object of the company is to be to organise, operate and run, either alone or in collaboration with third parties, PRO-PO [football pools] and any other games of chance introduced in future by the board of directors throughout the country or abroad on behalf of the Greek State. The above games and any others run in future are to be managed exclusively by OPAP AE on behalf of the Greek State.

6. In order to achieve its objectives, OPAP AE is to set up agencies throughout the country to sell the company's games in general on an exclusive basis and is to grant agency operating licences to natural or legal persons for one or more of its games, on terms and conditions set by the company's board of directors on each occasion.

C – Law No 2843/2000, as amended by Law No 2912/2001, and the statutes of OPAP

7. Article 27 of Law No 2843/2000, as amended by Article 41(2) of Law No 2912/2001, provides:

'1. The State may offer to investors via the Athens Stock Exchange up to forty-nine per cent (49%) of the share capital at the time of the public limited company registered as Organismos Prognostikon Agonon Podosfairou AE (OPAP).

2.

a. By a contract concluded between the Greek State, represented by the Minister for Finance and the Minister for Culture responsible for sport … and OPAP, OPAP shall be granted an exclusive right for twenty (20) years to run, manage, organise and operate the games which it currently runs, in accordance with the provisions in force, and the games BINGO LOTTO, KINO …

b. Regulations for every OPAP game, regulating matters pertaining to the subject-matter of the games, their organisation and operation in general and the financial terms on which games are run and, in particular, the percentage paid out to players in winnings, the percentage of winnings for each category of winner, the price per column and the percentage of agents' commission, shall be issued by decision adopted by the board of directors of OPAP and approved by the Minister for Finance and the Minister for Culture responsible for sport.

c. The contract referred to in paragraph 2(a) shall lay down the terms for the exercise by OPAP, and for any renewal, of the right provided for in that paragraph, the consideration for that right, the method of payment thereof, the more specific obligations incumbent upon OPAP and, in particular, matters pertaining to the principles of transparency of the procedures for running the games and of protection of public order and players …

5.

a. …

b. By decision of the Minister for Finance and the Minister for Sport … a Control, Announcement of Winners and Objections Committee shall be set up … Government officials and civil servants shall be appointed as committee members....

9.

a. If it is permitted by law to run any new game in addition to those referred to in paragraph 2a, a special committee shall be set up … to lay down the terms and conditions of, and the consideration for, the right granted to OPAP to run the game. … If OPAP refuses to take on the running of the game, … the State may take it on itself. If the running of the game in question is allowed to be entrusted to a third party, the consideration shall be no lower than that proposed to OPAP. Any future game relating to sporting events may be run exclusively and solely by OPAP.…'

8. Pursuant to that article, a contract was signed on 15 December 2000 between the Greek State and OPAP granting the latter the exclusive right, in return for payment of consideration, to run, manage, organise and operate games for a period of 20 years.

9. The statutes of OPAP state that the company operates in the public interest in accordance with the rules of the private economy, that it is supervised by the Minister for Culture responsible for sport and that its objects include organising, operating and running various games, advertising those games and running them abroad, and setting up agencies. Moreover, the 'OPAP AE general regulations governing the operation of betting games with fixed winnings' and the individual regulations for running games, whose operation comes under the provisions of the general regulations, were approved on the basis of the relevant authorising provisions.

D – *Law No 3336/2005*

10. By Article 14(1) of Law No 3336/2005, Article 27(1) of Law No 2843/2000 was replaced as follows:

'The State may offer to investors via the Athens Stock Exchange up to sixty-six per cent (66%) of the share capital at the time of the public limited company registered as Organismos Prognostikon Agonon Podosfairou AE (OPAP). The State's shareholding in OPAP shall not fall below thirty-four per cent (34%) at any time.'

11. Article 14 of Law No 3336/2005 further provides that the State is to appoint half plus one of the members of the board of directors of OPAP during the term of the exclusive right granted by the Greek State to run, manage, organise and operate the games provided for in the exclusivity contract dated 15 December 2000 or in any renewals thereof, and that appointments are to be made by joint decision of the Minister for Economic Affairs and Finance and the Minister for Culture responsible for sport.

E – *Law No 3429/2005 (A' 314)*

12. As is apparent from Article 20 of Law No 3429/2005 (A' 314) which was adopted subsequently, the State's right to appoint the majority of the members of the board of directors was abolished inasmuch as it was contrary to the second subparagraph of Article 34(1) of Codified Law No 2190/1920 on public limited companies (A' 37), which provides that the members of the board of directors of public limited companies are to be elected exclusively by the general meeting.

III – Facts, proceedings before the referring court, and the questions referred

13. The companies Stanleybet, William Hill and Sportingbet are established in the United Kingdom, where they have been granted, under the relevant English law, licences to run and organise games of chance.

14. With a view to extending their business activities to Greece, Stanleybet, by application of 30 June 2004, William Hill, by application of 12 April 2007, and Sportingbet, by application of 4 October 2006, requested the competent Greek authorities to grant them, pursuant to the provisions of the Treaty governing freedom of establishment and the freedom to provide services, the permission or licence to provide gambling services in Greece: such as services for the transaction, management, organisation and operation of bets with fixed or variable winnings on sporting or non-sporting events, via a network of agents and online.

15. Those applications having been tacitly rejected by the Greek authorities, insofar as the three-month deadline expired in each case without response, Stanleybet, William Hill and Sportingbet lodged the applications for annulment of those tacit rejections with the referring court.

16. According to the order for reference, those applications to the Greek authorities had been rejected on the grounds that, under the Laws No 2433/1996 and No 2843/2000 as well as the contract of 15 December 2000 between the Greek State and OPAP, as set out above, OPAP has been granted an exclusive right, until 2020, to run, organise and operate games of chance in Greece.

17. OPAP, the intervener in the main proceedings, started trading in 1999 in the form of a public limited company with the State as its sole shareholder. It was subsequently listed on the Athens Stock Exchange pursuant to Article 27 of Law No 2843/2000, with the State retaining an absolute majority (51%) of its shares.

18. With the entering into force of Law No 3336/2005 in 2005, the State was reduced to a minority shareholder (34%), but still appointed the majority of the members of OPAP's board of directors. That right to appoint the majority of the members of the board of directors was repealed by Article 20 of Law No 3429/2005.

19. However, the State still supervises OPAP, especially by approving the regulations governing its activities and by monitoring the procedure applied in order to run the games.

20. The referring court points out that OPAP has expanded its activities abroad. In fact, as stated in the reasoned opinion dated 28 February 2008 delivered by the Commission of the European Communities to the Hellenic Republic, OPAP had already established 206 agencies in Cyprus as at 31 March 2005, pursuant to an agreement between Greece and Cyprus. OPAP incorporated a company registered as OPAP Kiprou Ltd in 2003 and a company registered as OPAP International Ltd in 2004, has held 90% of the shares in OPAP Glory Ltd and 20% of the company Glory Technology Ltd since 2003, and incorporated a company registered as OPAP Parokhis Ipiresion AE in Greece in 2004.

21. In respect of the first question, the referring court takes the view that, according to the case-law of the Court, there are two policy objectives which may justify national measures imposing restrictions on the freedom of establishment and the freedom to provide services in the gambling sector, namely (i) to reduce the supply of games of chance or (ii) to combat related criminality by controlling the companies active in this sector so as to ensure that the activities in question are carried out only within controlled systems.

22. As to the first objective, it holds that the grant of an exclusive right to organise games of chance to a public limited company such as OPAP cannot be considered a suitable measure for reducing the supply of games of chance in a consistent and systematic manner.

23. Although OPAP is a public corporation and its revenue, following deduction of its operating costs and distributable profits, passes to the State, it operates on the basis of the rules of the private economy, enjoys exemptions regarding advertising its games on television, may use 10% of the advertising space in State and municipal stadia free of charge and is listed on the Athens Stock Exchange, in that it is provided that 66% of its share capital may be offered to investors. Moreover, players can participate freely, as there is only a limit per form and not per player.

24. In that light, the majority of the members of the referring court concluded that a genuine reduction in supply and the limitation of relevant activities is not sought in a consistent and systematic manner and that, therefore, the national legislation cannot be considered to be appropriate for achieving that objective.

25. According to the referring court, a minority of its members maintained, (although it does not affect the majority view), that limiting relevant activities is not the objective pursued by the legislation at issue. Rather, its lawfulness under European Union ('EU') law must be assessed by having regard to its sole objective, which is to control criminal activities on the basis of a policy of controlled expansion of gambling services.

26. As regards the objective of combating criminality related to games of chance and the second question referred, the referring court takes the view that where the exclusive right granted does not result in a reduction in the supply of games of chance but, on the contrary, in an increase, this increase must not go beyond the extent required to achieve the aforementioned objective. It notes that the majority of its members held that the grant of such an exclusive right to an organisation which has the same attributes and way of functioning as OPAP cannot be regarded as controlled expansion, whereas the minority opinion was that OPAP's activities are, in particular on the basis of the gaming regulations, controlled with a view to eliminate illegal betting.

27. The referring court is, however, unanimous in its view that if, contrary to the majority opinion, it were found that the grant of the exclusive right at issue to OPAP is to be considered as controlled expansion, it should be found that its grant does not go beyond what is necessary in order to attain the objective of combating criminality.

28. The third question referred is designed to adress the problem of the legal vacuum that would result from a finding to the effect that the Greek legislation at issue is in conflict with EU law.

29. Against that background, and entertaining reasonable doubts as to the compatibility of the Greek legislation at issue with the requirements of EU law, the Symvoulio tis Epikrateias decided to stay the proceedings and to refer the following questions, which are identical in both cases, to the Court of Justice for a preliminary ruling:

'(1) Is national legislation which, in order to attain the objective of restricting the supply of games of chance, grants the exclusive right to run, manage, organise and operate games of chance to a single undertaking, which has the form of a public limited company and is listed on the stock exchange, compatible with Articles 43 and 49 of the EC Treaty [now Articles Articles 49 and 56 TFEU] where, moreover, that undertaking advertises the games of chance which it organises and it expands abroad, players participate freely and the maximum bet and winnings are set per form and not per player?

(2) If the answer to the first question referred is in the negative, is national legislation which, in seeking exclusively to combat criminality by exercising control over the undertakings that operate in the sector at issue so as to ensure that those activities are carried out solely within controlled systems, grants a single undertaking the exclusive right to run, manage, organise and operate games of chance compatible with Articles 43 and 49 of the EC Treaty even where grant of the right results in parallel in unrestricted expansion of the supply in question? Or is it necessary in every case, in order for that restriction to be considered suitable for achieving the objective of combating criminality, that the expansion of supply be controlled in any event, that is to say, be only as great as is required in order to achieve that objective? If that expansion must in any event be controlled, can expansion be considered controlled from that point of view if the exclusive right in the sector in question is granted to a body with the attributes described in the first question referred? Finally, if grant of the exclusive right in question is considered to result in controlled expansion of the supply of games of chance, does its grant to just a single undertaking go beyond what is necessary, in the sense that the same objective can also be profitably served by granting that right to more than one undertaking?

(3) If, following the above two questions referred, it were to be held that the grant, by the national provisions relevant in the case in point, of an exclusive right to run, manage, organise and operate games of chance is not compatible with Articles 43 and 49 of the EC Treaty: (a) is it permissible, for the purposes of those provisions of the Treaty, for the national authorities not to examine, during a transitional period necessary in order to enact rules compatible with the EC Treaty, applications to engage in the activities in question submitted by persons lawfully established in other Member States; (b) if the answer is in the affirmative, on the basis of what criteria is the duration of that transitional period determined; (c) if no transitional period is allowed, on the basis of what criteria must the national authorities rule on the applications?'

IV – Joinder of the cases

30. In view of the close connection between Case C-186/11 and Case C-209/11, those cases were joined by Order of the President of the Court of 22 June 2011 for the purposes of the written procedure, the oral procedure and the judgment.

V – Legal analysis

A – *The first and second questions referred, concerning whether the monopoly granted to OPAP is in conformity with Articles 49 and 56 TFEU*

31. By its first and second questions, which it is appropriate to examine together, the referring court asks in essence whether Articles 49 and 56 TFEU are to be interpreted as precluding national legislation which grants the exclusive right to run, manage, organise and operate games of chance to a single undertaking such as OPAP which has the form of a public limited company, is listed on the stock exchange and advertises and expands the games of chance which it organises. More particularly, it wishes to know to what extent the restrictions imposed by that monopoly on the freedom to provide services and the freedom of establishment may be justified by the objective of restricting the supply of games of chance (as referred to in the first question referred) or by the objective of combating criminality related to gambling (as referred to in the second question referred).

1. Main arguments of the parties

32. As regards the present references for a preliminary ruling, written observations have been submitted by the OPAP, Stanleybet, William Hill, the Greek, Belgian and Polish Governments and by the Commission. In addition to those parties, Sportingbet and the Portuguese Government were represented at the hearing on 13 June 2012.

33. Stanleybet, William Hill, Sportingbet and the Commission take the view essentially that a monopoly such as that granted to OPAP in Greece, and with the attributes described by the referring court, is contrary to Articles 49 and 56 TFEU.

34. By contrast, according to the OPAP and the Belgian, Greek and Portuguese Governments, legislation such as that at issue in the main proceedings can be regarded as being in conformity with those articles. In their view, the restrictions on the freedom to provide services and the freedom of establishment which the grant of exclusive rights to OPAP in the gambling sector may entail are justified in the light of the case-law of the Court with regard to games of chance.

2. Analysis

35. As a preliminary point, it should be recalled that in accordance with the clear separation of functions between the national courts and the Court of Justice in the preliminary rulings procedure under Article 267 TFEU, it is a matter for the national court alone to assess the facts in the case and, ultimately, to apply the rules of EU law, as interpreted by the Court, to the particular case.[2] Therefore, to the extent that the referring court appears to have doubts as to which objectives are in fact pursued by the national legislation at issue, or as to the degree of control exercised by the State over OPAP's activities and their expansion, the Court cannot, notwithstanding the existence of differing views on those points among the members of the referring court, substitute its own assessment in those respects for that of the referring court.[3]

36. That being said, there is now plenty of case-law of the Court concerning games of chance which provides the criteria in the light of which the questions referred in the present cases must be examined.

37. First of all, in that regard, it is common ground in the present cases that the grant, under the national legislation at issue, of the exclusive right to run, manage and operate games of chance to OPAP imposes restrictions on both the freedom to provide services and the freedom of establishment, as guaranteed by Articles 49 and 56 TFEU respectively, in that it prohibits providers such as Stanleybet, William Hill and Sportingbet, established in another Member State, from offering games of chance in the territory of Greece and to set up agencies, branches or subsidiaries to that effect.

38. It is therefore necessary to assess whether such restrictions may be justified, in accordance with the case-law of the Court, on the basis of the derogations expressly provided for by the FEU Treaty or by overriding reasons in the public interest.[4]

39. With regard to possible justifications, the Court has observed that the objectives pursued by national legislation adopted in the area of betting and gaming, considered as a whole, usually concern the protection of the recipients of the services in question and of consumers more generally, and the protection of society. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services.[5]

40. The Court has, moreover, consistently held that moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the protection of society.[6]

41. Consequently, the Member States are, in principle, free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought.[7]

2 — See, to that effect, for example Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 49; Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 24; and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraphs 22 and 23.

3 — See, to that effect, for example Case C-347/09 *Dickinger and Ömer* [2011] ECR I-8185, paragraphs 50 and 51, and Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 29.

4 — Cf., inter alia, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 55.

5 — Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 74 and the case-law cited.

6 — See, inter alia, *Dickinger and Ömer*, cited in footnote 3, and *Stoß and Others*, cited in footnote 5, paragraph 76.

7 — See, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, cited in footnote 4, paragraph 59.

42. In that regard, the Court has acknowledged in its decisions that a Member State may legitimately take the view that it is only by the establishment of a monopoly that it can effectively pursue the objective of protection from risks connected with the gambling sector which it may thus have defined. [8]

43. As regards the objectives which may, according to the referring court, justify the restrictions at issue – more particularly, the grant of a monopoly as regards the provision of gambling services to OPAP – in the present case, namely, first, the reduction of betting and gaming opportunities and, second, the combating of criminality by making the operators active in the sector subject to control and channelling betting and gaming into the systems thus controlled, it is true that those objectives are among those recognised by case-law as capable of justifying restrictions on fundamental freedoms in the betting and gambling sector. [9]

44. In view of the fact that the order for reference is ambivalent in that regard, it must be noted that the question of which of those objectives is in fact pursued by the Greek legislation at issue is to be determined by the referring court. [10]

45. In any event, despite the abovementioned discretion accorded to the Member States in the gambling sector, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality, which is equally a matter which remains subject to final determination by the national court. [11]

46. That court needs thus to examine whether the restriction concerned is suitable for achieving the objective or objectives pursued by the legislation concerned at the level of protection which it seeks, and whether it does not go beyond what is necessary in order to achieve those objectives. [12]

47. In this connection it should be recalled, in particular, that national legislation can be deemed appropriate for ensuring attainment of the objective relied only if it genuinely reflects a concern to attain it in a consistent and systematic manner. [13]

48. Thus, first, in relation to the objective of reducing the betting and gaming opportunities, the referring court has to satisfy itself, having regard inter alia to the actual rules for applying the restrictive legislation concerned, that the legislation genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner. [14]

49. The referring court, has, however, indicated that it takes by the majority of its formation the view that the monopoly set up in Greece in favour of OPAP and the way it operates in practice cannot be regarded as reflective of that concern.

50. Rather, as is apparent, in particular, from the second question referred and the observations referred to the Court, OPAP seems to pursue an expansionist commercial policy and the exclusive right granted to it to result in an increase in the supply of games of chance.

51. Those circumstances, which fall to be verified by the national court, are in my view manifestly inconsistent with the purported objective of reducing the betting and gaming opportunities in Greece.

8 — See, to that effect, Case C-212/08 *Zeturf* [2011] ECR I-5633, paragraph 41, and *Stoß and Others*, cited in footnote 5, paragraphs 81 and 83.

9 — See Joined Cases C-72/10 and C-77/10 *Costa* [2012] ECR, paragraph 61, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 46 and 52.

10 — See, to that effect, *Dickinger and Ömer*, cited in footnote 3, paragraph 51, and *Sporting Exchange*, cited in footnote 3, paragraph 29.

11 — See *Zeturf*, cited in footnote 8, paragraph 43, and *Liga Portuguesa de Futebol Profissional and Bwin International*, cited in footnote 4, paragraphs 59 and 60.

12 — See, to that effect, for example *Liga Portuguesa de Futebol Profissional and Bwin International*, cited in footnote 4, paragraph 60.

13 — To that effect, in particular, *Costa*, cited in footnote 9, paragraph 63, and *Placanica and Others*, cited in footnote 9, paragraphs 48 and 53.

14 — See, in particular, *Dickinger and Ömer*, cited in footnote 3, paragraph 56, and *Stoß and Others*, cited in footnote 5, paragraph 98.

52. In this context, as regards the various elements cited by the referring court characterising the regulatory framework of OPAP and the way it operates in practice – that is, the fact that it has the form of a public limited company and is listed on the stock exchange, that it enjoys certain rights and privileges as regards advertising its games of chance, that it expands abroad and that the maximum bet and winnings are set per form and not per player –, although, arguably, none of those elements taken individually is of such a nature as to automatically exclude the qualification that the national legislation concerned seeks, by establishing a monopoly, to reduce gambling opportunities and to limit activities in that area, those elements have to be viewed and assessed together in order to determine whether the restrictive legislation is genuinely consistent with the aforementioned objective.

53. In my view, having regard to those elements, the referring court can legitimately conclude that the Greek legislation at issue does not genuinely reflect the concern to bring about a reduction of gambling opportunities or to limit activities in that sector in a consistent and systematic manner.

54. Second, as far as concerns the objective of preventing the use of betting and gaming activities for criminal or fraudulent purposes by chanelling them into a controlled system, the Court has indeed held in several judgments that, viewed from that perspective, a policy of controlled expansion of gambling activities may be consistent with the objective of channelling them into controlled circuits by drawing gamblers away from clandestine, prohibited betting and gaming to activities which are authorised and regulated. [15]

55. In order to achieve that objective of chanelling activities into controlled circuits, authorised operators or, as the case may be, the holder of the public monopoly must represent a reliable, but at the same time attractive, alternative to non-regulated activities, which may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques. [16]

56. In that regard, according to settled case-law it is also for the national court to assess, in the light of the circumstances of the dispute before it, whether a dynamic or expansive policy of the holder of the monopoly may be regarded – account being had, in particular, to the scale of advertising undertaken and with regard to the creation of new games – as forming part of a policy of controlled expansion in the sector of games of chance, aiming in fact to channel the propensity to gamble into controlled activities. [17]

57. In relation to the doubts expressed by the referring court in this context, it should be noted, first, that a policy of expanding games of chance can only be regarded as consistent to the extent that there is actually a problem of criminal and fraudulent activities of a significant scale connected to gambling in Greece, which the expansion of authorised and regulated activities would be capable of solving. [18]

58. Second, it should be recalled that the Court has consistently held that the establishment of a measure as restrictive as a monopoly, such as that granted to OPAP, must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively designed by reference to the said objective and subject to strict control by the public authorities. [19]

15 — See *Dickinger and Ömer*, cited in footnote 3, paragraph 63; *Stoß and Others*, cited in footnote 5, paragraphs 101 and 102; and *Placanica and Others*, cited in footnote 9, paragraph 55.

16 — See *Dickinger and Ömer*, cited in footnote 3, paragraph 64, and *Placanica and Others*, cited in footnote 9, paragraph 55.

17 — See, for example, *Zeturf*, cited in footnote 8, paragraph 69, and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757, paragraph 37.

18 — See, to that effect, *Dickinger and Ömer*, cited in footnote 3, paragraphs 66 and 67, and *Ladbrokes Betting & Gaming and Ladbrokes International*, cited in footnote 17, paragraphs 29 and 30.

19 — See *Zeturf*, cited in footnote 8, paragraph 58, and *Stoß and Others*, cited in footnote 5, paragraph 83.

59. It is clear from the strict requirements related to the proportionality of the monopoly concerned that a policy of expansion pursued by the holder of a monopoly, characterised, inter alia, by the expansion of the supply of games of chance and by the advertising of those games, must, firstly, remain measured and strictly limited to what is necessary in order to channel consumers towards controlled gaming networks and, secondly, that the supply of games must be subject to strict control.

60. In my view, it is apparent from the information provided by the referring court and the observations of the parties that, notwithstanding the final assessment by the referring court in that regard, the activities of OPAP are neither subject to strict control by the public authorities nor effectively limited by the legislative framework applicable to it.

61. More particularly, to the extent that the grant to OPAP of the exclusive rights in the gambling sector brings about an increase in the supply of games of chance beyond what is necessary to achieve the objective of combating criminality by chanelling the demand or even results in unrestricted expansion of that supply, the referring court may, as it did by the majority opinion expressed in the order for reference, legitimately conclude that the monopoly at issue cannot be regarded as seeking controlled expansion within the meaning of the case-law of the Court as described above.

62. In the light of all the foregoing, I propose that the answer to the first and second questions referred is that Articles 49 and 56 TFEU must be interpreted as meaning that national legislation, which grants the exclusive right to run, manage, organise and operate games of chance to a single undertaking which has the form of a public limited company and is listed on the stock exchange, may be justified to the extent that that legislation actually pursues the objective of restricting the supply of games of chance or the objective of combating criminality related to gambling by channelling players into controlled systems and that it genuinely reflects a concern to attain those objectives in a consistent and systematic manner. It is for the national court to determine which of those objectives is in fact pursued by the national legislation at issue and whether that legislation genuinely meets the concern to attain that objective in a consistent and systematic manner. More particularly, in so far as the national court holds that the relevant objective of the national legislation at issue is that of restricting the supply of games of chance in Greece, that court cannot conclude that that legislation genuinely reflects a concern to attain that objective in a consistent and systematic manner if it finds that the holder of the monopoly actually pursues an expansionist policy and that the exclusive right granted to it results in an increase in the supply of games of chance rather than in a reduction. By contrast, in so far as the national court identifies the combating of criminality related to gambling by channelling players into authorised and regulated circuits as being the sole objective pursued by the national legislation at issue, a policy of expansion by the holder of the monopoly, characterised, inter alia, by the expansion of the supply of games of chance and by the advertising of those games, can only be regarded as consistent to the extent that there is actually a problem of criminal and fraudulent activities on a significant scale linked to gambling in Greece, which could be dealt with by the expansion of authorised and regulated activities. Moreover, the expansion of the supply of games of chance and the advertising of those games must, firstly, remain measured and strictly limited to what is necessary in order to channel consumers towards controlled gaming networks and, secondly, the supply of games of chance by the holder of the monopoly must be subject to strict control by the public authorities.

B – *The third question referred concerning the consequences to be drawn by the national authorities from a finding to the effect that the national provisions at issue are incompatible with Articles 49 and 56 TFEU*

63. By its third question, the referring court essentially seeks guidance as to the consequences to be drawn from a finding that the Greek legislation at issue is incompatible with the Treaty provisions on the freedom to provide services and the freedom of establishment. In that regard it wishes to know, in particular, whether during a transitional period national authorities may refrain from ruling on applications concerning the grant of licences in the sector of games of chance.

1. Main arguments of the parties

64. Although they differ as to details, in their answers to the third question referred, the OPAP, the Greek, Polish and the Belgian Governments concur, in essence, that, if the Greek legislation at issue is incompatible with EU law, a transitional period should be granted with a view to the adoption of new legislation which complies with the requirements of the freedom to provide services and the freedom of establishment. According to those parties, in the absence of the enactment of appropriate new legislation, there is no or no sufficient legal basis in EU law or national law to decide on the applications at issue.

65. By contrast, Stanleybet, William Hill, Sportingbet and the Commission, argue that there is, in the light of direct effect and the primacy of the provisions on the fundamental freedoms and, in particular, the judgment of the Court in *Winner Wetten*,[20] no room for the grant of a transitional period such as that referred to in the third question during which the national legislation concerned would continue to apply. Those parties suggest essentially that the applications for permission to engage in the field of gambling should be dealt with by the national authorities on a case-by-case basis and/or in the light of the requirements flowing directly from EU law or, by analogy, from the remaining national regulatory framework.

2. Analysis

66. It should be recalled that in its decision in *Winner Wetten*,[21] the Grand Chamber of the Court, basing itself on an analysis of its case-law on the primacy and direct applicability of EU law[22] (in particular *Simmenthal* [23] and *Factortame and Others* [24]) has already ruled that national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.[25]

20 — Cited in footnote 2.

21 — Cited in footnote 2.

22 — See *Winner Wetten*, cited in footnote 2, in particular paragraphs 53 to 61.

23 — Case 106/77 [1978] ECR 629.

24 — Case C-213/89 [1990] ECR I-2433.

25 — See *Winner Wetten*, cited in footnote 2, paragraph 69 and the operative part of the judgment.

67. In that regard, the Court indicated that its case-law on the maintenance of an EU measure which has been annulled or declared invalid, the purpose of which is to avoid a legal vacuum from arising, may be applied by analogy and lead, exceptionally, to a provisional suspension of the ousting effect which a directly-applicable rule of EU law has on national law that is contrary thereto. It excluded, however, the possibility of such a suspension in the case at hand on the grounds of the lack of overriding considerations of legal certainty capable of justifying the suspension within the meaning of that case-law. [26]

68. In this context, according to the referring court in that case, the restrictive legislation at issue in that case did not effectively contribute to limiting betting activities in a consistent and systematic manner, so that it followed from the earlier case-law of the Court that such legislation infringes Articles 43 EC and Articles 49 EC (now Articles 49 and 56 TFEU).

69. As the circumstances of the present case do not appear to be substantially different from those in *Winner Wetten*, there is no room for concluding that, in so far as the restrictive legislation at issue is found by the referring court to be contrary to Articles 49 and 56 TFEU, according to the criteria provided by the case-law of the Court relating to the systematic and consistent nature of the restrictive measure, the national legislation at issue remains applicable during a transitional period.

70. That conclusion is not called into question by the more recent judgment of the Court in *Inter-Environnement Wallonie and Terre wallonne*. [27] In that case, which concerned an order adopted in breach of the obligation to carry out an environmental assessment as laid down by Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, [28] the Court held that the referring court may, given the existence of an overriding consideration relating to the protection of the environment, subject to a number of conditions exceptionally be authorised to make use of its national provision empowering it to maintain certain effects of an annulled national measure. [29]

71. It is, however, clear from the reasoning of the Court in that judgment that the authorisation to maintain the measure in breach of EU law is meant to be strictly exceptional and subject to very specific conditions as formulated in that judgment, which are clearly not applicable to the circumstances of the present case. [30]

72. Above all, the decision of the Court in *Inter-Environnement Wallonie and Terre wallonne* is premissed on the existence of an overriding consideration relating to the protection of the environment. [31] There appears to be in the present case no overriding consideration similar to that consideration capable of justifying the suspension.

73. In the light of the foregoing, it should be stated in answer to the third question referred that, to the extent that, according to the findings of the national court, the national legislation at issue granting the exclusive right to run, manage, organise and operate games of chance is incompatible with Articles 49 and 56 TFEU, because it does not contribute to limiting betting activities or to channelling players into controlled systems in a systematic and consistent manner, that legislation cannot continue to apply during a transitional period.

26 — See *Winner Wetten*, cited in footnote 2, paragraphs 66 and 67.

27 — Case C-41/11 [2012] ECR.

28 — OJ 2001 L 197, p. 30.

29 — See *Inter-Environnement Wallonie and Terre wallonne*, cited in footnote 27, paragraphs 57 to 62.

30 — See *Inter-Environnement Wallonie and Terre wallonne*, cited in footnote 27, in particular paragraph 63.

31 — See *Inter-Environnement Wallonie and Terre wallonne*, cited in footnote 27, paragraphs 57 and 58.

VI – Conclusion

74. For the reasons given above, I propose that the questions referred by the Symvoulio tis Epikrateias (Greece) should be answered as follows:

— Articles 49 and 56 TFEU must be interpreted as meaning that national legislation which grants the exclusive right to run, manage, organise and operate games of chance to a single undertaking which has the form of a public limited company and is listed on the stock exchange may be justified to the extent that that legislation actually pursues the objective of restricting the supply of games of chance or the objective of combating criminality related to gambling by channelling players into controlled systems and that it genuinely reflects a concern to attain those objectives in a consistent and systematic manner. It is for the national court to determine which of those objectives is in fact pursued by the national legislation at issue and whether that legislation genuinely meets the concern to attain that objective in a consistent and systematic manner. More particularly, in so far as the national court holds that the relevant objective of the national legislation at issue is that of restricting the supply of games of chance in Greece, that court cannot conclude that that legislation genuinely reflects a concern to attain that objective in a consistent and systematic manner if it finds that the holder of the monopoly actually pursues an expansionist policy and that the exclusive right granted to it results in an increase in the supply of games of chance rather than in a reduction. By contrast, in so far as the national court identifies the combating of criminality related to gambling by channelling players into authorised and regulated circuits as being the sole objective pursued by the national legislation at issue, a policy of expansion by the holder of the monopoly, characterised, inter alia, by the expansion of the supply of games of chance and by the advertising of those games, can only be considered as consistent to the extent that there is actually a problem of criminal and fraudulent activities on a significant scale linked to gambling in Greece which could be dealt with by the expansion of authorised and regulated activities. Moreover, the expansion of the supply of games of chance and the advertising of those games must, firstly, remain measured and strictly limited to what is necessary in order to channel consumers towards controlled gaming networks and, secondly, the supply of games of chance by the holder of the monopoly must be subject to strict control by the public authorities;

— to the extent that, according to the findings of the national court, the national legislation at issue granting the exclusive right to run, manage, organise and operate games of chance is incompatible with Articles 49 and 56 TFEU, because it does not contribute to limiting betting activities or to channelling players into controlled systems in a systematic and consistent manner, that legislation cannot continue to apply during a transitional period.