JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

8 January 2015 (*)

(State aid — Operation of Video Lottery Terminals — Grant by the Hellenic Republic of an exclusive licence — Decision finding no State aid — Failure to initiate the formal investigation procedure — Serious difficulties — Procedural rights of the interested parties — Obligation to state reasons — Right to effective judicial protection — Advantage — Joint assessment of the notified measures)

In Case T-58/13,

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

Vivere Entertainment AE, established in Athens (Greece),

Theros International Gaming, Inc., established in Patra (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 S. Pappas, lawyer,

applicants,

v

European Commission, represented by M. Afonso and P.-J. Loewenthal, acting as Agents,

defendant,

supported by

Hellenic Republic, represented by E.-M. Mamouna and K. Boskovits, acting as Agents,

and by

Organismos Prognostikon Agonon Podosfairou AE (OPAP), established in Athens, represented initially by K. Fountoukakos-Kyriakakos, Solicitor, L. Van den Hende and M. Sánchez Rydelski, lawyers, and subsequently by M. Petite and A. Tomtsis, lawyers,

interveners,

APPLICATION for 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 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 GENERAL COURT (Seventh Chamber),

composed of M. van der Woude (Rapporteur), President, I. Wiszniewska-Białecka and I. Ulloa Rubio, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2014,

gives the following

Judgment

Background to the dispute

1 The applicants, Club Hotel Loutraki AE, Vivere Entertainment AE, Theros International Gaming, Inc., Elliniko Casino Kerkyras, Casino Rodos, Porto Carras AE and Kazino Aigaiou AE, are seven casinos with an establishment licence in Greece which operate slot machines, amongst other games of chance.

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

3 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').

4 The second measure concerned the 10-year prolongation, from 2020 to 2030, of the exclusive rights already granted to OPAP for the operation of 13 games of chance by any means. That prolongation was granted by means of an addendum to an agreement signed by the Greek State and OPAP in 2000 ('the Addendum'). In the Addendum, it was provided that OPAP would pay in return for those rights (i) a lump sum payment of EUR 375 million and (ii) a levy by the Greek State of 5% of the gross gaming revenues from the games concerned for the period from 13 October 2020 to 12 October 2030.

5 On 4 April 2012, the applicants, with the exception of Kazino Aigaiou AE, filed a complaint with the Commission. In that complaint, they complained that the VLT Agreement entailed the grant to OPAP of State aid incompatible with the internal market. According to the applicants, the Greek State would have been able to receive a higher price than the EUR 560 million paid by OPAP if it had granted more than one licence to operate the VLTs and organised a public international call for tenders for their allocation. Moreover, the applicants claimed that the profits made by OPAP in connection with the exclusive operation of the VLTs were considerably higher than they would have been if OPAP had operated on the market with other providers holding a licence for the VLTs in conditions of free competition.

6 On 3 October 2012, the Commission adopted, on the basis of Article 4(2) of 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), 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 contested decision').

7 In the contested decision, the Commission stated that the existence of an advantage for the purpose of Article 107(1) TFEU could be excluded in the present case if, when granting exclusive rights to OPAP, the Greek State had left OPAP with only the minimum return which an average company would have needed to cover its operational and capital costs. Following that methodology, the Commission first determined the net present value of the VLT Agreement and of the Addendum taking into account the reasonable market return that could be left to OPAP and then compared that value with the consideration paid by OPAP for the grant of exclusive rights.

8 The method used to determine the net present value of the VLT Agreement and of the Addendum was the discounted cash flows method. In particular, that value was calculated on the basis of the forecasted 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 used.

9 Although the Commission evaluated each agreement separately, it conducted a joint assessment of the VLT Agreement and the Addendum since those agreements had been notified jointly by the Greek authorities and concerned the granting of exclusive rights to the same company at the same time for very comparable activities, and taking account of the announced privatisation of OPAP in the short-term.

10 As regards, first, the Addendum, the Commission observed that the study provided by the Greek authorities was based on sales projections elaborated by an independent company specialised in the gambling sector. The net present value of the Addendum was calculated on the basis of those projections, which were considered by the Commission to be reliable.

11 Following that calculation, the Commission found that the amount paid by OPAP in exchange for the Addendum, including the levy imposed by the Greek State corresponding to 5% of the gross gaming revenues generated by the games concerned for the period from 13 October 2020 to 12 October 2030 (see paragraph 4 above), was higher than the net present value of the Addendum.

12 As regards, secondly, the VLT Agreement, the Commission also calculated its net present value on the basis of the study commissioned by the Greek authorities.

13 On the basis of that calculation, the Commission stated that the net present value of the VLT Agreement was significantly higher than the amount of EUR 560 million provided for in the VLT Agreement, which would economically advantage OPAP.

14 However, the Commission stated that it was logical for the conformity of the VLT Agreement and the Addendum with Article 107(1) TFEU to be assessed jointly. In that way, the overpayment by OPAP for the Addendum was taken into account in order to assess the conformity of the VLT Agreement with that article. The Commission stated that the overpayment reduced the gap between the net present value of the VLT Agreement and the amount of EUR 560 million owed by OPAP, but that it was not sufficient to ensure that, on average, the amount of EUR 560 million is greater than or equal to the net present value of the VLT Agreement.

15 During discussions between the Commission and the Greek authorities within the context of the

notification, it was agreed that a supplement to the originally envisaged consideration 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, on top of the EUR 560 million provided for in the VLT Agreement ('the additional levy').

16 The additional levy was calculated as follows: OPAP would pay a levy corresponding to 5% of the gross gaming revenues from the operation of the VLTs if those revenues were above a certain threshold calculated on the basis of the daily revenues obtained by each VLT. Where the gross gaming revenues were below a certain floor, also calculated on the basis of the daily revenues obtained by each VLT, OPAP would not pay any additional levy. Finally, where the gross gaming revenues were between the aforementioned floor and threshold, OPAP would pay a reduced percentage on the gross gaming revenues calculated through a linear interpolation.

17 The Commission stated that the payment by OPAP of the additional levy had considerably lowered the net present value of the VLT Agreement in such a way that, on the basis of the majority of estimates, that value (which included a reasonable return for OPAP) was below EUR 560 million. Referring to the amendment introduced by the Greek authorities, and taking account of the overpayment for the Addendum, the Commission found, on average, OPAP would pay more than the value of the VLT Agreement.

18 In other words, the Commission took the view that, following the amendments to the initial notification, OPAP would pay the Greek State a higher amount than the cumulated values of the exclusive rights granted by the VLT Agreement and the Addendum (including a reasonable return for OPAP).

19 In those circumstances, the Commission concluded that the notified arrangements did not confer an advantage on OPAP since the amendments made by the Greek authorities ensured that OPAP would pay in overall terms at least as much as the value of the Addendum (including a reasonable return for OPAP) and the VLT Agreement (including a reasonable return for OPAP) taken together.

20 On that basis, the Commission concluded that the notified measures did not constitute State aid within the meaning of Article 107(1) TFEU.

Procedure and forms of order sought by the parties

21 By document lodged at the Court Registry on 29 January 2013, the applicants brought the present action.

22 By documents lodged at the Court Registry on 27 May and 11 June 2013 respectively, the Hellenic Republic and OPAP applied for leave to intervene in the present case in support of the form of order sought by the Commission.

23 By order of 12 July 2013, the President of the Fourth Chamber of the Court granted the Hellenic Republic's application to intervene. The Hellenic Republic lodged its statement in intervention on 1 October 2013. The Commission and the applicants submitted observations on that statement by documents lodged at the Court Registry on 28 November and 2 December 2013, respectively.

24 By order of 12 September 2013, the President of the Fourth Chamber of the Court also granted OPAP leave to intervene. OPAP lodged its statement in intervention on 30 October 2013. The Commission and the applicants submitted observations on that statement by documents lodged at

the Court Registry on 28 November and 17 December 2013, respectively.

25 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Seventh Chamber, to which the present case was accordingly allocated.

26 Upon hearing the Judge-Rapporteur, the Court decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, requested the Commission and the interveners to reply to some questions and requested the Hellenic Republic to produce various documents. Those parties replied within the prescribed period.

27 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 July 2014.

28 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

29 The Commission contends that the Court should:

– dismiss the action, in part, as unfounded and, in part, as inadmissible as regards the fourth plea;

– order the applicants to pay the costs.

30 The Hellenic Republic requests that the Court dismiss the action as inadmissible or as unfounded.

31 OPAP claims that the Court should:

– dismiss the action as inadmissible or, in the alternative, as unfounded;

– order the applicants to pay the costs.

Law

32 The applicants raise four pleas in support of their action. The first plea alleges infringement of Article 108(2) TFEU and a misuse of power inasmuch as the Commission failed to initiate the formal investigation procedure. The second plea, which alleges infringement of the obligation to state reasons and the right to good administration, and the third plea, which alleges infringement of the right to effective judicial protection, both concern the redaction, in the non-confidential version of the contested decision to which they had access, of economic data which the applicants categorise as essential. Those pleas will therefore be treated together. The fourth plea alleges infringement of Article 107(1) TFEU inasmuch as the contested decision jointly assessed the VLT Agreement and the Addendum to reach the conclusion that they did not confer an economic advantage on OPAP.

The first plea, alleging infringement of Article 108(2) TFEU and a misuse of power

33 The applicants claim that, in adopting the contested decision following a preliminary investigation, the Commission infringed their rights to be heard within the context of the formal investigation procedure provided for by Article 108(2) TFEU and misused its powers. The Commission is obliged

procedure provided for by Article 108(2) TFEU and misused its powers. The Commission is obliged to initiate that formal investigation procedure if an initial review does not enable it to objectively overcome all the difficulties raised by the assessment of the compatibility of the State measure in question with the internal market.

34 In support of that plea, the applicants claim, first, that the Commission infringed Article 7(2) and (3) of Regulation No 659/1999 (see paragraph 6 above) and, secondly, that it encountered serious difficulties in its assessment of the nature of the notified measures, having regard to the length of the preliminary investigation stage, the number and nature of the exchanges between the Commission and the Hellenic Republic during that phase and the content of the contested decision.

35 Before examining those arguments, it is appropriate to bear in mind some principles developed in the case-law relating to Article 108 TFEU.

36 First, if the Commission is unable to conclude, following an initial examination in the context of the procedure carried out under Article 108(3) TFEU, that a State aid measure either is not 'aid' within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, and has no discretion in that regard (see judgment of 22 December 2008 in *British Aggregates* v *Commission*, C-487/06 P, ECR, EU:C:2008:757, paragraph 113 and the case-law cited; see also, to that effect, judgment of 9 October 2001 in *Italy* v *Commission*, C-400/99, ECR, EU:C:2001:528, paragraph 48). That duty is, moreover, expressly confirmed by the provisions of Article 4(4), in conjunction with Article 13(1), of Regulation No 659/1999 (judgment in *British Aggregates* v *Commission*, EU:C:2008:757, paragraph 113).

37 Secondly, the notion of serious difficulties is an objective one. The existence of such difficulties must be sought both in the circumstances in which the contested measure was adopted and in its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (see judgment of 28 March 2012 in *Ryanair* v *Commission*, T-123/09, ECR, EU:T:2012:164, paragraph 77 and the case-law cited). It follows that judicial review by the Court of the existence of serious difficulties, by its nature, cannot be limited to consideration of whether or not there has been a manifest error of assessment (judgment of 27 September 2011 in *3F* v *Commission*, T-30/03 RENV, ECR, EU:T:2011:534, paragraph 55). A decision adopted by the Commission without initiating the formal investigation stage may be annulled on that ground alone, because of the failure to initiate the inter partes and detailed investigation laid down in the FEU Treaty, even if it is not established that the Commission's assessments as to the substance are wrong in law or in fact (see, to that effect, judgment of 9 September 2010 in *British Aggregates and Others* v *Commission*, T-359/04, ECR, EU:T:2010:366, paragraph 58).

38 Thirdly, although it has no discretion in relation to the decision to initiate the formal investigation procedure, where it finds that such difficulties exist the Commission nevertheless enjoys a certain margin of assessment in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 108(3) TFEU and the Commission's duty of good 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 (judgments of 15 March 2001 in *Prayon-Rupel* v *Commission*, T-73/98, ECR, EU:T:2001:94, paragraph 45, and 3 March 2010 in *Bundesverband deutscher Banken* v *Commission*, T-36/06, ECR, EU:T:2010:61, paragraph 126). That power presupposes that the Commission may align its position with the results of the dialogue it engaged in, without that alignment having to be interpreted, a priori, as

establishing the existence of serious difficulties (judgment of 12 December 2006 in *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, T-95/03, ECR, EU:T:2006:385, paragraph 139).

39 Fourthly, the fact that the time spent considerably exceeded the time usually required for a preliminary investigation under Article 108(3) TFEU may, with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 108(2) TFEU (judgments of 10 May 2000 in *SIC* v *Commission*, T-46/97, ECR, EU:T:2000:123, paragraph 102, and 10 February 2009 in *Deutsche Post and DHL International* v *Commission*, T-388/03, ECR, EU:T:2009:30, paragraph 94; see also, to that effect, judgment of 20 March 1984 in *Germany* v *Commission*, 84/82, ECR, EU:C:1984:117, paragraphs 15 and 17).

40 Fifthly, the applicant has the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary investigation procedure and, secondly, the content of the contested decision (judgment in *Bundesverband deutscher Banken* v *Commission*, paragraph 38 above, EU:T:2010:61, paragraph 127).

Infringement of Article 7(2) and (3) of Regulation No 659/1999

41 The applicants claim that Article 7(2) and (3) of Regulation No 659/1999 precludes the Commission from taking into consideration any modification made by the Member State concerned in order to close a case following the preliminary investigation phase. It is only after the initiation of the formal investigation procedure that the Commission can decide, taking into consideration the appropriate modification, that the notified measure, or the measure to which a complaint refers, does not constitute State aid.

42 In that regard, it should be noted, as the Commission does, that the Court has already stated that the Commission has the power to adopt, following the preliminary investigation stage, on the basis of Article 4(2) of Regulation No 659/1999, a decision by which it finds that there was no State aid but takes note of the commitments of the Member State (see, to that effect, judgment of 13 June 2013 in *Ryanair* v *Commission*, C-287/12 P, EU:C:2013:395, paragraphs 67 to 73).

43 In accordance with the objective of Article 108(3) TFEU and its duty of good administration, the Commission may engage in a dialogue with the notifying State or third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered. That power presupposes that the Commission may align its position with the results of the dialogue it engaged in, without that alignment having to be interpreted, a priori, as establishing the existence of serious difficulties (judgment in *Ryanair* v *Commission*, paragraph 42 above, EU:C:2013:395, paragraph 71).

44 It follows that the Commission was able, on the basis of Article 4(2) of Regulation No 659/1999, to lawfully adopt the contested decision, having taken note of the commitment of the Greek authorities.

The existence of serious difficulties during the preliminary investigation of the notified measures

45 The applicants observe, first, that extensive communication took place between the Commission and the Greek authorities during the preliminary investigation phase and that they were not of a purely informative or explanatory nature. In addition, the running of simulations and calculations, referred to in paragraph 22 of the contested decision, and the modification by the Greek authorities

of the notified measures, mean that the Commission objectively had serious doubts as to the compatibility of the VLT Agreement with the internal market.

46 Furthermore, the applicants submit that the modification was not made so as to simply allay the Commission's concerns. The amendment was premised on an extensive numerical analysis and was the product of negotiation between the Commission and the Greek authorities which had led to the overhaul of the notified measure.

47 In that regard, it must be borne in mind that, in accordance with the case-law mentioned in paragraph 38 above, the mere fact that discussions took place between the Commission and the notifying Member State during the preliminary investigation stage and that, in that context, the Commission asked for additional information about the measures submitted for its review cannot in itself be regarded as evidence that the Commission was confronted with serious difficulties of assessment. However, it cannot be ruled out that the content of the discussions between the Commission and the notifying Member State during that phase of the procedure may, in certain circumstances, prove the existence of such difficulties (see judgment of 10 July 2012 in *TF1 and Others* v *Commission*, T-520/09, EU:T:2012:352, paragraphs 76 and 77 and the case-law cited). In addition, a high number of requests for information to the notifying Member State by the Commission may, together with the duration of the preliminary investigation, be evidence of serious difficulties (judgment in *Deutsche Post and DHL International* v *Commission*, paragraph 39 above, EU T:2009:30, paragraph 99).

48 In the present case, it is apparent from paragraphs 1 to 7 of the contested decision that, following the initial notification of 1 December 2011, the Commission sent the Hellenic Republic a request for information on 31 January 2012, to which the latter replied by letter of 29 February 2012. On 21 March 2012, a meeting was held between the Commission and the Greek authorities. The Greek authorities provided additional information on 7 and 14 May 2012. The representatives of the Commission and the Hellenic Republic had a conference call on 11 May 2012. Finally, on 7 August 2012, the Greek authorities submitted a commitment letter supplementing their initial notification, so that it was only then that the Commission had all the information necessary to decide on the notified measures.

49 Moreover, it is apparent from paragraph 22 of the contested decision that there had been several rounds of simulations and calculations made by the Commission and by the Greek authorities during the preliminary investigation phase concerning the market value of the exclusive rights granted to OPAP by the Addendum and by the VLT Agreement.

50 Contrary to what the applicants claim, such exchanges cannot be considered to be particularly frequent or intense, given the technical nature of the questions which were designed to determine the level of the consideration that would ensure that OPAP did not receive an undue advantage through the grant of the exclusive rights. The Commission correctly observes that the fact that the exchanges focused on such technical questions does not necessarily imply that the Commission was faced with serious difficulties in assessing the conformity of the measures. In fact, it is not apparent from the contested decision that the Greek authorities disagreed with the test proposed by the Commission to determine the existence of an advantage or with the method used to apply that test. Nor does the fact, pointed out by the applicants, that those exchanges were not purely informative or explanatory show the existence of serious doubts at the time that the contested decision was adopted. On the contrary, the fact that, in the context of those exchanges, the Commission and the Greek authorities carried out joint simulations and calculations supports the Commission's arguments that, at the time when the contested decision was adopted, the measures at issue did not raise serious doubts.

51 Similarly, the Greek authorities' commitment, which was formally lodged on 7 August 2012, sought specifically to avoid any doubt that the Commission might have had. Contrary to what the applicants claim, it is apparent from paragraphs 51 and 52 of the contested decision that that commitment did not change the nature of the measures originally notified, but aimed only to increase the level of consideration provided for under the VLT Agreement.

52 Secondly, the applicants claim that the content of the contested decision is also indicative of the existence of serious difficulties. In this regard, they observe that the parts of that decision relating to a joint assessment of the measures at issue, and the final conclusion reached on the basis of external studies based on secondary and speculative sources, do not correspond to a prima facie examination.

53 Those arguments cannot be accepted. There is no reason that prohibits the Commission from undertaking a joint assessment of measures at the preliminary investigation stage if the facts of the case justify it. In addition, the legal and economic reasoning on which the Commission relied in concluding that the two agreements had conferred no advantage on OPAP is clear. In that regard, the mere fact that the Commission had to perform relatively complex calculations to arrive at such a conclusion is not necessarily indicative of serious difficulties of assessment, inasmuch as the answer to the question of whether a Member State acted as a private market operator is necessarily based on numerical considerations. Finally, the applicants have not put forward any arguments to support the conclusion that the study provided by the Greek authorities was based on speculative sources.

54 Thirdly, the applicants note that the contested decision was adopted following a preliminary investigation that lasted 10 months, although the period is usually of 2 months. The applicants also state that seven months elapsed between lodging their complaint and the adoption of the contested decision. In the applicants' view, those delays show that the Commission encountered serious difficulties.

55 In that regard, the applicants state that it cannot be considered that the preliminary investigation lasted two months as provided for by Article 4(5) of Regulation No 659/1999. First, the Greek authorities did not expressly consent to the two-month deadline being extended. Secondly, that two-month period did not begin on 7 August 2012, when the Greek State submitted a commitment letter, but on the date of the initial notification of the measures at issue, that is, 1 December 2011. Thirdly, even if it should be considered that the two-month period began to run in this case from the Greek authorities' commitment, it would be from 14 May 2011, the date on which the Hellenic Republic presented amendments to the measure at issue. Finally, the political and economic circumstances of Greece do not bear out the reasonable nature of a 10-month period, but rather prove the existence of serious difficulties.

56 The applicants point out, correctly, that the interested parties, within the meaning of Article 1(h) of Regulation No 659/1999 can invoke non-compliance with the two-month period provided for by Article 4(5) of Regulation No 659/1999 following the notification of a measure by a Member State as an indication of the existence of serious difficulties encountered by the Commission in the preliminary investigation of the notification, in support of an action seeking to safeguard procedural rights derived from Article 108(2) TFEU (judgment in *TF1 and Others* v *Commission*, paragraph 47 above, EU:T:2012:352, paragraph 66).

57 Under Article 4(5) of Regulation No 659/1999, the Commission's decisions at the end of the preliminary investigation are to be taken within a two-month period from the day following the complete notification. Accordingly, when the preliminary investigation is triggered by the notification of a Member State, the Commission is required to meet the deadline imposed by Regulation No 659/1999.

58 In this case, the Commission took more than 10 months after the notification of 1 December 2011 before adopting the contested decision on 3 October 2012. That period therefore exceeded the period within which the Commission is, in principle, required to complete its preliminary investigation.

59 However, it should be noted that exceeding the two-month period cannot in itself suffice for a conclusion that there were serious difficulties whose resolution required the opening of a formal investigation procedure. Consequently, a 10-month period, as alleged by the applicants, for the preliminary investigation phase can be a reliable indicator of the existence of serious difficulties only if it is supported by other evidence (see, to that effect, judgments in *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, paragraph 38 above, EU:T:2006:385, paragraph 135 and the case-law cited, and *Deutsche Post and DHL International* v *Commission*, paragraph 39 above, EU:T:2009:30, paragraphs 98 and 106).

60 It is apparent from an examination of the other arguments raised by the applicants that there is no other indication of the existence of such difficulties (see paragraphs 45 to 53 above).

61 Moreover, it should be noted that the six-month period that elapsed between the applicants' complaint being lodged on 4 April 2012 and the adoption of the contested decision on 3 October 2012 also does not indicate serious difficulties. In that regard, it should be recalled that whether or not the duration of the preliminary investigation following the lodging of a complaint is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case (judgments of 10 May 2006 in *Air One* v *Commission*, T-395/04, ECR, EU:T:2006:123, paragraph 61, and 11 July 2007 in *Asklepios Kliniken* v *Commission*, T-167/04, ECR, EU:T:2007:215, paragraph 81).

62 However, in this case, a 10-month period does not seem unreasonable considering, first, the need to collect the data necessary to carry out the calculations and simulations to enable the Commission to determine the net present value of the VLA Agreement and of the Addendum (see paragraph 48 above) and, second, the technical nature of those exercises. In that regard, it should be noted that the Commission could take a position on the notified measures only after receiving all the necessary information, either in the context of a request for information, or during its contacts with the Greek authorities. Moreover, it was not until the receipt of the commitment letter from the Greek authorities on 7 August 2012 that the Commission had all the information to enable it to compare the net present value of the two notified measures with the financial consideration agreed by OPAP and therefore to determine whether OPAP had enjoyed an advantage (see, to that effect, judgment in *TF1 and Others* v *Commission*, paragraph 47 above, EU:T:2012:352, paragraphs 61 to 63).

63 In the light of the foregoing, the Commission did not face serious difficulties in its assessment of the notified measures and was not therefore required to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

64 The first plea must therefore be dismissed in its entirety.

The second and third pleas, alleging infringement of the obligation to state reasons and the applicants' rights to good administration and to effective judicial protection

65 The applicants observe that, in the non-confidential version of the contested decision to which they have had access, all the essential economic data which led the Commission to adopt that decision was not disclosed on grounds of business confidentiality.

66 In their second plea, the applicants claim that, in omitting that data, the Commission infringed Article 296 TFEU, on the obligation to provide an adequate statement of reasons, and Article 41 of the Charter of Fundamental Rights of the European Union, on the applicants' right to good administration. In its third plea, the applicants submit that the omission of that data is also contrary to Article 47 of the Charter of Fundamental Rights and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, on the right to effective judicial protection.

67 The applicants submit that the Commission did not reveal the economic data which is mentioned in paragraphs 38 to 43 of the contested decision and which indicates, in their view, the method by which the Commission reached its conclusion that the consideration paid by OPAP for the rights provided for in the Addendum was higher than its commercial value. The same is true of the economic data mentioned in paragraphs 44 to 56 of the contested decision which indicates, first, the extent to which the gap between the net present value of the VLT Agreement and the consideration paid by OPAP was reduced by the inclusion of the Addendum's overpayment, and, secondly, the method by which the additional levy to be paid to the Greek State was calculated. The applicants add that the Commission did not disclose the valuations of the various agreements submitted by the independent consulting firm used by the Greek State.

68 The applicants argue that, by not having had access to that decisive data, they were unable to establish whether the Commission committed a manifest error of assessment when concluding that it was not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market. They also submit that the lack of data prevented them from challenging the substance of the contested decision, as they are unable to ascertain, by any means, the reasoning behind it. In particular, the applicants claim that they have not been able to compare the values adopted by the Commission with the amounts to be paid by OPAP. Moreover, in the applicants' view, the redaction of crucial economic data does not enable the Court to exercise its power of review.

69 The applicants submit that those deficiencies in the obligation to state reasons cannot be justified by reference to the duty to preserve business confidentiality. Such a duty cannot deprive the obligation to state reasons of its essential content. In any event, the Commission redacted data which is not normally covered by the obligation to respect professional secrecy as specified in Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions (OJ 2003 C 297, p. 6, 'the communication on professional secrecy'). The gross gaming revenues from the VLTs will become public through the publication of the company's annual accounts, whereas there is no special public interest attached to the VLT Agreement's net present value. If need be, the Commission should at least have given guidance by presenting the data in ranges of magnitude or size, in accordance with paragraph 21 of the communication on professional secrecy.

70 Finally, the applicants state that, in accordance with Articles 101 TFEU and 102 TFEU, the Commission cannot base a decision on confidential information which has not been disclosed to the other party. Having regard to the developing convergence between the anti-trust and State aid procedures, such a principle can be transposed to the present case.

71 In that regard, it is necessary to bear in mind the established case-law according to which the statement of reasons required by 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 that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of the case, in particular the

content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons 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 (see judgment of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63 and the case-law cited).

72 Similarly, Article 337 TFEU obliges the members, officials and agents of the institutions of the European Union not to disclose information which by its nature is covered by the obligation of professional secrecy. However, the obligation laid down in Article 337 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 deprived of its essential content (see, to that effect, judgment of 13 March 1985 in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, 296/82 and 318/82, EU:C:1985:113, paragraph 27).

73 In the present case, it should be noted, as observed by the applicants, that the non-confidential version of the contested decision omits a lot of economic data and that the lack of access to that data does not allow the accuracy of the calculations made by the Commission to be determined. However, that does not allow the conclusion that there was a failure to provide a statement of reasons within the meaning of Article 296 TFEU or an infringement of the right to effective judicial protection.

74 The Commission's reasoning is in fact clear from the non-confidential version of the contested decision to which the applicants had access. In that version, the Commission, first, set out in paragraph 32 the criterion which it intended to apply to determine whether or not an advantage existed. That criterion was to determine the net present value of the exclusive rights granted by the ALV Agreement and the Addendum, by taking account of the reasonable market return that could be left to OPAP, and to compare that value with the consideration paid by OPAP for the exclusive rights granted. Secondly, the Commission explained in paragraphs 33 to 36 how it had calculated the net present value of those agreements. The method used was that of discounted cash flows and the calculation was made on the basis of the forecasted 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 used. Thirdly, the Commission indicated in paragraphs 37 and 48 of the contested decision the reasons why it considered that it could jointly assess the two measures. Fourthly, the Commission stated in paragraph 43 of the contested decision that the consideration provided in the Addendum was higher than the net present value of the exclusive rights granted by it. Fifthly, with regard to the consideration provided in the VLT Agreement, the Commission explained in paragraphs 47 to 50 of the contested decision that it 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. Sixthly, the Commission explained in paragraphs 51 to 59 of the contested decision 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. The method of calculating that additional consideration was also explained in paragraph 23 of the contested decision.

75 The non-confidential version of the contested decision therefore clearly shows the methodology followed by the Commission in the case. It is therefore necessary to reject the applicants' arguments

followed by the Commission in the case. It is therefore necessary to reject the applicants' arguments that they were not able to challenge the validity of the Commission's reasoning.

76 Furthermore, the applicants have not specified the relevance of the omitted data for the purposes of the present action. They have 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 have 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.

77 In those circumstances, it must be concluded that the omission of economic data in the non-confidential version of the contested decision 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.

78 The second and third pleas must therefore be rejected.

The fourth plea, alleging infringement of Article 107(1) TFEU

79 The applicants claim first of all that the Commission recognised, in paragraph 37 of the contested decision, that the Addendum and the VLT Agreement refer to distinct markets. Nevertheless, the Commission assessed them jointly. The applicants submit that the existence of an advantage for the purpose of Article 107(1) TFEU must be assessed for each market and not on the basis of joint consideration of similar measures concerning different markets, even though the measures examined concern the same recipient. If it were otherwise, the protection of competition would be incomplete because measures constituting an anti-competitive advantage for the purpose of Article 107(1) TFEU in a given market might escape the prohibition laid down in that provision on the basis of a joint assessment. Conversely, measures which grant no economic advantage in a given market might nevertheless be covered by that provision on the basis of a joint assessment with a measure affecting another market.

80 The applicants state that the market definition is a necessary step in assessing State aid and that the Commission could not, therefore, assess the notified measures jointly without having first conducted a comprehensive market analysis. The fact that the Addendum and the VLT Agreement both involve games of chance is irrelevant since it involves a very broad category of games subject to different regulations. The applicants maintain that the cannibalisation between the game 'KINO' and the VLTs is an uncertain phenomenon which is not mentioned in the contested decision and does not, in any event, lead to the conclusion of the existence of the same market for all of the games covered by the Addendum and the VLTs.

81 The applicants claim that the VLT and slot machine market cannot be assessed jointly with the 13 games of chance covered by the Addendum since they have no relation to the market of the 13 games of chance on which OPAP has an absolute legal monopoly. By virtue of that monopoly, OPAP could carry out cross-subsidisation practices allowing OPAP to undercut the applicants' prices on the VLT and slot machine market, by financing that operation by a price increase on the market for the 13 games of chance. However, the joint assessment of the notified measures does not take into account the possibility of such practices.

82 Next, the applicants submit that the joint assessment of the measures cannot be justified by the fact that the VLT Agreement and the Addendum concern the same company and that they were jointly notified to the Commission. Nor can that assessment be justified by the fact that OPAP will soon be

the subject of privatisation. Those incidental factors are not sufficient to establish an intrinsic link between the measures at issue.

83 Finally, even assuming that the Court were to conclude that the joint assessment of the notified measures was lawful, the periods covered by those measures ought to be identical. However, in the present case, the Addendum refers to the period from 2020 to 2030, whereas the VLT Agreement covers the period from 2012 to 2022.

84 In particular, the Commission, supported by the interveners, disputes the admissibility of the applicants' fourth plea. The Commission notes that the applicants, by that plea, criticise the substance of the contested decision. However, it is settled case-law that an applicant may contest the substance of a decision assessing a State aid measure taken at the end of the preliminary investigation procedure only if it is directly and individually concerned by that decision within the meaning of the fourth subparagraph of Article 263 TFEU. According to the Commission, the applicants do not meet those requirements.

85 According to the case-law, it is for the Court to assess whether in the circumstances of the case the proper administration of justice justifies the dismissal of an action on the merits without ruling on the objection of inadmissibility raised by the Commission, a course of action which cannot be regarded as adversely affecting that institution (judgment of 26 February 2002 in *Council* v *Boehringer*, C-23/00 P, ECR, EU:C:2002:118, paragraph 52).

86 In this case, in the interests of economy of procedure, it is appropriate to examine the arguments raised by the applicants in support of the fourth plea, without first ruling on the plea of inadmissibility, as those arguments do not, and for the reasons set out below, demonstrate that the Commission infringed Article 107(1) TFEU in the contested decision.

87 In the first place, as regards the applicants' argument that there cannot be a joint assessment of two measures covering two distinct markets, it should be noted, first, that, contrary to what the applicants claim, the contested decision does not in any way establish that the two measures at issue relate to different markets. On the contrary, the Commission emphasised, in paragraph 37 of the contested decision, the fact that they concern similar activities, namely games of chance.

88 Next, a thorough and prior analysis of the market concerned is not necessary to determine the existence of an advantage for the purpose of Article 107(1) TFEU. According to case-law, the Commission is not required to carry out, when determining whether the measures at issue 'distort' or 'threaten to distort competition' within the meaning of Article 107(1) TFEU, an economic analysis of the actual situation on the relevant markets, of the market share of the recipients of the aid, of the position of competing undertakings and of trade flows between Member States (see, to that effect, judgments of 29 September 2000 in *CETM* v *Commission*, T-55/99, ECR, EU:T:2000:223, paragraphs 100, 102 and 103; 11 July 2002 in *HAMSA* v *Commission*, T-152/99, ECR, EU:T:2002:188 paragraph 225, and 8 July 2004 in *Technische Glaswerke Ilmenau* v *Commission*, T-198/01, ECR, EU:T:2004:222, paragraph 215).

89 It follows that the Commission was not required to define the relevant markets to determine whether the State measures constituted State aid within the meaning of Article 107(1) TFEU.

90 In the second place, for the following reasons it is also necessary to reject the applicants' argument that the joint analysis of the notified measures was not justified by the fact that the VLT Agreement and the Addendum concerned the same company and that they had been jointly notified in view of OPAP's privatisation.

91 As the Commission correctly stated, when it reviews whether a specific transaction contains State aid elements, it is required to take into account the context in which that transaction takes place (see, to that effect, judgment of 13 December 2011 in *Konsum Nord* v *Commission*, T-244/08, EU:T:2011:732, paragraph 57 and the case-law cited). The examination of a transaction outside its context could lead to purely formal results which do not correspond to economic reality.

92 In the present case, it is undisputed that the VLT Agreement and the Addendum were adopted at the same time, with a view to OPAP's privatisation. As stated by the Hellenic Republic and OPAP, the purpose of concluding those agreements was to increase OPAP's market value to make it more attractive to potential buyers. The documents provided by the Commission and the interveners in their responses to questions from the Court confirm that objective. Both the memoranda of understanding between the Hellenic Republic and the International Monetary Fund (IMF) and the 2011 reports of the IMF and the Commission refer to it several times. The Greek authorities also issued a call for tenders in September 2011 in order to select a specialised agency to conduct the independent calculation of the value of the two agreements in view of OPAP's privatisation. Those agreements were then finalised during the same period, namely in November 2011, for their joint notification to the Commission in December 2011 before the end of OPAP's sale process in October 2013. It follows that the Commission was therefore entitled to consider that the two notified measures were part of a single privatisation transaction, that they took place within the same economic context and that it was therefore appropriate and necessary to consider them jointly, in the context of a single notification.

93 As regards, in the third place, the applicants' alternative argument that, in any event, a joint assessment could be justified only if the measures covered similar periods, it is true that the Addendum concerns the exclusive operation of 13 games of chance during the period from 2020 to 2030, while the VLT Agreement covers the exclusive operation of VLTs during the period from 2012 to 2022. However, the interveners have confirmed in their replies to the Court's questions that the levies payable by OPAP for the grant of two categories of exclusive rights were due at the same time, that is in November and December 2011. In fact, OPAP paid the sum of EUR 375 million on 20 December 2011, a payment which directly followed the signing of the Addendum in November 2011. That advance payment also took place in the context of OPAP's imminent privatisation and is explained by the desire to offer potential purchasers a net balance. In those circumstances, the fact that the Addendum covers the operation from 2020 of 13 games of chance, whereas the VLT Agreement covers the period from 2012 to 2022, does not preclude the set-off, made in the contested decision, between the overpayment for the Addendum and the lower price paid for the VLT Agreement.

94 As regards, in the fourth and last place, the applicants' argument relating to subsidisation practices made possible by OPAP's monopoly over the 13 games of chance covered by the Addendum, it should be noted, first, that it is based on the assumption that OPAP is free to increase prices at will on those 13 games in order to compensate for lower prices on the VLT market. The applicants accordingly submit that OPAP will not sustain competitive pressures in its pricing policy. That argument is not, however, substantiated. In fact, the applicants do not support or demonstrate that the 13 games in question are not subject to competition from other games of chance.

95 Next, the applicants do not explain why the alleged practices of cross-subsidies between the lower prices on the VLT market and the higher prices on the market of the 13 games covered by the Addendum preclude the two notified measures being jointly assessed. Indeed, if such practices were to exist, they would create a link between the VLTs and the 13 games of chance, which instead supports the two measures being jointly assessed.

96 It follows from all the foregoing that the applicants have not demonstrated the existence of an error of law when the Commission carried out a joint assessment of the VLT Agreement and of the Addendum.

97 The applicants' fourth plea in law, and, therefore, the action as a whole must therefore be dismissed.

Costs

98 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay their own costs and those incurred by the Commission and OPAP, in accordance with the form of order sought by the Commission and OPAP.

99 Under Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. Accordingly, the Hellenic Republic, which has intervened in support of the Commission, must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

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 bear their own costs and to pay those incurred by the European Commission and the Organismos Prognostikon Agonon Podosfairou AE (OPAP);

3. Orders the Hellenic Republic to bear its own costs.

Van der Woude Wiszniewska-Białecka Ulloa Rubio

Delivered in open court in Luxembourg on 8 January 2015.

[Signatures]

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* Language of the case: English.