

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 29 March 2007<sup>1</sup>

1. In 1999, the Italian authorities renewed 329 horse-race betting licences without a prior tendering procedure. The Commission seeks a declaration that Italy thereby infringed the requirements of transparency and publicity which flow from the Treaty provisions on freedom of establishment and freedom to provide services. Italy denies the infringement, and is supported by Denmark and Spain, although Italy and the interveners each put forward different arguments for dismissing the Commission's action.

**Community law**

2. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State.

3. Article 49 EC prohibits restrictions on freedom to provide services within the 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.

4. Pursuant to Articles 45 and 46 EC (read, in so far as Article 49 is concerned, in conjunction with Article 55 EC), those prohibitions do not apply to activities which in a Member State are connected, even occasionally, with the exercise of official authority, and do not prejudice the applicability of national provisions entailing special treatment for foreign nationals on grounds of public policy, public security or public health.

5. In addition, the Court has repeatedly held that restrictions on freedom of establishment and freedom to provide services may be justified by overriding reasons in the public interest which do not go beyond what is

<sup>1</sup> — Original language: English.

necessary to achieve their aim and which are applied irrespective of nationality.<sup>2</sup>

exclude them, in particular because of differences between Member States' systems.<sup>4</sup>

6. At the material time, the award of public service contracts in general was regulated at Community level by Council Directive 92/50/EEC.<sup>3</sup> For contracts over a certain value, specific obligations are laid down, including in particular an obligation to advertise the procedure at Community level other than in certain strictly defined circumstances. However, the eighth recital in the preamble to the directive states that it covers the provision of services only in so far as it is based on contracts, and that the provision of services on other bases is not covered. The Commission had proposed that public service concessions be included in the scope of the directive but the Council decided to

7. The Court has however held that, although public service concessions are excluded from the scope of the public procurement directives, public authorities awarding them must comply with the fundamental rules of the EC Treaty, in particular the principle of non-discrimination on the ground of nationality.<sup>5</sup> Articles 43 and 49 EC are specifically applicable to public service concessions,<sup>6</sup> and the principle of equal treatment of tenderers applies even in the absence of discrimination on grounds of nationality.<sup>7</sup> Those principles impose a duty of transparency on the public authority, which must ensure a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed.<sup>8</sup>

2 — See, for example, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32.

3 — Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1); now repealed and replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). In the water, energy, transport and telecommunications sectors awards were regulated by Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84); now repealed and replaced by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1).

8. In 2000, the Commission published an interpretative communication on conces-

4 — See further paragraph 46 et seq. of the judgment in Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

5 — See *Telaustria*, cited in footnote 4, paragraph 60; Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 16; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 46; and Case C-410/04 *ANAV* [2006] ECR I-3303, paragraph 18.

6 — See *Parking Brixen*, paragraph 47; *ANAV*, paragraph 19.

7 — See *Parking Brixen*, paragraph 48; *ANAV*, paragraph 20.

8 — See *Telaustria*, paragraphs 61 and 62, *Parking Brixen*, paragraph 49, and *ANAV*, paragraph 21.

sions under Community law,<sup>9</sup> in which it sets out its understanding of the ways in which Community law impinges on the award of concessions.<sup>10</sup>

10. In 1999, it was decided by ministerial decree<sup>13</sup> to increase the number of betting centres in Italy from 329 to 1 000. 671 new concessions were put out to tender and awarded. The 329 existing concessions were simply renewed for six years from 1 January 2000.<sup>14</sup> A law was subsequently enacted providing that the 329 concessions were to be reawarded in accordance with the 1998 presidential decree, but would remain valid until that time.<sup>15</sup>

## Facts

9. Until 1996, the organisation of horse-race betting in Italy was the responsibility of UNIRE, the national union for the improvement of horse breeding, which awarded a number of concessions for that purpose. Since that year,<sup>11</sup> betting has been under the aegis of the Finance and Agriculture Ministries. According to a 1998 presidential decree,<sup>12</sup> those ministries are to award concessions on the basis of tendering procedures conducted in accordance with Community law. As a transitional measure, concessions awarded under the previous regime (which did not involve public tendering) were extended until the end of 1998 or, if tendering procedures could not be organised by then, the end of 1999.

## Procedure

11. On 24 July 2001 the Commission sent the Italian Republic a formal letter pursuant to Article 226 EC, concerning a number of matters related to betting, including the renewal of the 329 concessions in issue. It considered the circumstances of the renewal to be incompatible with the requirements of transparency and publicity flowing from Articles 43 and 49 EC.

9 — OJ 2000 C 121, p. 2.

10 — A more recent interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (OJ 2006 C 179, p. 2) expressly does not deal with concessions, although some of the guidance which it contains might be thought to be of a sufficiently general nature to do so.

11 — Under Law No 662/1996 (GURI, 28 December 1996, No 303).

12 — Presidential Decree No 169/1998 (GURI, 1 June 1998, No 125).

13 — Ministerial decree of 7 April 1999 (GURI, 14 April 1999, No 86).

14 — Ministerial directive of 9 December 1999, and ministerial decision of 21 December 1999 (GURI, 23 December 1999, No 300).

15 — Decree-Law No 452/2001 (GURI, 29 December 2001, No 301), converted after amendment into Law No 16/2002 (GURI, 27 February 2002, No 49).

12. In reply, the Italian authorities referred to the adoption of the abovementioned law.<sup>16</sup>

the obligation to advertise which follow from the provisions of the EC Treaty on the freedom of establishment in Article 43 et seq. and the freedom to provide services in Article 49 et seq., and

13. Considering that law to have remained a dead letter in practice, the Commission sent a reasoned opinion to Italy on 18 October 2002, inviting it to comply within two months.

— order the Italian Republic to pay the costs.

14. On 10 December 2002, the Italian authorities invoked the need to certify the financial status of the holders of the concessions still in force, pending organisation of the tendering procedures.

16. Italy asks the Court to dismiss the action and order the Commission to pay the costs.

15. On 17 June 2004, having received no information as to the completion of the certification process and the opening of the new tendering procedures, the Commission brought the present action, asking the Court to:

— declare that, the Ministry of Finance having renewed 329 licences for the taking of bets on horse races without a prior competitive tendering procedure, the Italian Republic has infringed the general principle of transparency and

17. Denmark and Spain have been granted leave to intervene in support of Italy, and have submitted statements in intervention. Finland and the Netherlands were also granted leave to intervene, but Finland later withdrew from the proceedings and the Netherlands has made no submission.

18. No hearing has been requested, and none has been held.

<sup>16</sup> — See point 10 and footnote 15.

**Assessment**

19. The Commission's argument may be summarised as follows. Betting concessions of the kind in issue are public service concessions for the purposes of Community law. As such, they do not fall within the scope of Directive 92/50 but are subject to the general requirements of non-discrimination, transparency and publicity which flow from Articles 43 and 49 EC. The simple renewal of 329 existing concessions without any tendering procedure is not compatible with those requirements. Only the grounds set out in Articles 45 and 46 EC can justify a derogation, and none of those grounds is present. As regards those 329 concessions, the Italian authorities had not brought their practice into compliance with Community law within the two-month period laid down in the reasoned opinion sent on 18 October 2002, or indeed by the time the application was lodged some 18 months later.

20. In the light of the facts as set out in points 9 and 10 above, which do not appear to be in dispute, and of the case-law summarised in point 7, it seems to me that the Commission has established a *prima facie* case for the declaration which it seeks.

21. Italy relies in its defence on a number of measures adopted in 2003 and the public-interest requirements underlying them.

22. Spain puts forward considerations relating to the specific features of the authorisation and organisation of gambling activities which, it asserts, the Commission has failed to take into account.

23. Denmark takes issue with the Commission's interpretation of the Court's judgment in *Telaustria* as to what the requirement of transparency means in circumstances such as those of the present case.

24. Having regard to the differences between the three sets of arguments put forward by the three Member States, I shall deal with them separately.

*Italy*

25. Italy submits that the measures which it has taken are legitimate. It refers in par-

particular to a decree-law of 2003 and a decision adopted thereunder.<sup>17</sup> The decree-law provided for verification of the financial status of all concession-holders, following difficulties which had arisen as to their ability to pay what turned out to be excessively high levies required of them. Further measures sought to alleviate those difficulties by various means, and the decision maintained existing concessions in force until that aim was attained, but not beyond 31 December 2011. All those measures were justified by the need to ensure continuity, financial stability and a proper return on investment for concession-holders, thereby discouraging recourse to clandestine betting activities, until the current concessions could be reawarded on the basis of tender procedures.

26. The Commission points out that measures taken in 2003 can have no bearing on the infringement. The question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion.<sup>18</sup>

17 — Decree-law 147/2003 of 24 June 2003 (GURI, 25 June 2003, No 145), converted into Law 200/2003; Decision 107/2003 of 14 October 2003 of UNIRE (which originally awarded the 329 concessions in question).

18 — The Commission cites Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899, paragraph 11. See, more recently, Case C-183/05 *Commission v Ireland* [2007] ECR I-137, paragraph 17.

27. I agree.

28. The Commission none the less goes on to consider whether the reasons given for adopting the 2003 measures could have justified the situation in 2002, and concludes that they could not.

29. I find nothing to support the Commission's statement that only justifications set out expressly in Articles 45 or 46 EC could be available, to the exclusion of other overriding reasons in the public interest. The Court has repeatedly accepted that such reasons may justify limitations on freedom of establishment or freedom to provide services.<sup>19</sup>

30. However, as the Commission rightly points out, to benefit from any justification — whether on the basis of a Treaty provision or on that of an overriding reason in the public interest — the measures in question must be suitable for achieving the objective sought and must not go beyond what is necessary to attain it.<sup>20</sup>

19 — See, for example, in the particular context of betting, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraphs 59 and 60; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 45.

20 — See *Gambelli*, paragraph 65; Case C-150/04 *Commission v Denmark* [2007] ECR I-1163, paragraph 46.

31. In addition, considerations of a purely economic or administrative nature cannot justify restricting the freedoms laid down by the Treaty.<sup>21</sup>

32. Of the objectives put forward by Italy, none seems to fall within the categories provided for in Articles 45 or 46 EC. As regards other (non-economic) overriding reasons, only that of preventing clandestine betting may be said, at least in principle, to be in the public interest.

33. However, according to the undisputed facts of the case, it was decided in 1999 to increase the number of betting concessions in Italy from 329 to 1 000. That target was duly achieved by awarding 671 new concessions after a tendering procedure and simply renewing the 329 old concessions. In those circumstances it is difficult to imagine — and Italy's defence does not explain — how the renewal or maintenance of the 329 old concessions without a tendering procedure could serve to prevent clandestine betting, or how the absence of transparency could be necessary for that purpose.

34. I therefore find that Italy has put forward no argument capable of rebutting the Commission's case.

### *Spain*

35. Spain submits that the Commission's application is inadequately grounded because it fails to take account of a number of essential considerations. First, as recognised by the Court,<sup>22</sup> moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, may imply a margin of appreciation for national authorities in regulating those activities in the interests of consumer protection and public order. Second, a transitional period is required when replacing one concession regime by another and can justify extending certain aspects of the previous regime. In both those regards, the Italian authorities show a clear intention to achieve full compliance with Community requirements. Third, complex social interests are involved, in particular the use of

21 — See, for example, Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 22, or Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraph 35.

22 — *Gambelli*, cited in footnote 19, paragraph 63, and the case-law cited there: Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-124/97 *Lääriä and Others* [1999] ECR I-6067 and Case C-67/98 *Zenatti* [1999] ECR I-7289.

betting revenue as the sole source of financing the improvement of horse breeding. Fourth, there are current serious financial difficulties in the Italian horse-race betting sector, whose origins date from earlier than the 2003 measures cited by Italy in its defence.

ments. And the expressed intention of the Italian authorities is not relevant to an assessment of the factual situation at the end of the period specified in the Commission's reasoned opinion.

### *Denmark*

36. However, none of those considerations seems capable of justifying the situation of which the Commission complains, namely the renewal and subsequent maintenance, without transparency or publicity, of 329 old concessions concurrently with the award of 671 new concessions by means of a tendering procedure.

37. The particular nature of betting and gambling has indeed been recognised by the Court, but not as being capable of justifying restrictions on Treaty freedoms which do not meet imperative requirements in the general interest, which are not suitable for achieving the objective which they pursue or which go beyond what is necessary in order to attain it.<sup>23</sup> Social and financial considerations of the kinds cited by Spain in its third and fourth considerations, or practical difficulties involved in changing from one regime to another, do not constitute such require-

38. Denmark raises a number of related issues concerned essentially with the extent of the obligations which flow from the Treaty with regard to public contracts or concessions not subject to the procurement directives. In particular it contends that a tendering procedure is not necessarily obligatory, and that the use of the word 'advertising' in the English version of the *Telaustria* judgment wrongly suggests a more demanding requirement than the equivalent of 'publicity' in other language versions. It asks the Court to specify whether the requirement implies a need for the awarding authority to seek future contractors or concession-holders openly, for potential tenderers to have access to tender documents, or for the awarding authority simply to publicise the fact that it intends to award a contract or concession.

39. Denmark's submissions in that regard are very similar to those which it made in

23 — *Gambelli*, paragraphs 65 and 67.

another case currently pending before the Court, *Commission v Finland*.<sup>24</sup> The questions which it raises are important, and I would agree that some clarification of the law may be desirable.<sup>25</sup> However, the general clarification which Denmark seeks seems aimed primarily at answering certain questions of general interest to the Member States, rather than at determining the outcome of the present infringement action.

41. I do not consider, therefore, that Denmark's submissions can affect the outcome of the present case.

### *Concluding remarks*

40. In the present case, it is not contested that the 329 concessions in question were quite simply and automatically renewed. Even if it might be argued that the Italian authorities publicised to some extent the fact that the procedure was to take place, it is quite obvious that the degree of publicity vis-à-vis those concessions (as opposed to the 671 new concessions awarded after a tendering procedure) was not, on any view, 'sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed'.<sup>26</sup>

42. I thus take the view that, regard being had to the Court's case-law and to the undisputed facts of the case, the Commission has sufficiently established the infringement which it seeks to have declared, and that none of the submissions by the Member States adequately rebuts the Commission's arguments in the circumstances.

43. I should make it clear that, in so doing, I express no opinion as to other circumstances in which renewal of horse-race betting concessions without a tendering procedure might be justified by public-interest requirements. Nor do I consider it necessary to specify the precise kind or degree of publicity required where a tendering procedure is conducted. Suffice it to recall that, in the present case, 671 concessions were awarded after a tendering procedure which, in the Commission's view, complied with Community law, while 329 were at the same time renewed without the slightest degree of transparency or publicity which could have afforded interested parties access to the award procedure.

24 — Case C-195/04; see in particular point 79 et seq. of my Opinion delivered on 18 January 2007.

25 — See further 'Seeing through transparency: the requirement to advertise public contracts and concessions under the EC Treaty', Adrian Brown, *Public Procurement Law Review* 2007, p. 1. It may also be noted that the Commission's 2006 interpretative communication (cited in footnote 10) is currently the subject of annulment proceedings brought by Germany before the Court of First Instance in Case T-258/06, in which several Member States and the European Parliament have applied to intervene.

26 — See point 7 and footnote 8 above.

**Costs**

44. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be

ordered to pay the costs if they have been applied for in the successful party's pleadings and, under Article 69(4), Member States which intervene in the proceedings are to bear their own costs. The Commission has applied for costs against Italy.

**Conclusion**

45. I am therefore of the opinion that the Court should

- declare that, the Ministry of Finance having renewed 329 licences for the taking of bets on horse races without a prior competitive tendering procedure, the Italian Republic has infringed the general principle of transparency and the obligation to advertise which follow from the provisions of the EC Treaty on the freedom of establishment in Article 43 et seq. and the freedom to provide services in Article 49 et seq., and
  
- order the Italian Republic to pay the costs, except for those of the intervening Member States, which should bear their own costs.