

**Case C-920/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

16 December 2019

**Referring court:**

Landesverwaltungsgericht Steiermark (Austria)

**Date of the decision to refer:**

6 December 2019

**Appellants:**

Fluctus s.r.o.

Fluentum s.r.o.

KI

**Respondent authority:**

Landespolizeidirektion Steiermark (Provincial Police Department of Styria)

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**Subject matter of the main proceedings**

Penalties for the operation of illegal gaming machines (interference with State gambling monopoly)

**Subject matter and legal basis of the reference**

Compatibility of the Austrian gambling monopoly with Article 56 TFEU in the light of licence holders' unmeasured advertising practices

**Questions referred**

1. Is Article 56 TFEU to be interpreted as meaning that, in the assessment of the impermissible advertising practices of the licence holder formulated by the Court of Justice in its established case-law in the case of a State gambling

monopoly, the relevant issue is whether there has in fact been growth in the gambling market considered overall in the relevant period, or is it sufficient that the advertising is aimed at stimulating active participation in gambling, such as by trivialising gambling, conferring on it a positive image because revenues derived from it are used for activities in the public interest, or by increasing its attractiveness by means of enticing advertising messages holding out the tantalising prospect of major winnings?

2. Is Article 56 TFEU also to be interpreted as meaning that advertising practices of a monopolist, should they exist, in any event rule out the coherence of the monopoly system, or is it possible for active participation in gambling also to be stimulated by the monopolist in the event of corresponding advertising activities of private providers, such as by trivialising gambling, giving it a positive image because revenues derived from it are used for activities in the public interest, or by increasing its attractiveness by means of enticing advertising messages holding out the tantalising prospect of major winnings?

3. Is a national court which is called upon, within the scope of its jurisdiction, to apply Article 56 TFEU under a duty, of its own motion, to give full effect to those provisions by refusing to apply any, in its opinion, conflicting provision of national law, even if the compliance of such a provision with EU law has been confirmed in constitutional-law proceedings?

#### **Provisions of EU law cited**

Article 56 TFEU

#### **Provisions of national law cited**

Bundesgesetz vom 28. November 1989 zur Regelung des Glücksspielwesens (Federal Law of 28 November 1989 on Gambling, ‘the GSpG’), Federal Law Gazette No 620/1989: Paragraphs 2, 3, 4, 14, 17, 21, 24, 50, 52, 53, 54, 56

#### **Case-law referred to:**

Judgments of 30 April 2014, *Pfleger*, C-390/12; of 6 November 2003, *Gambelli*, C-243/01; of 8 September 2010, *Carmen Media*, C-46/08; of 15 September 2011, *Dickinger and Ömer*, C-347/09; of 3 June 2010, *Ladbrokes*, C-258/08; of 8 September 2010, *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07; of 30 June 2011, *Zeturf*, C-212/08; of 24 January 2013, *Stanleybet and Others*, C-186/11 and C-209/11; of 11 January 2000, *Kreil*, C-285/98; of 29 April 1999, *Ciola*, C-224/97; of 14 June 2017, *Online Games and Others*, C-685/15; of 21 July 2005, *Coname*, C-231/03; of 13 October 2005, *Parking Brixen*, C-458/03; of 14 November 2013, *Belgacom*, C-221/12; of 30 June 2016,

*Admiral Casinos & Entertainment AG, C-464/15; of 10 April 1984, von Colson and Kamann, 14/83; and of 27 June 1991, Mecanarte, C-348/89*

### **Brief summary of the facts and procedure**

- 1 During the course of official inspections of operating premises, the machines found there, in each case installed without the official permit ('licence') required under the GSpG, were provisionally confiscated. The competent authorities issued a notice confirming provisional confiscation, initiated administrative penal proceedings and issued penalty notices imposing fines on the persons responsible, namely the owners of the machines, the operators of the premises, the operating staff and others.
- 2 In this case, an inspection in accordance with the GSpG was conducted of premises in Graz on 19 October 2016. Eight machines were suspected of being in breach of the GSpG. The machines were in operation and fully functional and some were even being used by players. The machines (gaming equipment interfering with the State monopoly), which it was established are owned by Fluentum s.r.o. and licensed to Fluctus s.r.o., were provisionally confiscated. Charges were lodged with the competent authority, namely the Landespolizeidirektion Steiermark (Provincial Police Department of Styria). A confiscation notice was then sent on 23 November 2016 to Fluctus s.r.o., as the holder of the licences to the machines. On 12 December 2016, an identical confiscation notice was served on Fluentum s.r.o., in which that company was named as the organiser of the games of chance. Appeals against the aforesaid notices were lodged with the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria).
- 3 Administrative penalty proceedings were subsequently initiated. The competent authority, the Provincial Police Department of Styria, assumed that KI is the manager of Fluctus s.r.o. and Fluentum s.r.o. for the purposes of commercial law. Separate penal proceedings were therefore initiated against KI, as the organiser and operator of the games of chance, and fines totalling EUR 480 000 were imposed on the appellant. Costs totalling EUR 48 000 were imposed. To be exact, the Provincial Police Department of Styria issued a penalty notice on 22 January 2018 imposing a fine of EUR 30 000 for each gaming machine (giving a total of EUR 240 000) and, in the event of non-payment, 7 days' imprisonment for default of payment of each fine, and the Provincial Police Department of Styria issued a penalty notice on 29 January 2018 which also imposed a fine of EUR 30 000 per gaming machine (giving a total of EUR 240 000) and, in the event of non-payment, 7 days' imprisonment for default of payment of each fine. Appeals against both penalty notices were lodged with the Regional Administrative Court, Styria.

- 4 The foreign connection required under Article 56 et seq. TFEU exists in the main proceedings, in that a limited liability company registered in another Member State of the European Union (in Bratislava, Slovakia) is party to them.

### **Summary of the basis for the reference**

- 5 The Regional Administrative Court, Styria, raises doubts as to the compliance of the advertising practices of the licence holders (monopolists) with EU law (Article 56 TFEU).
- 6 Legal requirements governing gambling advertising are worded only in a very non-specific manner in the Austrian GSpG. According to Paragraph 17(7) of the GSpG, lottery licence holders are obliged to provide general media support. However, there is no advertising obligation for casino operators. A definite restriction in relation to the content of gambling advertising can currently only be found in Paragraph 56(1) GSpG. According to that provision, licence and permit holders must ‘maintain a responsible standard’ in their advertising. Only supervision of compliance with that responsible standard is provided for and an action under Paragraph 1 et seq. of the Bundesgesetz gegen den unlauteren Wettbewerb (Federal Law Against Unfair Competition, ‘the UWG’) is explicitly excluded.
- 7 Austrian courts have reviewed and confirmed the compatibility of the Austrian Law on Gambling with applicable EU law and the position adopted by the regional administrative courts, or have expressed no concerns, in numerous administrative and civil proceedings. In judgments delivered in 2016, all three of Austria’s highest courts, namely the Verwaltungsgerichtshof (Supreme Administrative Court, ‘VwGH’), the Verfassungsgerichtshof (Constitutional Court, ‘ VfGH’) and the Oberster Gerichtshof (Supreme Court, ‘OGH’) confirmed that the Austrian gambling monopoly conforms to EU law (see paragraphs 21 and 23 below). Since then, numerous judgments have been delivered that follow those landmark judgments.
- 8 The Austrian gambling monopoly is in principle a restriction on the freedom to provide services in accordance with Article 56 TFEU. It is therefore compatible with EU law only where there is a justifying circumstance standardised in the Treaties or a justifying circumstance developed in the case-law of the Court of Justice (overriding requirement in the public interest) (see judgment in *Pfleger*, C-390/12, paragraph 38 et seq.). The main overriding requirements in the public interest for restricting gambling are consumer protection, combating fraud and preventing the incitement to squander money on gambling (see judgments in *Gambelli*, C-243/01, paragraph 65 et seq., and in *Carmen Media*, C-46/08, paragraph 55). However, asserting such objectives does not of itself suffice to justify any type of statutory rule. Where there is a recognised objective for restricting the fundamental freedom concerned, it is necessary to assess whether the principle of proportionality was observed.

- 9 The Court of Justice makes the permissibility of a gambling monopoly under EU law conditional not only on the objective of the legislature, but also on the actual effect of the regulations (see judgment in *Dickinger and Ömer*, C-347/09, paragraph 65). It therefore follows, including in connection with advertising, that the assessment of compliance with EU law must not focus solely on the content of the legal rule, in this case in particular on Paragraph 56(1) of the GSpG, under which licence and permit holders have to maintain a responsible standard in their advertising, but must also consider the actual effects of that provision.
- 10 In terms of the assessment of the suitability of a gambling monopoly, the consistency of the national legislation (judgments in *Gambelli*, C-243/01, paragraph 65 et seq., and in *Pfleger*, C-390/12, paragraph 56) is very important. In the event that the suitability is confirmed, the Court secondly assesses the necessity and, where appropriate, thirdly, the appropriateness of the restriction. According to the case-law of the Court, national legislation is contrary to EU law if that legislation does not actually pursue the objective of protecting gamblers or fighting crime and does not genuinely meet the concern to reduce opportunities for gambling or to fight gambling-related crime in a consistent and systematic manner (judgment in *Pfleger*, C-390/12, paragraph 56). Also connected with the demand for consistency are requirements regarding advertising by a monopoly or licence holder, which the Court has clarified in several judgments (see judgments in *Ladbrokes*, *Stoß*, *Zeturf*, *Dickinger and Ömer* and *Stanleybet* cited above under ‘case-law referred to’). The referring court deduces from these that the national legislature also has to regulate and monitor advertising by monopolists. Some commentators contend, including in connection with advertising by the licence holders Österreichische Lotterien and Casinos Austria AG, that the responsible standard required in advertising is not being maintained. There is criticism of the exclusivity for a predominantly private provider which is only superficially regulated, if at all, and, primarily as regards offer expansion and aggressive advertising, is not made to comply with any supervisory restrictions, contrary to EU law.
- 11 The Regional Administrative Court, Styria, is of the opinion that the requirements established by the Court of Justice in respect of the permissibility of a gambling monopoly are not satisfied against the background of the Austrian legal situation (consistency), on the one hand, and the commercial policy of the sole licence holder for lotteries (extensive advertising practice), on the other. It can be assumed that the licence holder’s offensive advertising policy exceeds the limits defined by the Court in the judgments in *Carmen Media*, *Stoß*, and *Dickinger and Ömer*, which means that, for that reason alone, the Austrian gambling monopoly, including its accompanying regulations, is no longer applicable in respect of persons who benefit from the freedom to provide services, such as the appellants. That assessment is supported by every legal commentary.
- 12 The monopolist’s expansionist policy, accompanied by intensive advertising expenditure, undermines the protection of consumers from incitement to squander money on gambling that is demanded by the Court of Justice. The advertising

restrictions prescribed by the Court are not being observed in practice. The market policy of the licence holders Österreichische Lotterien GmbH and Casinos Austria AG fulfils all the criteria established by the Court as to precisely how a monopolist may not behave: the monopolists' advertising stimulates active participation in gambling, confers a positive image on the games, holds out the tantalising prospect of major winnings, encourages new target groups to gamble, and is being continually expanded in terms of content.

- 13 The referring court cites numerous examples of intensive advertising in these five categories, such as annual advertising expenditure of approximately EUR 40 million, campaigns in public spaces and on television to achieve broad coverage, incentives to gambling, such as discounts, to encourage target groups with less of a propensity to gamble, such as women and young people, to start gambling, advertising easily achievable seven-figure winnings, conferring positive effects on gambling (support for public events and charities, tempting gamblers by linking values such as luck, fame, image, self-confidence, etc. and even physical attractiveness to gambling in advertising) and facilitating access to gambling (expansion of lottery points of sale, availability online or via mobile app, distribution of gambling coupons, etc.).
- 14 The current expansion in terms of the content of the monopolist's offer can only be explained from a monetary perspective, not as moderate channelling of the gaming instinct. The confusion of interests in the Ministry of Finance as a direct financial beneficiary of offer expansions and price increases in gambling is obvious. On the one hand, the Republic of Austria indirectly holds shares in Casinos Austria AG or Österreichische Lotterien GmbH, and, on the other hand, the Minister for Finance is supposed to perform a comprehensive supervisory function in respect of licence holders and to grant licences in contest with other competitors on the Austrian gambling market in a transparent and verifiable manner. This tension inevitably has an extensive impact on the gambling legislation, and is also evident in practice in the inadequate performance of the supervisory duties in respect of the licence holders.
- 15 It is noted, with reference to a judgment delivered in 2014 by the Landesgericht Linz (Regional Court, Linz), that overall advertising by the exclusive gambling licence holders (Österreichische Lotterien GmbH and Casinos Austria AG) was not measured and limited to directing the consumer to controlled gaming networks (of the monopolists), and to counteracting gambling addiction and criminal activities connected therewith (the existence of which it was broadly impossible to determine), but was instead expansionist advertising aimed at growth, which sought to promote gambling operations and stimulated active participation by trivialising, conferring a positive image on and increasing the attractiveness of gambling and holding out the prospect of tantalising winnings. The Landesverwaltungsgericht Vorarlberg (Regional Administrative Court, Vorarlberg) found that these advertising activities are not measured or strictly limited to what is necessary. Even the Supreme Court explicitly showed in several judgments that the gambling monopoly is contrary to EU law.

- 16 It is not only advertising by the monopolists that is neither measured nor limited and is not subject to effective supervision; the same applies to numerous third-party undertakings offering games of chance in Austria, especially in the online sector, with the majority of advertisements promoting undertakings which do not have a licence for operating draws in Austria. It remains unclear why the ban established in the GSpG on advertising for unlicensed gambling is not enforced by the Ministry of Finance. In any event, it obviously has nothing to do with a consistent gambling policy or protecting gamblers.
- 17 In the final analysis, the advertising does not serve exclusively to direct consumers to controlled gaming networks; instead it pursues the objective of stimulating active participation in gambling, in particular by people who have not been readily prepared to gamble in the past. Therefore, there is no measured advertising within the meaning of the cited case-law of the Court of Justice. The fact that Paragraph 56(1) of the GSpG excludes review of the standard in advertising required under EU law through an action brought by competitors or associations with the capacity to initiate proceedings under the UWG fits in with this picture. The gambling monopoly therefore lacks the justification required under EU law.
- 18 An answer to the questions referred is essential in these proceedings, as two of Austria's highest courts (VfGH and VwGH) have assumed that the GSpG is compatible with EU law and have, in a one-off review, delivered a landmark judgment (see paragraphs 21 and 23 below), by which, at least in the opinion of the highest courts, all other courts are now bound. Were one to espouse that view, it would be impossible in future to review the provisions of the GSpG against EU law. Furthermore, this practice contrary to EU law conflicts directly with the case-law of the Court of Justice (judgments in *Kreil*, C-285/98; in *Ciola*, C-224/97; and in *Online Games*, C-685/15).
- 19 The appellants are active in the protected area of the freedom to provide services. According to the provision of Article 56 TFEU governing that area, which is addressed to all the Member States, it is prohibited for authorities to restrict the freedom to provide services. The right conferred by the freedom to provide services is directly applicable, that is it does not require either an official or a judicial decision by the Austrian State in order to apply. The aforesaid prohibition in Article 56 TFEU prevails over national law, including national constitutional law. A national constitutional court cannot therefore sideline a fundamental freedom. Every authority must apply Article 56 TFEU as having primacy over any national restriction, irrespective of the legal quality of that restriction. Any national restriction, even if it ranks as constitutional law or takes the form of a final decision and/or judgment confirmed by a court, that conflicts with the higher-ranking prohibition in Article 56 TFEU may not be applied. The Court of Justice has explained previously, in a judgment in 1999 concerning Austria (*Ciola*, C-224/97, see paragraphs 24 to 34), that EU citizens may not be disadvantaged by laws and/or official measures, whether or not final/definitive,

that are contrary to EU law. On the contrary, the authorities must submit to the higher-ranking EU law.

- 20 The relevant penalty notice infringes EU law, which has primacy. It is based on the Austrian Law on Gambling which restricts the freedom to provide services. No justification for infringement of the freedom to provide services by the decision based on a law contrary to EU law (the Law on Gaming) was shown in the proceedings to be theoretically possible for reasons of an overriding requirement in the public interest. Reference to the judgment of the Court of Justice in *Pfleger* (C-390/12) suffices to substantiate the lack of legitimacy of the Austrian monopoly. The restrictions in the Austrian Law on Gaming are contrary to EU law in the — relevant — light of the ‘actual rules for applying the restrictive legislation concerned’. Austria did not even contend the opposite, even though it bears the burden of proof (see judgment in *Online Games*, C-685/15).
- 21 No one can rely on judgments of the Supreme Administrative Court that are contrary to EU law, such as, in particular, the landmark judgment of 16 March 2016 in case 2015/17/0022. Incorrect judgments of the Supreme Administrative Court cannot be superimposed on EU law and do not absolve the administration from the need to respect EU law, which has primacy. In its judgment in *Pfleger* (C-390/12, see paragraphs 53 to 55), the Court of Justice upheld its settled case-law that the Austrian monopoly cannot be justified under EU law on the basis of actual conditions in Austria. The State had been unable to show that crime or addiction to gambling actually constituted a problem that justified a monopoly.
- 22 Precisely the same applies in this case. The competent authorities have not shown that crime and/or addiction to gambling actually constituted, during the period at issue, a significant problem that could legitimise a monopoly and a decision based on it. On the contrary, it is clear that the real purpose of the monopoly is not to fight crime and protect gamblers, but solely to maximise State tax revenue by favouring a monopolist.
- 23 The Supreme Administrative Court arbitrarily disregards EU law in its binding interpretation by the Court of Justice; hence the questions referred are of vital importance to the proceedings under way; otherwise, there is a danger that the GSpG will be upheld once again, in breach of EU law. How this unlawful practice stands in relation to the questions referred on advertising is illustrated by the fact that the relevant judgments of the highest courts (especially the Supreme Administrative Court judgment of 16 March 2016, Ro 2015/17/0022, and the Constitutional Court judgment of 15 October 2016, E 945/2015) are not based on independent fact-finding with regard to the question of the compatibility with EU law of the monopoly system under the GSpG, which is why, at a purely factual level, they cannot by default help to clarify the requirement highlighted by the Court again recently (see judgment in *Admiral Casinos & Entertainment AG*, C-464/15) that Article 56 TFEU is to be interpreted as meaning that, in a review of the proportionality of restrictive national legislation in the area of games of chance, the approach taken must be dynamic rather than static, in the sense that it

must be based not only on the objective of that legislation at the time of its adoption, but also on the effects of the legislation, assessed after its adoption.

- 24 For the rest, the advertising opportunities of, or the advertising of games of chance by, licence holders in Austria are contrary to EU law (see again the cited judgments in *Ladbroke's, Stoß, Zeturf, Dickinger and Ömer* and *Stanleybet*).
- 25 Although it would in principle be permissible in accordance with the case-law of the Supreme Administrative Court (see judgment of 11 July 2018, Ra 2018/17/0048) for licence holders to engage on occasion in aggressive advertising, that only applies where aggressive advertising is necessary for the particular game of chance or the particular gaming sector in order to guarantee protection of gamblers, especially where the advertisement can guide gamblers away from the illegal to the legal sector. As there is no evidence in Austria of illegal offers in terms of lottery products or live casino games, it has to be assumed that a stricter criterion must be applied here as far as advertising is concerned. Aggressive advertising, of lottery tickets for example, cannot be justified by an allegedly widespread illegal offer of gaming machines. In the legal opinion of the Supreme Administrative Court, that would mean that it would be permissible to engage on occasion in aggressive advertising, although admittedly only for the gaming machine sector in Austria. However, precisely the opposite applies. The exhibits adduced illustrate aggressive and, in the opinion of the EU judicature, prohibited advertising in sectors in Austria which are not even affected by the alleged illegal activities. For that reason alone, the monopoly established under the Law on Gaming is unlawful and, therefore, persons subject to that law cannot be penalised.
- 26 In view of paragraph 27 of the order of the Court of Justice of 9 January 2019 in *Fluctus and Fluentum*, C-444/18, the questions require an answer as, although the highest courts in Austria found in their landmark judgments that the advertising is aggressive and intended to win new gamblers who have not previously played, they ignore that fact by finding nonetheless that it is compatible with EU law. This practice contrary to EU law directly contradicts the case-law of the Court of Justice. It is vital that the questions referred be answered, as the unlawful practice of the Austrian courts will not be curtailed without a new and unequivocal decision by the Court of Justice.