



## Reports of Cases

### JUDGMENT OF THE COURT (Third Chamber)

12 June 2014\*

(Request for a preliminary ruling — Freedom to provide services — Article 56 TFEU — Betting and gaming — Federal legislation banning games of chance via the internet which was not applied for a limited period in a federal entity of a Member State — Consistency — Proportionality)

In Case C-156/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 24 January 2013, received at the Court on 28 March 2013, in the proceedings

**Digibet Ltd,**

**Gert Albers**

v

**Westdeutsche Lotterie GmbH & Co. OHG,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 2 April 2014,

after considering the observations submitted on behalf of:

- Digibet Ltd and Mr Albers, by R. Reichert and U. Karpenstein, Rechtsanwälte, and R.A. Jacchia, avvocato,
- Westdeutsche Lotterie GmbH & Co. OHG, by M. Hecker, M. Ruttig and M. Pagenkopf, Rechtsanwälte,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the Belgian Government, by L. Van den Broeck, M. Jacobs and C. Pochet, acting as Agents, and R. Verbeke, advocaat,

\* Language of the case: German.

— the Maltese Government, by A. Buhagiar, acting as Agent,

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

— the European Commission, by F.W. Bulst, I.V. Rogalski and H. Tserepa-Lacombe, acting as Agents,

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

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 56 EC.
- 2 The request has been made in proceedings between Digibet Ltd ('Digibet'), on the one hand, and Mr Albers and the Westdeutsche Lotterie GmbH & Co. OHG ('Westdeutsche Lotterie') on the other, concerning the ban on offers of games of chance via the internet by Digibet.

### German legal context

- 3 In accordance with Paragraphs 70 and 72 of the German Basic Law, legislation on games of chance falls within the competence of the *Länder*.
- 4 Accordingly, in 2008 the 16 *Länder* adopted a State treaty on games of chance (Glücksspielstaatsvertrag; 'the GlüStV 2008'), by which they laid down common rules on that area. The treaty provided that its rules were applicable for four years from 1 January 2008, thereby setting its expiry date as 31 December 2011.
- 5 In 2012, the amending treaty on games of chance (Glücksspieländerungsstaatsvertrag, 'the GlüStV 2012'), which entered into force on 1 July 2012, succeeded the GlüStV 2008'. That treaty was initially ratified by all the *Länder* except for the *Land* Schleswig-Holstein.
- 6 On 20 October 2011, the *Land* Schleswig-Holstein adopted a law reorganising games of chance (Gesetz zur Neuordnung des Glücksspiels, GVOBl. Sch.-H, p. 280, 'the GlSpielG SH'), which entered into force on 1 January 2012, with the aim of liberalising the law on games of chance.
- 7 Unlike Paragraph 5(3) of the GlüStV 2008, Paragraph 26 of the GlSpielG SH authorised, in principle, advertising for public games of chance on television or the internet.
- 8 By virtue of the GlSpielG SH, the organisation and facilitation of public games of chance via the internet is no longer prohibited. Although authorisation from the competent authorities of the *Land* was always required in order to do so, authorisation to market public bets was, however, to be granted to any citizen and any legal person in the European Union if certain objective conditions were met.
- 9 For all the other *Länder*, in accordance with Paragraph 4(4) and the first sentence of Paragraph 5(3) of the GlüStV 2012, the organisation and facilitation of public games of chance via the internet and advertising for public games of chance on television, the internet and via telecommunications networks remain, in principle, prohibited. That treaty provides that the use of the internet for those purposes

may be authorised only in exceptional circumstances and under certain conditions, for lotteries and sporting bets, in order to offer an appropriate alternative to the illegal supply of games of chance and to combat the development and spread of the latter type of gaming.

- 10 The more liberal legislation on games of chance applicable in the *Land* Schleswig-Holstein ceased to be in force with effect from 9 February 2013, when that *Land* adopted the GlüStV 2012, the common provisions of which replaced those of the GlSpielG SH. However, under the GlSpielG SH, the *Land* Schleswig-Holstein issued a series of authorisations to operators, in order to offer games of chance via the internet which remained valid for a transitional period even after the repeal of the GlSpielG SH.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 11 The Westdeutsche Lotterie is the public lottery company in North Rhine-Westphalia. Digibet, a company whose registered office is situated in Gibraltar, offers, for remuneration, games of chance and sports betting in German via the internet site ‘digibet.com’. It holds a gaming licence issued in Gibraltar. Mr Albers is the managing director of Digibet.
- 12 The Westdeutsche Lotterie takes the view that the services offered by Digibet are anti-competitive in that they infringe certain rules applicable to games of chance. Following the action brought by the Westdeutsche Lotterie before the Landgericht Köln, that court, by judgment of 22 October 2009, ordered Digibet and Mr Albers, inter alia, to cease to offer the possibility of playing games of chance for money via the internet to persons in Germany, in the course of business and for the purpose of obtaining a competitive advantage.
- 13 Hearing the appeal by Digibet and Mr Albers, on 3 September 2010, the Oberlandesgericht Köln dismissed their appeal and confirmed the judgment at first instance.
- 14 Digibet and Mr Albers brought an appeal on a point of law against that judgment before the referring court, seeking the dismissal of Westdeutsche Lotterie’s action in its entirety.
- 15 The Bundesgerichtshof takes the view that, given the legislative amendments since 1 January 2012 in the *Land* Schleswig-Holstein, it is conceivable that the appeal on a point of law might be upheld on the basis of an infringement of the freedom to provide services enshrined in EU law. It recalls that, according to the case-law of the Court, the exceptions and restrictions on legislation limiting gaming must be subject to a check for consistency in order to ascertain whether they affect the ability of that legislation to achieve the legitimate objectives of public interest that it pursues (see Case C-46/08 *Carmen Media Group* EU:C:2010:505, paragraph 106 et seq.). In that context, the different legal position in one *Land* as compared with the others could result in the restrictions on marketing and advertising of games of chance on the internet in the other *Länder* being inapplicable on account of an infringement of EU law, so that a ban on the facilitation and organisation of games of chance on-line would be without foundation.
- 16 In the opinion of that court, it would however be inappropriate and inconsistent with the principle of proportionality to prevent all the other *Länder* from exercising a prerogative granted to them by EU law to decide themselves whether it is appropriate to ban certain gaming activities wholly or in part, or whether it is sufficient to restrict those activities and to lay down more or less strict supervisory rules for that purpose (see *Carmen Media Group* EU:C:2010:505, paragraph 58), simply on the ground that a single *Land* wishes to introduce a derogation. In that connection, the referring court states that, under the Federal Constitution, a *Land* cannot be required either by the Federal State or by the other *Länder*, to adopt specific legislation in an area falling within the competence of the *Länder*.

- 17 Finally, that court observes that, in sectors which are not harmonised, such as games of chance, the practical consequences of any inconsistencies caused by the differences between the *Länder* of a Federal State for the internal market should not be distinguished from any diverging laws which may exist between large and small Member States and which must be accepted in EU law.
- 18 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Does it represent an inconsistent restriction on gaming and betting activities where, on the one hand, in a Member State organised as a federal State, the organisation and facilitation of public games of chance on the internet is, in principle, prohibited by the law in force in the overwhelming majority of the *Länder* and — without an established right — can be allowed, exceptionally, only for lotteries and sporting bets in order to provide a suitable alternative to the illegal supply of games of chance as well as to combat the development and spread thereof, but — on the other hand, under the law in force in one of that Member State’s *Länder*, subject to certain specified objective conditions, an authorisation for the marketing of sporting bets on the internet must be issued to any EU citizen or equivalent legal person, thereby undermining the effectiveness of the restriction on the marketing of games of chance on the internet in force in the rest of the Federal Republic in achieving the legitimate public interest objectives which it pursues?
  2. Does the answer to the first question depend on whether the different legal position in one *Land* removes altogether or significantly undermines the effectiveness of the restrictions on the marketing of games of chance on the internet in force in the other *Länder* in achieving the legitimate public interest objectives which they pursue?

If the answer to the first question is in the affirmative:

3. Is the inconsistency avoided by the *Land* with the divergent legislation adopting the restrictions on games of chance in force in the rest of the *Länder*, even where, in relation to the administrative licensing contracts already concluded there, the previous more generous rules on internet games of chance in that *Land* remain in force for a transitional period of several years because those authorisations cannot be revoked, or cannot be revoked without incurring compensation payments which the *Land* would find difficult to bear?
4. Does the answer to the third question depend on whether, during the transition period of several years, the effectiveness of the restrictions on games of chance in force in the other *Länder* is affected or significantly undermined?’

#### **The questions referred for a preliminary ruling**

- 19 As a preliminary point, it must be observed that, after the order for reference, the *Land* Schleswig-Holstein adopted the GlüStV 2012 and repealed the GlSpielG SH with effect from 8 February 2013, while providing for the continued validity of authorisations granted during a transitional period.
- 20 In the light of that fact, it must be held that, by its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 56 TFEU must be interpreted as meaning that it precludes legislation common to the majority of federal entities of a Member State having a federal structure which prohibits, in principle, the organisation and facilitation of games of chance via the internet, where, for a limited period, a single federal entity maintained in force more liberal

legislation coexisting with the restrictive legislation of the other federal entities and that that entity issued authorisations to operators in order to supply games on the internet which remain valid for a transitional period after the repeal of that more liberal legislation.

- 21 It is not disputed that legislation of a Member State such as that at issue in the main proceedings, which, in principle, prohibits the advertising, organisation and facilitation of games of chance via the internet, constitutes a restriction on the freedom to provide services guaranteed by Article 56 TFEU (see Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* EU:C:2010:504, paragraph 68 and the case-law cited).
- 22 It is necessary, however, to determine whether such a restriction may be allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for under Articles 51 TFEU and Article 52 TFEU, which are applicable in the area of freedom to provide services by virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (Case C-470/11 *Garkalns* EU:C:2012:505, paragraph 35, and Joined Cases C-186/11 and C-209/11 *Stanleybet International and Others* EU:C:2013:33, paragraph 22 and the case-law cited).
- 23 Thus, the Court has consistently held that restrictions on betting and gaming may be justified by overriding requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (*Garkalns*, EU:C:2012:505, paragraph 39, and *Stanleybet International and Others*, EU:C:2013:33, paragraph 23 and the case-law cited).
- 24 In that context, the Court has repeatedly stated that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation in the field at EU level, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* EU:C:2009:519, paragraph 57, and *Stanleybet International and Others*, EU:C:2013:33, paragraph 24 and the case-law cited), the identification of the objectives which are in fact pursued by the national legislation falls, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the national court (Case C-347/09 *Dickinger and Ömer* EU:C:2011:582, paragraph 51, and *Stanleybet International and Others*, EU:C:2013:33, paragraph 26).
- 25 In the present case, the referring court does not raise any questions concerning the justification of the restriction at issue on the freedom to provide services.
- 26 However, it asks the Court about the requirement that restrictions imposed by the Member States must satisfy the conditions of proportionality and non-discrimination which apply to them, as laid down in the Court's case-law and, in particular, the condition according to which national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, *Stanleybet International and Others*, EU:C:2013:33, paragraph 27 and the case-law cited).
- 27 The referring court therefore wishes to know whether the proportionality and consistency of the restrictive legislation at issue in the main proceedings, seen as a whole, is called into question given the existence, for a limited period, of more liberal legislation only in the *Land* Schleswig-Holstein.
- 28 Digibet, Mr Albers and the Maltese Government argue that the lack of consistency in the German legislation at issue in the main proceedings may be inferred in particular from a reading of paragraphs 69 and 70 of the judgment in *Carmen Media Group* (EU:C:2010:505), according to which the authorities in the *Land* concerned and the Federal authorities are jointly required to fulfil the obligation on the Federal Republic of Germany not to infringe Article 56 TFEU so that they are under a duty to coordinate the exercise of their respective competences.



- 29 Furthermore, by referring to the federal structure of the Federal Republic of Germany, they rely on paragraph 61 of the judgment in Case C-409/06 *Winner Wetten* (EU:C:2010:503), according to which rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law.
- 30 Conversely, the Westdeutsche Lotterie, the German, Belgian and Portuguese Governments and the Commission take the view that the first question should be answered in the negative and that, in the circumstances of the case in the main proceedings, the GlüStV 2012 does not constitute a disproportionate restriction on the freedom to provide services.
- 31 In that connection, first of all, the particular nature of the gambling sector must be mentioned, where, unlike the establishment of free, undistorted competition in a traditional market, the presence of that kind of competition in the very specific market of games of chance, that is to say, between several operators authorised to run the same games of chance, is liable to have a detrimental effect owing to the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive than their competitors and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction (see, *Stanleybet International and Others*, EU:C:2013:33, paragraph 45).
- 32 Therefore, and for the reasons set out in paragraph 24 of the present judgment, in the specific area of the organisation of games of chance, national authorities enjoy a wide measure of discretion which enables them to determine what is required in order to ensure consumer protection and the preservation of order in society and — provided that the conditions laid down in the Court's case-law are in fact met — it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary to prohibit, wholly or in part, betting and gaming or only to restrict them and, to that end, to lay down more or less strict supervisory rules (see, to that effect, *Dickinger and Ömer*, EU:C:2011:582, paragraph 99, and *Stanleybet International and Others*, EU:C:2013:33, paragraph 44).
- 33 Next, it should be recalled that, when provisions of the Treaties or of regulations confer powers or impose obligations upon the Member States for the purposes of the implementation of EU law, the question of how the exercise of such powers and the fulfilment of such obligations may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State (Case C-428/07 *Horvath*, EU:C:2009:458, paragraph 49). The Court has, moreover, already held that, in a State such as the Federal Republic of Germany, the legislature may take the view that, in the interests of all the persons concerned, it is for the *Länder* rather than the Federal authorities to adopt certain legislative measures (see, to that effect, Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler*, EU:C:2011:508, paragraph 55).
- 34 In the present case, the division of competences between the *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, according to which the Union must respect national identities, inherent in their fundamental structures, political and constitutional, including regional and local self-government.
- 35 Furthermore, the facts of the present case can be distinguished from those in the case which gave rise to the judgment in *Carmen Media Group* (EU:C:2010:505) since, in the case in the main proceedings, the issue is not the relationship and possible duty of vertical coordination between the authorities of the *Land* concerned and the Federal authorities, but the horizontal relationship between the *Länder* having their own legislative powers within a Member State having a federal structure.
- 36 Finally, even assuming that the existence of legislation of one *Land*, which is more liberal than that in force in the other *Länder*, might damage the consistency of the legislation at issue as a whole, it must be observed that, in the circumstances of the case in the main proceedings, such damage to consistency was limited *ratione temporis* and *ratione loci* to a single *Land*. Therefore, it cannot be

argued that the derogating legal situation in one *Land* seriously affects the appropriateness of the restrictions on games of chance applicable in all the other *Länder* to achieve the legitimate public interest objectives that they pursue.

- 37 As is clear, in particular, from the written submissions of the German Government and the Westdeutsche Lotterie, the more liberal legislation on games of chance adopted by the *Land* Schleswig-Holstein was in force from 1 January 2012 until 8 February 2013. After that date, that *Land* applied the more restrictive rules of the GlüStV 2012 already in force in the other *Länder*.
- 38 In those circumstances, the case-law cited in paragraphs 28 and 29 of the present judgment cannot be interpreted as meaning that the 15 other *Länder* should have adopted the level of consumer protection in force solely in the *Land* Schleswig-Holstein for a limited period.
- 39 It follows that the restriction on the freedom to provide services constituted by the legislation on games of chance at issue in the main proceedings is capable of satisfying the requirements of proportionality as laid down in the case-law of the Court.
- 40 In any event, it must be recalled that it is for the referring court, taking account of the indications given by the Court, to verify whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law concerning their proportionality (see *Dickinger and Ömer*, EU:C:2011:582, paragraph 50).
- 41 Having regard to all the foregoing considerations, the answer to the questions referred is that Article 56 TFEU must be interpreted as meaning that it does not preclude legislation common to the majority of the federal entities of a Member State having a federal structure which prohibits, in principle, the organisation and facilitation of games of chance via the internet, where, for a limited period, a single federal entity has maintained in force more liberal legislation coexisting with the restrictive legislation of the other federal entities, provided that such legislation is able to satisfy the conditions of proportionality laid down by the case-law of the Court, which is for the national court to ascertain.

#### *Costs*

- 42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 56 TFEU must be interpreted as meaning that it does not preclude legislation common to the majority of the federal entities of a Member State having a federal structure which prohibits, in principle, the organisation and facilitation of games of chance via the internet, where, for a limited period, a single federal entity has maintained in force more liberal legislation coexisting with the restrictive legislation of the other federal entities, provided that such legislation is able to satisfy the conditions of proportionality laid down by the case-law of the Court, which is for the national court to ascertain.**

[Signatures]