

Court of Justice EU, 12 July 2012, Hit Larix v Bundesminister



ADVERTISING

Prohibition of advertising games of chance permitted if other Member State does not provide equivalent protection of gamblers

- Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

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Court of Justice EU, 12 July 2012

(J.-C. Bonichot, A. Prechal, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas)

JUDGMENT OF THE COURT (Fourth Chamber)

12 July 2012 (*)

(Article 56 TFEU – Restriction on the freedom to provide services – Games of chance – Legislation of a Member State prohibiting the advertising of casinos located in other States if the level of legal protection for gamblers in those States is not equivalent to that ensured at national level – Justification – Overriding reasons in the public interest – Proportionality)

In Case C-176/11,

REFERENCE for a preliminary under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 28 March 2011, received at the Court on 14 April 2011, in the proceedings

HIT hoteli, igralnice, turizem dd Nova Gorica, HIT LARIX, prirejanje posebnih iger na srečo in turizem dd

v

Bundesminister für Finanzen,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, L. Bay Larsen, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 9 February 2012,

after considering the observations submitted on behalf of:

– HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd, by R. Vouk, Rechtsanwalt,

– the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

– the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and P. Vlaeminck, advocaat,

– the Greek Government, by E.-M. Mamouna, acting as Agent,

– the Spanish Government, by S. Centeno Huerta, acting as Agent,

– the Portuguese Government, by L. Inez Fernandes, A. Barros, A. Silva Coelho and P.I. Valente, acting as Agents,

– the European Commission, by G. Braun and I. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 April 2012,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 56 TFEU.

2 This question has been raised in proceedings brought by HIT hoteli, igralnice, turizem dd Nova Gorica and HIT LARIX, prirejanje posebnih iger na srečo in turizem dd (collectively ‘HIT and HIT LARIX’) against the Bundesminister für Finanzen (Federal Minister for Finance; ‘the Minister’) concerning the latter’s rejection of their applications for authorisation to carry out advertising in Austria for casinos which they operate in Slovenia.

Legal context

National legislation

3 In the Federal Law on gaming (Glücksspielgesetz) of 28 November 1989 (BGBl. I, 620/1989, in the version published in BGBl. I, 54/2010; ‘the GSpG’), Paragraph 21, which is headed ‘Casinos, licence’, specifies the conditions for the grant of licences to operate casinos in Austria. It provides, in particular, that the licensee must be a capital company that has a supervisory board and is established in Austria, that the licensee must have share capital of at least EUR 22 million and that, having regard to the circumstances, it must be justifiable to presume that the licensee will operate the licence in the best manner in compliance with the provisions of the GSpG on the protection of gamblers and prevention of money-laundering.

4 Paragraph 25 of the GSpG, headed ‘Casino customers’, essentially contains a series of measures designed to protect gamblers against the risks

connected with gaming such as the development of gambling addiction and incitement to squander money (in particular, limitation of entrance to casinos exclusively to persons who have attained the age of majority, an obligation on the casino's management to request information on gamblers who appear to be addicts from an independent body which provides information on the solvency of persons, an interview with the gambler, if appropriate, in order to ascertain whether his participation in gaming jeopardises the specific minimum income required for his subsistence, a temporary or permanent ban on entry).

5 Paragraph 25 also provides for the possibility for casino customers to bring a direct civil action, within three years from the loss suffered by them, against the casino management which has breached the obligations that are imposed upon it in order to protect gamblers. The casino management's liability in connection with the validity of the gaming contract or with losses due to gambling is governed exhaustively by that paragraph and it is limited to the specific minimum income required for subsistence.

6 Paragraph 56 of the GSpG, headed 'Permissible advertising', provides:

'(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 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 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 [ministry]. Such a permit shall be granted where the casino operator demonstrates to the [ministry] 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 [ministry] may prohibit advertising by the operator of the casino located outside Austria.'

Facts of the main proceedings and the question referred for a preliminary ruling

7 HIT and HIT LARIX are two public limited companies established in Slovenia. They hold licences

in Slovenia to operate certain games of chance there and do in fact offer those services in a number of establishments located in that Member State.

8 HIT and HIT LARIX applied for permits under Paragraph 56 of the GSpG to carry out advertising in Austria for their gaming establishments located in Slovenia, in particular for casinos. By two decisions adopted on 14 July 2009, those applications were rejected by the ministry on the ground that HIT and HIT LARIX had not proved that the Slovenian legal provisions concerning games of chance ('the Slovenian legislation') ensured a level of protection for gamblers comparable to the level provided for in Austria, when compliance with such a condition is necessary under Paragraph 56(2)(2) of the GSpG in order for the permits applied for to be capable of being granted.

9 HIT and HIT LARIX brought an action against those decisions refusing a permit, contending essentially that the decisions were adopted in breach of the right freely to provide services which is enjoyed by them under European Union law.

10 Before the referring court, the ministry submits that HIT and HIT LARIX have not established that the Slovenian legislation imposes on the management of casinos a legal obligation to warn and bar gamblers or a monitoring system that are comparable to those existing in Austrian law. Nor is it proven that the Slovenian legislation contains detailed rules concerning the protection of minors in gaming halls or that casino customers can bring an action directly before the Slovenian civil courts if the licensee breaches its obligations.

11 The ministry contends that the obligation owed by the Republic of Austria to protect consumers who are in its territory does not fall away when they are encouraged by advertising to visit casinos located in other Member States which apply standards of protection clearly lower than those in force in Austria, since both that advertising and the actual visiting of those establishments by Austrian residents attracted by such advertising could have morally and financially harmful consequences both for the individual and for society and thus seriously endanger persons and families resident in Austria and public health. Furthermore, the need to verify whether comparable protective measures exist follows from the requirement for consistency, laid down by European Union law.

12 The referring court makes reference to the Court of Justice's settled case-law and states that, in the light of that case-law, Paragraph 56(2) of the GSpG constitutes, in principle, a restriction on the freedom to provide services within the meaning of Article 56 TFEU. Such a restriction might, however, be justified by overriding reasons in the public interest, provided that it is proportionate.

13 The referring court notes that, according to the Court's case-law, the overriding reasons in the public interest that might justify a restriction on the freedom to provide services include the objectives of national legislation in the area of gambling and betting, which pursue both the protection of the recipients of the

services concerned and, more generally, that of consumers, as well as protection of the social order. It adds that, in the absence of harmonised legislation at European level in the area of games of chance, it is for each Member State to define the level of protection for gamblers that it seeks to ensure.

14 In this instance, the referring court does not rule out that the grounds underlying the national legislation at issue may justify the restriction on the freedom to provide services, given the degree of latitude accorded in the matter to the Member States by the Court's caselaw.

15 It was in those circumstances that the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'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?'

The question referred for a preliminary ruling

The existence of restrictions on the freedom to provide services

16 Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services ([see, inter alia, Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others \[2011\] ECR I-0000, paragraph 85 and the case-law cited](#)).

17 More specifically, in the area of advertising for games of chance, the Court has held that national legislation whose effect is to prohibit the promotion in a Member State of gambling organised legally in other Member States constitutes a restriction on the freedom to provide services ([see, to this effect, Joined Cases C-447/08 and C-448/08 Sjöberg and Gerdin \[2010\] ECR I-6921, paragraphs 33 and 34](#)).

18 Likewise, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services since it impedes the access of consumers resident in Austria to the services offered in casinos located in another Member State, by making the promotion in Austria of those activities subject to an authorisation scheme which requires, in particular, that the operator of the casino concerned prove that the legal provisions for the protection of gamblers adopted in the Member State where that casino is operated at least correspond to the relevant Austrian legal provisions ('the contested condition').

19 Consequently, it must be held that national legislation such as that at issue in the main proceedings

constitutes a restriction on the freedom to provide services that is guaranteed by Article 56 TFEU.

Justification of the restriction on the freedom to provide services

20 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 51 TFEU and 52 TFEU, applicable in this area by virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.

21 It is clear from the Court's case-law that restrictions on gaming activities may be justified by overriding reasons in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling (see, to this effect, Case C- 46/08 Carmen Media Group [2010] ECR I-8149, paragraph 55 and the case-law cited).

22 However, the restrictions imposed by the Member States must satisfy the conditions laid down in the case-law of the Court as regards their proportionality, that is to say, be suitable for ensuring attainment of the objective pursued and not go beyond what is necessary in order to achieve that objective. It should also be recalled in this connection that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, the restrictions must be applied without discrimination ([see, to this effect, Case C-42/07 Liga Portuguesa de Futebol Profissional and Bwin International \[2009\] ECR I-7633, paragraphs 59 to 61 and the case-law cited](#)).

23 In the case in point, it is not in dispute that the national legislation at issue and, in particular, the contested condition pursue the objective of protecting consumers against the risks connected with games of chance, which, as is clear from paragraph 21 of the present judgment, is capable of constituting an overriding reason in the public interest such as to justify restrictions on the freedom to provide services.

24 In this connection, the Court has repeatedly held that 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, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required to protect the interests in question ([Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 57 and the case-law cited](#)).

25 Thus, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the proportionality of the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure ([Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 58 and the case-law cited](#)).

26 Here, the Austrian Government takes the view that the restriction on the freedom to provide services at issue in the main proceedings is not disproportionate in relation to the objectives pursued. It states that the number of casinos is limited in Austria to a maximum of 15 and casino operators are required to observe strict rules concerning the protection of gamblers, such as the duty to retain details of their identity for at least five years or the duty of the casino's management to observe a gambler's conduct in order to determine whether the frequency and intensity of his participation in gaming jeopardise the minimum income required for his subsistence.

27 According to the Austrian Government, in practice the application of those preventive rules has resulted in a significant reduction in the number of gamblers, as more than 80 000 persons were subject in 2011 to restrictions or bars on entering Austrian casinos. Therefore, in the absence of the contested condition, gamblers would be further encouraged to cross the border and to incur greater risks in casinos located in other Member States where similar regulatory guarantees of protection in some cases do not exist.

28 In that regard, it is apparent from the contested condition that, in order for a permit to carry out advertising in Austria for casinos established abroad to be granted, the levels of protection for gamblers that exist in the various legal systems concerned must first be compared.

29 Such an authorisation scheme is in principle capable of fulfilling the condition of proportionality if it is limited to making authorisation to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting its residents against the risks connected with games of chance.

30 Such a condition does not appear to constitute an excessive burden for operators given the objective, recognised by the Court as an overriding reason in the public interest, of protecting the population against the risks inherent in games of chance.

31 Since the Member States are free to set the objectives of their policy on games of chance and to define in detail the level of protection sought (see [Liga Portuguesa de Futebol Profissional and Bwin International, paragraph 59 and the case-law cited](#)), it must be held that legislation such as that at issue in the main proceedings does not go beyond what is necessary provided that it merely requires, in order for authorisation to carry out advertising to be granted, that it be established that, in the other Member State, the applicable legislation ensures protection against the risks of gaming that is in essence of a level equivalent to that which it guarantees itself.

32 The position would, however, be different, and the legislation would have to be regarded as disproportionate, if it required the rules in the other Member State to be identical or if it imposed rules not

directly related to protection against the risks of gaming.

33 In the procedure referred to in Article 267 TFEU, a provision which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts is a matter for the national court (see [Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Stoß and Others \[2010\] ECR I-8069, paragraph 46 and the case-law cited](#)).

34 Thus, it is for the referring court to satisfy itself that the contested condition is limited to making authorisation to carry out advertising for gaming establishments established in another Member State conditional upon the legislation of the latter providing guarantees that are in essence equivalent to those of the national legislation with regard to the legitimate aim of protecting individuals against the risks connected with games of chance.

35 The referring court will, in particular, be able to consider whether Paragraph 56(2)(1) of the GSpG, by the reference which it makes to Paragraph 21 in its entirety, imposes conditions that go beyond consumer protection.

36 In light of the foregoing, the answer to the question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fourth Chamber) hereby rules:

Article 56 TFEU must be interpreted as not precluding legislation of a Member State which permits the advertising in that State of casinos located in another Member State only where the legal provisions for the protection of gamblers adopted in that other Member State provide guarantees that are in essence equivalent to those of the corresponding legal provisions in force in the first Member State.

* Language of the case: German.

OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 17 April 2012 (1)

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').

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 (BGBl I No 126/2008). That amendment was adopted following an infringement procedure opened by the European Commission (2) 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)

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.

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.

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.

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.

1 – Original language: French.

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-0000.

4 – Case C-347/09 Dickinger and Ömer [2011] ECR I-0000.

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-0000, 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-0000 paragraph 56.

7 – See, to that effect, Joined Cases C-72/10 and C-77/10 Costa and Cifone [2012] ECR I-0000, 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.

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-0000, 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.

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.