ECLI:EU:C:2016:72

JUDGMENT OF THE COURT (First Chamber)

4 February 2016 (*)

(Freedom to provide services — Article 56 TFEU — Games of chance — Public monopoly on betting on sporting competitions — Prior administrative authorisation — Exclusion of private operators — Collection of bets on behalf of an operator established in another Member State — Criminal penalties — National provision contrary to EU law — Exclusion — Transition to a system providing for the grant of a limited number of licences to private operators — Principles of transparency and impartiality — Directive 98/34/EC — Article 8 — Technical regulations — Rules on services — Obligation to notify)

In Case C-336/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Amtsgericht Sonthofen (Local Court, Sonthofen, Germany), made by decision of 7 May 2013, received at the Court on 11 July 2014, in the criminal proceedings against

Sebat Ince,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2015,

after considering the observations submitted on behalf of:

– Sebat Ince, by M. Arendts, R. Karpenstein and R. Reichert, Rechtsanwälte,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Belgian Government, by P. Vlaemminck, B. Van Vooren, and R. Verbeke, advocaten, and by M. Jacobs, L. Van den Broeck and J. Van Holm, acting as Agents,

– the Greek Government, by E.-M. Mamouna and M. Tassopoulou, acting as Agents,

– the European Commission, by G. Braun and H. Tserepa-Lacombe, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 October 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU and 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 (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) (‘Directive 98/34’).

2 The request has been made in the context of two joined sets of criminal proceedings brought against Ms Ince, who is alleged to have acted as an intermediary, without the authorisation of the competent authority, in sporting bets within the territory of the *Land* of Bavaria.

Legal context

EU law

3 Recitals 5 to 7 of Directive 98/34 read as follows:

‘(5) Whereas it is essential for the Commission to have the necessary information at its disposal before the adoption of technical provisions; whereas, consequently, the Member States, which are required to facilitate the achievement of its task pursuant to Article 5 of the Treaty, must notify it of their projects in the field of technical regulations;

(6) Whereas all the Member States must also be informed of the technical regulations contemplated by any one Member State;

(7) Whereas the aim of the internal market is to create an environment that is conducive to the competitiveness of undertakings; whereas increased provision of

information is one way of helping undertakings to make more of the advantages inherent in this market; whereas it is therefore necessary to enable economic operators to give their assessment of the impact of the national technical regulations proposed by other Member States, by providing for the regular publication of the titles of notified drafts and by means of the provisions relating to the confidentiality of such drafts.'

4 Article 1 of that directive states:

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

1. "product", any industrially manufactured product and any agricultural product, including fish products;

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.

…

3. "technical specification", a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.

…

4. "other requirements", a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;

5. "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

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 Directive 98/34 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.

Where appropriate, and unless it has already been sent with a prior communication, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.

Member States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.

…'

German law

Federal law

6 Paragraph 284 of the Criminal Code (Strafgesetzbuch) states:

'(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 for a period not exceeding two years or a fine.

…

(3) Whosoever in cases under subparagraph (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 for a period from three months to five years.

…’

The Treaty on gaming

7 By the State Treaty on lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; ‘the Treaty on lotteries’), which entered into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and commercial placing of games of chance, with the exception of casinos.

8 In a judgment of 28 March 2006, the Bundesverfassungsgericht (Federal Constitutional Court) held, in relation to the legislation transposing the Treaty on lotteries in the *Land* of Bavaria, that the public monopoly on betting on sporting competitions existing in that *Land* infringed Article 12(1) of the Basic Law (Grundgesetz), guaranteeing freedom of occupation. That court held, inter alia, that, by excluding private operators from the activity of organising bets, without at the same time providing a regulatory framework capable of ensuring, in form and in substance, both in law and in fact, the effective pursuit of the objectives of reducing the passion for gambling and of combating gambling addiction, that monopoly had a disproportionately adverse effect on the freedom of occupation thus guaranteed.

9 The State Treaty on gaming (Staatsvertrag zum Glücksspielwesen; ‘Treaty on gaming’), which entered into force on 1 January 2008, established a new uniform framework for the organisation, operation and intermediation of games of chance designed to meet the requirements laid down by the Bundesverfassungsgericht (Federal Constitutional Court) in the above judgment of 28 March 2006. The Treaty on gaming had been notified to the Commission at the draft stage, in accordance with Article 8(1) of Directive 98/34.

10 According to Paragraph 1 of the Treaty on gaming, its objectives were the following:

‘1. to prevent dependency on gambling and on betting, and to create the conditions for effectively combating dependency,

2. to limit the supply of games of chance and to channel the gaming instinct of the population in an organised and supervised manner, preventing in particular a drift towards unauthorised gaming,

3. to ensure the protection of minors and players,

4. to ensure the smooth operation of games of chance and the protection of players against fraudulent manoeuvres, and to prevent criminality connected with and arising from games of chance.’

11 Paragraph 4 of that Treaty provided:

‘(1) 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).

(2) Such authorisation shall be refused where the organisation or intermediation of the game of chance is contrary to the objectives of Paragraph 1. Authorisation shall not be issued for the intermediation of games of chance that are unlawful according to the present State Treaty. There is no established right to obtain an authorisation.

…

(4) The organisation and intermediation of public games of chance on the internet are prohibited.’

12 According to Paragraph 5(3) of that Treaty:

‘The advertising of public games of chance on television ..., the internet and via telecommunications equipment is prohibited’.

13 Paragraph 10 of the Treaty was worded as follows:

‘(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.’

14 Paragraph 21(2) of the Treaty on gaming prohibited, inter alia, the organisation and intermediation of sporting bets or the advertising of such bets from being associated with the retransmission of sporting events by broadcasting and telemedia services.

15 Paragraph 25(6) of that Treaty set out the conditions under which the *Länder* were authorised, in derogation from Paragraph 4(4) of the Treaty, to permit the organisation and intermediation of lotteries on the internet.

16 Paragraph 28(1) of the Treaty on gaming provided for the possibility for the *Länder* to extend the Treaty upon its expiry on 31 December 2011. The *Länder* did not exercise that option. However, each *Land*, with the exception of the *Land* of Schleswig-Holstein, adopted provisions under which, upon the expiry of the Treaty on gaming, its rules would continue to apply as *Land* law until the entry into force of a new Treaty between the *Länder*. In Bavaria, the provision to that effect was contained in Paragraph 10(2) of the Bavarian Law implementing the Treaty on gaming (Bayerisches Gesetz zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland) of 20 December 2007 (GVBl p. 922, BayRS 2187-3-I; 'the Law implementing the Treaty on gaming'). Neither that Law nor the corresponding provisions adopted by the other *Länder* were notified to the Commission at the draft stage in accordance with Article 8(1) of Directive 98/34.

The amending Treaty on gaming

17 The amending Treaty on gaming (Glücksspieländerungsstaatsvertrag; 'the amending Treaty'), concluded between the *Länder*, entered into force in Bavaria on 1 July 2012.

18 Paragraphs 1 and 4 of the amending Treaty are, essentially, identical to Paragraphs 1 and 4 of the Treaty on gaming.

19 Paragraph 10 of the amending Treaty 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. That committee is to be composed of persons who, in view of the objectives referred to in Paragraph 1, have particular scientific or practical experience.

(2) In accordance with the law, the *Länder* may undertake that task either by themselves, through the intermediary of a public body operated jointly by all the *Länder* parties to the [amending] Treaty, or through the intermediary of legal persons under public law or private law companies in which legal persons under public law have a direct or indirect controlling holding.

…

(6) Persons other than those referred to in subparagraphs 2 and 3 shall be authorised to organise only lotteries and games in accordance with the provisions of the third section.'

20 Paragraph 10a of the amending Treaty, entitled 'Experimental clause for sports betting', provides:

'(1) With a view to achieving the objectives set out in Paragraph 1 in the best way possible, particularly in the context of combating the black market identified during the

assessment, Paragraph 10(6) shall not apply to the organisation of sporting bets for a period of seven years from the entry into force of the first amending Treaty on gaming.

(2) During that period, sporting bets may be organised only with a licence (Paragraphs 4a to 4e).

(3) The maximum number of licences is set at 20.

(4) The licence entitles the licensee, in accordance with the substantive and ancillary provisions laid down in accordance with Paragraph 4c(2), to organise and intermediate sporting bets on the internet, in derogation from the prohibition contained in Paragraph 4(4). Paragraph 4(5) and (6) shall apply by analogy. The scope of the licence shall be limited to the territory of the Federal Republic of Germany and to that of those Member States which recognise the validity of the German authorisation in their national territory.

(5) The *Länder* shall limit the number of bodies intermediating bets in order to achieve the objectives set out in Paragraph 1. Intermediation of sporting bets at those bodies shall require the authorisation referred to in the first sentence of Paragraph 4(1). The second sentence of Paragraph 29(2) shall apply by analogy.'

21 Paragraph 29 of the amending Treaty permits public operators holding an authorisation to organise sporting bets and their intermediaries to continue to offer such bets for one year after the first licence has been granted, without themselves being in possession of a licence.

22 Paragraphs 4a to 4e of the amending Treaty outline the licensing system. In particular, Paragraph 4a(4) of that treaty sets out the conditions for the grant of a licence and requires, inter alia, demonstration of the lawful origin of the resources necessary for organising gaming. Paragraph 4b of that treaty sets out the detailed arrangements governing the procedure for granting licences. That paragraph lists, inter alia, in subparagraph 5, the criteria to be used in deciding between several tenderers eligible to obtain a licence.

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

23 The referring court is requested to rule on the complaints raised by the public prosecutor's office in Kempten (Staatsanwaltschaft Kempten, *Land* of Bavaria) in the context of two joined sets of criminal proceedings brought against Ms Ince, a Turkish national resident in Germany, pursuant to Paragraph 284 of the Criminal Code.

24 The public prosecutor's office in Kempten accuses Ms Ince of having carried out sporting bet intermediation activities without holding authorisation issued by the competent authority of the *Land* concerned, by means of a gaming machine installed in a sports bar located in Bavaria. Ms Ince is alleged to have collected such bets on behalf of a

company established in Austria and holding a licence in that Member State authorising it to organise sporting bets. However, that company was not licensed to organise such bets in Germany.

25 The charges against Ms Ince concern, as regards the first set of criminal proceedings, the period from 11 to 12 January 2012, and, as regards the second set of criminal proceedings, the period between 13 April and 7 November 2012. Those proceedings differ essentially only in respect of the German legal framework in force at the time of the matters alleged.

26 The matters underlying the first charges, and underlying the second charges for the period between 13 April and 30 June 2012, came under the Law implementing the Treaty on gaming, which provided that, following the expiry of the Treaty on gaming, the rules thereof would continue to apply in Bavaria as *Land* law. That treaty established a public monopoly on the organisation and intermediation of sporting bets, first, by prohibiting, in Paragraph 4(1), the organisation and intermediation of sporting bets without the authorisation of the competent authority of the *Land* of Bavaria and, second, by excluding, in Paragraph 10(5), the issue of such authorisations to private operators.

27 By the 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), the Court held that the German courts could legitimately be led to consider that the public monopoly arising from the Treaty on gaming and the Treaty on lotteries was not suitable for guaranteeing, in a consistent and systematic manner, achievement of the objectives of general interest invoked by the German legislature, on the ground, inter alia, that the holders of that public monopoly were engaging in intensive advertising campaigns and that the competent authorities were conducting policies aimed at encouraging participation in certain games of chance not falling under that monopoly and resulting in a particularly high risk of addiction.

28 According to the referring court, all of the German courts that have been called upon to determine, following those judgments of the Court of Justice, whether the public monopoly on sporting bets was in conformity with EU law concluded that that was not the case. However, those courts are in disagreement as to the consequences to be drawn from the unlawfulness of that monopoly.

29 First, certain German courts, including some higher administrative courts, as well as certain administrative authorities, take the view that only Paragraph 10(5) of the Treaty on gaming, which provides for the exclusion of private operators, is incompatible with EU law, the authorisation obligation laid down in Paragraph 4(1) of that treaty being in principle compliant with EU law. Consequently, those courts have ruled out the application of the provision providing for the exclusion of private operators under the principle of primacy of EU law. They have accordingly taken the view that the substantive conditions laid down by the Treaty on gaming and the implementing laws of the *Länder* relating to the grant of authorisations to public operators should be applied to private operators. According to those courts, therefore, it is necessary to examine on a

case-by-case basis whether a private operator may obtain, under a fictitious authorisation procedure, an authorisation under the conditions laid down for the holders of the public monopoly and their intermediaries ('the fictitious authorisation procedure').

30 The Bundesverwaltungsgericht (Federal Administrative Court) confirmed and subsequently supplemented the case-law delivered following the 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) with a number of judgments delivered on 16 May 2013, allowing a precautionary prohibition of the organisation and intermediation of sporting bets by a private operator lacking German authorisation pending clarification, by the competent authorities, as to the eligibility of that operator to obtain such an authorisation, unless it is evident that the substantive conditions for the grant of an authorisation provided for public operators, with the exception of the potentially unlawful provisions concerning the monopoly regime, are satisfied.

31 The referring court notes that no private operator has obtained authorisation to organise or intermediate sporting bets within German territory following the fictitious authorisation procedure.

32 Second, other German courts are of the view that, since an infringement of EU law results from the combined effect of the authorisation obligation and the exclusion of private operators provided for by the Treaty on gaming and the implementing laws of the *Länder*, the act of ruling out application of that exclusion and replacing it with the fictitious authorisation procedure did not suffice to overcome the finding of unlawfulness. In support of such an approach, the referring court states that the procedure and authorisation criteria set by the Treaty on gaming and the legislation implementing that treaty were designed exclusively for public operators organising sporting bets and their intermediaries.

33 The facts underlying the second set of charges relating to the period between 1 July and 7 November 2012 were governed by the amending Treaty. The experimental clause for sports betting, introduced in Paragraph 10a of that treaty, lifted until 30 June 2019 the prohibition of issuing to private operators an authorisation to organise games of chance, under Paragraph 10(6) of that treaty, in relation to sporting bets. Private operators may thus, in theory, obtain such an authorisation through the prior issue of a licence to organise sporting bets.

34 Under those new rules, the organiser of sporting bets is required to obtain such a licence. Once the licence has been awarded to that organiser, its intermediaries may obtain an authorisation to collect bets on behalf of the organiser. Paragraph 10a of the amending Treaty provides for the grant of a maximum of 20 licences to public and/or private operators, following a centrally-organised procedure for the whole of Germany. However, pursuant to Paragraph 29 of the amending Treaty, the obligation to hold a licence applies to public organisers that are already operational and to intermediaries only for one year after the first licences have been granted.

35 On 8 August 2012 the licensing authority published a contract notice in the *Official Journal of the European Union* putting out to tender 20 licences for the pursuit of sporting bet organisation activities.

36 As a first step, a pre-selection phase was organised in order to eliminate candidates not fulfilling the minimum conditions for obtaining a licence. This was followed, as a second step, by a negotiation phase during which candidates selected in the first phase were invited to present their projects to the licensing authority. At the conclusion of that second phase, a comparative selection was carried out on the basis of a number of criteria.

37 A number of private operators have expressed doubts as to the transparency and impartiality of that procedure.

38 The referring court has noted that, as at the date on which the request for a preliminary ruling was filed, no licence had yet been issued pursuant to Paragraph 10a of the amending Treaty. In its written observations, the German Government has stated that, although 20 candidates were selected following the selection procedure, the award of licences was suspended by orders made in the context of actions for interim measures brought by a number of the unsuccessful candidates. During the hearing on 10 June 2015, the German Government stated that the licences had still not been awarded as of that date, owing to other incidents that had occurred in the context of national judicial proceedings.

39 The referring court takes the view that the objective constituent elements of the offence alleged against Ms Ince pursuant to Paragraph 284 of the Criminal Code are satisfied given that she carried out activities in the intermediation of sporting bets without holding an authorisation to that effect. Nevertheless, that court has doubts as to whether those activities attract criminal liability under EU law.

40 In those circumstances, the Amtsgericht Sonthofen (Local Court, Sonthofen) decided to stay the proceedings and to refer the following questions to the Court 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?

(b) Is the answer to Question (1)(a) altered by the fact that, in one of the fifteen 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*?

(c) Must the principles of EU law, in particular the freedom to provide services, and the judgment of the Court of Justice in *Stanleybet International and Others* (C-186/11 and C-209/11, EU:C:2013:33) 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 fulfilled 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 [Treaty on gaming]?

[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 [amending Treaty], 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 twenty 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 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504], *Carmen Media* [*Group*, C-46/08, EU:C:2010:505] and *Winner Wetten* [C-409/06, 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 twenty 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, invited only fourteen tenderers to present their social responsibility and safety policies in person, because these had fulfilled all of the minimum conditions for a licence, but, fifteen months after the start of the procedure, announced that not one of the tenderers had provided "verifiable" evidence that it fulfilled the minimum conditions;

(d) the State-controlled tenderer …, consisting of a consortium of State-owned lottery companies, was one of the fourteen tenderers invited to present their proposals to the licensing authority but, because of its organisational links to organisers of sporting events, was probably not eligible for a licence because the law … 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 [("Glücksspielkollegium")] 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?'

Findings of the Court

Jurisdiction of the Court

41 The Belgian Government disputes, in essence, the jurisdiction of the Court to answer the questions referred for a preliminary ruling on the ground that the situation at issue in the main proceedings does not fall within the scope of the freedom to provide services, which, in view of the wording of Article 56 TFEU, is enjoyed only by nationals of the Member States, thereby excluding nationals of third countries such as Ms Ince.

42 In that regard, it should be stated that, given that Ms Ince was collecting sporting bets on behalf of a company established in Austria, the situation at issue in the main proceedings concerns the exercise, by that company, of the freedom to provide services guaranteed by Article 56 TFEU.

43 Where a company established in a Member State pursues the activity of collecting bets through the intermediary of an economic operator established in another Member State, any restrictions imposed on the activities of that operator come within the scope of the freedom to provide services (see, by analogy, judgment in *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 46).

44 Consequently, the Court has jurisdiction to answer the questions referred for a preliminary ruling.

Question 1

Admissibility

45 The German Government contends that Question 1(a) is inadmissible on the ground that is hypothetical in nature, since, in view of the practice of certain Bavarian administrative and judicial authorities, consisting in applying 'fictitiously' to private operators the authorisation conditions laid down for selecting the holders of exclusive rights under the public monopoly deemed contrary to EU law, that monopoly has in fact ceased to exist.

46 That argument must be rejected given that the compatibility of that practice with Article 56 TFEU is specifically the subject of Question 1(b) and (c). Thus, the Court's answer to Question 1(a) would remain necessary for resolution of the case in the main proceedings if the Court were to find, when answering Question 1(b) and (c), that such a practice did not suffice to ensure the compliance with Article 56 TFEU of a public monopoly regime, such as that arising out of the provisions of the Treaty on gaming and its regional implementing laws held to be contrary to EU law following the findings made by the national courts.

47 Furthermore, the Greek Government disputes the admissibility of Question 1(b) and (c) on the basis that this is hypothetical in nature by reason of the fact that the German authorities have not had the opportunity to examine Ms Ince's eligibility to obtain an authorisation to organise or intermediate sporting bets.

48 In that regard, it should be pointed out that, according to the case-law, 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 breach of EU law. Given that Question 1(b) and (c) seeks to establish whether the conditions imposed for the award of an authorisation under the national legislation were contrary to EU law, the relevance of that question for the purposes of resolving the dispute before the referring court cannot be called into question (see, to that effect, judgment in *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 43).

49 It follows from all of the foregoing that Question 1 is admissible.

Merits

50 By its first question, the referring court essentially asks whether Article 56 TFEU must be interpreted as precluding the criminal-prosecution authorities of a Member State from penalising the unauthorised intermediation of sporting bets by a private operator on behalf of another private operator lacking an authorisation to organise sporting bets in that Member State, but holding a licence in another Member State, in the case where the obligation to hold an authorisation to organise or intermediate sporting bets forms part of a public monopoly regime that has been held by the national courts to be contrary to EU law. In addition, the referring court asks whether Article 56 TFEU precludes such a penalty even where a private operator may, in theory, obtain an authorisation to organise or intermediate sporting bets to the extent that knowledge of the procedure for granting such an authorisation is not guaranteed and the public monopoly regime governing sporting bets, held by the national courts to be contrary to EU law, has persisted despite the adoption of such a procedure.

51 Thus, the referring court is essentially asking the Court about the consequences to be drawn by the administrative and judicial authorities of a Member State from the finding of incompatibility with EU law of domestic law provisions establishing a public monopoly over sporting bets, such as those at issue in the main proceedings, pending legislative or regulatory reform to remedy such an infringement of EU law.

52 In that regard, it should be recalled at the outset that, in accordance with the principle of the precedence of EU law, provisions of the Treaties and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law (see judgments in *Simmenthal*, 106/77, EU:C:1978:49, paragraph 17; *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 18; and *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 53).

53 The Court has held 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 a 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 (see judgments in *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 69, and *Stanleybet International and Others*, C-186/11 and C-209/11, EU:C:2013:33, paragraph 38).

54 However, the refusal to allow a transitional period in the event of incompatibility of national legislation with Article 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 FEU Treaty provisions, inter alia by

making them subject to effective and strict controls by the public authorities (see judgment in *Stanleybet International and Others*, C-186/11 and C-209/11, EU:C:2013:33, paragraph 46).

55 In any event, if the Member State concerned should find that a reform of an existing monopoly, 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 Article 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 a system of prior administrative authorisation 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 (see judgments in *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 90, and *Stanleybet International and Others*, C-186/11 and C-209/11, EU:C:2013:33, paragraph 47).

56 It is appropriate to verify, in the light of those principles, whether a practice such as the fictitious authorisation procedure for the organisation and intermediation of sporting bets at issue in the main proceedings meets objective, non-discriminatory criteria that are known in advance.

57 In that regard, it must be noted that such a practice is, by definition, not codified. Moreover, in spite of the circumstance, invoked by the German Government, that the competent authority for granting in a centralised manner the authorisations for the organisation of sporting bets in the *Land* of Bavaria received almost 70 applications for authorisation from private operators, it follows neither from the order for reference nor from the observations submitted by the interested parties that that practice was the subject of advertising measures with a view to being brought to the attention of private operators liable to carry out activities in the organisation or collection of sporting bets. Thus, subject to verification by the referring court, the view cannot be taken that knowledge of the practice in question by such operators was guaranteed.

58 Furthermore, it is apparent from the order for reference that the competent authorities of the *Länder* do not apply that fictitious authorisation procedure in a unanimous and uniform manner, as only some of those authorities make use of it. Similarly, as has been stated in paragraphs 29 to 32 of the present judgment, the German courts are divided as to the lawfulness of such a procedure.

59 In such circumstances, it cannot be excluded that private operators may not be in a position to know either the procedure to be followed for requesting an authorisation for organising and intermediating sporting bets or the conditions under which they will be granted or refused an authorisation. Such lack of precision does not enable the operators concerned to be apprised of the extent of their rights and obligations deriving from

Article 56 TFEU, with the result that the system in question must be regarded as being contrary to the principle of legal certainty (see, by analogy, judgments in *Église de scientologie*, C-54/99, EU:C:2000:124, paragraph 22; *Commission* v *France*, C-483/99, EU:C:2002:327, paragraph 50; and *Festersen*, C-370/05, EU:C:2007:59, paragraph 43).

60 In any event, it must be stated that, as is apparent from the order for reference, no authorisation to organise or intermediate sporting bets has been issued to a private operator following the fictitious authorisation procedure at issue in the main proceedings.

61 In that regard, the referring court has noted that, since the conditions for granting an authorisation to organise sporting bets applicable to public operators under the Treaty on gaming and the implementing laws of the *Länder* are specifically aimed at justifying the exclusion of private operators, such operators can never in practice fulfil those conditions. Such is, *a fortiori*, the position following the judgments of the Bundesverwaltungsgericht (Federal Administrative Court) of 16 May 2013, which allow a precautionary prohibition of the organisation and intermediation of sporting bets by private operators in cases where those operators are not manifestly eligible to obtain such an authorisation.

62 It follows from such a finding that, as the referring court, Ms Ince and the Commission have argued, a practice such as the fictitious authorisation procedure at issue in the main proceedings cannot be regarded as having remedied the incompatibility with EU law, found by the national courts, of provisions of national law establishing a public monopoly regime with regard to the organisation and intermediation of sporting bets.

63 As regards the consequences of such an incompatibility, it must be recalled 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 (see judgments in *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, paragraph 69; *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraph 115; and *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 43).

64 Such a prohibition, which stems from the principle of the primacy of EU law and from the principle of sincere cooperation laid down in Article 4(3) TEU, is binding, within the sphere of their areas of competence, on every organ of the Member State concerned, including the criminal prosecution authorities (see, to that effect, judgment in *Wells*, C-201/02, EU:C:2004:12, paragraph 64 and the case-law cited).

65 Having regard to the foregoing, the answer to Question 1(a) to (c) is that Article 56 TFEU must be interpreted as precluding the criminal prosecution authorities of a Member State from penalising the unauthorised intermediation of sporting bets by a private operator on behalf of another private operator lacking an authorisation to organise sporting bets in that Member State, but holding a licence in another Member State, in the case where the obligation to hold an authorisation to organise or intermediate sporting

bets forms part of a public monopoly regime deemed by the national courts to be contrary to EU law. Article 56 TFEU precludes such a penalty, even where a private operator may, in theory, obtain an authorisation to organise or intermediate sporting bets, to the extent that knowledge of the procedure for granting such an authorisation is not guaranteed and the public monopoly regime with regard to sporting bets, deemed by the national courts to be contrary to EU law, has persisted despite the adoption of such a procedure.

Question 2

66 By its second question, the referring court essentially asks whether Article 8(1) of Directive 98/34 must be interpreted as meaning that the draft of regional legislation which maintains in force, throughout the region concerned, the provisions of legislation common to the various regions of a Member State that has expired is subject to the notification obligation laid down in that Article 8(1), in so far as that draft contains technical regulations, within the meaning of Article 1 of that directive, under which the breach of that obligation results in the unenforceability of those regulations against an individual in the context of criminal proceedings, even where that common legislation had previously been notified to the Commission at the draft stage pursuant to Article 8(1) of Directive 98/34 and expressly provided for the possibility of an extension, which, however, was not used.

67 As a preliminary point, it must be borne in mind that a breach of the notification obligation laid down in Article 8(1) of Directive 98/34 constitutes a procedural defect in the adoption of the technical regulations concerned, and renders those technical regulations inapplicable and therefore unenforceable against individuals (see, inter alia, judgment in *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 48 and the case-law cited).

68 In that regard, it should be emphasised that, as the Advocate General noted in point 60 of his Opinion, even though Article 8(1) of that directive requires the entire draft of a law containing technical regulations to be communicated to the Commission (see, to that effect, judgment in *Commission* v *Italy*, C-279/94, EU:C:1997:396, paragraphs 40 and 41), the non-applicability which results from the breach of that obligation extends not to all of the provisions of such a law, but only to the technical regulations contained therein.

69 Consequently, in order to provide a useful answer to the referring court, it is necessary, first, to verify whether the provisions of the Treaty on gaming allegedly infringed by Ms Ince, which remained applicable, upon the expiry of that treaty, as law of the *Land* of Bavaria by virtue of the Law implementing the Treaty on gaming, constitute ‘technical regulations’ for the purposes of Article 1.11 of Directive 98/34.

70 According to that latter provision, the concept of ‘technical regulation’ encompasses four categories of measures, namely (i) ‘technical specifications’ within the meaning of Article 1.3 of Directive 98/34, (ii) ‘other requirements’ as defined in Article 1.4 of that directive, (iii) ‘rules on services’ as referred to in Article 1.5 of that

directive, and (iv) ‘laws, regulations or administrative provisions of Member States … 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’.

71 It would appear, first of all, that the Treaty on gaming does not contain any provision falling within the first category of technical regulations, namely the concept of ‘technical specification’ within the meaning of Article 1.3 of Directive 98/34. That concept concerns exclusively national measures which refer to the product or its packaging as such and thus lay down one of the characteristics required of a product (see judgments in *Fortuna and Others*, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 28, and *Ivansson and Others*, C-307/13, EU:C:2014:2058, paragraph 19). The Treaty on gaming, however, regulates the organisation and intermediation of sporting bets without referring to the products which may be involved in such activities.

72 For the same reason, the Treaty on gaming likewise cannot contain provisions falling within the second category of technical regulations, namely the concept of ‘other requirements’ within the meaning of Article 1.4 of that directive, as that concept concerns the life cycle of a product after it has been placed on the market.

73 Last, it is necessary to verify whether the Treaty on gaming contains rules coming within the third and/or fourth categories of ‘technical regulations’ listed in Article 1.11 of Directive 98/34, namely ‘rules on services’ or those ‘prohibiting the provision or use of a service, or establishment as a service provider’.

74 According to Article 1.5 of that directive, ‘rules on services’ consist of every requirement of a general nature relating to the taking-up and pursuit of the service activities referred to in Article 1.2 of that directive, which include ‘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’.

75 In that regard, it must be stated that, as the Commission argued during the hearing, some of the provisions of the Treaty on gaming may be categorised as ‘rules on services’, in so far as they concern an ‘Information Society service’ within the meaning of Article 1.2 of Directive 98/34. Those provisions include the prohibition of offering games of chance on the internet laid down in Paragraph 4(4) of the Treaty on gaming, the exceptions to that prohibition listed in Paragraph 25(6) of that treaty, the restrictions placed on offering sporting bets via telemedia services under Paragraph 21(2) of that treaty, and the prohibition of broadcasting advertisements for games of chance on the internet or via telecommunications equipment pursuant to Paragraph 5(3) of that treaty.

76 With regard, by contrast, to the provisions of the Treaty on gaming other than those relating to an ‘Information Society service’, within the meaning of Article 1.2 of Directive 98/34, such as the provisions introducing the obligation to obtain an authorisation to organise or collect sporting bets and the impossibility of issuing such an authorisation to private operators, these do not constitute ‘technical regulations’ within the meaning of Article 1.11 of that directive. National provisions which merely lay down

conditions governing the establishment or provision of services by undertakings, such as provisions making the exercise of an activity subject to prior authorisation, do not constitute technical regulations within the meaning of that provision (see, to that effect, judgment in *Lindberg*, C-267/03, EU:C:2005:246, paragraph 87).

77 It will be for the referring court to verify whether Ms Ince, in the context of the joint criminal proceedings at issue in the main proceedings, is alleged to have infringed any of the provisions mentioned in paragraph 75 of the present judgment, which must be regarded as introducing rules on services within the meaning of Article 1.5 of Directive 98/34.

78 It is appropriate, second, to examine whether the Law implementing the Treaty on gaming, in so far as it rendered the provisions of the Treaty on gaming applicable as law of the *Land* of Bavaria upon the expiry of that treaty, was subject to the obligation of notification to the Commission under Article 8(1) of Directive 98/34, with the result that, in the event that Ms Ince were alleged to have infringed one or more of the technical regulations laid down by the Treaty on gaming, those regulations would be unenforceable against her in the absence of such notification.

79 In that regard, it must be noted at the outset that, as the Commission has stated, the provisions of the Law implementing the Treaty on gaming cannot be subject to the obligation, imposed by the third subparagraph of Article 8(1) of Directive 98/34 on Member States, to 'communicate the draft again' if significant changes are made to it. That obligation relates only to the situation — which does not obtain in the present case — in which significant changes are made, during the national legislative procedure, to a draft technical regulation after that draft has been notified to the Commission.

80 By contrast, it is appropriate to examine whether the Law implementing the Treaty on gaming ought, prior to its adoption, to have been notified to the Commission pursuant to the first subparagraph of Article 8(1) of Directive 98/34, in addition to and irrespective of the notification of the Treaty on gaming at the draft stage.

81 In this regard, it should be pointed out that, although the rules governing the organisation and intermediation of sporting bets under the Law implementing the Treaty on gaming are identical in content to the rules of the Treaty on gaming that had previously been notified to the Commission, they differ in their temporal and territorial scope.

82 Thus, attainment of the objectives pursued by Directive 98/34 requires that draft legislation such as the Law implementing the Treaty on gaming be notified to the Commission pursuant to the first subparagraph of Article 8(1) of that directive. As is apparent from, inter alia, recitals 5 and 6 thereof, the directive seeks, in the first place, to ensure a precautionary control of the technical regulations contemplated by a Member State by allowing the Commission and other Member States to become acquainted with them before their adoption. In the second place, as recital 7 of that directive indicates, the directive seeks to allow economic operators to make more of the advantages inherent in

the internal market by ensuring the regular publication of the technical regulations proposed by Member States and thus enabling those operators to give their assessment of the impact of those regulations.

83 Having regard, in particular, to that second objective, it is important that the economic operators of a Member State be informed of draft technical regulations adopted by another Member State and of their temporal and territorial scope, so as to enable them to be apprised of the extent of the obligations that may be imposed on them and to anticipate the adoption of those texts by adapting, if necessary, their products or services in a timely manner.

84 Consequently, the answer to Question 2 is that Article 8(1) of Directive 98/34 must be interpreted as meaning that the draft version of regional legislation which maintains in force, throughout the region concerned, the provisions of legislation common to the various regions of a Member State that has expired is subject to the notification obligation laid down in that Article 8(1) in so far as that draft version contains technical regulations within the meaning of Article 1 of that directive, with the result that failure to comply with that obligation renders those regulations unenforceable against an individual in the context of criminal proceedings. Such an obligation is not called into question by the fact that that common legislation had previously been notified to the Commission at the draft stage pursuant to Article 8(1) of Directive 98/34 and expressly provided for the possibility of an extension, which possibility, however, was not exercised.

Question 3

85 By its third question, the referring court essentially asks whether Article 56 TFEU must be interpreted as precluding a Member State from penalising the unauthorised intermediation of sporting bets on its territory on behalf of an economic operator holding a licence to organise sporting bets in another Member State:

– where the issue of an authorisation to organise sporting bets is subject to the obtaining of a licence by that operator in accordance with a procedure for the award of licences, such as that at issue in the main proceedings, if the referring court finds that that procedure does not observe the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency, and

– to the extent that, despite the entry into force of a national provision permitting the grant of licences to private operators, application of the provisions establishing a public monopoly regime over the organisation and intermediation of sporting bets, deemed by the national courts to be contrary to EU law, has persisted in practice.

86 It should be recalled, as a preliminary point, that public authorities concluding service concession contracts are obliged to comply with the fundamental rules of the Treaty in general, including Article 56 TFEU and, in particular, with the principles of equal treatment and non-discrimination on the ground of nationality, and with the

consequent obligation of transparency (see, to that effect, judgment in *Sporting Exchange*, C-203/08, EU:C:2010:307, paragraph 39 and the case-law cited).

87 In that context, that obligation of transparency, which is a corollary of the principle of equality, is designed essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all relevant information and to ensure the elimination of any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules governing the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the bids submitted satisfy the criteria applying to the contract in question (judgment in *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 73 and the case-law cited).

88 It is ultimately a matter for the referring court, which alone has jurisdiction to assess the facts and interpret the national legislation, to examine, in the light of those principles, whether the factors which it has set out, taken individually or through their combined effect, are capable of bringing into question the compliance of a procedure for granting licences to organise sporting bets, such as that at issue in the main proceedings, with the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency.

89 It must be pointed out that, in the present case, the referring court has noted, in the context of Question 3(f), that the licensing authority has not availed itself of the possibility of awarding licences to private organisers pursuant to Paragraph 10a of the amending Treaty. As has been mentioned in paragraph 38 of the present judgment, it is apparent from the observations of the German Government that the award of licences to the candidates selected following the selection procedure was suspended by several orders for interim measures made by German courts. Therefore, at the time of the matters alleged against Ms Ince, no private operator was authorised to organise or collect sporting bets in Germany, since the case-law of the Bundesverwaltungsgericht (Federal Administrative Court) cited in paragraphs 29 and 30 of the present judgment continued to apply to private operators.

90 By contrast, as the Amtsgericht Sonthofen (Local Court, Sonthofen) also found in the context of Question 3(f), public operators holding an authorisation to organise or intermediate sporting bets obtained pursuant to the Treaty on gaming or the regional laws applying that treaty could, by virtue of the transitional provision contained in Paragraph 29 of the amending Treaty, continue to carry out such activities for one year after the grant of the first licence, without themselves being in possession of a licence.

91 In those circumstances, that court takes the view that the public monopoly regime with regard to the organisation and intermediation of sporting bets provided for by the Treaty on gaming and the regional laws applying that treaty, which has been deemed by the national courts to be contrary to EU law, has persisted in practice.

92 In that regard, it should be emphasised that, as has been noted in paragraphs 53 to 55 of the present judgment, the Court held, in the judgment in *Stanleybet International and Others* (C-186/11 and C-209/11, EU:C:2013:33, paragraphs 38, 46 and 47), that national legislation concerning a public monopoly on sporting bets which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, cannot continue to apply during a transitional period. The refusal to allow a transitional period does not, however, oblige the Member State concerned to liberalise the market in games of chance, that State also being able to reform the existing monopoly in order to make it compatible with EU law or to replace it with a system of prior administrative authorisation based on objective, non-discriminatory criteria which are known in advance.

93 Having regard to the foregoing, and without it being necessary to determine, in addition, whether each of the factors set out in the context of Question 3(a) to (e), taken individually or through their combined effect, is capable of bringing into question the compliance of the procedure for granting licences at issue in the main proceedings with Article 56 TFEU, it must be stated that legislative reform, such as that which follows from the introduction of the experimental clause for sports betting contained in Paragraph 10a of the amending Treaty, cannot be regarded as having remedied the incompatibility with Article 56 TFEU of a public monopoly regime with regard to the organisation and intermediation of sporting bets, such as that which arises from the provisions of the Treaty on gaming and the laws applying it, in so far as, regard being had to the circumstances described in the context of Question 3(f), such a regime has continued to apply in practice despite the entry into force of that reform.

94 However, as has been pointed out in paragraph 63 of the present judgment, 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.

95 Accordingly, the answer to Question 3 is that Article 56 TFEU must be interpreted as precluding a Member State from penalising the unauthorised intermediation of sporting bets on its territory on behalf of an economic operator holding a licence to organise sporting bets in another Member State:

– where the issue of an authorisation to organise sporting bets is subject to the obtaining of a licence by that operator in accordance with a procedure for the award of licences, such as that at issue in the main proceedings, if the referring court finds that that procedure does not observe the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency, and

– to the extent that, despite the entry into force of a national provision permitting the grant of licences to private operators, application of the provisions establishing a public monopoly regime with regard to the organisation and intermediation of sporting bets, deemed by the national courts to be contrary to EU law, has persisted in practice.

Costs

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

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

1. **Article 56 TFEU must be interpreted as precluding the criminal prosecution authorities of a Member State from penalising the unauthorised intermediation of sporting bets by a private operator on behalf of another private operator lacking an authorisation to organise sporting bets in that Member State, but holding a licence in another Member State, in the case where the obligation to hold an authorisation to organise or intermediate sporting bets forms part of a public monopoly regime deemed by the national courts to be contrary to EU law. Article 56 TFEU precludes such a penalty, even where a private operator may, in theory, obtain an authorisation to organise or intermediate sporting bets, to the extent that knowledge of the procedure for granting such an authorisation is not guaranteed and the public monopoly regime with regard to sporting bets, deemed by the national courts to be contrary to EU law, has persisted despite the adoption of such a procedure.**

2. **Article 8(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, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that the draft version of regional legislation which maintains in force, throughout the region concerned, the provisions of legislation common to the various regions of a Member State that has expired is subject to the notification obligation laid down in that Article 8(1), in so far as that draft version contains technical regulations within the meaning of Article 1 of the directive, with the result that failure to comply with that obligation renders those regulations unenforceable against an individual in the context of criminal proceedings. Such an obligation is not called into question by the fact that that common legislation had previously been notified to the Commission at the draft stage pursuant to Article 8(1) of Directive 98/34 and expressly provided for the possibility of an extension, which possibility, however, was not exercised.**

3. **Article 56 TFEU must be interpreted as precluding a Member State from penalising the unauthorised intermediation of sporting bets on its territory on behalf of an economic operator holding a licence to organise sporting bets in another Member State:**

– **where the issue of an authorisation to organise sporting bets is subject to the obtaining of a licence by that operator in accordance with a procedure for the award of licences, such as that at issue in the main proceedings, if the referring court finds**

that that procedure does not observe the principles of equal treatment and non-discrimination on grounds of nationality and the consequent obligation of transparency, and

– **to the extent that, despite the entry into force of a national provision permitting the grant of licences to private operators, application of the provisions establishing a public monopoly regime with regard to the organisation and intermediation of sporting bets, deemed by the national courts to be contrary to EU law, has persisted in practice.**

[Signatures]

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* Language of the case: German.