Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

16 February 2012 *

(Freedom of establishment — Freedom to provide services — Betting and gaming — Collection of bets on sporting events — Licensing requirement — Consequences of an infringement of European Union law in the awarding of licences — Award of 16 300 additional licences — Principle of equal treatment and the obligation of transparency — Principle of legal certainty — Protection of holders of earlier licences — National legislation — Mandatory minimum distances between betting outlets — Whether permissible — Cross-border activities analogous to those engaged in under the licence — Prohibition under national legislation — Whether permissible)

In Joined Cases C-72/10 and C-77/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Corte Suprema di Cassazione (Italy), made by decisions of 10 November 2009, received at the Court on 9 February 2010, in the criminal proceedings against

Marcello Costa (C-72/10),

Ugo Cifone (C-77/10),

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 29 June 2011,

after considering the observations submitted on behalf of:

— Mr Costa, by D. Agnello, avvocatessa,

— Mr Cifone, by D. Agnello, R. Jacchia, A. Terranova, F. Ferraro, A. Aversa, A. Piccinini, F. Donati and A. Dossena, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, and by F. Arena, avvocato dello Stato,

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

* Language of the case: Italian.

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

— the Portuguese Government, by L. Inez Fernandes and P. Mateus Calado, acting as Agents,

— the European Commission, by E. Traversa and S. La Pergola, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2011,

gives the following

Judgment

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

2 The references have been made in criminal proceedings brought against Mr Costa and Mr Cifone, the managers of data transmission centres ('DTCs') bound by contract to Stanley International Betting Ltd ('Stanley'), a company incorporated under the law of England and Wales, for failure to comply with the Italian legislation governing the collection of bets, in particular Royal Decree No 773 approving a consolidated version of the laws on public security (Regio decreto n. 773 — Testo unico delle leggi di pubblica sicurezza) of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (Ordinary Supplement to GURI No 302 of 29 December 2000) ('the Royal Decree'). The legal and factual context of these references is similar to that of the cases which gave rise to the judgments in Case C-67/98 *Zenatti* [1999] ECR I-7289; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891; and Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083.

Legal context

3 The Italian legislation provides in substance that the collecting and managing of bets are activities which may be engaged in only by the holder of a licence, granted under a public tendering procedure, and police authorisation. Any infringement of that legislation carries criminal penalties.

Licences

4 Until amendments were made to the relevant legislation in 2002, operators in the form of companies whose shares were quoted on the regulated markets could not obtain a betting or gaming licence. As a consequence, such operators were excluded from the tendering procedures for the award of licences, which were held in 1999. In *Placanica and Others*, inter alia, such exclusion was declared unlawful under Articles 43 EC and 49 EC.

5 Decree-Law No 223 of 4 July 2006 laying down urgent measures for economic and social revival, the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion, converted into statute by Law No 248 of 4 August 2006 (GURI No 18 of 11 August 2006; 'the Bersani Decree') reformed the betting and gaming sector in Italy, with the aim of bringing it into line with the requirements under European Union ('EU') law.

6 Under paragraph 1 of Article 38 of the Bersani Decree, which is entitled 'Measures to counter unlawful betting and gaming', a series of provisions are to be adopted by 31 December 2006 'in order to counter the spread of irregular and illicit betting and gaming, tax evasion and avoidance in the betting and gaming sector and to ensure the protection of gamblers and players'.

7 Article 38(2) and (4) of the Bersani Decree lays down the new rules governing the marketing of gambling on (i) events other than horse racing and (ii) horse racing. The following provision is made, in particular:

— at least 7 000 new outlets are to be opened for gambling on events other than horse racing and at least 10 000 new outlets for gambling on horse racing events;

— the maximum number of outlets per municipality is set according to the number of inhabitants and the number of outlets for which a licence was awarded following the 1999 tendering procedure;

— a minimum distance must be observed between the new outlets and those for which a licence was awarded following the 1999 tendering procedure;

— the Independent Authority for the Administration of State Monopolies ('AAMS'), acting under the supervision of the Ministry of Economic Affairs and Finance, is made responsible for 'laying down measures for the protection' of the holders of licences awarded under the 1999 tendering procedure.

Police authorisations

8 The licensing system is linked to a system of police checks governed by the Royal Decree. Article 88 of that decree provides that police authorisation may be granted only to the holders of a licence, or of an authorisation granted by a Ministry or other body to which the law reserves the right to organise or operate betting.

Criminal penalties

9 The organisation of betting or gaming, including remote betting or gaming on line or by telephone, without the required licence or police authorisation is a criminal offence in Italy punishable by a custodial sentence of up to three years under Article 4 of Law No 401 of 13 December 1989 on clandestine gaming and betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989), as amended by Article 37(5) of Law No 388 of 23 December 2000 (Ordinary Supplement to GURI No 302 of 29 December 2000), ('Law No 401/89').

The disputes in the main proceedings and the question referred for a preliminary ruling

Stanley and its situation in Italy

10 Stanley is authorised to act as a bookmaker in the United Kingdom under a licence issued by the City of Liverpool. Stanley takes fixed-odds bets on a large range of national and international sporting and non-sporting events.

11 Stanley operates in Italy through more than 200 agencies, in the form of DTCs. The DTCs are premises open to the public in which gamblers are able to place sporting bets on line by accessing one of Stanley's servers in the United Kingdom or another Member State, pay their stakes and, where appropriate, draw their winnings. The DTCs are run by independent operators linked by contract to Stanley. Stanley operates in Italy exclusively through those physical outlets and is therefore not an operator of internet gambling.

12 It is common ground that, in view of Stanley's business model, it is in principle Stanley's responsibility to obtain a licence for the collecting and managing of bets in Italy, so that the DTCs can engage in their activities.

13 Stanley, which formed part of a group quoted on the regulated markets, was excluded — in breach of EU law — from the tendering procedure which led to the award in 1999 of 1 000 licences to market betting on sporting contests other than horse racing, valid for six years and renewable for a further six years.

14 The provisions of the Bersani Decree were implemented through tendering procedures held by the AAMS during the course of 2006. On 28 August 2006, two invitations to tender were published, pursuant to Article 38(2) and (4) of the Bersani Decree, for licences for (i) 500 specialist horse betting outlets and 9 500 non-specialist horse betting outlets, in addition to the creation of remote gambling networks for horse racing, and (ii) 1 900 specialist sports betting outlets and 4 400 non-specialist sports betting outlets, in addition to the creation of remote sports betting networks. Those invitations to tender were also published on 30 August 2006 in the *Official Journal of the European Union* (procedures Nos 2006/S-163-175655 and 2006/S-164-176680).

15 The tender documents included tender specifications, comprising eight annexes, and the model contract between the AAMS and the successful tenderer for the licence for betting on events other than horse races ('the model contract').

16 The tender specifications made participation in the tendering procedure conditional upon the arranging of a provisional bank guarantee (Article 13) and the acceptance of a commitment to arrange a definitive bank guarantee covering the obligations arising from the licence (Article 14).

17 Under Article 23(2)(a) of the model contract, the AAMS is required to withdraw the licence where, in relation to 'licensees, their legal representatives or directors, interim protective measures have been adopted, or a decision has been taken to remit a matter to the court with jurisdiction to rule on the substance, in connection with any of the offences referred to in Law No 55 of 19 March 1990 or any other offence liable to breach the relationship of trust with the AAMS'.

18 Moreover, Article 23(3) of the model agreement states that, after suspending its effects immediately as a protective measure, the AAMS is to withdraw the licence 'where the licensee markets, either itself or through a company linked to it — whatever the nature of that link — on Italian territory or by means of data transmission sites located outside Italian territory, games analogous to public games or to other games operated by the AAMS, or games which are prohibited under Italian law'.

19 Under Article 23(6) of the model contract, where the licence is withdrawn, the bank guarantee arranged by the licensee is to be forfeited to the AAMS, without prejudice to the right of the AAMS to seek compensation for any further loss.

20 Following the publication of the invitations to tender, Stanley again expressed an interest in obtaining a licence for the collecting and managing of bets, and obtained from the AAMS the software package needed for submitting a tender. Stanley subsequently asked the AAMS to explain some of the provisions which might have barred it from taking part in the tendering procedure and the interpretation of which seemed unclear to it in certain respects.

21 By letter of 21 September 2006, Stanley asked the AAMS whether it regarded Stanley's business model, based on DTCs affiliated to it, as being inconsistent with the principles and provisions set out in the tender documents and, in particular, with Article 23(3) of the model contract — if so, the consequence being that, if Stanley participated in the procedures, possibly with success, it might be precluded from continuing to use its business model — and whether use of that model might give grounds for the revocation, withdrawal or suspension of any licences which might have been awarded.

22 In its reply dated 6 October 2006, the AAMS stated that participation in the tendering procedures was conditional on the cessation in Italy of cross-border activities, but at the same time pointed out, in particular, that the new system would make it possible for successful tenderers to create sales networks which could also extend nationwide. The AAMS drew attention, however, to the fact that those networks 'obviously tended to replace any old networks and, in those circumstances, the provisions under Article 23 of the model contract constitute[d] appropriate protection of the investments made by those licence holders'.

23 In reply to that letter, Stanley asked the AAMS on 10 October 2006 to reconsider its position 'by amending the clauses of the invitation to tender and, in particular, Article 23 of the model contract, so that [Stanley] [could] participate in the selection process without being forced to relinquish the exercise of its fundamental freedom to provide cross-border services'.

24 Stanley also submitted the following additional question to the AAMS on 12 October 2006:

'In the event that Stanley should decide to relinquish the operation of its cross-border services in Italy and to participate in the tendering procedures, could the current operators of its network — which extends nationwide — find themselves personally barred from operating? If the answer is negative, would those operators have to meet additional entitlement criteria or, on the other hand, could they merely sign the standard model contract drawn up by the AAMS?'

25 On 17 October 2006, Stanley pointed out that it had not received a reply to its requests for explanations of 10 and 12 October 2006 and that it urgently needed a reply so that it could decide whether or not it would participate in the tendering procedures. On 18 October 2006, the AAMS definitively refused Stanley's requests for explanations and Stanley accordingly decided not to participate in the tendering procedure.

26 Stanley brought proceedings before the Tribunale amministrativo regionale del Lazio (Lazio Regional Administrative Court) for annulment of the invitations to tender and the tender documents by Action No 10869/2006 of 27 November 2006, which is currently pending.

27 The tendering procedures were completed in December 2006 with the award of some 14 000 new licences.

The proceedings involving managers of Stanley's DTCs

28 Notwithstanding the fact that Stanley does not hold a licence to collect and manage bets, Mr Costa and Mr Cifone applied for police authorisation for the purposes of Article 88 of the Royal Decree to engage in the management of DTCs.

Costa (Case C-72/10)

29 At the material time for the purposes of the main proceedings, Mr Costa was the manager of a DTC in Rome (Italy) under a contract dated 27 May 2008.

30 On 8 October 2008, following his application for police authorisation, officers of the Rome branch of the National Police inspected Mr Costa's DTC and officially noted the offence, under Article 4 of Law No 401/89, of the illicit operation of betting activities and, more specifically, the collection of bets on sporting events without the required licence and police authorisation.

31 By decision of 27 January 2009, the Giudice per le Indagini Preliminari (judge responsible for preliminary investigations) of the Tribunale di Roma (Rome District Court) decided to acquit Mr Costa 'because the facts no longer constitute an offence'. According to that court, the Corte

Suprema di Cassazione (Supreme Court of Cassation) had held in a similar case that the relevant Italian penal legislation was inconsistent with EU law and should therefore not be applied (judgment of 27 May 2008 in Case No 27532/08).

32 The Public Prosecutor appealed against that decision to the Corte Suprema di Cassazione, contending that the national legislation relating to licences and police authorisation was compatible with EU law and that, in the absence of a decision of the Italian authorities refusing to grant a licence, which would be open to appeal before an administrative court, Mr Costa was not entitled to claim that the Italian Republic had infringed EU law and to seek the non-implementation of legislation from which he had chosen of his own free will to remain aloof.

Cifone (Case C-77/10)

33 At the material time for the purposes of the main proceedings, Mr Cifone was the manager of a DTC in Molfetta in the Province of Bari (Italy). An application for a police authorisation had been submitted on 26 July 2007 to the Questore di Bari (Police Commissioner, Bari).

34 On 7 November 2007, a complaint was lodged with the Public Prosecutor at the Tribunale di Trani by a competitor, a company holding a licence issued by the AAMS under the Bersani Decree. The purpose of that complaint was to cause criminal proceedings to be instituted against a number of intermediaries — one of whom was Mr Cifone — operating in the Province of Bari for the illicit operation of betting activities, an offence under Article 4 of Law No 401/89.

35 On 20 October 2007, the Guardia di Finanza di Molfetta (the authority responsible for investigating business irregularities, Molfetta), acting on its own initiative, placed the equipment and premises of Mr Cifone's DTC under temporary seizure.

36 The Public Prosecutor upheld the legality of that seizure and applied to the Giudice per le Indagini Preliminari del Tribunale di Trani for an order placing the premises and equipment of all the persons under investigation for a criminal offence, including Mr Cifone, under preventive seizure. By decision of 26 May 2008, that court issued a preventive seizure order on the grounds of infringement inter alia of Article 4 of Law No 401/89, a decision subsequently upheld by the Tribunale del Riesame di Bari (Review Court, Bari) by an order of 10 and 14 July 2008.

37 On 9 September 2008, Mr Cifone appealed on a point of law to the Corte Suprema di Cassazione against the order of 10 and 14 July 2008. Mr Cifone claims that the national legislation, including its penal provisions, should not be applied, on the grounds that, by confirming the validity of the old licences and laying down restrictions on the location of new outlets in order to favour existing outlets, and in providing for the withdrawal of licences in circumstances which are seriously discriminatory, it is contrary to EU law.

The question referred

38 Both in *Costa* and in *Cifone*, the Corte Suprema di Cassazione found that there was uncertainty regarding interpretation of the scope of the freedom of establishment and the freedom to provide services and, in particular, 'whether they may be curtailed by a domestic legal order having features which are, or appear to be, discriminatory and exclusionary'.

39 In those circumstances, the Corte Suprema di Cassazione decided to stay the proceedings in both cases and to refer the following question to the Court for a preliminary ruling:

'The Court of Justice is requested to interpret Articles 43 EC and 49 EC with reference to freedom of establishment and freedom to provide services in the sector of betting on sports events in order to establish whether or not those Treaty provisions permit national rules establishing a State monopoly and a system of licences and authorisations which, within the context of a given number of licences:

(a) tend generally to protect holders of licences issued at an earlier period on the basis of a procedure that unlawfully excluded some operators;

(b) in fact ensure the maintenance of market positions acquired on the basis of a procedure that unlawfully excluded certain operators (by … prohibiting new licensees from locating their kiosks within a specified distance of those already in existence), and

(c) provide cases in which the licence may be withdrawn with forfeiture of very large guarantee deposits, including the case in which the licensee directly or indirectly carries on cross-border betting or gaming activities analogous to those under the licence.'

40 By order of the President of the Court of 6 April 2010, Cases C-72/10 and C-77/10 were joined for the purposes of the written and oral procedure and of the judgment.

Admissibility of the question

41 The Italian Government challenges the admissibility of the question referred.

42 First of all, the Italian Government argues that the question referred is hypothetical. In its opinion, a declaration that the new Italian legislation under the Bersani Decree is incompatible with EU law would not affect the defendants in the main proceedings because Stanley chose of its own free will not to participate in the 2006 tendering procedures which were governed by that new legislation. The Italian Government suggests that the features of a licensing system with which Stanley has had no involvement cannot have any bearing on the position of Mr Costa and Mr Cifone under criminal law.

43 In that regard, it should be noted that, according to consistent case-law, a Member State may not apply a criminal penalty for failure to complete an administrative formality where such completion has been refused or rendered impossible by the Member State concerned, in infringement of EU law (*Placanica and Others*, paragraph 69). Given that the question referred is intended precisely to establish whether the conditions which were imposed for the award of a licence under the national legislation, and which led Stanley to decline to participate in the tendering procedures at issue in the main proceedings, were contrary to EU law, the relevance of that question for the purposes of deciding the cases before the referring court cannot be called into question.

44 Secondly, the Italian Government argues that the question referred for a preliminary ruling is inadmissible because it is too general.

45 In that connection, it is true that the precision — and even the usefulness — both of the observations submitted by the Governments of the Member States, and the other interested parties, and of the answer given by the Court may depend on sufficient details being provided as to the content and objectives of the national legislation applicable to the cases before the referring court. Nevertheless, in the light of the division of jurisdiction as between the national courts and the Court of Justice, it must be regarded as sufficient that both the subject-matter of the cases before the referring court and the main issues raised for the EU legal order can be understood from the order for reference, in order to enable the Member States to submit their observations in accordance with Article 23 of the Statute of

the Court of Justice and to participate effectively in the proceedings before the Court (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 41). Those requirements are met by the order for reference in both cases.

46 The objections raised by the Italian Government regarding the admissibility of the references for a preliminary ruling should therefore be dismissed.

The question referred for a preliminary ruling

47 By its question, the referring court raises two issues, which should be examined separately.

48 First, that court is called upon to decide whether the measures adopted by the legislature in order to remedy the unlawful exclusion of operators, such as Stanley, from the 1999 tendering procedure are in conformity with EU law. While the referring court finds that the provision made under the Bersani Decree for the award of approximately 16 000 new licences appears at first sight to comply with the requirements laid down by the Court in paragraph 63 of *Placanica and Others*, it harbours doubts as to the compatibility with EU law of other aspects of the new system, whereby the market positions of operators which obtained a licence under the 1999 tendering procedure are protected against potential competition from operators which were unlawfully excluded from that procedure and were unable to take part in a tendering procedure for the award of licences until 2006. In that connection, the referring court cites in particular the obligation laid down in Article 38(2) and (4) of the Bersani Decree, under which new licence holders must, when setting up their outlets, observe a minimum distance from existing licence holders.

49 Secondly, the referring court notes that, whilst the relevant legislation was amended in 2002 in order to remove the ground for exclusion relied upon in the 1999 tendering procedure and at issue in *Placanica and Others*, a new set of restrictions was introduced following the adoption of the Bersani Decree, in particular through the provision made in Article 23 of the model contract regarding situations in which licences must be withdrawn and guarantees forfeited. The referring court is uncertain whether those new restrictions are compatible with EU law.

The protection of market positions acquired by operators awarded licences under the 1999 tendering procedure

50 By the first part of its question, the referring court asks in essence whether Articles 43 EC and 49 EC must be interpreted as precluding a Member State which, in breach of EU law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.

51 First of all, it should be noted that, as the Court held in paragraph 63 of *Placanica and Others*, it is for the national legal order to lay down detailed procedural rules to ensure the protection of the rights of operators unlawfully excluded from the first tendering procedure, provided, however, that those detailed rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).

52 In the same paragraph of *Placanica and Others*, the Court went on to hold that the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences could be appropriate courses of action. In principle, those courses of action are both capable of remedying, at least as regards the future, the unlawful exclusion of certain operators, by allowing them to engage in their activity on the market under the same conditions as existing operators.

53 That is not the case, however, if the market positions acquired by the existing operators are protected by the national legislation. The very fact that the existing operators have been able to start up several years earlier than the operators unlawfully excluded, and have accordingly been able to establish themselves on the market with a certain reputation and a measure of customer loyalty, confers on them an unfair competitive advantage. To grant the existing operators even greater competitive advantages over the new licence holders has the consequence of entrenching and exacerbating the effects of the unlawful exclusion of the latter from the 1999 tendering procedure, and accordingly constitutes a new breach of Articles 43 EC and 49 EC and of the principle of equal treatment. Such a measure also makes it excessively difficult to exercise the rights conferred by EU law on operators unlawfully excluded from the 1999 tendering procedure and, as a consequence, is inconsistent with the principle of effectiveness.

54 It should be noted in this context that the public authorities which grant betting and gaming licences have a duty to comply with the fundamental rules of the Treaties and, in particular, with Articles 43 EC and 49 EC, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency (see, to that effect, Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraph 39, and Case C-64/08 *Engelmann* [2010] ECR I-8219, paragraph 49 and the case-law cited).

55 Without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies if the licence in question may be of interest to an undertaking located in a Member State other than that in which the licence is granted, requires the licensing authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the licence to be opened up to competition and the impartiality of the award procedures to be reviewed (*Commission* v *Italy*, paragraph 24 and the case-law cited; *Sporting Exchange*, paragraphs 40 and 41; and *Engelmann*, paragraph 50).

56 The award of such licences must therefore be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion (see, to that effect, *Engelmann*, paragraph 55 and the case-law cited).

57 The principle of equal treatment requires moreover that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. This is especially the case in a situation such as that in the cases before the referring court, in which a breach of EU law on the part of the licensing authority concerned has already resulted in unequal treatment for some operators.

58 As regards more specifically the obligation laid down in Article 38(2) and (4) of the Bersani Decree for new licence holders to observe a minimum distance between their establishments and those already in existence, the effect of that measure is to protect the market positions acquired by the operators who are already established to the detriment of new licence holders, who are compelled to open premises in less commercially attractive locations than those occupied by the former. In consequence, such a measure entails discrimination against the operators which were excluded from the 1999 tendering procedure.

59 As regards possible justifications for such unequal treatment, it is settled law that grounds of an economic nature, such as the objective of ensuring continuity, financial stability or a proper return on past investments for operators who obtained licences under the 1999 tendering procedure, cannot be

accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom guaranteed by the Treaty (*Commission* v *Italy*, paragraph 35 and the case-law cited, and Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraphs 53 to 56).

60 Moreover, the Italian Government cannot, in circumstances such as those of the cases before the referring court, validly rely on its purported objective of ensuring the uniform distribution of betting and gaming outlets on Italian territory in order to prevent consumers who live close to such establishments from being exposed to an excess of supply and to counter the risk that consumers living in less well served areas might opt for clandestine betting or gaming.

61 It is true that those objectives — the reduction of betting and gaming opportunities, and the combating of criminality by making the operators active in the sector subject to control and channelling betting and gaming into the systems thus controlled — are among those recognised by case-law as capable of justifying restrictions on fundamental freedoms in the betting and gaming sector (*Placanica and Others*, paragraphs 46 and 52).

62 However, as the Advocate General states in point 63 of his Opinion and as was held by the Court in paragraph 54 of *Placanica and Others*, as regards the first of those objectives, the betting and gaming sector in Italy has long been marked by a policy of expanding activity with the aim of increasing tax revenue, and no justification can therefore be found in that context in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling. In so far as the Bersani Decree has significantly increased the number of betting and gaming opportunities still further, as compared with the period under consideration in *Placanica and Others*, that conclusion is all the more valid in relation to the current situation in that sector.

63 Also, as regards the second objective relied upon, it is settled law that the restrictions imposed by Member States must satisfy the principle of proportionality and that national legislation is appropriate for achieving the objective invoked only if the means used are consistent and systematic (*Placanica and Others*, paragraphs 48 and 53).

64 However, as the Advocate General observes in point 67 of his Opinion, the rules on minimum distances were imposed exclusively on new licence holders and not on those already established. That being so, even if a system of minimum distances between outlets were in itself justifiable, it could not be acceptable for such restrictions to be applied in circumstances such as those of the cases before the referring court, in which the only operators to be placed at a disadvantage as a result would be the new licence holders entering the market.

65 In any event, a system of minimum distances between outlets would be justifiable only if such rules — and this would be for the national court to determine — did not have as their true objective the protection of the market positions of the existing operators, rather than the objective relied upon by the Italian Government of channelling the activities of betting and gaming into controlled systems. Moreover, it would be for the referring court, where appropriate, to determine whether the obligation to observe minimum distances, which precludes the establishment of additional outlets in densely-populated areas, is really appropriate for the purposes of attaining the purported objective and whether it indeed results in new operators choosing to set up in less populated areas, thereby ensuring nationwide coverage.

66 The answer to the first part of the question referred is therefore that Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of EU law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.

The new restrictions introduced following the adoption of the Bersani Decree

67 By the second part of its question, the referring court asks in essence whether Articles 43 EC and 49 EC must be interpreted as precluding a national regulatory framework, such as that at issue in the cases before it, which provides for the withdrawal of a licence for the collecting and managing of bets, and the forfeiture of financial guarantees arranged in order to obtain such a licence, where

— criminal proceedings have been brought against the licensee, his legal representative or director for offences 'liable to breach the relationship of trust with the AAMS', as provided for in Article 23(2)(a) of the model contract; or

— the licensee markets, on Italian territory or by means of data transmission sites located outside Italian territory, games of chance analogous to those operated by the AAMS, or games of chance which are prohibited under Italian law, as provided for in Article 23(3) of the model contract.

68 It is apparent in that regard from the documents produced before the Court that although, strictly speaking, Article 23 of the model contract specifies situations in which a licence cannot be retained, those situations also correspond in practice to conditions for obtaining a licence, since an operator who has fallen within one of those situations at the time the licence is granted will immediately have his licence withdrawn. Given that, in view of Stanley's business model, it is in principle Stanley's responsibility to obtain a licence enabling DTCs — such as those run by Mr Costa and Mr Cifone — to engage in their activities, any obstacle to the award of a licence to Stanley also automatically restricts the activities of the DTCs.

Preliminary observations

69 It should be noted first of all that Articles 43 EC and 49 EC require the abolition of all restrictions on freedom of establishment and freedom to provide services — even if those restrictions apply without distinction to national providers of services and to those from other Member States — if they are liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State in which it lawfully provides similar services (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 51 and the case-law cited).

70 It is common ground that national legislation, such as that at issue in the cases before the referring court, which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the licence is to be withdrawn constitutes an obstacle to the freedoms thus guaranteed by Articles 43 EC and 49 EC.

71 Such restrictions may, however, be recognised as exceptional measures, as expressly provided for in Articles 45 EC and 46 EC, or justified by overriding reasons in the public interest, provided that they comply with the requirements under the case-law of the Court with regard to their proportionality. A certain number of overriding reasons relating to the public interest have been recognised in that regard by the case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on betting and gaming, as well as the general need to preserve public order (*Placanica and Others*, paragraphs 45, 46 and 48).

72 It follows moreover from the provisions and principles referred to in paragraph 54 above that, when licences such as those in the cases before the referring court are awarded, the licensing authority has an obligation of transparency consisting inter alia in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the licences to be opened up to competition and the impartiality of the procurement procedures to be reviewed (*Commission* v *Italy*, paragraph 24 and the case-law cited; *Sporting Exchange*, paragraphs 40 and 41; and *Engelmann*, paragraph 50).

73 In that context, the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801, paragraph 111, and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraphs 45 and 46).

74 The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80 and the case-law cited).

75 It is in the light of those considerations that the second part of the question referred must be examined.

Withdrawal of the licence because of the initiation of criminal proceedings

76 As the Advocate General states in point 93 of his Opinion, the exclusion of operators whose managers have been convicted of criminal offences can in principle be regarded as a measure which is justified by the objective of combating criminality. As the Court has consistently held, betting and gaming involve a particularly high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 63).

77 Withdrawal of the licence, however, constitutes a particularly serious measure for the licensee, a fortiori in circumstances such as those of the cases before the referring court, in which, by virtue of Article 23(6) of the model contract, it leads automatically to forfeiture of a substantial financial guarantee and possible obligations to compensate the AAMS for damage suffered.

78 In order to enable any potential tenderer to assess with certainty the likelihood that such penalties will be applied to it, to preclude any risk of favouritism or arbitrariness on the part of the licensing authority and, lastly, to ensure that the principle of legal certainty is observed, it is therefore necessary for the circumstances in which those penalties will be applied to be set out in a clear, precise and unequivocal manner.

79 The reference in Article 23(2)(a) of the model contract to 'offences referred to in Law No 55 of 19 March 1990', which relates to Mafia crime and other forms of criminality constituting a serious danger for society, appears — subject to verification by the referring court — to satisfy that requirement. However — and this is also subject to verification by the referring court — that does not seem to be the case as regards the reference in Article 23(2)(a) of the model contract to 'any other offence liable to breach the relationship of trust with the AAMS'. It is for the referring court to determine whether a reasonably informed tenderer exercising ordinary care could have understood the exact significance of that reference.

80 In the course of so doing, the referring court will have to take into account, inter alia, not only the fact that potential tenderers had a period of less than two months within which to examine the tender documents but also the approach taken by the AAMS to the requests for clarification made to it by Stanley.

81 In any event, it is settled case-law that restrictions imposed by national legislation must not go beyond what is necessary to attain the end in view (*Gambelli and Others*, paragraph 72). Although it may therefore, in certain circumstances, prove justifiable to take preventive measures against a gaming operator suspected, on the basis of reliable evidence, of being implicated in criminal activities, exclusion from the market through withdrawal of the licence should in principle be regarded as proportionate to the objective of combating criminality only if it is based on a judgment which has the force of *res judicata* and concerns a sufficiently serious offence. Legislation which provides for operators to be excluded, even temporarily, from the market can be regarded as proportionate only if it provides for an effective legal remedy and compensation for any loss suffered in the event that such exclusion subsequently proves to be unjustified.

82 Moreover, it would appear — subject to verification by the referring court — that the ground for withdrawal provided for in Article 23(2)(a) of the model contract did in practice prevent the participation in the 2006 tendering procedures of operators such as Stanley, whose representatives were at that time the subject of criminal proceedings, initiated before judgment was given in *Placanica and Others*, which resulted in acquittals at a later date.

83 It should be noted in that context that it is clear from *Placanica and Others* (paragraph 70) that the Italian Republic cannot impose criminal penalties for pursuit of the organised activity of collecting bets without a licence or police authorisation on persons linked to an operator which has been excluded from the relevant tendering procedure in breach of EU law. That judgment was delivered on 6 March 2007, that is to say, four months after the deadline of 20 October 2006 set for the submission of applications in the tendering procedure provided for under the Bersani Decree.

84 Consequently, since criminal proceedings against an operator — such as Stanley, or its representatives or directors — which, in the light inter alia of *Placanica and Others*, were subsequently revealed to be unfounded, were pending at the time of the tendering procedure provided for under the Bersani Decree, making it impossible in practice for such an operator to participate in that tendering procedure without immediately having its licence withdrawn as a result of those proceedings, it must be concluded that the new tendering procedure has not in fact remedied the exclusion of that operator from the earlier tendering procedure which was at issue in *Placanica and Others*.

85 Accordingly, and for the same reasons as those given in *Placanica and Others*, penalties for engaging in the organised activity of collecting bets without a licence or police authorisation cannot — even following the new tendering procedure provided for under the Bersani Decree — be imposed on persons, such as Mr Costa and Mr Cifone, who are linked to an operator such as Stanley, which was excluded from the earlier tendering procedures in breach of EU law.

86 In view of the answer to be given to that part of the question in the light of the abovementioned considerations, it is not necessary to determine whether — and, if so, to what extent — the contested provision infringes, as claimed by Mr Costa and Mr Cifone, the presumption of innocence which is a feature of the constitutional traditions common to the Member States and which is set out in Article 48 of the Charter of Fundamental Rights of the European Union.

Withdrawal of the licence because games of chance are being marketed by means of data transfer sites located outside the national territory

87 As attested both by the exchanges between Stanley and the AAMS, summarised in paragraphs 21 to 26 above, and by the fact that the Advocate General felt obliged to envisage, in points 72 to 89 of his Opinion, two alternative outcomes based on radically different interpretations of Article 23(3) of the model contract, that provision is unclear.

88 Uncertainty arises as to the objective and the effect of Article 23(3) of the model contract, which is either to prevent a licensee from marketing actively on Italian territory forms of gambling other than those for which it holds a licence, or to prevent any cross-border betting or gaming, in particular if based on a business model such as Stanley's, using DTCs.

89 In that regard, the interpretation of provisions of national law is a matter for the national courts, under the cooperative arrangements established by Article 267 TFEU, not for the Court of Justice (*Placanica and Others*, paragraph 36). However, it follows from the case-law referred to in paragraphs 72 to 74 above that, under EU law, the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court must be drawn up in a clear, precise and unequivocal manner. That is not the case so far as Article 23(3) of the model contract is concerned, even in the light of the additional explanations provided by the AAMS at Stanley's request.

90 It must be held that an operator such as Stanley cannot be criticised for deciding not to apply for a licence in the absence of legal certainty, with uncertainty remaining as to whether its business model complied with the provisions of the contract to be signed if a licence were to be granted. Where such an operator has been excluded, in breach of EU law, from the earlier tendering procedure — at issue in *Placanica and Others* — it must be held that the new tendering procedure has not in fact remedied the exclusion of that operator.

91 In the light of all those considerations, the answer to the second part of the question is that Articles 43 EC and 49 EC must be interpreted as precluding the imposition of penalties for engaging in the organised activity of collecting bets without a licence or police authorisation on persons who are linked to an operator which was excluded, in breach of EU law, from an earlier tendering procedure, even following the new tendering procedure intended to remedy that breach of EU law, in so far as that tendering procedure and the subsequent award of new licences have not in fact remedied the exclusion of that operator from the earlier tendering procedure.

92 It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court and, in particular, the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(2)(a) and (3) of the model contract, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.

Costs

93 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 (Fourth Chamber) hereby rules:

1. **Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of European Union law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.**

2. **Articles 43 EC and 49 EC must be interpreted as precluding the imposition of penalties for engaging in the organised activity of collecting bets without a licence or police authorisation on persons who are linked to an operator which was excluded, in breach of European Union law, from an earlier tendering procedure, even following the new tendering procedure intended to remedy that breach of European Union law, in so far as that tendering procedure and the subsequent award of new licences have not in fact remedied the exclusion of that operator from the earlier tendering procedure.**

3. **It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court and, in particular, the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(2)(a) and (3) of the model contract, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.**

[Signatures]