OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 3 March 2010 [1]

I — Introduction

1. An industry worth thousands of millions of euros involving a harmful and culturally sensitive activity. A service which, thanks to new means of communication, finds it easy to cross frontiers. A sector for which the law is not harmonised and the case-law is based on individual cases.

2. All those elements are present in the gaming sector: that is why it should be no surprise that the sector is highly litigious and will probably continue to give rise to disputes in the future. The questions considered here are clear proof of this, like many other questions which have already been referred to the Court. [2]

3. In the present case the absence of secondary law is a decisive factor compelling the courts to refer directly to the treaties. In spite of a marked increase in decided cases, there is still not a sufficient basis in case-law to resolve the different situations which are brought before the national courts every day. In the final instance it is they who have to examine, from the viewpoint of Community law, legislation restricting access to the gaming market in a Member State. The Court, in replying to questions referred for a preliminary ruling, has to give them guidance in that difficult task.

4. In the present cases the Verwaltungsgerichte (Administrative Courts) of Giessen and Stuttgart have asked the Court to give a ruling, first, on the compatibility with Community law of the monopoly of sports betting and lotteries that exists in Germany, because they consider that the national policy of limiting gaming suffers from a presumed lack of consistency. Secondly, the Court must give a ruling on the possibility of applying the principle of mutual recognition to national licences for the organisation of sports betting.

1 — Original language: French.

2 — Case C-46/08 *Carmen Media Group*; Case C-64/08 *Engelmann*; Case C-212/08 *Société Zeturf Ltd;* and Joined Cases C-447/08 and C-448/08 *Sjöberg* and *Gerdin*.

II — Legal context

A — *Community legislation*

5. The gaming sector is not at present harmonised in Community law. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [3] expressly excludes gaming from its ambit: 'this Directive shall not apply to the following activities: … (h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions' (Article 2(2)).

6. The fact that there is no secondary law means that recourse must be had to primary law and, in particular in the present case, Article 49 EC, the first paragraph of which provides that 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'.

3 — OJ 2006 L 376, p. 36, 'the Services Directive'.

B — *German law*

7. In Germany, powers relating to gaming are shared between the Federal State and the *Länder*, in most of which there is a regional monopoly for the organisation of sports betting and lotteries, while the operation of slot machines and casinos is entrusted to duly authorised private operators.

1. Federal law

8. Paragraph 284 of the Strafgesetzbuch (German Criminal Code, 'StGb') provides as follows:

'(1) Whosoever without the authorisation of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment of not more than two years or a fine.

…

(3) Whosoever in cases under subsection (1) above acts

1. on a commercial basis …

…

shall be liable to imprisonment of between three months and five years.

…'

9. The *Länder* are responsible for laying down the conditions for granting the authorisation mentioned in Paragraph 284 of the StGb, with the exception of authorisation for organising betting on official horse races and for installing and operating slot machines, where authorisation is granted by the *Länder* but in pursuance of, respectively, the conditions laid down by the Law on on-course betting and lotteries (Rennwett- und Lotteriegesetz, 'RWLG') and the Trade and Industry Code (Gewerbeordnung).

10. With regard to the authorisation of betting on horse races, Paragraph 1 RWLG states as follows:

'An association wishing to operate a totalisator undertaking on the occasion of public horse races or other public competitions for horses must obtain the authorisation of the appropriate authorities under *Land* law.

…

3. Authorisation shall be granted only to associations which offer an assurance that they will use the income solely for the development of horse-breeding in the *Land*.'

11. Paragraph 2(1) of the RWLG provides as follows:

'Whosoever wishes, on a commercial basis, to take bets on public competitions for horses or to act as an intermediary for such bets (bookmakers) must obtain the authorisation of the appropriate authorities under *Land* law.'

2. The law of the Länder

(a) The LottStV

12. With the State Treaty on Lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland, 'the LottStV'), which came into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and location, on a commercial basis, of games of chance, with the exception of casinos.

13. Paragraph 1 of the LottStV specifies the objects of the Treaty between the *Länder* as follows:

'1. to channel and to monitor the natural propensity of the population to gamble and, in particular, to prevent it from turning to unauthorised gambling,

2. to prevent excessive inducements to gamble,

3. to prevent the exploitation, for private or commercial gain, of the propensity to gamble,

4. to ensure that gaming takes place in a lawful manner and that the logic of games is comprehensible, and

5. to ensure that a substantial portion of the income from gaming is used to promote public objectives or objectives which have a favoured tax status, within the meaning of the Tax Code.'

14. In accordance with Paragraph 5 of the LottStV:

'1. In the context of the objectives specified in Article 1, the *Länder* shall have a statutory obligation to ensure the adequate availability of gaming services.

2. On the basis of the law, the *Länder* themselves may carry out that task or may cause it to be carried out by legal entities governed by public law or by private-law companies in which a controlling share is held, directly or indirectly, by legal entities governed by public law.

3. The persons referred to in subparagraph 2 shall be authorised to act as organisers or agents … only in the *Land* in which they carry out their tasks in accordance with paragraph 2. They may market or procure the marketing of their gaming services in that

Land only. They may organise or carry out gaming services in another *Land* only with the authorisation of that *Land*. The obtaining of consent is not an acquired right.

4. Persons other than those referred to in subparagraph 2 shall have only the right to organise lotteries and draws in accordance with the provisions of the third section.'

15. Paragraph 6 in the third section of the LottStV requires prior authorisation for the organisation of public lotteries not covered by Article 5(2) and lists a number of conditions which must be fulfilled for such authorisation. Paragraph 7(1) of the LottStV excludes authorisation where there is a possibility that a lottery, having regard to the existing general volume of games available, particularly encourages the propensity for gambling.

16. Within the framework laid down by the LottStV, each *Land* has enacted its own legislation on gaming, reserving the organisation of lotteries and sports betting for itself or entrusting it to private-law companies controlled by it.

(b) The legislation of the *Land* Hessen

17. Under Paragraph 1(1) of the Law on State-run sports betting, number lotteries and bonus lotteries in Hessen (Gesetz über staatliche Sportwetten, Zahlenlotterien und Zusatzlotterien in Hessen), the *Land* alone is authorised to organise sports betting in its territory, with the exception of betting on horse races (subparagraph 1). However, it may entrust the management of sports betting and lotteries to a private-law legal person (subparagraph 4). Sports betting and lotteries may be arranged on a commercial basis only at authorised receiving points (subparagraph 5).

(c) The legislation of the *Land* Baden-Württemberg

18. Under Paragraph 2 of the Law on lotteries, betting and draws of the *Land* Baden-Württemberg (Gesetz über staatliche Lotterien, Wetten und Ausspielungen), the *Land* organises Lotto, sporting Lotto and the lottery (subparagraph 1), and it may entrust the operation of games organised by the Land to a private-law legal person in which it holds, directly or indirectly, a controlling share (subparagraph 4).

3. The Bundesverfassungsgericht judgment of 28 March 2006

19. On 28 March 2006 the Bundesverfassungsgericht (German Federal Constitutional Court) delivered a judgment [4] which found incompatible with the fundamental freedom of enterprise enshrined in Paragraph 12 of the Basic Law the monopoly of sports betting which existed in the *Land* of Bavaria in so far as its legal structure, its marketing arrangements and its presentation did not have the aim of contributing consistently and actively to the objective of reducing the propensity for gaming and preventing addiction.

20. The judgment related to the *Land* of Bavaria, but it can be extended to the monopolies of sports betting that exist in other *Länder* and have the same characteristics.

21. The Constitutional Court allowed the legislatures concerned a transitional period up to 31 December 2007 in which to restructure the respective monopoly and to make it consistent, to a minimum degree, with the aim of preventing addiction. [5]

22. For that purpose the *Länder* adopted a new treaty, the Staatsvertrag zum Glücksspielwesen in Deutschland (State Treaty on gaming in Germany), which came into force on 1 January 2008. [6]

III — Main proceedings and questions referred

23. The applicants in the six cases in the main proceedings [7] have business premises in the *Länder* of Hessen and Baden-Württemberg, where they carry on business as intermediaries for sports betting [8] on behalf of gaming organisers established in other Member States. The organisers in question are two Austrian undertakings – Happybet Sportwetten GmbH [9] and web.coin Handelsges.m.b.H, [10] a company based in Malta – Fa. Tipico Co. Ltd [11] – and two British companies, one

4 — BVerfG, 1 BvR 1054/01.

5 — BVerfG, I BvR 1054/01, paragraph 148 et seq., where the Court clarifies the legal and administrative conditions necessary for bringing the betting monopoly into conformity with the Basic Law.

6 — The *Carmen Media Group* judgment cited above deals with the conformity with Community law of the new statutory framework, which was not in force at the material time in the present case.

7 — Markus Stoß, Kulpa Automatenservice Asperg GmbH, SOBO Sport & Entertainment GmbH, Andreas Kunert, Avalon Service-Online-Dienste GmbH and Olaf Amadeus Wilhelm Happel.

8 — However, the applicant in Case C-358/07, Kulpa Automatenservice Asperg GmbH is the owner of the premises which it lets to Allegro GmbH which operates the gaming business.

9 — Joined Cases C-316/07 and C-409/07.

10 — Case C-359/07.

11 — Case C-360/07.

registered in Gibraltar – Fa. Digibet Ltd [12] – and the other in London – Happy Bet Ltd. [13] All those companies have obtained authorisation from the competent local authorities of the place where their registered office is situated to carry on business in the sports betting sector.

24. In 2005, 2006 and 2007, the competent authorities of the *Länder* of Hessen and Baden-Württemberg (the Landrat of Wetterau and the regional executive body of Karlsruhe) adopted a number of decisions prohibiting the applicants from organising sports betting in the abovementioned *Länder*.

25. These administrative decisions were challenged before the Verwaltungsgericht (Administrative Court) of Giessen and that of Stuttgart on two grounds: first, that the monopolies of sports betting existing in the *Länder* concerned are contrary to the freedom of establishment (Article 43 EC) and the freedom to provide services (Article 49 EC); and, second, that the applicants held licences issued by other Member States for organising games of chance, which ought to have been sufficient for carrying on the same business in Germany.

26. The abovementioned courts express serious doubt in their orders for reference as to whether the German gaming legislation is compatible with Community law and they have submitted the following questions to the Court for a preliminary ruling under Article 234 EC: [14]

'(1) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain gaming, such as sports betting, where there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, in particular because the operators which have been granted a licence within that Member State encourage participation in other gaming – such as State-run lotteries and casino games – and, moreover, other games with the same or a higher suspected potential danger of addiction – such as betting on certain sporting events (e.g. horse racing) and slot machines – may be provided by private service providers?

(2) Are Articles 43 EC and 49 EC to be interpreted as meaning that authorisations to operate sports betting, granted by State

12 — Case C-358/07.
13 — Case C-410/07.

14 — For the purpose of simplification, I have unified the wording of the two questions from the referring courts.

bodies specifically designated for that purpose by the Member States, which are not restricted to the particular national territory, entitle the holder of the authorisation and third parties appointed by it to make and implement offers to conclude contracts also in other Member States without any additional national authorisations being required?'

IV — The procedure before the Court of Justice

27. The orders for reference were received by the Registry of the Court of Justice on 9 July 2007 (Case C-316/07), 2 August 2007 (C-358/07, C-359/07 and C-360/07), and 3 September 2007 (C-409/07 and C-410/07).

28. Markus Stoß, Kulpa Automatenservice Asperg GmbH, SOBO Sport & Entertainment GmbH, the Wetteraukreis, the Commission and the Austrian, Belgian, Danish, Finnish, French, German, Italian, Lithuanian, Netherlands, Norwegian, Portuguese, Slovene and Spanish Governments have submitted written observations.

29. The representatives of the parties to the main proceedings, of the Wetteraukreis, the *Land* Baden-Württemberg, the Commission and the German, Belgian, Greek, Italian, Portuguese and Norwegian Governments made their oral observations at the hearing on 8 December 2009.

V — The first question

A — *The fundamental principles of the case-law on gaming*

30. The relationship between the fundamental freedoms and the different policies of the Member States concerning gaming has been dealt with by the Court in a substantial body of case-law which, since the *Schindler* judgment, [15] has focused on the possibility of justifying measures restricting the freedom to provide services (Article 49 EC) or the freedom of establishment (Article 43 EC) within the Union.

15 — Case C-275/92 [1994] ECR I-1039.

31. In that connection, the case-law pays attention to the particular nature of gaming, a sector in which it is not possible to disregard 'moral, religious or cultural considerations' and which entails 'a high risk of crime or fraud' and which constitutes 'an incitement to spend which may have damaging individual and social consequences'.[16] In view of those factors, and in default of Community harmonisation in the sector, the Court has held that the Member States have a sufficient margin of appreciation to determine, according to their own scale of values, what is required to protect participants and, more generally, to maintain order in society.[17]

32. Consequently, while the case-law recognises that national legislation which prohibits certain games of chance[18] or confines their operation to a limited number of licensees, public or private,[19] is an obstacle to the freedom to provide services, whether discriminatory or not, the case-law authorises such restrictions where they pursue an objective of public interest,[20] such as reducing gambling opportunities and preventing fraud and crime.[21]

33. The Member States are therefore free to 'set the objectives of their policy on betting and gaming' and 'to define in detail the level of protection sought'.[22] However, it is not sufficient to cite those objectives formally: since the *Zenatti* judgment, the Court has pointed out the need to ascertain that the legislation in question is consistent with the alleged objectives and that it is proportionate. And since the *Gambelli* judgment, the Court has also required, in more detail, that the restrictions on the freedom to provide services:(1) be applied without discrimination, (2) be justified by imperative requirements in the public interest, (3) be suitable for achieving the objective

16 — *Schindler*, paragraphs 59 and 60; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 14; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 47; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Baw International* [2009] ECR I-7633, paragraph 57.

17 — *Schindler*, paragraphs 32 and 61; *Zenatti*, paragraph 15; *Gambelli*, paragraph 63; *Läärä*, paragraph 14; *Placanica*, paragraph 47, and *Liga Portuguesa*, paragraph 57.

18 — For example lotteries, as in *Schindler*.

19 — Or even a single public body, as in *Läärä and Others*; Case C-6/01 *Anomar and Others* [2003] ECR I-8621; *Liga Portuguesa* or even the present case.

20 — Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; Case C-76/90 *Säge* [1991] ECR I-4221, paragraph 15; and Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 13.

21 — *Placanica*, paragraph 52.

22 — *Placanica*, paragraph 48.

which they pursue, and (4) not go beyond what is necessary in order to attain it. [23]

34. With regard to the third condition, it must be borne in mind that 'national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner'. [24] Therefore a national monopoly in the gaming sector such as that in the present case will comply with Articles 43 EC and 49 EC provided that it is not discriminatory, is proportionate and suitable (consistent, according to the terminology used in the case-law on gaming) to the desired objective in the public interest which is cited by way of justification.

B — *Rewording of the first question*

35. The first question asked by the Administrative Courts of Giessen and Stuttgart is whether the monopoly of sports betting and lotteries in Germany is incompatible with Articles 43 EC and 49 EC, given the presumed lack of consistency which they consider exists in the national policy of limiting gaming.

36. However, in my view the wording of the question is inadequate in two respects.

37. In the first place, the wording is incorrect in so far as it starts from the premiss that the legislation concerned is unsuitable because it designates as symptoms the public inducement to participate in games placed under a monopoly and the opening to private undertakings of other games entailing a risk of addiction which is probably equivalent or greater. However, according to the case-law cited, the reference to that inconsistency is in itself sufficient to invalidate any justification for the restrictions of the freedom to provide services.

38. Therefore, as the courts of Giessen and Stuttgart wish to know whether the configuration of the monopoly of lotteries and sports betting is compatible with the Treaty, it should not be presumed that the German gaming legislation is inconsistent, and the question that should be asked is whether the circumstances indicated (partial opening of other games and wide advertising) lead to

23 — *Gambelli*, paragraph 65; *Lindman*, paragraph 29; *Placanica,* paragraph 49; and *Liga Portuguesa*, paragraph 60. In general, for the conventional test of compatibility with the Treaty, see Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

24 — *Liga Portuguesa*, paragraph 61.

inconsistency of that kind and, consequently, incompatibility with Union law.

39. Second, I think that the German legislation should be examined only in the light of the Treaty provisions on the freedom to provide services (Article 49 EC). The freedom of establishment (Article 43 EC), to which the German administrative courts also refer, is not relevant in the present cases.

40. All the applicants in the present cases are German natural or legal persons that wish to carry on a business as intermediaries for sports betting on behalf of companies which are established in other Member States and do not appear to have intended to set up an establishment in Germany. Therefore the freedom of establishment is not at issue in the present case, only the freedom to provide services.

41. In view of the foregoing, the first question from the referring courts should be put as follows or in similar terms:

'Is Article 49 EC to be interpreted as precluding a State monopoly in relation to certain games of chance such as sports betting if the organisations holding national licences encourage participation in such games [25] and, in addition, the providers of private services can offer games that may involve an equivalent or greater risk of addiction (for example, betting on specified sports events such as horse races, and slot machines). Are those circumstances to be regarded as precluding a policy on gaming which is consistent and systematic within the meaning of the case-law?'

42. With this first question the referring courts seek clarification from the Court regarding the form and the criteria to be used for assessing the national legislation on gaming as to whether it can be described as 'consistent', an attribute which is necessary for the legislation to be viable for the purposes of the Treaty. In particular, the referring courts are uncertain as to whether such assessment is to be carried out globally, in relation to gaming policy in general, or individually for each form of gaming, so that regulatory decisions or measures adopted for one form of gaming do not affect the assessment of legislation relating to another.

25 — In the first question the two referring courts use the term "other gaming" and give as examples sports betting and lotteries (Verwaltungsgericht Stuttgart) and national lotteries and casinos (Verwaltungsgericht Giessen). I think the reference to casinos, and the use of the adjective "other" is mistaken because the referring courts' argument is centred on the existence of wide advertising for the gaming which is monopolised by organisers holding national licences, and not on the potential inducement to take part in gaming open to private operators (such as casinos).

43. In view of the many different arguments put forward by all the interveners and by the referring courts, I think a helpful reply to the question can be given only after consideration of three aspects of the German legislation concerned in the present case. Those are: whether it is discriminatory or not (C); the public interest purpose which it pursues (D); and whether it is consistent or suitable for that purpose (E).

C — *Non-discriminatory character*

44. It has consistently been held that Article 49 EC prohibits any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided. [26]

45. In the particular sector of games of chance, the Court has observed that national legislation prohibiting any person other than the licensed public body from operating a particular form of gaming involves no discrimination if it applies without [differentiation] to all operators interested in that activity, whether they are nationals of the Member State in question or of the Member State where they are established. [27] It is possible to take the view that the German monopolies of betting are of that kind since they are prejudicial to all private gaming companies without differentiation, irrespective of nationality and whether they are established on German soil.

D — *The public interest objective*

46. The next stage in the examination of a policy for restricting gaming consists in defining its public interest objective because only by reference to a clear purpose can the Court determine whether the legislation in question is consistent with it.

47. It appears from Paragraph 1 of the LottStV that the German legislation has a number of aims, one of which is the prevention of fraud and of excessive inducements to gaming which, as the Court has already observed, constitutes an overriding ground in the public interest which may, subject to certain conditions, justify restrictions on gaming activities. [28]

26 — *Stichting Collective Antennevoorziening Gouda*, cited above, paragraph 10.

27 — *Läärä and Others*, paragraph 28.

28 — *Placanica*, cited above, paragraph 52.

48. Paragraph 1 of the LottStV also refers to '[ensuring] that a substantial portion of the income from gaming is used to promote public objectives or objectives which have a favoured tax status, within the meaning of the Tax Code' (Paragraph 1(5) of the LottStV). According to the case-law, there is nothing to prevent the pursuit of such an aim if the objective of financing social, philanthropic or general-interest activities constitutes 'only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.' [29]

49. It is for the national court to decide whether that is the case in Germany or whether, in fact, the aim of generating revenue is the only purpose of the monopoly in question, as some of the applicants in the main proceedings allege. However, that question is closely connected with the 'consistency test' of gaming policy.

E — *The test of the suitability and proportionate nature of the legislation*

50. Having clarified the two previous points, it is necessary to carry out the so-called hypocrisy test in relation to the disputed measures, [30] which is at the heart of the first question from the referring courts. To be precise, this is the conventional test as to whether the legislation at issue is suitable and proportionate, both points being considered together by the case-law on gaming.

51. The Administrative Courts of Giessen and Stuttgart cite in their orders for reference a number of circumstances and characteristics of the German legislation which are capable of calling into question its consistency and proportionality and, therefore, its compatibility with the Treaty.

52. However, two of those factors are particularly important in so far as they are the only ones mentioned in the operative part of the question referred: first, the intense promotion to induce participation in the forms of gaming covered by the monopoly and, second, the opening to private operators of forms of gaming entailing a greater risk of addiction.

29 — *Schindler*, paragraph 60; *Zenatti*, paragraph 36; and *Gambelli*, paragraph 62.

30 — Spapens, T., Littler, A. and Fijnaut, C., *Crime, Addiction and the Regulation of Gambling*, Martinus Nijhoff Publishers, 2008, p. 86, and Straetmans, G., *Common Market Law Review*, No 41 (2004), issue 5, p. 1424.

1. Advertising for forms of gaming covered by the monopoly

53. The applicants in the main proceedings and the referring courts consider that the policy on gaming in Germany is inconsistent because the State 'heavily promotes' its services (sports betting and lotteries). [31]

54. The Court has already examined that difficult question in *Gambelli*, warning the authorities that they risk contradicting themselves when they try to avoid harm arising from an action which they have induced: 'in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke … the need to reduce opportunities for betting in order to justify measures' which restrict the freedom to provide services. [32]

55. That argument was repeated and clarified in the *Placanica* judgment where the Court noted that, according to the case-law of the Corte suprema di cassazione, 'the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector with the aim of increasing tax revenue' and therefore 'no justification for the Italian legislation is to be found in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling'. [33]

56. Nevertheless the Court added an important qualification: after observing that both the Corte suprema di cassazione and the Italian Government identify 'preventing the use of betting and gaming activities for criminal or fraudulent purposes by channelling them into controllable systems … as the true goal of the Italian legislation at issue', the Court pointed out that, 'viewed from that perspective, it is possible that a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated'. [34] However, to attain that objective, 'authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity [which] may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques'. [35]

31 — For example, the Administrative Court of Stuttgart refers to the widely publicised 'jackpot' for certain lotteries, which, according to the court, 'creates the (unrealistic) impression in the mind of the individual that he can win the jackpot' (order for reference in Case C-358/07, p. 9).

32 — *Gambelli*, paragraph 69.

33 — *Placanica*, cited above, paragraph 54.

34 — See, to the same effect, *Läärä*, paragraph 37.

35 — *Placanica*, paragraph 55.

57. The Court therefore supported the advertising by the holders of exclusive rights in the gaming sector in Italy in so far as the restriction of Article 49 EC was intended to prevent crime.

58. Consequently the *Placanica* judgment clearly indicated the consistency of legislation which aims to prevent fraudulent and criminal activity in that sector, while at the same time allowing the monopoly operator to use the medium of advertising.

59. But what is the position where the national law aims to prevent addiction to gaming and to limit the opportunities for it? At first sight, paragraph 69 of the *Gambelli* judgment and paragraph 54 of the *Placanica* judgment might suggest that the case-law states that a measure which aims to limit access to games of chance is totally inappropriate where the monopoly holder advertises its services. However, closer study of the abovementioned judgments reveals the cautions or conditions which the Court has attached to its initial reasoning. As a decisive factor in relation to the inconsistency mentioned above, the Court includes the fact that gaming is promoted 'to the financial benefit of the public purse'. [36]

60. The Court of Justice of the European Free Trade Association ('EFTA Court') has the same practice. In its *Ladbrokes* judgment it used the argument of channelling the demand for gaming in the context of the prevention of addiction. On the basis of the *Placanica* judgment, it considers that it is appropriate to use marketing measures in order to 'draw players away from highly addictive games offered via the internet or other channels which are hard to suppress'. [37]

61. Mere advertising is not sufficient to prevent attainment of the objective of limiting the opportunities for gaming, provided that the advertising is moderate and is genuinely intended to concentrate gaming around regulated and controlled services, and not to increase the tax revenue received by the Member State by means of that system. Supporting monopolies or organisers holding a national licence without enabling them to promote their services would not, in my view, be very realistic. That is why I propose that the Court extend the reasoning which it has already set

36 — *Gambelli*, cited above, paragraph 69: 'In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings'. To the same effect, *Placanica*, cited above, paragraph 54, states that 'the Italian legislature is pursuing a policy of expanding activity in the betting and gaming sector with the aim of increasing tax revenue'.

37 — Case E-3/06 *Ladbrokes Ltd.* v *Government of Norway*, paragraph 54.

out in the *Placanica* judgment to the objective of limiting opportunities for gaming, but only within the narrow framework which has just been described.

62. It is for the national court to monitor those conditions. However, in the present case, the Bundesverfassungsgericht judgment of 28 March 2006 already provides an examination of the legislation and practices of the gaming sector in Germany. [38]

63. Thus the judgment cited above stated that 'the betting services organised by the *Land* of Bavaria are in no way intended to prevent addiction to gaming and addictive behaviour in gaming'; on the contrary, 'the organisation of the ODDSET sports betting system clearly pursues a tax objective, among others'. [39] The Karlsruhe court found that that was the situation with regard to the marketing of ODDSET, the present situation, according to the court, being 'similar to the economically effective marketing of a leisure pursuit which is fundamentally harmless'. [40] In that connection, the court cites the existence of a large-scale advertising campaign which presents gaming as a socially acceptable or even positive form of amusement. [41]

64. On the basis of the abovementioned judgment there appears to be no doubt that the monopoly in question did not, at the time of the material events in the main proceedings, fulfil the conditions necessary for being described as consistent and systematic. According to the Bundesverfassungsgericht, the advertising used was not sufficiently moderate and was not intended to limit opportunities for gaming and to prevent addiction to gaming, but was intended to obtain tax revenue for the public purse.

65. It is true that there have been a number of changes since 2006, both in terms of legislation and in terms of organisation. The *Länder* consider that they have met the conditions laid down by the Constitutional Court by making those changes. The new agreement of the *Länder* on gaming in Germany, which came into force on 1 January 2008, and a number of other measures, some of which directly affect the promotion of gaming, [42] meet that objective. Nevertheless, it will be for the national courts to say whether the new situation must be taken into account in order to reply to the questions from Markus Stoß and the other applicants and, if so, whether the 'metamorphosis' which is supposed to

38 — The judgment concerned legislation of the *Land* of Bavaria, but it should be extended to other *Länder* with similar monopolies of sports betting.

39 — BVerfG, I BvR 1054/01, paragraphs 132 and 133.

40 — BVerfG, I BvR 1054/01, paragraph 134, free translation.

41 — BVerfG, I BvR 1054/01, paragraph 136.

42 — According to the German Government, advertising for ODDSET sports betting was considerably reduced both quantitatively and qualitatively after the judgment. After that date, advertising is said to have been limited to purely information content and to have disappeared from stadiums, for example.

have taken place in the gaming sector is sufficient to consider that the abovementioned conditions have been fulfilled.

2. The opening of other games to private operators

66. In the second place, the administrative courts of Giessen and Stuttgart raise the issue of the inconsistency which is said to exist, on the one hand, in creating a monopoly of the operation of lotteries and sports betting on the ground of preventing crime and addiction to gaming and, on the other hand, at the same time permitting private operators to offer other forms of gaming entailing a probably equivalent or greater risk, such as betting on horse racing and slot machines.

67. That point again raises the question of whether the issue of the compatibility with Union law of the Member States' gaming legislation must be assessed from a general viewpoint or a sectoral viewpoint, that is to say, from the viewpoint of each form of gaming.

68. The applicants in the main proceedings consider that a Member State's gaming legislation should retain an overall consistency, not an individual kind of consistency in relation to each restriction. In support of this they refer to the *Gambelli* judgment, from which they infer that the Court carried out a general assessment of Italian policy on gaming in order to decide on the legality of a particular restrictive measure.

69. That initial impression of the *Gambelli* judgment is erroneous. The allusion in paragraph 69 to advertising for forms of gaming which differ from those affected by the restriction in question signifies that excessive inducement to participate in a particular form of gaming (betting or lotteries, etc.) would prevent the State from pleading the prevention of addiction in relation to that particular form and from justifying the restriction of competition in that specific area.

70. In the *Placanica* judgment, which followed, the Court expressed itself more clearly in favour of a differentiated assessment by stating that 'the restrictive measures imposed by the national legislation should therefore be examined in turn.' [43] This idea is confirmed by the fact that, since its first judgments in this field, the Court has examined only the contested restriction, without carrying out an overall assessment of the legislation relating to all forms of gaming in the Member State concerned. For example, the *Schindler* judgment found that the ban on lotteries in the United Kingdom legislation was compatible with the Treaty, without considering the

43 — Judgment cited above, paragraph 49.

sports betting legislation that exists in the same country, which is known as one of the most liberal in the European Union.

71. Reference may likewise be made to the judgment in Case C-262/02 *Commission* v *France,* [44] which also concerned a restriction of Article 49 EC, although the restriction was justified on grounds of public health: 'as far as concerns the argument that the French rules on television advertising are inconsistent, since they apply only to alcoholic beverages whose alcohol content exceeds 1.2°, concern only television advertising, and do not apply to advertising for tobacco, it is sufficient to reply that that option lies within the discretion of the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved' (judgment cited above, paragraph 33).

72. In accordance with the judgments cited above, I consider that the legislation on the different forms of gaming in a Member State cannot be treated as a whole and that each restriction and each form of gaming should be examined separately. [45] The Court has never maintained that liberalisation should be 'all or nothing'; the terms of its judgments indicate clearly that problems in that area must be resolved case by case.

73. That interpretation is much more in line with the idea which forms the basis of the case-law concerning gaming, namely that the Member States should have a discretion to determine the conditions necessary for the protection of gamblers and of the social order, in conformity with the Member States' own scale of values. [46] For moral or cultural reasons the Member States do not have the same perception of the different games of chance, which explains why, irrespective of the risk of addiction and without prejudice to the sincere wish of governments to safeguard their citizens' interest, participation in certain forms of gaming is freer in some countries than in others.

74. In any case, while considering whether the suitability of restrictive measures should be assessed in a sectoral framework or not, I think that the legislative option that consists in creating a monopoly of certain forms of gaming and leaving others in the hands of the private sector is not in principle inconsistent with the aims of preventing fraud or limiting opportunities for gaming within a Member State, provided that the authorities maintain some degree of control over the operators and provided that the forms of gaming

44 — Case C-262/02 [2004] ECR I-6569.

45 — On that point I agree with the Commission's opinion in paragraph 35 of its observations.

46 — Judgments cited above, *Schindler*, paragraph 61; *Zenatti*, paragraph 15; *Gambelli*, paragraph 63; *Läärä*, paragraph 14; *Placanica*, paragraph 47; and *Liga Portuguesa*, paragraph 57.

on offer covered by the monopoly are fewer than those that could exist with a private provider. [47]

75. In addition, the addictive potential of certain games of chance is not in my view the only criterion for evaluating the risk which they entail in relation to the aims of gaming policy. Although numerous studies indicate that slot machines and casinos give rise to addictive behaviour in relation to gaming more often than lotteries and sports betting, that does not mean that the first two present a greater risk to the attainment of the objectives of preventing crime (which depends on the sector which is most susceptible to fraudulent activity in each country) and reducing the opportunities for gaming. As the Danish Government rightly observes, the difference between the two groups of gaming lies in the fact that casinos and slot machines require the physical presence of the player, which is not necessary in order to participate in lotteries and sports betting. That is why, even where a number of undertakings hold licences for casinos (or slot machines) each of them operates in a limited area: any increase in what is on offer in a monopoly situation is limited. On the other hand, an increase in the number of gaming providers with nationwide coverage, such as lotteries and sports betting (which, furthermore, can be done by means of the internet) would generate a considerable increase in competition and, very probably, in the opportunities for gaming.

47 — Reference should likewise be made to Case C-170/04 *Rosengren and Others* [2007] ECR I-4071, paragraph 47, concerning the monopoly on sales of alcoholic beverages in Sweden, where the Court declared that a State monopoly which does not limit the quantity offered of a dangerous product is not appropriate for attaining the objective of preventing addiction. However, the German Government considers that that condition is fulfilled in the present case, in so far as Staatliche Toto-Lotto GmbH permits betting only on the final result of programmed matches or sporting events and the possibility, generally offered by private undertakings, of betting on intermediate factors, such as the number of goals, corners or cards, for example (paragraphs 28 and 61 of Germany's observations) does not exist in the present case.

76. Therefore it is not necessary either to carry out a comparative assessment of policy concerning forms of gaming involving an equivalent risk of addiction. Whether a monopoly of a single form of gaming is compatible with Article 49 EC is a question which must be assessed separately and in relation to its suitability or consistency with regard to the objective pursued.

3. Other factors

77. The referring courts and the parties to the main proceedings have also raised the

issue of other factors or circumstances which may threaten the consistency of gaming legislation in Germany. I shall now consider those factors and circumstances very briefly.

(a) The internet enables the monopoly to be circumvented

78. According to the Verwaltungsgericht Stuttgart, it is possible to avoid the restriction entailed by the German monopoly of sports betting by using the services of licensed operators in other Member States offered via the internet, which 'clearly shows the limits and the inevitable shortcomings of the national measures'.

79. As the French Government points out in its observations, the difficulties that a State may encounter in securing compliance with national law are not relevant with regard to judging its compatibility with Community law. A restriction laid down by national law is in itself either compatible or incompatible with the Treaty and the ease with which it is possible to act contrary to national rules is irrelevant in that connection, particularly where, as Finland points out in its observations, those provisions may be intended to reduce gaming on the internet because of the considerable risk of addiction.

(b) No prior assessment of the consistency and proportionality of the measures

80. According to the referring courts, the consistency and proportionality of the German measures have not been demonstrated by a prior assessment of the risks of addiction to gaming and the alternatives for avoiding them, which the Court has required since the *Lindman* judgment. [48]

81. In that case, the Court found to be contrary to Article 49 EC Finnish tax legislation which exempted from income tax prizes from lotteries organised in Finland, but taxed prizes from gaming organised in other Member States. The Court stated that 'the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State', which had not been done in that case because the file transmitted to the Court 'discloses no statistical or other

48 — Case C-42/02 *Lindman* [2003] ECR I-13519.

evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals of the Member State concerned in lotteries organised in other Member States.' [49]

82. That judgment shows only that the burden of proving that restrictions on the freedom to provide services are proportionate and consistent rests with the Member State, and the Court has never sought to impose a requirement that that defence be published before the legislation in question is enacted, or that it should take the form of statistical surveys, as suggested by one of the applicants. [50]

83. Paragraph 50 of the *Placanica* judgment does not contradict the foregoing statement: the existence of a prior survey or investigation serving as a basis for the justification put forward by a Member State, which occurred in the Italian case, is an advantage but not a *sine qua non*. As the Commission rightly observes, the mere fact that there was no prior appraisal of consistency with the fundamental freedoms of the Treaty does not mean that it is impossible to clear a restrictive national measure.

49 — *Lindman*, cited above, paragraphs 25 and 26.

50 — In particular, Markus Stoß.

(c) Other *Länder* allow exceptions to the monopoly system

84. The applicants in the main proceedings also point out, as factors which may compromise the consistency of the system, certain unjustified exceptions to the monopoly system, such as the continued existence of four gaming licences granted at the time to private undertakings by the German Democratic Republic, or the system for licensing individuals at present in force in the *Land* Rheinland-Pfalz. [51]

85. If they were verified, it would be difficult to say that such special cases are compatible with a system which defends limiting the number of operators as being a means of reducing the opportunities for gaming and preventing crime. [52] It will nevertheless be for the German courts to carry out that assessment, having regard to the parties' arguments.

51 — At the hearing the applicants also stated that *Land* Schleswig-Holstein in the past considered the possibility of withdrawing from the treaty between the *Länder* in order to liberalise the gaming sector entirely.

52 — The fact that the legislation in question applies in other *Länder* does not make these allegations irrelevant. As I showed at length in my Opinion in Case C-46/08 *Carmen Media Group*, the legislation and the organisation of each form of gaming must be examined independently, but always from a national viewpoint: in the present case, that of the whole Federal State of Germany.

F — *Corollary*

86. Having regard to the foregoing, I consider that Article 49 EC is compatible with a public monopoly of certain forms of gaming which does not lead to discrimination based on nationality or the country of establishment, which pursues one or more objectives in the public interest and which is proportionate and consistent or suitable in relation to those objectives.

87. The assessment of those conditions reverts to the national court. However, with regard to the question of consistency, account must be taken of the following circumstances.

88. First, the fact that monopoly-holders induce people to participate in gaming is not sufficient to rule that the legislation concerned is inconsistent or unsuitable if the promotion is moderate and is genuinely intended to prevent crime or to channel the propensity for gaming into a regulated and controlled system, and not to increase the revenue of the public purse.

89. Second, allowing private operators to offer gaming services involving a risk of addiction which is probably equivalent to or greater than that of monopoly games is likewise not, in itself, inconsistent or unsuitable in relation to general interest objectives and does not render disproportionate the decision to bring betting and lotteries under a State monopoly, provided that the public authorities ensure sufficient control of private operators and provided that the supply of games subject to the monopoly is less than what could exist with a private provider.

VI — The second question

90. The second question to the Court from the Administrative Courts of Giessen and Stuttgart concerns whether the principle of mutual recognition can be applied to licences for the organisation of sports betting.

91. In the final analysis, this amounts to asking whether Articles 43 EC and 49 EC must be interpreted as meaning that licences issued by a Member State which are not limited to its own territory authorise the holder to carry on the same business in another Member State without the need to obtain a further licence.

92. I am led to reply to that question in the negative on the basis of three considerations: the case-law, which is unambiguous with regard to monopolies and other restrictions of Article 49 EC (1), the failure of attempts at harmonisation in the gaming sector (2), and the spread of techniques which are not consistent with mutual trust (3).

1. The acceptance by the case-law of monopolies and other restrictions of Article 49 EC in the gaming sector

93. As I have shown at length in part V of this Opinion, the Court openly and unambiguously accepts, albeit subject to certain conditions, monopolies and other restrictions relating to the number of operators in the gaming sector. This trend is clearly confirmed by the *Liga Portuguesa* judgment cited above.

94. That eventuality having been accepted, there is quite simply no room for the uniform operation of a system of mutual recognition of gaming licences for the whole of the European Union. If a Member State in which a gaming monopoly (complying with the requirements of the Treaty) has been instituted had to take into account licences issued in other Member States of the Union, the abovementioned case-law would become impracticable and meaningless.

95. As the Court found in the *Säger* judgment, [53] restrictions of the freedom to provide services may be justified on grounds of public interest, provided that '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'. If, in the light of the tests laid down by the case-law, a national measure which has opted for a monopoly system on a particular ground of public interest is found to be legitimate and complies with the Treaty, it seems impossible to maintain that another country which has a more open market offers its citizens the same level of protection in relation to that interest (particularly when account is taken of cultural and even moral differences which determine how governments approach the matter). Otherwise, the monopoly principle would be disproportionate and therefore unlawful. Consequently mutual recognition, even with the precautions referred to in *Säger*, is incompatible with the current case-law.

96. In theory only there would be grounds for defending the mutual recognition of licences as between States with an equivalent degree of openness in the gaming sector and similar licensing systems with the same aim. However, the actual situation in the sector and its lack of harmonisation preclude the viability of partial mutual recognition. [54]

53 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15.

54 — See Korte, S., 'Das Gambelli-Urteil des EuGH: Meilenstein oder Rückschritt in der Glücksspielrechtsprechung?', Neue Zeitschrift für Verwaltungsrecht. Vol. 23 (2004), No 12, p. 1452. Even without a monopoly, the differences between the requirements concerning private operators would give rise to undesirable competition ('race to the bottom'), a gradual reduction in the regulation of the sector in certain States with the aim of attracting enterprises to their country [Littler, A. 'Regulatory perspectives on the future of interactive gambling in the internal market' European Law Review, Vol. 33 (2008), No 2, p. 226].

2. Lack of harmonisation

97. In the second place, mutual recognition does not seem possible without Community harmonisation of the gaming sector, which it does not appear can take place in the near future. Points 144 to 148 of the Opinion of Advocate General Ruiz-Jarabo Colomer in the *Placanica* case are a faithful reflection of that desideratum, which was still realistic at the time (although several previous attempts had failed) thanks to the so-called Bolkenstein [55] proposal for a directive on services.

98. However, the final text of Directive 2006/123 did not include games of chance in its scope [56] 'in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.' [57]

99. That exclusion of games of chance in no way affects the freedom of establishment and the freedom to provide services in the gaming sector, [58] nor does it confer upon the Member States a wider latitude than the Court has hitherto allowed when it interpreted the treaties. Nevertheless, after that clear manifestation of the intention of the Community legislature, there are no grounds either for continuing to hope for harmonisation of the sector, at least in the short term. However, without such harmonisation, it is difficult to guarantee recognition of gaming authorisations.

100. The fact is that the principle of mutual recognition, although attractive, is far from being a 'miracle solution.' [59] In certain sectors the enormous differences between the laws of the Member States make it impossible to apply the principle which, in spite of its very considerable potential as a means of establishing the internal market, is by nature an instrument which has its limits. [60]

101. Consequently, without harmonisation there will always be limitations to the application of the freedom of movement. It is the task of case-law to delimit the restrictions which, in this non-harmonised sector, comply with the provisions of the Treaty.

55 — After the name of the Commissioner who presented it.

56 — Article 2(2)(h) of Directive 2006/123.

57 — Recital 25 of the preamble to Directive 2006/123.

58 — Games of chance are still 'services' within the meaning of the Treaty (*Schindler,* cited above, paragraph 25).

59 — See, to that effect, Barnard, C., *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press, 2nd ed., 2007, p. 591.

60 — See also Hotzopoulos, V., *Le principe communautaire d'équivalence et de reconnaissance mutuelle et de libre prestation de services*, Thesis for doctorate in law, presented and defended in public on 6 December 1997, Université Robert Schuman de Strasbourg, p. 158.

102. Directive 2006/123 shows that, if the authorities of the State in which the service is to be offered are to uphold the controls in place in the country of establishment of the service provider, those authorities must be given the means of doing so as effectively as possible. For that purpose the whole of Chapter VI (Articles 28 to 36) of the directive is devoted to the regulation of administrative cooperation between Member States, which includes the obligation to exchange information on service providers, a clear division of powers between the States concerned and an alert mechanism.

103. That degree of collaboration does not exist at present in the gaming sector: on the contrary, there is a proliferation of certain practices which are detrimental to mutual trust.

3. Practices inconsistent with mutual trust

104. In the third place, the cases at present before the Court reveal national practices which are themselves capable of destroying the mutual trust (Article 10 EC) upon which an eventual harmonisation of the sector or, at least, the system of mutual recognition of gaming licences would have to be based. [61] I refer to the technique which consists in issuing extra-territorial or off-shore licences, which is used by the authorities of Malta and Greece, for example. The issue arises particularly in Case C-46/08 *Carmen Media Group* and I examine it in more detail there. However, in the present case that constitutes a further argument in support of the need to rule out mutual recognition, which cannot arise from a situation of breach of mutual trust between the Member States.

4. Corollary

105. Finally, the lack of harmonisation, the spread of off-shore licences and the acceptance by case-law of monopolies and other restrictions in that sector lead me to the conclusion that, as matters stand in Community law and case-law, a system of mutual recognition in the gaming sector would not be viable.

VII — Conclusion

106. I therefore propose that the Court's reply to the questions referred to it by the Administrative Courts of Giessen and Stuttgart should be as follows:

61 — See the Opinion in *Placanica*, cited above, paragraph 128.

‘(1) Article 49 EC must be interpreted as not precluding a State monopoly of certain games of chance (such as, for example, sports betting),

— even if the organisers holding national licences encourage participation in those games, if the promotion of gaming is moderate and is genuinely intended to prevent crime or to concentrate gaming on forms which are regulated and controlled, and not to increase the revenue of the public purse;

— and even if private service providers are licensed to offer games which are presumed to present an equivalent or greater risk of addiction (such as bets on horse racing and slot machines), provided that the public authorities guarantee a certain degree of control over those private operators and that the supply of games subject to the monopoly is less than what could exist with a private provider.

If those conditions are fulfilled, the abovementioned circumstances do not prohibit a gaming policy which is consistent and systematic within the meaning of the case-law. It is for the national court to scrutinise that policy.

(2) Articles 43 EC and 49 EC must be interpreted as meaning that licences issued by the competent bodies of a Member State for the organisation of sports betting which are not restricted to its national territory do not authorise the licence holder or third parties appointed by it to offer and conclude contracts on the territory of other Member States.’