Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 9 March 2017 [1]

Case C-685/15

Online Games Handels GmbH
Frank Breuer
Nicole Enter
Astrid Walden
v
Landespolizeidirektion Oberösterreich

(Request for a preliminary ruling from the Landesverwaltungsgericht Oberösterreich (Upper Austria Regional Administrative Court, Austria))

(Articles 49 and 56 TFEU — Games of chance — Gaming monopoly in a Member State — Infringement — National legislation providing for the court to examine the facts ex officio (Amtswegigkeitsgrundsatz) — European Convention for the Protection of Human Rights and Fundamental Freedoms — Article 6 — Charter of Fundamental Rights of the European Union — Article 47)

1. This request for a preliminary ruling arises in the context of the Glücksspielgesetz (Austrian Law on games of chance) of 28 November 1989 (BGBI. 620/1989), as applied inter alia to natural or legal persons exercising rights of establishment (Article 49 TFEU) or the freedom to provide services (Article 56 TFEU), and the procedural rules that apply to hearings before the administrative courts of that Member State. Against that background, the Court is asked to interpret fundamental rights principles in the form of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), as construed in the light of Article6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). [2] The particular point at issue is the right of the accused to a fair hearing, as protected by Article 47 of the Charter, in circumstances in which the court hearing the case is not only to reach a final decision on the merits but also to seek out evidence in the case *ex officio*.

1 — Original language: English.

2 — Signed in Rome on 4 November 1950.

Legal framework

EU law

The Treaty on the Functioning of the European Union

2. Article 49 TFEU (which forms part of Chapter 2, entitled 'Right of Establishment', of Title IV) provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

3. Article 52(1) TFEU states:

'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.' [3]

4. According to Article 56 TFEU (which forms part of Chapter 3, entitled 'Services', of Title IV):

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

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.'

5. Article 62 TFEU provides:

'The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.'

The Charter

6. Article 47 of the Charter provides:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

3 — I should point out that the Law on games of chance appears to concern a general derogation from the freedom of establishment and the freedom to provide services. As such, it does not provide for 'special treatment for foreign nationals'. Since, however, the national legislation at issue in this case is the same as the legislation at issue in *Pfleger and Others* (judgment of 30 April 2014, C-390/12, EU:C:2014:281) and since this case concerns procedural questions arising out of the interpretation of that legislation by the national administrative courts, I do not consider it necessary to address that point further.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

…'

The ECHR

7. Article 6(1) of the ECHR states:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...'

National law

8. The Law on games of chance restricts the organisation of games of chance using gaming machines to licensed operators.

9. In the version in force at the material time as regards the *first case* before the referring court in the main proceedings, paragraph 50 of that law provided for jurisdiction over offences under that law to lie at first instance with the Bezirksverwaltungsbehörden (District administrative authorities) and, at second instance, with the Unabhängiger Verwaltungssenat (Independent Administrative Tribunal) (now the Landesverwaltungsgericht (Regional Administrative Court)) for the region. Enforcement authorities, including tax offices, were to provide support to those bodies and have the right to monitor compliance with that law on their own initiative.

10. Under Paragraph 52(1) of that law, less serious infringements were to be treated as an administrative offence and fines of up to EUR 22 000 could be imposed by the administrative authorities. Under Paragraph 52(2), the procedure governing aggravated infringements was to be that laid down in respect of offences committed under the Strafgesetzbuch (Criminal Code). Paragraph 53 gave the administrative authorities the power to confiscate gaming machines in cases of suspected contravention of the monopoly in respect of games of chance which that law gave to the State.

11. By amendments to the Law on games of chance which entered into force in 2014 and which therefore apply to the *second case* before the referring court in the main proceedings, Paragraph 52 of that law was modified so that all infringements were to be subject to administrative sanctions only.

12. Under Article 90(2) of the Bundes-Verfassungsgesetz (Federal Constitutional Law), proceedings in criminal cases are to be subject to the adversarial procedure. As regards actions brought before the regional administrative courts for annulment of decisions of the administrative authorities, such as the referring court, Article 130(4) of the same law provides that on appeal those courts are required themselves to give a ruling on the substance of the case.

13. By virtue of Paragraph 46(1) of the Verwaltungsgerichtverfahrengesetz (Law on the procedure before administrative courts), it is the task of the administrative court to ingather all the evidence necessary to dispose of the case.

14. Pursuant to Paragraph 25 of the Verwaltungsstrafgesetz (Law on administrative offences), an administrative tribunal is to investigate offences *ex officio*. It is to take account of both exonerating and incriminating circumstances.

Facts, procedure and the question referred

15. The request for a preliminary ruling concerns two cases that are pending before the referring court. I shall describe them separately.

Proceedings brought against Online Games Handels GmbH

16. Following information received from an anonymous source, the Bundespolizeidirektion Wels (now part of the Landespolizeidirecktion Oberösterreich) (Upper Austria Regional police directorate; 'the Police Directorate') instructed officials of the Finanzamt Linz (Tax office, Linz; 'the Tax Office') to investigate a cafe known as the 'SJ-Bet Sportbar' in Wels. They did so on 8 March 2012. The premises contained eight gaming machines which were assessed as contravening the federal monopoly imposed by the Law on games of chance. The officials carrying out the investigation were informed that one of those machines belonged to Online Games Handels GmbH ('Online Games'), a company incorporated in Austria. It subsequently transpired that the organiser of the games in question was a limited company incorporated in Brno in the Czech Republic. All the gaming machines were seized and the Police Directorate, by decision of 17 April 2012, ordered their confiscation.

17. Online Games challenged that decision before the referring court's predecessor (the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the *Land* of Upper Austria)). By decision of 21 May 2012, that court rejected the challenge. Online Games then brought an appeal against that decision before the Verwaltungsgerichtshof (Upper Administrative Court, Austria), which set aside that decision by judgment of 1 October 2015. The case is now once more before the referring court, which is now known as the Landesverwaltungsgericht Oberösterreich (Upper Austria Regional Administrative Court). In those proceedings, Online Games contests the compatibility of the Law on games of chance with EU law, in particular the Treaty provisions concerning the freedom of establishment and the freedom to provide services laid down in Articles 49 and 56 TFEU respectively.

Proceedings brought against Frank Breuer and Others

18. Acting on information received from a third party, officials of the Tax Office raided a cafe known as the 'Café Vegas' in Linz on 14 August 2014. They confiscated eight gaming machines which they considered were being operated in breach of the Law on games of chance. They were informed by an employee at the premises that those machines belonged to Franck Gastro s.r.o., a company incorporated in the Czech Republic. The Police Directorate subsequently imposed fines of EUR 24 000 on each of Mr Breuer and the other two parties to the proceedings before the referring court on the basis of their alleged organisation or participation in the organisation of the gaming at the premises in question. Mr Breuer is the representative of a limited company incorporated in Slovakia.[4]

19. Each of those parties has challenged those fines before the referring court. They contend that the federal monopoly imposed by the Law on games of chance is contrary to EU law.

4 — See footnote 19 below.

The question referred for a preliminary ruling

20. In deciding the issues before it, the referring court is mindful of this Court's case-law concerning the Law on games of chance set out in *Pfleger and Others*[5] and, in particular, the statement in paragraph 50 of that judgment concerning the duties imposed on a Member State which wishes to rely on an objective capable of justifying a restriction of the freedom to provide services.[6] The referring court sees that statement as being equally applicable to restrictions on the freedom of establishment, since the Law on games of chance falls equally to be interpreted as derogating from that freedom.[7] In that context, it is concerned that the active role which the Austrian administrative courts are required to play in eliciting evidence in cases before them[8] and the corresponding, relatively passive, role played by the prosecution authorities in those proceedings may be contrary to this Court's case-law.

21. The referring court has therefore decided to refer the following question to the Court for a preliminary ruling pursuant to Article 267 TFEU:

'Is Article 56 TFEU or Article 49 et seq. TFEU, in the light of Article 6 of [the ECHR] read in conjunction with Article 47 of [the Charter], to be interpreted, having regard to the judicial objectivity and impartiality required by the case-law of the European Court of Human Rights (in particular with regard to its judgment [in *Ozerov v. Russia*[9]], paragraph 54), as precluding, in the light of the case-law of the Court of Justice of the European Union (in particular its judgment [in *Pfleger and Others*]), a national rule according to which, in the case of administrative offence proceedings, it is not for the State prosecution services (or other State prosecution bodies) in their function of representing the prosecution but rather for the court called upon to rule on the legality of the criminal measure against which an action has been brought, of its own motion and independently of the conduct of the parties to the proceedings, (in one and the same person/function) to state and delimit wholly independently the evidence justifying the criminal law protection of the quasi-monopoly regulation of the national gambling market and then autonomously to investigate and evaluate it?'

22. Written observations have been lodged by Online Games, Mr Breuer and Others, the Austrian and Belgian Governments and by the European Commission. At the hearing on 10 November 2016, those parties presented oral argument and responded to the questions asked by the Court.

Assessment

Admissibility

23. The Austrian Government submits that the request for a preliminary ruling in this case is inadmissible.

24. It argues, first, that the question referred is hypothetical. The 'national rule' to which it refers does not exist, since the referring court's interpretation of national law is incorrect and that of the Austrian Government is to be preferred.

5 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

6 — See further point 33 below.

7 — See point 49 et seq. of my Opinion in that case (C-390/12, EU:C:2013:747) for an analysis of the restrictions on the freedom to provide services which that law entails.

8 — See, inter alia, point 14 above and points 40 and 58 et seq. below.

9 — Judgment of 18 May 2010, CE:ECHR:2010:0518JUD006496201.

25. Were the Austrian Government's position to be accepted, it would be tantamount to saying that this Court is under a duty to accept the submissions of a national government as to the correct interpretation of domestic law in preference to a situation described by a referring court in its order for reference. That is manifestly erroneous and it is plain that the Austrian Government's argument in that regard is entirely without merit. I do not consider it further.[10] The question referred can clearly *not* be categorised as 'hypothetical' on that basis.

26. Second, the Austrian Government contends that the referring court has failed to provide sufficient factual and legal background in its order for reference for this Court to give a ruling.

27. According to settled case-law, questions referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on such a question only where it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[11]

28. It is true that the precise status of the Law on games of chance under national law is, at least as far as the matters put forward before this Court are concerned, unclear and that notwithstanding questions put to the parties at the hearing. However, there is in my view sufficient information available to the Court as regards the legal and factual context of the dispute before the referring court and the scope of the question referred is clear. Moreover, neither the European Commission nor any of the governments submitting observations has shown any difficulty in formulating those observations on the basis of the order for reference.[12]

29. I therefore conclude that the request for a preliminary ruling is admissible.

Preliminary matters

Applicability of the Charter and the ECHR

30. In order for the Charter to apply, a Member State must be 'implementing Union law' for the purposes of Article 51 thereof. As I explained in my Opinion in *Pfleger and Others*,[13] where a Member State enacts a measure that derogates from a fundamental freedom guaranteed by the FEU Treaty, that measure falls within the scope of EU law. The power to derogate from a fundamental freedom guaranteed by EU law in certain circumstances is a power that Member States retain and that EU law recognises; but the *exercise* of that power is circumscribed by EU law. When a court – be it a national court or this Court – reviews whether national legislation restricting the exercise of such a fundamental freedom falls within the Treaty derogation (and is thus permissible) that process of review is carried out by reference to, and under criteria derived from, EU law, not national law. A Member State must therefore be regarded as 'implementing Union law' within the meaning of Article 51 when it puts in place a derogation from a fundamental freedom. It follows that the Charter applies.[14] Since the national measure at issue in the main proceedings 'implements' EU law because it falls within the scope of EU law, it must be interpreted in the light of the Charter. The fact that the present case, unlike *Pfleger and Others*, concerns the procedural rules which the national court must apply in ruling on the case and not the validity of the derogating measure itself makes in my view no difference.

10 — See also, as regards the admissibility of an order for reference in a situation where there are differing views between national courts as to the interpretation of a decision of this Court, order of 15 October 2015, *Naderhirn*, C-581/14, not published, EU:C:2015:707.

11 — See, inter alia, judgment of 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10, EU:C:2010:363, paragraph 27 and the case-law cited.

12 — See, for example, judgment of 25 March 2004, *Azienda Agricola Ettore Ribaldi and Others*, C-480/00, C-482/00, C-484/00, C-489/00 to C-491/00 and C-497/00 to C-499/00, EU:C:2004:179, paragraph 74.

13 — C-390/12, EU:C:2013:747.

14 — See also, in that regard, judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 36.

31. It is the settled case-law of European Court of Human Rights ('the Strasbourg Court') that Article 6(1) of the ECHR applies to administrative offences and the corresponding administrative criminal procedure under Austrian law.[15] It follows that such offences are to be classified as 'criminal' for the purposes of that provision[16] and, by necessary extension, those of Article 47 of the Charter.

The judgment in *Pfleger and Others*

32. The question before the Court in this case arises against the background of the judgment in *Pfleger and Others*.[17] In that case, the Court was asked to rule on a number of questions referred by the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the Land of Upper Austria), as predecessor of the referring court, essentially concerning the validity of the Law on games of chance in the light of the principle of proportionality, as it applies in the context of Article 56 TFEU on the freedom to provide services. The Court held that Article 56 TFEU had to be interpreted as precluding national legislation such as the Law on games of chance 'where that legislation does not actually pursue the objective of protecting gamblers or fighting crime and does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner'.[18]

33. In reaching that conclusion, the Court held, in particular, as follows:

'43 … It should be recalled that the restrictions imposed by the Member States must satisfy the relevant conditions of proportionality and non-discrimination, as laid down in the Court's case-law. Thus, national legislation is appropriate for guaranteeing attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner …

44 The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure …

…

47 … The identification of the objectives in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the referring court …

48 It is also for the referring court, while taking account of the information provided by the Court, to determine whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law as regards their proportionality …

49 In particular, it is for that court 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, to limit activities in that area and to fight gambling-related crime in a consistent and systematic manner …

15 — See, inter alia, judgment of 20 December 2001, *Baischer v. Austria*, CE:ECHR:2001:1220JUD003238196, paragraph 22.

16 — See decision of the Strasbourg Court of 4 July 2002, *Weh and Weh v. Austria*, CE:ECHR:2002:0704DEC003854497.

17 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

18 — See paragraph 56 and the operative part of the judgment.

50 In that regard, the Court has previously held that it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality ...

…

52 … 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.'

34. The Court reached its conclusions in that case by reference to the fundamental freedom to provide services under Article 56 TFEU. In this case, the question referred concerns not only that freedom but also the freedom of establishment laid down under Article 49 TFEU.[19] Since, however, the provisions permitting a Member State to derogate from the latter freedom in Articles 51 to 54 TFEU apply equally to the freedom to provide services by virtue of Article 62 TFEU, it is my view that the principles set out in the judgment in *Pfleger and Other*[20] apply equally to both freedoms.

The role of the referring court and the nature of the offences alleged to have been committed by the applicants in the main proceedings

35. The referring court forms part of the Austrian administrative law system. Technically, it falls to be classified as an appellate court of second instance, administrative offences being dealt with by the administrative authorities at first instance.[21] Appeals from its judgments lie before the Verwaltungsgerichtshof (Upper Administrative Court).

36. The offences with which the applicants in the main proceedings have been charged are administrative offences under national law and the procedure applying to the cases involving those applicants is that applying in respect of administrative proceedings. That procedure requires the court responsible for deciding on the case to investigate the offence *ex officio*.[22] On an appeal being filed with a court such as the referring court, the administrative authority which issued the administrative penalty assumes the function of the prosecuting authority.[23] As mentioned in point 31 above, the offences which the applicants in the main proceedings are alleged to have committed fall to be classified as 'criminal' for the purposes of Article 6 of the ECHR.

19 — The precise relationship of the facts of the main proceedings with the freedom of establishment is not made entirely clear by the order for reference. I assume, however, that it concerns the involvement of the Slovak company referred to in point 18 above.

20 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

21 — See, as regards the Unabhängiger Verwaltungssenat (Independent Administrative Tribunal), as the predecessor of the current Landesverwaltungsgericht (Regional Administrative Court), decision of the Strasbourg Court of 4 July 2002, *Weh and Weh v. Austria*, CE:ECHR:2002:0704DEC003854497. The Austrian Government confirmed at the hearing that the Landesverwaltungsgericht (Regional Administrative Court) occupies a similar position.

22 — See point 14 above.

23 — That, at least, is the position as recorded in the Austrian Government's written observations. As regards the Unabhängiger Verwaltungssenat (Independent Administrative Tribunal), as the predecessor of the current Landesverwaltungsgericht, see decision of the Strasbourg Court of 4 July 2002, *Weh and Weh v. Austria*, CE:ECHR:2002:0704DEC003854497. In its observations relating to that case, the referring court indicates that paragraph 51d of the Verwaltungsstrafgesetz (Law on administrative offences) on which the Strasbourg Court based its analysis has been repealed without being replaced. I note, however, that the Minute of Proceedings of the referring court for the Online Games case, which form part of the national case file submitted to this Court, include a reference to the Police Directorate as the respondent authority (*belangte Behörde*), under the observation that no representative of that authority had participated at the hearing and that no reason had been given for such failure.

Substance

37. By its question, the referring court essentially seeks guidance on the application of Article 6 of the ECHR and Article 47 of the Charter to judicial proceedings involving an alleged infringement of a national rule which, in order for its validity to be upheld, must satisfy the conditions applying to derogations from the freedom of establishment and the freedom to provide services as laid down in Articles 49 and 56 TFEU, respectively, and applied in the Court's case-law, in particular in the judgment in *Pfleger and Others*.[24]

38. Under what is generally known as the adversarial procedure,[25] the tasks of the prosecution and the court are, in theory at least, clearly separated. It is the duty of the former to elicit and to present the material it relies on in support of its case and for the latter to give a ruling on that material in the light, inter alia, of the submissions made on behalf of the defence. Were a court to seek to carry out the functions of the prosecution under that procedure, that would amount to an unacceptable departure from its judicial role and any resulting decision would almost certainly be set aside on appeal.

39. In proceedings before the referring court, that court is required to examine the material before it *ex officio*.[26] Such a procedure, which involves a fundamentally different allocation of duties as between the prosecution and the court, is traditionally termed 'inquisitorial'.[27]

40. It has been observed that it is now difficult to find any legal system that is either purely adversarial or inquisitorial.[28] As described by the Austrian Government in its written observations, the essential elements of the system that applies before the referring court are as follows. First, the court must, *ex officio*, investigate the truth of the facts underlying the offence by putting together all the necessary evidence, the submissions of the parties being irrelevant in that regard. In so doing, the court is under a duty to do all that is within its power to reach the truth. It must accordingly have regard to all sources capable of disclosing that truth and, in particular, ingather all evidence that is available in the case before it and which may be relevant in reaching a decision. It must investigate all material that may potentially have an impact on the outcome without restriction and do so entirely autonomously.

41. Part of the reasoning of the referring court in its order for reference suggests that this Court should find that the inquisitorial system, by its very nature, contravenes the requirements of Article 6 of the ECHR and Article 47 of the Charter.

24 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

25 — I use this term to denote a form of procedure whereunder the parties develop and present their arguments and gather and submit their evidence, thereby, within certain rules, controlling the proceedings. The fact-finder, in the form of a judge or jury, remains neutral or passive throughout. I do not use it in the broader sense sometimes used by the Strasbourg Court, in order to denote a procedure which ensures equality of arms (see, for example, judgment of 16 February 2000, *Rowe and Davis v. United Kingdom*, CE:ECHR:2000:0216JUD002890195, paragraph 60).

26 — See points 14 and 36 above.

27 — Although that expression is used in the order for reference and also appears in the Austrian Government's written observations, the Austrian Government's representative at the hearing appeared to cast some doubt on its appropriateness in the context of the Austrian system at issue in the main proceedings. I should therefore emphasise that I use the expression descriptively rather than as a term of art.

28 — See Armenta-Deu, T., 'Beyond Accusatorial or Inquisitorial Systems: a Matter of Deliberation and Balance', in *Visions of Justice*, Ackerman, B., Ambos, K. and Sikirić, H., editors, Duncker & Humboldt, Berlin, 2016, pp. 57 to 75.

42. In support of its position, the referring court refers to certain judgments of the Strasbourg Court, [29] to two Opinions delivered by Advocates General of this Court [30] and to an opinion issued by the Consultative Council of European Judges and the Consultative Council of European Prosecutors ('the CCJE/CCPE Opinion'). [31]

43. It is true that dicta or observations can be found in each of these sets of documents placing great emphasis on the importance of judicial impartiality. The judgments of the Strasbourg Court and the CCJE/CCPE Opinion also stress the need for there to be no confusion between the functions of prosecutor and judge. [32] But nowhere is there an indication that the inquisitorial system should or may, of itself, fall to be regarded as unsafe.

44. Nor do I believe that there are grounds for adopting the referring court's approach. [33]

45. As I see it, the true position is that both the adversarial and the inquisitorial systems may, if care is not taken, give rise to difficulties as regards compliance with Article 6 of the ECHR and Article 47 of the Charter. In the former case, weak representation of an accused may infringe the right to equality of arms. In the latter, a failure properly to distinguish between what is the task of the prosecutor and what is the task of the judge may lead to the two functions becoming blurred, again to the detriment of the accused. But, if managed properly, each is a system for ascertaining the truth; they simply do so in different ways. I shall return to the function of the prosecutor in inquisitorial proceedings later in this Opinion. [34]

46. I therefore reject the notion that the inquisitorial system should, by its very nature, be regarded as contravening the requirements of Article 6 of the ECHR and Article 47 of the Charter.

47. That does not mean, however, that no useful guidance can be given to the referring court in answer to its question.

48. There remains, in particular, the issue of how the Court's judgment in *Pfleger and Others* [35] is to be applied in the context of a national system such as that described in point 40 above.

29 — These comprise judgments of 15 December 2005, *Kyprianou v. Cyprus*, CE:ECHR:2005:1215JUD007379701, paragraphs 118, 121 and 126 to 128; of 18 May 2010, *Ozerov v. Russia*, CE:ECHR:2010:0518JUD006496201, paragraphs 51 to 54; and of 20 September 2016, *Karelin v. Russia*, CE:ECHR:2016:0920JUD000092608. The last of these was delivered after the date of the order for reference; it was submitted separately by the referring court.

30 — These comprise the Opinion of Advocate General Ruiz-Jarabo Colomer in *Kaba*, C-466/00, EU:C:2002:447, point 90 et seq., and the Opinion of Advocate General Cruz Villalón in *X*, C-507/10, EU:C:2011:682, point 20 et seq.

31 — See Opinion No 12(2009) of the Consultative Council and European Judges and Opinion No 4(2009) of the Consultative Committee of European Prosecutors ('the Bordeaux Declaration'), paragraphs 3 and 7. The document can be consulted at http://www.coe.int/t/dghl/cooperation/ccje/textes/avis_EN.asp.

32 — See, in particular, judgment of the Strasbourg Court of 15 December 2005, *Kyprianou v. Cyprus*, CE:ECHR:2005:1215JUD007379701, paragraph 126.

33 — I should stress that, contrary to what counsel for Online Games submitted at the hearing, I did *not* suggest in my Opinion in *Pfleger and Others*, C-390/12, EU:C:2013:747, that the inquisitorial procedure is contrary to either the ECHR or to EU law.

34 — See point 63 et seq. below.

35 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

Paragraph 50 of the judgment in *Pfleger and Others*

49. In that regard, the Austrian Government offers an interpretation of that judgment which, in my view, essentially fails to take account of paragraph 50. Instead, it concentrates on paragraphs 48, 49 and 52. There, the Court sets out its interpretation of the duties of a court which is called upon to rule on the validity of what it describes as 'restrictive legislation'. [36] Read on their own, those paragraphs can, at least arguably, be seen as supporting the position that the referring court's concerns are groundless. The Member State and its authorities have no role to play. It is the national court that must play the key role.

50. But that is to leave paragraph 50 of the judgment out of the equation and thereby disregard a material part of the Court's analysis. I do not believe that it is appropriate to do so. It is also important to bear in mind that the reasoning set out in that point reflects the Court's settled case-law in that regard. [37]

51. The requirement imposed on the Member States by paragraph 50 is both an important and an onerous one. Where a derogation from any of the fundamental freedoms is at issue, it falls to the Member State to present clear and convincing reasons to justify it.

52. By their very nature, those reasons are likely to be complex, requiring special knowledge that will in most, if not all, cases bear a particular relationship to the Member State seeking the derogation. In nearly every case, they will take as their basis the particular social and/or economic reality and the particular social and/or economic policies of the Member State in question. That Member State can be expected to have given careful consideration to the justification(s) underlying the measure before adopting it. That is the context in which the Court's reference in paragraph 47 of the judgment in *Pfleger and Others* [38] to 'the objectives *in fact pursued by the national legislation*' [39] falls in my view to be construed.

53. The task of putting forward that justification can, I suggest, be a matter only for the Member State concerned. [40] It is not for other parties to proceedings, including the national court or the party seeking to challenge the validity of the national measure giving effect to the derogation in question, to do so. They cannot, in other words, be expected to 'second guess' the reasoning which led the Member State to adopt the measure.

54. If and to the extent that a duty of that nature does not already arise under the legal system of the Member State in question, it will operate as an overlay to the procedural rules that would otherwise apply. It cannot, obviously, detract from the rights of the defence; indeed, it should fortify them by providing swifter and more complete access to the reasoning which led the Member State to adopt the derogation in question.

36 — See paragraph 52 of the judgment.

37 — See judgments of 8 September 2010, *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 71; of 15 September 2011, *Dickinger and Ömer*, C-347/09, EU:C:2011:582, paragraph 54; and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386; paragraph 65. See also judgment of 13 March 2008, *Commission v Belgium*, C-227/06, not published, EU:C:2008:160, paragraphs 62 and 63 and the case-law cited.

38 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

39 — Emphasis added.

40 — I should make it clear that, in referring in this context to a 'Member State', I do not mean that it is that Member State's government itself that need necessarily provide the necessary justification. That justification must, however, be put forward by a party representing that Member State or having its authority to do so.

55. It remains of course the national court's duty to evaluate and rule on the material submitted by the Member State. That is so whether the procedure before that court follows an adversarial or an inquisitorial model. In the latter case, it will (or may) also be under an obligation to undertake *ex officio* investigations of its own and that requirement will continue to apply in any event. The material submitted by the Member State will operate to supplement those investigations; subject to the point I shall make below, [41] it will not replace them.

56. How, precisely, the national court conducts its inquiry must to a very large degree be a matter for that court, provided that the requirements of the ECHR and of EU law, in particular the principles of equivalence and effectiveness [42] and – where applicable – the Charter, are met. The nature of that task will inevitably vary (in some cases considerably) from one case to another and from one jurisdiction to another; it is not the role of this Court to intervene in areas which are purely a matter for national law. [43]

57. It is, however, worth addressing two particular issues that have been raised in the order for reference and the observations submitted to the Court.

58. First, the courts' investigatory duties as described by the Austrian Government are considerable, not to say potentially Herculean. [44] What resources are available to the national courts in undertaking those investigatory duties? That point may be more theoretical than real in straightforward cases involving issues with which the national court is already fully familiar. But in cases such as the present one, which are liable to give rise to complicated questions of scientific and statistical analysis, the task is in my view plainly not one which can be carried out by the national court acting alone. Material from experts becomes a crucial part of that exercise.

59. In its order for reference, the referring court indicates that the regional administrative courts in Austria have no independent experts of their own and that they are required to have recourse primarily to experts belonging to one of the national administrative services (who are likely to be a part of the same institution that is a party to the proceedings before the national court).

60. Should that indeed be the case, [45] it seems to me to raise some material concerns as to compliance with Article 6 of the ECHR and, by extension, Article 47 of the Charter. Article 6(1) of the ECHR requires that the determination of a criminal charge against an accused party be undertaken 'by an independent and impartial tribunal established by law'. Given the *ex officio* nature of the assessment to be carried out by the national administrative courts in Austria, it is likely that, at least in cases of any complexity, those courts will need to have recourse to the opinion of one or more experts in order to reach a concluded view. It is in my view clear that those experts too must be independent and impartial. They must also be sufficiently qualified to be able to assess, and report on, conflicting points of view. They are there, after all, to assist the court in performing its duties. In assessing impartiality, the Strasbourg Court has emphasised that that requirement has both a subjective and an objective

41 — See point 68 below.

42 — See in that regard, inter alia, judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 37.

43 — It is this Court's settled case-law that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (see to that effect, inter alia, judgment of 18 March 2010, *Alassini and Others*, C-317/08 to C-320/08, EU:C:2010:146, paragraph 47}.

44 — See point 40 above.

45 — When questioned at the hearing on that point, the Austrian Government's representative did not deny that this was the position, preferring instead to focus on the referring court's duty to have regard to all relevant circumstances.

element.[46] In my view, there must be at least a risk that experts drawn from the national administrative services will fail to satisfy the first of these and almost a certainty that they will not meet the second. It follows that the national courts must have access to the services of experts who are truly independent and impartial.

61. The second issue concerns the reliance which the national court may place on explanatory documents[47] to the domestic legislation that is under challenge and on the records of the parliamentary proceedings that led to the adoption of that legislation. The Austrian Government suggests that the court may draw inspiration from the former and the Belgian Government does the same as regards the latter. Can the national court rely on one (or both) of these sources that are already in the public domain, thereby eliminating the need for the Member State to put forward its justification pursuant to paragraph 50 of the judgment in *Pfleger and Others*?[48]

62. Such a solution appears unduly simplistic. Whilst the competent national authorities will no doubt wish to draw on those documents as part of their submissions to the national court, any challenge is likely to relate to one or more specific aspects of the legislation in question. The onus is on the Member State to indicate to the national court which elements of its wider justification that court should focus on in reaching its decision on the case. The Member State may wish (and need) to provide further and fuller information in support of the justification on which it founds its submissions. Moreover, those sources cannot by definition be regarded as fully complete or reliable where, as was the case with the Law on games of chance, this Court has given strong indications that the legislation in question may not satisfy the requirements of EU law.[49]

The presence of the prosecution at hearings

63. The referring court is concerned that the prosecution does not play a clear role at hearings before it. That court indicates, in particular, that, in proceedings such as the main proceedings, the prosecution is only exceptionally present. Instead, its place is taken by a representative of the executive authorities, who, moreover, plays a wholly passive part in them.[50] The referring court's essential concern in that regard appears to be the blurring of the distinction between the roles of the court and the prosecution, with the consequent impact that that may have on the court's independence and impartiality. It refers in that regard to three judgments of the Strasbourg Court. The first is *Kyprianou v. Cyprus*.[51] That case involved contempt of court proceedings against the applicant by way of summary procedure, and conducted by the same judges who had been the subject of the applicant's criticisms in open court. The prosecution was undertaken by the judges themselves. The Strasbourg Court held that the confusion of roles could self-evidently prompt objectively justified fears as to the impartiality of the court which conducted the proceedings.[52]

64. The second case is *Ozerov v. Russia*.[53] There, the applicant had been convicted of a criminal offence by a first instance court. Throughout the trial, no representative of the prosecution was present, although the participation of the State prosecutor had been ordered. The procedure in question was adversarial and, under the domestic law as in force at the relevant time, the prosecution

46 — See, inter alia, judgment of 15 December 2005, *Kyprianou v. Cyprus*, CE:ECHR:2005:1215JUD007379701, paragraphs 118 and 119. I should emphasise for the avoidance of doubt that there is no suggestion in the present case that any element of the subjective element of those tests is involved.

47 — In German, '*Erläuterungen*'.

48 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281.

49 — See judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 56 and operative part.

50 — See further footnote 23 *in fine*.

51 — Judgment of 15 December 2005, CE:ECHR:2005:1215JUD007379701.

52 — See paragraphs 127 and 128 of the judgment.

53 — Judgment of 18 May 2010, CE:ECHR:2010:0518JUD006496201.

was required to be present at the trial if so ordained. Had the prosecutor been present, he would have taken part in the examination of the evidence and made submissions. The Strasbourg Court held that the national court had confused the roles of prosecutor and judge and had accordingly given grounds for legitimate concerns as to its impartiality. [54]

65. The third case relied on by the referring court is *Karelin v. Russia*. [55] The applicant was convicted of an administrative offence and appealed against that conviction. No representative of the prosecution was present either at first instance or on appeal. The trial judge had modified the charges against the applicant during the course of the hearing. The Strasbourg Court noted that, in the absence of the prosecutor, the trial court had no choice but to bear the burden not only of presenting but also of supporting the accusation against the applicant during the hearing. It found that the lack of a prosecuting party at both first instance and appeal level had infringed the requirement as to impartiality. [56]

66. In reaching that conclusion, the Strasbourg Court carried out a full review of its case-law relating to the fear of partiality that may arise in the public prosecutor's absence from court hearings. It did so without making any particular distinction between adversarial and inquisitorial proceedings. [57] The Court also considered issues that might arise by reason of the fact that a case was being heard on appeal rather than at first instance. It held that the situation might be different on appeal, in particular where only points of law were at issue, and that the prosecution's role might therefore be perceived as 'less compelling'. It went on to add, however, that the impartiality requirement must nevertheless be observed at that stage. [58] The Strasbourg Court also observed that, where an oral hearing is judged opportune for the judicial determination of a criminal charge against an accused, the presence of a representative of the prosecuting authority 'is, as a rule, appropriate in order to avoid legitimate doubts that may otherwise arise as to the impartiality of the court'. [59]

67. I do not discern a single thread that joins all of these observations together apart from the overriding requirement that the judicial body called upon to determine the accused's guilt, whether it be at first instance or on appeal, must be seen – viewed objectively – to be both independent and impartial. I do not see, in other words, that any hard and fast rules can be laid down as regards the presence of the prosecution in these types of proceedings, save to note the Strasbourg Court's overriding observation that it is, as a rule, 'appropriate'. Whilst that statement was made in the context of a hearing at first instance and proceedings before a court such as the referring court here are classified as being on appeal, the nature of those proceedings under national law is such that it appears to be the first occasion on which a full judicial determination of the issues will occur. Moreover, the reason for holding a hearing is to enable a dialogue to take place between the parties to the action and, through that dialogue, to ensure that the court is better informed. If the prosecution is not present, that dialogue cannot take place, or take place in full. [60]

54 — See paragraphs 52 to 55 of the judgment.

55 — Judgment of 20 September 2016, CE:ECHR:2016:0920JUD000092608. As indicated in footnote 29 above, the judgment was submitted separately by the referring court.

56 — See paragraph 84 of the judgment.

57 — See paragraph 53 et seq. of the judgment.

58 — See paragraphs 81 and 83 of the judgment.

59 — See paragraph 76 of the judgment.

60 — The Austrian Government places great emphasis in its written observations on the fact that, in cases such as the main proceedings, the function of the prosecuting authority is assumed by the administrative authority which issued the administrative penalty (see point 36 above). There is therefore no confusion between the roles of the prosecution and the court. I would observe that, in assessing the strength of that point, there is an inevitable correlation between the degree to which that authority plays an active part in any proceedings as opposed to a purely passive one.

68. I would add that, because the overriding requirement is that of independence and impartiality, where there is any doubt as to the matter the national court called upon to give a ruling must give priority to ensuring that that requirement is satisfied. Should that mean, in any given case, that the national court must refrain from raising an issue that might benefit the prosecution to the detriment of the accused, then so be it. Let me also emphasise that it cannot in any circumstances be the duty of a court in a position such as that of the referring court to substitute itself for the Member State in setting out the justification which it is the duty of the latter to provide in terms of paragraph 50 of the judgment in *Pfleger and Others*.[61] Should such a justification not be supplied (as will be the case with any other instance where the prosecution, through absence or passivity or otherwise, fails to fulfil a duty incumbent on it), the national court may draw all inferences that are appropriate by reason of such failure.

Conclusion

69. I therefore suggest that the Court should answer the question referred by the Landesverwaltungsgericht Oberösterreich (Upper Austria Regional Administrative Court) as follows:

'Where the legislation of a Member State seeks to derogate from a fundamental freedom of the European Union, including the freedom to provide services under Article 56 TFEU and the freedom of establishment under Article 49 TFEU, neither Article 6 of the European Convention for the Protection of Fundamental Rights and Freedoms nor Article 47 of the Charter of Fundamental Rights of the European Union preclude a national rule according to which, in the case of administrative offence proceedings, the court or tribunal having jurisdiction to rule on the validity of that derogation in the light of EU law is required to investigate offences *ex officio*. However, it is for the Member State seeking to rely on the derogation to put forward the justification for the measure concerned so that the party charged with the offence is aware of the nature thereof and the court or tribunal in question can evaluate it and give a ruling. In that context, the following additional matters may also be relevant:

— in reaching its decision on the matter, that court or tribunal is entitled to have access, should it so require, to experts who are independent and impartial;

— whilst there is no general rule which requires the presence of a representative of the prosecuting authority at proceedings before the court or tribunal in question, such presence is, as a rule, appropriate in order to avoid legitimate doubts that may otherwise arise as to the impartiality of that court or tribunal.

61 — Judgment of 30 April 2014, C-390/12, EU:C:2014:281. See point 51 et seq. above.