

OPINION OF MR ADVOCATE GENERAL GULMANN  
delivered on 16 December 1993 \*

*Mr President,  
Members of the Court,*

for public-interest purposes or accrues to the  
State exchequer.

1. In the legal systems of all the Member States there is a fundamental prohibition on lotteries and other forms of games of chance. The reasons for the prohibitions are broadly the same. Lotteries and games of chance are activities which, for ethical and social reasons, should not be permitted. Citizens should be protected against the dangers that may stem from the urge to gamble and there is a significant risk of criminality in this field.

2. The lotteries sector, with which the present case is concerned, is characterized by the fact that in most of the Member States there is one or more large country-wide lottery which is either operated directly by the public authorities or is subject to tight public controls and there are also rules under which small local lotteries are permitted subject to certain conditions, in particular as regards their revenue. Moreover, according to the information given, there are prohibitions or far-reaching restrictions on the activities of foreign lotteries in the Member States. <sup>1</sup>

But at the same time in all Member States there are to a greater or lesser extent exceptions from that prohibition. That is because it may be appropriate to permit some measure of gambling, partly to meet the citizens' desire to gamble and partly to prevent unlawful gambling. It is possible to lay down requirements concerning permitted forms of gambling in such a way as to limit the risk of criminality. In addition a significant factor in all the Member States is that it is possible to make authorization subject to conditions whereby the revenue from gambling is used

The internal market has thus not been achieved in the lotteries sector. The large country-wide lotteries have been given exclusive rights and they are to a large extent protected against competition from foreign lotteries.

\* Original language: Danish.

<sup>1</sup> — See point 41 of the order for reference.

3. In the present case the Court of Justice is called on to determine whether the rules in the Treaty of Rome are applicable in this sector and if so whether the restrictions which apply to the activities of foreign lottery operators are compatible with the Treaty.

6. This information is largely taken from a report published by the Commission on gambling in the internal market.<sup>2</sup> The Report, which points out that the figures used therein relate to 1989 and are to be treated with caution, sub-divides the gambling market into a number of product sectors with the following market shares at Community level:

The case is thus of considerable practical and fundamental interest and all the Member States except Italy have submitted their observations.

— national lotteries and the like 36%

— horse-racing and the like 31%

4. The questions referred to the Court of Justice for a preliminary ruling have been raised in a case in which an English court must rule on the compatibility with Community law of the seizure of advertising material for a foreign lottery pursuant to United Kingdom legislation which at the material time prohibited lotteries apart from specified local lotteries, that is to say at a time when there was no large country-wide lottery in the United Kingdom.

— casinos 17%

— gaming machines 11%

*Gambling and the regulation of gambling in the Member States*

— bingo etc. 5%

5. It may be appropriate to supplement these introductory remarks by a short overview of the various forms of gambling in the Member States and the regulations applying thereto.

2 — *Gambling in the Single Market — A study of the Current Legal and Market Situation, Volumes I, II, and III, June 1991* (the 'Commission Report'). The report was prepared for the Commission by the accountants Coopers & Lybrand and it is stated that the report 'does not necessarily represent the Commission's official position'.

Underlying the report is a distinction between betting and gaming. Betting is defined as a game where a financial stake is wagered against the outcome of an event. Betting involves an element of knowledge of the event concerned. Gaming, on the other hand, is defined as the wagering of a stake against the outcome of an event in which no skill element is involved. That form of gaming is thus called games of chance. Lotteries are games of chance.

Total turnover, that is to say the sums staked in the legal gambling sector, was estimated at just over ECU 45 000 million.

distributed as follows amongst the national markets:

	— Germany	8.5%
	— Spain	26.0%
7. The Report shows that there are major differences between the gambling markets in the various Member States.	— France	16.0%
	— Italy	11.0%
	— United Kingdom (presumably only football pools)	6.0%
	— The other Member States	12.5%

As a result of those national differences in the market for horse-race betting, for example, the United Kingdom and France had 55% and 30% respectively of the total market at Community level while the lottery market<sup>3</sup> — in respect of which the Report includes only figures for the large country-wide lotteries but on the other hand includes figures from betting on football and other sports (Totto/football pools) — was

8. The Commission Report thus emphasizes that the gambling market is made up of highly differentiated national markets and that that reflects different national traditions and preferences and differing national regimes.<sup>4</sup>

<sup>3</sup> — Lotteries are characterized by a pooling of all the stakes and a high win/low stake ratio. The lottery market today is dominated by lotto. Class Lotteries, like lotteries in general, consist of the sale of numbered tickets from which one or more winning number is subsequently drawn. In Class Lotteries players take part in several draws ('classes') with a single ticket. The various Class Lotteries have adopted specific rules on the number of draws in each class. There are also other forms of lotteries. One example is the 'instant lottery' where the 'draw' is carried out immediately in that the player for example can scratch part of the lottery ticket and immediately see whether he has won. According to the Commission Report the breakdown of the market for lotteries and the like was as follows: 'classic' lotteries — 25%, lotto — 46%, the toto (betting on sport) — 22%, and 'instant lotteries' — 6%.

9. The Report also states that the gambling market today must not least be seen as an important source of State revenue.

<sup>4</sup> — See Vol. I, p. 3 of the Report.

That is striking in the lottery sector too. It is apparent from the Commission Report and also from the observations submitted in this case that the States either retain revenues from lotteries for themselves (and pay them into the public exchequer) or require that revenues be used for purposes in the public interest (in some cases after deduction from the revenue of taxes for the public exchequer). In some Member States winners have to pay tax on their winnings. According to the information that has been given, no country-wide lotteries operated on a commercial basis, by private undertakings which may decide on the use of revenue themselves, are permitted.

The proportion of the total turnover which, as revenue, is to be paid into the State exchequer or used for purposes in the public interest varies somewhat from one Member State to another but in all cases it is a relatively high proportion of total turnover, typically between 25% and 40%.

10. Even if the basic principle is the same in all the Member States, namely that lotteries are prohibited unless they have been specifically authorized or comply with general conditions for specified, normally local, operators, there are considerable differences as regards the operators who are given authorization. As mentioned above, in most Member States the large country-wide lotteries are operated by the public authorities themselves or by State companies. It is also

possible for lottery concessions to be granted to companies which are responsible for holding lotteries on behalf of the State. Finally, there are instances in many Member States of lotteries being held at national level by benevolent organizations which finance part of their operations with the revenues from the lotteries they organize.

11. It is apparent from the Commission Report<sup>5</sup> that to a certain limited — but, because of technical developments, increasing — extent there is to be found cross-border sale of lottery tickets. In particular, lottery tickets for the German Class Lotteries are sold in Belgium, Denmark, the Netherlands and Luxembourg. The Commission Report points out that the United Kingdom market is particularly interesting for foreign lottery operators since there has hitherto been no possibility there of taking part in large lotteries. It is presumed that cross-border gambling is a 'market-driven phenomenon' since consumers are primarily attracted by the size of prizes.

12. The United Kingdom lottery market has hitherto differed from the lottery markets in the other Member States.

<sup>5</sup> — Vol. I, p. 3 and p. 18.

The United Kingdom legislation lays down a general prohibition on the organization of lotteries. Exceptions are made from that prohibition only in respect of certain specified local lotteries promoted either by local authorities or by organizations or the like where the profit is destined for 'good causes'.

It is apparent from the White Paper that those amendments should be seen in the light of the technical developments which at one and the same time open up the possibilities of extensive cross-border lottery operations and render difficult the maintenance of the ban on such operations.<sup>8</sup>

One consequence is that it has not been possible for country-wide lotteries to be held and a prohibition has also applied to the sale of lottery tickets in or the marketing of foreign lotteries.<sup>6</sup>

13. That legal position, which obtained at the material time in this case (April 1990), has now been altered in key respects. On the basis of a White Paper in March 1992<sup>7</sup> a law was adopted on 21 October 1993 on the establishment of a national lottery (National Lottery etc. Act 1993) to be operated by a concession-holder under public control, the profit from which is destined for purposes in the public interest. The legislation has also been amended to allow the import of lottery tickets from lotteries in other Member States but the prohibition on at least certain forms of promotion of foreign lotteries remains.

*The background to the questions referred for a preliminary ruling and their content*

14. Gerhart Schindler acts, together with his brother Jörg Schindler, as an independent agent for the Süddeutsche Klassenlotterie. In 1990 they sent as a mass mailshot from the Netherlands some 20 000 individually addressed envelopes to persons resident in the United Kingdom. Each envelope contained a letter inviting the addressee to participate in the 87th issue of the Süddeutsche Klassenlotterie, application forms and a reply

6 — The United Kingdom stated at the hearing that there is no ban on private individuals buying lottery tickets and importing them into the United Kingdom for their own use.

7 — *A National Lottery — Raising Money for Good Causes*, Cm 1861, London, March 1992.

8 — According to the White Paper:

'8. Recently, concern about the potential impact of lotteries from other European Community countries following the completion of the Single European Market on 1 January 1993 has given a new stimulus to the debate about a national lottery. (...)

9. However, even if our prohibition on foreign lotteries is maintained in law, the Government recognizes that it would become increasingly difficult to enforce in practice. Without a national lottery of our own, the United Kingdom market would continue to be attractive to lotteries from other EC countries and elsewhere.

10. It is undoubtedly true that modern technology will make it increasingly difficult to prevent our citizens seeing advertising for, and participating in, foreign lotteries (...). Many foreign broadcasts are already available on satellite television. Cheaper telecommunications, and new means of payment, might in due course make participation in a foreign lottery as easy as a phone call. The British public might therefore be able to participate in lotteries benefiting the citizens of other countries but not their own.'

envelope on which was printed an address in the Netherlands.<sup>9</sup>

15. Her Majesty's Customs seized all the letters and application forms on the grounds that they had been imported into the United Kingdom in breach of the law. The customs authorities subsequently brought an action against Gerhart and Jörg Schindler for a declaration that the seizure, which had been contested by the brothers, was lawful.

16. The High Court of Justice (Queen's Bench Division) has asked six questions pursuant to Article 177 of the EEC Treaty.

<sup>9</sup> — The Süddeutsche Klassenlotterie is a public institution established by the four German Länder of Bavaria, Hessen, Baden-Württemberg and the Rheinland Palatinate and has an annual turnover of some DM 700 million. The management of the lottery is supervised by a State lottery committee which has to approve the budget and the annual accounts. Agents, who must meet specified requirements as to personal and professional qualifications, are expected to promote the lottery but under the rules of the Süddeutsche Klassenlotterie may not promote the lottery in States where that is prohibited. The agents receive a commission for every ticket sold.

The Süddeutsche Klassenlotterie is a lottery in which players buy whole tickets or fractions of tickets which are entered in several draws in each class. There are two lotteries a year. Each lottery runs for a period of 26 weeks. The draws are spread over six classes, with four draws in Classes 1 to 5 and six draws in Class 6. In practice there is one draw each week throughout the year. Tickets are issued for each class separately. Class 6 offers the highest prize (in the lottery in question in the main proceedings, the highest prize was DM 4 million). The attraction of the Class Lottery lies in the very high main prize and also the relatively high chance of recovering the stake. See also paragraphs 34 to 38 of the Report for the Hearing and the Commission Report, Vol. II, p. 93.

Questions 1 and 4 seek to ascertain whether tickets in, or advertisements for, a lottery which is lawfully conducted in another Member State constitute goods for the purposes of Article 30 of the EEC Treaty or whether the provision of tickets in, or the sending of advertisements for, such a lottery constitutes the provision of services for the purposes of Article 59 of the EEC Treaty.

Questions 2 and 5 seek to ascertain whether either Article 30 or Article 59 applies 'to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized from outside or within the United Kingdom'.

If the answer is affirmative, Questions 3 and 6 seek a ruling on whether 'the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 36' or 'under Article 56 read with Article 66 or otherwise.'

17. The observations that have been submitted in this case show the need to examine the following questions:

*Are lotteries covered by the Treaty?*

- To what extent is the establishment and operation of lotteries an ‘economic activity’ falling within the scope of the Treaty?
- Do tickets and advertising for lotteries constitute goods within the meaning of Article 30 or services within the meaning of Article 59?
- Is the ban on imports discriminatory?
- If not, does it constitute a restriction on the free movement of goods or services which is in principle incompatible with the Treaty?
- Can the grounds which are relied on justify such a restriction?
- Is the restriction necessary and proportionate to the objects that are being pursued?

18. Several of the Member States have argued either that lotteries fall wholly outside the scope of the Treaty or that in any event they are not covered by the Treaty rules on the free movement of services. Some of those Member States have, however, confined that view to lotteries which can be characterized as public undertakings providing services.

19. The underlying common argument for that view is that the Treaty applies only to economic activities with a view to attaining the objectives set out in Article 2 of the Treaty and that a lottery does not constitute such an economic activity. Reference is made in this respect *inter alia* to the case-law of the Court of Justice to the effect that non-economic activities fall outside the scope of the Treaty, in particular the judgments in *Walrave* and *Dona*,<sup>10</sup> in which it was held that certain sporting activities were not covered by the Treaty because they were not of an economic nature. Reference was also made to the provision in Article 58 of the Treaty under which the Treaty applies only to companies or firms which operate for

<sup>10</sup> — Case 36/74 *Walrave* [1974] ECR 1405 and Case 13/76 *Dona* [1976] ECR 1333.

profit and that it is apparent from the Treaty definition of the provision of services that it refers to services which are normally carried out for payment (see Article 60).

It is also argued that support for that view can be drawn from the fact that gambling is in principle unlawful in all the Member States and that gambling debts cannot be enforced since the underlying agreements are regarded as invalid. It is said that such agreements constitute a threat to public order and that they do not pursue any aim meriting protection. Further support is to be found in the fact that in some Member States, and in any event in Germany, gambling is regarded as a matter of public law.

20. I do not consider that view tenable. The circumstances stressed by the Member States show that gambling has a special position in society in comparison with most common economic activities. They are circumstances which are clearly relevant to the assessment of the significance of the rules of the Treaty in this field but they do not entail that the Treaty as such or the Treaty rules on services are fundamentally inapplicable.

21. There is no basis in the Treaty rules, as interpreted by the Court of Justice,<sup>11</sup> for giving the Treaty a narrow scope. It is clear from this case that the economic significance of gambling, including lotteries, is considerable in all the Member States. It is a quite particular form of economic activity inasmuch as, at least in so far as lotteries are concerned, the revenue, after payment of the often considerable expense of holding the lottery and the prizes, either accrues to the State exchequer or is used for public-interest purposes. However, that does not signify that the activity falls outside the scope of the Treaty. Such activities are also economic activities within the meaning of the Treaty. The services in question, participation in a lottery with the consequent possibility of winning, are provided for payment and the revenue from the activity is economic, irrespective of the use to which it is put. Article 90 of the Treaty shows that the Treaty also applies to public undertakings and

11 — See in this connection the judgments in Case 196/87 *Steymann* [1988] ECR 6159 concerning the application of the Treaty rules to the economic activities of religious organizations, Case 186/87 *Cowan* [1989] ECR 195 concerning the application of the Treaty to national rules on compensation for victims of acts of violence, and Case C-159/90 *Grogan* [1991] ECR I-4685 concerning the application of the Treaty to rules regarding information on abortion.

Reference may also be made in this connection to Case C-272/91 *Commission v Italy* in which the Court of Justice has been asked to rule on the compatibility with the Treaty and Council Directive 77/62/EEC on public supply contracts of an Italian public tendering procedure for computerization of the Italian lottery. The Italian Government contends that the tendering procedure relates to a concession of the right to hold the lottery and that it is therefore covered by Articles 55 and 66 of the Treaty. As far as the present case is concerned, it is worth observing that neither the Italian Government nor the Commission was prompted to consider whether the holding of a lottery is covered by the Treaty rules at all. In my Opinion of 14 July 1993 in Case C-272/91, I concluded that the tendering procedure did not concern the right to operate the lottery since I considered that the procedure related to an agreement to carry out services for and the supply of goods to the public administration with a view to the latter's holding of lotteries. If the Court of Justice follows that view, the question whether lotteries as such are covered by the Treaty rules will not directly be at issue in that case.



undertakings to which Member States grant special or exclusive rights, including undertakings which have the characteristics of fiscal monopolies.

22. No cogent grounds have been put forward for gambling, including lotteries, to be in principle outside the scope of the Treaty.<sup>12</sup> It should be plain in my view that, in so far as they authorize gambling, the Member States must observe the fundamental prohibition in the Treaty of discrimination on grounds of nationality.

23. In connection with the question of the scope of the Treaty, reference has been made to Council Directive 75/368/EEC of 16 June 1975 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities (ex ISIC Division 01 to 85) and, in particular, transitional measures in respect of those activities.<sup>13</sup> That directive, one of the so-called transitional directives, applies *inter alia* to lotteries conducted by private persons in certain Member States but does not cover lotteries organized by public

bodies (public services).<sup>14</sup> It can in any event be concluded from that directive that lotteries are not as such excluded from the scope of the Treaty. In so far as concerns lotteries operated by public bodies, the only conclusion that may be drawn is that the Council did not consider it appropriate for the rules in that directive to apply to them.

*Do the facts in the main proceedings relate to goods or services within the meaning of the Treaty (Questions 1 and 4)?*

24. As mentioned above, the Court has been expressly asked to rule on how certain activities relating to lotteries are to be classified with regard to the concepts of goods and services under the Treaty.

Such a classification under the Treaty is in any event necessary even though it is at least to some extent correct, as certain Member States point out in their observations, that the question whether the United Kingdom rules are to be assessed on the basis of the

12 — No weight can be attached to the view that the activity in question is not regarded as a private-law economic activity in one or more Member States. The scope of the Treaty must necessarily be determined on the basis of an independent interpretation of the Treaty which cannot be bound by the definition of terms in one or more Member States.

13 — OJ 1975 L 167, p. 22.

14 — According to the preamble 'lottery and similar activities which come under ISIC Group 859 often belong to the field of public services, either directly or through public bodies, or are prohibited, and some of these activities do not therefore come within the scope of this Directive; ... however, in certain Member States such activities can be conducted by private persons and should be included in this Directive'.

Treaty rules on the free movement of goods or the Treaty rules on the free movement of services is not determinative for a decision on their lawfulness (see also point 56).

25. I do not consider that such classification gives rise to any major problems.

26. That lotteries as such constitute services within the meaning of the Treaty has not been contested in this case and is probably indisputable. That is in any event also clearly presupposed by the directive referred to in point 23.

It is Gerhart and Jörg Schindler alone who contend that lottery tickets must be regarded as goods within the meaning of the Treaty and that advertising material connected to the sale of lottery tickets is covered by the Treaty rules on the free movement of goods.

The Member States which have commented on the issue and the Commission agree that the activities in question in this case relating to a lottery must be regarded as part of the provision of those services.

27. There can be no doubt to my mind that that view is correct. There is no particular reason for treating lottery tickets as goods. They represent the evidence that the owner of the lottery ticket has paid for the right to take part in the lottery, that is to say, has paid for the chance of being drawn as the winner of one of the prizes in the lottery in question. The purchase of a lottery ticket corresponds in that context to the signing of an insurance contract or the purchase of personal travel services where the documents issued by the provider of services for the purchase of the services — the policy and the travel ticket — are not goods within the meaning of the Treaty. The factual and legal differences that may exist as regards the transferability of such documents are not material in this instance.

28. The Court has held that advertising material relating to trade in goods is to be treated as goods under the Treaty rules.<sup>15</sup> I consider that there can be no doubt that advertising material relating to the provision of services must be treated as services under the Treaty rules.

29. It follows that lotteries and related activities, including the sale of lottery tickets and advertising for lotteries, constitute services within the meaning of the Treaty and that

<sup>15</sup> — See judgment in Case C-362/88 *GB-INNO* [1990] ECR I-667.

national rules regulating such activities fall within the Treaty rules on the freedom to provide services.

has decided not to submit proposals for Community rules in this field.<sup>16</sup>

*The right of the Member States to regulate lotteries*

30. No rules have been adopted at Community level on lotteries and other forms of gambling that are relevant in the present instance. The abovementioned Directive 75/368/EEC on transitional provisions only lays down a limited obligation for Member States to accept specified evidence of the good repute and other qualifications of foreign undertakings and the Member States' obligations in this regard are also limited in so far as concerns lotteries conducted by private individuals.

31. There can be no doubt that the Member States regulate this sector in an intensive and fairly restrictive manner.

The question is not whether the Member States may undertake such regulation. The Treaty does not affect the Member States' fundamental competence to lay down rules on the access to and exercise of occupations. The only question is what limitations are to be inferred from the Treaty rules for the Member States' regulatory power in this sector.

32. As stated above, the present case concerns the significance in this context of the Treaty rules on services. But it may be useful, before considering the rules on services, to make more general observations regarding the Member States' general competence to regulate the access to and exercise of activities in the lottery sector.

It has also been stated in the course of the proceedings that the Commission has informed the European Council that in view of the principle of subsidiarity, as embodied in the new Article 3b inserted in the EC Treaty by the Treaty on European Union, it

16 — See the conclusions of the Presidency of the European Council Meeting in Edinburgh on 11 and 12 December 1992, Annex 2 to Part A: 'Subsidiarity — Examples of the Review of Pending Proposals and Existing Legislation', published in the *Bulletin of the European Communities* No 12-1992, p. 16 et seq.

33. The starting point in all the Member States is, as mentioned above, that gambling is prohibited and that legal position cannot be contrary to the Treaty. In practice certain forms of gambling are, however, allowed in all Member States under certain specified conditions. There are quite considerable differences between the Member States as regards the forms of gambling that are permitted and as regards the conditions for such authorization. As a result, one form of gambling may be prohibited in one Member State but permitted in another.

34. If gambling is permitted, the Member States may undoubtedly lay down rules regarding the qualifications to be met in order for operators to be allowed access to the activity and as regards the way in which the activity must be carried out in order to ensure that it is not abused to the detriment of the individual players and of society as a whole.

There may be differences in the intensity and scope of the protection against abuse afforded by the legislation of the various countries.

35. In practice a frequent requirement in the Member States, and one laid down in all

major cases in the lotteries sector,<sup>17</sup> is that the revenue from the activity in question accrues to the State exchequer or is applied to public-interest purposes. It must be possible for the Member States to lay down such requirements.

36. The practice in Member States where lotteries are permitted is that major national lotteries must generally be administered by the public sector or subject to public supervision. That is apparently because it is regarded as an appropriate means of protecting against abuse and because it is regarded as natural in view of the fact that the revenue is to accrue to the State exchequer or to be used for public-interest purposes.

37. Finally, in practice the Member States regulate, at least to a certain extent, lotteries in such a way that the 'supply' is restricted. The purpose is said to be to protect consumers against the dangers inherent in excessive participation in gambling by individuals (gambling fever) and the means used include, in particular, restricting the number of undertakings which may operate lotteries,

17 — However, examples are to be found under national legislation where revenue from certain lotteries can accrue to private individuals. Typical conditions are that the sums involved are small (both as regards the price of each lottery ticket, the total turnover and the prizes offered, which commonly may not be cash prizes) and the activity is conducted as part of other entertainments, for example travelling fun-fairs and the like.

restricting the number of lotteries that may be offered and restricting the number of draws.

question exclusively to one or more undertakings or, in some cases, by reserving it to the State itself.

38. Provided that the fundamental requirement of equal treatment of undertakings laid down in Article 52 of the Treaty is observed, I believe it may be presumed that Member States may, without coming into conflict with the Treaty, lay down rules on lotteries which

Such doubts arise both with regard to the Treaty rules on establishment and the Treaty rules on services.

— prohibit lotteries altogether or in part;

It is plain from the rules on establishment under the Treaty and the case-law of the Court that there is no absolute prohibition on confining certain forms of commercial activity to one or more undertakings, including possibly public undertakings or undertakings under public control. But the Treaty does require that there be general criteria which are acceptable under the scheme of the Treaty and which necessitate such derogation from the principle of equal access to trades or occupations (see point 75 below).

— lay down requirements regarding responsible operation of an authorized activity;

— require revenue to be used solely for public or public-interest purposes; and

— restrict the supply of lotteries, at least to some extent.

40. The question is whether the Member States can restrict access to the exercise of lottery activities on the basis of what might be called an assessment of needs, that is to say on the basis of determining what supply there should be on the market for the services in question. In other words, the question is whether Member States can in this field set aside the general mechanisms of the market.

39. It is perhaps more doubtful whether the Member States may restrict supply, as they do in practice, by confining the activity in

41. There must be good reasons for not allowing the general mechanisms of the market to function. In an open market economy it is market forces and not public regulation which should in principle determine what supply of certain goods or services there should be.

42. But in this particular field cogent grounds have been put forward for such interference with the mechanisms of the market. All Member States have in any event taken two key measures: first, either no lotteries are allowed at national level at all or only one or a few lotteries are allowed, and secondly, no ordinary commercial undertaking may be operated in this sector.

There is certainly no call in these proceedings to examine from the right of establishment aspect the lawfulness of such restrictions on the right of undertakings to engage in the business of lotteries. But, as will be seen below, there can be no real doubt that Member States may lawfully regulate the market in the abovementioned respects provided that they comply with the obligation of equal treatment under Article 52 of the Treaty and so long as the Community has not adopted relevant rules on the matter.

43. Those considerations are not conclusive but they are relevant to a decision on the

nub of this case, namely what are the limits applying to the right of States to extend the scope of their legislation to apply to foreign providers of services.

44. Those considerations are not conclusive because it is apparent from the case-law referred to in point 54 below that the prohibition under Article 59 against restricting the free movement of services is more extensive than the prohibition which under Article 52 applies to the possibility for Member States to regulate the right of establishment of undertakings.

The considerations are relevant because the factors which underlie the Member States' regulation of the right of establishment are the same factors that may form the basis for limitations on the free movement of services and it may well be that the object pursued in regulating the right of establishment can only be achieved if the rules on establishment, that is to say the rules on access to and exercise of the activity in question, must be complied with both by national and by foreign undertakings.

45. In deciding on the fundamental issue in these proceedings it is important to appreci-

ate clearly the consequences of the Court's possible answers.

49. The Court must finally consider, and this is the key issue in the case, whether the State of destination must in addition be given the possibility of restricting the supply of lotteries.

46. The most far-reaching impact of application of the Treaty rules on services to the Member States' rules on foreign lotteries would be that the State of destination would have to admit unreservedly services from undertakings operating lotteries lawfully under the legislation of their own State. That would entail in principle full mutual recognition amongst the Member States of their rules on lotteries.

If they were not given such a possibility, there would exist in each Member State a market situation in which the State's own lottery or lotteries would offer their services and, at the same time, all lotteries operating lawfully in other Member States (and if appropriate complying with the abovementioned requirements regarding responsible operation and the like) would be able to do the same.

47. It would of course be necessary to consider to what extent the State of destination could, in that event, also require of foreign providers of services that their activities were exercised in compliance with rules affording sufficient guarantees of responsible operation with a view to the protection of the interests of consumers and society.

In such a situation it would be substantively impossible for an individual State to restrict supply since the total supply on the market would depend on the supply that was permitted in other States and at the same time a situation would arise on the market in which the large lotteries — first and foremost those with a large home market — would have significant competitive advantages because they were in a position to offer consumers the biggest prizes (see point 113 below).

48. It is also necessary to consider whether the State of destination would be able to apply to foreign providers of services in the same way as to its own undertakings the requirement that profits must in any event be applied to public or public-interest purposes.

In short a situation would arise in which there would be no real possibility of restricting supply in order to protect consumers

against the dangers of excessive gambling and competition would not be between private commercial undertakings, with the ensuing advantages regarding the allocation of resources, but between public funds and public-interest purposes in the various Member States.

50. It is that result which the Member States find fundamentally wrong and which, they claim, cannot result from the Treaty.

*Observations on Questions 5 and 6*

51. As mentioned above, these questions relate to the significance of the rules on services as regards the application to foreign lotteries of the United Kingdom rules laying down a general prohibition on the operation of large lotteries in the United Kingdom.

52. In principle I believe that the Court should confine its answer to those questions to the legality of such rules under the Treaty.

Nonetheless I have also considered it appropriate to include observations regarding the significance of the Treaty to the situation

applying in most of the Member States where the market for large lotteries is confined to one or more lottery undertakings which are operated by the public sector itself under public control. In interpreting the Treaty rules in the context of this case the Court must, of course, take account of the implications of its interpretation for the legal positions in the other Member States. Moreover, the United Kingdom has rightly pointed out that the rules that applied at the material time in the main proceedings cannot be assessed without regard to the fact that a decision has finally been taken in the United Kingdom to introduce a legal situation which in principle corresponds to that in the other Member States. Furthermore, the other Member States in their observations have largely expressed views which are relevant to an assessment of the legal positions in those countries.

*Question 5*

53. As indicated above, Question 5 asks:

‘does Article 59 apply to the prohibition by the United Kingdom of the importation of tickets or advertisements for major lotteries, given that the restrictions imposed by the



United Kingdom law on the conduct of such lotteries within the United Kingdom apply without discrimination on grounds of nationality and irrespective of whether the lottery is organised from outside or within the United Kingdom?’

in *Säger* on patent renewal services.<sup>21</sup> In *Säger* the Court held: ‘Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services’ (paragraph 12).

54. The Court has always stressed in its case-law that the Treaty rules on services primarily prohibit overt and covert discrimination against foreign services but it has further stated that the prohibition can also affect restrictions other than those stemming from discriminatory rules. In its judgments in 1979 in *Van Wesemael* and in 1981 in *Webb*<sup>18</sup> the Court held that the rules on services can also limit the possibility for Member States to apply non-discriminatory rules to foreign services. That was stated still more clearly in the 1986 judgments in the so-called ‘Co-insurance cases’, which related to non-discriminatory requirements regarding establishment and authorization in the insurance sector.<sup>19</sup> It has been reiterated most recently in the 1991 judgment in the so-called ‘Tourist guide cases’<sup>20</sup> and in the 1991 judgment

55. An important proviso for a proper understanding of the Court’s case-law on this point is of course the possibility that still exists that restrictions, whether or not they stem from discriminatory rules, may be justified and therefore lawful.

As regards ‘national rules which are not applicable to services without discrimination as regards their origin,’ they ‘are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty’.<sup>22</sup> In so far as concerns

18 — Case 110/78 *Van Wesemael* [1979] ECR 35 and Case 279/80 *Webb* [1981] ECR 3305.

19 — See in particular Case 205/84 *Commission v Germany* [1986] ECR 3755.

20 — Case C-154/89 *Commission v France* [1991] ECR I-659, Case C-180/89 *Commission v Italy* [1991] ECR I-709 and Case C-198/89 *Commission v Greece* [1991] ECR I-727.

21 — Case C-76/90 *Säger* [1991] ECR I-4221.

22 — See for example judgment in Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraph 15.

other restrictions the Court has held: 'Having regard to the particular characteristics of certain provisions of services, specific requirements imposed on the provider, which result from the application of rules governing those types of activities, cannot be regarded as incompatible with the Treaty. However, as a fundamental principle of the Treaty, the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives'.<sup>23</sup>

56. As will be seen, there is a large degree of correspondence between the Court's case-law concerning Article 30 and Article 59 of the Treaty.

It should, however, be pointed out that the Court has not held with regard to Article 59, in the same way as it has with regard to Article 30, that any restriction capable of hindering, directly or indirectly, actually or potentially, the free movement of services is

covered by the prohibition under the Treaty.<sup>24</sup>

The area of services is at least to some extent different from that of goods in particular because of the important personal element in many services and the consequent importance of distinguishing between conditions applying to access to the activity in question (personal qualifications and the like) and the conditions applying to the exercise of that activity.

57. On that basis the Court's case-law regarding Article 59 can perhaps most accurately be summarized as follows:

— all discriminatory measures are caught by Article 59, and

— some, but not necessarily all, other measures that restrict the activities of foreign providers of services in the host country may be caught by Article 59.<sup>25</sup>

<sup>24</sup> — See the judgment in Case 8/74 *Dassonville* [1974] ECR 837.

<sup>25</sup> — The principle that within the context of Article 30 too there may also exist limitations on the free movement of goods which do not constitute restrictions within the meaning of Article 30 has been laid down in the judgment of 24 November 1993 in Cases C-267/91 and C-268/91 *Keck* [1993] ECR I-6097.

<sup>23</sup> — See judgment in *Sager* (cited in footnote 21), paragraph 15.

58. A finding that the rules at issue constitute a non-discriminatory limitation on the activities in the United Kingdom of foreign providers of services does not, therefore, answer the High Court's fifth question.

It is necessary to determine whether the limitation constitutes a restriction within the meaning of Article 59.

59. Most of the observations that have been submitted in these proceedings, including those of the United Kingdom, contend that this question must be answered in the affirmative.

60. However, some Governments have defended the contrary view. They refer to the judgments of the Court in *Société Générale Alsacienne de Banque* <sup>26</sup> and in *Debauve* <sup>27</sup> which can both be read as signifying that the national rules at issue were not

caught by the prohibition under Article 59 simply because they were non-discriminatory. <sup>28</sup>

61. It seems to me that strong grounds can be put forward for holding that national rules which contain a general prohibition of a specified activity and which are neither overtly nor covertly discriminatory are not incompatible with Article 59 of the Treaty. Such rules are equally burdensome for national and foreign providers of services and it is not immediately clear why foreign providers of services should be able to exercise an activity which is prohibited for nationals merely because those foreign providers lawfully exercise that activity in their own State.

62. But that cannot be conclusive in the present case. The two abovementioned judgments can be relied on in support of that result only up to a point. In *Debauve* the Court in fact carried out an assessment of whether the prohibition at issue was disproportionate to the objective pursued and the

28 — The *Société Générale Alsacienne de Banque* case concerned a provision of services, specifically stock exchange time-bargains carried out by a bank on instructions from a customer, which under German law were regarded as not being legally binding. The Court held: 'The fact that debts arising out of a wagering contract or other similar debts are not actionable cannot be regarded as discrimination against a person providing services established in another Member State if the same limitation applies to any person providing services established within the territory of the same State whenever that person claims payment of a debt of the same kind, and this has not been disputed in the present case' (paragraph 5). The *Debauve* case concerned a Belgian prohibition on the transmission on cable television of foreign advertisements. The Court held: 'Articles 59 and 60 of the Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television — as they prohibit the broadcasting of advertisements by television — if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service or the place where he is established' (paragraph 16).

26 — Case 15/78 *Société Générale Alsacienne de Banque v Koestler* [1978] ECR 1971.

27 — Case 52/79 *Debauve* [1980] ECR 833.

fact must not be overlooked that the Court in its subsequent decisions has stated, as mentioned above, that non-discriminatory restrictions can also be caught by Article 59.

underlying Question 5, namely that the United Kingdom rules at issue, in so far as their actual content is concerned, apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized within or outside the United Kingdom.

63. There is, moreover, one ground which in the circumstances of this case suggests that rules like those at issue must also be regarded as restrictions within the meaning of Article 59. The prohibition at issue is being applied in a situation in which the United Kingdom has stated that it is to be abolished because the view has been taken that it is appropriate to set up a national lottery. A legal position under which foreign providers of services cannot operate in the same way as national providers is in any event a restriction within the meaning of Article 59, even if in this case it was to be regarded as non-discriminatory.

66. However, the Commission and Gerhart and Jörg Schindler contend that the rules are in fact discriminatory since they deny a lottery like the *Süddeutsche Klassenlotterie* access to a market on which similar gambling activities by competing undertakings are permitted.

They point primarily to the activities that may be carried out by local lotteries and the activities carried out by private undertakings which organize football pools. According to the Commission and Gerhart and Jörg Schindler, those competing undertakings are thus afforded indirect protection and the rules at issue are therefore discriminatory.

64. On those grounds the following answer should be given to Question 5: Article 59 of the Treaty applies to the rules at issue even if they apply without discrimination on grounds of nationality and irrespective of whether the lottery is organized within or outside the United Kingdom.

67. I do not consider that that view is correct.

*Are the United Kingdom rules substantively discriminatory?*

65. Nobody in this case seems to have challenged the correctness of the premiss

68. The starting point must be the fact that the United Kingdom legislation lays down a general prohibition on the holding of

lotteries that is only subject to a number of specified and *prima facie* objectively well-founded exceptions for the benefit of local lotteries whose objects are well-defined and whose turnover cannot exceed specified limits.<sup>29</sup>

69. The United Kingdom legislation does permit football pools as a form of gambling. Authorization is even given for private undertakings to engage in this activity for profit since regulation by the State is confined to ensuring that the activity is conducted in a responsible manner and that a proper proportion of the profit flows into the exchequer as tax.<sup>30</sup>

There is nothing in this case to indicate that the direct or indirect object of that legal situation is to protect British lotteries against competition from other lotteries organized outside the United Kingdom. There is an apparently objectively-founded delimitation of the United Kingdom lottery market to admit only local lotteries with a limited turnover. The fact that that limitation signifies that large foreign lotteries cannot exercise their activities in competition with the authorized local lotteries does not make the rules in question discriminatory.

There has been nothing to suggest that the current United Kingdom rules on football pools taken on their own are incompatible

29 — Under the Lotteries and Amusements Act 1976 the exceptions are for small lotteries incidental to certain entertainments (section 3), private lotteries confined to a restricted group (section 4), lotteries promoted on behalf of certain societies (section 5), lotteries promoted by local authorities (section 6) and lotteries promoted and conducted in accordance with the Art Unions Act 1846.

In practice it is the lotteries referred to in sections 5 and 6 of the 1976 Act that are the most significant. The following details of such lotteries are set out in Annex A to the 1992 White Paper on a national lottery: "There are three types of lotteries which may be promoted by a society or local authority. A short-term lottery can be promoted within a month of a previous lottery. The maximum turnover (i. e. value of tickets sold) is £ 45 000 and the maximum prize is £ 6 000. A medium-term lottery can be promoted between one and three months of a previous lottery. The maximum turnover is £ 90 000 and the maximum prize is £ 9 000. The largest public lotteries are promoted quarterly with turnover of £ 180 000 and a maximum single prize of £ 12 000. In all cases, the maximum price of a ticket is £ 1".

The United Kingdom has stated that those limits have been raised in connection with the establishment of the national lottery.

30 — The Court has heard that there are currently three pools undertakings: Littlewoods, with more than 76% of the market, Vernons with some 20% of the market and Zetters with some 3%. According to a Mintel survey, Special Report, Gambling 1991, p. 32 et seq., those undertakings pay more than 40% of their turnover to the State while their own net revenue amounts to some 4.4% of turnover. In its 1992 White Paper the United Kingdom described the effects that the establishment of the national lottery would have on other forms of gambling as follows:

"29. The football pools are the form of gambling most likely to be affected by the national lottery. They offer a "small stake/large win" form of gambling and have expressed concern that a national lottery would eventually drive them out of business. In some countries a national lottery has had an adverse effect on the pools but in others they co-exist. More work will be needed to establish the impact of the national lottery on the pools in this country. 30. Other forms of gambling are less likely to be affected than the pools. They offer a product which differs substantially from a national lottery either in the nature of the gamble or the circumstances in which it is made, or both. For example, those who bet on horse or greyhound racing are unlikely to be attracted by the "long-odds/no skill" gamble of a national lottery. Bingo is a social activity for which the purchase of a lottery ticket is no substitute. Similarly, casinos offer a type of gambling and other facilities quite different from participation in a lottery. Gaming machines most readily available to the public provide amusement rather than the chance to win a major prize.

33. One of the concerns most frequently voiced about the impact of a national lottery is that charities will lose income from existing small lotteries and from charitable donations generally. The level of income which charities at present obtain from small lotteries is unclear because figures for all lotteries are not collected centrally. ... Charities will be specifically singled out as one of the categories to benefit from the national lottery. ..."

with the Treaty rules, nor has there been anything to indicate that the United Kingdom's rules applying to the gambling market in question here might have been adopted in order to protect the British gambling market against competition from foreign lottery undertakings.

obliged for that reason alone to accept corresponding forms of gambling conducted by foreign undertakings.

*Is the existence of a large national lottery significant with regard to the question of discrimination?*

Those regulations must be regarded as a legitimate manifestation of the United Kingdom legislature's views on how the gambling market should be organized. They may reflect historical experience and take account of what is regarded as socially most acceptable (for example there is an element of skill in football pools which is lacking in lotteries) and they may reflect a simple choice between two possible forms of gambling as the legislature considers that it is desirable to allow only one because otherwise the total supply of gambling would be too great.

71. It may be claimed that the decision to set up a national lottery shows that there is in fact discrimination against corresponding foreign lotteries.

72. But it would be wrong in my view when assessing the possible discriminatory effect of the rules in question in this case to attach any importance to the fact that those rules have subsequently been amended. The rules in question in the main proceedings do not become discriminatory because at the time in question consideration may have been given to amending those rules and that may subsequently have resulted in amendments.

70. The United Kingdom legislation treats different forms of gambling in different ways and the fact that there are to some extent competing activities does not in itself signify that there exists covert discrimination. Moreover, acceptance of the view put forward by the Commission and Gerhart and Jörg Schindler could in fact be said to rest on the premiss that because a Member State has authorized one form of gambling it is

73. But I am also inclined to hold that it would not be right to classify as discriminatory a legal position like that which applies in the United Kingdom following the adoption of the National Lottery Act 1993 and which, according to what we have been told, applies in the other Member States.

74. It is quite possible for rules to apply in a country which prevent foreign service undertakings from providing their services — even if that is permitted for national undertakings — without such rules falling to be classified as discriminatory. Typical examples are national rules which provide that a specified occupation can only be exercised by undertakings which are established in that country. Such rules constitute ‘the very negation’ of the freedom to provide services in the words of the Court’s judgment in the Co-insurance cases.<sup>31</sup> The Court did not classify that legal position as discriminatory but held that ‘if such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued’ and it thus accepted that factors other than those referred to in Article 56 of the Treaty might justify such a significant restriction on the free movement of services.

75. The situation in this instance differs from a general requirement regarding establishment in so far as the activity in question, after an assessment of needs, is permitted only for one or a few undertakings. That in itself does not make the rules discriminatory. The most appropriate assumption is still that they do not embody discriminatory treatment on grounds of nationality or the origin of the undertakings.

It is not in itself incompatible with the Treaty for the Member States to give one or a few undertakings exclusive rights (see in this respect Article 90 of the Treaty). In such a situation the Member States are under a duty to comply with the general rules of the Treaty, that is to say in the present context in particular the Treaty rules on establishment and services. That signifies *inter alia* that the limitations which the exclusive rights in question entail for the free movement of services must be capable of being justified under the general case-law of the Court.

If the very fact that exclusive rights have been granted is seen as constituting discrimination, exclusive rights would be lawful only if they were on the grounds of one of the factors referred to in Article 56, namely public policy, public security or public health.

Such a result would not, in my view, be correct.

76. On the one hand, I consider that it would be inappropriate to give a broad scope to the concept of discrimination in a context such as this and, on the other, I do not consider that it is of conclusive importance for the effective application of Article 59 of the Treaty whether or not the situation is classified as discriminatory.

31 — Case 205/84 *Commission v Germany*, cited in footnote 19, paragraph 52.

77. Article 56 provides that the provisions of the chapters on establishment and service do not prejudice the applicability of national 'provisions ... providing for special treatment for foreign nationals' on grounds of one of the factors referred to in that provision.

The very wording of Article 56 shows that there must be special rules for foreign undertakings and it does not seem reasonable to me in cases where exclusive rights are given to certain undertakings without regard to nationality or the undertakings' origin to describe such rules as '*special* treatment for *foreign*' undertakings.

Moreover, the Court has given a restrictive interpretation to Article 56 and stressed that the grounds referred to in that article may be invoked only if there exists 'a genuine and sufficiently serious threat to ... one of the fundamental interests of society.'<sup>32</sup> Such a restrictive interpretation is undoubtedly apposite with regard to national rules which, whether overtly or covertly, take account of nationality or the undertakings' origin. But it would be out of place if any discriminatory effects of disputed measures were a practical consequence of delimiting criteria which may be objectively well-founded.

I can see a danger in applying a broad concept of discrimination and at the same time interpreting Article 56 restrictively. It might lead to an unintended limitation of the regulatory powers which, under the scheme of the Treaty, the Member States must necessarily enjoy so long as the Community institutions have not undertaken a harmonization of the national rules on the matter.

78. Nor do I consider that the question of classification is of any great practical importance in this case. However the situation is classified with regard to the concept of discrimination, there is a significant restriction, a real negation of the right to the free movement of services, which can be justified only if the measures at issue are objectively necessary to take account of fundamental interests of society.

79. The decisive questions are thus in my view in any event whether the interests of society invoked by the States are so fundamental that in the area in question they can justify the existing restriction and whether the rules in question are objectively necessary in order to achieve the objective pursued and are also reasonable in relation to that objective.

32 — Judgment in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35.



*Does the restriction resulting from the United Kingdom prohibition on the import of lottery tickets and advertising for large lotteries comply with the conditions of legality under the Treaty?*

80. Question 6 asks:

‘do the concerns of the United Kingdom to limit lotteries for social policy reasons and to prevent fraud constitute legitimate public policy or public morality considerations to justify the restrictions of which complaint is made, whether under Article 56 read with Article 66 or otherwise, in the circumstances of the present case?’

81. The 11 Member States which have submitted observations all proposed that this question should be answered in the affirmative. Gerhart and Jörg Schindler and the Commission disagree.

*What interests do the existing restrictions seek to protect?*

82. The Member States essentially contend that three interests underlie the strict

regulation of lotteries and the ensuing restrictions on free movement of services.

83. The first is the need to protect consumers, that is players in the lottery, against fraud and other forms of illegal conduct of lotteries.<sup>33</sup>

84. Reference is also made to the need more generally to combat by regulation and controls the real danger of lotteries being taken over by criminal elements and used for criminal purposes, including money laundering.

85. It is contended that there are special risks with cross-border lotteries.<sup>34</sup> Some Member States have referred in this connection to the increased risk of tax evasion. The Commission does not deny that there is an increased risk of abuse with cross-border lotteries but has stated that, on the basis of

33 — It is pointed out that lotteries are a form of gambling which is especially vulnerable to fraud. That is because the participant has no ready and independent means of ascertaining either the total amount paid in or that the promised prizes have been paid out. Without adequate controls, it would be possible for the operator of a lottery to skim off part of the proceeds, or, in the case of instant lotteries, to withhold, perhaps for his own use, the winning tickets (see point 30 of the order for reference).

34 — Examples of complaints of such alleged abuses are given in the observations of the Belgian Government.

the information given, that has not caused the Member States any insurmountable problems.

86. Second, all the Member States contend that for the sake of consumers it is necessary to limit the overall supply of gambling and to regulate the manner in which gambling is offered. They point to the real danger that certain persons can gamble to excess with serious social and health consequences for themselves and their families, and thus for society.

87. Third, reference is made to the need to ensure that revenues from lotteries are used for specified purposes approved by society in connection with which it may be necessary to regulate what proportion of the lottery's turnover may be applied to the operating expenditure of the lottery, what proportion may be used as prizes, and what proportion must be used for public purposes or other purposes in the public interest.

88. It is in my view undeniable, and as far as can be seen it has not seriously been disputed in these proceedings, that each one of those aims could in appropriate circumstances justify limitations on the free movement of services. They are aims which are so important that the Court could if it saw fit classify them as aims falling within Article 56 of the Treaty.

89. The decisive point remains therefore whether the restrictions considered here are necessary in order to achieve the aims in question, whether those aims could be achieved by other, less restrictive means, and whether those restrictions are in general reasonable in relation to those aims.

*Do they comply with the principle of proportionality?*

90. The answer given by Gerhart and Jörg Schindler and the Commission to that question is clearly negative while the Member States are unanimous in giving an affirmative answer.

91. It was contended in these proceedings that those factors cannot be taken in isolation one from another. In essence I agree with that. While it is necessary to consider each factor separately, that does not, however, rule out the possibility that the factors taken together may justify the restrictions even if, considered separately, they cannot do so.

*Are the restrictions necessary in order to protect consumers and society against fraud and the like?*

92. It has not been disputed in these proceedings that the concern to protect consumers against the obvious dangers of abuse in lotteries and also against the use of lotteries for criminal ends may justify even very stringent regulation of and controls over lotteries.

93. It is, however, argued that at least in the present case that factor cannot justify the relevant restrictions, in particular because it can only be invoked in so far as the lottery undertaking providing the services in question is not already subject in its home State to adequate rules concerning its activities and to adequate controls corresponding to the rules and controls applying in the State of destination.

94. It follows from the case-law of the Court that the State of destination cannot insist that its own rules be complied with by foreign providers of services if the considerations underlying those requirements are

already taken into account by the provider's own legislation (principle of equivalence).<sup>35</sup>

95. In this instance it can certainly be argued that the principle of equivalence is difficult to apply because large lotteries were prohibited in the United Kingdom at the material time in the main proceedings and because there was therefore no prescribed level of protection with which the level of protection applying to the foreign provider of services can be compared.

However that objection is merely one of form. First of all, it is possible in this respect to make a comparison with the protection afforded by the United Kingdom to consumers in connection with local lotteries and similar gambling activities such as football pools and also now with the protection that will be afforded to consumers in connection with the new national lottery.

Second, it is established that the rules applying to and the controls exercised over the *Süddeutsche Klassenlotterie* offer a high degree of protection against abuse.<sup>36</sup>

It has, moreover, not been argued in the course of these proceedings that there is a greater risk of abuse in connection with the *Süddeutsche Klassenlotterie* than is consid-

<sup>35</sup> — See the judgments in the Co-insurance cases, in particular Case 205/84 *Commission v Germany*, cited in footnote 19, paragraph 34 et seq.

<sup>36</sup> — See footnote 9.

ered acceptable for comparable gambling activities in the United Kingdom.

is necessary to limit the overall supply of gambling, it would at first sight also appear necessary for the Member States to be able to limit the right of foreign undertakings to provide their services.

96. Nor, finally, is there any real basis, in my view, in the assertions of the Member States in general terms regarding the increased risk in connection with cross-border lotteries for holding that that alleged risk in itself could justify the United Kingdom authorities' application of the rules at issue.

97. If the aforementioned factor cannot be relied on in the present instance as a basis for the exclusion of the Süddeutsche Klassenlotterie's activities in the United Kingdom, that does not of course signify that the Member States are prevented in other instances from refusing foreign lotteries access to their markets if the rules applying to those lotteries in their home States and the controls to which they are there subject are not adequate by comparison with the level of protection which the State of destination wishes to ensure.

*Are the restrictions necessary in order to limit the supply of gambling in the State of destination?*

98. If it is accepted — and all the Member States have proceeded on this basis — that it

The fact is, as mentioned above, that the gambling markets in the various countries differ. What is permitted in one country may be prohibited in another. If a State cannot ban services from countries where they are permitted, its possibility of limiting the total supply of gambling will be sharply reduced.

99. Against that, Gerhart and Jörg Schindler and the Commission argue that such factors cannot reasonably be invoked in this instance by the United Kingdom in view of the following: the total gambling market in the United Kingdom in 1990 amounted to more than UK £ 13 000 million; a comprehensive range of gambling is available, including football pools (which are private commercial undertakings which in principle can be operated by anybody who meets the relevant general requirements); the United Kingdom has decided to establish a large national lottery; and the United Kingdom

has also acknowledged that lotteries are the least dangerous form of gambling.<sup>37</sup>

that country regard as the least harmful form of gambling in relative terms.

100. However, those arguments, which at first sight appear very cogent, must be rejected for the following reasons:

Quite apart from making difficult discretionary decisions necessary, acceptance of that point of view would entail the rejection of a central part of the Member States' arguments for being able to regulate gambling, namely the necessity of being able to limit overall supply.

101. Acceptance of the view argued for by Gerhart and Jörg Schindler and the Commission would, as mentioned above, have the result that a Member State with relatively liberal gambling laws would no longer be able to maintain limitations on the supply of gambling, at least not with regard to the form of gambling which the authorities of

In view of what is now known of the dangers associated with gambling for certain people, I do not consider it possible to dismiss the consensus of the Member States that there is a real need to limit the supply of gambling and that such limitation — in the absence of Community rules on the matter — must necessarily be undertaken by each Member State separately.

37 — See the 1992 White Paper, in which it is stated:

14. The Rothschild Royal Commission recognized two principles for gambling policy. First, that gambling should be properly regulated to ensure that it is conducted honestly and fairly. Second, that the demand for gambling should not be positively encouraged because, if taken to excess, it can cause misery for the individual and his family, and have damaging consequences for society as a whole. Although these general principles underlie all gambling controls, they have been applied in different degrees to different forms of gambling.

15. For example, casino gaming is more vulnerable to abuse by criminals and large amounts of money may be lost very quickly. It represents the "hardest" form (in the sense of vulnerability to abuse and of its dangers to the individual) of gambling and so it is the most tightly regulated. ... By contrast, lotteries have long been considered to be the "softest" form of gambling. The amounts staked are usually small and there is not the same incentive to chase losses. They are subject to a lighter regulatory regime because the sums of money involved are more modest. Because they offer modest prizes and support good causes, they can be advertised quite freely. In particular, they can be advertised on TV and radio whereas the broadcast advertising of all betting and gaming is prohibited by a mixture of statutory controls and the broadcasting authorities' advertising codes.

102. If the individual Member States must admit lotteries which are held in a lawful and proper manner in all other Member States, they are denied the possibility of controlling the number of lotteries held, the number of draws, and the amount of the authorized turnover. The supply in the Member States will in fact be determined by overall supply in all the Member States.

103. The Commission itself indicated at the hearing that there presumably must be some possibility for the individual Member States to limit supply by means of a non-discriminatory system of authorizations.

On the other hand I consider it impossible to infer from the Treaty rules on services directly applicable obligations for the Member States to issue authorizations to a specified number of lotteries. In other words, it is not possible on the basis of the Treaty to infer criteria for determining how large a supply of a certain form of gambling there should be.

104. That view shows the difficulty of opening the national markets to foreign services by means of the direct application of the Treaty rules on services.

If it is accepted that the Member States may limit the supply, the question of the extent of that supply must be left to the Member States, whose decisions will reflect choices that are largely determined by the social and cultural circumstances prevailing in those countries.<sup>38</sup>

I do not consider it possible to interpret the Treaty rules on services — or the Treaty rules on the right of establishment — as meaning that the Member States are precluded from prohibiting certain forms of gambling on an objective basis.

No duty can therefore be inferred on the basis of the Treaty for Member States to introduce a system of authorizations in a field where they consider that the form of gambling in question should be prohibited.

105. In short, I believe that on the basis of the Treaty rules on services and in the absence of harmonization at Community level, an intermediate solution can be found between, on the one hand, accepting the possibility for the Member States to limit supply on a non-discriminatory basis, including by means of prohibiting or limiting the provision of services by foreign lotteries, and, on the other, total acceptance of the right of foreign lotteries to provide their services if they are subject to proper control and the like in their home State.

However, as mentioned above, it is undoubtedly possible on the basis of the Treaty to require the Member States, in so far as they authorize a limited supply of a certain form of gambling, to implement that in a non-discriminatory manner.

38 — See judgment in Case 169/91 *Council of the City of Stoke-on-Trent* [1992] ECR I-6635, paragraph 11.

106. If it is thus accepted that the Member States must be able to regulate the supply of gambling, and in particular lotteries, it must also be accepted that limitation of the services provided by foreign undertakings is a necessary and proportionate measure.

*Are the restrictions necessary in order to maintain the Member States' ability to lay down rules regarding the use of lottery revenues?*

107. The last of the factors invoked by the Member States, namely the possibility of ensuring that revenues from lotteries are used for public or public-interest purposes, is also relevant as a basis for accepting the possibility for Member States to limit the provision of services by foreign lotteries.

108. The contention that a main underlying reason for allowing gambling at all is that the revenues from it can be used for 'good causes' is undoubtedly both historically correct and still a reality.

109. There are certainly some grounds for scepticism today as to the motives behind

Member States' regulation of the gambling market. As already mentioned above, the disapprobation of gambling as such and the concern to reduce the risk of excessive gambling amongst their citizens have, in a number of Member States at least, lost ground to the concern to exploit people's desire to gamble as a source of funds for the State exchequer (with the revenue either accruing directly to the exchequer or being subject to high levels of taxation) or for public-interest purposes. The liberalization of the gambling market in many of the Member States and the acceptance of often quite aggressive advertising for gambling are indications of that trend.

110. But even if that is so, it remains true that the revenues are used for non-commercial purposes. I consider it immaterial whether the revenues accrue to the State exchequer or public-interest purposes. If the revenues are devoted to public-interest purposes that will to some extent at least relieve the public purse of expenditure on those purposes.

111. A number of factors are relevant in this regard.

It is probably right, as is mentioned in many of the observations, that participants in

lotteries do to some extent decide to participate because the revenues accrue to a purpose which is of particular concern to them. But on the basis of the foregoing it may also be presumed that, in so far as the large lotteries are concerned, the use to which the revenues are put has only a limited bearing on the participants' decision to take part. It seems to be accepted that it is not least the size of the prizes that is decisive.<sup>39</sup>

112. It is therefore reasonable to suppose, as has moreover been claimed by many of the Member States, that the opening of the national markets would probably lead to intensive competition between the large lotteries for market shares throughout the whole Community.

A not unlikely development would be that the lotteries which are the largest to start with — those that today have the largest 'home market' — would be able to out-compete not just the small local lotteries (which face difficulties from the outset) but

39 — According to the Commission Report on *Gambling in the Single Market*, Vol. I, p. 44: 'The player's main interest is to participate in an attractive game. A game's attractiveness is reflected in the size of the prizes, the chances to win and in the fact that no or only little tax is levied on the winnings. Where a foreign lottery seems more attractive than a domestic game, some players will participate either by ordering the tickets by mail or by crossing the border to buy them at an agent's abroad. Mail order is particularly viable in class lotteries as deadlines for accepting tickets can be many weeks in the future.'

also the national lotteries of the smaller Member States.<sup>40</sup>

113. The competition would, presumably, as mentioned above, also be conducted on the basis of the size of prizes. These essentially depend on turnover, the amount of administrative costs, and the proportion of revenues that must be devoted to public or public-interest purposes. A major parameter for competition would therefore be what proportion may be used for prizes and what proportion must be devoted to public or public-interest purposes. The lotteries which devote the greatest proportion to prizes would have a competitive advantage. It seems to me that it ought to be permissible for the Member States to prevent such forms of competition on this very special market.

114. It is undoubtedly also important for the Member States to be able to prevent free

40 — According to the Commission Report, Vol. I, p. 18: 'Cross-border betting is a market-driven phenomenon. The agents of certain Klassenlotteries are the most active promoters of illegal cross-border betting. "Mail-shot" marketing has been organized throughout the twelve Member States. The smaller lottery markets, with correspondingly smaller prizes, are clearly the most vulnerable.'

...  
The big prizes of the German Klassenlotterie are very attractive to consumers who normally play on the smaller national lotteries which have smaller first prizes. In this regard, diagram 8 shows the vulnerability of Denmark, Belgium and the Netherlands.

...  
Cross-border betting which occurs out of convenience resulting from nearness to a neighbouring Member State or similar language and culture is of an osmotic nature. Osmotic cross-border betting is more likely to occur if there is a disproportionate size of population and therefore larger lotteries with bigger prizes next to smaller national lotteries or lottos.'



competition arising between lotteries at European level as the main practical result would be that the exchequers or public-interest purposes of the various countries would compete for the money which European citizens spend on lotteries.

cannot justify derogations from the Treaty rules on the free movement of services.<sup>41</sup>

116. It might perhaps at first sight appear contrary to the principles for such an 'economic aim' to serve to justify limitations on the free movement of services.

On that basis it is certainly not impossible that one potential consequence of the opening of the national markets would be that the large German Class Lotteries would come to have such a dominant share of the market that it would become uneconomic to operate the small national lotteries in neighbouring countries. That would signify that the funds that have hitherto accrued to public-interest purposes in those countries would henceforth flow into the public funds of the German Länder which operate those lotteries.

But I believe that closer examination shows that that aim can be taken into account in the present context. It does not constitute an economic aim within the meaning attributed to that term in the case-law of the Court.

117. The Treaty is founded on the principle that turnover in economic goods can be taxed in the State of consumption (see Article 95 of the Treaty).

115. The Commission disputes that any weight can be attached to that factor in connection with the application of one of the fundamental principles of the Treaty which is one of the cornerstones of the attainment of the internal market.

The Commission pointed out at the hearing that a Member State cannot ban the sale of tobacco and spirits from other Member States if the sale thereof is permitted in the State in question. That is of course right. But

That view is supported by the case-law of the Court to the effect that economic aims

41 — See for example Case 352/85 *Bond van Adverteerders* [1988] ECR 2085 in which the Court held: 'It must be pointed out that economic aims, such as that of scouring for a national public foundation all the revenue from advertising intended especially for the public of the Member State in question, cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty' (paragraph 34).

it does not alter the fact that the Member States may tax the imported goods in the same way as national goods.

that case could be justified by the aim of protecting the States' tax revenues by ensuring the cohesion of tax systems.<sup>42</sup>

It seems to me not unreasonable to regard the position relating to lotteries as also involving a form of taxation. If the Commission's view that under the Treaty the Member States are under a duty to open their markets to foreign lotteries is upheld, that will mean that the 'tax' on lottery tickets — that is that proportion of the payment for the lottery ticket which must be paid into the State exchequer (or be applied for public-interest purposes) — will be paid to the 'State of production' and not to the 'State of consumption'.

120. What is more important, however, in my view, is that the Court in the present case is considering a market of a very special nature where the rules of all the Member States show that the general mechanisms of the market cannot and should not apply. So far as I can see, not one of the Member States considers it appropriate to have free competition in this area with the consequences that are detailed above.

118. That it is not unreasonable to view the position in that light is borne out by the information given regarding the arrangements between the Luxembourg Government and two German lotteries under which those two lotteries have been authorized to carry on their activities in Luxembourg in return for the Luxembourg State receiving a certain percentage of their turnover in Luxembourg.

121. There would be competition that could hardly fail to have far-reaching consequences for a number of lotteries of long-standing which are a major source of finance for important benevolent and public-interest organizations. Acceptance of the competition that would result from the opening of the markets might curtail national diversities and cannot, in my view, be regarded as a necessary consequence of the attainment of the internal market.

119. I find support for the view that this factor may in appropriate circumstances justify restrictions on cross-border services in the judgment in *Bachmann* in which the Court held that the serious restrictions on the free movement of workers and services at issue in

<sup>42</sup> — Judgment of 28 January 1992 in Case C-204/90 *Bachmann* [1992] ECR I-249.

122. It is hard to point to any effects of the opening of the markets that would merit protection. So far as I can see it would not serve to further any of the aims referred to in Article 2 of the Treaty.

The Commission is perhaps also right as regards the latter point. However, I do not consider that that can be one of the aims which the Treaty seeks to achieve. An increase in the size of the prizes might on the one hand increase the desire to gamble and on the other result in a reduction in the proportion of the turnover of lotteries which accrues as revenue for public or public-interest purposes.

123. The appropriate allocation of resources which from an economic point of view is the most important basis for the Treaty rules on the free movement of services is not, in my view, of any relevance as regards lotteries.<sup>43</sup>

125. It may therefore be concluded, in my view, that there are no cogent reasons which must be taken into account pursuant to the aims of the Treaty militating against the Member States continuing to be able to limit the free movement of services; on the other hand considerable importance must attach to the grounds invoked by all the Member States against opening the markets. It is an area in which there are good grounds for continuing to uphold the regulatory powers of the Member States so long as it is established that the Community does not intend to exercise its regulatory powers in this area.

124. The Commission does indeed point out that the opening of the markets would mean that consumers would have a wider range of choice between the public-interest purposes they wish to support and would also offer consumers bigger prizes. As regards the former, it is possible that the Commission is right in the short-term. But, as mentioned above, it is not unlikely that one long-term effect of the opening of the markets would be that a number of lotteries would be driven from the market which would thus narrow the range of choice available to consumers.

126. It must also be concluded in my view that it is not possible on the basis of the foregoing to identify less restrictive means of achieving the aims underlying the existing

<sup>43</sup> — See Article 102a of the EC Treaty as amended by the Treaty on European Union, the second sentence of which provides: 'the Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 3a'.

limitations on the free movement of services.<sup>44</sup>

large foreign lotteries in a situation in which large national lotteries are also prohibited.

127. I therefore consider that it is appropriate to hold, in answer the High Court's questions, that there is nothing in the Treaty rules on services to preclude the application of national rules which prohibit the import of lottery tickets and advertising material for

It is of no significance in this respect that a decision has been taken to set up a large national lottery, if only because, in my view, even where such lotteries exist, the Member States may maintain limitations on the free movement of services.<sup>45</sup>

## Conclusion

128. For those reasons I propose that the Court give the following answer to the High Court's questions:

Rules on the import of lottery tickets and advertisements for large lotteries are within the scope of Article 59 of the Treaty of Rome but that does not preclude those rules from prohibiting services from large foreign lotteries where such a prohibition is part of a general prohibition of the conduct of large lotteries.

44 — In the United States of America, Congress, acting pursuant to the commerce clause in the Federal Constitution, has laid down a fundamental prohibition on the free movement of services between the States in the field of lotteries. The constitutionality of that legislation was confirmed by a 1903 judgment of the Federal Supreme Court in the *Lottery* case (*Champion v Ames* (1903) 186 U. S. 321).

45 — I have considered whether the second paragraph of Article 55 of the Treaty may be of any relevance to the interpretation of Article 59 of the Treaty in the context of this case. Article 55, in conjunction with Article 66, provides that the Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of the chapter on services are not to apply to certain activities. There has been nothing in these proceedings to suggest that the Council and Commission might have considered applying that provision to exempt lotteries from the Treaty rules on services. It is clearly of importance in any event that that provision cannot apply unless the Commission has submitted a proposal regarding its application. The result of my analysis is that that provision is not of any relevance in the context of this case.