Reference for a preliminary ruling from the Bezirksgericht Linz (Austria) lodged on 31 August 2009 — Criminal proceedings against Jochen Dickinger, Franz Ömer

(Case C-347/09)

(2009/C 282/45)

Language of the case: German

Referring court

Bezirksgericht Linz

Parties to the main proceedings

Jochen Dickinger, Franz Ömer

Questions referred

1. (a) Are Articles 43 EC and 49 EC to be interpreted as, in principle, precluding legislation of a Member State, such as Paragraph 3 in conjunction with Paragraph 14 et seq. and Paragraph 21 of the Austrian Law on Gaming (Glücksspielgesetz), under which

   — a licence for lotteries (e.g. lotteries, electronic lotteries, etc.) may be granted to no more than one applicant for a period of up to 15 years, such applicant being required, inter alia, to be a capital company established in Austria, prohibited from establishing branches outside Austria, having a paid-up nominal or share capital of at least EUR 109 000 000 and which may, in the circumstances, be expected to achieve the best yield in terms of federal taxation;

   — a licence for casinos may be granted to no more than 12 applicants for a period of up to 15 years, such applicants being required, inter alia, to be public limited companies established in Austria, prohibited from establishing branches outside Austria, having a paid-up share capital of EUR 22 000 000 and which may, in the circumstances, be expected to achieve the best yield in terms of taxation for the regional authorities?

   These questions arise specifically against the following background: Casinos Austria AG holds all 12 casino licences, which were granted on 18 December 1991 for the maximum period of 15 years and which have since been extended without a public tendering procedure or notice.

   (b) If so, can such legislation also be justified for reasons relating to the public interest in a restriction of betting activities if the licensees in a quasi-monopoly are themselves pursuing a policy of expansion of games of chance, and employing intensive advertising in order to do so?

   (c) If so, must the referring court — in its examination of the proportionality of such legislation, which aims to prevent criminal offences by monitoring operators active in this sector and thereby steering gaming activities towards a regime in which they will be subject to checks — take account of the fact that the legislation also covers cross-border service providers who, in any event, are subject in the Member State of establishment to the strict conditions and checks associated with their licence?

2. Are the fundamental freedoms of the EC Treaty, in particular the freedom to provide services under Article 49 EC, to be interpreted as meaning that, irrespective of the continuing responsibility, in principle, of the Member States for the regulation of criminal law, rules of a Member State's criminal law are nevertheless to be assessed by reference to Community law if they are liable to prohibit or impede the exercise of one of the fundamental freedoms?

3. (a) Is Article 49 EC, in conjunction with Article 10 EC, to be interpreted as meaning that the checks carried out in a service provider's State of establishment, and the safeguards provided there, must be taken into account in the State in which those services are provided, on the basis of the principle of mutual trust?

   (b) If so, is Article 49 EC to be interpreted further as meaning that, where the freedom to provide services is restricted for reasons in the public interest, consideration must be given to whether sufficient account is not already taken of this public interest in the legal provisions, checks and investigations to which a service provider is subject in the State in which he resides?

   (c) If so, must consideration be given — when examining the proportionality of a Member State's rules imposing penalties for the cross-border provision of gaming services without a licence granted in that Member State — to the fact that the regulatory interests upon which the State in which the services are provided relies in order to justify the restriction of the fundamental freedom are already sufficiently taken into account in the State of establishment in strict authorisation and supervision procedures?

   (d) If so, must the referring court take account — in the context of its examination of the proportionality of such a restriction — of the fact that, in the State in which the service provider resides, the degree of control exercised by virtue of the provisions in question actually exceeds that of the State in which the services are provided?

(e) Moreover, does the principle of proportionality in the case of a prohibition — on pain of criminal penalties — of games of chance that is imposed for regulatory reasons, such as the protection of players and the fight against crime, require the referring court to make a distinction between providers who offer games of chance without any authorisation whatsoever, and those who are established and licensed in other Member States of the European Union and who conduct their activities in the exercise of their freedom to provide services?

(f) In the examination of the proportionality of a Member State's rules prohibiting the cross-border provision of gaming services without a licence granted or authorisation given in that Member State, on pain of criminal penalties, must account be taken, lastly, of the fact that, as a result of objective, indirectly discriminatory barriers to entry, it has not been possible for a provider of games of chance who is duly licensed in another Member State to obtain a licence in the first Member State, and the licensing and supervisory procedure in the State of establishment offers a level of protection that is at least comparable to that of the first Member State?

4. (a) Is Article 49 EC to be interpreted in such a way that the temporary nature of the service provision precludes the service provider from equipping himself with a certain infrastructure (such as a server) in the host Member State without being deemed to be established in that Member State?

(b) Is Article 49 EC to be interpreted further as meaning that a provision directed at support services within a Member State which prohibits them from facilitating the provision of services by a provider established in another Member State also amounts to a restriction of that service provider's freedom to provide services if the support services are established in the same Member State as some of the recipients of the service?

Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, Münster (Germany) lodged on 31 August 2009 — Pietro Infusino v Oberbürgermeisterin der Stadt Remscheid

(Case C-348/09)

(2009/C 282/46)

Language of the case: German

Referring court

Oberverwaltungsgericht für das Land Nordrhein-Westfalen, Münster

Parties to the main proceedings

Applicant: Pietro Infusino

Defendant: Oberbürgermeisterin der Stadt Remscheid

Question referred

Does the term 'imperative grounds of public security' contained in Article 28(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [1] cover only threats posed to the internal and external security of the State in terms of the continued existence of the State with its institutions and important public services, the survival of the population, foreign relations and the peaceful co-existence of nations?

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[1] OJ 2004 L 158, p. 77.

Appeal brought on 2 September 2009 by ThyssenKrupp Nirosta AG, formerly ThyssenKrupp Stainless AG against the judgment of the Court of First Instance (Fifth Chamber) delivered on 1 July 2009 in Case T-24/07 ThyssenKrupp Stainless AG v Commission of the European Communities

(Case C-352/09 P)

(2009/C 282/47)

Language of the case: German

Parties

Appellant: ThyssenKrupp Nirosta AG, formerly ThyssenKrupp Stainless AG (represented by: M. Klusmann and S. Thomas, lawyers)

Other party to the proceedings: Commission of the European Communities

Form of order sought by the appellant

1. Set aside the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 1 July 2009 in Case T-24/07 *ThyssenKrupp Stainless AG* v *Commission* in its entirety;

2. In the alternative, refer the case back to the Court of First Instance for fresh judgment;