Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 December 2016*

(Appeal — State aid — Operation of Video Lottery Terminals — Grant by a Member State of an exclusive licence — Decision finding no State aid — Article 108(3) TFEU — Regulation (EC) No 659/1999 — Articles 4, 7 and 13 — Failure to initiate the formal investigation procedure — Concept of 'serious difficulties' — Date of the assessment — Article 296 TFEU — Charter of Fundamental Rights of the European Union — Article 41 — Obligation to state reasons — Article 47 — Right to effective judicial protection — Article 107(1) TFEU — Concept of 'economic advantage' — Joint assessment of the measures notified)

In Case C-131/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 March 2015,

**Club Hotel Loutraki AE**, established in Loutraki (Greece),

**Vivere Entertainment AE**, established in Athens (Greece),

**Theros International Gaming, Inc**., established in Patras (Greece),

**Elliniko Casino Kerkyras**, established in Athens,

**Casino Rodos**, established in Rhodes (Greece),

**Porto Carras AE**, established in Alimos (Greece),

**Kazino Aigaiou AE**, established in Syros (Greece),

represented by I. Ioannidis, dikigoros, and S. Pappas, avocat,

appellants,

the other parties to the proceedings being:

**European Commission**, represented by A. Bouchagiar and P.-J. Loewenthal, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

**Hellenic Republic,**

* * Language of the case: English.

**Organismos Prognostikon Agonon Podosfairou AE (OPAP)**, established in Athens, represented by A. Tomtsis, dikigoros, and M. Petite, avocat,

interveners at first instance,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, A. Arabadjiev (Rapporteur), C.G. Fernlund and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 June 2016,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

## Judgment

1 By their appeal, Club Hotel Loutraki AE, Vivere Entertainment AE, Theros International Gaming, Inc., Elliniko Casino Kerkyras, Casino Rodos, Porto Carras AE and Kazino Aigaiou AE seek to have set aside the judgment of the General Court of the European Union of 8 January 2015, *Club Hotel Loutraki and Others* v *Commission* (T-58/13, not published, 'the judgment under appeal', EU:T:2015:1), by which the General Court dismissed their action seeking annulment of Commission Decision C(2012) 6777 final of 3 October 2012 on State aid SA.33988 (2011/N) — Greece — Arrangements for the extension of the exclusive right of the Organismos Prognostikon Agonon Podosfairou AE (OPAP) (football results forecasting body) to operate 13 games of chance and the granting of an exclusive licence to operate 35 000 Video Lottery Terminals for a period of 10 years ('the decision at issue').

### Legal context

2 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), which was in force on the date on which the decision at issue was adopted, provided, in Article 4, entitled 'Preliminary examination of the notification and decisions of the Commission':

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary investigation, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary investigation, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article [107(1) TFEU], it shall decide that the measure is compatible with the [internal] market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary investigation, finds that doubts are raised as to the compatibility with the [internal] market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108(2) TFEU] (hereinafter referred to as a "decision to initiate the formal investigation procedure").

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.

…'

3 Article 7 of Regulation No 659/1999, entitled 'Decisions of the Commission to close the formal investigation procedure', provided:

'1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the [internal] market have been removed, it shall decide that the aid is compatible with the [internal] market (hereinafter referred to as a "positive decision"). That decision shall specify which exception under the Treaty has been applied.

4. The Commission may attach to a positive decision conditions subject to which aid may be considered compatible with the [internal] market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a "conditional decision").

5. Where the Commission finds that the notified aid is not compatible with the [internal] market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a "negative decision").

6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed. The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.

…'

4 Article 13 of Regulation No 659/1999, entitled 'Decisions of the Commission', provided as follows in paragraph 1:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

## Background to the dispute

5 Seven casinos holding establishment licences in Greece operate, in that Member State, games of chance, including slot machines.

6 On 1 December 2011, the Greek authorities notified the Commission about two measures in favour of OPAP. The first measure concerned the grant to OPAP, in return for a fee of EUR 560 million, of an exclusive licence to operate 35 000 Video Lottery Terminals ('VLTs') for a period of 10 years, ending in 2022 ('the VLT Agreement'). The second measure consisted in a 10-year prolongation, from 2020 to 2030, by means of an addendum to an agreement signed between the Greek State and OPAP in 2000, of the exclusive rights already granted to OPAP for the operation of 13 games of chance by any means ('the Addendum').

7 On 4 April 2012, the appellants, with the exception of Kazino Aigaiou, filed a complaint with the Commission in which they submitted that the VLT Agreement involved the grant to OPAP of State aid incompatible with the internal market. According to the appellants, the Greek State would have been able to receive a higher price than the EUR 560 million provided for in that agreement if it had granted several licences and organised a public international call for tenders. Moreover, according to the appellants, the profits made by OPAP would have been considerably lower if it had operated under conditions of free competition.

8 By the decision at issue, the Commission took the view that the VLT Agreement and the Addendum could not be regarded as constituting an advantage for the purposes of Article 107(1) TFEU. Although it had evaluated those measures separately, it conducted a joint assessment of them inasmuch as they had been notified jointly and concerned the granting of exclusive rights to the same undertaking at the same time for comparable activities, and taking account of the announced privatisation of OPAP in the short term.

9 The Commission thus found that, although the amount of EUR 560 million owed by OPAP was significantly lower than the net present value of the VLT Agreement, the amount paid by OPAP as consideration for the Addendum, including the levy imposed by the Greek State corresponding to 5% of the gross revenues generated by the games concerned for the period from 13 October 2020 to 12 October 2030, was, by contrast, higher than the net present value of the Addendum.

10 The Commission also stated that the overpayment made by OPAP in the context of the Addendum was not, however, sufficient to ensure that, on average, the amount of EUR 560 million was greater than or equal to the net present value of the VLT Agreement. It was therefore agreed, in the course of exchanges between the Commission and the Greek authorities, that the latter had to commit to introducing an additional levy on the gross gaming revenues generated by OPAP in connection with the operation of the VLTs on top of the initial amount of EUR 560 million.

11 In those circumstances, the Commission concluded that the notified arrangements did not confer an advantage on OPAP and, consequently, did not constitute State aid within the meaning of Article 107(1) TFEU.

## The proceedings before the General Court and the judgment under appeal

12 By application lodged at the Registry of the General Court on 29 January 2013, the appellants brought an action for annulment of the decision at issue.

13 They relied on four pleas in support of their action. The first plea alleged infringement of Article 108(2) TFEU and a misuse of power inasmuch as the Commission had failed to initiate the formal investigation procedure even though it had encountered serious difficulties in the assessment

of the measures notified. By their second and third pleas, the appellants alleged infringement of Article 296 TFEU, as well as of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, inasmuch as the Commission had failed to fulfil its obligation to state reasons by not disclosing essential economic data in the non-confidential version of the decision at issue. It had also infringed the appellants' rights to good administration and to effective judicial protection. The fourth plea alleged infringement of Article 107(1) TFEU inasmuch as the Commission had unlawfully examined jointly the two measures notified.

14 By the judgment under appeal, the General Court dismissed the appellants' action in its entirety and ordered them to pay the costs.

## Forms of order sought

15 The appellants claim that the Court should:

— set aside the judgment under appeal;

— annul the decision at issue; and

— order the Commission and OPAP to pay the costs.

16 The Commission and OPAP contend that the Court should:

— dismiss the appeal; and

— order the appellants to pay the costs.

## The appeal

### *The first ground of appeal: infringement of Article 108(3) TFEU and of Articles 4, 7 and 13 of Regulation No 659/1999*

#### Arguments of the parties

17 The first ground of appeal is divided into two parts. By the first part of their first ground of appeal, the appellants take issue with the General Court for finding that the Commission was not required to initiate the formal investigation procedure provided for in Article 108(2) TFEU, despite the conclusions adopted by it before the commitment given on 7 August 2012 by the Greek authorities to introduce an additional levy on the gross gaming revenues generated by OPAP on top of the EUR 560 million provided for in the VLT Agreement. In this regard, they claim, in the first place, that the Commission's discretion in deciding to initiate the formal investigation procedure is restricted and that the preliminary investigation should not interfere with that procedure.

18 The appellants maintain, in the second place, that it follows from Article 108(2) and (3) TFEU and from Articles 4, 7 and 13 of Regulation No 659/1999 that the preliminary investigation is a *prima facie* assessment of those notified measures which, at the conclusion of that investigation, prove manifestly to constitute neither aid nor compatible aid. The formal investigation procedure laid down in Article 108(2) TFEU is aimed at assessing measures that are not *prima facie* compatible with the internal market.

19 According to the appellants, to the extent that, during the preliminary investigation and prior to negotiation of the additional levy, the Commission had concluded that the VLT Agreement conferred an advantage on OPAP, the Commission should have initiated the formal investigation procedure provided for in Article 108(2) TFEU, pursuant to Article 4(4) of Regulation No 659/1999. Consequently, by holding that there was no such obligation on the Commission in the present case, the General Court erred in law.

20 By the second part of their first ground of appeal, the appellants criticise the General Court on the ground that it did not carry out a combined assessment, first of all, of the frequency of the exchanges between the Commission and the Greek authorities, next, of the content of those exchanges and, finally, of the duration of the preliminary investigation. A joint assessment of those elements would, however, they submit, have demonstrated the existence of serious difficulties encountered by the Commission in the analysis of the measures notified.

21 In particular, they claim, first, that the technical nature of the questions raised by the assessment of the measures notified, as put forward by the General Court in paragraph 50 of the judgment under appeal to justify the finding that the exchanges between the Commission and the Greek authorities could not be considered to have been particularly frequent or intense, was not an appropriate criterion, the assessment being technical in each case, taking into account the nature of the test relating to the prudent private investor in a market economy.

22 Secondly, the complex calculations carried out during the preliminary investigation were, the appellants submit, not clear-cut since they involved several rounds of re-calculations and led to the adoption of the additional levy modifying the measures originally notified. The exchanges between the Commission and the Greek authorities were therefore not purely informative or explanatory.

23 Thirdly, the 10-month duration of the preliminary investigation confirmed in itself the existence of serious difficulties.

24 The Commission and OPAP contest the appellants' arguments. In particular, the Commission considers that the first ground of appeal is inadmissible in its entirety, as the appellants confine themselves to reproducing an argument advanced at first instance. OPAP, for its part, contends that the second part of the first ground of appeal is inadmissible inasmuch as the appellants are asking the Court to carry out an appraisal of the facts.

Findings of the Court

25 With regard to the alleged inadmissibility of the first ground of appeal in its entirety, suffice it to note that, contrary to what the Commission claims, the appellants do not confine themselves to repeating the arguments put forward at first instance, but contest the Court's application of EU law in paragraphs 47 to 62 of the judgment under appeal.

26 According to settled case-law of the Court, the points of law examined at first instance may be discussed again in the course of an appeal because, if a party could not base its appeal on pleas in law and arguments already relied on before the General Court, the appeal procedure would be deprived of part of its purpose (judgment of 4 September 2014, *Spain* v *Commission*, C-192/13 P, EU:C:2014:2156, paragraph 45).

27 As regards the admissibility of the second part of the first ground of appeal, it must be noted that, by the argument summarised in paragraphs 21 to 23 of the present judgment, the appellants ask the Court to undertake a fresh appraisal of the facts, as OPAP rightly observes. As such an assessment falls outside the jurisdiction of the Court, those claims must be rejected as being inadmissible.

28 Furthermore, while the arguments put forward in support of the second part of that ground of appeal in paragraph 20 of the present judgment, according to which the General Court failed to carry out a combined assessment of the various elements with which the appellants took issue, are admissible, those arguments are, none the less, based on a misreading of the judgment under appeal. The General Court did proceed, as is clear from paragraphs 60 to 62 of the judgment under appeal, to carry out a combined assessment of those different elements.

29 It follows that the second part of that ground of appeal must be rejected as being in part inadmissible and in part unfounded.

30 As regards the merits of the arguments put forward in the context of the first part of the first ground of appeal, it should be borne in mind that, according to settled case-law, the procedure under Article 108(2) TFEU is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the internal market. Thus, the Commission may confine itself to the preliminary investigation under Article 108(3) TFEU when taking a decision in favour of aid only if it is able to satisfy itself, after an initial examination, that that aid is compatible with the internal market. If, by contrast, the initial examination leads the Commission to the opposite conclusion or even if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 108(2) TFEU (judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 70 and the case-law cited).

31 As the criterion of serious difficulties is objective in nature, the existence of such difficulties must be looked for not only in the circumstances in which the Commission's decision was adopted after the preliminary investigation but also in the assessments upon which the Commission relied (judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 71 and the case-law cited).

32 It follows that the lawfulness of a decision not to raise objections, based on Article 4(3) of Regulation No 659/1999, depends on the question whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the measure notified should objectively have raised doubts as to the compatibility of that measure with the internal market, given that such doubts must lead to the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of that regulation may participate (judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 72 and the case-law cited).

33 The same principles apply where the Commission entertains doubts as to the actual classification of the measure under examination as aid, within the meaning of Article 107(1) TFEU (judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 47).

34 In view of the legal consequences of initiating the procedure provided for in Article 108(2) TFEU with regard to measures treated as new aid, where the Member State concerned contends that those measures do not constitute aid within the meaning of Article 107(1) TFEU, the Commission must undertake a sufficient examination of the question on the basis of the information notified to it at that stage by that State, even if the outcome of that examination is not definitive. By virtue of the principle of sincere cooperation between Member States and institutions, as embodied in Article 4(3) TEU, and in order not to delay the procedure, it is the responsibility of a Member State which considers that the measures in question do not constitute aid to provide the Commission, at the earliest possible moment after the Commission has drawn its attention to those measures, with the information on which its position is based. If those elements are such as to remove any doubts as to

the absence of any element of aid in the measures examined, the Commission cannot initiate the procedure provided for in Article 108(2) TFEU (judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 48).

35 In that regard, in accordance with the objective of Article 108(3) TFEU and its duty of sound administration, the Commission may, amongst other things, engage in a dialogue with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered. However, that power presupposes that the Commission may adjust its position in accordance with the results of the dialogue in which it engages, without that adjustment having to be interpreted, *a priori*, as establishing the existence of serious difficulties (judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 71).

36 Accordingly, the Commission may lawfully adopt, on the basis of Article 4(2) of Regulation No 659/1999, a decision whereby, while finding that there is no State aid, it takes note of commitments entered into by the Member State (see, to that effect, judgment of 13 June 2013, *Ryanair* v *Commission*, C-287/12 P, not published, EU:C:2013:395, paragraph 72).

37 It follows from the foregoing that, contrary to what the appellants claim, the fact that the Commission concluded, during the preliminary investigation and prior to negotiation of the additional levy, that the VLT Agreement conferred an advantage on OPAP was in no way such as to require the Commission to initiate, pursuant to Article 4(4) of Regulation No 659/1999, the formal investigation procedure provided for in Article 108(2) TFEU, as it remained possible to overcome the difficulties encountered during talks with the notifying State and in particular, as in the present case, by means of commitments entered into by the Greek State.

38 In those circumstances, it must be held that, by finding that the Commission was able lawfully to adopt the decision at issue on the basis of Article 4(2) of Regulation No 659/1999 after having taken note of the commitment entered into by the Greek authorities and after having concluded, following a detailed examination, that the Commission had not faced serious difficulties in its assessment of the measures notified, the General Court did not err in law in the manner claimed by the appellants.

39 Having regard to the foregoing considerations, the first ground of appeal must be rejected as being partly inadmissible and partly unfounded.

*The second ground of appeal: infringement of Article 296 TFEU by the Commission, as well as infringement of Articles 41 and 47 of the Charter*

Arguments of the parties

40 By their second ground of appeal, the appellants claim that the General Court erred in law in holding that the absence of certain data in the decision at issue did not support the conclusion that the Commission's decision was vitiated through failure to state reasons within the meaning of Article 296 TFEU or that it infringed the right to effective judicial protection. They submit that the Commission redacted, in the decision at issue, almost all of the economic data in question, including those serving as the basis of the calculations made and those relating to the additional levy. Consequently, the appellants argue, they were prevented from arguing that there was a manifest error of assessment on the part of the Commission and the General Court was unable to review the validity of the economic data and the accuracy of the calculations made by the Commission.

41 In particular, the appellants claim that they were unable to verify whether the amount paid by OPAP in consideration for the measures notified corresponded to the highest price that a private investor acting under normal competitive conditions would have been prepared to pay.

42 The appellants maintain, furthermore, that the Commission's declarations concerning the fact that OPAP made an 'overpayment' for the Addendum, the level of consideration for which excluded any advantage resulting from the lower price paid for the VLT Agreement, cannot be the subject of judicial review.

43 The Commission and OPAP contest the appellants' arguments and contend, in particular, that the second ground of appeal is inadmissible, as the appellants confine themselves in this regard to reproducing an argument advanced at first instance.

Findings of the Court

44 With regard to the inadmissibility of the second ground of appeal, suffice it to note that the appellants do not confine themselves to repeating the arguments put forward at first instance, but contest the interpretation or application of EU law by the General Court in paragraphs 73 to 76 of the judgment under appeal.

45 With regard to the merits of this ground of appeal, first of all it must be stated that, when an applicant seeks the annulment of a decision not to raise objections, that applicant essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the measure notified should have raised doubts as to the compatibility of that measure with the internal market. The use of such arguments cannot, however, have the consequence of changing the subject matter of the application or of altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in order to show that the Commission was required to initiate the formal investigation procedure under Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 (judgment of 27 October 2011, *Austria* v *Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 50).

46 Next, the statement of reasons required by Article 296 TFEU and Article 41(2)(c) of the Charter must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court of the European Union to exercise its power of review (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 147 and the case-law cited).

47 The requirement that reasons be given must be assessed according to the circumstances of the case. It is not necessary for the reasoning to go into all of the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150 and the case-law cited).

48 However, the obligation laid down in Article 339 TFEU to preserve professional secrecy cannot justify deficiencies in the statement of reasons. In accordance with the case-law, the obligation to respect professional secrecy cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essential content (see, to that effect, judgment of 13 March 1985, *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, 296/82 and 318/82, EU:C:1985:113, paragraph 27).

49 Finally, it must be noted that the first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union have been infringed to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection and the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law (judgments of 18 December 2014, *Abdida*, C-562/13, EU:C:2014:2453, paragraph 45, and of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650, paragraph 95).

50 In the present case, the General Court noted in paragraph 73 of the judgment under appeal 'that the non-confidential version of the [decision at issue] [omitted] a lot of economic data and that the lack of access to that data [did] not allow the accuracy of the calculations made by the Commission to be determined'.

51 However, in paragraphs 74 and 75 of that judgment, it held that 'the Commission's reasoning [was] in fact clear from the non-confidential version of the [decision at issue] to which the applicants had access' because that version 'clearly [showed] the methodology followed by the Commission in the case'.

52 In this respect, the General Court stated in paragraph 74 of that judgment that, in that version, the Commission:

— set out the criterion which it intended to apply in order to determine whether or not an advantage existed;

— explained how it had calculated the net present value of the VLT Agreement and the Addendum;

— stated that that value depended on the discount rate to be used;

— indicated the reasons why it considered that it could jointly assess the two measures;

— stated that the consideration provided in the Addendum was higher than the net present value of the exclusive rights granted by it;

— explained that the consideration provided in the VLT Agreement was less than the net present value of the exclusive rights and that, even by adding the overpayment made by OPAP in the Addendum, that consideration remained inadequate;

— explained that the increase of the consideration provided in the VLT Agreement, stipulated in the commitment lodged by the Greek authorities on 7 August 2012, ensured that the level of consideration was sufficient to exclude any advantage; and

— explained the method by which that consideration was calculated.

53 In paragraph 76 of the judgment under appeal, the General Court indicated that 'the applicants [had] not specified the relevance of the omitted data for the purposes of the present action. They [had] not explained the importance of that data either for understanding the reasoning followed by the Commission or for developing their pleas relating to the obligation to initiate a formal investigation procedure (first plea) and the joint assessment of the VLT Agreement and of the Addendum (fourth plea). The applicants [had] also failed to specify what other pleas they would have sought to develop in support of the present action, if they had had access to the omitted data'.

54 The General Court then concluded, in paragraph 77 of that judgment, that in those circumstances 'the omission of economic data in the non-confidential version of the [decision at issue] did not prevent the applicants from understanding the reasoning followed by the Commission nor hinder their ability to challenge that decision before the Court, nor prevent the Court from exercising its judicial review in the present action'.

55 Consequently, it follows from the findings and the assessments of the General Court that the non-confidential version of the decision at issue discloses in a clear and unequivocal fashion the reasoning followed by the Commission and the methodology used by it, in such a way as to enable the persons concerned, including the appellants in particular, to ascertain those reasons and the General Court to exercise its power of review in respect of them.

56 As regards the question whether the circumstances of the case required the reasoning to specify the data redacted in that version, it has been stated in paragraphs 33 and 45 of the present judgment that the appellants may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary investigation phase of the measure notified should objectively have raised doubts, in the present case, as to the classification as aid, within the meaning of Article 107(1) TFEU, of the measures at issue. Consequently, the arguments put forward by the appellants before the General Court had to be intended, not to challenge the merits of the decision at issue, but precisely to establish the existence of such doubts and, thus, of the Commission's serious difficulties in the classification of the VLT Agreement and the Addendum as State aid.

57 However, as the General Court also emphasised in paragraph 76 of the judgment under appeal, the appellants have specified neither at first instance nor, moreover, before the Court to what extent the redacted data would have been relevant for the purpose of providing evidence that the Commission had encountered serious difficulties as regards the classification as aid, for the purposes of Article 107(1) TFEU, of the measures at issue. By their arguments, the appellants confine themselves to challenging the merits of the decision at issue.

58 In those circumstances, it has not been established either that the Commission infringed the obligation to state reasons incumbent on it by redacting the economic data in the non-confidential version of the decision at issue or that that redaction infringed the appellants' right to an effective judicial remedy.

59 In those circumstances, the second ground of appeal must be rejected as unfounded.

*The third ground of appeal: infringement of Article 107(1) TFEU*

Arguments of the parties

60 By their third ground of appeal, the appellants claim, in the first place, that the application of Article 107(1) TFEU requires the Commission, in the case of a joint assessment of different measures, to determine whether or not those measures affect the same market. In that respect, they point to the risk of the joint assessment hiding the existence of a distortion of competition on at least one of the markets taken individually.

61 In the second place, they maintain that the compensation of payments, such as that made in the context of the joint assessment, is capable of resulting in the same effects of excluding competition as is predatory pricing.

62 The appellants complain, in the third place, that the General Court based its conclusion as to the lawfulness of the joint assessment of the measures notified, in paragraph 87 of the judgment under appeal, on the vague concept of 'similarity' of the activities covered both by the Addendum and by the

VLT Agreement. First of all, they submit, the single common point between those activities resides in the element of chance that they entail. Next, they argue, differences between those activities were highlighted by Advocate General Bot in his Opinion in the case which gave rise to the judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International* (C-42/07, EU:C:2009:519). Finally, in their view, the concept of 'similarity' does not amount to 'interchangeability'.

63 In the fourth place, challenging the conclusion reached by the General Court in paragraphs 91 and 92 of the judgment under appeal, according to which the joint assessment of the measures notified was lawful on the sole ground that they formed part of the same economic context, the appellants stress that this concept must be defined objectively and not in a way that allows the notifying Member State to modify it at its discretion.

64 In the fifth place, they submit that, although the consideration was paid at the same time for the two measures, the joint assessment could not, however, concern measures relating to different time periods.

65 In the sixth and last place, the appellants take the view that cross-subsidisation practices do not create a link between the VLT and slot-machine market, on the one hand, and that of the 13 games covered by the Addendum, on the other, given that the transfer of funds occurs only from a logistical point of view and does not imply that it is combined with a shift of demand.

66 OPAP and the Commission contest the appellants' arguments. In particular, the Commission maintains that the third ground of appeal is inadmissible in its entirety, given that the appellants lacked standing to challenge the merits of the decision at issue before the General Court.

Findings of the Court

67 As a preliminary point, it should be observed that it is for the Court to assess whether, in the circumstances of the present case, the proper administration of justice justifies the rejection of the third ground of appeal on the merits without ruling on the plea of inadmissibility raised by the Commission (see, to that effect, judgment of 24 June 2015, *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 193 and the case-law cited).

68 The Court finds that that is the position here. As the General Court itself, in paragraphs 85 and 86 of the judgment under appeal, in the interests of economy of procedure, applied the principles stemming from the judgment of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraph 52), economy of procedure also justifies the Court in examining the third ground of appeal on the merits without ruling beforehand on the plea of inadmissibility raised.

69 In that respect, it must be noted that the Commission confined itself, in the decision at issue, to examining whether the VLT Agreement and the Addendum conferred an economic advantage on OPAP for the purposes of Article 107(1) TFEU. Taking the view that that was not the case, the Commission did not examine the other criteria referred to in that provision.

70 According to settled case-law of the Court, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which are to be regarded as constituting an economic advantage that the recipient undertaking would not have obtained under normal market conditions meet the conditions for the conferral of an economic advantage (judgment of 8 May 2013, *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 83).

71 In the same way, the conditions which a measure must meet in order to be treated as 'aid' for the purposes of Article 107 TFEU are not met if the recipient undertaking could, in circumstances which correspond to normal market conditions, have obtained the same advantage as that which has been made available to it through State resources (judgment of 24 January 2013, *Frucona Košice* v *Commission*, C-73/11 P, EU:C:2013:32, paragraph 70).

72 However, the expression 'normal market conditions', within the meaning of that settled case-law, is to be interpreted as covering the conditions applying to the economy of a Member State where it does not intervene in favour of certain undertakings (see, to that effect, order of 5 February 2015, *Greece* v *Commission*, C-296/14 P, not published, EU:C:2015:72, paragraph 34).

73 Consequently, a general obligation for the Commission to define, prior to any analysis of the possible conferral of an economic advantage in favour of one or several undertakings, the market or markets concerned by the State intervention subject to examination under Article 107 TFEU cannot be deduced from that case-law.

74 As Article 107(1) TFEU is intended to prevent the recipient undertaking from being placed, by means of State resources, in a more favourable financial position than that of its competitors (judgment of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 90), the Commission may directly assess, where it proves to be possible, whether the State measure at issue is capable of placing its recipients in a more favourable financial position than that of their identified competitors or type of competitors.

75 Furthermore, in so far as, for the purposes of classifying State intervention as State aid within the meaning of that provision, the Commission analyses whether that intervention has the effect of favouring its recipient and, therefore, of placing the latter in a more favourable financial position than that of its competitors, there is nothing, in principle, to prevent the Commission from having the possibility, where several State interventions affect the financial position of the same undertaking, of examining them jointly where this proves to be appropriate.

76 In the present case, the General Court found, in paragraphs 92 and 93 of the judgment under appeal, that the VLT Agreement and the Addendum had been adopted at the same time, with a view to one and the same privatisation of OPAP, that they had been the subject of a joint notification to the Commission, and that the levies payable by OPAP for the grant of two categories of exclusive rights were due at the same time, by means of an advance payment.

77 In those circumstances, the General Court properly held that the appellants had not demonstrated the existence of errors of law when the Commission carried out a joint assessment of the VLT Agreement and the Addendum. In particular, the reasons why the financial situation of OPAP would be different if the latter had carried out, at the same time and for the two same levies, the payment of an identical total amount that broke down into different percentages for the VLT Agreement and the Addendum are not apparent from the appellants' arguments.

78 It follows that the third ground of appeal must be rejected as unfounded.

79 Having regard to all of the foregoing considerations, the appeal must be dismissed.

## Costs

80 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs.

81 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

82 Since the appellants have failed in their appeal and OPAP and the Commission have applied for costs to be awarded against them, the appellants must be ordered to pay the costs.

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

**1. Dismisses the appeal;**

**2. Orders Club Hotel Loutraki AE, Vivere Entertainment AE, Theros International Gaming, Inc., Elliniko Casino Kerkyras, Casino Rodos, Porto Carras AE and Kazino Aigaiou AE to pay the costs.**

Silva de Lapuerta Regan Arabadjiev

Fernlund Rodin

Delivered in open court in Luxembourg on 21 December 2016.

A. Calot Escobar President
Registrar R. Silva de Lapuerta