

Reports of Cases

OPINION OF ADVOCATE GENERAL SHARPSTON delivered on 14 November 2013¹

Case C-390/12

Robert Pfleger Autoart as Mladen Vucicevic Maroxx Software GmbH Ing. Hans-Jörg Zehetner

(Request for a preliminary ruling from the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Austria))

(Article 56 TFEU — Freedom to provide services — Games of chance — Legislation prohibiting the provision of gaming machines without a licence — Limited number of licences — Criminal penalties — Proportionality — Charter of Fundamental Rights)

- 1. Austrian law restricts the organisation of games of chance using gaming machines to licenced operators. Licences are available in limited numbers. Gaming machines that are placed at the disposal of the public without a licence are confiscated and destroyed. Those persons found to have been involved in the organisation of unlicensed games of chance are subject to administrative or criminal penalties.
- 2. The Unabhängiger Verwaltungssenat des Landes Oberösterreich (Independent Administrative Tribunal of the *Land* of Upper Austria) asks whether Article 56 TFEU and the Charter on Fundamental Rights of the European Union² ('the Charter') preclude those restrictions and/or the penalties imposed in the event of infringement.

1 — Original language: English.

2 — OJ 2010 C 83, p. 389.



Legal framework

EU law

The Charter

- 3. Under Article 15(2) of the Charter, every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Under Article 16, the freedom to conduct a business in accordance with Union law and national laws and practices is recognised. Article 17 guarantees the right to own, use, dispose of and bequeath lawfully acquired possessions, which may be confiscated only in the public interest and as provided for by law, subject to fair compensation being paid; it stipulates that the use of property may be regulated by law in so far as is necessary for the general interest.
- 4. Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated must have the right to an effective remedy before an independent and impartial tribunal previously established by law. Article 50 provides that no one may be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
- 5. Article 51(1) states that the provisions of the Charter are addressed to the Member States only when they are implementing EU law.

The Treaty on the Functioning of the European Union

- 6. Article 56 TFEU prohibits restrictions on the freedom to provide services within the Union 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.
- 7. Such a restriction may be permitted as a derogation expressly provided for in Article 52(1) TFEU, which is applicable to the provision of services by virtue of Article 62 TFEU.

National law

- 8. Paragraph 2 of the Glücksspielgesetz (Law on games of chance, 'the GSpG'), as currently in force, defines 'lotteries' as, essentially, games of chance made available to the public by an operator, in which stakes are paid and from which winnings are obtained. For that purpose, an 'operator' is a person who independently carries on a stable activity in order to receive money from the organisation of the games of chance, even if the activity is not designed to offer winnings. When several persons agree to organise such games they are all considered to be operators, even if they have no intention of receiving money or only participate in making the game available to the public. Lotteries for which no licence or authorisation has been granted are unlawful.
- 9. Paragraph 3 of the GSpG reserves the right to organise games of chance to the Austrian State, with the exception of gaming machines regulated by the laws of the Bundesländer (Federal States) by virtue of Paragraph 4 or 5 of the same law.

^{3 —} In its order for reference, the referring court has set out the provisions of national law currently in force. However, it would appear that the facts giving rise to some of the alleged offences occurred before this version of the law came into force. It will be for the national court to determine which version of the law was in force at the material time.

- 10. Paragraph 4 of the GSpG provides that regional games of chance by gaming machines within the meaning of Paragraph 5 are not subject to the State monopoly on games of chance.
- 11. Paragraph 5 of the GSpG provides that each of the nine Bundesländer may grant up to three licences to organisers of small-scale games of chance using gaming machines. Licences are granted for a period of up to 15 years subject to certain requirements concerning public order and the protection of players. Such games may be offered in a hall with between 10 and 50 machines, with a maximum stake of EUR 10 and maximum winnings of EUR 10 000 per game or by the provision of up to three individual machines with a maximum stake of EUR 1 and maximum winnings of EUR 1 000 per game.
- 12. Under Paragraphs 14, 15 and 17 of the GSpG, read together, the Austrian State may, subject to certain conditions, grant the exclusive right to organise different types of lotteries, by granting a licence for up to 15 years, in exchange for a fee.
- 13. Under Paragraph 21 of the GSpG, the Austrian State may grant up to 15 licences to organise games of chance through a gaming establishment (casino) for a period of up to 15 years. A fee of EUR 10 000 is payable for each licence application, and a further fee of EUR 100 000 for each licence granted. Games provided pursuant to these licences are subject to taxes of between 16 and 40% each year (Paragraphs 17, 28, 57 and 59a(1) of the GSpG).
- 14. Paragraph 52 of the GSpG provides that anyone who, as an 'operator', organises or participates in the organisation of games of chance without a licence is liable to an administrative penalty of up to EUR 22 000. However, when the stake is greater than EUR 10 per game, the offence attracts criminal liability under Paragraph 168(1) of the Strafgesetzbuch (Criminal Code, 'the StGB'), which applies instead. The Oberster Gerichtshof (Supreme Court) has held that 'series games' in which the individual stake is lower than EUR 10 but cumulatively greater also attract criminal liability under Paragraph 168(1) of the StGB.
- 15. Under Paragraph 53 of the GSpG, a gaming machine may be seized provisionally where there is a suspicion that it is being operated in breach of the GSpG provisions.
- 16. Paragraph 54 of the GSpG provides that objects which have been the means of infringing the provisions of Paragraph 52(1) are to be confiscated; all persons who may have a claim to the object must be notified. Confiscated objects are to be destroyed by the administration.
- 17. Under Paragraph 56a, an establishment providing games of chance in breach of the law may be closed down.
- 18. The organisation of games of chance for commercial purposes by a person who does not hold a licence is a criminal offence. Under Paragraph 168(1) of the StGB, 'any person who organises a game in which winning or losing depend exclusively or predominantly on chance or which is expressly prohibited, or who promotes a meeting organised with a view to such a game taking place, in order to obtain a pecuniary advantage for himself or another person from that organisation or meeting' commits an offence. Games of chance operated without a licence fall within the definition of prohibited games by virtue of Paragraph 52(1)(1), read in combination with Paragraph 2(4), of the GSpG. The penalties are imprisonment for up to six months or a fine of up to 360 daily rates. Paragraph 168(2) of the StGB provides that the same penalty applies to anyone who participates in such a game of chance as an 'operator' as defined in Paragraph 2 of the GSpG.

Facts, procedure and the questions referred

- 19. The request for a preliminary ruling concerns four sets of proceedings relating to various establishments in Upper Austria (the referring court states that a large number of similar cases are pending). In the national proceedings, Mr Pfleger, Autoart a.s. Prague ('Autoart'), Mr Vucicevic, Maroxx Software GmbH ('Maroxx') and Mr Zehetner have appealed against administrative decisions in relation to gaming machines which, without an official licence, were installed ready for use in various business premises in Upper Austria.
- 20. In the first set of proceedings, the finance police provisionally seized six machines at an inn in Perg providing unauthorised games of chance. Mr Pfleger was found to be the organiser and Autoart, a company registered in the Czech Republic, was presumed to be the owner of those machines. The competent local authority confirmed the seizure. In their appeals, Mr Pfleger contends that he was neither the owner or holder of the machines nor the organiser of games of chance and did not supply the machines to the proprietor of the inn, whilst Autoart contends that it has no legal connection with the machines: it is not their owner, has not loaned, rented, distributed or held them and does not 'manage' them.
- 21. In the second set of proceedings, the finance police provisionally seized eight gaming machines in an establishment in Wels which it found to have been placed at the disposal of the public without the appropriate licence. The owner of the machines was Mr Vucicevic. The competent local authority confirmed the seizure. In his appeal, Mr Vucicevic admits that he purchased the establishment concerned but denies that he became the owner of the machines at the same time.
- 22. In the third set of proceedings, the finance police provisionally seized two gaming machines put at the disposal of the public without the appropriate licence at a service station in Regau operated by Mrs Jacqueline Baumeister, a German national. The seizure was confirmed by the competent local authority; Mrs Baumeister's appeal against the seizure was held to be out of time. The confiscation was then confirmed, and notified to Maroxx, a company registered in Austria, as owner of the machines, who appealed.
- 23. In the fourth set of proceedings the finance police seized three gaming machines put at the disposal of the public without the appropriate licence at a service station in Enns, which was operated by Mr Hans-Jörg Zehetner. The competent authority ascertained that the machines were owned by Maroxx and adopted a decision confirming the seizure. A fine of EUR 1 000 (alternatively, in the case of non-payment, 15 hours of imprisonment) was imposed on Mr Zehetner. A fine of EUR 10 000 (alternatively, 152 hours' imprisonment) was imposed on Maroxx.⁴
- 24. In his appeal, Mr Zehetner alleged that the national law did not comply with EU law, in particular Article 56 TFEU and certain provisions of the Charter.
- 25. Considering that the outcome of the disputes before it turns on the interpretation of European Union law, the referring court seeks a preliminary ruling on the following questions:
- (1) Does the principle of proportionality laid down in Article 56 TFEU and in Articles 15 to 17 of the [Charter] preclude national legislation such as the relevant provisions in the main proceedings, namely, Paragraphs 3 to 5 and Paragraphs 14 and 21 of the GSpG, which permits the organisation of games of chance using machines only on the condition which may be enforced by both criminal penalties and direct intervention of the prior issue of a licence, which are available only in limited numbers, even though as far as can be seen the State has not shown thus far in a single judicial or administrative procedure that associated crime and/or

^{4 —} It is not clear to me how a period of imprisonment could be imposed (even in the alternative) on a legal person; but these are the facts as taken from the order for reference.

addiction to gambling actually constitute a significant problem which cannot be remedied by a controlled expansion of authorised gaming activities to a large number of individual providers, but only by a controlled expansion, coupled with only moderate advertising, by one monopoly holder (or a small number of oligopolists)?

- (2) If the first question is to be answered in the negative: Does the principle of proportionality laid down in Article 56 TFEU and in Articles 15 to 17 of the [Charter] preclude national legislation like Paragraphs 52 to 54 of the GSpG, Paragraph 56a of the GSpG and Paragraph 168 of the StGB by which, as a result of imprecise legal definitions, there is almost complete criminal liability, even for various categories of persons (who may be established in other European Union Member States) whose participation is very indirect (such as mere sellers or lessors of gaming machines)?
- (3) If the second question is also to be answered in the negative: Do the requirements relating to democracy and the rule of law on which Article 16 of the [Charter] is clearly based and/or the requirement of fairness and efficiency under Article 47 of the [Charter] and/or the obligation of transparency under Article 56 TFEU and/or the right not to be tried or punished twice under Article 50 of the Charter of Fundamental Rights preclude national rules like Paragraphs 52 to 54 of the GSpG, Paragraph 56a of the GSpG and Paragraph 168 of the StGB, the delimitation between which is not really foreseeable or predictable *ex ante* for a citizen, in the absence of clear legislative provision, and can be clarified in each specific case only through an expensive formal procedure, but which are associated with extensive differences in terms of competences (administrative authority or court), powers of intervention, the connected stigmatisation in each case and procedural position (e.g. reversal of the burden of proof)?
- (4) If one of the first three questions is to be answered in the affirmative: Does Article 56 TFEU and/or Articles 15 to 17 of the [Charter] and/or Article 50 of the [Charter] preclude the punishment of persons who have one of the close connections with a gaming machine mentioned in Paragraph 2(1)(1) and Paragraph 2(2) of the GSpG and/or the seizure or confiscation of such machines and/or the closure of the entire undertaking owned by such persons?'

26. Written observations were submitted by Mr Vucicevic, Maroxx, Mr Zehetner, the Austrian, Belgian, Netherlands, Polish and Portuguese Governments, and the Commission. At the hearing held on 17 June 2013, Mr Vucicevic, Maroxx, Mr Zehetner, the Austrian and Belgian Governments and the Commission presented oral argument.

Analysis

Admissibility

- 27. The Austrian Government submits that this request for a preliminary ruling is inadmissible on the grounds that the facts set out and questions posed are insufficiently precise to enable the Court to provide a useful answer. This government also submits that it is not clear that the case presents a cross-border element giving rise to the application of the freedom to provide services.
- 28. The Commission considers that the questions are admissible. It submits that it cannot be excluded that entities from other Member States would wish to offer games of chance in Austria and would be subject to the national law at issue.
- 29. None of the other parties submitting observations have addressed this issue.

- 30. The Court has consistently held that it is for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order for it to be able to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling.⁵
- 31. I do not consider that the factual basis for the questions here and the questions themselves are insufficiently clear for the Court to be able to provide a ruling. In particular, the order for reference sets out in sufficient detail the national legislation at issue in the main proceedings for the Court to be able to give a useful answer to the questions of interpretation of EU law which are relevant to its review.
- 32. As regards the objection that the cross-border element is not clear, the Court has held that where national legislation applies to nationals of all EU Member States alike it is capable of falling within the scope of the provisions relating to the fundamental freedoms, if only to the extent that it applies to situations connected with trade between the Member States.⁶ In *Garkalns* the Court held that the request for a preliminary ruling in that case was admissible even though all the elements of the dispute were confined within one Member State.
- 33. The facts of the present case demonstrate that operators from other Member States are interested in operating games of chance using slot machines in Austria. One of the appeals before the national court was brought by a German national, Mrs Baumeister, who ran a service station in which an unlicensed slot machine was found; and one of the seized slot machines appeared to have been supplied by a company registered in the Czech Republic, Autoart. In my view, therefore, the request for a preliminary ruling is admissible.

Applicability of the Charter

- 34. All the questions referred request interpretations of provisions of the Charter. The preliminary issue arises as to whether the Charter applies when a national court is judicially reviewing a national law, such as that at issue in the main proceedings, which derogates from rights conferred by European Union law.
- 35. This issue is addressed by Mr Zehetner, the Austrian, Netherlands, Polish and Portuguese Governments and the Commission. The four governments submitting observations on this question all consider that the Charter does not apply to the national law at issue in the main proceedings. Mr Zehetner and the Commission both take the opposite view.
- 36. I consider that the Charter does apply in relation to a national law that derogates from a fundamental freedom guaranteed by the Treaty.
- 37. The scope of application of the Charter is defined at Article 51(1) thereof, which provides that it applies to Member States 'only when they are implementing Union law'.
- 38. Does the use of the term 'implementing' in Article 51 of the Charter limit the latter's applicability to cases where a Member State is required to take specific positive action (for example, to transpose a directive)⁷ in order to comply with EU law?
- $5 Case \ C-470/11 \ \textit{Garkalns} \ [2012] \ ECR, paragraph \ 17, \ and \ Case \ C-169/07 \ \textit{Hartlauer} \ [2009] \ ECR \ I-1721, paragraph \ 24.$
- 6 Garkalns, cited in footnote 5 above, at paragraph 21 and case-law cited.
- 7 I draw a clear distinction between transposition and implementation, the latter being significantly wider than the former.

39. I do not think so.

40. I note that (predictably) there is a degree of linguistic variation in the texts of the Charter in different equally authentic languages. Thus, whilst the English text speaks of 'implementing', the German has 'bei der Durchführung des Rechts der Union' and the French 'lorsqu'ils mettent en oeuvre le droit de l'Union'. The Spanish and Portuguese (for example) are broader ('cuando apliquen el Derecho de la Unión' and 'quando apliquem o direito da União', respectively). Against that background, one turns naturally to the explanations relating to the Charter, which must, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter itself, be taken into consideration for the interpretation of the Charter. These give the following guidance in relation to Article 51(1):

'[a]s regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.

Four judgments of the Court are then cited: Wachauf, ERT, Annibaldi and Karlsson and Others. 10

- 41. In judgments postdating the entry into force of the Lisbon Treaty, the Court has confirmed that national legislation *falling within the scope* of European Union law must comply with the Charter and that 'the *applicability* of European Union law entails applicability of the fundamental rights guaranteed by the Charter'. The Court has therefore already clearly indicated that the test is whether the situation is one in which EU law *applies* (that is, one that falls 'within the scope of EU law') rather than (perhaps more narrowly) whether the Member State is 'implementing' EU law by taking specific positive action. ¹²
- 42. The case-law cited in the explanation relating to Article 51(1) of the Charter sheds helpful light on what 'in the scope of Union law' means. Wachauf and Karlsson and Others both concerned national rules that nuanced the application of EU regulations relating to the operation of the supplementary levy on milk. Some national rules were clearly required in order to complement the EU rules and, by adding detail, make them fully operational. Those national rules had therefore to comply with fundamental rights as recognised under EU law. By contrast, in Annibaldi the national legislation at issue (a regional law establishing a nature and archaeological park) clearly had nothing to do with the implementation (or indeed the operation) of any Community law relating to the common organisation of agricultural markets, to the environment or to culture; nor was there any other point of attachment to Community law.
- 43. For present purposes, *ERT* is of particular relevance. That case concerned a national law which allowed a single television broadcaster to have a television monopoly for the entire territory of a Member State and to make television broadcasts of any kind. The question arose as to whether the freedom to provide services guaranteed by the Treaty precluded that national law. The Court held that, where such a monopoly gave rise to discriminatory effects to the detriment of broadcasts from other Member States, it was prohibited by Article 59 of the EEC Treaty (now Article 56 TFEU) unless

^{8 —} Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, p. 17.

^{9 —} See Case C-283/11 Sky Österreich [2013] ECR, paragraph 42, and Case C-279/09 DEB [2010] ECR I-13849, paragraph 32.

^{10 —} Case 5/88 Wachauf [1989] ECR 2609; Case C-260/89 ERT [1991] ECR I-2925; Case C-309/96 Annibaldi [1997] ECR I-7493; and Case C-292/97 Karlsson and Others [2000] ECR I-2737.

^{11 —} Case C-617/10 Åkerberg Fransson [2013] ECR, paragraph 21 (emphasis added), and Case C-418/11 TEXDATA Software [2013] ECR, paragraph 73 (emphasis added).

^{12 —} The potential divergence of meaning is lessened if one does not regard 'transposing' and 'implementing' as synonyms: see footnote 7 above.

the rules could be justified on one of the grounds indicated in Article 56 EEC (now Article 52(1) TFEU), to which Article 66 of the EEC Treaty (now Article 62 TFEU) cross-referred. Thus, *ERT* concerned a situation in which the law of a Member State derogated from the fundamental freedom to provide services.

44. The further question arose in *ERT* as to whether the national law respected Article 10 of the European Convention on Human Rights ('ECHR'). The Court held that fundamental rights formed an integral part of the general principles of law, the observance of which the Court ensured and that it could not accept measures which were incompatible with those rights. ¹⁴ Where national rules fell within the scope of Union law, and reference was made to the Court for a preliminary ruling, the Court had to provide all the criteria of interpretation needed by the national court to determine whether those rules were compatible with the fundamental rights the observance of which the Court ensured. ¹⁵ In particular, the Court held that where a Member State relied on the combined provisions of Articles 56 and 66 of the EEC Treaty (now Articles 52(1) TFEU and 62 TFEU) to justify national rules likely to obstruct the exercise of the freedom to provide services, such justification must be interpreted in the light of the general principles of law and in particular of fundamental rights. It was only if the national rules were compatible with fundamental rights ensured by the Court, which included Article 10 of the ECHR, that they were permitted as exceptions to the freedom to provide services. ¹⁶

45. ERT thus makes it clear that, where a Member State enacts a measure that derogates from a fundamental freedom guaranteed by the TFEU, that measure falls within the scope of Union law. The power to derogate from the 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. Thus, for example, the rule of interpretation that such derogations are to be interpreted narrowly, and the application of the proportionality test to a derogation that is prima facie permissible, both derive from EU law itself. Because only a national derogating measure that complies with those EU law criteria will be permissible (otherwise, the Treaty freedom would prevail), it follows that the derogating measure itself falls within the scope of EU law. That to me is both the necessary consequence of the familiar Treaty structure (protected right, limited derogation from that right) and of the inclusion of ERT in the explanation to Article 51 of the Charter.

46. 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. 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.

47. I now turn to the questions posed.

13 — At paragraph 26.

14 — Paragraph 41.

15 - Paragraph 42.

16 — Paragraph 43.

Question 1

- 48. By its first question, the referring court asks whether Article 56 TFEU and/or Articles 15 to 17 of the Charter must be interpreted as precluding national legislation that restricts the right to organise games of chance using gaming machines to those persons or undertakings holding licences, which are available in limited numbers. More particularly, it asks whether the principle of proportionality is breached in circumstances where it is not established that crime and addiction to gambling constituted significant problems and that, if such problems did exist, they could not be remedied by controlled expansion of authorised gaming activities by a large number of individual providers instead of controlled expansion by a limited number of providers.
- 49. I shall first consider Article 56 TFEU and then the Charter.

Article 56 TFEU

- 50. There is now a considerable body of case-law of the Court concerning games of chance (including four requests for preliminary rulings that arose in earlier proceedings relating to the GSpG)¹⁷ which provides the criteria in the light of which the question of interpretation of Article 56 TFEU must be examined.
- 51. That case-law makes it clear that legislation, such as that at issue in the main proceedings, under which only a limited number of licence holders may organise games of chance and all other operators, whether established in Austria or in any other Member State, are prohibited from offering such services, constitutes a restriction on the freedom to provide services and, as such, is prohibited by Article 56 TFEU. Such a restriction may nevertheless be justified on the basis of the derogations expressly provided for by the TFEU or by overriding reasons in the public interest. 19
- 52. The Austrian Government says that the restriction is justified because it pursues the objectives of ensuring a high level of protection for players and the prevention of crime. Marrox, Mr Vucicevic and Mr Zehetner all allege, however, that increasing tax revenue was that government's main objective.
- 53. The Court has held that Member States' restrictions on gambling services are capable of being justified where they are intended to ensure consumer protection, including protecting players from gambling addiction ²⁰ and preventing crime. ²¹ By contrast, increasing revenues for the Member State's government is not an objective capable of justifying a restriction on the freedom to provide services, although that may be an ancillary benefit for the government concerned. ²²
- 54. It is a matter of fact for the national court to determine what objectives are actually pursued by the national law in issue. ²³ If the court determines that the real objective is primarily to increase revenue, then the restriction must be regarded as incompatible with Article 56 TFEU.
- 17 The provisions of the GSpG also gave rise to requests for preliminary rulings in Case C-64/08 Engelmann [2010] ECR I-8219, which concerned the obligation on persons holding licences to operate gaming establishments to have their seat in national territory; Case C-347/09 Dickinger and Ömer [2011] ECR I-8185, which concerned a monopoly of the operation of internet casino games in favour of a single operator; and Case C-176/11 HIT and HIT LARIX [2012] ECR, which concerned advertising for casinos. The most recent judgment on this issue, Joined Cases C-186/11 and C-209/11 Stanleybet and Others [2013] ECR, which concerned an exclusive monopoly on the management, organisation and operation of games of chance granted by a state to a public limited company, was handed down on 24 January 2013, post-dating the order for reference in the present case.
- 18 Stanleybet and Others, cited in footnote 17, paragraph 21.
- 19 Ibid., at paragraph 22; see also Garkalns, cited in footnote 5, paragraph 35 and the case-law cited.
- 20 Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Stoβ and Others [2010] ECR I-8069, paragraphs 74 and 75 and case-law cited.
- 21 Case C-6/01 Anomar and Others [2003] ECR I-8621, paragraphs 61 to 75.
- 22 Case C-212/08 Zeturf [2011] ECR I-5633, paragraph 52 and case-law cited, and Dickinger and Ömer, cited in footnote 17, paragraph 55.
- 23 Stanleybet and Others, cited in footnote 17, paragraph 26 and case-law cited.

- 55. On the other hand, if the national court finds that the restriction genuinely pursues the permitted objectives of protecting consumers and preventing crime, it will have then to consider whether the restriction is proportionate. The court must be satisfied that the restriction is suitable for achieving the objective pursued by the legislation concerned at the level of protection which it seeks and does not go beyond what is necessary to achieve those objectives.
- 56. Just as a Member State that seeks to ensure a particularly high level of protection may, as the Court has acknowledged in its case-law, be entitled to take the view that it is only by granting exclusive rights to a single entity which is subject to strict controls that it can tackle the risks of gambling, 4 equally, a Member State may take the view that having a system of licences which are granted to a small number of providers is an appropriate method of tackling those risks. As the Court held in *Engelmann*, 5 a limit on the number of concessions to operate gaming establishments of its very nature makes it possible to limit opportunities for gambling ... Since consumers must travel to the premises of an establishment in order to be able to take part in the games of chance in question, the consequence of a limitation on the number of such establishments is to reinforce the barriers to taking part in such games'.
- 57. It would therefore appear that the limitation on the number of gaming establishments is a proportionate means of achieving the objectives of protecting consumers and preventing crime. Allowing a greater number of establishments to provide such services would be less likely to achieve those objectives because it would give greater opportunities for gambling. Such a policy would be less likely to achieve a high level of protection. This, however, is subject to verification by the national court which, in analysing the facts and evidence before it, will also need to have regard to the nature, frequency and intensity of the controls that are applied to licensed establishments. ²⁶
- 58. The burden of proving that the restriction is proportionate rests with the Austrian authorities, which are under a duty to supply the national court called upon to rule on that question with all the evidence necessary to enable the latter to be satisfied that the measure is, in fact, intended to pursue the declared objective and could achieve it.²⁷ In *Dickinger and Ömer*,²⁸ the Court clarified that the national court must ascertain whether criminal and fraudulent activities as well as addiction to gambling might have been a problem in Austria at the material time and whether expansion of authorised and regulated activities might have solved that problem. The present case requires the national court to carry out that same exercise.
- 59. The national court must also be satisfied that the national legislation genuinely reflects a concern to attain the objective in a consistent and systematic manner. ²⁹ Since the practices of the limited number of licence holders may determine whether or not the objectives may be attained, the commercial policies of those licence holders are relevant to that assessment. ³⁰
- 60. The referring court notes in its order for reference that the commercial policy of licence holders has not been limited to controlled expansion with limited advertising. It states that licence holders have, on the contrary, engaged in what it terms 'colossal expenditure' on an 'aggressive' advertising campaign which promotes a positive image of games of chance and encourages active participation. While the Court has recognised that moderate advertising may be consistent with a policy to protect consumers, that is only where the advertising is strictly limited to what is necessary to channel
- $24\,-\,$ Stanleybet and Others, cited in footnote 17 above, paragraph 29.
- 25 Engelmann, cited in footnote 17 above, paragraph 45.
- 26 That analysis may also assist the national court in determining the true objective of the licensing requirements: see points 54 and 55 above.
- 27 See Stoß and Others, cited in footnote 20 above, paragraph 71.
- 28 Cited in footnote 17 above, paragraph 66.
- 29 Stanleybet and Others, cited in footnote 17 above, paragraph 27, and Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International [2009] ECR I-7633, paragraphs 49 to 61 and case-law cited.
- 30 Dickinger and Ömer, cited in footnote 17, paragraph 58.

consumers towards controlled gaming networks. ³¹ Advertising that encourages gambling by trivialising it, giving it a positive image or increasing its attractiveness aims to expand the overall market for gaming activities rather than channelling the existing market to certain providers. Such an expansionist commercial policy is plainly inconsistent with an aim of achieving a high level of protection for consumers. As the Court stated in *Dickinger and Ömer*: 'A Member State is not ... entitled to rely on reasons of public policy related to the need to reduce opportunities for gambling in so far as the public authorities of that State incite and encourage consumers to participate in games of chance so that the public purse can benefit'. ³²

- 61. The actual objective of the national legislation at issue in the main proceedings and, if it is a permitted objective, whether the legislation is in fact proportionate and coherent and consistent with that objective is a matter for the national court to determine.
- 62. Is further review of the national law at issue in the main proceedings required in the light of Articles 15, 16 and 17 of the Charter?

Articles 15, 16 and 17 of the Charter

- 63. Article 15(2) of the Charter³³ recognises the freedom of every citizen of the Union to exercise the right to establishment and to provide services in any Member State. The explanations relating to the Charter³⁴ confirm that Article 15(2) deals with the freedom of movement for workers, freedom of establishment and freedom to provide services guaranteed by Articles 26, 45, 49 and 56 TFEU. As provision for this freedom is made within the Treaties, its scope and interpretation is determined by Article 52(2) of the Charter, which states that such freedoms 'shall be exercised under the conditions and within the limits defined by those Treaties'. The explanation to Article 52(2) also confirms that 'the Charter does not alter the system of rights conferred by the EC Treaty and taken over by the Treaties'. Thus, so far as the present proceedings are concerned, respect for Article 15(2) of the Charter is coterminous with compliance with Article 56 TFEU.
- 64. Article 16 of the Charter recognises the freedom to conduct a business but expressly states that this must be 'in accordance with Union law and national laws and practices'. As the explanations relating to the Charter also confirm, this freedom may be subject to limitations that are permitted by Article 52(1) of the Charter. That article requires that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 65. In *Sky Österreich* ³⁵ the Court confirmed that 'the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented.'
- 66. In my view, this freedom is respected where the relevant Treaty provisions are satisfied given, in particular, the requirement to respect the principle of proportionality when restricting the freedom to provide services.
- 31 Dickinger and Ömer, cited in footnote 17, paragraph 68.
- 32 Ibid., paragraph 62.
- 33 Only Article 15(2) is relevant to the facts of this case. Article 15(1) concerns the right to engage in work and to pursue a freely chosen or accepted occupation, while Article 15(3) entitles third country nationals who are authorised to work in the territories of Member States to working conditions equivalent to those of citizens of the Union.
- 34 Cited in footnote 8 above.
- 35 Cited in footnote 9 above, paragraphs 46 and 47.

- 67. Article 17 of the Charter recognises the right to property, the use of which 'may be regulated by law in so far as is necessary for the general interest'. The explanation relating to this article says that it is based on Article 1 of the First Protocol to the ECHR. In accordance with Article 52(3) of the Charter, its meaning and scope are thus the same as those of the right guaranteed by the ECHR and, while limitations on the rights are permissible, they may not exceed those permitted by the ECHR.
- 68. The Court has also consistently held that the right to property may be subject to proportionate limitations. In *Križan and Others*, the Grand Chamber held that 'the right to property is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed'. ³⁶ It follows that a proportionate restriction on the use of gaming machines in the general interest does not breach Article 17 of the Charter.
- 69. It seems to me that a restriction on the use of gaming machines that is permissible in accordance with Article 56 TFEU, which includes the requirement to satisfy the principle of proportionality, also respects Article 17 of the Charter. Such a limitation on the use of property does not exceed that permitted by Article 1 of the First Protocol to the ECHR, which makes the right to property subject to the 'right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'.
- 70. In my view, therefore, Articles 15 to 17 of the Charter impose no greater obligations to be satisfied for a restriction on the freedom to provide services to be permitted than is already established by the case law of the Court in relation to Article 56 TFEU.
- 71. For those reasons, I propose that the Court should answer the first question to the effect that Article 56 TFEU must be interpreted as precluding national legislation such as that at issue in the main proceedings under which only a limited number of licence holders may organise games of chance, unless that restriction is justified on the basis of an overriding objective in the public interest, such as consumer protection and/or the prevention of crime, pursues that objective in a consistent and coherent manner having regard to the commercial policies of the existing licence holders and is proportionate. Whether those criteria are satisfied are matters for the national court to determine. Where a restriction fulfils those criteria, it is not precluded by Articles 15, 16 or 17 of the Charter.

Question 2

- 72. By its second question, the referring court asks whether the principle of proportionality laid down in Article 56 TFEU and Articles 15 to 17 of the Charter precludes national legislation, such as Paragraphs 52 to 54 and 56a of the GSpG and Paragraph 168 of the StGB, which, as a result of imprecise legal definitions, extends criminal liability to persons who are only very remotely involved (such as the mere sellers or lessors of gaming machines).
- 73. This question, like the third and fourth questions, is only relevant if the national court decides that Article 56 TFEU does not preclude the restriction at issue in the main proceedings. If that restriction is precluded by Article 56 TFEU, then EU law also precludes the imposition of criminal penalties for infringing the restriction.³⁷

36 - Case C-416/10 [2013] ECR, paragraph 113 and case-law cited.

^{37 —} Dickinger and Ömer, cited in footnote 17 above, paragraphs 32 and 43 and case-law cited.

- 74. In so far as Member States are permitted by EU law to derogate from Article 56 TFEU and to impose restrictions on the provision of gambling services, they may also impose criminal penalties in order to enforce those restrictions, provided that those penalties are proportionate and respect fundamental rights.
- 75. It seems to me that, in order to be proportionate, the personal scope of criminal liability for a breach of the national law imposing the restriction must not extend beyond those persons responsible for the breach, whether directly or indirectly, and who knew or ought to have known that their actions would contribute to the breach.
- 76. In the context of the free movement of goods, the Court has recognised that criminal liability may be extended to those who aid and abet an offence.³⁸ Such persons are not directly responsible for the breach of criminal law they do not themselves put the gaming machine at the disposal of the public without a licence but they do enable that breach to occur.
- 77. In my view, bringing within the scope of criminal liability those persons who are indirectly responsible for the breach of the restriction, where they knew or ought to have known that their actions would contribute to the breach, contributes to enforcing the restriction and thus achieving the desired high level of protection. It would, however, be disproportionate to extend criminal liability to persons who did not know and could not have known about the breach, because such persons are not in a position to choose to avoid contributing to the breach.
- 78. The national court is required to interpret the national legislation in conformity with EU law, in so far as that is possible taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring the effectiveness of EU law.³⁹
- 79. In my view, therefore, Article 56 TFEU and Articles 15, 16 and 17 of the Charter do not preclude a provision that extends criminal liability to persons who are directly or indirectly responsible for the breach of a restriction on providing gaming services, provided that the personal scope of criminal liability is limited to those persons who knew, or ought to have known, that their actions contributed to the breach.

Question 3

- 80. By its third question the referring court asks whether Article 56 TFEU and/or Articles 16, 47 and 50 of the Charter and/or general principles of EU law preclude provisions of national law which impose either criminal or administrative sanctions for breaches of the law, but which do not enable a person to be sure in advance under which provisions he will be charged.
- 81. In my view, Article 50 of the Charter does not preclude such provisions. From the material placed before the Court, it does not appear that the suggestion that there is a risk of an offence being prosecuted twice is well founded. Either the offence is dealt with through the administrative courts, or it is dealt with through the criminal courts. It appears that the StGB applies in respect of games of chance with stakes of EUR 10 or more and to 'series games' with smaller individual stakes which cumulatively amount to more than EUR 10. Otherwise, an offence is dealt with as an administrative offence under the provisions of the GSpG.

38 — Case C-5/11 Donner [2012] ECR.

39 - Case C-42/11 Lopes Da Silva Jorge [2012] ECR, paragraphs 54 to 56 and case-law cited.

- 82. Only after the facts of an individual case are known will it be possible to determine whether they give rise to an administrative offence (illegal games of chance involving stakes of less than EUR 10 and not a series game) or a criminal offence (illegal games of chance involving stakes of more than EUR 10 or smaller stakes as part of a series game). Thus any legal uncertainty arises merely because different provisions apply in different factual circumstances.
- 83. Article 47 of the Charter, which recognises the right to an effective remedy and a fair trial, is not infringed in circumstances where the person accused of an offence has access to a court or tribunal, whether those courts are the administrative or criminal courts.
- 84. Neither Article 56 TFEU nor Articles 16, 47 or 50 of the Charter therefore preclude a national law, such as that in the main proceedings, which provides that criminal penalties are imposed in respect of unlawful gaming services with stakes of EUR 10 and series games with smaller individual stakes which cumulatively amount to more than EUR 10 whereas administrative penalties apply in respect of unlawful gaming services with stakes of less than EUR 10.

Question 4

- 85. By its fourth question, the referring court asks whether Article 56 TFEU and/or Articles 15 to 17 and 50 of the Charter preclude penalties, such as those provided for under Articles 53, 54 and 56(a) of the GSpG, which include the confiscation and destruction of the gaming machines and the closure of the business.
- 86. As I have already indicted, 40 if a Member State imposes a restriction that is justified by overriding reasons in the public interest and is therefore not precluded by Article 56 TFEU, that Member State may also enforce that restriction by imposing penalties whenever it is breached. Those penalties must, however, comply with the principle of proportionality and fundamental rights.
- 87. From the facts and legislation set out in the order for reference, it appears to be the case that, where games of chance using gaming machines have been organised without a licence, the gaming machine is automatically confiscated and thereafter destroyed. The provisions under which those steps are taken do not appear to allow for any alternative action depending on the degree of fault of the owner of the machine, or any other person having an interest in the machine, or the severity of the infringement of the law. Any defence to the commission of the offence or mitigating circumstances which the person with an interest in the machine may wish to rely on cannot, apparently, lead to an alternative outcome.
- 88. If it is indeed the case that the penalty cannot be adjusted to reflect elements such as the degree of fault, that would be a disproportionate penalty precluded by Article 56 TFEU itself as well as by Articles 15, 16 and 17 of the Charter. However, this is a matter for the national court to verify. (Article 50 of the Charter does not, in my view, have any bearing on this question.)
- 89. By contrast, Article 56(a) of the GSpG appears to make the decision to close down an establishment discretionary. Given the flexibility in the application of that power, a decision to close an establishment may be taken in circumstances where that is a proportionate penalty. I do not therefore consider that Article 56(a) of the GSpG as such is precluded by Article 56 TFEU. It will be for the national court to verify whether in practice the power is indeed exercised with due regard to the surrounding circumstances and hence with the necessary flexibility to satisfy the proportionality test.

40 — See point 74 above.

Conclusion

90. In the light of the foregoing considerations, I propose that the Court should answer the questions raised by the Unabhängiger Verwaltungssenat des Landes Oberösterreich (Austria) to the following effect:

- (1) Article 56 TFEU precludes national legislation such as that at issue in the main proceedings under which only a limited number of existing licence holders may organise games of chance, unless that restriction is justified on the basis of an overriding objective in the public interest, such as consumer protection and/or the prevention of crime, pursues that objective in a consistent and coherent manner having regard to the commercial policies of the licence holders and is proportionate. Whether those criteria are satisfied are matters for the national court to determine. Where a restriction fulfils those criteria, it is not precluded by Articles 15, 16 or 17 of the Charter of Fundamental Rights of the European Union ('the Charter)'.
- (2) Article 56 TFEU and Articles 15, 16 and 17 of the Charter do not preclude a provision that extends criminal liability to persons who are directly or indirectly responsible for the breach of a restriction on providing gaming services, provided that the personal scope of criminal liability is limited to those persons who knew, or ought to have known, that their actions contributed to the breach.
- (3) Neither Article 56 TFEU nor Articles 16, 47 or 50 of the Charter preclude a national law, such as that in the main proceedings, which provides that criminal penalties are imposed in respect of unlawful gaming services with stakes of 10 EUR and 'series games' with smaller individual stakes which cumulatively amount to more than 10 EUR whereas the administrative penalties apply in respect of unlawful gaming services with stakes of less than 10 EUR.
- (4) Article 56 TFEU and Articles 15, 16 and 17 of the Charter preclude national legislation pursuant to which machines which are used in unlicensed games of chances are automatically confiscated and destroyed without the possibility for that outcome to be varied having regard to the degree of culpability of the owner of the slot machine, or any other person having an interest in the machine, and/or the extent of the infringement. Article 56 TFEU and Articles 15, 16 and 17 of the Charter do not, however, preclude national legislation pursuant to which a Member State has a discretionary power to close an establishment where unlicensed gaming machines have been placed at the disposal of the public.