

JUDGMENT OF THE COURT (Eighth Chamber)

30 June 2011 *

In Case C-212/08,

REFERENCE for a preliminary ruling under Article 234 EC, from the Conseil d'État (France), made by decision of 9 May 2008, received at the Court on 21 May 2008, in the proceedings

Zeturf Ltd

v

Premier ministre,

THE COURT (Eighth Chamber),

composed of K. Schieman (Rapporteur), President of the Chamber, C. Toader and A. Prechal, Judges,

* Language of the case: French.

Advocate General: N. Jääskinen,
Registrar: R. Şereş, Administrator,

Having regard to the written procedure and further to the hearing on 8 December 2010,

after considering the observations submitted on behalf of:

- Zeturf Ltd, by O. Delgrange and M. Riedel, *avocats*,
- the Groupement d'Intérêt Économique Pari Mutuel Urbain, by P. de Montalembert, P. Pagès and C.-L. Saumon, *avocats*,
- the French Government, by E. Belliard, N. Rouam, G. de Bergues and B. Messmer, acting as Agents,
- the Belgian Government, by C. Pochet and L. Van den Broeck, acting as Agents, and by P. Vlæmminck, *advocaat*,
- the German Government, by M. Lumma and B. Klein, acting as Agents,
- the Greek Government, by E.-M. Mamouna, M. Tassopoulou and G. Papadaki, acting as Agents,

- the Maltese Government, by A. Buhagiar, S. Camilleri and J. Borg, acting as Agents,
- the Portuguese Government, by L. Inez Fernandes and P. Mateus Calado, acting as Agents,
- the European Commission, by C. Vrignon and E. Traversa, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 49 EC and 50 EC.
- ² The reference was made in proceedings between Zeturf Ltd ('Zeturf'), a Maltese company, and the French Prime Minister in relation to the latter's implied decision to refuse to repeal national measures conferring a monopoly, in France, for the management of off-course betting on horseracing on the Groupement d'Intérêt Économique Pari Mutuel Urbain ('PMU').

Legal context

European Union legislation

- 3 Council Directive 90/428/EEC of 26 June 1990 on trade in equidae intended for competitions and laying down the conditions for participation therein (OJ 1990 L 224, p. 60) is intended, in the words of the second recital in its preamble, to lay down at Community level rules governing intra-Community trade in equidae intended for competitions.
- 4 The fifth recital in the preamble to Directive 90/428 is worded as follows:

‘Whereas trade in equidae intended for competitions and participation in such competitions may be jeopardized by disparities existing in the rules concerning the allocation of a percentage of the prize money or profits for the safeguard, development and improvement of breeding in the Member States; ...’
- 5 Article 1 of that directive provides that it ‘lays down the conditions governing trade in equidae intended for competitions and the conditions governing their participation therein.’
- 6 Under Article 2(2) of Directive 90/428 “competition” means any equestrian competition.’

7 Article 3 of that directive prohibits any discrimination, in the rules of the competition, with regard to equidae which are registered in a Member State, or originate in a Member State, other than that in which the competition is being held.

8 Article 4 of that directive provides as follows:

‘1. The obligations set out in Article 3 shall apply in particular to:

...

(c) the prize money or profits which may accrue from the competition.

2. However:

...

— for each competition or type of competition Member States shall be authorised to reserve, through the bodies officially approved or recognised for that purpose, a certain percentage of the prize money or profits referred to in paragraph 1(c) for the safeguard, development and improvement of breeding.

...’

National legislation

The organisation of horse races

- 9 Article 1 of the Law of 2 June 1891 regulating the authorisation and operation of horse races (*Bulletin des lois* 1891, No 23707), in the version applicable to the main proceedings ('the 1891 Law'), provides as follows:

'No racecourse may be opened without the prior authorisation of the Minister for Agriculture.'

- 10 Article 2 of the 1891 Law provides:

'Horse racing shall be authorised only where it has the sole aim of improving the equine breed and is organised by undertakings whose statutes have been approved by the Minister for Agriculture after consultation with the Conseil supérieur des haras (Higher Stud Council).'

- 11 Article 1 of Decree No 97-456 of 5 May 1997 concerning racecourse undertakings (sociétés de courses de chevaux) and totalisator betting (JORF of 8 May 1997, p. 7012), in the version applicable to the main proceedings ('the 1997 Decree'), is worded as follows:

'Racecourse undertakings shall be governed by the provisions of the Law of 1 July 1901 concerning the contract of association in so far as those provisions are not contrary to those of the Law [of 1891] and the regulations adopted to implement them.'

Racecourse undertakings shall have as their object the organisation of horse races and activities directly connected to that object or for which they are authorised by law.

The statutes of undertakings shall be approved by the Minister for Agriculture and must satisfy, *inter alia*, the conditions set out under the present heading. The statutes of racecourse undertakings ... must comply with the model statutes determined by the Minister.’

- ¹² At the material time, racecourse undertakings had to submit to the Minister of Agriculture statutes that complied with the model statutes set out in the Annex to the Decision of 26 December 1997 concerning model statutes for racecourse undertakings (JORF of 14 February 1998, p. 2344).

- ¹³ Article 3 of the 1997 Decree provides as follows:

‘The authorisation to organise horse races shall be granted for one year, after consultation with the prefect, by the Minister for Agriculture; it may be withdrawn, before its stipulated term, from undertakings that have disregarded the legislative or regulatory provisions or failed to fulfil their obligations under the statutes.

The statutes must provide that a racecourse undertaking which has not been granted authorisation for three consecutive years is to be dissolved automatically.’

The organisation of betting on horseracing

- 14 Betting on horseracing is subject to a general principle of prohibition pursuant to Article 4 of the 1891 Law, under which any person who, in any place and in any form whatsoever, has offered to receive or has received bets on horseracing, either directly or through an intermediary, is to be liable to imprisonment and a fine.
- 15 However, the State authorises certain racecourse undertakings to organise betting on horseracing. Thus, Article 5(1) of the 1891 Law states:

‘... undertakings that fulfil the conditions set out in Article 2 may, pursuant to a special authorisation that may be withdrawn at any time by the Minister for Agriculture, and in return for a fixed levy in favour of local charity and husbandry activities, organise totalisator betting, but that authorisation shall be subject to the other provisions of Article 4.’
- 16 With regard to that possibility for racecourse undertakings to organise betting on horseracing, Article 27 of the 1997 Decree establishes a monopoly in favour of the PMU to accept off-course bets in the following terms:

‘Racecourse undertakings authorised to organise off-course totalisator betting pursuant to Article 5 of the above-mentioned [1891] Law shall entrust the management of such betting, on their behalf, to an economic interest grouping constituted from amongst them in accordance with the conditions set out in the above-mentioned Order of 23 September 1967. The statutes of that body, called the “Pari mutuel urbain” (PMU), shall be approved by the Minister for Agriculture and the Minister for the Budget.

The parent undertakings defined in Article 2 may also confer on that economic interest grouping the management, on their behalf, of totalisator betting at their racecourses.

Where that economic interest grouping authorises private persons to operate betting outlets, that authorisation shall be subject to the prior examination and favourable opinion of the Minister for the Interior.’

- ¹⁷ The Decree of 13 September 1985 governing the Pari Mutuel Urbain (JORF of 18 September 1985, p. 10714), as amended by the Decree of 29 August 2001 (JORF of 28 September 2001, p. 15333, ‘the 1985 Decree’), adds the possibility of internet betting. The PMU website is one of the five largest commercial sites in France.

The organisation of the PMU and the framework for its activities

- ¹⁸ Article 3 of the statutes of the PMU provides as follows:

‘The object of the [PMU] is to implement, for each of the racecourse undertakings that are members of the [PMU], a set of technical, administrative, legal, financial and staff resources that are necessary for the permanent and continuous service of totalisator betting both off-course and at the racecourses of the parent companies, for all or some of the meetings that they organise.

It may manage or ensure the management of all holdings in French or foreign undertakings, groupings or legal entities that participate directly or indirectly, in France or abroad, in the organisation of totalisator betting and in any service connected with that activity.

It shall carry out any activities that are complementary or directly relevant to the performance of its principal object.

Like that of each of the member undertakings, the object of the [PMU] is benevolent and non-profit-making and is governed by civil law.’

- 19 Article 29 of the 1997 Decree provides as follows in relation to the composition of the board of directors of the PMU:

‘The [PMU] shall be administered by a board of ten members appointed by the general meeting;

The chief executive officer of the [PMU] who, put forward by the member undertakings, may be chosen from outside the members of the general meeting and who must be approved by the Minister for Agriculture and the Minister for the Budget;

The deputy chief executive officer, proposed by the chief executive officer, who must be approved by the Minister for Agriculture and the Minister for the Budget;

Four representatives of the member undertakings of the [PMU];

Four representatives of the State, two proposed by the Minister for Agriculture and two proposed by the Minister for the Budget.

The term of office of the chief executive officer of the [PMU] shall be four years and shall be renewable. The term of office of the deputy chief executive officer shall end at the same time as that of the chief executive officer who has proposed him.

During the deliberations of the board, each member shall have one vote; however, the chief executive officer shall have a casting vote in the event of a tied vote. The State financial officer and the Government Commissioner shall attend board meetings without taking part in the voting.’

- 20 Article 40 of the 1997 Decree provides for the inspection of horse races and betting on horseracing in the following terms:

‘The inspection and supervision of horse races and of totalisator betting shall be carried out jointly by officials of the Department of Rural Space and Forestry of the Ministry for Agriculture, by officials of the police service responsible at the Ministry for the Interior for horse races and by senior accountants of the Treasury or their representatives.

The officials responsible for the inspection and supervision of horse races and totalisator betting may require presentation of all documents and evidence relating to those activities. They shall have access before, during and after the races to all locations and premises where bets are taken and centralised, on and off the racecourses.
...’

- 21 With regard to the detailed rules and the types of bet that the PMU may offer, Article 39 of the 1997 Decree provides as follows:

‘The regulation of totalisator betting shall be determined by the Minister for Agriculture and the Minister for the Budget, on a proposal by the [PMU] and after obtaining the opinion of the Minister for the Interior. It shall be published in the *Journal officiel de la République française*.’

22 Under Article 1 of the 1985 Decree:

‘This decree covers bets that forecast an event connected to the outcome of one or more horse races, organised by undertakings that are authorised for that purpose by the Minister for Agriculture, at racecourses that have been granted authorisation to open, the conduct of the events being governed by the various racing codes.

A decree of the Minister for Agriculture shall specify the types of bet authorised for each undertaking.’

23 The first paragraph of Article 2 of the 1985 Decree provides as follows:

‘The principle of totalisator betting implies that the stakes placed by bettors on a given type of bet are redistributed among the winning bettors for that type of bet, after deduction of the levies established by the legislation in force.’

24 The first paragraph of Article 8 of the 1985 Decree reaffirms the principle of the general prohibition on betting on horseracing in the following terms:

‘It is forbidden for any person to place or accept bets on races organised in France other than through the services of the Pari Mutuel Français.’

25 About 74 % of the takings from bets placed with the PMU are redistributed to the bettors. Around 12 % is collected by the State, approximately 8 % is put towards horsebreeding and around 5 % is to cover the costs of collection and processing of the bets by the PMU.

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

- ²⁶ Zeturf is a company that provides horse-race betting services on the internet. It has a licence issued by the Maltese gambling regulation authority and offers, inter alia, betting on French horse races on its website.
- ²⁷ On 18 July 2005, Zeturf applied to the Minister for Agriculture seeking the repeal of Article 27 of the 1997 Decree, and in particular the first paragraph of that article, conferring on the PMU a monopoly for the management of off-course betting on horseracing.
- ²⁸ As the minister did not respond to that application, it followed that there was an implied decision to reject it, which Zeturf challenged before the referring court. Zeturf also requested the referring court to order the Prime Minister and the Minister for Agriculture to repeal the first paragraph of Article 27, subject to a penalty of EUR 150 per day of delay from the date of notification of that court's decision.
- ²⁹ The action brought by Zeturf before the Conseil d'État is based inter alia, on a breach of the freedom to provide services guaranteed by Article 49 EC.
- ³⁰ The referring court held in that regard that the first paragraph of Article 27 of the 1997 Decree constitutes a restriction on the freedom to provide services in that it is likely to limit, for suppliers of a Member State other than the French Republic, the operation of off-course betting on horseracing in France.

- 31 It acknowledges, however, that such a restriction may be permitted as a derogation provided for by the EC Treaty or justified by overriding reasons in the public interest if it meets the requirements imposed by European Union law regarding proportionality.
- 32 Before the referring court, Zeturf claims, *inter alia*, that the competent national authorities have failed to demonstrate the existence of an overriding reason in the public interest that justifies such a restriction, that, even assuming that such a reason could be established, that restriction is not proportionate to the objectives pursued and that the PMU follows an expansionist commercial policy based on incitement to gamble and to spend money which is not consistent with the aims of the applicable national legislation.
- 33 By contrast, the national authorities argue, before the referring court, that the aim of the monopoly conferred on the PMU is to protect society, having regard to the effects of gambling on individuals and on society, and to protect public order with a view to combating the use of gambling for criminal or fraudulent purposes, and that such a monopoly contributes, furthermore, to rural development by financing horse breeding. The expansionist policy followed by the PMU is justified, moreover, by the objective of efficiently combating the attraction of gambling by maintaining an attractive lawful offer so that bettors turn to authorised and regulated activities.
- 34 In those circumstances, the Conseil d'État decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Articles [49 EC] and [50 EC] to be interpreted as precluding national legislation which has established a system whereby off-course betting on horseracing is managed exclusively by a single, non-profit-making operator where, although that legislation appears to fit the purpose of combating criminality and thus of protecting public order more effectively than would less restrictive measures, it is accompanied, in order to neutralise the risk of unauthorised gambling networks

emerging and to channel bettors towards the lawful offer, by a dynamic commercial policy on the part of the operator, which does not, in consequence, fully achieve the objective of reducing gambling opportunities?

- (2) Is it appropriate, in order to determine whether national legislation such as that in force in France, which has established a system whereby off-course betting on horseracing is managed exclusively by a single, non-profit-making operator, is contrary to Articles [49 EC] and [50 EC], to assess the restriction on freedom to provide services solely from the point of view of the restrictions placed on offering on-line horse-race betting, or is it appropriate to take into consideration the entire horse-race betting sector in whatever form such betting is offered and is accessible to bettors?’

The questions referred for a preliminary ruling

- ³⁵ As pointed out in paragraph 30 of this judgment, the referring court found that the French legislation regarding horse-race betting, at issue in the main proceedings, constitutes a restriction on the freedom to provide services. The questions raised therefore relate only to whether or not that restriction is justified.

The first question

- ³⁶ In order to answer the first question, it is necessary to examine, firstly, the conditions under which Article 49 EC allows the establishment of a system whereby the exclusive right to organise off-course betting on horseracing is conferred on a single operator, such as the system at issue in the main proceedings and, secondly, to what extent the

pursuit of a dynamic commercial policy by the operator benefiting from such an exclusive right can be consistent with the aims pursued by that exclusive system.

The establishment of a system conferring the exclusive right to organise off-course betting on horseracing

³⁷ It should be borne in mind at the outset that a restriction on the freedom to provide services, such as that found by the referring court, may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 55).

³⁸ With regard, more specifically, to the justifications which are capable of being accepted, the Court has observed that the objectives pursued by national legislation adopted in the area of betting and gaming, 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 society. 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 (Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 74 and case-law cited).

³⁹ 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 protection of society (*Stoß and Others*, paragraph 76 and case-law cited).

⁴⁰ Consequently, the Member States are, in principle, free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

⁴¹ A Member State that is seeking to ensure a particularly high level of protection may, consequently, as the Court has acknowledged in its decisions, be entitled to take the view that it is only by granting exclusive rights to a single body which is subject to strict control by the public authorities that it can tackle the risks connected with the gambling sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness (see, to that effect, *Stoß and Others*, paragraphs 81 and 83).

⁴² The national public authorities may indeed legitimately consider that the fact that, in their capacity as overseer of the body holding the monopoly, they will have additional means of influencing the latter's conduct outside the statutory regulating and monitoring 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 (*Stoß and Others*, paragraph 82).

43 The fact remains, however, that the restrictions imposed must satisfy the conditions laid down in the case-law of the Court as regards their proportionality, a matter which it is for the national courts to determine (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 59 and 60, as well as *Stoß and Others*, paragraphs 77 and 78).

44 In the context of the main proceedings and in the light of the observations submitted to the Court, some clarification should be provided in this regard relating, first, to the evaluation of the objectives pursued by the national legislation and, second, to the control actually exercised by the public authorities over the PMU.

— The objectives pursued by the national legislation

45 It is apparent from the documents provided by the referring court to the Court, and from the observations of the French government before the Court, that the national legislation pursues three objectives, the main two being, first, to combat fraud and money laundering in the horse-race betting sector and, second, to protect society, having regard to the effects of gambling on individuals and on society. The third objective, cited only as a subsidiary matter by the PMU and the French government, is that of contributing to rural development by financing horse breeding.

46 The first two of those objectives are, as noted in paragraph 38 of the present judgment, among those that have been acknowledged as being capable of justifying restrictions on the freedom to provide gambling services. However, as it was recalled in paragraph 41 of this judgment, the establishment of a measure as restrictive as a monopoly can be justified only in order to ensure a particularly high level of protection with regard to those objectives.

- 47 Therefore, it is for the referring court to determine whether the national authorities genuinely sought, at the material time, to ensure a particularly high level of protection and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary.
- 48 It should be recalled, in that context, that the mere fact that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than supervision of a single operator is irrelevant. Indeed, it is apparent from the case-law of the Court that administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by European Union law (see, to that effect, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 48, and Case C-318/07 *Persche* [2009] ECR I-359, paragraph 55).
- 49 With regard to the level of protection sought by the national authorities in the light of the cited objectives, Zeturf argues, inter alia, that substantial sums of money are regularly laundered by trafficking winning PMU betting slips, which is only possible because the bets are placed with the PMU anonymously and it is therefore impossible to trace the bettor. Zeturf adds, moreover, that that technique of money laundering is widely known and attested to by the activity reports of TRACFIN, the French anti-money laundering unit, which is answerable to the Minister for the Economy, Finance and Employment and to the Minister for the Budget, Public Accounts and the Civil Service.
- 50 It is for the referring court to examine to what extent these allegations are established and whether any tolerance of such practices is compatible with the pursuit of a high level of protection.

- 51 In relation to the third objective of the legislation at issue in the main proceedings, cited as a subsidiary matter by the French government, it should be noted that rural development, as identified by that government, can be equated, in the context of the case in the main proceedings, with the financing of benevolent or public interest activities in Case C-275/92 *Schindler* [1994] ECR I-1039.
- 52 In that regard, the Court has stated on several occasions that, although it is not irrelevant that a levy on the proceeds of authorised gambling may contribute significantly to the financing of such activities, such a ground could constitute only an ancillary beneficial consequence and not the substantive justification for the restrictive policy established (see, to that effect, *Schindler*, paragraph 60, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 36). Indeed, it is settled case-law that economic grounds are not included in the grounds listed in Articles 45 EC and 46 EC and do not constitute an overriding reason in the public interest capable of justifying a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 61 and case-law cited, and Case C-153/08 *Commission v Spain* [2009] ECR I-9735, paragraph 43).
- 53 It follows, *a fortiori*, that such an objective cannot justify the establishment of a measure as restrictive as a monopoly. The subsidiary objective, according to which the establishment of a monopoly in the area of off-course betting on horseracing is intended to contribute to rural development, cannot therefore constitute a justification for the restriction on the freedom to provide services introduced by the national legislation at issue in the main proceedings.
- 54 Furthermore, it should be noted that, contrary to the contention of the French Government, Article 4(2) of Directive 90/428 does not implicitly or explicitly authorise the allocation of the proceeds of betting on horseracing to the safeguarding, development or improvement of breeding and rearing of equidae. That directive does not have the objective of regulating gambling linked to horse races. It is intended only to

eliminate any discrimination against horses registered in a Member State, or originating in a Member State, other than that in which they participate in competitions. Those competitions are defined in the second paragraph of Article 2 of that directive, that provision being referred to in Articles 3 and 4 of the directive. The option afforded to the Member States by Article 4 of the directive, to reserve a percentage of the prize money or profits resulting from those competitions, makes explicit reference to the obligations set out in Article 3. It is therefore the profits and prize money generated by those horses that are referred to in Article 4(2) of Directive 90/428 and not the proceeds of the betting on horseracing organised on the occasion of such competitions.

— Control of PMU activities

⁵⁵ As observed by the PMU and by the French and Portuguese governments, the details supplied by the referring court and summarised at paragraphs 19 to 22 of the present judgment, particularly in relation to the composition of the board of directors of the PMU, the control and supervision of horseracing and of totalisator betting by two ministries, on the one hand, and the detailed rules and types of bet offered by the PMU, on the other, appear to indicate, subject to verification by the referring court, that the system of control of betting at issue in the main proceedings is analogous to that in Case C-124/97 *Läärä and Others* [1999] ECR I-6067 and in *Liga Portuguesa de Futebol Profissional and Bwin International*.

⁵⁶ If that is indeed the case, there appears to be particularly strict State control over the organisation of betting on horseracing. Thus, the State exercises direct control over the functioning of the exclusive operator, the organisation of the events on which bets are placed, the types of bet authorised and their channels of distribution, including the proportion of the winnings to the stakes and the conduct and supervision of the regulated activities. The referring court may, therefore, in principle, come to the conclusion that the legislation at issue in the main proceedings is appropriate to ensure

the objective of combating the criminal and fraudulent activities linked to gambling, as well as that of protecting society, having regard to the effects of gambling on individuals and on society.

- 57 It should nevertheless be recalled in that context 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 (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55).
- 58 The Court has already held in that regard that the establishment of a measure as restrictive as a monopoly 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 designed by reference to the said objective and subject to strict control by the public authorities (*Stoß and Others*, paragraph 83).
- 59 Indeed, it may be considered that there is a certain conflict of interest for all operators, including those that are public or charitable bodies, between the need to increase their income and the objective of reducing gambling opportunities. A public or non-profit-making operator may, like any private operator, be tempted to maximise its income and develop the gambling market, thus undermining the objective of seeking to reduce gambling opportunities.
- 60 This is particularly the case where the income generated is intended to achieve objectives acknowledged to be in the public interest, the operator being encouraged to increase the income generated by the gambling in order to fulfil those objectives more effectively. The allocation of income to those objectives may, moreover, lead to a situation in which it is difficult to forgo the amounts generated by the gambling, the natural tendency being to increase opportunities for gambling and to attract new bettors.

- 61 Those considerations are particularly relevant in situations where the single operator holds, as is the case in the main proceedings, exclusive rights over the organisation of horse races as well as over the betting on those races. That operator is then in a very favourable position to increase, should it so wish, betting activities, by organising more events on which bets can be placed.
- 62 It is consequently for the national court to determine, in the light of, *inter alia*, the development of the market for games of chance in France, whether the State controls to which the activities of the PMU are, in principle, subject are actually implemented in the consistent and systematic pursuit of the objectives sought by the establishment of the system whereby exclusive rights are conferred on the PMU (see, to that effect, Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757, paragraph 37).
- 63 In that regard, it should be noted that, in that context, the aspect that is more specifically highlighted by the second part of the referring court's first question, which concerns the commercial policy pursued by the PMU, is clearly of relevance when assessing the manner in which those objectives are pursued.

The pursuit of a dynamic commercial policy

- 64 The second part of the first question concerns the extent to which the pursuit of a dynamic commercial policy by an operator who benefits from an exclusive right to organise gambling can be regarded as compatible with the requirements of Article 49 EC.

- ⁶⁵ It is apparent from the order for reference and from the observations submitted to the Court that the dynamic commercial policy to which the referring court makes reference is characterised by a number of elements. In particular, it is clear that the PMU makes use of sustained and growing advertising for its products, including on the internet, and is increasing the number of outlets for betting and for the products offered to bettors. It uses, moreover, a commercial strategy that seeks to draw in new audiences for the betting offered.
- ⁶⁶ It must be recalled at the outset in that context that, in so far as the authorities of a Member State incite and encourage consumers to participate in games of chance to the financial benefit of the public purse, the authorities of that State cannot invoke public and social policy concerns relating to the need to reduce opportunities for gambling in order to justify restrictions on the freedom to provide services (*Gambelli and Others*, paragraph 69)
- ⁶⁷ The Court has nevertheless held that a policy of controlled expansion of gambling activities may be consistent with the objective of channelling them into controlled circuits by drawing bettors away from clandestine, prohibited betting and gaming to activities which are authorised and regulated. Such a policy may indeed be consistent both with the objective of preventing the use of gambling activities for criminal or fraudulent purposes and that of preventing incitement to squander money on gambling and of combating addiction to the latter, by directing consumers towards the offer emanating from the holder of the public monopoly, that offer being deemed to be protected from criminal elements and also designed to safeguard consumers more effectively against squandering of money and addiction to gambling (*Stoß and Others*, paragraphs 101 and 102).
- ⁶⁸ In order to achieve that objective of channelling into controlled activities, it is common ground that authorised operators must represent a reliable, but at the same time attractive, alternative to non-regulated activities, 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 (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 55, and *Stoß and Others*, paragraph 101).

⁶⁹ It is specifically for the national court to determine, in the light of the facts of the dispute before it, whether the commercial policy of the PMU may be regarded, both with regard to the scale of advertising undertaken and with regard to its creation of new games, as forming part of a policy of controlled expansion in the betting and gaming sector, aiming, in fact, to channel the propensity to gamble into controlled activities (*Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 37).

⁷⁰ In the context of that assessment, it is for the national court to determine, in particular, whether, first, criminal and fraudulent activities linked to gambling and, second, gambling addiction might have been a problem in France at the material time and whether the expansion of authorised and regulated activities would have been capable of solving such a problem (*Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 29). In particular, 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 (*Stoß and Others*, paragraph 71). In that regard the Commission argues that the national authorities have not, in contrast to the situation in *Placanica and Others* and *Liga Portuguesa de Futebol Profissional and Bwin International*, demonstrated the reality of a black market for betting on horseracing.

⁷¹ In any event, any advertising issued by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order thus to channel consumers towards controlled gaming networks. Such advertising cannot, on the other hand,

specifically 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 owing 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 holding out the prospect of major winnings (*Stoß and Others*, paragraph 103).

⁷² In light of all those considerations, the answer to the first question is that Article 49 EC must be interpreted as follows:

- (a) A Member State that is seeking to ensure a particularly high level of consumer protection in the gambling sector may be justified in taking the view that it is only by granting exclusive rights to a single body, subject to strict control by the public authorities, that it can tackle the risks connected with that sector and pursue the objective of preventing incitement to squander money on gambling and of combating addiction to gambling with sufficient effectiveness;

- (b) It is for the national court to determine whether:
 - the national authorities genuinely sought, at the material time, to ensure such a particularly high level of protection and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary, and

 - the State controls to which the activities of the body benefiting from the exclusive rights are, in principle, subject are actually implemented in the consistent and systematic pursuit of the objectives assigned to that body;

- (c) In order to be consistent with the objectives of combating criminality and reducing gambling opportunities, national legislation establishing a gambling monopoly must:
- be based on a finding that criminal and fraudulent activities linked to gaming and gambling addiction are a problem in the territory of the Member State concerned, which the expansion of authorised and regulated activities would be capable of solving, and
 - allow only advertising that is measured and strictly limited to what is necessary in order to channel consumers towards controlled gaming networks.

The second question

⁷³ By its second question, the referring court asks, in essence, how to assess the scope of the restriction on the freedom to provide services by a system that has conferred exclusive rights to organise horse-race betting on a single operator and, specifically, whether the market for online betting on horseracing can be regarded as distinct from the sector as a whole.

⁷⁴ It must be stated at the outset that any restriction concerning the supply of games of chance over the internet is more of an obstacle to operators established outside the Member State concerned, in which the recipients benefit from the services; those operators, as compared with operators established in that Member State, would thus be denied a means of marketing that is particularly effective for directly accessing

that market (see, to that effect, Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 74, and Case C-108/09 *Ker-Optika* [2010] ECR I-12213, paragraph 54).

- ⁷⁵ It is apparent from the case-law of the Court, moreover, that the internet constitutes a simple channel through which games of chance may be offered (Case C-46/08 *Carmen Media Group* [2010] ECR I-8149, paragraph 101).
- ⁷⁶ Given that the objectives of the national legislation at issue in the main proceedings are intended above all to ensure the protection of consumers of games of chance and, more specifically, to ensure protection against fraud committed by operators as well as against incitement to squander money on gambling and against addiction to gambling, a consideration that is certainly relevant is the degree of substitutability between the various marketing channels from the point of view of the consumer. In so far as it is established, for example, that consumers consider placing an individual bet on horseracing by the internet as a substitute for placing that same bet by the traditional channels, that militates in favour of an overall assessment rather than a separate assessment for each distribution channel of the sector.
- ⁷⁷ The market in horse-race betting should, therefore, in principle, be considered in its entirety, independently of the question whether the bets concerned are offered by traditional channels, at physical locations, or by the internet, and a restriction on the activity of collecting bets should be examined independently of the medium through which they are made.
- ⁷⁸ Nevertheless, the Court has already had occasion to draw attention to certain particularities relating to the offering of games of chance on the internet (see *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72, and *Carmen Media Group*, paragraph 101).

- 79 It has thus observed in particular that, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70, and *Carmen Media Group*, paragraph 102).
- 80 Furthermore, the Court has noted that, in the same way, the characteristics specific to the offer of games of chance by the internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as has been underlined by settled case-law (*Carmen Media Group*, paragraph 103).
- 81 All the substitutable marketing channels should therefore be taken into account, unless the consequence of using the internet is to increase the risks linked to games of chance beyond those that exist in relation to games marketed through traditional channels.
- 82 Accordingly, in the case of national legislation such as that which has given rise to the reference for a preliminary ruling, which applies in the same way to on-line betting and to betting by traditional channels and in respect of which the national legislature

has not considered it necessary to draw any distinction between the various marketing channels, an assessment should be made of the restriction on the freedom to provide services from the point of view of restrictions placed on the entire sector concerned.

- ⁸³ The answer to the second question is therefore that, in order to assess the restriction on the freedom to provide services by a system that has established exclusive rights to organise horse-race betting, it is for the national courts to take account of all the substitutable channels of marketing for that betting, unless the consequence of using the internet is to increase the risks linked to games of chance beyond those that exist in relation to games marketed through traditional channels. Where the national legislation applies in the same way to horse-race betting on-line and to such betting through traditional channels, the restriction on the freedom to provide services should be assessed from the point of view of the restrictions placed on the entire sector concerned.

Costs

- ⁸⁴ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. Article 49 EC must be interpreted as follows:

- (a) A Member State that is seeking to ensure a particularly high level of consumer protection in the gambling sector may be justified in taking the view that it is only by granting exclusive rights to a single body, subject to strict control by the public authorities, that it can tackle the risks connected with that sector and pursue the objective of preventing incitement to squander money on gambling and of combating addiction to gambling with sufficient effectiveness;**
- (b) It is for the national court to determine whether:**

 - the national authorities genuinely sought, at the material time, to ensure such a particularly high level of protection and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary, and**
 - the State controls to which the activities of the body benefiting from the exclusive rights are, in principle, subject are actually implemented in the consistent and systematic pursuit of the objectives assigned to that body;**

(c) In order to be consistent with the objectives of combating criminality and reducing gambling opportunities, national legislation establishing a gambling monopoly must:

- be based on a finding that criminal and fraudulent activities linked to gaming and gambling addiction are a problem in the territory of the Member State concerned, which the expansion of authorised and regulated activities would be capable of solving, and**
- allow only advertising that is measured and strictly limited to what is necessary in order to channel consumers towards controlled gaming networks.**

2. In order to assess the restriction on the freedom to provide services by a system that has established exclusive rights to organise horse-race betting, it is for the national courts to take account of all the substitutable channels of marketing for that betting, unless the consequence of using the internet is to increase the risks linked to games of chance beyond those that exist in relation to games marketed through traditional channels. Where the national legislation applies in the same way to the offering of horse-race betting online and to such betting through traditional channels, the restriction on the freedom to provide services should be assessed from the point of view of the restrictions placed on the entire sector concerned.

[Signatures]