JUDGMENT OF THE COURT (Grand Chamber)

8 September 2010 *

In Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07,

REFERENCES for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Gießen (Germany) (C-316/07, C-409/07 and C-410/07) and the Verwaltungsgericht Stuttgart (Germany) (C-358/07 to C-360/07), made by decisions of 7 May (C-316/07), 24 July (C-358/07 to C-360/07) and 28 August 2007 (C-409/07 and C-410/07), received at the Court on, respectively, 9 July, 2 August and 3 September 2007, in the proceedings

Markus Stoß (C-316/07),

Avalon Service-Online-Dienste GmbH (C-409/07),

Olaf Amadeus Wilhelm Happel (C-410/07)

* Language of the case: German.

v

Wetteraukreis,

and

Kulpa Automatenservice Asperg GmbH (C-358/07),

SOBO Sport & Entertainment GmbH (C-359/07),

Andreas Kunert (C-360/07)

v

Land Baden-Württemberg,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and P. Lindh, Presidents of Chambers, K. Schiemann (Rapporteur), A. Borg Barthet, M. Ilešič, J. Malenovský, U. Lõhmus, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: P. Mengozzi,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2009,

after considering the observations submitted on behalf of:

— Mr Stoß, Mr Kunert and Avalon Service-Online-Dienste GmbH, by R. Reichert and M. Winkelmüller, Rechtsanwälte,

— Mr Happel, by R. Reichert, Rechtsanwalt,

— Kulpa Automatenservice Asperg GmbH, by M. Maul, Rechtsanwalt, and R. Jacchia, avvocato,

— SOBO Sport & Entertainment GmbH, by J. Kartal and M. Winkelmüller, Rechtsanwälte,

— the Wetteraukreis, by E. Meiß and J. Dietlein, acting as Agents,

— the Land Baden-Württemberg, by M. Ruttig, Rechtsanwalt,

— the German Government, by M. Lumma, B. Klein and J. Möller, acting as Agents,

— the Belgian Government, by L. Van den Broeck and A. Hubert, acting as Agents, and by P. Vlaemminck, advocaat,

— the Danish Government, by J. Bering Liisberg, acting as Agent,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the French Government, by G. de Bergues, acting as Agent,

— the Italian Government, by I.M. Braguglia, I. Bruni and G. Palmieri, acting as Agents, and by P. Gentili and F. Arena, avvocati dello Stato,

— the Lithuanian Government, by D. Kriaučiūnas, acting as Agent,

— the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes, acting as Agent, and by A. Barros, advogada,

— the Slovenian Government, by N. Pintar Gosenca, acting as Agent,

— the Finnish Government, by J. Heliskoski, acting as Agent,

— the Norwegian Government, by P. Wennerås and K.B. Moen, acting as Agents,

— the European Commission, by E. Traversa, P. Dejmek and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 43 EC and 49 EC.

2 The references were made in the context of disputes between, first, Mr Stoß, Avalon Service-Online-Dienste GmbH ('Avalon') and Mr Happel, of the one part, and the Wetteraukreis, of the other part; and, secondly, between Kulpa Automatenservice Asperg GmbH ('Kulpa'), SOBO Sport & Entertainment GmbH ('SOBO') and Mr Kunert, of the one part, and the Land Baden-Württemberg, of the other part, concerning decisions by those two authorities prohibiting the persons concerned, on pain of a fine, from carrying on any business seeking to allow or facilitate the conclusion of bets on

sporting competitions organised by providers established in Member States other than the Federal Republic of Germany.

National legal context

Federal law

3 Paragraph 284 of the Criminal Code (Strafgesetzbuch; 'the StGB') provides:

'(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 subparagraph 1 above acts

1. on a commercial basis

…

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

…'

4 Apart from bets concerning official horse races, which fall primarily under the Law on Racing Bets and Lotteries (Rennwett- und Lotteriegesetz; 'the RWLG'), and the installation and use of gambling machines in establishments other than casinos (gaming arcades, cafes, hotels, restaurants, and other accommodation), which fall primarily within the Trade and Industry Code (Gewerbeordnung) and the Regulation on Gambling Machines (Verordnung über Spielgeräte und andere Spiele mit Gewinnmöglichkeit), determination of the conditions under which authorisations within the meaning of Paragraph 284(1) of the StGB may be issued for games of chance has taken place at the level of the various *Länder*.

5 Paragraph 1(1) of the RWLG provides:

'An association wishing to operate a mutual betting undertaking on horse races or other public horse competitions must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*.'

6 Paragraph 2(1) of the RWLG provides:

'Any person wishing, on a commercial basis, to conclude bets on public horse competitions or serve as intermediary for such bets (Bookmaker) must first obtain the authorisation of the competent authorities in accordance with the law of the *Land*.'

The LottStV

7 By the State treaty concerning lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; 'the LottStV'), which entered into force on 1 July 2004, the *Länder* created a uniform framework for the organisation, operation and commercial placing of gambling, apart from casinos.

8 Paragraph 1 of the LottStV states:

'The objectives of the State treaty are:

1. to channel the natural propensity of the population for gambling in an ordered and supervised manner, and, in particular, to prevent it being transferred to unauthorised games of chance;

2. to prevent excessive incitements to gamble;

3. to prevent the exploitation of the propensity to gamble for profit-making private or commercial purposes;

4. to ensure that games of chance take place in a regular manner and that their logic is comprehensible; and

5. to ensure that a significant part of the receipts from games of chance is used to promote public objectives, or objectives with a privileged tax status, within the meaning of the Tax Code.'

9 Paragraph 5(1) and (2) of the LottStV provide:

'(1) The *Länder* are, within the framework of the objectives set out in Paragraph 1, legally obliged to ensure [the existence of] a sufficient supply of games of chance.

(2) On the basis of the law, the *Länder* may themselves assume that task, or entrust it to legal persons under public law or to private law companies in which legal persons under public law directly or indirectly hold a controlling shareholding.'

The legislation of the Land Hessen

10 Under Paragraph 1 of the Law on Bets on Sporting Competitions, Lottery Draws and other State Lotteries in Hessen (Gesetz über staatliche Sportwetten, Zahlenlotterien und Zusatzlotterien in Hessen) of 3 November 1998 (GVBl. 1998 I, p. 406), as most recently amended on 13 December 2002 (GVBl. 2002 I, p. 797; 'the GSZZ H'):

'(1) The Land Hessen is the only body authorised to organise bets on sporting competitions within its territory....

(2) The Land Hessen shall organise lottery draws.

...

(4) A private law company may be entrusted with the implementation of bets on sporting competitions and lotteries organised by the Land Hessen.

'...

11 Pursuant to Paragraph 1(1) and (4) of the GSZZ H, bets on sporting competitions are organised and operated by the Hessische Lotterieverwaltung (lottery administration of the Land Hessen) in the name of the Land Hessen, whereas their technical implementation has been entrusted to Lotterie-Treuhandgesellschaft mbH Hessen.

12 Paragraph 5(1) of the GSZZ H provides:

'Any person who, in the Land Hessen, without the authorisation of the Land

1. advertises,

2. solicits the conclusion or negotiation of gaming contracts,

3. accepts offers for the conclusion or negotiation of gaming contracts

for a sporting bet or a lottery draw shall be liable to a term of imprisonment not exceeding two years or a fine if the act does not fall within Paragraph 287 of the Criminal Code.'

The legislation of the Land Baden-Württemberg

13 Paragraph 2 of the Law on Lotteries, Bets and State Draws of the Land Baden-Württemberg (Gesetz über staatliche Lotterien, Wetten und Ausspielungen) of 14 December 2004 (GBl. 2004, p. 894; 'the StLG BW') provides:

'(1) The Land shall organise the following games of chance:

1. Lotto

2. Sporting lotto

3. Scratch cards.

...

(4) The Ministry of Finance shall determine the organisation of State games of chance. The decision of the Ministry of Finance on the organisation of new games of chance shall require the approval of the Landtag. The Ministry of Finance may entrust the implementation of games of chance organised by the Land to a private law company in which the Land directly or indirectly holds a controlling shareholding.

...'

The actions in the main proceedings and the questions referred for a preliminary ruling

Cases C-316/07, C-409/07 and C-410/07

14 Mr Stoß, Avalon and Mr Happel each have commercial premises in the Wetteraukreis (Land Hessen), in Germany, where they carry on a business comprising the placing of bets on sporting competitions (acceptance of bets, collection of stakes and payment of winnings). The first two applicants in the main proceedings carry on their business on behalf of Happybet Sportwetten GmbH ('Happybet Austria'), a company with its registered office at Klagenfurt (Austria), and the third does so on behalf of Happy Bet Ltd ('Happy Bet UK'), a company with its registered office in London (United Kingdom).

15 Happybet Austria holds an authorisation for the conclusion of bets on sporting events issued by the Regional Government of the *Land* of Carinthia. Happy Bet UK likewise holds an authorisation issued by the competent authorities of the United Kingdom.

16 By orders dated respectively 11 February 2005, 18 and 21 August 2006, the administrative police authority of the Wetteraukreis prohibited Mr Happel, Mr Stoß and Avalon from promoting and concluding at their commercial premises bets on sporting competitions on behalf of organisers other than the Hessische Lotterieverwaltung or from offering facilities for promoting or concluding such bets. Those orders were based on the fact that neither the persons concerned nor the organisers of bets on whose behalf they acted held an authorisation for their business from the Land Hessen. Nor had they applied for such authorisation or sought clarification of the law by

means of a legal action. Under the terms of those orders, the activities thus prohibited had to cease within seven days, on pain of a fine of EUR 10 000.

17 The administrative complaint by Mr Happel against the order of 11 February 2005 was dismissed on 20 February 2007. The administrative complaints of Mr Stoß and Avalon, directed respectively against the orders of 18 and 21 August 2006, were dismissed on 8 December 2006.

18 Mr Stoß, Mr Happel and Avalon brought actions before the Verwaltungsgericht Gießen (Administrative Court, Gießen) for the annulment of the orders thus confirmed, on the ground that they infringed Community rules on the freedom of establishment and the freedom to provide services. In their submission, the monopoly on bets on sporting competitions, on which the decisions at issue in the main proceedings were based, is contrary to Articles 43 EC and 49 EC. Moreover, Happybet Austria and Happy Bet UK held the authorisations required, in their respective Member States, for organising bets on sporting competitions, and such authorisations should be recognised by the German authorities.

19 The Verwaltungsgericht Gießen states that neither Mr Stoß, Mr Happel and Avalon nor Happybet Austria and Happy Bet UK are holders of the authorisation required under Paragraph 284 of the StGB and Paragraph 5(1) of the GSZZ H for carrying on the activities in question. It further states that, having regard to the monopoly enjoyed by the Land Hessen in the organisation of bets on sporting competitions under Paragraph 1(1) of the GSZZ H and the total absence of rules setting out the conditions under which authorisation might, in appropriate cases, be granted to a private operator, any application by the persons concerned for such authorisation is bound to fail.

20 The said court doubts whether the restrictions on the freedom of establishment and the freedom to provide services arising from that situation may be justified by objectives in the public interest such as the prevention of incitement to squander money on gambling or fighting addiction to the latter, because of failure by the monopoly at issue in the main proceedings to satisfy the requirements of the principle of proportionality. In the absence of such justification, as is shown in particular by Case C-243/01 *Gambelli and Others* [2003] ECR I-13031 and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, Articles 43 EC and 49 EC preclude both the application of the sanctions laid down by Paragraph 284 of the StGB and Paragraph 5(1) of the GSZZ H and the contested police measures.

21 The doubts which that court has as to the conformity of the monopoly at issue in the main proceedings with European Union law ('EU law') are of three types.

22 With reference to Case C-42/02 *Lindman* [2003] ECR I-13519, the Verwaltungsgericht Gießen is in doubt, first, as to whether it is lawful for a Member State to rely on the declared objective of preventing incitement to squander money on gambling and fighting addiction to the latter in order to justify a restrictive measure in circumstances where the said Member State is not able to prove the existence of a study carried out before the adoption of the said measure and concerning its proportionality. In this case, such a study, which would involve an examination of the gaming market, of the dangers of games and the possibility of preventing them, and of the effects of the restrictions envisaged, was not carried out prior to the conclusion of the LottStV and the adoption of the GSZZ H.

23 Secondly, the said court doubts whether the legislation at issue in the main proceedings is limited to what is strictly necessary, since the objective thus pursued could also be achieved by establishing supervision in order to ensure compliance, by the organisers

of private bets, with the rules on the types and methods of offers authorised and on advertising, with a less adverse effect on the freedoms laid down by the EC Treaty.

24 Thirdly, for the purposes of ensuring that the policy of the authorities for preventing incitement to squander money on gambling and combating addiction to the latter is carried out in a consistent and systematic manner, as required by the case-law of the Court of Justice and particularly the judgment in *Gambelli and Others*, the referring court considers that it could be necessary to make an exhaustive examination as to the conditions on which all forms of games are authorised, without limiting the examination merely to the sector of gambling covered by the monopoly at issue in the main proceedings.

25 In the view of the referring court, the Land Hessen has no consistent and systematic policy for restricting gambling, in particular because the holder of the public monopoly on bets on sporting competitions encourages participation in other games of chance; because, in relation to casino games, the said Land is opening up new gaming possibilities, particularly on the internet; and because federal legislation authorises the exploitation of other games of chance by private operators.

26 Moreover, having regard to the fact that Happybet Austria and Happy Bet UK hold an authorisation allowing them to offer bets on sporting competitions with the use of modern technology and that they are probably subject, in the Member State in which they are established, to a system of supervision and penalties, the referring court wonders whether Articles 43 EC and 49 EC have the effect of requiring the German authorities to recognise those authorisations.

27 In those circumstances, the Verwaltungsgericht Gießen has decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(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 ([for example,] horse racing) and automated games – 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 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?'

Cases C-358/07 to C-360/07

28 SOBO, Mr Kunert and Allegro GmbH ('Allegro') each have commercial premises in Stuttgart (Germany). The premises used by Allegro were let to it by Kulpa.

29 SOBO, Mr Kunert and Allegro carry on a business comprising the placing of bets on sporting competitions (acceptance of bets and electronic transmission of the latter to the organiser). SOBO carries on its activity on behalf of Web.coin GmbH ('Web.coin'), a company with its registered office in Vienna (Austria), Mr Kunert acts on behalf of Tipico Co. Ltd ('Tipico'), a company established in Malta, and Allegro acts on behalf of Digibet Ltd ('Digibet'), a company established in Gibraltar.

30 Digibet, Tipico and Web.coin each hold a licence issued by the authorities within whose jurisdiction they fall by virtue of their establishment, authorising them to organise bets on sporting competitions.

31 By orders dated, respectively, 24 August 2006, 23 November 2006 and 11 May 2007, the Regierungspräsidium Karlsruhe prohibited SOBO, Kulpa and Mr Kunert from organising, negotiating or promoting bets on sporting competitions or supporting such activities in the Land Baden-Württemberg. Under the terms of those orders, the activities thus prohibited had to cease within two weeks, on pain of a fine of EUR 10 000.

32 SOBO, Kulpa and Mr Kunert brought actions before the Verwaltungsgericht Stuttgart directed against those orders on the ground that the monopoly on bets on sporting competitions, on which they were based, was contrary to Articles 43 EC and 49 EC. In their submission, moreover, the authorisations held by Digibet, Web.coin and Tipico had to be recognised by the German authorities.

33 The Verwaltungsgericht Stuttgart, whilst taking the view that, in accordance with the case-law of the Court of Justice, monopolisation of betting activities might in certain cases be compatible with Articles 43 EC and 49 EC, and that Member States have a certain margin of discretion in this area, doubts whether that is so in the case of the

monopoly in force on bets on sporting competitions in the Land Baden-Württemberg, as it arises from Paragraph 5(2) of the LottStV and Paragraph 2(1)(2) of the StLG BW.

34 The doubts of that court largely echo those expressed by the Verwaltungsgericht Gießen.

35 First, neither the conclusion of the LottStV nor the adoption of the StLG BW was preceded by a study of the dangers of addiction to gambling and the various available possibilities of prevention.

36 Secondly, the restrictions thus imposed on the business of bets on sporting competitions do not satisfy the requirement under the case-law of the Court of Justice that measures against gambling should be consistent and systematic. No account was taken, in an overall measure, of all the gambling sectors and, comparatively, of the risk and addiction potential of each of them.

37 Even if casinos are the subject of detailed systems of concession, and gaming machines authorised in restaurants are subject to protective rules under the Trade and Industry Code, the fact remains that those games of chance may be offered by private operators, even though gaming machines present a higher risk of addiction than bets on sporting competitions.

38 Moreover, the Regulation on Gambling Machines has been recently amended so as to increase the number of machines authorised in a restaurant or gaming arcade, reduce the minimum duration per game and increase the limit on losses allowed.

39 A consistent and systematic policy is also lacking, in the national court's view, having regard to the aggressive promotional activity of the holder of the public monopoly. Massive advertising campaigns for lottery products, particularly on the internet and on posters, for the purpose of encouraging participation in gambling, moreover underline the use of the profits for social, cultural and sporting activities and the need to finance those activities. The maximisation of the profits, intended, up to a ceiling determined by the public authority, for such activities, and, as to the remainder, for the public finances, thus becomes a major objective of gaming policy, and not just an incidental benefit of it.

40 The Verwaltungsgericht Stuttgart wonders, thirdly, whether, as regards the assessment of the appropriateness of the monopoly at issue in the main proceedings in relation to the pursuit of the alleged objectives, account should not be taken of the fact that organisers of bets established in other Member States generally have a presence on the internet enabling players resident in Germany to conclude electronic transactions directly, and of the fact that, faced with such a transfrontier phenomenon, the national authorities are rather powerless and purely national measures are ineffective.

41 Moreover, the question arises whether the authorisations held in the Member State of their establishment by Digibet, Web.coin and Tipico to offer bets on sporting competitions over the internet should not benefit from mutual recognition between Member States, thus relieving their holder from the need to obtain authorisation in Germany.

42 In those circumstances, the Verwaltungsgericht Stuttgart decided to stay the proceedings and refer to the Court of Justice, in the context of each of the three cases before it, the following questions for a preliminary ruling, drafted in terms very close to those used by the Verwaltungsgericht Gießen:

'(1) Are Articles 43 [EC] and 49 EC to be interpreted as precluding a national monopoly on certain gaming, such as sports betting and lotteries, where there is no consistent and systematic policy to limit gaming in the Member State concerned as a whole, because the operators which have been granted a licence within that Member State encourage and advertise participation in other gaming – such as State-run sports betting and lotteries – and, moreover, other games with the same or even higher potential danger of addiction – such as betting on certain sporting events (horse racing), automated games and casino games – 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 the competent State bodies of 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 in other Member States as well without any additional national authorisations being required?'

43 By order of the President of the Court of Justice of 15 October 2007, Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 were joined for the purposes of the written and oral procedures and the judgment.

The application for reopening of the oral procedure

44 By letter of 21 June 2010, Mr Stoß, Mr Happel, Mr Kunert and Avalon applied for the oral procedure to be reopened, arguing, essentially, that it had recently been revealed in the German press that a study dating from 2009 ordered by the German *Länder* and concerning the risks of addiction connected with sporting bets and with measures suitable for combating such risks appears to have been subject to some manipulation. According those applicants, who refer in that respect to the doubts expressed by the referring courts as to the consequences likely to flow from the *Lindman* judgment, the said *Länder* cannot rely on that study in support of the proportionality of the restrictive measures at issue in the main proceedings.

45 In that respect, it should be recalled that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31 and case-law cited).

46 Moreover, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts in the case is a matter for the national court or tribunal. In particular, the Court is empowered to rule only on the interpretation or the validity of Community acts on the basis of the facts placed before it by the national court or tribunal. It is for the national court or tribunal to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the

judgment which it is required to deliver (see, in particular, Case C-491/06 *Danske Svineproducenter* [2008] ECR I-3339, paragraph 23 and case-law cited).

47 In this case, it is sufficient to note that the study referred to by Mr Stoß, Mr Happel, Mr Kunert and Avalon in their application was not mentioned by the referring courts and neither could it have been, given that, dating from the year 2009, it is largely subsequent to those courts' references to the Court of Justice.

48 Having regard to the above, and having heard the views of the Advocate General, the Court considers that it has all the necessary information to rule on the references for a preliminary ruling and that the latter do not have to be examined on the basis of an argument which has not been debated before it.

49 Therefore, the application for reopening of the oral procedure must be dismissed.

The questions referred

Admissibility

50 The Italian Government is of the view that the first question referred in each of the cases in the main proceedings should be declared inadmissible. It argues that the referring courts alone have jurisdiction to verify whether the monopolies at issue in

the main proceedings satisfy the requirement of consistency in the fight against gambling addiction, and that the orders for reference do not contain the basic minimum of factual and legal information to enable an understanding of why those courts have doubts as to the compatibility of the national systems in question with EU law.

51 In that regard, according to settled case-law, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, in particular, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 24).

52 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*PreussenElektra*, paragraph 39, and *Hartlauer*, paragraph 25).

53 That is not the case with the present proceedings. The factual and legal information set out in the orders for reference and the doubts expressed in relation thereto by the referring courts as to the interpretation of EU law in the perspective of the outcome of the disputes in the main proceedings bear a clear relation to the subject-matter of those disputes and allow the Court to exercise its jurisdiction.

54 In those circumstances, the references for a preliminary ruling must be regarded as admissible.

Identification of the provisions of EU law requiring interpretation

55 The Netherlands Government and the Commission have expressed doubts as to the relevance of the reference in the questions referred to Article 43 EC, maintaining that only Article 49 EC can be applied to situations such as those at issue in the cases in the main proceedings.

56 In that regard, it should be noted that, according to consistent case-law, activities which consist in allowing users to participate, for remuneration, in gambling constitute 'services' within the meaning of Article 49 EC (see, in particular, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 25, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 24). The same applies to the activity of promoting and placing gambling, such an activity constituting only specific steps in the organisation or operation of the gambling to which that activity relates (see, in particular, *Schindler*, paragraphs 22 and 23).

57 Services such as those at issue in the main proceedings may thus fall within the scope of Article 49 EC where, as in the cases in the main proceedings, at least one of the providers is established in a Member State other than that in which the service is offered (see, in particular, *Zenatti*, paragraph 24), unless Article 43 EC applies.

58 As regards Article 43 EC, it should be recalled that that provision prohibits restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries (*Gambelli and Others*, paragraph 45).

59 The case-law of the Court shows in this respect that the concept of establishment is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Community in the sphere of activities as self-employed persons (see, in particular, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25). Thus, the maintenance of a permanent presence in a Member State by an undertaking established in another Member State may fall within the provisions of the Treaty on the freedom of establishment even if that presence does not take the form of a branch or agency, but consists merely of an office managed by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency (see Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21).

60 With regard to the area of games and bets, the Court of Justice held, in *Gambelli and Others*, that Article 43 can apply to a situation in which an undertaking established in one Member State has, in another Member State, a presence which takes the form of commercial agreements with operators or intermediaries relating to the creation of data transmission centres which make electronic means of communication available to users, collect and register intentions to bet and forward them to the said undertaking. Where an undertaking pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State, any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment (*Gambelli and Others*, paragraphs 14 and 46, and *Placanica and Others*, paragraph 43).

61 In the disputes in the main proceedings, the information contained in the orders for reference concerning the relations between the operators organising bets on sporting competitions established in other Member States and the operators party to the said disputes who market those bets in the two *Länder* concerned neither confirms nor excludes the possibility that those latter operators should be regarded as subsidiaries, branches or agencies created by the former within the meaning of Article 43 EC.

62 In those circumstances, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (see, in particular, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27 and case-law cited).

63 Moreover, as indicated in paragraph 51 of this judgment, it is for the national court alone to assess both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice in that regard.

64 It is thus for the referring courts to determine, in the light of the circumstances of each case, whether the situations at issue in the main proceedings fall under Article 43 EC or Article 49 EC.

65 In the light of the above, it is necessary to examine the questions referred having regard to both Article 43 EC and Article 49 EC.

The first question referred in each of the cases

66 Having regard to the information contained in the orders for reference, as reported in paragraphs 14 to 25 and 28 to 40 of this judgment, this Court considers that, in their first question, the referring courts are, in essence, asking whether Articles 43 EC and 49 EC must be interpreted as precluding regional public monopolies on bets on sporting competitions, such as those at issue in the cases in the main proceedings, those monopolies pursuing an objective of preventing incitement to squander money on gambling and combating addiction to the latter, in so far as:

(i) the authorities of the Member State concerned are not able to demonstrate the existence of a study on the proportionality of the said monopolies, carried out before the latter were instituted;

(ii) such an objective could also be achieved by supervision to ensure compliance, by duly authorised private operators, with the rules on the types of bets, on marketing methods and on advertising, while having a lesser adverse impact on the freedoms laid down by the Treaty;

(iii) those monopolies might not be suitable for achieving the said objective, because the national authorities are likely to have difficulty ensuring actual compliance with them in the transnational environment generated by the internet;

(iv) it is doubtful, in the particular case, whether the objective thus alleged is being pursued in a consistent and systematic manner having regard:

— first, to the fact that operation by private operators of other types of games of chance, such as bets on competitions involving horses, automated games or casino games, is authorised;

— secondly, to the fact that participation in other types of games of chance falling under those same public monopolies, namely lotteries, is encouraged by the holders of those monopolies by means of intensive advertising campaigns designed to maximise revenue from gambling; and

— thirdly, to the fact that offers relating to other types of games of chance, such as casino games or automated games installed in gambling arcades, cafes, restaurants and places of accommodation, are the subject of an expansionary policy.

67 Those various questions will be examined successively below.

68 By way of preliminary observation, it is common ground that legislation of a Member State such as the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services guaranteed by Article 49 EC or, alternatively, to the freedom of establishment guaranteed by Article 43 EC (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52).

69 However, it is necessary to assess in this case, having regard to the doubts thus expressed by the referring courts, whether such a restriction may be justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

The absence of a study on the proportionality of public monopolies, such as those at issue in the main proceedings, prior to their establishment

70 On the basis of the judgment in *Lindman*, the referring courts are in doubt as to whether, in order to justify restrictive measures such as the monopolies at issue in the main proceedings by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, the national authorities must be able to produce a study supporting the proportionality of those measures which was prior to their adoption.

71 As the Advocate General has observed in points 81 and 82 of his Opinion, that question arises from a misreading of that judgment. As is clear from paragraphs 25 and 26 of the latter and from the subsequent case-law referring thereto (see, in particular, the judgment of 13 March 2008 in Case C-227/06 *Commission* v *Belgium* [2008] ECR I-46, paragraphs 62 and 63 and case-law cited), the Court has stated that if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality.

72 It cannot, however, be inferred from that case-law that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue.

Possible disproportionality of public monopolies, such as those at issue in the main proceedings, on the ground that a system for issuing authorisations to private operators might constitute a measure less restrictive of Community freedoms

73 As stated in paragraph 23 of this judgment, the Verwaltungsgericht Gießen has doubts as to whether a public monopoly, such as that at issue in the cases before it, is capable of satisfying the requirement of proportionality in so far as the objective of preventing incitement to squander money on gambling and combating addiction to the latter is also capable of being pursued by means of supervision to ensure compliance, by duly authorised private operators, with the rules on the types of bets, on marketing methods and on advertising, while having a lesser adverse effect on the freedoms laid down by the Treaty.

74 In that regard, it should be recalled, by way of preliminary observation, that, with regard to the justifications which are capable of being accepted where internal measures restrict the freedom to provide services or the freedom of establishment, the Court has observed that the objectives pursued by national legislation adopted in the area of gambling and bets, considered as a whole, usually concern the protection of the recipients of the services in question and of consumers more generally, and the protection of public order. It has also held that such objectives are amongst the overriding reasons in the public interest capable of justifying obstacles to the freedom to provide services (see, in particular, *Schindler*, paragraph 58; Case C-124/97 *Läärä and Others*

[1999] ECR I-6067, paragraph 33; *Zenatti*, paragraph 31; Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 73; and *Placanica and Others*, paragraph 46).

75 The Court has thus acknowledged in particular that, in the area of games and bets, excesses in which have damaging social consequences, national regulations seeking to prevent the stimulation of demand by limiting the human passion for gambling could be justified (*Schindler*, paragraphs 57 and 58; *Läärä and Others*, paragraphs 32 and 33; and *Zenatti*, paragraphs 30 and 31).

76 In that context, the Court has, moreover, often stated that moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the preservation of public order (see, in particular, *Placanica and Others*, paragraph 47 and case-law cited, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57).

77 However, although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59 and case-law cited).

78 It is thus necessary for the national courts to examine whether a restriction decided upon by a Member State is suitable for achieving the objective or objectives invoked by the Member State concerned, at the level of protection which it seeks, and whether it does not go beyond what is necessary in order to achieve those objectives (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

79 As regards, more particularly, the establishment of public monopolies, the Court has previously acknowledged that a national system providing for limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, was capable of falling within the pursuit of the abovementioned public interest objectives of protecting the consumer and public order (see, in particular, *Zenatti*, paragraph 35, and *Anomar and Others*, paragraph 74). It has also held that the question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to a licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued (*Läärä and Others*, paragraph 39).

80 In that latter regard, it should nevertheless be noted that, having regard to the discretion which Member States enjoy in determining the level of protection for consumers and public order which they intend to ensure in the gaming sector, it is in particular not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue (see, by analogy, Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraphs 83 and 84).

81 Having regard to the above, it must be acknowledged that the public authorities of a Member State may be entitled to take the view, within the margin of discretion which they have in that respect, that granting exclusive rights to a public body whose management is subject to direct State supervision or to a private operator over whose activities the public authorities are able to exercise tight control is likely to enable them to tackle the risks connected with the gambling sector and pursue the legitimate objective of preventing incitement to squander money on gambling and combating addiction to gambling more effectively than would be the case with a system authorising the business of operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework (see, to that effect, *Läärä and Others*, paragraphs 40 to 42; *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 66 and 67; and Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 59).

82 The said authorities may indeed legitimately consider that the fact that, in their capacity as controller of the body holding the monopoly, they will have additional means of influencing the latter's conduct outside the statutory regulating and surveillance mechanisms is likely to secure for them a better command over the supply of games of chance and better guarantees that implementation of their policy will be effective than in the case where those activities are carried on by private operators in a situation of competition, even if the latter are subject to a system of authorisation and a regime of supervision and penalties.

83 The fact remains, however, that the establishment of a measure as restrictive as a monopoly, which can be justified only in order to ensure a particularly high level of consumer protection, must be accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, the objective thus determined by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities.

The alleged ineffectiveness of monopolies such as those at issue in the main proceedings having regard to the transnational environment generated by the internet

84 As indicated in paragraph 40 of this judgment, the doubts expressed in this respect by the Verwaltungsgericht Stuttgart concern the fact that, in a transnational environment such as that generated by the internet, the authorities of a Member State which has established public monopolies comparable to the monopolies at issue in the main proceedings might be confronted with certain difficulties in ensuring compliance with those monopolies by organisers of games and bets established outside that Member State, who, via the internet and in breach of those monopolies, conclude bets with persons within the territorial area of the said authorities.

85 However, as the Advocate General has pointed out in point 79 of his Opinion, such a circumstance cannot be sufficient to call into question the conformity of such monopolies with EU law.

86 First, whilst it is true that illicit transactions on the internet may, particularly when they are of a transnational character, prove more difficult to control and sanction than other types of illicit conduct, such a situation is not limited to the gambling sector. A Member State cannot be denied the right to extend to the internet the application of the unilateral restrictive rules which it adopts for legitimate purposes in the public interest simply because that technological medium has a character that is in essence transnational.

87 Secondly, it is undisputed that Member States are not deprived of legal means enabling them to ensure, as effectively as possible, compliance with the rules which they lay down in relation to actors operating on the internet and falling, for one reason or another, within their jurisdiction.

The requirement that games of chance be limited in a consistent and systematic manner

88 As a preliminary observation, it should be noted that, in paragraph 67 of the judgment in *Gambelli and Others*, after stating that restrictions on gaming activities might be justified by imperative requirements in the public interest, such as consumer protection and the prevention of both fraud and incitement to squander money on gambling, the Court held that that applied only in so far as such restrictions, based on such grounds and on the need to preserve public order, were suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

89 As is apparent from paragraph 66 of this judgment in particular, the referring courts have doubts as to the scope of that latter requirement.

90 According to those courts, it is doubtful whether public monopolies such as the monopolies at issue in the main proceedings, relating to bets on sporting competitions and established for purposes of preventing incitement to squander money on gambling and combating addiction to the latter, are capable of contributing to limiting betting activities in a consistent and systematic manner, given the way in which other types of games of chance are marketed.

91 In that regard, it should be recalled that the Court has previously held that it is for each Member State to assess whether, in the context of the legitimate aims which it pursues, it is necessary wholly or partially to prohibit activities of that nature, or only to restrict them and to lay down more or less strict supervisory rules for that purpose, the need for and proportionality of the measures thus adopted having to be assessed solely in relation to the objectives thus pursued and the level of protection which the national authorities concerned seek to ensure (see, in particular, *Läärä and Others*, paragraphs 35 and 36; *Zenatti*, paragraphs 33 and 34; and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

92 It has also held that, in the context of legislation which is compatible with the Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy (*Anomar and Others*, paragraph 88).

93 The Court has also held that, in the matter of games of chance, it is in principle necessary to examine separately for each of the restrictions imposed by the national legislation whether, in particular, it is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives (*Placanica and Others*, paragraph 49).

94 In paragraphs 50 to 52 of its judgment in *Schindler*, delivered in relation to legislation of a Member State prohibiting lotteries, the Court observed, in particular, that other games for money, such as football pools or 'bingo', which remained authorised in that Member State, whilst they might give rise to stakes comparable to those of lotteries, and involved a significant element of chance, differed in their object, rules and methods of organisation from large-scale lotteries established in other Member

States. Those other games were therefore not in a comparable situation to that of lotteries prohibited by the legislation of that Member State and could not be assimilated to them.

95 As all the governments which have submitted observations to the Court have observed, it is undisputed that the various types of games of chance can exhibit significant differences, particularly as regards the actual way in which they are organised, the size of the stakes and winnings by which they are characterised, the number of potential players, their presentation, their frequency, their brevity or repetitive character and the reactions which they arouse in players, or again, as the Advocate General has stated in point 75 of his Opinion, by reference to whether, as in the case of games offered in casinos and slot machines in casinos or other establishments, they require the physical presence of the player.

96 In those circumstances, the fact that some types of games of chance are subject to a public monopoly whilst others are subject to a system of authorisations issued to private operators cannot, in itself, render devoid of justification, having regard to the legitimate aims which they pursue, measures which, like the public monopoly, appear at first sight to be the most restrictive and the most effective. Such a divergence in legal regimes is not, in itself, capable of affecting the suitability of such a public monopoly for achieving the objective of preventing citizens from being incited to squander money on gambling and of combating addiction to the latter for which it was established.

97 However, as has been recalled in paragraph 88 of this judgment, the case-law of the Court of Justice also shows that the establishment, by a Member State, of a restriction on the freedom to provide services and the freedom of establishment on the

grounds of such an objective is capable of being justified only on condition that the said restrictive measure is suitable for ensuring the achievement of the said objective by contributing to limiting betting activities in a consistent and systematic manner.

98 The Court has, similarly, held that it is for the national courts to ensure, having regard in particular to the actual rules for applying the restrictive legislation concerned, that the latter genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see to that effect, in particular, *Zenatti*, paragraphs 36 and 37, and *Placanica and Others*, paragraphs 52 and 53).

99 As the Court has already held in those various respects, in *Gambelli and Others*, paragraphs 7, 8 and 69, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance or 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 gambling in order to justify restrictive measures, even if, as in that case, the latter relate exclusively to betting activities.

100 In the present case, after stating that bets on competitions involving horses, automated games and casino games may be exploited by private operators which hold an authorisation, the referring courts have also noted, first, that the holder of the public monopoly on bets on sporting competitions is engaging, in relation to lottery games to which that monopoly also extends, in intensive advertising campaigns emphasising the need to finance social, cultural or sporting activities to which the profits derived are allocated, thereby making it appear that maximisation of the profits destined for such activities is becoming an end in itself of the restrictive measures concerned. Those courts have also noted, secondly, in relation to casino games and automated games, that, despite the fact that they present a higher potential risk of addiction than bets on sporting competitions, the public authorities are developing

or tolerating policies of expanding supply. The offering of new possibilities of casino games on the internet is tolerated by those authorities, while the conditions in which automated games may be exploited in establishments other than casinos, gaming arcades, restaurants, cafes and places of accommodation have recently been the subject of important relaxations.

101 In that regard, it should be remembered that, giving its view in relation to the objective pursued by a national legislature consisting in preventing exploitation of gaming activities for criminal or fraudulent purposes, the Court has held that a policy of controlled expansion of the said activities may be consistent with the objective of channelling them into controllable circuits by drawing players away from clandestine, prohibited betting and gaming to activities which are authorised and regulated. In order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques (see *Placanica and Others*, paragraph 55).

102 As the Advocate General has observed in point 61 of his Opinion, such considerations may, in principle, also apply where restrictive internal measures pursue an objective of protecting consumers, preventing incitement to squander money on gambling and combating addiction to the latter, in that, in particular, a certain amount of advertising may, without prejudice to the requirements referred to in paragraphs 97 to 99 of this judgment, contribute in certain cases to directing consumers towards the offer emanating from the holder of the public monopoly, that offer being deemed to have been established and conceived precisely in order better to pursue the said objective.

103 However, as the Advocate General has also stated in point 61 of his Opinion, it is important, in that respect, that any advertising issued by the holder of a public monopoly remain measured and strictly limited to what is necessary in order thus to channel consumers towards authorised gaming networks. Such advertising cannot, however, in particular, aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image due to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages depicting major winnings in glowing colours.

104 As for the fact that advertising campaigns conducted by the holder of the monopoly with regard to lottery products thus lay emphasis on the fact that revenue from the marketing of the latter is used to finance activities which are non-profit-making or in the public interest, it should also be recalled, first, that, according to settled case-law, although it is a relevant factor that games played for money may contribute significantly to the financing of such activities, such a ground cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services. The latter are permissible only on condition, in particular, that the financing of such social activities constitutes an ancillary beneficial consequence of, and not the substantive justification for, the restrictive policy established, which it is for the national court to ascertain (see, to that effect, *Zenatti*, paragraphs 36 and 37).

105 Since the Verwaltungsgericht Stuttgart has also indicated that, after the deduction, provided for by the legislation at issue in the main proceedings in favour of eligible non-profit-making activities, has been made, the surplus revenue is paid into the public purse, and in so far as it is not possible to exclude the possibility that the financial support given to bodies recognised as being in the public interest permits the latter to develop activities in the public interest which the State might normally be called upon to undertake, thereby leading to a reduction in the State's expenses, it should, secondly, be recalled that neither is the need to prevent the reduction of tax revenues

among the overriding reasons in the public interest capable of justifying a restriction on a freedom instituted by the Treaty (see, to that effect, Case C-318/07 *Persche* [2009] ECR I-359, paragraphs 45 and 46 and case-law cited).

106 Having regard to all the foregoing, it must be acknowledged that, on the basis of findings such as those made by the referring courts and referred to in paragraph 100 of this judgment, the said courts may legitimately be led to consider that the fact that, in relation to games of chance other than those covered by the public monopoly at issue in the main proceedings, the competent authorities thus conduct or tolerate policies aimed at encouraging participation in those other games rather than reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner, has the effect that the objective of preventing incitement to squander money on gambling and combating addiction to the latter, which was at the root of the establishment of the said monopoly, can no longer be effectively pursued by means of the latter, so that the latter can no longer be justified having regard to Articles 43 EC and 49 EC.

107 The answer to the first question in each of the cases must therefore be that, on a proper interpretation of Articles 43 EC and 49 EC:

(i) in order to justify a public monopoly on bets on sporting competitions and lotteries, such as those at issue in the cases in the main proceedings, by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, the national authorities concerned do not necessarily have to be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter;

(ii) a Member State's choice to use such a monopoly rather than a system authorising the business of private operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework is capable of satisfying the requirement of proportionality, in so far as, as regards the objective concerning a high level of consumer protection, the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities;

(iii) the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring compliance with such a monopoly by organisers of games and bets established outside that Member State, who, via the internet and in breach of the said monopoly, conclude bets with persons within the territorial area of the said authorities, is not capable, as such, of affecting the potential conformity of such a monopoly with the said provisions of the Treaty;

(iv) in a situation where a national court finds, at the same time:

— that advertising measures emanating from the holder of such a monopoly and relating to other types of games of chance which it also offers are not limited to what is necessary in order to channel consumers towards the offer emanating from that holder by turning them away from other channels of unauthorised games, but are designed to encourage the propensity of consumers to gamble and to stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities,

— that other types of games of chance may be exploited by private operators holding an authorisation, and

— that, in relation to other types of games of chance not covered by the said monopoly, and which, moreover, present a higher potential risk of addiction than the games subject to that monopoly, the competent authorities are conducting or tolerating policies of expanding supply, of such a kind as to develop and stimulate gaming activities, in particular with a view to maximising revenue from the latter,

the said national court may legitimately be led to consider that such a monopoly is not suitable for guaranteeing achievement of the objective for which it was established, of preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner.

The second question referred in each of the cases

108 By the second question referred in each of the cases, the referring courts ask whether, on a proper interpretation of Articles 43 EC and 49 EC, where a private operator holds, in the Member State in which it is established, an authorisation to offer games of chance, such an authorisation permits that operator to offer such games in other Member States by reason of an obligation which may be incumbent on the latter to recognise such authorisation.

109 In this respect, it should first be noted, as the Advocate General has stated in point 94 of his Opinion, that, where a public monopoly in the area of games of chance has been established in a Member State and it appears that that measure satisfies the various conditions permitting it to be justified having regard to the legitimate public interest objectives allowed by the case-law, any obligation to recognise authorisations issued to private operators established in other Member States is, *ex hypothesis*, to be excluded, simply by virtue of the existence of such a monopoly.

110 Thus, only if the monopolies at issue in the main proceedings were held incompatible with Article 43 EC or Article 49 EC would the question as to the possible existence of such an obligation of mutual recognition of authorisations issued in other Member States be capable of having any relevance for the purposes of resolving the disputes in the main proceedings.

111 In that respect, it should however be noted that, having regard to the discretion, referred to in paragraph 76 of this judgment, which Member States have in determining, according to their own scale of values, the level of protection which they intend to ensure and the requirements which that protection entails, the Cour had regularly held that assessment of the proportionality of the system of protection established by a Member State cannot, in particular, be influenced by the fact that another Member State has chosen a different system of protection (see to that effect, in particular, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

112 Having regard to that margin of discretion and the absence of any Community harmonisation in the matter, a duty mutually to recognise authorisations issued by the various Member States cannot exist having regard to the current state of EU law.

113 It follows in particular that each Member State retains the right to require any operator wishing to offer games of chance to consumers in its territory to hold an authorisation issued by its competent authorities, without the fact that a particular operator already holds an authorisation issued in another Member State being capable of constituting an obstacle.

114 In order to be justified under Articles 43 EC and 49 EC, it is also necessary, having regard to the obstacles which it creates in relation to the right to the freedom to provide services or the freedom of establishment, that such an authorisation system should satisfy the requirements which follow in that respect from the case-law, particularly as to its non-discriminatory character and its proportionality (*Placanica and Others*, paragraphs 48 and 49).

115 Having regard to the information provided by the Verwaltungsgericht Gießen and set out in paragraph 19 of this judgment, it should also be noted that, according to consistent case-law, a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of EU law (*Placanica and Others*, paragraph 69).

116 In the light of all the foregoing, the answer to the second question is that, on a proper interpretation of Articles 43 EC and 49 EC, in the current state of EU law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer games of chance does not prevent another Member State, while complying with the requirements of EU law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.

Costs

117 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. On a proper interpretation of Articles 43 EC and 49 EC:

(a) in order to justify a public monopoly on bets on sporting competitions and lotteries, such as those at issue in the cases in the main proceedings, by an objective of preventing incitement to squander money on gambling and combating addiction to the latter, the national authorities concerned do not necessarily have to be able to produce a study establishing the proportionality of the said measure which is prior to the adoption of the latter;

(b) a Member State's choice to use such a monopoly rather than a system authorising the business of private operators which would be permitted to carry on their business in the context of a non-exclusive legislative framework is capable of satisfying the requirement of proportionality, in so far as, as regards the objective concerning a high level of consumer protection, the establishment of the said monopoly is accompanied by a legislative framework suitable for ensuring that the holder of the said

monopoly will in fact be able to pursue, in a consistent and systematic manner, such an objective by means of a supply that is quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities;

(c) the fact that the competent authorities of a Member State might be confronted with certain difficulties in ensuring compliance with such a monopoly by organisers of games and bets established outside that Member State, who, via the internet and in breach of the said monopoly, conclude bets with persons within the territorial area of the said authorities, is not capable, as such, of affecting the potential conformity of such a monopoly with the said provisions of the Treaty;

(d) in a situation where a national court finds, at the same time:

— that advertising measures emanating from the holder of such a monopoly and relating to other types of games of chance which it also offers are not limited to what is necessary in order to channel consumers towards the offer emanating from that holder by turning them away from other channels of unauthorised games, but are designed to encourage the propensity of consumers to gamble and to stimulate their active participation in the latter for purposes of maximising the anticipated revenue from such activities,

— that other types of games of chance may be exploited by private operators holding an authorisation, and

— **that, in relation to other types of games of chance not covered by the said monopoly, and which, moreover, present a higher potential risk of addiction than the games subject to that monopoly, the competent authorities are conducting or tolerating policies of expanding supply, of such a kind as to develop and stimulate gaming activities, in particular with a view to maximising revenue from the latter,**

the said national court may legitimately be led to consider that such a monopoly is not suitable for guaranteeing achievement of the objective for which it was established, of preventing incitement to squander money on gambling and combating addiction to the latter, by contributing to reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner.

2. **On a proper interpretation of Articles 43 EC and 49 EC, in the current state of European Union law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer games of chance does not prevent another Member State, while complying with the requirements of European Union law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.**

[Signatures]