OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 20 May 1999 *

I — Introduction

1. This preliminary reference by the Consiglio di Stato (Italian Council of State, hereinafter 'the national court') raises the question whether the Court's interpretation in *Schindler* [1] of the Treaty rules on freedom to provide services in the context of national restrictions on the sale of lottery tickets is equally applicable to national legislation regulating the taking of bets.

II — Legal and factual context

2. Mr Diego Zenatti (hereinafter the 'defendant') runs what the national court has described as a centre for the exchange of information on bets and has acted since March 1997 as an intermediary in Italy for a British company specialising in taking bets, SSP Overseas Betting Ltd (hereinafter 'SSP'). The defendant passes on bets placed by Italian clients on sporting events abroad by faxing or sending via the Internet betting forms completed by its clients, with attached photocopies of bank transfer documents. He also receives photocopies sent by SSP and transmits them to his clients. The defendant states that he merely acts as an intermediary and denies engaging in bookmaking or having any influence on the terms of the betting transaction, which are fixed by SSP in London. He is paid a percentage of the turnover arising from bets submitted to SSP. He states that he does not act exclusively on behalf of SSP and describes his business as a data transmission centre, which is open to all persons who wish to transmit data either within Italy or abroad.

3. The Questore di Verona (Public Prosecutor, Verona, hereinafter 'the Prosecutor') ordered the defendant on 16 April 1997 to cease taking bets, because these activities were subject to the requirement of an authorisation which the defendant did not possess and to which — pursuant to Article 88 of the Italian Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (hereinafter 'the 1931 Decree') — he was not entitled. The defendant requested the Tribunale Amministrativo Regionale del Veneto (Regional Administrative Court, Veneto, hereinafter 'the Tribunale') to review the legality of the Prosecutor's decision and to take interim measures.

* Original language: English.

1 — Case C-275/92 [1994] ECR I-1039.

The Tribunale ordered the contested decision to be suspended. The Prosecutor appealed to the national court against the suspension of his decision by the Tribunale.

4. Article 88(1) of the 1931 Decree provides as follows:

'No licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is a precondition for the competition to take place ... .'

It then makes express reference to the establishment of a monopoly on betting on horse races in favour of the bodies authorised to conduct such events.

5. Article 88(1) of the 1931 Decree is considered by the national court to have been amended by the general provisions of Article 19 of Law No 241 of 7 August 1990, introducing new rules on administrative procedure and rights of access, as amended by Article 2 of Law No 537 of 24 December 1993. This substitutes for the licensing process referred to in Article 88(1), a procedure whereby a notice of commencement of activity is submitted by the person concerned to the competent public authority, attesting to compliance with any legal requirements. The authority has 60 days in which to verify such compliance. However, this procedural change does not appear to have affected the prohibition on taking of bets expressed by the 1931 Decree.

6. The organisation of betting is permitted in respect of sporting events run by the Comitato Olimpico Nazionale Italiano (the national Olympic Committee, hereinafter 'CONI') and of horse races. The Minister for Finance fixes the levy to be paid from gross betting receipts from these events to CONI [2] and to the Unione Nazionale Incremento Razze Equine (the national equine organisation, hereinafter 'UNIRE') [3] respectively. The use to which these monies are put is also regulated by the same legislative instruments, provision being made for investment in sporting infrastructure and training, particularly in poorer areas, and for the support of horse racing and of horse breeding. Article 6 of Legislative Decree No 496 of 14 April 1948 reserved to CONI and UNIRE the right to take bets in respect of events organised by them or under their supervision. If they did not wish to exercise this role, the Ministry of Finance could, by virtue of Article 2 of that Legislative Decree, either organise betting directly itself or entrust this task to persons who furnished adequate financial and moral guarantees as defined by the

2 — Article 3(231) of Law No 549 of 28 December 1995, as amended by Article 24 of Law No 449 of 27 December 1997.

3 — Article 12(1) of Presidential Decree No 169 of 8 April 1998.

Ministry's inspectorate general of lotteries. It appears that CONI organised a pools forecasting competition in respect of sports for which it was responsible, administered through some 15 000 newsagents, while UNIRE granted between 300 and 350 concessions for on- and off-course totalisator betting on horse races. Legislation adopted between 1995 and 1997 provides for the concessions for the organisation of betting for sporting events governed by CONI and UNIRE to be granted pursuant to a call for tenders, [4] in return for payment of the relevant levies and subject to compliance with ministerial guidelines regarding the proper management of betting activity. [5]

7. Article 718 of the Italian Penal Code penalises the holding or facilitating of a game of chance in a public place or a place open to the public or in private. Article 4 of Law No 401 of 13 December 1989 penalises anyone who unlawfully organises a lottery or bets or prediction contests, which are reserved by law to the State or its agents. Participation in such unlawful betting is also prohibited. Article 1933 of the Italian Civil Code provides that no action lies for payment of a gaming or betting debt, nor can an action lie for recovery where the debt has been paid voluntarily following a game or bet not involving fraud. According to Article 2035 of the Civil Code, there is no right to sue for recovery in the case of services which are contrary to public morality.

8. There are, however, no restrictions on private individuals resident in Italy placing bets directly, by post, telephone, fax or Internet, with bookmakers established outside Italy. None the less, it appears that a foreign bookmaking undertaking which advertised its services in Italy would be liable to prosecution.

9. With regard to the conclusion of contracts with a cross-border character, Article 1327(1) of the Italian Civil Code provides that where, at the request of the promoter, or because of the nature of the activity, or according to custom, a contract is to be executed without any prior communication, the contract is concluded at the time and place where performance begins.

10. The national court considers, pursuant to Article 1327(1) of the Civil Code, that betting contracts passed on to SSP by the defendant on behalf of Italian clients are concluded in Italy, as this is the place where the better, accepting the bookmaker's offer to the public, commences performance by placing the bet and tendering the required

4 — In the case of CONI events, see Article 3(229) and (230) of Law No 549 of 1995, as amended by Article 24(25) and (26) of Law No 449 of 1997; as regards horse races, see Article 3(77) and (78) of Law No 662 of 23 December 1996, as amended by Article 24(27) and (28) of Law No 449 of 1997, and the Ministerial Decree of 15 June 1998.

5 — These guidelines on the running of the betting business are set out in Article 2 of Decree No 174 of the Minister for Finance of 2 June 1998.

sum of money. Article 88(1) of the 1931 Decree is, therefore, applicable, in its view, due to this link between the conclusion of the betting contract and Italian territory.

11. The national court takes the view that the ruling in *Schindler* regarding national regulation of lotteries can be applied by analogy to the Italian legislation on betting. It states that the Italian rules are not discriminatory. They are founded upon social and ethical repugnance to private enrichment from games of chance and to an economically unproductive activity which is injurious to thrift and individual dignity. The interest in controlling betting on public policy grounds is illustrated by Article 718 of the Penal Code and by Article 4 of Law No 401 of 1989; the importance of public morality concerns is illustrated by Articles 1933 and 2035 of the Civil Code. It refers the following question to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

'Do the Treaty provisions on the provision of services preclude rules such as the Italian betting legislation in view of the social policy concerns and of the concern to prevent fraud that justify it?'

III — Observations

12. Written and oral observations have been submitted by the defendant, the Kingdom of Spain, the Italian Republic, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden and the Commission of the European Communities. Written observations only were submitted by the Federal Republic of Germany and the Kingdom of Norway, while oral observations were also submitted by the Kingdom of Belgium and the French Republic.

13. The defendant claims that his activity is not unlawful under Italian law, as he does not himself organise betting. He compares his activity to the placing of bets by individuals by internet or with credit cards. He also argues that the betting contracts are subject to United Kingdom rather than Italian law. In his view, the betting contract is concluded at the moment of payment of the bet in Britain, so that United Kingdom courts have jurisdiction in respect of contractual disputes between Italian betters and SSP.

14. The defendant submits that the Court's reasoning in *Schindler* is not applicable in his case, as betting on sporting events is not a game of chance but of informed prediction of the result.

15. Furthermore, the defendant invokes the reasoning in *Reisebüro Broede* v *Sandker*, in which the Court held that freedom to provide services under Article 59 of the EC Treaty (now, after amendment, Article 49 EC) 'may be restricted only by rules which are justified by overriding reasons in the general interest, in so far as that interest is not safeguarded by the rules to which the provider of the service is subject in the Member State where he is established'. [6] In this regard, he stresses that the activity of SSP is subject to authorisation and strict supervision in the United Kingdom. The amounts involved in his activities are too small to permit money laundering. In addition, his business could, if necessary, be subjected to a levy in order to fund sporting activity in Italy. Furthermore, the defendant asserts that Italy's policy is inconsistent, as more damaging types of gambling, such as lotteries, are freely permitted and widely advertised in the country.

16. The defendant claims to be an access provider within the meaning of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [7] and of European Parliament and Council Directive 97/13/EC of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services. [8] He relies upon the eighth recital in the preamble to Directive 90/388/EEC, which identifies only a limited number of possible justifications of restrictions on the freedom to supply telecommunications services, and on the 25th recital, which states that telecommunications services should not be subject to any restriction as regards free access by users to such services, except where this is warranted by an essential requirement in proportion to the objective pursued.

17. The Commission and the Member States which have submitted observations argue that betting constitutes an economic activity which, in this case, falls within the scope of the Community rules on freedom to provide services. Whether or not the defendant's activity constitutes the organisation of betting under Italian law, or involves the conclusion of contracts governed by Italian private law, is not material to the question whether, as a matter of Community law, Italy may suppress it because of its intrinsic links with betting operations in the United Kingdom. The Commission and Sweden raise the possibility that the Treaty provisions on establishment may be applicable, depending on the nature of the relationship between the defendant and SSP. The Commission notes that the right of establishment can be exercised through the appointment of an independent agent on a permanent basis in another Member State, [9] while adding that the result would be the same in either case.

6 — Case C-3/95 [1996] ECR I-6511, paragraph 28.

7 — OJ 1990 L 192, p. 10.

8 — OJ 1997 L 117, p. 15.

9 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21.

18. The Commission and the various Member States are unanimous in submitting that the Italian legislation is a justified restriction on the provision of services. The judgment in *Schindler* makes express reference to other types of gambling. [10] Common features of the two cases include the cross-border character of the transactions, involving competitions whose rules are set by companies established abroad, making supervision by the authorities of the relevant Member State impossible. All agree that Member States have a wide discretion to adopt non-discriminatory measures, [11] in keeping with their socio-cultural traditions, restricting or prohibiting the organisation of lotteries or games of chance by undertakings established either in their territory or elsewhere in the Community, in the interests of the protection of consumers and their families and of the prevention of crime, or in order to finance charitable, cultural or sporting activities. However, Italy stresses that the organisation of betting is, in principle, prohibited in its territory, on grounds of human dignity and of public order and public morality, and that it is permitted on an exceptional basis to serve the merely secondary objective of funding socially desirable projects.

IV — Analysis

19. I should observe, first of all, that the taking of bets by bookmakers clearly constitutes an economic activity and that the same holds true for the activities of the defendant, who transmits bets and proof of payment from customers to a bookmaker and the results of bets and any winnings from the bookmaker to his customers. [12] In circumstances where the activity in question is not totally prohibited in all the Member States, neither the questionable morality of betting, nor the element of chance involved, nor the recreational aspect of such activity, nor the regulation by many Member States of the use of profits arising therefrom, deprives it of its economic character. [13]

20. Secondly, the regulation of betting and bookmaking and of related activities such as those of the defendant has not been harmonised at Community level. I do not accept the defendant's argument that harmonisation of certain rules regarding the provision of telecommunications services deprives the Member States of the power to regulate the content of material transmitted by telephone, fax or internet. First, it does not appear that Directives 90/388/EEC and 97/13/EC apply to what might be described as the retail-level activities of the defendant. It follows, secondly, that the possible essential requirements justifying restrictions on the use of the public telecommunications network listed in the eighth recital in the preamble to Directive 90/388/EEC, such as security of network

10 — Loc. cit., paragraph 60.

11 — See Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12.

12 — *Schindler*, loc. cit., paragraph 19.

13 — Ibid., paragraphs 31 to 35.

operations and interoperability, are not relevant to the defendant's activities and cannot be taken as excluding other grounds for national regulation of his activity.

21. It is necessary, next, to determine whether the regulation of the defendant's economic activities in relation to betting falls to be examined under the Treaty provisions on freedom to provide services (Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC)) or under those guaranteeing the right of establishment (Article 52 of the EC Treaty (now, after amendment, Article 43 EC)). Although the criteria applicable both to the identification of restrictions on the exercise of these rights and to the possible justification of such restrictions are essentially the same, a potential practical difference arises from the fact that a service provider may only be subjected to national restrictions, imposed in the general interest, in so far as that interest is not safeguarded by rules applied in his State of establishment. [14] As will be seen below, this is of relevance to one of the two principal grounds of justification invoked by Italy in the present case.

22. The defendant is himself established in Italy. However, it can be argued that his activities constitute the provision of cross-border services of two types: passing on bets from Italian-based clients to SSP and acting on behalf of SSP in Italy. The '*Tourist Guides*' cases suggest that the former type of cross-border economic activity can constitute a service, even though it is undertaken by and on behalf of persons who are all established in a single Member State. [15] However, the category of services is, in the scheme of the Treaty, a residual category of economic activities, so that the provisions on services are subordinate to those on the right of establishment. [16] The concept of establishment is a broad one, relating essentially to stable and continuous participation in the economic life of a Member State other than that where an economic actor originates, whereas services are understood as normally pursued on a temporary basis. [17] It is worthwhile quoting the Court's remarks in this regard in *Gebhard*:

'[T]he temporary nature of the activities has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host

14 — Case 205/84 *Commission* v *Germany*, loc. cit., paragraph 34 et seq.; Case C-43/93 *Vander Elst* v *Office des Migrations Internationales* [1994] ECR I-3803, paragraph 16; *Reisebüro Broede* v *Sandker*, loc. cit., paragraph 28.

15 — Case C-154/89 *Commission* v *France* [1991] ECR I-659; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727. It is possible for a service provider to challenge restrictions imposed by his own State of establishment; see, for example, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 29 to 31.

16 — See the first paragraph of Article 60 of the EC Treaty; Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 (hereinafter '*Gebhard*'), paragraph 22.

17 — Ibid., paragraphs 25 and 26.

Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.' [18]

The Court has also observed, in Case 205/84 *Commission* v *Germany*, that an insurance undertaking which maintains a permanent presence in another Member State comes within the scope of the Treaty provisions on establishment even if that presence does not take the form of a branch or agency, but consists merely of an office managed by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. [19] Such a form of establishment may be contrasted with the provision of services via an intermediary who is not an authorised agent of the foreign undertaking. [20] In the present case, the defendant states that he does not act exclusively for SSP because his transmission centre sends messages, documents and data of all sorts on behalf of clients. It is not apparent that he acts for any other bookmakers. The possibility that the defendant's relationship with SSP is one which is more permanent and more closely bound up with the promotion of SSP's business in his region of Italy than that of a simple provider of occasional telecommunications services is evidenced by the fact that he is paid on the basis of betting turnover rather than in accordance with the volume of material transmitted. However, in the absence of any other evidence of the nature of the defendant's relationship with SSP, I think it preferable to approach the case, as the national court has done thus far, as one relating to services, while it is, of course, a matter for the national court to verify that this is appropriate before reaching final judgment in the case. Should it decide otherwise, the remarks, in the text which follows, regarding home-State regulation of SSP's activities will, of necessity, have to be discounted, but the rest of my analysis would still be applicable.

23. It is useful, as a next step in my analysis, to note certain similarities and certain differences between the context of this case and that of *Schindler*. First, an arguable, but in my view usual, distinction may be made between lotteries and betting on sporting events on the ground that the latter involves an element of skill absent from the former. [21] However, it is the personal, social, moral and economic consequences of gambling of all kinds which underlie both Italy's arguments in favour of its regulation of the sector and the Court's acceptance of certain arguments of this type in *Schindler*. [22] Such arguments may, of course, apply with greater or lesser force depending on the type of gambling to which they are applied. Thus, for example, the disproportion between the stake and the potential winnings is normally much

18 — Ibid., paragraph 27; see also *Reisebüro Broede* v *Sandker*, loc. cit., paragraph 21.

19 — Loc. cit., paragraph 21.

20 — Ibid., paragraph 16.

21 — See the Opinion of Advocate General Gulmann in *Schindler*, loc. cit., footnote 1.

22 — See the general references to gambling in the first and second sentences of paragraph 60 of the judgment in *Schindler*.

greater in the case of lotteries than in the case of betting. [23]

24. The most significant difference between the present case and *Schindler* is that the latter case involved a total prohibition on the type of gambling at issue, i.e. large lotteries. That prohibition was considered by the Court to be an indistinctly applicable restriction. [24] Italian law, on the other hand, permits the organisation of betting on sporting events in certain circumstances. Although this is done through an exception to a general prohibition, it appears to be, in substance, a restriction imposed on the provision of organised betting services (or, as the case may be, on the establishment of betting undertakings) under the guise of the grant of special or exclusive rights to two organisations, CONI and UNIRE. [25] Of these, UNIRE is the more relevant, as it does not appear that CONI organises betting on individual events separately from its pools competition. As the restriction on SSP's and the defendant's activities directly affects access to the Italian betting market, it is evidently one which falls within the prohibition in the first paragraph of Article 59 of the EC Treaty. [26]

25. Although the grant of such special or exclusive rights to national undertakings inevitably results in a disadvantage to foreign service providers operating in the same field, [27] this is not treated as being a form of discriminatory restriction which can be maintained only by application of Article 56 of the EC Treaty (now, after amendment, Article 46 EC) and Article 66 of the EC Treaty (now Article 55 EC). [28] Such restrictions may be justified to the extent that they serve imperative requirements in the general interest. In *Mediawet*, for example, the Court examined the argument that a national restriction on the supply of radio and television services could be justified by reference to cultural policy objectives. [29] Similar justificatory arguments to those considered in *Schindler* may also be examined in the present context.

26. The restriction on the organised provision of betting services in the present case is prohibited by Article 59 of the EC Treaty unless it can be justified by overriding reasons relating to the public interest which are not already satisfied by the rules imposed on such service providers in the Member State in which they are established. [30] The national rules in question must be such as to guarantee the achievement of the intended aim and must not go

23 — See the third sentence of paragraph 60 of the judgment in *Schindler*, ibid.

24 — Loc. cit., paragraph 52.

25 — On the restriction of freedom to provide services through the grant to certain undertakings of special or exclusive rights, see, for example, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraphs 21 to 25 and 33 to 37 (hereinafter '*Mediawet*').

26 — See *Alpine Investments*, loc. cit., paragraph 38.

27 — See *Mediawet*, loc. cit., paragraph 25.

28 — *Mediawet*, loc. cit., paragraph 15.

29 — I share the views expressed in this regard by Advocate General Gulmann at paragraphs 75 and 76 of his Opinion in *Schindler*, loc. cit., and by Advocate General La Pergola at paragraph 28 of his Opinion of 4 March 1999 in Case C-124/97 *Markku Juhani Läärä and Others* v *Kihlakunnansyyttäjä and Suomen Valtio* (hereinafter '*Läärä*').

30 — It cannot be plausibly argued that the Italian rules are protected by Article 90(2) of the EC Treaty (now Article 86(2) EC); see the Opinion of Advocate General La Pergola in *Läärä*, loc. cit., paragraph 30.

beyond that which is necessary in order to achieve that objective. [31] The possible justifications are essentially three in number, as they were in *Schindler*: the prevention of crime and the protection of consumers against fraud; avoidance of the stimulation of demand for gambling and of the consequent moral and financial harm to participants and to society in general; and the interest in ensuring that gambling activity is not organised for personal or commercial profit but solely for charitable, sporting or other good causes.

27. Italy rightly accepts the secondary function of the third justification pleaded. The Court stated in *Schindler* that the possibility of exploiting certain forms of gambling to finance public interest activities could not, in itself, be regarded as an objective justification of a restriction on a fundamental freedom, although it also remarked, cryptically, that it was 'not without relevance'. [32] It was not mentioned in the operative part of the judgment, which referred only to social policy and the prevention of fraud. I share the reservations expressed by Advocate General La Pergola in his Opinion in *Läärä* [33] that such a ground of justification of a restriction is of an essentially economic character and consequently unacceptable. This assessment is reinforced by the comment of the agent for Portugal that, if gambling were opened to competition, with the consequent reduction in revenue from pre-existing gambling monopolies, the authorities would be compelled either to abandon socially useful expenditure financed in this way or to raise taxes.

28. I must, therefore, consider, firstly, the possible justification of the Italian legislation based on consumer protection and prevention of crime. It is already clear from the judgment in *Schindler* that this is a permissible ground on which to impose a restriction on cross-border gambling activity. [34] It is noteworthy that the Court, when addressing this question in *Schindler*, did not advert, as Advocate General Gulmann had done, [35] to the possible existence of equivalent safeguards in the Member State where the relevant service provider was established — safeguards which he thought were sufficient in that case. The Court's silence in this regard may be because other national supervisory mechanisms, no matter how stringent, were not considered to be equivalent in protective effect to a comprehensive prohibition of the gambling activity in question. In any event, there is no reason to conclude that a comparison of regulatory regimes need not be undertaken by the national court in the present case, in order to verify the necessity for the Italian restriction. When engaging in that exercise, the national court should, of course, bear in mind that it is the efficacy of the United

31 — *Mediawet*, loc. cit., paragraphs 17 and 19; *Gebhard*, loc. cit., paragraph 37; *Reisebüro Broede* v *Sandker*, loc. cit., paragraph 28.

32 — Loc. cit., paragraph 60.

33 — Loc. cit., paragraphs 11, 12 and 33.

34 — Loc. cit., paragraphs 60 and 63 and paragraph 3 of the operative part.

35 — Loc. cit., paragraph 97 of his Opinion.

Kingdom's supervision of SSP's *overseas* activity, such as arises from its relations with the defendant, which should be the subject of comparison with the Italian regime. [36]

29. However, quite apart from the results of any such comparison, the necessity for the prohibition of organised betting outside the framework of the special or exclusive rights granted to UNIRE and CONI on consumer-protection and crime-prevention grounds is placed in doubt by the very fact that lawful channels for sporting betting exist in Italy under the responsibility of these two organisations. One assumes that these two organisations' gambling activities are subject to what is deemed by the authorities to be an adequate level of supervision on such grounds, without this resulting in an outright prohibition. Unless it can be demonstrated to the national court that some special risk attaches to the defendant's dealings with SSP, which cannot be countered through the application to each of the existing supervisory mechanisms in the two relevant jurisdictions, with the result that there is a greater danger of fraud or other crime than in the purely domestic context, it must be concluded that the prohibition of the taking of bets outside the limited authorised channels is overly restrictive and, therefore, cannot be justified on these grounds. The mere fact that the betting transactions involved are cross-border in character does not appear to me to be sufficient in itself to justify a greater degree of restriction.

30. On the other hand, the argument in favour of justification of the Italian rules by reference to a social policy of countering the harmful moral and financial effects of gambling on individuals and on society through limiting betting opportunities is, in my opinion, more plausible. This, again, is a ground of justification which was expressly accepted by the Court in *Schindler*. [37] Given the particular nature of gambling, which can incite individuals to spend a large proportion of their disposable income in the hope of merely contingent rewards, Member States are entitled to take steps to avoid stimulating demand in order to protect the players and to maintain order in society. [38] National authorities have, in this regard, particular latitude to determine what steps to take, in the light of specific social and cultural features, especially the widely differing moral and social attitudes to gambling in the Member States. [39] Thus, the fact that certain forms of gambling are permitted, subject to necessary controls, while others, which differ in their objects, rules and methods of organisation, are prohibited, may be the acceptable consequence of national choices of a socio-cultural character. [40]

36 — Joined Cases 110/78 and 111/78 *Ministère Public and A.S.B.L.* v *Van Wesemael* [1979] ECR 35, paragraph 30.

37 — Loc. cit., paragraphs 58, 60, 61 and 63 and paragraph 3 of the operative part.

38 — Ibid., paragraphs 57, 59, 60 and 61.

39 — Ibid., paragraph 61.

40 — Ibid., paragraphs 51 and 61; see also paragraphs 69 and 70 of the Opinion of Advocate General Gulmann.

31. Furthermore, a Member State may, in my view, take steps to restrict access to a form of gambling, such as betting, which it considers to be harmful but which is not completely outlawed. In so far as the potential demand for certain types of gambling activity is greater than is considered compatible with social order, it is permissible for Member States to impose restrictions based on an assessment of needs informed by national social policy.[41] I would agree with the view expressed by Advocate General Gulmann in *Schindler* that such a justification of restrictions is available even to Member States which have, in general, relatively liberal gambling regimes; otherwise, they would be prevented from acting against what, in their view, are the most dangerous forms of gambling.[42] Limitation of supply is obviously impossible if gambling undertakings established in other Member States are free to provide services in a Member State which pursues such an objective.

32. Thus, the grant of special or exclusive rights through a restrictive system of licences or concessions may be consistent with such a policy of limitation of supply, provided this is adopted in pursuit of a genuine diminution in gambling opportunities and in the stimulation of demand through advertising. It would not be acceptable, on the other hand, if the grant of licences or concessions were simply a means of channelling the proceeds of virtually unrestricted demand into the coffers of the national authorities or of bodies engaged in public-interest activities. A Member State may not, in my view, engage either directly or through certain privileged bodies in the active promotion of officially organised gambling with the primary objective of financing social activities, however worthy, under the guise of a morally justified policy of control of gambling. This would, as I have already said, constitute a merely economic objective. It is, however, for the national court to determine whether this condition is satisfied in the case of the Italian market for betting on sporting events, in the light of the actual practice of UNIRE and that of the bookmakers to whom UNIRE has granted concessions. If it is so satisfied, the exclusion from the Italian betting market of undertakings such as SSP and the defendant, which do not appear even to have applied for a concession, may be deemed to be a justified restriction on their freedom to provide services.

33. To conclude my analysis, I would like to make two final observations. First, the exercise of Italy's police power in its own territory through the justified imposition of restrictions on betting cannot be affected either by the fact that contracts such as those entered into by the defendant and SSP with their clients may not be governed by Italian law, which is exclusively a private-law matter, or by the fact that the actual bookmaking is undertaken in the United Kingdom. Secondly, the fact that indivi-

41 — See the Opinion of Advocate General Gulmann in *Schindler*, ibid., paragraphs 40 to 42 and 49.

42 — Ibid., paragraph 101 of the Opinion.

duals resident in Italy can freely place bets with overseas bookmakers by telephone, fax or Internet does not affect my analysis, because the likely effects of such activity on social order seem very small compared to those of unrestricted provision of organised betting services through representatives operating in Italian territory.

V — Conclusion

34. In the light of the foregoing, I recommend that the Court respond to the question referred by the Consiglio di Stato as follows:

National rules which grant special or exclusive rights to certain undertakings to take bets on sporting events and consequently restrict the freedom to provide bookmaking services are not incompatible with the Treaty provisions on the provision of services if they are imposed as part of a consistent and proportionate national policy of curbing the harmful individual and social effects of betting.