OPINION OF ADVOCATE GENERAL BOT delivered on 31 March 2011 [1]

1. The issue of the conformity of a monopoly concerning gambling and games of chance with the freedoms of movement established by Community law has given rise, since September 2009, to several preliminary rulings which have enabled the Court to explain its previous case-law. [2]

2. It is apparent from those rulings, first of all, that such a monopoly may be in accordance with those freedoms if its objectives are to ensure a high level of preservation of public order and consumer protection and if it is organised and operated in such a way as to achieve those objectives.

3. It is also apparent that the holder of that monopoly may be not only a public body but also a private operator. [3] In this second case, the monopoly must be granted in accordance with the principle of equal treatment and the obligation of transparency, unless the grant of that monopoly to that private operator constitutes an 'in house' award. [4]

4. In the specific area of gambling via the Internet, the grant of monopolies has found an additional justification in the particular risks posed by those games. [5]

5. The Court has also stated that a Member State was not required to recognise the authorisation to offer Internet games given to an on-line games provider by another Member State in which that provider is established. [6]

6. The subject-matter of this reference for a preliminary ruling from the Bezirksgericht Linz (Austria), which reached the Court at

1 — Original language: French.

2 — Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633); Case C-203/08 *Sporting Exchange* [2010] ECR I-4695; Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757; Case C-409/06 *Winner Wetten* [2010] ECR I-8015; 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; Case C-46/08 *Carmen Media Group* [2010] ECR I-8149; and Case C-64/08 *Engelmann* [2010] ECR I-8219.

3 — *Sporting Exchange*, paragraph 48, and *Stoß and Others*, paragraph 81.

4 — *Sporting Exchange*, paragraph 59.

5 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 69 to 72, and *Carmen Media Group*, paragraphs 102 and 103.

6 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69; *Sporting Exchange*, paragraph 33, and *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 54.

the end of August 2009, that is, before the aforementioned rulings were given, is the assessment of the conformity with the freedom to provide services of the Austrian legislation applicable to electronic lotteries.

7. Under that legislation, the provision of such games to persons residing in Austria is subject to an operating monopoly reserved for a maximum period of fifteen years to a private operator which has to fulfil certain conditions. Inter alia, it must be a capital company with its seat in Austria and it may not establish any branches in another country.

8. The national court raises several questions designed to enable it to assess whether such a monopoly and the conditions imposed by its national law for granting the monopoly are in accordance with Community law.

9. Most of these questions find their response in the case-law and, in particular, in the judgments delivered after the order for reference had been received.

10. However, the present case offers the Court the opportunity to offer additional clarification of its case-law as regards the condition that the company holding the monopoly must have its seat in the territory of the Member State concerned.

11. In the judgment in *Engelmann*, such a condition, in so far as it was imposed on concessionaires of traditional gaming establishments such as casinos, was held to be disproportionate to the objectives of supervision and the preservation of public order invoked by the Austrian Government.

12. In this opinion, I shall propose that the Court hold that that condition, in the very specific case of a monopoly to operate games via the Internet, may be justified.

13. I shall point out that a monopoly scheme, because it is very restrictive of the freedoms of movement, can be justified only if its objective is to ensure a high level of preservation of public order and consumer protection.

14. I shall also point out that gambling via the Internet poses more significant risks to public order and consumers than traditional games and that it may be provided from a distance, with no infrastructure in the Member State of destination, in which that State may itself carry out in-depth checks. I shall state that, as Community law now stands, there is no instrument of cooperation which

enables a Member State to obtain from another Member State, in whose territory an on-line games provider is established, the assistance necessary for such checks.

15. I shall infer from that that a Member State may therefore lawfully require an operator who holds the monopoly to operate games via the Internet in the national territory to have its seat in that territory in order to exercise effective control over that operator's activity.

16. Finally, I shall point out that a Member State cannot prohibit the holder of the monopoly to operate Internet games in its territory from establishing a branch in another country without showing that that measure is justified by overriding reasons in the general interest and that it is proportionate to those objectives.

I — Legal context

A — *Community law*

17. Games of chance and gambling have not so far been the subject of any regulation or harmonisation in Community law. That activity was excluded from the scope of Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market. [7]

18. Since gambling is an economic activity, it falls within the scope of the freedoms of movement, in particular of Article 49 EC which prohibits restrictions on the freedom to provide services within the European Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

19. Under Articles 55 EC and 48 EC, Article 49 EC is applicable to the services offered by a company formed in accordance with the law of a Member State and having its seat, central administration or principal place of business within the Community.

B — *Austrian law*

20. In Austria, games of chance are regulated by the Federal Law on Games of Chance (Glücksspielgesetz). [8]

7 — OJ 2006 L 376, p. 36.

8 — BGBl. 620/1989, as last amended in the BGBl. I, 145/2006 ('the GSpG').

21. Under Paragraph 3 of the GSpG, the right to organise games of chance is, in principle, reserved to the Federal Government. However, the Federal Minister for Finance has the authority to grant concessions to private persons to organise lotteries and electronic draws.

22. Under Paragraph 12a of the GSpG, electronic lotteries are defined in this context as 'lottery draws, in which the gaming agreement is concluded via electronic media, the decision on winning or losing is given or made available centrally and the player can learn the result immediately after playing the game'.

23. Under Paragraph 14 of the GSpG, the Federal Minister for Finance may grant a concession for the organisation of lotteries and electronic draws. Paragraph 14(2) of the GSpG provides that the concession may be granted to only one applicant which:

— is a capital company having its seat in Austria:

— does not have owners (shareholders) who have a dominant influence and whose influence makes it impossible to ensure reliability from a legislative point of view;

— has a supervisory board and paid-up capital of at least EUR 109 000 000, the lawful provenance of which must be appropriately demonstrated;

— appoints managers who, owing to their training, are professionally competent, have the qualities and experience necessary for carrying out the activity properly and in respect of whom there are no grounds for exclusion under Paragraph 13 of the Code of the craft, commercial and industrial professions;

— in the light of the circumstances (in particular experience, knowledge and resources), offers the best prospects of revenue for the Federal Government (concession tax and betting tax), and

— in respect of which the possible structure of the group to which the owner/owners with a qualifying holding in the undertaking belong/s does not impede effective supervision of the concessionaire.

24. The concession may, pursuant to the first sentence of Paragraph 14(3) of the GSpG, be granted for a maximum period of fifteen years. The first sentence of Paragraph 14(5) of

the GSpG provides that, as long as a lottery concession is in force, no other concession can be granted.

25. Under Article 15(1) of the GSpG, the concessionaire does not have the right to establish any branches outside Austria. Furthermore, the acquisition by the concessionaire of qualifying holdings in other companies requires authorisation from the Federal Minister for Finance. Under Paragraph 15a of the GSpG, such authorisation is also required for an extension to the concessionaire's business and it must be granted only if there is no risk of a reduction in Federal Government revenue from the concession tax and betting tax.

26. Moreover, under Paragraph 18(1) of the GSpG, the concessionaire must inform the Federal Minister for Finance of the names of the persons holding its capital.

27. The organisation, by a person who does not hold an operating concession, of games of chance with the intention of making a financial gain, is subject to criminal proceedings under Paragraph 168 of the Strafgesetzbuch (Austrian Criminal Code).

II — Facts in the main proceedings and the questions referred

28. J. Dickinger and F. Ömer, who are Austrian nationals, are the founders of the multinational on-line gaming group 'bet-at-home.com'. The parent company of that group is 'bet-at-home.com AG', a German company established in Düsseldorf (Germany). One of the subsidiaries of 'bet-at-home.com AG' is 'bet-at-home.com Entertainment GmbH', an Austrian company. This has its seat in Linz (Austria) and is active in the field of automatic data processing and information technology services. It also holds a valid sports betting licence under Austrian law. Moreover, it established a subsidiary, 'bet-at-home.com Holding Ltd', incorporated in accordance with Maltese law. This in turn created three subsidiaries, 'bet-at-home.com Internet Ltd', 'bet-at-home.com Entertainment Ltd' and 'bet-at-home.com Internationale Ltd', which are Maltese companies and all have their seat in Malta.

29. Two of these Maltese companies, 'bet-at-home.com Entertainment Ltd' and 'bet-at-home.com Internationale Ltd' offer games of chance and sports betting via the Internet. The former company has a valid Maltese 'Class One Remote Gaming Licence') for online games of chance, and the latter company has a valid Maltese 'Class Two Remote Gaming Licence' for online sports betting. The gaming and sports betting that is available is provided by both Maltese companies

via the Internet platform 'bet-at-home.com'. The webpage is available in Spanish, German, Greek, English, Italian, Hungarian, Dutch, Polish, Slovene, Turkish and Russian, but not in Maltese. Games of chance such as poker, blackjack, baccarat and roulette are offered via the web address, as well as virtual one-armed bandits. All these games can be played with unlimited stakes.

30. The Internet platform www.bet-at-home.com is operated exclusively by 'bet-at-home.com Internet Ltd' and 'bet-at-home.com Entertainment Ltd'. These Maltese companies are responsible for organising the games. The participants in the games conclude the corresponding agreements exclusively with those companies, which also hold licences for the software needed to operate the gaming platform.

31. Until December 2007 'bet-at-home.com Entertainment Ltd' and 'bet-at-home.com Internationale Ltd' used a server established in Linz, Austria, made available to them by 'bet-at-home.com Entertainment GmbH', which also maintained the Internet site and the software needed for the games. Until that date, telephonic support for users was situated for all players in Linz. The provision of all those support services was invoiced to the Maltese companies.

32. Furthermore, an Austrian bank established in Linz provided banking facilities for the transfer of stakes. The holder of the account in question was the Maltese company bet-at-home.com Internationale Ltd'.

33. On the basis of these facts, criminal proceedings were brought against J. Dickinger and F. Ömer for infringement of Paragraph 168 of the Austrian Criminal Code, in which the national court is called upon to rule at first instance.

34. In response to a request from the court, the Austrian Government stated that J Dickinger and F. Ömer are charged in the main proceedings on the basis of activities in connection with their role within the Austrian company 'bet-at-home.com Entertainment GmbH'. According to that Government, the indictment is worded as follows:

'Jochen Dickinger and Franz Ömer, as directors of bet-at-home.com Entertainment GmbH, have, between 1 January 2006 and the present, committed the offence of organising games of chance under Paragraph 168(1) of the Criminal Code for the benefit of the company by offering via the Internet games in which winning and losing depend exclusively or predominantly on luck or which are expressly prohibited...'

35. Before the Bezirksgericht Linz, J. Dickinger and F. Ömer argued that the national legislation applicable to games of chance is unlawful in the light of Articles 43 EC and 49 EC.

36. The Bezirksgericht Linz has fundamental doubts as to whether the provisions of the Austrian Criminal Code, read in conjunction with the Austrian legislation concerning games of chance applicable in this case, are compatible with Community law. It therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Are Articles 43 EC and 49 EC to be interpreted as, in principle, precluding legislation of a Member State, such as Paragraph 3 in conjunction with Paragraph 14 et seq. and Paragraph 21 of the [GSpG], under which

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

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

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

(b) If so, can such legislation also be justified for reasons relating to the public interest in a restriction of betting

activities if the licensees in a quasi-monopoly are themselves pursuing a policy of expansion of games of chance, and employing intensive advertising in order to do so?

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

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

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

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

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

authorisation and supervision procedures?

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

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

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

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

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

III — Analysis

37. First of all, it is important to state that the questions raised by the national court partially exceed the context of the main action and include questions which are clearly unnecessary for its solution. This is the case, in particular, of question 1(a), second indent, concerning the concession scheme provided by the Austrian legislation with regard to the operation of casinos.

38. As is apparent from the order for reference and confirmed both by the information in the file and the Austrian Government' s response to the Court's requests for clarification, the two persons prosecuted before the national court are accused of having offered Internet gambling in breach of the Austrian legislation. The main action has nothing to do with operating casinos in Austria.

39. I therefore propose that the Court examine the questions raised only in so far as they relate to the supply of games via the Internet.

40. In my view, the numerous questions posed by the referring court cover four queries which I propose to examine in the following order.

41. Accordingly, the national court asks, first, whether provisions of the legislation of a Member State imposing criminal penalties on anybody who contravenes a monopoly to operate gambling via the Internet must comply with the freedoms of movement and, in particular, with Article 49 EC even though criminal law falls within the jurisdiction of the Member States (question 2).

42. It wishes to know, secondly, whether Article 49 EC is relevant in the present case even though the Maltese companies use material resources such as a server established in Austria and the company which provides those resources is established in Austria (question 4(a) and (b)).

43. The national court wishes to know, thirdly, whether the operating monopoly provided for in its national law and the conditions to which the grant of that monopoly is subject are in accordance with Article 49 EC, in particular in the light of the obligations and controls to which the Maltese companies are subject in their own State (question 1(a), first indent, and (c), and question 3 (a) to (f)).

44. It asks, fourthly, whether the legislation at issue may be justified even though the holder of the monopoly is pursuing a policy of expansion and employing intensive advertising in order to do so (question 1 (b)).

A — *The framework of the jurisdiction of the Member States in criminal matters.*

45. The national court is asking, in essence, whether legislation of a Member State which imposes criminal penalties on anybody who contravenes a monopoly to operate gambling, such as the monopoly to operate electronic lotteries provided for under the Austrian law, must comply with the freedoms of movement and, in particular, with Article 49 EC even though criminal law falls within the jurisdiction of the Member States.

46. It is true that criminal matters, at the time of the events in the main action, were reserved to the jurisdiction of the Member States. That remains the case to a large extent, in spite of the amendments made by the Lisbon Treaty. However, it is settled case-law that each of those States, in the exercise of its reserved powers, must honour the commitments it has given in connection with the EC Treaty and, inter alia, the freedoms of movement. [9]

47. A legal provision of a Member State cannot therefore depart from the scope of the freedoms of movement and, consequently, no longer be subject to the requirement of conformity with those freedoms solely on the ground that it is part of the criminal law of that State. [10]

48. That requirement of conformity as regards criminal provisions which, as in the present case, are designed to ensure compliance with an operating monopoly in respect of gambling established for reasons of public interest takes the following form. If that monopoly is considered to be in accordance with Community law, the criminal penalties designed to ensure compliance with that monopoly are also in accordance, in principle, unless they themselves infringe other rules such as fundamental rights.

49. Conversely, if that monopoly is found to be contrary to a freedom of movement, the criminal provisions designed to ensure compliance with that monopoly must not be applied. It is settled case-law that 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 breach of Community law. [11]

50. I therefore propose that the answer to the question under consideration should be that legislation of a Member State which imposes

9 — See, for example, in the field of direct taxation, Case C-101/05 *A* [2007] ECR I-11531, paragraph 19 and the case-law cited therein; as regards the power of the Member States to organise their social security systems, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 15, 16 and 21, and, in the field of health, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92.

10 — See, inter alia, Case 186/87 *Cowan* [1989] ECR 195, paragraph 19.

11 — Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, point 69.

criminal penalties on anybody who contravenes a monopoly to operate gambling, such as the monopoly to operate electronic lotteries provided for by Austrian law, must be in accordance with the freedoms of movement, inter alia with Article 49 EC, even though criminal law falls within the jurisdiction of the Member States.

B — *The relevance of Article 49 EC in the present case*

51. The national court doubts whether the case before it falls within the scope of Article 49 EC.

52. It therefore asks, in essence, by question 4(a), whether, on a proper interpretation of Article 49 EC, the operation of games via the Internet, by an operator established in a Member State other than that of destination, may be regarded as having a temporary nature and thus fall within the scope of that article where that operator uses material communication resources such as a server and a switchboard situated in the Member State of destination and provided to it by a third undertaking.

53. It then asks, by question 4(b), whether, on a proper interpretation of Article 49 EC, legislation of a Member State, which prohibits providers established in that Member State from providing companies established in another Member State with the resources for offering gambling via the Internet to persons residing in its territory, constitutes a restriction on the freedom to provide services.

1. The effect of the use of material communication resources situated in the Member State of destination

54. According to settled case-law, the supply, by an operator established in one Member State, of games via the Internet to consumers residing in another Member State constitutes a provision of services within the meaning of Article 49 EC. [12] That case-law stems from the precedent according to which the supply by the intermediary of communication resources to recipients situated in a Member State other than that of the provider, without the provider moving to that other Member State, constitutes a provision of services. [13]

55. The national court wishes to know whether the fact that the Maltese undertakings, which provide games via the Internet to consumers residing in Austria, use material

12 — Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 54, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 46.

13 — See, inter alia, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 22.

resources such as a server and a telephone switchboard, provided to them by a company established in Austria, means that they are installed in a stable and durable manner in that territory, so that they no longer fall within the scope of Article 49 EC, but of the provisions of the Treaty applicable to freedom of establishment.

56. The national court does not indicate what it considers to be the issue with regard to this question. I am of the opinion that there really is no issue. If it were to be acknowledged that the Maltese companies have a stable establishment in Austria and that they are therefore established there within the meaning of the Treaty provisions relating to freedom of establishment, the examination of the conformity of the Austrian legislation at issue in the light of those provisions rather than by reference to the freedom to provide services would not lead to a different result. [14] In both cases, that legislation would be analysed as a restriction on the exercise of the applicable freedom of movement and the assessment of its conformity with Community law in the light of the justifications put forward by the Austrian Government would lead to the same conclusion.

57. However, if it is necessary to give a reply to the question under consideration I take the view that, in the light of the information provided by the national court, it should be answered in the negative. The simple fact that a provider of online games uses material communication resources provided by a third undertaking established in the Member State of destination does not seem to me, in itself, to establish that that provider has in that State a stable establishment comparable to an agency.

58. In my view, this situation should be distinguished from the situation which the Court had to consider in *Gambelli and Others*. In that judgment, the Court acknowledged that Stanley International Betting Ltd, a British company, had exercised its right to freedom of establishment in Italy because it had concluded commercial agreements with Italian operators or intermediaries under which the latter collected and registered the bets of Italian consumers in order to forward them to that company.

59. The Court inferred from that that Stanley International Betting Ltd pursued the activity of collecting bets in Italy through the intermediary of an organisation of agencies. [15]

60. In the present case, the documents in the case do not show that the Maltese companies concluded, with the Austrian company which provided them with material resources,

14 — See to this effect the judgment in *Gambelli and Others*, paragraph 59. See also the judgment in *Stoß and Others*.

15 — Paragraph 46 of that judgment.

commercial agreements which have the effect of giving that company a mandate to act permanently on their behalf in the same way as an agency, in accordance with the criteria laid down by the Court in *Commission* v *Germany*, [16] and reproduced in *Winner Wetten* [17] and *Stoβ and Others*. [18]

61. Moreover, the fact that an economic operator uses a server physically situated in a Member State does not mean that operator exercises its economic activity in that State. In that regard, and although Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [19] excludes online games from its scope, [20] it may be appropriate to point out that, according to recital 19 of the directive, the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity.

62. In the light of these considerations, I take the view that the reply to the question under consideration should be that, on a proper interpretation of Article 49 EC, the fact that the provider of games via the Internet uses material communication resources such as a server and a telephone switchboard situated in the Member State of destination and provided to it by a third undertaking does not, in itself, preclude the application of the provisions of the Treaty on the freedom to provide services.

63. However, the particular factual context of the main action makes it necessary, in my view, to add to that reply. We know that the two Maltese companies which offer gambling via the Internet to Austrian consumers using a server and a telephone support service provided by the Austrian company 'bet-at-home.com Entertainment GmbH' are the indirect subsidiaries or 'sub-subsidiaries' of that company. They are the subsidiaries of the Maltese company 'bet-at-home.com Holding Ltd', which is itself the subsidiary of the Austrian company.

64. As the Austrian Government and the European Commission rightly point out, Article 49 EC cannot be applicable in the present case if it is established that those Maltese subsidiaries are purely artificial in nature, and that they were set up only to enable their Austrian parent company to

16 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21.
17 — Paragraph 46.
18 — Paragraph 59.
19 — OJ 2000 L 178, p. 1.
20 — Article 1(5)(d) of the directive on electronic commerce.

circumvent the prohibition against operating online games in Austria. [21]

65. That would be the case if those subsidiaries had no economic reality. As the Court pointed out in *Cadbury Schweppes and Cadbury Schweppes Overseas*, [22] the concept of establishment within the meaning of the Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there. [23]

66. That actual establishment must be capable of being verified on the basis of objective factors, such as the extent to which the company physically exists in terms of premises, staff and equipment. [24]

67. I therefore propose that the Court supplement the previous reply by stating that Article 49 EC cannot be relied upon if it is established that, in the circumstances of the present case, the Maltese subsidiaries have

21 — Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20 and the case-law cited therein.

22 — Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995.

23 — Paragraph 54.

24 — Paragraph 67.

a purely artificial nature designed to enable their Austrian parent company to circumvent the prohibition against operating online games in Austria.

2. The effect of the establishment in Austria of the persons accused

68. By question 4(b), the national court wishes to know whether Article 49 EC is applicable in the present case even though the national legislation on which the prosecutions are based is used against the managers of a company which is itself established in the Member State of destination.

69. The reply to this question should not give rise to difficulties. Article 49 EC, in the circumstances of the present case, is, in a way, 'doubly applicable'.

70. First, national legislation which, as the Austrian legislation at issue, has the effect of preventing a company established in Austria from supplying to providers of online games established in another Member State the resources for offering their games to Austrian consumers, restricts the right of that Austrian company to supply its own support services

to those providers. It therefore constitutes a restriction on the freedom of the intermediary company to provide its services. [25]

71. Secondly, the prohibition imposed by a Member State on its residents, on pain of criminal penalties, against serving as intermediaries for an operator established in another Member State in order to prevent that operator from supplying its services in the territory of the Member State of prohibition also constitutes a restriction within the meaning of Article 49 EC. It has the effect of restricting the opportunity for the operator concerned to offer its services in a Member State other than that in which it is established and the opportunity of the consumers residing in that State to have access to those services. [26]

72. I therefore propose that the answer to the question under consideration should be that, on a proper interpretation of Article 49 EC, legislation of a Member State which prohibits providers established in the national territory from supplying to companies established in another Member State the material resources for offering games via the Internet to persons residing in its territory, constitutes a restriction on the freedom to provide services within the meaning of that article.

25 — *Gambelli and Others*, paragraph 58.

26 — See, inter alia, Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 24, and *Stoß and Others*, paragraph 57.

C — *The justification for the monopoly and the conditions imposed on its holder*

73. The conformity with Community law of the prosecutions at issue in the main action depends, as I have stated, on the conformity therewith of the monopoly which they are intended to enforce. The national court has raised several questions designed to enable it to assess the conformity of that monopoly.

74. By question 1(a), it wishes to know whether Article 49 EC precludes a monopoly for operating lotteries via the Internet and the conditions to which the grant of that monopoly is subject in its legislation. By questions 1(c) and 3(a) to (f), the national court asks whether and, if appropriate, to what extent, the fact that providers of online games established in another Member State are subject in that State to obligations and controls must be taken into consideration when assessing the proportionality of that legislation.

75. I propose that the Court examine these questions together. The questions raised by the national court concerning the existence and, possibly, the scope of a duty of mutual recognition of the obligations and controls to which the Maltese companies are subject in Malta call into question the validity of the

introduction of the monopoly in question and, to a certain extent, the validity of the condition that the company which holds that monopoly must have its seat in Austria.

76. These questions from the national court may therefore be understood as meaning that it is asking, in essence, whether Article 49 EC precludes legislation of a Member state under which the operation of lotteries via the Internet is reserved to a single concessionaire, whose concession cannot exceed 15 years, which must be a capital company with a paid-up nominal or share capital of at least EUR 109 000 000, which has its seat in that State and which cannot set up branches in another country.

77. The reply to this question involves examining in turn the various restrictions which result from the Austrian legislation, namely the existence of a monopoly, its duration, the legal form of the company holding that monopoly and the amount of its capital, the requirement that it have its seat in the national territory and, finally, the prohibition against setting up a branch in another country.

78. Before carrying out that examination, it is necessary to point out the rules laid down by the case-law within the framework of which it must be conducted.

79. According to settled case-law, the Member States have the right to impose restrictions on the operation of gambling in their territory. Gambling constitutes an economic activity which may objectively have very harmful consequences both for society owing to the risk of the impoverishment of players who gamble excessively and for public order in general, in view inter alia of the significant revenue it generates.

80. The freedom to provide gambling services may therefore be the subject of restrictions on grounds of public policy, public security or public health, in accordance with Article 46(1) EC, or for overriding reasons in the general interest, such as the prevention of fraud and the protection of consumers against incitement to squander money on gambling. [27]

81. In the absence of Community harmonisation and since there are in this field significant moral, religious and cultural differences between the Member States, it is for each Member State to determine, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected. [28]

27 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56.

28 — Ibidem, paragraph 57 and the case-law cited therein.

82. It is important, however, that the restriction on the freedoms of movement imposed in order to protect those interests satisfy a suitability and proportionality test. That restriction must therefore be appropriate for ensuring attainment of the objective or objectives it pursues, which means that must be consistent and systematic, and be proportionate. [29]

83. In connection with the assessment of the need for and proportionality of the provisions enacted by a Member State, it is established that the mere fact that that State has opted for a system of protection which differs from that adopted by another Member State cannot have any effect, in the light of the absence of harmonisation of the matter concerned and the aforementioned discretion of the Member States. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure. [30]

84. In the present case, it is apparent from the papers before the Court that the Austrian legislation at issue was introduced in order to fight crime and to protect consumers. Its aim, according to the Austrian Government, is to prevent money-laundering and fraud and to fight crime. It is also designed to ensure adequate security for the payment of winnings and to protect players against squandering money on gambling.

85. In accordance with the aforementioned principles, it is in the light all these objectives that it is necessary to consider whether the restrictions contained in the Austrian legislation, to which the national court refers, may be regarded as justified. I shall examine them in turn.

1. The grant of a monopoly to operate lotteries via the Internet

86. As I indicated by way of introduction to this opinion, it is apparent from settled case-law that a monopoly to operate gambling may comply with Community law if the aim of that monopoly is to ensure a high level of preservation of public order and consumer protection.

87. Accordingly, the Court has acknowledged that the public authorities of a Member State are entitled to take the view 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 may secure for

29 — Ibidem, paragraphs 60 and 61.

30 — Ibidem, paragraph 58 and the case-law cited therein.

them, better guarantees that implementation of their policy of maintaining public order and protecting consumers will be more 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. [31]

88. The grant of such a monopoly may, in particular, help to prevent incitement to squander money on gambling and to combat addiction to gambling more effectively than would be the case with a system which opened up that market to several providers. [32]

89. In other words, granting a monopoly makes it possible to avoid the harmful effects of competition between several operators, which might encourage them to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming. [33]

90. That case-law applies, *a fortiori*, in the field of Internet games owing to the additional risks which those games pose for public order and consumers. [34] Those risks were described in the judgment in *Carmen Media Group* as follows:

'102... 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)

103 It should be 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

31 — *Stoß and Others*, paragraphs 81 and 82.
32 — Ibidem, paragraph 81 and the case-law cited therein.
33 — *Sporting Exchange*, paragraph 58.
34 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 67 to 70.

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 underlined by consistent case-law.'

91. A Member State is therefore entitled to reserve to a single private operator the right to operate gambling via the Internet in its territory.

92. That conclusion having been established, the national court's questions regarding the existence and possible scope of a duty of the Member State concerned to take into consideration the obligations and controls to which providers of Internet games are subject in the Member State in which they are established are irrelevant.

93. As is very clearly stated in the judgment in *Stoß and Others*, 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 hypothesi*, to be excluded, simply by virtue of the existence of such a monopoly. Only if the monopolies at issue in the main proceedings were held incompatible with Community law 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. [35]

94. This conclusion is called for *a fortiori* in the field of Internet games. As I pointed out by way of introduction, it is apparent from settled case-law that, in the light of the difficulties liable to be encountered by the authorities of a Member State in assessing the qualities and integrity of online games providers established in its territory, the other Member States are entitled to take the view that the controls and obligations to which those providers are subject in their Member State of establishment do not amount to an assurance that national consumers will be sufficiently protected against the risks of fraud and crime. [36]

95. The Maltese Government which, unless I am mistaken, has not intervened in previous cases brought before this Court concerning

35 — *Stoß and Others*, paragraphs 109 and 110.

36 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69; *Sporting Exchange*, paragraph 33, and *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 54.

gambling, contested, in its written observations, the validity of that case-law. It referred to the quality of the controls provided for by its legislation.

96. I do not consider that the Maltese Government's arguments justify amending the case-law. From the moment it is recognised by established case-law that a high level of consumer protection against incitement to squander money on gambling may justify granting a monopoly, the discussion which the Maltese Government is trying to re-open is irrelevant.

97. However, since a monopoly is a very restrictive measure, the case-law requires that it be designed to ensure a particularly high level of consumer protection. It must therefore 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 objectives thus determined, especially the objective of protecting consumers against incitement to squander money on gaming, and by the exercise of strict control by the public authorities. [37]

98. It is for the national court to determine whether those conditions have been satisfied. [38]

99. The Austrian Government maintains, in that regard, that, under its legislation, the holder of the monopoly is required to provide for high standards of player protection such as fixing a ceiling of EUR 800 per week and limits on time and personal bets. It is also apparent from the file that that holder carries out its activities under the supervision of the Austrian Ministry of Finance through the intermediary of State inspectors and a member of the Supervisory Committee, who have a right to examine the undertaking's management in depth without, however, being able to influence the undertaking directly.

100. It is for the national court to determine whether the Austrian legislation, thus interpreted and depending on the way in which it is implemented, fulfils the aforementioned conditions.

101. In that regard, in the light of the fact that the national court, by its questions, has mentioned the provisions of its national law as regards gaming establishments such as casinos, it may be useful to make the following observations.

102. In my view, the conformity of the monopoly at issue with Community law cannot be affected by the fact that the operation of casinos, under Austrian law, is the subject not of a monopoly but of a concession system which is less restrictive, since it is open to 12

37 — *Stoß and Others*, paragraph 83.

38 — *Zenatti*, paragraph 37; *Gambelli and Others*, paragraph 66, and *Stoß and Others*, paragraph 78.

operators. The offer of games via the Internet and the offer in casinos present significant differences, in particular in the circumstances in which players may have access to them, which justify the subjection of the former to a much stricter framework. [39]

103. That is also the reason why I consider that the fact, mentioned during the hearing, that the limit of EUR 800 per week applies only to Internet lotteries, so that a player who has reached that limit is not prevented from playing other kinds of traditional games in Austria, does not call into question the consistency of the Austrian legislation concerning online games.

2. The duration of the monopoly

104. The duration of a monopoly may in itself constitute a restriction on the freedoms of movement, different from that stemming from the grant of exclusive rights, because this duration determines the period during which the market at issue is closed to other operators.

105. In the judgment in *Engelmann*, the Court held that a duration of up to 15 years for concessions to operate gaming establishments in itself constitutes a restriction on the freedom to provide services. [40] This analysis applies, *a fortiori*, when that duration of up to 15 years is laid down for the grant of a monopoly to a private operator.

106. In the same judgment, the Court considered, however, that the grant of concessions for that duration could be justified having regard, in particular, to the concessionaire's need to have a sufficient length of time to recoup the investments required by the setting up of a gaming establishment. [41]

107. I think that case-law is transposable to the grant of a monopoly to operate Internet games, even though the investment needed to carry out that activity seems to me to be, a priori, less than that needed to operate casinos.

108. Furthermore, to grant an operating monopoly for too short a duration might encourage the operator holding that exclusive right to seek to maximise his profits. From this perspective, the grant of an operating monopoly for a sufficiently long duration may

39 — *Stoß and Others*, paragraphs 95 and 96.

40 — Paragraph 46.

41 — Paragraph 48.

help to achieve the objective relating to the protection of consumers against incitement to squander money on gaming.

3. The legal form and amount of capital

109. The Austrian legislation at issue provides that the holder of a monopoly to operate Internet lotteries must be a capital company and have a paid-up nominal or share capital of at least EUR 109 000 000.

110. The first of these requirements deprives natural persons or undertakings established in another Member State of the opportunity to carry out the activity at issue in Austria under another form of company. The second has the effect of making it more difficult to set up a capital company able to apply for the grant of the monopoly in question. Accordingly, each of these requirements constitutes a restriction on freedom of establishment. [42] They may, nevertheless, be justified by the objectives pursued by the legislation if they are found to be proportionate to those objectives.

42 — See to this effect the judgment in *Engelmann*, paragraph 28.

111. The Austrian Government states, in that regard, that the condition relating to the legal form reflects the wish to require the holder of the monopoly to have a transparent structure of undertaking in order to prevent money-laundering and fraud. It points out that Community law lays down the same legal form requirement with regard to the field of insurance. [43] As regards the amount of share capital, it states that it is proportionate in the light of the amount of winnings which the monopoly holder may have to pay out in respect of the various games which it is authorised to offer via the Internet, since these may include a jackpot of several millions.

112. In the light of these explanations and of the case-law, the two conditions under consideration, subject to the assessment of the national court, may seem justified and proportionate.

113. As regards the legal form, it should be pointed out that, contrary to the legislation at

43 — The Austrian Government cites Article 6(1)(a) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), Article 8(1)(a) of First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3), and Article 5 of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (OJ 2005 L 323, p. 1), read in conjunction with Annex I to Directive 2005/68.

issue in *Gambelli and Others* and *Placanica and Others*, the Austrian legislation opens up the possibility of operating the monopoly in question to all capital companies without distinction. [44]

114. Also, in *Engelmann*, the Court stated that the controls which may be imposed by a Member State on an economic operator wishing to operate gambling in its territory may justify that operator being required to adopt a particular legal form. It stated that the Austrian legislation which reserved the operation of casinos to public limited companies could be justified having regard to the obligations binding that form of company in regard, in particular, to the keeping of their accounts, the scrutiny to which they may be subject and relations with third parties. [45]

115. This analysis ought to be transposable to the condition that the undertaking must adopt the form of a capital company, having regard to the obligations which the Community legislation imposes on capital companies with regard to keeping their accounts and the checks to which they are subject. [46]

116. We may therefore conclude that the conditions imposed by the Austrian legislation according to which the holder of the monopoly must adopt the form of a capital company and have a nominal or share capital of at least EUR 109 000 000 may comply with Community law, subject to verification of their proportionality by the national court.

4. The location of the company seat

117. The Austrian legislation at issue provides that the holder of the monopoly to operate Internet lotteries must have its company seat in the national territory.

118. That condition constitutes without any doubt a restriction on the freedom of establishment. In *Engelmann*, it was analysed as a discriminatory measure, since it introduces a difference in treatment between companies

44 — The Italian legislation at issue in those judgments excluded capital companies quoted on the regulated markets. The Court considered that that exclusion, which was based on the transparency of undertakings, was disproportionate because there were other means of checking their accounts and activities (*Gambelli and Others*, paragraph 74).

45 — *Engelmann*, paragraph 30.

46 — See First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ 1968 L 65, p. 8), and Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) and its amending acts.

which have their seat in the national territory and those whose seat is in another Member State. Such a condition also prevents the latter from operating Internet games in Austria through the intermediary of a secondary establishment such as an agency or a branch.

119. In that judgment, the Court stated, in connection with the provisions of the Austrian legislation concerning gaming establishments, that the condition that concessionaires had to have their seat in Austria also had the effect of preventing a company established in another Member State from carrying on its activity in Austria through the intermediary of a subsidiary. At the hearing, the Austrian Government stated that, as regards the monopoly to operate Internet lotteries, it could be granted to a subsidiary of a company established in another Member State.

120. It is necessary to examine whether the condition under consideration may be justified. As the Court stated in the aforementioned judgment, owing to its discriminatory nature, it may be justified only by one of the grounds laid down in Article 46 EC, namely public policy, public security or public health. [47]

47 — Paragraph 34.

121. The Austrian Government maintains that it is necessary for the seat to be in the national territory so as to enable effective control of online gaming. It states that its presence there enables the competent national authorities to monitor effectively the decisions and management of the monopoly holder. Those authorities are thus able to know that holder's decisions before they are implemented and to oppose them if they contravene the objectives of the national gaming policy. It maintains that it does not have the same opportunities in the case of an operator established in another Member State.

122. I agree with the Commission that the Austrian Government's arguments may be supported.

123. Admittedly, in *Engelmann*, the Court reached the opposite conclusion as regards the same condition of establishment imposed by the Austrian legislation on holders of a concession to operate a gaming establishment.

124. It considered that it was possible to use less restrictive measures to monitor the activities and accounts of concessionaires and thus to fight crime, such as, inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment, the systematic communication of the decisions adopted by the managing organs and the possibility

of gathering information concerning their managers. [48]

125. The Court added that any undertaking established in a Member State can be supervised, and have sanctions imposed on it, regardless of the place of residence of its managers. Finally, it states that, having regard to the activity at issue, namely the operation of gaming establishments located in Austrian territory, investigations could be carried out on the premises of those establishments. [49]

126. I consider that that reasoning and the conclusion the Court reached at the end of it are not transposable to a monopoly to operate Internet games. I base that view on the following considerations, which concern the preservation of public order, according to the definition of that concept given in the case-law, since they relate to a genuine and sufficiently serious threat to a fundamental interest of society. [50]

127. It is not disputed that Internet gambling poses more significant risks than those created by traditional gaming establishments such as casinos. The most significant danger of those games, I should point out, stems from the lack of direct contact between player and operator which is likely to foster fraud both on the part of the consumer as regards his age or identity and on the part of the operator with regard to the conduct of the game.

128. That danger also stems from the very great ease with which anybody may access the games by means of a computer or mobile telephone, the permanence of their access, their potentially very high volume and the fact that the player's environment, when he plays the games, is usually characterised by isolation, anonymity and a lack of social control.

129. It is therefore acknowledged that these games may foster the development of a gambling addiction and squandering of money, particularly in the young and in persons having a particular propensity for gambling.

130. Those particular characteristics therefore justify a Member State establishing the means of monitoring effectively the conditions under which the economic operator

48 — Paragraphs 37 and 38.

49 — Paragraphs 38 and 39.

50 — Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, paragraph 86 and the case-law cited therein.

authorised to operate those games in its territory actually carries out its activities. As the Austrian Government stated, a Member State is entitled to wish to be able to check that its legislation is being obeyed and, if necessary, to be able to oppose a decision of that operator which is contrary to its obligations before that decision has been implemented and has caused harmful social consequences.

131. In other words, the Member State is entitled to consider that it is not enough to restrict the action of the monopoly holder by very specific rules. It is also entitled to seek to exercise an in-depth control of compliance with those rules and to adopt measures which enable it to take preventive action against any infringement of them.

132. However, the particular nature of Internet games also relates to the fact that they may be provided entirely from a distance. Their provision, contrary to that of traditional gambling such as casino games, does not need, from a physical point of view, any infrastructure in the territory of the Member State of destination which the authorities of that State may control themselves.

133. In the case of online games provided from another Member State, the competent authorities of the Member State of destination are therefore unable to carry out themselves the controls and checks which they consider necessary to make on the premises in which the service-provider carries out its activities. It is important to point out, in that regard, that, in the fight against money laundering and terrorism financing, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, [51] which applies to casinos providing Internet games, required Member States to provide for the possibility of carrying out on-site checks. In my view, a Member State is justified in thinking that the protection of its consumers against the risk of fraud and incitement to squander money on gambling also justifies this type of control.

134. However, as several Member States pointed out during the hearing, there is not, to date, any instrument of Community cooperation under which the Member State of establishment is required to give to the competent authorities of the Member State of destination any technical assistance which

51 — OJ 2005 L 309, p. 15.

they may need in order to check compliance with their own legislation. [52]

135. Moreover, in my view, it is unreasonable to suppose that the authorities of the Member State in whose territory such a games provider is established are able to check closely and in-depth that that provider fulfils scrupulously and permanently the obligations to which it is subject in each of the States in which it is authorised to operate games. This is *a fortiori* because those obligations, in the absence of harmonisation, differ from one Member State to another and are likely to change in each of them at any time.

136. Such an analysis is called for in particular where the activity of such a provider is directed towards several States, as appears to be the case of 'bet-at-home.com Entertainment Ltd' and 'bet-at-home.com Internationale Ltd', whose Internet site is accessible in Spanish, German, Greek, English, Italian, Hungarian, Dutch, Polish, Slovene, Turkish and Russian.

137. Moreover, the principle of mutual recognition, which is normally designed to apply in the absence of harmonisation in order to permit the exercise of the freedoms of movement, cannot be invoked in the particular domain of Internet games. As we have seen, it is settled case-law that, owing to the practical difficulties of carrying out an effective and in-depth control of the activity of an online games provider, the controls carried out in the State in which it is established may be considered insufficient by the other Member States. [53]

138. At the hearing, it was asked whether it would not be sufficient to require the Internet games provider to establish in the Member State of destination the server enabling it to provide those games in the territory of that State. The Belgian Government replied that such a requirement could prove to be insufficient where the server is used from another Member State and all the decisions relating to its use are taken in that State.

139. In the light of the various criteria developed in this case, it therefore does not appear, in my view, that the condition under consideration is disproportionate. I believe that a Member State is justified in thinking

52 — The measures which the Member States are required to adopt in respect of casinos established on their territory under Directive 2005/60 have the sole aim of fighting money laundering and terrorism financing. They are not designed to prevent all fraud which may be committed against consumers in the exercise of that kind of activity. Nor are they intended to protect players. Nor are they designed to enable a Member State to monitor compliance with its gaming legislation by another Member State.

53 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69; *Sporting Exchange*, paragraph 33, and *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 54.

that it will be better able to exercise a close and effective control over an Internet games provider, enabling it, if necessary, to oppose the implementation of a decision contrary to its legislation, if that provider has its seat in its territory.

140. One last argument deserves to be taken into account, in my view, in connection with the examination of the proportionality of this condition.

141. We have seen that the conformity of a monopoly with Community law is subject to the condition that that monopoly has the objective of ensuring a high level of protection of public order and consumers and that it is accompanied by a legislative framework which guarantees the attainment of those objectives and an in-depth control by the Member State concerned. These requirements are logical in the light of the scheme of the freedoms of movement, because an operating monopoly constitutes a measure which is very restrictive of those freedoms.

142. I therefore consider that it is consistent with that requirement to permit a Member State, in the specific domain of Internet games, to require the holder of that monopoly to have its seat in its territory because that measure enables it to ensure that the operator complies with its policy of protecting consumers from fraud and gambling addiction much more effectively than if the operator carried out its activity from another Member State.

143. At the hearing, the defendants themselves, Mr Dickinger and Mr Ömer, made a point of referring to the fact that the companies providing the games in question were established on Maltese territory and composed of persons who were all residents of Malta as proof, inter alia, that it really does exercise effective and serious controls. It is unclear, therefore, why the same conditions imposed for the same purposes are to be regarded as unacceptable on the ground that they are so regarded by the Austrian Republic.

144. I shall therefore propose that the Court rule that Article 49 EC does not preclude a Member State from requiring the capital company to which it has granted the monopoly to operate Internet games in its territory to have its seat in that territory.

5. The prohibition against setting up a branch in another Member State

145. The prohibition against setting up a branch in another country, in so far as

it prohibits its establishment in another Member State, is a clear negation of one of the rights expressly conferred on a company having its seat in the territory of a Member State by Articles 43 EC and 48 EC. That prohibition is therefore likely to make it less attractive to exercise the monopoly to operate Internet games in Austria and thus to discourage a company established in another Member State from applying for the grant of that monopoly.

146. The Austrian Government, in its written observations, merely stated that the prohibition under consideration only transposes the idea that it is for each Member State to regulate the operation of gambling in its territory.

147. I am of the opinion that that explanation cannot be upheld as a valid ground for restriction.

148. Admittedly, the right to operate gambling in a Member State is a matter for the discretion of that State. However, it is for each Member State to decide and, if appropriate, to adopt measures designed to ensure compliance with its legislation. If a Member State decides to open up its gambling market to private operators, any company lawfully established in a Member State is entitled to seek entry into that market and to take part, as appropriate, in the authorisation procedure established by that State.

149. The Austrian Government cannot therefore reasonably prohibit an economic operator, to which it has granted the monopoly to operate Internet games in its territory, from exercising the same activity through a branch in another Member State without explaining in what respect such a prohibition is necessary for the attainment of a lawful objective such as the preservation of public order and consumer protection pursued by its own legislation.

150. It is also necessary for such a prohibition to pursue those objectives in a consistent and systematic manner. In the present case, it would be possible to question the consistency of such a measure if that measure prohibited only the creation of a branch and not of a subsidiary. Finally, the prohibition against setting up a branch in another country must be in proportion to the objectives pursued.

151. Since the proceedings in this case are centred on the validity of a monopoly to

operate Internet games and of the condition relating to the presence of the seat in the national territory, it is conceivable that the Austrian Government may rely before the national court on information which justifies the condition under consideration.

152. That is why I propose that the Court leave it to the national court to assess the validity of this condition and reply that Article 43 EC precludes legislation of a Member State under which the undertaking which holds the monopoly to operate Internet games on its territory is prohibited from setting up a branch in another Member State, unless that condition is properly justified by a overriding reason in the general interest and is proportionate to that objective.

D — *The conduct of the holder of the monopoly*

153. By question 1(b), the national court asks, in essence, whether a monopoly to operate Internet games may be justified where the holder of that monopoly is pursuing a policy of expansion and employing intensive advertising in order to do so.

154. The Court has replied to a similar question, inter alia in the aforementioned judgments in *Ladbrokes Betting & Gaming and Ladbrokes International* and *Stoß and Others*.

155. It is apparent from those judgments that the fact that the holder of an operating monopoly is pursuing a policy of expansion and advertising its games is not necessarily incompatible with the existence of such a monopoly and the objective of protecting consumers against excessive incitement to gamble.

156. It is apparent from the case-law that a Member State is justified in authorising the holder of a monopoly to operate Internet games to pursue a policy of expansion and to use a certain degree of advertising for them if it can be shown that the scale of unlawful online games is sufficiently significant, so that such expansion and advertising is regarded as necessary for channelling players towards the lawful network. [54]

157. A Member State confronted with a large number of unauthorised Internet sites offering games may therefore lawfully allow the

54 — *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 30.

holder of the monopoly to operate online games in its territory to use advertising which is quite extensive and sufficiently attractive to lead consumers towards the authorised games.

158. Where a Member State seeks both to protect consumers against excessive incitement to gamble and to fight against fraud and unlawful gambling, the question whether its legislation pursues those objectives consistently and systematically must therefore be assessed in the light of those various objectives taken together. [55]

159. A controlled policy of expansion, supported by substantial advertising designed to attract players towards the lawful network, must not therefore be regarded, in principle, as incompatible with the objective of protecting consumers against excessive incitement to gamble, even though they may appear to be opposed. [56] It is important that the action of the monopoly holder, as circumscribed by the Member State concerned, should try to find the right balance between the pursuit of all those objectives.

160. It is therefore for the national court to consider whether the policy of expansion pursued by the monopoly holder and its advertising, in its scope and nature, are within the limits necessary to channel players towards the lawful network and are compatible with the objective relating to the protection of consumers against an excessive incitement to gamble. [57]

161. I therefore propose that the Court reply to the question under consideration that a monopoly to operate Internet games may be justified even though the holder of that monopoly pursues a policy of expansion and uses intensive advertising in order to do so where that expansion and advertising are necessary in order to channel players towards authorised online games and are not of a scope and nature irreconcilable with the protection of consumers against incitement to squander money on gambling.

55 — Ibidem, paragraph 26 and the case-law cited therein.

56 — *Stoß and Others*, paragraph 101 and the case-law cited therein.

57 — *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 37, and *Stoß and Others*, paragraph 103.

IV — Conclusion

162. In the light of the foregoing considerations, I propose that the Court give the following answers to the questions submitted to it by the Bezirksgericht Linz for a preliminary ruling:

'1 Legislation of a Member State which imposes criminal penalties on anybody who contravenes a monopoly to operate gambling, such as the monopoly to operate electronic lotteries provided for by Austrian law, must comply with the freedoms of movement, inter alia with Article 49 EC, even though criminal law falls within the jurisdiction of the Member States.

2. Article 49 EC is to be interpreted as meaning that the fact that an Internet games provider uses material means of communication such as a server and telephone switchboard situated in the Member state of destination and provided to it by a third undertaking, does not in itself preclude the application of the provisions of the EC Treaty concerning the freedom to provide services.

However, Article 49 EC cannot be invoked if it is established that, in the circumstances of the present case, the Maltese subsidiaries have a purely artificial nature designed to enable their Austrian parent company to circumvent the prohibition against operating online games in Austria.

Article 49 EC is to be interpreted as meaning that legislation of a Member State, which prohibits providers established in the national territory from providing companies established in another Member State with the material means of of-

fering Internet games to persons residing in its territory, constitutes a restriction on the freedom to provide services within the meaning of that article.

3. Article 49 EC does not preclude a Member State from requiring the capital company to which it has granted the monopoly to operate Internet games in its territory to have its seat in that territory.

Article 43 EC precludes legislation of a Member State under which the company which holds that monopoly is prohibited from setting up a branch in another Member State, unless that condition is properly justified by an overriding reason in the general interest and is proportionate to that objective.

4. A monopoly to operate Internet games may be justified even though the holder of that monopoly pursues a policy of expansion and uses intensive advertising in order to do so, where that expansion and advertising are necessary in order to channel players towards authorised online games and are not of a scope and nature irreconcilable with the protection of consumers against incitement to squander money on gambling.'