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EUROOPAN UNIONIN TUOMIOISTUIN
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OPINION OF ADVOCATE GENERAL SZPUNAR
delivered on 22 October 2015 [1]

Case C-336/14

Sebat Ince

(Request for a preliminary ruling from the Amtsgericht Sonthofen (Local Court, Sonthofen) (Germany))

(Freedom to provide services — Games of chance — Public monopoly on betting in sporting competitions — Authorisation — Exclusion of private operators — Criminal sanctions — Directive 98/34/EC — Draft of technical regulations — Obligation to notify — Compatibility of licence with principles of transparency and equal treatment)

[1] – Original language: English.

EN

1. Ever since the seminal *Simmenthal* [2] ruling, it is well established in EU law that 'every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [EU] rule'. Such an obligation flows from the principle of primacy of EU law over national law.

2. In the case at issue, where a German public prosecutor accuses Ms Ince of having committed a criminal offence under the German criminal code of unauthorised organisation of a game of chance, because she installed and made available to the public a gaming machine without an authorisation, the referring court, in its endeavour to achieve conformity with EU law, is faced with the difficulty of determining precisely which national provisions it must set aside in order to comply with EU law, and in particular the Court's judgments in *Winner Wetten*, [3] *Stoß and Others* [4] and *Carmen Media Group*. [5] The referring court needs to ascertain which of several means available to it is the one that ensures compliance with EU law. The case at issue therefore allows the Court to recall a number of issues related to the Treaty provisions on the freedom to provide services and to the principle of primacy of EU law.

I – Legal framework

A – *EU law*

3. Article 56 TFEU reads as follows:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited 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.

...'

4. According to Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services: [6]

2 – 106/77, EU:C:1978:49, paragraph 21.

3 – C-409/06, EU:C:2010:503.

4 – C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504.

5 – C-46/08, EU:C:2010:505.

6 – OJ 1998 L 204, p. 37.

'For the purposes of this Directive, the following meanings shall apply:

...

2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

...

11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

...'

5. Article 8(1) of the same directive provides:

'Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

...'

B – *German law*

6. In accordance with Articles 70 and 72 of the German Basic Law (Grundgesetz), legislation on games of chance falls within the competence of the *Länder*.

7. The State Treaty on Gaming (Staatsvertrag zum Glücksspielwesen, 'the GlüStV') concluded between the *Länder* and entering into force on 1 January 2008, established a new uniform framework for the organisation, operation and intermediation of games of chance, replacing a previous such State Treaty.

8. Paragraph 4(1) of the GlüStV states:

'The organisation or intermediation of public games of chance may take place only with the authorisation of the competent authority of the *Land* concerned. All

organisation or intermediation of such games is prohibited without such authorisation (unlawful games of chance).'

9. Paragraph 10 of the GlüStV provides:

'(1) In order to attain the objectives set out in Paragraph 1, the *Länder* are under a statutory obligation to ensure a sufficient supply of games of chance. They shall be assisted by a technical committee composed of experts specialised in combating dependency on games of chance.

(2) In accordance with the law, the *Länder* may undertake that task either by themselves or through the intermediary of legal persons under public law or private law companies in which legal persons under public law hold a direct or indirect controlling shareholding.

...

(5) Persons other than those referred to in subparagraph 2 shall be authorised to organise only lotteries and games in accordance with the provisions of the third section.'

10. The GlüStV expired at the end of 2011. However, the German *Länder* (with the exception of Schleswig-Holstein) each adopted legislation under which the provisions of the GlüStV continued to apply, until the entry into force of a new State Treaty on Gaming, as *Land* law. In Bavaria, this took the form of the Bavarian Law implementing the State Treaty on Gaming in Germany (Bayerisches Gesetz zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland; 'the AGGlüStV'). Neither that law nor the corresponding laws of the other *Länder* were notified to the Commission.

11. The State Treaty amending the provisions on games of chance (Glücksspieländerungsstaatsvertrag; 'the GlüÄndStV') entered into force in Bavaria on 1 July 2012.

12. Paragraph 10(2) and (6) thereof provides for a State monopoly on sports betting. [7] In accordance with Paragraph 4 of the GlüÄndStV, the obligation to obtain an authorisation for the organisation and intermediation of bets on sporting competitions continues to apply, although an authorisation is not to be issued for the intermediation of games of chance which are not authorised under the GlüÄndStV and there is no established right to the issue of an authorisation. A new feature of the GlüÄndStV is an 'experimental clause for sports betting' (Paragraph 10a). In accordance with that clause, the State monopoly on sports betting provided for in Paragraph 10(6) is not to be applied to the organisation of sports betting for a period of seven years as from the entry into force of the

[7] – Just like Paragraph 10(2) and (5) of the GlüStV.

GlüÄndStV. During that period, sports betting may be organised only under licence and a maximum of 20 licences are to be issued. The licensing obligation is to apply initially only to non-State-owned betting organisers. In the case of the 16 State-owned organisers already active, it is not to apply until one year after the licences have been awarded.

13. On 8 August 2012, the German authorities announced the commencement of the procedure for awarding those licences in the Official Journal. It appears that that process has not yet been concluded.

14. Paragraph 284 of the German Criminal Code (Strafgesetzbuch; 'the StGB'), entitled 'Organising unlawful gaming' reads as follows:

'(1) Whosoever without the permission of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment not exceeding two years or a fine.

...

(3) Whosoever in cases under subsection (1) above acts

1. on a commercial basis; or

2. as a member of a gang whose purpose is the continued commission of such offences,

shall be liable to imprisonment from three months to five years.

...'

II – Facts, procedure and questions referred

15. Ms Ince, a Turkish national resident in Germany, is charged with having, on 11 and 12 January 2012 (first charge) and in the period from 13 April to 7 November 2012 (second charge), acted as an intermediary for the collection of bets on sporting competitions, via a gaming machine installed in the 'Sportsbar' that she runs, on behalf of a betting organiser established and licensed in Austria which does not hold a German authorisation to offer sports betting. She is accused of having thereby committed a criminal offence of 'unauthorised organisation of a game of chance' under Paragraph 284 of the StGB.

16. By order of 7 May 2013, received at the Court Registry on 11 July 2014, the Amtsgericht Sonthofen (Local Court, Sonthofen) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'I. On the first charge (January 2012) and the second charge in so far as it relates to the period up to the end of June 2012:

(1) (a) Must Article 56 TFEU be interpreted as meaning that criminal prosecution authorities are prohibited from penalising the intermediation of bets on sporting competitions carried on without German authorisation on behalf of betting organisers licensed in other Member States, where such intermediation is subject to the condition that the betting organiser too must hold a German authorisation, but the legal position under statute that is contrary to EU law ("monopoly on sports betting") prohibits the national authorities from issuing an authorisation to non-State-owned betting organisers?

(1) (b) Is the answer to Question (1)(a) altered by the fact that, in one of the 15 German Länder which jointly established and jointly implement the State monopoly on sports betting, the State authorities maintain, in injunction proceedings or criminal proceedings, that the statutory prohibition on the issue of an authorisation to private suppliers is not applied in the event of an application for an authorisation to operate as an organiser or intermediary in that federal Land?

(1) (c) Must the principles of EU law, in particular the freedom to provide services, and the judgment of the Court of Justice in Case C-186/11 be interpreted as precluding a permanent prohibition or an imposition of penalties (described as "precautionary") on the cross-border intermediation of bets on sporting competitions, where this is justified on the ground that it "was not obvious, that is to say recognisable without further examination" to the prohibiting authority at the time of its decision that the intermediation activity fulfils all the substantive conditions of authorisation (apart from the reservation of such activities to a State monopoly)?

(2) Must Directive [98/34] be interpreted as precluding the imposition of penalties for the intermediation of bets on sporting competitions via a gaming machine, without a German authorisation, on behalf of a betting organiser licensed in another EU Member State, where the interventions by the State are based on a law, not notified to the European Commission, which was adopted by an individual Land and has as its content the expired [GlüStV]?

II. The second charge in so far as it relates to the period from July 2012

(3) Must Article 56 TFEU, the requirement of transparency, the principle of equality and the EU law prohibition of preferential treatment be interpreted as precluding the imposition of penalties for the intermediation of bets on sporting competitions, without a German authorisation, on behalf of a betting organiser licensed in another EU Member State in a situation characterised by the [GlüÄndStV], applicable for a period of nine years and

containing an "experimental clause for bets on sporting competitions", which, for a period of seven years, provides for the theoretical possibility of awarding also to non-State-owned betting organisers a maximum of 20 licences, legally effective in all German Länder, as a necessary condition of authorisation to operate as an intermediary, where:

(a) the licensing procedure and disputes raised in that connection are managed by the licensing authority in conjunction with the law firm which has regularly advised most of the Länder and their lottery undertakings on matters relating to the monopoly on sports betting that is contrary to EU law and represented them before the national courts in proceedings against private betting suppliers, and was entrusted with the task of representing the State authorities in the preliminary ruling proceedings in [judgments in] *Stoß [and Others*, C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, ECLI:EU:C:2010:504], *Carmen Media [Group*, C-46/08, ECLI:EU:C:2010:505] and *Winner Wetten* [C-409/06, ECLI:EU:C:2010:503];

(b) the call for tenders for licences published in the *Official Journal of the European Union* on 8 August 2012 gave no details of the minimum requirements applicable to the proposals to be submitted, the content of the other declarations and evidence required or the selection of the maximum of 20 licensees, such details not having been communicated until after the expiry of the deadline for submission of tenders, in a so-called "information memorandum" and numerous other documents, and only to tenderers who had qualified for the "second stage" of the licensing procedure;

(c) eight months after the start of the procedure, the licensing authority, contrary to the call for tenders, invites only 14 tenderers to present their social responsibility and safety policies in person, because these have fulfilled all of the minimum conditions for a licence, but, 15 months after the start of the procedure, announces that not one of the tenderers has provided "verifiable" evidence that it fulfilled the minimum conditions;

(d) the State-controlled tenderer "Ods" (Ods Deutschland Sportwetten GmbH), consisting of a consortium of State-owned lottery companies, is one of the 14 tenderers invited to present their proposals to the licensing authority but, because of its organisational links to organisers of sporting events, is probably not eligible for a licence because the law (Paragraph 21(3) of the GlüÄndStV) requires a strict separation of active sport and the bodies organising it from the organisation and intermediation of bets on sporting competitions;

(e) one of the requirements for a licence is to demonstrate "the lawful origin of the resources necessary to organise the intended offer of sports betting facilities";

(f) the licensing authority and the gaming board that decides on the award of licences, consisting of representatives from the Länder, do not avail themselves of the possibility of awarding licences to private betting organisers, whereas State-owned lottery undertakings are permitted to organise bets on sporting competitions, lotteries and other games of chance without a licence, and to operate and advertise them via their nationwide network of commercial betting outlets, for up to a year after the award of any licences?'

III – Analysis

A – *Preliminary remarks*

17. First, the case at issue is to be examined with respect to the Treaty provisions. Directive 2006/123/EC [8] does not apply to gambling activities.

18. Secondly, as the referring court rightly assumes, the fact that Ms Ince is a third-country national does not mean that she cannot, as a matter of principle, invoke Article 56(1) TFEU which prohibits restrictions on freedom to provide services 'in respect of nationals of Member States'. There is a cross-border service between the service provider, established in Austria, and the recipients of the service in Germany. Ms Ince's role is confined to that of an intermediary between the provider and the recipients of such services. She acts on behalf of the Austrian service provider. She does not provide the service herself. And yet her activities are caught by Article 56 TFEU with the consequence that she can invoke that provision before the national court. Indeed, if the overall process of service provision between the Austrian provider and the recipient in Germany were to be chopped up into several sub-processes, situations forming part of this overall process would often escape from Article 56 TFEU, either because one of the intermediaries in the chain is a third-country national or because there is no cross-border situation in that sub-process.

19. Thirdly, this case is not about whether or not a monopoly in respect of sports betting is compatible with EU law. As a matter of fact, the referring court does not appear to be in any doubt that, following a number of judgments of the Court, [9] the operation in Germany of a monopoly in respect of sports betting under the provisions cited above under 'Legal framework' pursues illegitimate

8 – See Article 2(2)(h) of Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

9 – Judgments in *Stoß and Others* (C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504) and *Carmen Media Group* (C-46/08, EU:C:2010:505).

objectives and is thus contrary to the Treaty freedom to provide services. What the referring court is uncertain about is what *consequences* in EU law are to be drawn from those judgments in the context of administrative prohibitions and criminal-law penalties.

20. In the first question, the referring court is aware that there is an unjustified restriction on the freedom to provide services and therefore a breach of Article 56 TFEU. The uncertainty of this court of first instance stems, in my opinion, from the fact that the case-law on the national level in this respect is far from coherent. Faced with a confusing and contradictory case-law in Germany, the referring court is in need of guidance from the Court of Justice. In a case where the public prosecutor undertakes a criminal prosecution of a person who has not applied for an authorisation, the referring court needs to ascertain precisely which provision of national law it must set aside in order to comply with EU law. By contrast, the third question is made in the context of a different legal situation in which the German authorities have organised a licensing procedure. Here, the referring court seeks to determine whether there is a violation of Article 56 TFEU. The referring court seeks to ascertain whether the ongoing licensing procedure is or is not justified, as it may or may not comply with general principles of law.

21. The first question is, therefore, in essence about the primacy of EU law while the third question deals with the proportionality of a licensing procedure.

B – *First question*

22. By its first question, which is divided into three sub-questions, which should nevertheless be examined together, the referring court would like to know whether Article 56 TFEU and the principles it contains precludes criminal prosecution authorities from penalising the intermediation of bets on sporting competitions carried on without German authorisation on behalf of betting organisers licenced in other Member States. The referring judge is faced with the question whether or not Ms Ince has fulfilled the substantive requirements of Paragraph 284 of the StGB. This depends on whether the system in Germany is lawful or not. The referring court has doubts as to its compatibility with EU law, since it is unsure as to how the judicial and executive authorities of a Member State should deal with a situation in which the national legislature has not yet adopted measures to remedy a situation which is contrary to EU law.

1. Article 56 TFEU — substantive and procedural requirements arising out of *Winner Wetten, Stoß and Others, Carmen Media Group,* and *Stanleybet and Others*

23. According to the information provided by the referring court, pursuant to the Court's judgments in *Stoß and Others* [10] and *Carmen Media Group*, [11] German

[10] – C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 107.

courts consider that the German State monopoly is contrary to Article 56 TFEU, given that it is not suitable for ensuring the achievement of the objective for which it was established which was to contribute to reducing the opportunities for gambling and to limiting activities within that area in a consistent and systematic manner.

24. Against this background, this is not the place to recall the entire case-law of this Court as regards justified restrictions to Article 56 TFEU in the area of gambling. However, for the purposes of the case at issue, a number of points merit emphasis.

25. In *Winner Wetten* [12] the Court was asked whether what are now Articles 49 TFEU and 56 TFEU allowed for national rules governing a State monopoly normally contrary to those provisions to be maintained 'for a transitional period on an exceptional basis, notwithstanding the primacy of directly applicable [EU] law'.

26. The question boiled down to whether recognition of a principle authorising, in exceptional circumstances, the provisional maintenance of the effects of a national rule held to be contrary to a directly-applicable rule of EU law was justified by analogy, having regard to the case-law developed by the Court on the basis of Article 264(2) TFEU.

27. The Court found that 'by reason of the primacy of directly-applicable EU law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of the national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period'. [13]

28. This principle has, in my view, not been diluted by *Stanleybet and Others*.

29. In that case, the Court reaffirmed the findings of *Winner Wetten*. [14] It then recalled case-law according to which national authorities enjoy a sufficient measure of discretion to enable them to determine what is required in order to ensure consumer protection and the preservation of order in society, within the confines of the principle of proportionality [15] and according to which the sector of

[11] – C-46/08, EU:C:2010:505, paragraph 71.

[12] – C-409/06, EU:C:2010:503, paragraph 28.

[13] – Ibid., paragraph 69.

[14] – See judgment in *Stanleybet and Others* (C-186/11 and C-209/11, EU:C:2013:33, paragraphs 38, 39 and 42).

[15] – Ibid., paragraph 44 and the case-law cited.

games of chance is a 'very specific market' in which competition between several operators authorised to run the same games of chance is liable to have detrimental effects and increase consumers' expenditure on gaming and the risks of their addiction. [16]

30. From that case-law the Court concluded that the refusal to allow a transitional period in the event of incompatibility of national legislation with Articles 49 TFEU and 56 TFEU 'does not necessarily lead to an obligation for the Member State concerned to liberalise the market in games of chance if it finds that such a liberalisation is incompatible with the level of consumer protection and the preservation of order in society which that Member State intends to uphold. Under EU law as it currently stands, Member States remain free to undertake reforms of existing monopolies in order to make them compatible with Treaty provisions, inter alia by making them subject to effective and strict controls by the public authorities.' [17]

31. The Court went on to state that 'if the Member State concerned should find that a reform of an existing monopoly effected with a view to making it compatible with Treaty provisions is not feasible and that a liberalisation of the market in games of chance is the better measure for ensuring the level of consumer protection and the preservation of order in society which that Member State intends to uphold, it will be required to observe the fundamental rules of the Treaties, including in particular [Articles 49 TFEU and 56 TFEU], the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency ... In such a case, the introduction in that Member State of an administrative permit scheme for the provision of certain types of games of chance must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion so that it is not used arbitrarily ....' [18]

32. From the case-law just cited, I retain the following: first, neither is a State monopoly as such contrary to Article 56 TFEU, nor does that provision require Member States to liberalise markets in the domain of gambling. Secondly, an administrative permit scheme for the provision of games of chance is, in principle, permissible, as long as it is based on objective, non-discriminatory criteria known in advance that circumscribe the exercise of national authorities' discretion so that it is not used arbitrarily. In principle, therefore, Member States are free to regulate in this domain as long as they respect EU law. [19] Thirdly, the Court does not

16 – Ibid., paragraph 45 and the case-law cited.

17 – Ibid., paragraph 46.

18 – Ibid., paragraph 47.

19 – See also Łacny, J., 'Swoboda państw członkowskich w zakresie regulowania gier hazardowych — przegląd orzecznictwa TS', *Europejski Przegląd Sądowy grudzień*, 2010, pp. 37-47, at p. 39.

provide for any transitional period during which a law considered to be incompatible with EU law can continue to be applied.

2. Obligation to set aside authorisation requirement

33. Further to a judgment of the Court from which it can be inferred that a national law is not compatible with EU law, *all* organs of a Member State concerned are under an obligation to remedy that situation. This results from the principles of primacy and of sincere cooperation enshrined in Article 4(3) TEU. In this respect the Court consistently holds that Member States are required to nullify the unlawful consequences of a breach of EU law. [20] The Court has underlined that '[s]uch an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned'. [21] For the legislature this implies the abolition of the legal provisions contrary to EU law. [22] The national judge must, as is well known since *Simmenthal*, set aside conflicting provisions of national law. [23] The same obligation applies to all the public authorities.

34. But which provisions have to be set aside by the German courts *in casu*? Only the provisions relating to the State monopoly (Paragraph 10 of the GlüStV) or, in addition, the provision requiring an authorisation for the organisation and intermediation of bets on sporting competitions (Paragraph 4 of the GlüStV)? This is what the referring court is struggling with. The decision as to which provisions to set aside is not made easier by the fact that there are two lines of case-law in Germany, which should be quickly described.

35. According to a view held in particular by the higher administrative courts, a prohibition on intermediation of sports betting is contrary to EU law only where it is based on Paragraph 10(2) and (5) of the GlüStV. This does not mean, however, that a private operator may act as an intermediary without the authorisation

20 – See, by way of example, judgment in *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 37 and the case-law cited).

21 – See judgment in *Wells* (C-201/02, EU:C:2004:12, paragraph 64 and the case-law cited).

22 – In the context of infringement proceedings, the Court consistently holds that the incompatibility of national legislation with EU provisions can be remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty: see, by way of example, judgment in *Commission* v *Italy* (C-358/98, EU:C:2000:114, paragraph 17 and the case-law cited). If the result of a judgment in the context of a preliminary reference is that EU law precludes certain provisions of national law, then the Member State concerned is under an obligation to remedy that situation.

23 – It is well established in EU law that when assessing the compatibility of national legislation with EU law a national court must not limit its analysis to the wording of national rules but should also take into account how these rules are applied by national authorities, see Łacny, J., 'Swoboda państw członkowskich w zakresie regulowania gier hazardowych — przegląd orzecznictwa TS', *Europejski Przegląd Sądowy grudzień*, 2010, pp. 37-47, at p. 44.

required by Paragraph 4 of the GlüStV and that Paragraph 284 of the StGB becomes inapplicable. These courts examine whether private organisers or intermediaries would be able to obtain authorisation under the conditions which the GlüStV and its implementing laws lay down for State monopoly holders and their intermediaries. However, as the referring court points out, this (fictitious) 'eligibility for authorisation' is always found not to exist. One of the reasons given for that finding is that a private betting organiser does not comply with the marketing restrictions or other provisions laid down in the GlüStV as being applicable to monopoly holders by way of justification for the monopoly.

36. In this regard, the Bundesverwaltungsgericht (Federal Administrative Court) held in a number of judgments in May and June 2013 that the German authorities may 'as a precaution' prohibit the organisation and intermediation of bets on sporting competitions without a German authorisation, unless the organiser or intermediary concerned fulfilled the substantive conditions for authorisation — with the exception of the potentially unlawful monopoly provisions — and that this was obvious, that is to say recognisable without further examination, to the prohibiting authority at the time of its decision.

37. Other courts, on the other hand, consider that the authorisation restriction of Paragraph 4(1) of the GlüStV must not be applied in isolation from the prohibition laid down in Paragraph 10(2) and (5) of the GlüStV. According to them, the fiction of a judicial authorisation procedure for private operators is itself unlawful. Moreover, the authorisation procedure laid down in the GlüStV and its implementing laws is designed not for private betting organisers and their intermediaries but only for State monopoly holders and their intermediaries.

38. Against the background of the remarks made above, one could be inclined to reply that it is only the provision on a State monopoly that is to be set aside. After all, the Court in no way questions the general admissibility of an authorisation procedure.

39. I am nevertheless sceptical of such an approach and would suggest that the Court should go further than that. My assessment of the questions leads me to the conclusion that *both* must be set aside by the referring judge, as I shall try to demonstrate below. I should like to stress that it is the specific facts in the case at issue that compel me to propose the second option.

40. First, the fact that there is conflicting case-law at the national level as regards the obligation to undergo an authorisation procedure does not ensure legal certainty on the part of economic operators. I do not think that in such a situation, which is marked by uncertainty, they can be required to choose the option that is less favourable to them.

41. Secondly, no authorisation has been issued for any private operator who underwent a procedure. Indeed, it appears that national authorities do not grant an

authorisation if it was not clearly obvious to the authority at the time of the decision that the intermediation activity fulfils all the substantive conditions of authorisation. Such a practice obviously renders the whole authorisation procedure worthless. Such a procedure does not appear to be one where the outcome is open from the start (lack of 'Ergebnisoffenheit'). It would be cynical to ask an economic operator to subject itself to a procedure that is bound to fail. The legal consequence can only be that it is not required to submit to such a procedure.

42. Thirdly, the fact that national authorities must set aside legal provisions conflicting with EU law does not mean that an individual actually expects them to do so. After all, for an individual, laws enjoy a presumption of legality. The principle of legal certainty requires rules of law to be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings. [24] Such precision is clearly not given here. This cannot be other than detrimental to the individual.

43. Fourthly, I have difficulty in separating the requirement of an authorisation from the State monopoly. The two provisions are inextricably linked, given that the whole authorisation procedure is geared towards public entities. The whole logic of the GlüStV is that it applies to State entities only. If in that logic only State entities can apply for an authorisation, one can hardly expect a private operator to apply for such an authorisation when the law expressly discourages it.

3. No criminal sanction

44. The consequence of such an interpretation is that the substantive requirements of Paragraph 284 of the StGB will not be met.

45. Such reasoning is further supported by the reasoning of the Court in *Placanica*. Here, the Court unequivocally stated that 'a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of [EU] law'. [25] The Court repeated this formula in *Stoß and Others*, [26] a case which, as has been recalled above, had as its subject-matter the German legislation on bets on sporting competitions.

46. Ergo, the answer to the first question should be that in a situation in which a national court has established that a monopoly on sports betting is contrary to EU law, and in which only public entities can, under the provisions of the national law, obtain a national authorisation, Article 56 TFEU precludes national criminal

24 – See judgment in *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80, paragraph 74 and the case-law cited).

25 – See judgment in *Placanica* (C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 69).

26 – C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 115.

prosecution authorities from penalising the intermediation of bets on sporting competitions carried on without a national authorisation on behalf of a betting organiser licenced in another Member State.

C – *Second question*

47. By the second question, the referring court seeks to establish whether Directive 98/34 precludes an application of the provisions of the AGGlüStV after the expiration of the GlüStV, as this Bavarian law was not notified to the Commission.

48. Despite the considerable overall length of the request for a preliminary ruling, the referring court at this point does not very well substantiate the relevance of this question for the case at issue. It leaves open which provisions of the AGGlüStV it considers relevant in this respect. I shall come back to this point below.

49. Pursuant to Article 8(1) of Directive 98/34, which is a directly-applicable provision in the sense that it may be relied upon by an individual before a national court, [27] Member States are under an obligation to communicate to the Commission 'any draft technical regulation'. A technical regulation is defined in Article 1(11) of Directive 98/34 as 'technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider'.

50. The entire draft GlüStV was notified before its adoption to the Commission under Article 8(1) of Directive 98/34. [28] Pursuant to its terms, as notified to the

[27] – This constitutes settled case-law since judgment in *CIA Security International* (C-194/94, EU:C:1996:172, paragraph 44).

[28] – This is not the place to examine exactly which provisions of the GlüStV constitute technical regulations in the sense of the directive and therefore triggered the obligation to notify. Suffice it to say that, certainly, a provision containing a prohibition on gambling via the internet would constitute a technical regulation.

Commission and finally adopted, [29] the GlüStV ceased to be valid at the end of the fourth year following its entry into force. [30]

51. When the GlüStV expired at the end of 2011, the provisions of the GlüStV remained in force in Bavaria, by virtue of the AGGlüStV. At no point did a notification of this extension to the Commission take place.

52. I take the view that a notification should have taken place and that there is an infringement of Article 8(1) of Directive 98/34.

53. Since the directive's aim is preventive, to forestall complications arising from possible future barriers to trade, it is in the interest of both the Commission, as guardian of the Treaties, and the other Member States to be comprehensively informed of draft technical regulations. If a law is limited in time, this is an important, not to say essential, element. The Commission and Member States have an interest in knowing whether a law, which they consider to have expired, is re-enacted.

54. It should be added at this stage that the Court requires Member States to submit the drafts of entire laws to the Commission, even if only some of their provisions actually constitute technical regulations. [31] The Court has justified this by reference to the aim stated in the last sentence of the first subparagraph of Article 8(1) of the directive which is to enable the Commission to have as much information as possible on any draft technical regulation with respect to its content, scope and general context in order to enable it to exercise as effectively as possible the powers conferred on it by the directive. [32]

55. In my view, therefore, the Bavarian authorities infringed Article 8(1) of Directive 98/34 when they failed to notify the AGGlüStV. Extending the validity of a law by way of a different law in other words constitutes a new draft technical regulation, which is caught by Article 8(1), first subparagraph, of Directive 98/34. [33]

29 – Both the draft and the final version are available on the Commission's webpage: http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year= 2006&num= 658&mLang= EN.

30 – Unless the Conference of Minister-Presidents, with at least 13 votes, decided before the end of the fourth year that the Treaty would continue to be valid, taking into account the results of the evaluation — which did not happen.

31 – See judgment in *Commission* v *Italy* (C-279/94, EU:C:1997:396, paragraphs 40 and 41).

32 – Ibid.

33 – I thus do not consider Article 8(1), third subparagraph, of Directive 98/34 to play a decisive role at this stage, for we are clearly not in the presence of 'changes to [a] draft that have the effect of

56. What are the legal consequences of this non-notification?

57. It would be tempting to suggest that if a Member State has failed to notify a law, the entire law is not applicable. In defence of such a view it is argued that if a whole law has to be notified, then logically non-applicability should also extend to the whole law. [34] Such a solution, which would have the charm of being easily applicable, would moreover give Member States an additional incentive to notify draft laws to the Commission.

58. Nevertheless, I do not see room for such a strict interpretation.

59. Since *CIA Security International*, [35] the Court consistently holds that 'breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals'.

60. I understand this passage as only referring to the specific technical regulation(s) that *actually trigger* the notification obligation. Indeed, with respect to a draft Italian law, the Court has held that the mere fact that all the provisions contained in that law were notified to the Commission did not prevent the Italian Republic from bringing into force immediately, and therefore without waiting for the results of the examination procedure provided for by the directive, the provisions which did not constitute technical regulations. [36] In other words: while the Court requires a Member State to communicate the entire draft of a law, it does not require that State to suspend the entry into force of those parts that do not constitute technical regulations. Against the background of that case-law, it would appear to me to be logical that only those provisions of a law that actually constitute technical regulations are non-applicable. [37]

61. This brings me back to the case at issue. Neither the authorisation requirement nor the State monopoly constitute, in my view, technical regulations within the meaning of Directive 98/34.

significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive'.

34 – See Streinz, R., Herrmann, Ch., and Kruis, T., 'Die Notifizierungspflicht des Glücksspielstaatsvertrags und der Ausführungsgesetze der Länder gem. der Richtlinie Nr. 98/34/EG (Informationsrichtlinie)', *Zeitschrift für Wett- und Glücksspielrecht*, 2007, pp. 402-408, at p. 406.

35 – C-194/94, EU:C:1996:172, paragraph 54.

36 – See judgment in *Commission* v *Italy* (C-279/94, EU:C:1997:396, paragraph 42).

37 – This view is shared by Dietlein, J., 'Informationsrichtlinie', in J. Dietlein, M. Hecker and M. Ruttig (ed.), *Glücksspielrecht*, C.H. Beck, Munich, 2008, point 19.

62. Directive 98/34 is designed to protect, by means of preventive monitoring, the free movement of *goods* as well as the free provision of *information society services*.

63. It is true that the Court has previously ruled that national provisions on games on low-prize *machines* which could have the effect of limiting, or even gradually rendering impossible, the running of gaming on such low-prize *machines* anywhere other than in casinos and gaming arcades are capable of constituting 'technical regulations' within the meaning of Article 1(11) of Directive 98/34. [38] In such a case, one might try to identify a link to the free movement of goods, *in casu* gaming machines. In the present case, however, the prohibition is considerably wider. The link with a machine would appear to me to be too tenuous.

64. I therefore propose that the Court should reply to the second question that Article 8 of Directive 98/34 precludes the imposition of penalties for the intermediation of bets on sporting competition via a gaming machine, without a national authorisation, on behalf of a betting organiser licensed in another Member State where the interventions by the State are based on technical regulations, not notified to the European Commission. National provisions such as Paragraphs 4(1) and 10(2) and (5) of the GlüStV do not constitute 'technical regulations' within the meaning of Article 1(11) of Directive 98/34.

D – *Third question*

65. The third question has as its correct premiss that a restriction on the freedom to provide services and a licensing procedure are only justified to the extent that they serve to protect an overriding public interest objective and are, moreover, proportionate to the objective pursued and in conformity with general principles of EU law.

66. Thus, the referring court seeks guidance as to whether the ongoing licencing procedure on the basis of the GlüÄndStV is in conformity with Article 56 TFEU and general principles of EU law. Were this not to be the case, Ms Ince could not be held criminally liable under Paragraph 284 of the StGB. The referring court refers to long list of factors which could, in its view, lead to the ongoing licencing procedure being held to be illegal under EU law.

67. At the outset, it should be recalled that it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether national law is proportionate to the public interest

38 – See judgment in *Fortuna and Others* (C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 40). The Court was rather cautious however, as it went on to state in that same paragraph, that the notification obligation applied only in so far as it was established that the provisions constituted conditions which could significantly influence the nature or the marketing of the product concerned and that this was a matter for the referring court to determine.

objective. [39] However, the Court of Justice may provide guidance, based on the information provided in the context of the proceedings. [40] In the case at issue, the Court is not in a position to evaluate every detail provided by the national court, given that the third question is heavily laden with matters of fact. I would therefore advise the Court not to analyse in detail the matters of fact provided by the referring court as this exercise would require access to all elements of the national licensing procedure.

68. It is for this reason that I shall recall a few general principles to be respected by national authorities when they resort to a system of licensing. Those principles derive from the Court's case-law in the contexts of procurement, concessions and prior administrative authorisation procedures. The Court applies the same principles to these areas. There is always an obligation to comply with the fundamental rules of the Treaty and the principles flowing therefrom, as the exercise of such activities is liable to be of potential interest to economic operators in other Member States. [41]

69. Public authorities granting licences are bound to comply with the fundamental Treaty rules, including the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency. [42] In this respect, Member States must ensure a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed. [43]

70. Moreover, a licensing system must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily. [44] Any person affected by a restrictive measure based on a derogation to the freedom to provide services must have a judicial remedy available to them. [45]

71. Further guidance can be found in Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession

[39] – See judgments in *Rinner-Kühn* (171/88, EU:C:1989:328, paragraph 15); *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 82); and *Bressol and Others* (C-73/08, EU:C:2010:181, paragraph 75).

[40] – See judgment in *Bressol and Others* (C-73/08, EU:C:2010:181, paragraph 65).

[41] – See judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 33 and the case-law cited). See also judgment in *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraphs 39 to 47)

[42] – See judgment in *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraph 39 and the case-law cited).

[43] – Ibid., paragraph 41.

[44] – Ibid., paragraph 50 and the case-law cited.

[45] – Ibid.

contracts. [46] This directive, which entered into force on 18 April 2014, has to be transposed by 18 April 2016. Though the directive does not appear to apply to a licensing procedure such as the one in the case at issue [47] and, in any event, the transposition deadline has not yet expired, the general principles underlying it may serve as a source of inspiration and guidance given that the Court resorts to the same principles in procedures for granting licenses and concessions. [48]

72. With respect to a conflict of interest in the context of procurement, the Court has held that a person who has carried out certain preparatory work may find himself in a situation where it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer. [49] Moreover, Directive 2014/23 states in its Article 35, entitled 'Combating corruption and preventing conflicts of interest', that 'Member States shall require contracting authorities and contracting entities to take appropriate measures to combat fraud, favouritism and corruption and to effectively prevent, identify and remedy conflicts of interest arising in the conduct of concession award procedures, so as to avoid any distortion of competition and to ensure the transparency of the award procedure and the equal treatment of all candidates and tenderers'. It goes on to say that '[t]he concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or entity who are involved in the conduct of the concession award procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the concession award procedure'.

73. The principle of transparency requires the contracting authority to ensure, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed. [50] Again, Directive 2014/23, in its Annex V, contains a detailed list of 'Information to be included in concession notices referred to in Article 31'.

74. It is for the referring court to determine, in the light of the preceding considerations, whether the ongoing licensing procedure complies with the

46 – OJ 2014 L 94, p. 1.

47 – See recital 14 to the directive. Though both the GlüÄndStV and the order for a preliminary reference use the German term 'Konzession(en)', it should be stressed that, for the purposes of EU law, we are clearly in the presence of licenses and not 'concession contracts' in the sense of the directive.

48 – See judgment in *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraphs 39 to 47).

49 – Judgment in *Fabricom* (C-21/03 and C-34/03, EU:C:2005:127, paragraph 31).

50 – See judgment in *Telaustria and Telefonadress* (C-324/98, EU:C:2000:669, paragraph 62).

general principles and, therefore, constitutes a justified restriction to Article 56 TFEU.

75. The reply to the third question should therefore be that Article 56 TFEU precludes the imposition of penalties for the intermediation of bets on sporting competitions, without a national authorisation, on behalf of a betting organiser licensed in another Member State in a situation where a national court has established that a licensing procedure leading to the award of a maximum of 20 licences for betting organisers does not comply with general principles, such as those of equality, non-discrimination in respect of nationality and transparency.

IV – Conclusion

76. In the light of all of the foregoing considerations, I propose that the Court answer the questions referred by the Amtsgericht Sonthofen (Local Court, Sonthofen) (Germany) as follows:

(1) In a situation in which a national court has established that a monopoly on sports betting is contrary to EU law, and in which only public entities can, under the provisions of the national law, obtain a national authorisation, Article 56 TFEU precludes national criminal prosecution authorities from penalising the intermediation of bets on sporting competitions carried on without a national authorisation on behalf of a betting organiser licenced in another Member State.

(2) Article 8 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services precludes the imposition of penalties for the intermediation of bets on sporting competition via a gaming machine, without a national authorisation, on behalf of a betting organiser licensed in another Member State where the interventions by the State are based on technical regulations, not notified to the European Commission. National provisions such as Paragraphs 4(1) and 10(2) and (5) of the State Treaty on Gaming (Staatsvertrag zum Glücksspielwesen) do not constitute 'technical regulations' within the meaning of Article 1(11) of Directive 98/34.

(3) Article 56 TFEU precludes the imposition of penalties for the intermediation of bets on sporting competitions, without a national authorisation, on behalf of a betting organiser licensed in another Member State in a situation where a national court has established that a licensing procedure leading to the award of a maximum of 20 licences for betting organisers does not comply with general principles, such as those of equality, non-discrimination in respect of nationality and transparency.