Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 28 July 2016 [1]

**Case C-131/15 P**

**Club Hotel Loutraki AE**
**Vivere Entertainment AE**
**Theros International Gaming, Inc.**
**Elliniko Casino Kerkyras**
**Casino Rodos**
**Porto Carras AE**
**Kazino Aigaiou AE**
**v**

**European Commission**

(Appeal — State aid — Extension of exclusive rights for the operation of 13 games of chance — Grant by the Hellenic Republic of an exclusive license to operate Video Lottery Terminals — Article 108(2) and (3) TFEU — Preliminary examination — Conditions for initiating the formal investigation procedure — Decision finding no State aid — Serious difficulties — Statement of reasons — Joint assessment of the notified measures)

1. This appeal raises certain issues relating to the State aid review procedure. It illustrates that third parties, or rather interested parties, who seek to overturn a decision by the European Commission not to initiate the formal investigation procedure set out in Article 108(2) TFEU, by arguing that the Commission encountered 'serious difficulties' in assessing the measures in question, might in fact themselves encounter such difficulties.

2. Should this case have been one of the few successful cases? For the reasons set out below I would advise against it.

3. 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 ('the appellants') seek to have set aside the judgment of 8 January 2015 in *Club Hotel Loutraki and Others* v *Commission,* [2] by which the General Court dismissed their action seeking the annulment of a decision adopted by the Commission pursuant to Article 4(2) of Regulation No 659/1999. [3]

1 — Original language: English.

2 — Judgment in Case T-58/13, EU:T:2015:1 ('the judgment under appeal').

3 — Commission Decision C(2012) 6777 final on State aid SA.33988 (2011/N) — Greece — Arrangements for the extension of OPAP's exclusive right 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').

## I – Legal framework

4. Regulation (EC) No 659/1999[4] has been replaced by Council Regulation (EU) 2015/1589[5] of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. However, at the time of the adoption of the decision at issue, only Regulation No 659/1999 was applicable.[6]

5. Article 4 of Regulation No 659/1999 ('Preliminary examination of the notification and decisions of the Commission') provides:

'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 examination, 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 examination, finds that no doubts are raised as to the compatibility with the common 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 common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the [FEU] Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common 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 …'

## II – Background to the proceedings

6. On 1 December 2011, the Greek authorities notified the Commission of two measures ('the notified measures') in favour of the Organismos Prognostikon Agonon Podosfairou AE (OPAP) (football results forecasting body).

7. The first measure concerned the grant to OPAP, in exchange 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').

8. The second measure concerned the 10-year prolongation, from 2020 to 2030, of the exclusive rights previously granted to OPAP for the operation of 13 games of chance by any means ('the Addendum'). The Addendum stipulated that OPAP would pay in return for those rights, (i) a lump sum of EUR 375 million and (ii) a levy to the Greek State of 5% on the gross gaming revenues from the games concerned for the period from 13 October 2020 to 12 October 2030.

4 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

5 — OJ 2015 L 248, p. 9.

6 — As worded before the entering into force of Council Regulation No 734/2013 of 22 July 2013 amending Regulation No 659/1999.

9. On 4 April 2012, six casinos (all of the appellants except for Kazino Aigaiou AE) lodged a complaint with the Commission, claiming that the VLT Agreement entailed the grant to OPAP of State aid which was incompatible with the internal market.

10. During discussions between the Commission and the Greek authorities in the context of the notification, it was agreed that a supplement to the consideration originally envisaged for the VLT Agreement should be introduced. By letter of 7 August 2012, the Greek authorities submitted a commitment to introduce an additional levy on the gross gaming revenues obtained by OPAP from the operation of VLTs ('the additional levy').

11. On 3 October 2012, the Commission adopted the decision at issue. In that decision the Commission concluded, having regard to the additional levy introduced by the Greek authorities, that the notified measures did not confer an advantage on OPAP and thus did not constitute State aid within the meaning of Article 107(1) TFEU.

## III – Procedure before the General Court and the judgment under appeal

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

13. In support of their action, the appellants put forward four grounds for annulment: (i) infringement of Article 108(2) TFEU and misuse of power in that the Commission failed to initiate the formal investigation procedure as required by that provision; (ii) and (iii) breach of the duty to state reasons and of the right to good administration, and breach of the right to effective judicial protection, as regards the redaction, in the non-confidential version of the decision at issue, of essential economic data; and (iv) infringement of Article 107(1) TFEU in that the Commission examined the VLT Agreement and the Addendum jointly in order to verify whether an economic advantage was conferred on OPAP.

14. By orders of 12 July and 12 September 2013, the Hellenic Republic and OPAP were granted leave to intervene in support of the forms of order sought by the Commission.

15. Following a public hearing, the General Court, in the judgment under appeal, dismissed the action in its entirety and ordered the appellants to bear their own costs and to pay those incurred by the Commission and OPAP.

## IV – Forms of order sought and procedure before the Court

16. By their appeal, the appellants claim that the Court should:

— set aside the judgment under appeal;

— annul the decision at issue;

— order the Commission and OPAP to pay the costs.

17. In its response, the Commission claims that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

18. In its response, OPAP, claims that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

19. The appellants, the Commission and OPAP presented oral argument at the hearing held on 2 June 2016.

## V – Assessment of the grounds of appeal

### A – *Preliminary observations*

#### 1. The grounds of appeal

20. The appellants put forward three grounds of appeal in support of the forms of order sought.

21. By their first ground of appeal, the appellants claim that the General Court erred in law by holding that the Commission was not obliged to initiate the formal investigation procedure set out in Article 108(2) TFEU. By holding that the Commission was entitled to negotiate and take into account the additional levy introduced by the Greek authorities, the General Court failed to distinguish between the preliminary examination stage and the formal investigation procedure — a distinction which is fundamental to the protection of the appellants' procedural rights. Furthermore, it did so by erroneously concluding that there was no indication that the Commission was faced with 'serious difficulties' in assessing the notified measures, such as to require it to initiate the formal investigation procedure.

22. By their second ground of appeal, the appellants claim that the General Court erred in law by concluding that the Commission had observed its duty to state reasons and that the appellants' rights to good administration and effective judicial protection had not been infringed, even though it was impossible to determine, on the basis of the non-confidential version of the decision at issue, whether the calculations made by the Commission were correct.

23. By their third ground of appeal, the appellants argue that the General Court erred in law by holding that the joint assessment of the Addendum and the VLT Agreement by the Commission did not infringe Article 107(1) TFEU.

24. Before examining the various grounds of appeal in detail, I shall briefly reflect on the EU State aid review procedure and the role that interested parties — that is, anyone whose interests might be affected by the granting of aid, such as the beneficiary of the aid or competing undertakings —[7] play in that procedure.

7 — 'Interested party' is defined in Article 1(h) of Regulation No 659/1999 as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

2. EU State aid review procedure and the role of interested parties

25. According to Article 108(1) TFEU, the Commission must constantly review and control State aid. In order to enable the Commission to review any new aid that Member States intend to grant, they must notify the Commission thereof. [8] Since the notifying Member State is prevented from putting the planned aid into effect during the review procedure, a two-month period is prescribed, within which the Commission has to take a decision to clear the measure [9] or to initiate the second stage of the procedure, that is to say, the formal investigation procedure set out in Article 108(2) TFEU. [10] According to Article 4(4) of Regulation No 659/1999, the Commission must initiate the formal investigation procedure if it finds, after a preliminary examination, that *doubts* are raised as to the compatibility of a notified measure with the internal market.

26. I shall further reflect on the limits of the preliminary examination stage and the obligation to initiate the formal investigation procedure in the context of the appellants' first ground of appeal. It is sufficient here to take note of the term 'doubts', which in the Court's case-law is often referred to as 'serious difficulties'; [11] a key term for delimiting the scope of the preliminary examination.

27. At this juncture, I would like to emphasise that the State aid review procedure is first and foremost a procedure between the Commission and the notifying Member State. Interested parties, such as the appellants, are not parties to the procedure and hence only play a marginal role. [12] It is only within the framework of the formal investigation procedure that Article 108(2) TFEU imposes an obligation on the Commission to give interested parties notice to submit their comments. It follows from the case-law that this right enables such parties to be involved in the administrative procedure to the extent appropriate, having regard to the circumstances of the case, [13] but does not give them any rights of defence on a par with the notifying Member State, which is a party to the procedure and the addressee of the decision. [14] It is important to bear this in mind when examining the appellants' second ground of appeal relating to the inadequacy of the statement of reasons.

28. To counterbalance this peripheral role of interested parties, the Court has held that any interested party may challenge a clearance decision adopted by the Commission pursuant to Article 4(2) or (3) of Regulation No 659/1999, or in other words, a decision not to initiate the formal investigation procedure set out in Article 108(2) TFEU. [15] However, an interested party may not challenge the substance of such a decision without having demonstrated, in accordance with Article 263(4) TFEU, that it is directly and individually concerned by the decision. The appellants' third ground of appeal raises the issue of whether they meet this requirement.

29. Keeping those characteristics of the State aid review procedure and the role of interested parties in mind, I shall now examine the different issues raised by the appeal.

8 — See Article 108(3) TFEU. The notification system is complemented by a possibility for interested parties to complain about aid measures adopted by Member States.

9 — The Commission may either adopt a decision pursuant to Article 4(2) of Regulation No 659/1999, as in the present case, finding that the notified measure does not constitute aid, or a decision pursuant to Article 4(3) of Regulation No 659/1999, finding that the notified measure constitutes aid but is compatible with the internal market.

10 — The two-month time limit stems from the Court's case-law: see judgment of 11 December 1973 in *Lorenz*, 120/73, EU:C:1973:152. It has since then been codified in the procedural regulation: see Article 4(5) of Regulation No 659/1999.

11 — Judgment of 2 April 2009 in *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraph 61 and the case-law cited.

12 — Judgment of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 59. For a description of that (marginal) role see the Opinion of Advocate General Jääskinen in *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2010:715, points 27 to 40.

13 — Judgment of 26 June 2008 in *SIC* v *Commission*, T-442/03, EU:T:2008:228, paragraphs 222 to 225 and the case-law cited.

14 — Judgment of 12 September 2007 in *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 43.

15 — Judgments of 19 May 1993 in *Cook* v *Commission*, C-198/91, EU:C:1993:197, and of 15 June 1993 in *Matra* v *Commission*, C-225/91, EU:C:1993:239. See also judgment of 24 May 2011 in *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 47 and the case-law cited.

B – *First ground of appeal*

30. By their first ground of appeal the appellants argue that the General Court infringed Article 108(3) TFEU and Articles 4(4), 7(2) and (3), and 13(1) of Regulation No 659/1999 by holding that the Commission was not obliged to commence the formal investigation procedure set out in Article 108(2) TFEU.

31. The Commission raises a plea of inadmissibility, with regard not only to this ground, but also to the appeal in its entirety. In addition, OPAP considers the first ground of appeal to be inadmissible in part. In any event both the Commission and OPAP consider the first ground of appeal to be unfounded.

1. Admissibility

32. The Commission claims that the appeal should be dismissed as manifestly inadmissible in its entirety, since it merely repeats or reproduces the pleas in law and arguments submitted at first instance and, hence, amounts to requesting the Court to re-examine the application at first instance.

33. It is certainly true that an appeal must indicate precisely the contested elements of the judgment which an appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal.[16] An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court is inadmissible.[17]

34. However, contrary to what the Commission claims, the appellants do identify the contested elements of the General Court's judgment and challenge the General Court's interpretation of the case-law in a sufficiently precise manner for the appeal to be admissible. The Commission's plea of inadmissibility must therefore be rejected.

35. In addition to the Commission's general plea of inadmissibility, OPAP maintains that the first ground of appeal is inadmissible to the extent that the appellants seek to challenge the General Court's assessment of the facts.

36. In my view, the appellants do not question the General Court's assessment of the facts. Viewed in their context, the arguments of the appellants instead clearly seek to question the legal appraisal of the General Court as regards the limits to the preliminary examination stage. That is an issue of law, which is admissible on appeal.

2. Substance

37. The first ground of appeal concerns the limits to the preliminary examination stage and the obligation of the Commission to initiate the formal investigation procedure set out in Article 108(2) TFEU. The appellants claim that the General Court erred in law, first, by concluding that the Commission could lawfully accept an amendment to the measures notified to it, and, second, by concluding that the Commission did not encounter serious difficulties during its preliminary examination.

16 — See Article 256 TFEU, Article 58(1) of the Statute of the Court of Justice of the European Union and Article 169(2) of the Rules of Procedure of the Court of Justice. See also order of 5 February 2015 in *Greece* v *Commission*, C-296/14 P, EU:C:2015:72, paragraph 42 and the case-law cited.

17 — Order of 5 February 2015 in *Greece* v *Commission*, C-296/14 P, EU:C:2015:72, paragraph 43 and the case-law cited.

38. As regards the appellants' first contention — namely that the Commission was prohibited from taking into consideration any amendments made by the Greek authorities to the notified measures in the context of the preliminary examination — it is sufficient to make the following observation.

39. As the General Court rightly pointed out in paragraph 42 of the judgment under appeal, the Court has already held that the Commission has the power to adopt, following a preliminary examination, a decision on the basis of Article 4(2) of Regulation No 659/1999 by which it finds that there was no State aid, while taking note of the commitments offered by the Member State concerned. [18]

40. The crux of this first ground of appeal lies rather in determining whether the Commission encountered serious difficulties during the preliminary examination, such as to require the opening of the formal investigation procedure. The General Court concluded in the judgment under appeal that this was not the case, a conclusion which is strongly contested by the appellants.

41. Before examining the arguments put forward by the appellants in support of this ground of appeal, it is useful to recall certain principles deriving from the case-law of the Court in relation to the preliminary examination stage, the concept of 'serious difficulties' and the duty to initiate the formal investigation procedure.

42. First, the Court has held that the purpose of the preliminary examination stage is to allow the Commission to form a prima facie opinion on the character of the measure in question as State aid and the conformity of such aid with the internal market. [19]

43. Second, as stated above at point 25, it follows from Article 4(4) of Regulation No 659/1999 that the Commission is obliged to initiate the formal investigation procedure if, following its preliminary examination, it entertains *doubts* as regards the compatibility with the internal market of the notified measure. The Court has elaborated on this and held that the formal investigation procedure is essential whenever the Commission encounters *serious difficulties* in determining whether an aid measure is compatible with the internal market. [20] If that is the case, the Commission must initiate the formal investigation procedure and has no discretion in that regard. [21] The Court has held that the same principles apply where the Commission entertains doubts as to the actual classification as aid of the measure examined. [22]

44. Third, in accordance with the objective of Article 108(3) TFEU and the 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 stage of the procedure, any difficulties encountered. That power presupposes that the Commission may adjust its position according to the results of the dialogue engaged in, without that adjustment having to be interpreted, a priori, as establishing the existence of serious difficulties. [23]

45. Fourth, it follows from the case-law of the Court that the concept of serious difficulties is objective and that the existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, comparing the assessments which underpin the Commission's decision with the information available to it when it took that decision regarding the compatibility of the aid measure concerned with the internal market. [24]

18 — Judgment of 13 June 2013 in *Ryanair* v *Commission*, C-287/12 P, EU:C:2013:395, paragraphs 67 to 73.

19 — Judgment of 19 May 1993 in *Cook* v *Commission*, C-198/91, EU:C:1993:197, paragraph 22.

20 — Judgment of 2 April 2009 in *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, EU:C:2009:223, paragraph 61 and the case-law cited.

21 — Judgment of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 113 and the case-law cited.

22 — Judgment of 10 May 2005 in *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 47.

23 — Judgment of 13 June 2013 in *Ryanair* v *Commission*, C-287/12 P, EU:C:2013:395, paragraph 71.

24 — Judgment of 24 January 2013 in *3F* v *Commission*, C-646/11 P, EU:C:2013:36, paragraph 31. See also judgment of 28 March 2012 in *Ryanair* v *Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited.

46. Fifth, the Court has held that the burden of proof to establish the existence of serious difficulties lies with the party contesting the clearance decision adopted by the Commission pursuant to Article 4(2) or (3) of Regulation No 659/1999. [25]

47. In the present case, the appellants claim that the General Court erred in law when it held that the Commission was not obliged to initiate the formal investigation procedure after it had concluded that the VLT Agreement, having been assessed jointly with the Addendum, conferred an advantage on OPAP within the meaning of Article 107(1) TFEU. They argue that, at that point in time, it must have been clear to the Commission that the VLT Agreement entailed (presumably incompatible) aid. To put it differently, the Commission had, according to my understanding of the appellants' arguments, encountered serious difficulties in assessing the notified measures and should have initiated the formal investigation procedure. In addition, the appellants allege that the General Court made a number of errors in paragraphs 50 to 53 of the judgment under appeal, which, according to the appellants, led it to the erroneous conclusion that the Commission was not faced with serious difficulties in assessing the notified measures. The appellants essentially seek to establish that the General Court, by holding that the Greek authorities were entitled to introduce amendments to the initially notified measures after several rounds of calculations and re-calculations, has in reality limited the Commission's obligation to initiate the formal investigation procedure to cases of a disagreement between the Commission and the notifying Member State. Lastly, the appellants claim that the General Court erred in law by assessing individually the factual elements submitted at first instance to prove the existence of serious difficulties, when it should have examined those elements jointly to determine whether such difficulties existed.

48. Although there may arguably be situations in which the Commission could be criticised for stretching the limits of the preliminary examination stage too far, and thereby depriving interested parties of their right to be involved in the review procedure, I consider that the General Court, in this specific case, came to the right conclusion: namely that the Commission did not encounter serious difficulties in assessing the notified measures, such as to require it to initiate the formal investigation procedure set out in Article 108(2) TFEU.

49. First of all, as the General Court noted in paragraph 43 of the judgment under appeal, the Commission may engage in a dialogue with the notifying Member State, a right which naturally presupposes that the Commission may align its position with the results of such dialogue.

50. Furthermore, it is apparent from the judgment under appeal [26] that the purpose of the discussions between the Commission and the Greek authorities was to determine the appropriate level of consideration to be paid by OPAP for the exclusive rights under the VLT Agreement and the Addendum, and that the commitments made by the Greek authorities in this specific case did not change the nature of the measures originally notified, but merely aimed to increase the level of consideration provided for under the VLT Agreement.

51. Moreover, if one were to accept the appellants' view that, since the level of consideration to be paid by OPAP for the exclusive rights is crucial for determining the existence of aid, and that accordingly the initially notified level of consideration could not be amended without involving interested parties within the framework of the formal investigation procedure, then one would also have to accept that the Commission, in this specific case, could not enter into discussions at all with the Greek authorities during the preliminary examination since, in reality, only the calculation of the price was an issue.

25 — Judgment of 24 January 2013 in *3F* v *Commission*, C-646/11 P, EU:C:2013:36, paragraph 30 and the case-law cited.

26 — Paragraphs 49 to 51.

52. Although I recognise that the preliminary examination, being a prima facie review of a notified measure, cannot be open-ended, I still consider that, in this specific case, a 10-month review period does not seem excessive, given the political and economic backdrop to the case.[27] It should be recalled that Greece, at that point in time, was experiencing a severe financial and political crisis and that there were on-going discussions of whether Greece would have to exit the euro area, which would naturally have influenced the outcome of the discussions between the Commission and the Greek authorities regarding the remuneration OPAP should pay for the exclusive rights under the VLT Agreement and the Addendum. The many calculations and re-calculations of the remuneration and the length of the procedure must be seen in this context.

53. In addition, it is important to bear in mind that the Court has held that the 'doubts' or 'serious difficulties' should exist at the moment when the Commission *takes a decision* regarding a notified measure. That is the point in time when the Commission has finally established its position, or put in terms of this appeal, when the Commission adopted the decision at issue.[28]

54. In my view, it is therefore not decisive whether the Commission, during its preliminary examination, found — as the appellants maintain it did — that the measures originally notified to it conferred an economic advantage on OPAP. What is important is whether that was the case at the time when the Commission adopted the decision at issue.

55. It seems to me, having regard to the relatively few cases where an interested party has managed to overturn a decision by the Commission not to initiate the formal investigation procedure, that an interested party, in order to be successful must — unless the Commission has itself expressed doubts as regards the classification of a measure as aid or the compatibility of such a measure with the internal market[29] — be able to show that the Commission did not have at its disposal, when it adopted the decision that is challenged, all the necessary information to exclude any doubts as regards either the classification of the notified measure as aid or its compatibility with the internal market[30] or, in the alternative, that the Commission had made an insufficient or inadequate analysis of relevant information.[31]

56. The appellants' arguments relating to the review procedure, are not of such a nature as to call into question the General Court's finding that the Commission, at the end of the preliminary examination stage, was not faced with 'serious difficulties', or in other words, did not have 'doubts' as regards the classification of the notified measures or for that matter their compatibility with the internal market. The appellants' claim to the contrary must therefore be rejected as unfounded.

57. Finally, as regards the appellants' claim that the General Court erred in law by assessing individually the factual elements submitted at first instance to prove the existence of serious difficulties, when it should have assessed those elements jointly, it is in my view unfounded. In fact, after establishing that none of the elements advanced by the appellants was indicative of serious difficulties,[32] and that the length of the procedure was not in itself sufficient to conclude that the

27 — That is, irrespective of the fact that it has not been made clear as from when the actual two-month period set out in Article 4(5) of Regulation No 659/1999 should be calculated.

28 — Judgment of 13 June 2013 in *Ryanair* v *Commission*, C-287/12 P, EU:C:2013:395, paragraph 68 and the case-law cited.

29 — Judgments of , 20 March 1984 in *Germany* v *Commission*84/82, EU:C:1984:117, paragraph 16, and of 10 May 2000 in *SIC* v *Commission*, T-46/97, EU:T:2000:123, paragraphs 81, 87 and 92.

30 — See, inter alia, judgments of 22 September 2011 in *Belgium* v *Deutsche Post and Others*, C-148/09 P, EU:C:2011:603, paragraphs 83 to 87; of 25 November 2014 in *Ryanair* v *Commission*, T-512/11, EU:T:2014:989, paragraph 106; and of 9 September 2010 in *British Aggregates and Others* v *Commission*, T-359/04, EU:T:2010:366, paragraph 102.

31 — See, inter alia, judgments of 3 May 2001 in *Portugal* v *Commission*, C-204/97, EU:C:2001:233, paragraphs 40 and 49; of 10 July 2012 in *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 97; and of 7 November 2012 in *CBI* v *Commission*, T-137/10, EU:T:2012:584, paragraph 309. See also judgment of 15 September 1998 in *BP Chemicals* v *Commission*, T-11/95, EU:T:1998:199, paragraphs 188 to 193.

32 — Judgment under appeal, paragraphs 45 to 53.

Commission was faced with serious difficulties,[33] the General Court held that the duration of the preliminary examination in this specific case did not seem unreasonable given the circumstances of the case.[34] To put it differently, the General Court did in fact examine jointly all elements advanced by the appellants and concluded that they did not show the existence of serious difficulties.

58. Having regard to the above, I conclude that the General Court did not err in law by holding that the Commission was not obliged to initiate the formal investigation procedure. The appellants' first ground of appeal should therefore be dismissed.

### C – *Second ground of appeal*

59. By their second ground of appeal, the appellants claim that the General Court infringed Article 296 TFEU and their rights to good administration and effective judicial protection under Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, by holding that the non-confidential version of the decision at issue was sufficiently reasoned in spite of the redaction of essential economic data.

60. The Commission raises an objection to admissibility in respect of this ground of appeal. In any event, the Commission, supported by OPAP, submits that the second ground of appeal is unfounded.

#### 1. Admissibility

61. The Commission's objection to the admissibility of the second ground of appeal is in line with its general plea of inadmissibility which I have already dealt with at points 32 to 34.

#### 2. Substance

62. The issue to be settled by the Court is whether *the non-confidential* version of the decision at issue should have enabled the appellants to verify, and the General Court to review, the validity of the economic data provided and the accuracy of the calculations made by the Commission, as the appellants argue, or whether the General Court was right to hold that this was not required for compliance with the obligation to state reasons and with the appellants' rights to good administration and effective judicial protection.

63. As noted above at point 28, an interested party may challenge a clearance decision adopted by the Commission pursuant to Article 4(2) or (3) of Regulation No 659/1999, or in other words, a decision not to initiate the formal investigation procedure set out in Article 108(2) TFEU. To be able properly to exercise this right to judicial review, such a party must be informed of the reasons for adopting the decision. The obligation to state reasons pursuant to Article 296 TFEU should be seen in this context and requires the Commission to take due account of the interest that third parties may have in obtaining explanations.[35]

33 — Judgment under appeal, paragraph 59.

34 — Judgment under appeal, paragraphs 61 and 62.

35 — Judgment of 13 March 1985 in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, 296/82 and 318/82, EU:C:1985:113, paragraph 19. See also Opinion of Advocate General Lenz in *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1997:249, point 54 and case-law cited.

64. The Court has held that the obligation to protect confidential information under Article 337 TFEU cannot justify deficiencies in the statement of reasons and that the obligation to respect confidential information cannot be given so wide an interpretation that the obligation to provide a statement of reasons is deprived of its essential content.[36]

65. Although, the case-law referred to above must equally apply to the non-confidential version of the decision at issue, to which interested parties such as the appellants have access, the appellants nevertheless seem to misunderstand the scope of the obligation to state reasons incumbent on the Commission.

66. It is settled case-law that the statement of reasons required under Article 296 TFEU must be appropriate to the measure 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 Union Court to exercise its power of review.[37]

67. The decision at issue is a decision adopted pursuant to Article 4(2) of Regulation No 659/1999, that is to say, a decision whereby the Commission finds that the notified measures do not constitute State aid. The interest of third parties in such a decision lies in the fact that the Commission, by not commencing the formal investigation procedure, arguably deprived them of their right to be involved in the decision-making process (see further above at point 27). Interested parties must therefore be informed of the reasons for such a decision in a sufficiently precise manner for them to determine whether there are indications of serious difficulties, such as to require the opening of the formal investigation procedure. In this specific case, almost all economic data has been redacted. That being so, in order for the Commission to have properly discharged its obligation to state reasons, both the method of calculation used by the Commission and each of its components must, in my view, clearly emerge from the non-confidential version of the decision.

68. The General Court explained in detail, in paragraph 74 of the judgment under appeal, how the reasoning of the non-confidential version of the decision at issue (i) clearly shows the methodology applied by the Commission, and (ii) allows the appellants to understand the reasoning followed by the Commission and thus formulate their grounds for annulment. The General Court noted, inter alia, that the decision at issue sets out the criterion which the Commission intended to apply to determine whether the measures at issue gave rise to an advantage[38] and explains how the Commission calculated the net present value of the VLT Agreement and the Addendum.[39] Furthermore, the General Court observed that the decision at issue indicates the reasons why the Commission considered it appropriate to assess the two measures together. The decision also explains that the increase in 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. Finally, the General Court noted that the decision at issue also sets out the method of calculating that additional consideration.

36 — Judgment of 13 March 1985 in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, 296/82 and 318/82, EU:C:1985:113.

37 — Judgment of 2 December 2009 in *Commission* v *Ireland and Others*, C-89/08 P, EU:C:2009:742, paragraph 77 and the case-law cited.

38 — That criterion was to determine the 'net present value' of the exclusive rights granted by the VLT Agreement and the Addendum, taking into account a reasonable market return for OPAP, and to compare that value with the consideration paid by OPAP for the exclusive rights granted.

39 — The method applied was that of 'discounted cash flows' and the calculation was made on the basis of the forecast revenues and expenses resulting from the future operation of the various games and the resulting free cash flows generated by those games. The Commission also stated that that value depended on the discount rate to be applied.

69. Having regard to the above, I find that the General Court did not err in law when it held that the Commission had not failed to state reasons or injured the appellants' rights to good administration and effective judicial protection, notwithstanding the fact that the non-confidential version of the decision at issue did not enable the appellants to review the economic data and the correctness of the calculations made by the Commission.

70. On that basis, the second ground of appeal ought to be dismissed.

D – *Third ground of appeal*

71. By their third ground of appeal, the appellants claim, in essence, that the General Court infringed Article 107(1) TFEU when it held that the Commission was entitled to examine the VLT Agreement and the Addendum jointly, even though, in their view, the two agreements affect different markets, which a prior market analysis arguably would have shown.

72. The Commission contends that the appellants' third ground of appeal should be declared inadmissible for lack of standing. In any event the Commission, supported by OPAP, considers the third ground of appeal to be unfounded.

1. Admissibility

73. The Commission contends, as it did before the General Court, that the appellants, who have challenged the substance of the decision at issue, have failed to show that they are directly and individually concerned by the notified measures.

74. The appellants do not seem to question that they are in fact challenging the substance of the decision at issue, but claim that since the General Court ruled on the substance of the fourth plea at first instance without having first examined the question of admissibility and since that ruling is binding upon the appellants, they have standing to challenge this part of the judgment. Their right of appeal would otherwise be disproportionately limited solely because the General Court decided, in the interests of economy of procedure, not to examine the issue of their standing.

75. Although I may, to some extent, concur with the appellants' arguments that the method employed by the General Court, that is, considering the case on its merits without examining *locus standi*, could put claimants in an unfortunate situation, especially where the Court finds that the General Court has erred in law as regards the conclusion on the substance of a plea put forward in support of annulment,[40] it nonetheless follows from the Court's case-law that the question of inadmissibility for lack of standing is a question of public policy which may, and even must, be raised by the Court of its own motion.[41]

76. The appellants have not in their submissions before the Court, in spite of being given the opportunity to respond to the Commission's submissions, demonstrated how any of the criteria laid down in Article 263(4) TFEU are fulfilled in the present case. Here, it follows from the Commission's submissions that the appellants have claimed to be direct competitors of OPAP insofar as their slot machines allegedly compete with the VLTs covered by the VLT Agreement, but that they have failed to establish the existence of such a relationship and have also failed to show that the notified measures would substantially affect the market position of each appellant individually.[42]

40 — For a criticism of the practice of reversing the order of assessment, see the opinion of Advocate General Bot in *Philips Lighting Poland and Philips Lighting* v *Council*, C-511/13 P, EU:C:2015:206, points 49 to 67.

41 — Judgment of 27 February 2014 in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 45.

42 — Judgments of 22 November 2007 in *Spain* v *Lenzing*, C-525/04 P, EU:C:2007:698, paragraph 31, and in *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 54 and the case-law cited.

77. As I agree with the Commission that the appellants have not demonstrated that they have standing to challenge the substance of the decision at issue, the third ground of appeal ought in my view to be declared inadmissible.

78. In the event that the Court does not agree with me, I shall nonetheless examine the substance of the third ground of appeal.

2. Substance

79. The question raised by the third ground of appeal is whether the General Court erred in law by holding that the Commission was entitled to assess jointly the VLT Agreement and the Addendum for the purpose of determining the presence of an advantage, without having first defined the market(s) affected by those agreements. According to the appellants, a prior market definition is essential since Article 107(1) TFEU allows separate State aid measures to be assessed together only where such measures affect the same market.

80. To address the issue raised by the third ground of appeal, it is necessary to consider the concept of an 'advantage' within the meaning of Article 107(1) TFEU.

81. It is established that an advantage within the meaning of Article 107(1) TFEU includes any economic benefit that the recipient would not have obtained under normal market conditions.[43] In order to determine whether an advantage is present, the Commission must examine any measure notified to it in its proper context and take into account all the relevant features of the transaction at issue.[44]

82. The General Court examined, in paragraphs 92 and 93 of the judgment under appeal, the context in which the notified measures were adopted. It found, inter alia, that the VLT Agreement and the Addendum were finalised during the same period of time, that they served the same objective (to increase OPAP's market value with a view to its upcoming privatisation) and that the levies payable by OPAP for the grant of the two categories of exclusive rights were due at the same time. Taking this into account, the General Court upheld the Commission's conclusion that it was appropriate and necessary to consider the notified measures jointly, in the context of a *single* notification.

83. The appellants do not seem to question that the economic context is relevant for the purpose of establishing the presence of an advantage within the meaning of Article 107(1) TFEU. They maintain however that, before a decision is made as to whether a joint assessment is appropriate, a market analysis is necessary. That is because if such a market analysis shows that the notified measures belong to two different markets, a joint assessment of those measures must be excluded since it may conceal an advantage conferred by one of the measures. The appellants maintain that, in the present case, a joint assessment of the VLT Agreement and the Addendum (supposedly affecting two different markets) would allow OPAP to lower its prices in the competitive VLT market by charging excessive prices on the market covering the 13 games of chance covered by the Addendum on which OPAP has an exclusive concession.

43 — Judgments of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 78 and the case-law cited, and of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 84 and the case-law cited.

44 — Judgment of 13 September 2010 in *Greece* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 172 and the case-law cited.

84. As the Commission points out, the relevance of a market definition in State aid cases is first and foremost limited to the context of determining whether a particular measure distorts competition or affects trade between Member States.[45] In addition, it can also play a role when it comes to determining selectivity of a measure.[46] Neither of those two elements for determining the existence of State aid under Article 107(1) TFEU is discussed in the decision at issue.

85. Moreover, the appellants' arguments as to why a prior market definition is important in this specific case are not pertinent.

86. Assuming that OPAP could, as the appellants argue, cross-subsidise between the two supposedly distinct markets, such a practice would in my view, be wholly unrelated to the separate or joint assessment of the VLT Agreement and the Addendum. What could enable such a practice, were it proven, is the fact that OPAP already has a monopoly as regards the 13 games of chance covered by the Addendum. To put it differently, the price paid for the VLT Agreement is unconnected to OPAP's possibility of charging excessive prices in the operation of the 13 games of chance covered by the Addendum.

87. Still, as the General Court points out, the appellants have failed to substantiate their assumption that OPAP is free to increase prices at will on the 13 games of chance covered by the Addendum. Since that is a question of fact, as pointed out by the Commission, it is not subject to the Court's review.

88. Additionally, the appellants submit that the economic context must be defined objectively and that Member States cannot be free to construct the context of a State aid measure. The appellants claim that Greece notified the VLT Agreement and the Addendum jointly in order to maximise its public revenue.

89. This argument must be rejected as manifestly unfounded. As the Commission points out, a Member State, being the author of the measures, will necessarily influence the context within which the measures are adopted. It is the Member State that decides which measures it wishes to adopt, and notifies the Commission thereof. It is then up to the Commission to assess the notified measures taking into account all of their relevant features.

90. The appellants have not put forward any other legal arguments that could call into question the validity of the General Court's conclusion as regards the joint assessment of the notified measures. Therefore, I consider that their third ground of appeal should also be dismissed and, consequently, the appeal in its entirety falls to be dismissed.

## VI – Costs

91. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. The Commission and OPAP have applied for costs and the appellants have been unsuccessful.

## VII – Conclusion

92. In the light of the above considerations, I propose that the Court should:

— dismiss the appeal;

45 — Judgment of 8 September 2011 in *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 131 and the case-law cited.

46 — Judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 41.

— order 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 relating to this appeal, including those incurred by the European Commission and the Organismos Prognostikon Agonon Podosfairou AE (OPAP).