



Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 17 April 2012¹

Case C-176/11

HIT hoteli, igralnice, turizem dd Nova Gorica HIT LARIX, prirejanje posebnih iger na srečo in turizem dd
v
Bundesminister für Finanzen

(Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Freedom to provide services — Games of chance — Legislation of a Member State prohibiting, on its territory, advertising of casinos located in other States where the level of legal protection for gamblers in the State concerned is not considered to be equivalent to the level of protection under domestic law)

1. The Verwaltungsgerichtshof (Administrative Court, Austria) has referred to the Court for a preliminary ruling the following question concerning the freedom to provide services:

‘Is legislation of a Member State which permits the domestic advertising of casinos located abroad only where the legal provisions in those foreign locations for the protection of gamblers correspond to the domestic provisions compatible with the freedom to provide services?’

2. The referring court considers that the Court’s answer to that question is necessary in order for it to adjudicate in the action brought by two public limited companies established in Slovenia, namely HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd (the ‘applicants in the main proceedings’) against the Bundesminister für Finanzen (the Federal Minister for Finance) concerning the decisions made by the latter to reject their application for a permit to carry out advertising in Austria for their gaming establishments in Slovenia.

3. The contested decisions of the Bundesminister für Finanzen were based on the fact that the applicants in the main proceedings, which hold licences to operate certain games of chance in Slovenia, had not established that the legal provisions under Slovenian law for the protection of gamblers corresponded at least to the Austrian legal provisions, which is one of the conditions for the grant of a permit to advertise in Austria casinos located outside the national territory.

National law

4. In Austria, games of chance are regulated by the Federal Law on gaming (Glücksspielgesetz, BGBl. No 620/1989; ‘GSpG’).

¹ — Original language: French.

5. Paragraph 3 of the GSpG establishes a state monopoly over games of chance and provides that the right to organise and operate games of chance is generally reserved to the State unless otherwise stated in that Law.

6. Pursuant to Paragraph 21(1) of the GSpG, the Federal Minister for Finance may grant the right to organise and operate games of chance by granting licences to operate casinos.

7. Advertising of casinos is governed by Paragraph 56 of the GSpG. The current version of that article is the result of an amendment to the GSpG carried out by the Law of 26 August 2008 (BGB1 I No 126/2008). That amendment was adopted following an infringement procedure opened by the European Commission² concerning the previous version of Article 56 of the GSpG which prohibited the advertising of casinos located outside of Austria. The current version of Article 56 of the GSpG states the following:

‘(1) Licensees and permit holders under this Federal Law shall maintain a responsible attitude in their promotional activities. Compliance with this requirement for a responsible attitude shall be ensured exclusively through supervision by the Federal Minister for Finance and shall not be amenable to enforcement by actions brought under Paragraph 1 et seq. of the Bundesgesetz gegen den unlauteren Wettbewerb (Federal law against unfair competition). The first sentence of the present subparagraph shall not constitute a protective law for the purposes of Paragraph 1311 of the Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code).

(2) Casinos from Member States of the European Union or European Economic Area States may promote in Austria visits to their establishments located outside Austria in Member States of the European Union or of the European Economic Area in accordance with the principles established in subparagraph 1 if the casino operator has been granted a permit to that effect by the Federal Minister for Finance. Such a permit shall be granted where the casino operator demonstrates to the Federal Minister for Finance that:

1. the licence to operate the casino conforms to the requirements of Paragraph 21 and the casino operates under that licence in the State granting it, that State being a Member State of the European Union or of the European Economic Area, and
2. the legal provisions for the protection of gamblers adopted by that Member State at least correspond to the Austrian provisions.

If the promotional measures do not satisfy the requirements of subparagraph 1, the Federal Minister of Finance may prohibit advertising by the operator of the casino located outside Austria.’

Appraisal

8. This is the third occasion on which the provisions of the GSpG have prompted the Austrian courts to refer questions to the Court for a preliminary ruling in order to clarify the rules relating to the freedom to provide services and, as the case may be, the freedom of establishment. In the first case the issue was, inter alia, the obligation on persons holding licences to operate gaming establishments to have their seat in national territory.³ In the second case the issue was, inter alia, a monopoly on the operation of internet casino games in favour of a single operator.⁴

2 — The Commission decided to drop the infringement proceedings 2006/4265 against Austria following the amendment of Article 56 of the GSpG by the Law of 26 August 2008 – see Commission press release IP/09/1497.

3 — Case C-64/08 *Engelmann* [2010] ECR I-8219.

4 — Case C-347/09 *Dickinger and Ömer* [2011] ECR I-8185.

9. In the present proceedings for a preliminary ruling, the referring court draws the attention of the Court to an Austrian rule which permits the advertising of casinos located outside the national territory only where the legal provisions for the protection of gamblers adopted by the Member State in which the casino is established are equivalent to the Austrian legal provisions. The referring court asks if the rules relating to the freedom to provide services preclude such a rule.

10. It would seem, at first glance, that the question referred requires an examination, followed by a comparison, of the level of legal protection for gamblers in Austria and Slovenia. In reality, this is not the case. That is a matter for the referring court. Hence, the present opinion is not concerned with the criteria which must be taken into account in order to carry out a comparison of the level of protection for gamblers in various legal systems. I must nevertheless indicate my doubts as to the possibility of properly carrying out such a comparison, given the lack of harmonisation in the area of gambling and games of chance,⁵ as well as the diversity of national legislation in this area.

11. In order to answer the question referred, it is necessary to take account of two factors. First, it is settled case-law that the notion of ‘services’ within the meaning of Article 56 TFEU applies not only to activities allowing users to participate, for remuneration, in gambling, but also to the activity of promoting gambling, as in the present case, given that such an activity merely constitutes a concrete step in the organisation or operation of the gambling to which it relates.⁶ It follows that the activity of promoting gambling benefits from the prohibition of restrictions on freedom to provide services as laid down in Article 56 TFEU. Such restrictions may, however, be recognised as exceptional measures, as expressly provided for in Articles 51 TFEU and 52 TFEU, applicable in this area by virtue of Article 62 TFEU, or justified by overriding reasons in the public interest, provided that they comply with the requirements under the case-law of the Court with regard to their proportionality.⁷

12. Second, as the referring court points out, supported in this respect by all of the parties who submitted observations to the court,⁸ it cannot be denied in the present case that the Austrian legislation making the grant of a permit to advertise casinos located outside the national territory subject to the condition that the legal provisions for the protection of gamblers adopted by the Member State in which the casino is established are equivalent to the Austrian legal provisions constitutes an obstacle to the freedom to provide services.

13. In light of the two abovementioned factors, it is therefore clear that the scope of the question is limited to determining whether the obstacle thereby posed to the freedom of services is, or is not, justified.

14. It is necessary, in consequence, to consider to what extent a rule such as that arising from the Austrian legislation in question, making the grant of a permit to advertise casinos located outside the national territory subject to the condition that the legal provisions for the protection of gamblers adopted by the Member State in which the casino is established are equivalent to the applicable national legal provisions, may be justified for reasons of ‘public policy, public security or public health’ pursuant to Article 52 TFEU,⁹ applicable in this area by virtue of Article 62 TFEU, or by overriding reasons in the public interest permitted under the case-law of the Court.

5 — According to the 25th recital in the preamble to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, p. 36), gambling activities are excluded from its scope in view of the specific nature of these activities.

6 — See, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 22; Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 43, and Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069 paragraph 56.

7 — See, to that effect, Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR, paragraph 71.

8 — Written observations have been submitted by the applicants in the main proceedings, as well as by the Austrian, Belgian, Greek, Portuguese and Spanish Governments and the Commission.

9 — It would not seem necessary in the present case to envisage the application of derogation from the freedom to provide services pursuant to Article 51 TFEU. It is not disputed that the activities in question, which relate to the area of games of chance, cannot be considered as activities connected, even occasionally, with the exercise of official authority.

15. These reasons include, inter alia, the objectives of consumer protection, the prevention of fraud and incitement to squander money on gambling, and the general need to protect public order.¹⁰ In addition, the Court has acknowledged that, in the area of gaming and betting, which have damaging social consequences when taken to excess, national legislation seeking to prevent the stimulation of demand by limiting the exploitation of the human passion for gambling could be justified.¹¹

16. In this respect, it is worth pointing out that the Court has 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 preservation of public order. Consequently, the Member States are generally free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the degree of protection sought.¹²

17. With regard to the obstacle to the freedom to provide services in question, namely a rule which makes the advertising of casinos located outside the national territory subject to the condition that the legal provisions for the protection of gamblers adopted by the Member State in which the casino is established are equivalent to the national legal provisions, it would seem that the obstacle does indeed pursue an objective of consumer protection. The Austrian Government has argued that the legislation concerning the advertising of casinos located outside the national territory aimed, in particular, to protect consumers and to combat compulsive gambling by preventing casinos from inciting individuals to gamble in an excessive manner. It is, of course, for the referring court to determine whether the national provision does in fact pursue the objectives mentioned.¹³

18. In any event, the other conditions under the Court's case-law concerning the justification of an obstacle to the freedom to provide services should not be forgotten. According to that case-law, such an obstacle must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective. In addition, it must not be applied in a discriminatory way.¹⁴

19. At this point, it may be useful once again to identify the obstacle to the freedom to provide services in the present case. It is a 'rule which makes the advertising of casinos located outside the national territory subject to the condition that the legal provisions for the protection of gamblers adopted by the Member State in which the casino is established are equivalent to the legal provisions in the Member State in which the advertising shall be carried out'. This rule amounts to a system of prior authorisation for the advertising of casinos located outside the national territory.

20. It is true that in *Sjöberg and Gerdin*,¹⁵ the Court held that the prohibition on the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States was a justified obstacle to the freedom to provide services. However, it is important to bear in mind that the Swedish legislation which gave rise to the questions referred for a preliminary ruling in that case pursued a different objective than the one pursued by the Austrian legislation in question in the present case, namely the objective of imposing strict limits on the carrying on of gambling operations for profit. For that reason, it cannot be concluded that, if a total prohibition of advertising was justified, then it should be the same, on the basis of a *majori ad minus* argument, for a system of prior authorisation of advertising.

10 — See, to that effect Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* ECR I-1891, paragraph 48; Joined Cases C-447/08 and C-448/08 *Sjöberg and Gerdin* ECR I-6917, paragraph 36; and *Costa and Cifone*, cited in footnote 7 above, paragraph 71.

11 — *Stoß and Others*, cited in footnote 6 above, paragraph 75 and the case-law cited.

12 — See, to that effect, Case C-212/08 *Zeturf* [2011] ECR I-5633, paragraphs 39 and 40 and the case-law cited.

13 — See, to that effect, *Dickinger and Ömer*, cited in footnote 4 above, paragraph 51.

14 — See, to that effect, Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 24.

15 — Cited in footnote 10 above.

21. It is not precluded that such a system may, in itself, contribute to pursuing the objective of protecting consumers and, consequently, be considered as necessary in order to achieve such an objective. Thus, such a system, even if it constitutes an obstacle to the freedom to provide services, could be used as a measure to protect consumers.

22. However, the assessment of a specific system of prior authorisation depends upon the conditions which must be met in order to obtain a permit. In the present case, the grant of a permit is subject to the condition that the casino operator prove that the level of legal protection for gamblers in the Member State in which the casino is established is equivalent to that of the Member State on the territory of which the advertising is to be carried out.

23. I am of the opinion that, for two sets of reasons, such a system of prior authorisation goes beyond what is necessary to achieve the objective of protecting consumers.

24. First, the system of prior authorisation in question could represent a 'hidden' total prohibition of the advertising of foreign casinos. This would be the case if the authorities of the Member State in question systematically held that the legal protection of gamblers in all other Member States was inferior to that of their own State.¹⁶ In this regard, I wish to repeat my doubts as to the possibility of actually comparing the level of protection of gamblers in different legal systems, given the lack of harmonisation in the area of gambling and games of chance, as well as the diversity of national legislation in this area.

25. Second, and in any event, the system of prior authorisation in question leads, ultimately, to a discrimination based on the origin of the applicant, given that the casino operators who request a permit under Article 56(2) of the GSpG are assessed on the basis of the Member State in which the casino is established and, more specifically, its legal system. Through the application of Article 56 of the GSpG, the Austrian authorities will gradually compile a list of Member States whose legal systems do not satisfy the condition of an equivalent level of protection for gamblers, and consequently, subsequent applicants will be judged solely on the basis of the Member State in which the casino in question is established.

26. Moreover, the grant of a permit depends solely on the content of the legislation of the Member State, without taking account of the actual level of protection provided by the casino operator. As the referring court rightly pointed out in its reference for a preliminary ruling, the casino operators have no influence over that issue.

27. In conclusion, having regard to the foregoing, I am of the opinion that the protection of consumers against advertising of casinos located outside national territory can be achieved by less onerous measures than a system of prior authorisation which makes the grant of a permit subject to an obligation on the casino operator to prove that the level of legal protection for gamblers in the Member State in which the casino is established is equivalent to that of the Member State in which the advertising is to be carried out.

16 — The fact, confirmed by the Austrian Government during the hearing, that, so far, no authorisation has been granted under Article 56(2) of the GSpG supports this view.

Conclusion

28. In the light of the foregoing considerations, I propose that the Court reply as follows to the question submitted for a preliminary ruling by the Verwaltungsgerichtshof:

Article 56 TFEU should be interpreted as precluding the legislation of a Member State which makes the grant of a permit to advertise casinos located outside the national territory subject to an obligation on the casino operator to prove that the level of legal protection for gamblers in the Member State in which the casino is established is equivalent to that of the Member State in which the advertising is to be carried out.