

JUDGMENT OF THE COURT (Grand Chamber)

8 September 2009\*

In Case C-42/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de Pequena Instância Criminal do Porto (Portugal), made by decision of 26 January 2007, received at the Court on 2 February 2007, in the proceedings

**Liga Portuguesa de Futebol Profissional,**

**Bwin International Ltd,** formerly Baw International Ltd,

v

**Departamento de Jogos da Santa Casa da Misericórdia de Lisboa,**

\* Language of the case: Portuguese.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann (Rapporteur), J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: Y. Bot,  
Registrars: K. Sztranc-Sławiczek and B. Fülöp, Administrators,

having regard to the written procedure and further to the hearing on 29 April 2008,

after considering the observations submitted on behalf of:

- the Liga Portuguesa de Futebol Profissional and Bwin International Ltd, by E. Serra Jorge, advogado, and by C.-D. Ehlermann and A. Gutermuth, Rechtsanwälte,
  
- the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, by V. Rodrigues Feliciano, procurador-adjunto,
  
- the Portuguese Government, by L. Inez Fernandes, M.L. Duarte and A. Matos Barros, acting as Agents,

- the Belgian Government, by A. Hubert and L. Van den Broek, acting as Agents, assisted by P. Vlaemminck, advocaat,
  
- the Danish Government, by J. Liisberg, acting as Agent,
  
- the German Government, by M. Lumma, acting as Agent,
  
- the Greek Government, by N. Dafniou, O. Patsopoulou and M. Tassopoulou, acting as Agents,
  
- the Spanish Government, by F. Díez Moreno, acting as Agent,
  
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,
  
- the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,
  
- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Slovenian Government, by T. Mihelič, acting as Agent,
  
  
  
  
  
  
  
  
  
  
- the Finnish Government, by J. Heliskoski, acting as Agent,
  
  
  
  
  
  
  
  
  
  
- the Norwegian Government, by P. Wennerås and J.A. Dalbakk, acting as Agents,
  
  
  
  
  
  
  
  
  
  
- the Commission of the European Communities, by E. Traversa and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2008,

gives the following

### **Judgment**

<sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 56 EC.

- 2 The reference has been made in the course of proceedings between, on the one hand, the Liga Portuguesa de Futebol Profissional ('the Liga') and Bwin International Ltd ('Bwin'), formerly Baw International Ltd, and, on the other, the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Santa Casa') concerning fines imposed on the Liga and Bwin by the directors of Santa Casa on the ground that they had infringed the Portuguese legislation governing the provision of certain games of chance via the internet.

## **Legal framework**

### *The regulation of games of chance in Portugal*

- 3 In Portugal games of chance are, in principle, prohibited. However, the State has reserved the right to authorise, in accordance with the system which it deems most appropriate, the operation of one or more games directly, through a State body or a body controlled directly by the State, or to grant the right to operate such games to private entities, whether profit-making or not, by calls for tender conducted in accordance with the Code of Administrative Procedure.
- 4 Games of chance in the form of lotteries, lotto games and sports betting are known in Portugal as games of a social nature ('jogos sociais') and the operation of such games is systematically entrusted to Santa Casa.
- 5 Each type of game of chance organised by Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the various games offered by it, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the method of selecting authorised distributors, and the methods and periods for payment of prizes, are covered by government regulation.

- 6 The first type of game in question was the national lottery (Lotaria Nacional), which was established by a royal edict of 18 November 1783, and a concession was awarded to Santa Casa, the concession being renewed regularly thereafter. Today that lottery consists in the monthly drawing of numbers by lot.
  
- 7 Following a number of legislative developments, Santa Casa acquired the right to organise other games of chance based on the drawing of numbers by lot or on sporting events. This led to the introduction of two games involving betting on football matches called 'Totobola' and 'Totogolo', respectively enabling participants to bet on the result (win, draw or loss) and the number of goals scored by the teams. There are also two lotto games, namely Totoloto, in which six numbers are chosen from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called 'Joker', which consists in the drawing of a single number by lot. Lastly, there is also the Lotaria Instantânea, an instant game with a scratch card, commonly called 'raspadinha'.

*The provision of games of a social nature via the internet*

- 8 In 2003 the legal framework governing lotteries, lotto games and sports betting was adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet. Those measures feature in Decree-Law No 282/2003 of 8 November 2003 (*Diário da República* I, series A, No 259, 8 November 2003). They seek essentially, first, to license Santa Casa to distribute its products by electronic means and, secondly, to extend Santa Casa's exclusive right of operation to include games offered by electronic means, in particular the internet, thereby prohibiting all other operators from using those means.
  
- 9 Article 2 of Decree-Law No 282/2003 confers on Santa Casa, through its Departamento de Jogos (Gaming Department), exclusive rights for the operation by electronic means

of the games in question and for any other game the operation of which may be entrusted to Santa Casa, and states that that system covers all of the national territory, and includes, in particular, the internet.

10 Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences:

‘(a) the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;

(b) the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;

...’

11 Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in, inter alia, Article 11(1)(a) and (b) of that Decree-Law. For legal persons, the fine is to be not less than EUR 2 000 or more than three times the total amount deemed to have been collected from organising the game in question, provided that the triple figure is greater than EUR 2 000 but does not exceed a maximum of EUR 44 890.

*The organisation and activities of Santa Casa*

- 12 The activities of Santa Casa were, at the material time, regulated by Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa (*Diário da República* I, series A, No 195, 26 August 1991), as amended by Decree-Law No 469/99 of 6 November 1999 (*Diário da República* I, series A, No 259, 6 November 1999) ('Decree-Law No 322/91').
- 13 The preamble to Decree-Law No 322/91 emphasises the importance of the various aspects of Santa Casa — historical, social, cultural and economic — and concludes that the Government must pay 'specific and continuous attention in order to prevent negligence and failures ... while nevertheless granting [Santa Casa] the broadest possible autonomy in the management and operation of games of a social nature'.
- 14 Under Article 1(1) of its statutes, Santa Casa is a 'legal person in the public administrative interest'. The administrative organs of Santa Casa consist, by virtue of Article 12(1) of its statutes, of a director and a board of management. Pursuant to Article 13 of those statutes, the director is appointed by decree of the Prime Minister, the other members of Santa Casa's board of management being appointed by decree of the members of the Government under whose supervision Santa Casa falls.
- 15 Under Article 20(1) of its statutes, Santa Casa has been given specific tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social situations of serious deprivation, and primary and specialised health care.
- 16 The earnings generated by the operation of games of chance are allocated between Santa Casa and other public-interest institutions or institutions involved in social projects. Those other public-interest institutions include associations of voluntary fire

crews, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, and the cultural development fund.

- 17 The operation of games of chance falls within the responsibilities of the Gaming Department of Santa Casa. That department is governed by regulations adopted, as in the case of Santa Casa's statutes, by Decree-Law No 322/91, and it has its own administrative and control organs.
- 18 In accordance with Article 5 of the regulations governing the Gaming Department, the administrative organ of that department consists of the director of Santa Casa, who is the *ex officio* chairman, and two deputy directors appointed by joint decree of the Minister for Employment and Solidarity and the Minister for Health. Pursuant to Articles 8, 12 and 16 of the regulations of the Gaming Department, the majority of the members of the committees in charge of games, draws and complaints are representatives of the public authorities, that is to say, the General Tax Inspectorate and the District Government in Lisbon. Accordingly, the chairman of the complaints committee, who has a casting vote, is a judge appointed by decree of the Minister for Justice. Two of the three members of that committee are appointed by decree of the chief tax inspector and decree of the chief administrative officer (*prefect*) of the District of Lisbon respectively, while the third member of the committee is appointed by the director of Santa Casa.
- 19 The Gaming Department has the powers of an administrative authority to open, institute and prosecute proceedings concerning offences involving the illegal operation of games of chance in relation to which Santa Casa has the exclusive rights, and to investigate such offences. Decree-Law No 282/2003 confers upon the directors of the Gaming Department, *inter alia*, the necessary administrative powers to impose fines as provided for under Article 12(1) of that Decree-Law.

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

- 20 Bwin is an on-line gambling undertaking which has its registered office in Gibraltar. It offers games of chance on an internet site.
- 21 Bwin has no establishment in Portugal. Its servers for the on-line service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's internet site or by some other means of direct communication. Stakes on that site are paid by credit card in particular, but also by other means of electronic payment. The value of any winnings is credited to the gambling account opened for the gambler by Bwin. The gambler may use that money in order to gamble or ask for it to be transferred to his bank account.
- 22 Bwin offers a wide range of on-line games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Santa Casa.
- 23 Betting is on the results of football matches and other sporting events. The different games offered include bets on the result (win, draw or loss) of football matches in the Portuguese championship equivalent to the Totobola and Totogolo games operated exclusively by Santa Casa. Bwin also offers on-line betting in real time, in which the odds are variable and change as the sporting event in question unfolds. Information such as the match score, the time elapsed, yellow and red cards given, and so on, are displayed in real time on the Bwin internet site, thus enabling gamblers to place bets interactively as the sporting event unfolds.

24 The order for reference states that the Liga is a private-law legal person with the structure of a non-profit-making association, made up of all the clubs taking part in football competitions at professional level in Portugal. It organises, inter alia, the football competition corresponding to the national First Division and is responsible for the commercial operation of that competition.

25 The Liga and Bwin stated in the observations which they submitted to the Court that a sponsorship agreement, concluded by them on 18 August 2005 for four playing seasons starting in 2005/2006, made Bwin the main institutional sponsor of the First Football Division in Portugal. Under the terms of that agreement, the First Division, previously known as the 'Super Liga', changed its name first to the Liga betandwin.com, and then subsequently to the Bwin Liga. In addition, the Bwin logos were displayed on the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The Liga's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

26 Subsequently, in exercising the powers conferred on them by Decree-Law No 282/2003, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of EUR 75 000 and EUR 74 500 respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of that Decree-Law. Those sums represent the aggregated amounts of two fines imposed on each of the Liga and Bwin for promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.

27 The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law.

28 In those circumstances, the Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court, Oporto) (Portugal) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘[Do] the exclusive rights granted to Santa Casa, when relied on against [Bwin], that is to say, against a provider of services established in another Member State in which it lawfully provides similar services, which has no physical establishment in Portugal, [constitute] an impediment to the free provision of services, in breach of the principles of freedom to provide services, freedom of establishment and the free movement of payments enshrined in Articles 49, 43 and 56 of the EC Treaty [?]

[Is it] contrary to Community law, in particular to the abovementioned principles, for rules of domestic law such as those at issue in the main proceedings first to grant exclusive rights in favour of a single body for the operation of lotteries and off-course betting and then to extend those exclusive rights to “the entire national territory, including ... the internet”[?]

### **The application to have the oral procedure reopened**

29 By document lodged at the Court Registry on 30 October 2008, Bwin requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.

30 In accordance with that provision, the Advocate General was heard in connection with that application.

31 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, *inter alia*, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37 and case-law cited).

32 However, neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion.

33 In its application, Bwin essentially confines itself to commenting on the Opinion of the Advocate General, emphasising in particular that, in relation to a number of points of fact, the Advocate General based himself on the observations submitted by Santa Casa and the Portuguese Government, without taking into account the arguments put forward by Bwin or the Liga in order to challenge those points, or noting that those points were the subject of dispute.

34 The Court takes the view that it has all the material necessary in the present case to enable it to reply to the question referred by the national court and that the case does not have to be examined in the light of an argument that has not been the subject of discussion before it.

35 Consequently, there is no need to order the reopening of the oral procedure.

**The admissibility of the reference for a preliminary ruling**

- 36 In its observations submitted to the Court, the Italian Government argues that the reference for a preliminary ruling is inadmissible on the ground that the question referred by the national court requests the Court of Justice to give a ruling on the compatibility of a provision of national law with Community law.
- 37 In that connection, it should be noted that the cooperative arrangements established by Article 234 EC are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36).
- 38 It must be pointed out that, by its question, the national court is not asking the Court of Justice to rule on the compatibility with Community law of the specific Portuguese legislation on games of chance, but rather on certain aspects only of that legislation, which are set out in general terms. More specifically, these relate to the prohibition of all service providers other than Santa Casa, including service providers established in other Member States, from offering via the internet in Portugal games of chance which Santa Casa is authorised to operate, and any similar games. Such a reference is admissible.
- 39 In addition, the Italian, Netherlands and Norwegian Governments and the Commission of the European Communities question the admissibility of the reference for a preliminary ruling on the ground that it does not provide sufficient information on the content and objectives of the Portuguese legislation applicable to the dispute in the main proceedings.

40 With regard to the information that must be provided to the Court in connection with a reference for a preliminary ruling, it should be noted that that information does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the Governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, according to settled case-law, it is firstly necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based. Secondly, the order for reference must set out the precise reasons why the national court is unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the national court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link which it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (see *Placanica and Others*, paragraph 34 and the case-law cited).

41 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 dispute in the main proceedings. Nevertheless, in the light of the division of responsibilities between the national courts and the Court of Justice, the referring court cannot be required to make all the findings of fact and of law required by its judicial function first before it may then bring the matter before the Court. It is sufficient that both the subject-matter of the dispute in the main proceedings and the main issues raised for the Community legal order may be understood from the reference for a preliminary ruling, 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.

42 In the main proceedings, the order for reference satisfies those requirements. The referring court has defined the factual and legislative context of the question which it has referred to the Court. In so far as the objectives of the Portuguese legislation on games of chance are not set out in the order for reference, the Court will be required to answer the question referred by having particular regard to the objectives referred to by the parties to the main proceedings and by the Portuguese Government before the

Court. Accordingly, the Court takes the view that, in those circumstances, it has all the material necessary to enable it to reply to that question.

43 In the light of all those considerations, the reference for a preliminary ruling must be held to be admissible.

### **The question referred for a preliminary ruling**

44 By its question, the national court seeks a ruling from the Court on the interpretation of Articles 43 EC, 49 EC and 56 EC.

#### *The applicability of Articles 43 EC and 56 EC*

45 In so far as the question referred by the national court refers not only to Article 49 EC but also to Articles 43 EC and 56 EC, it should be made clear from the outset that it is not apparent, in the light of the information in the file, that those last two articles might be applicable to the dispute in the main proceedings.

46 As to whether Article 43 EC is applicable, it is common ground that Bwin carries on its activities in Portugal exclusively via the internet, without resorting to intermediaries in Portugal and thus without having established a principal place of business or secondary establishment in that State. Similarly, it is not apparent from the file that Bwin had any intention to establish itself in Portugal. Consequently, there is nothing to suggest that the Treaty provisions on freedom of establishment might be applicable to the dispute in the main proceedings.

47 As to whether Article 56 EC is applicable, it must be noted that any restrictive effects which the national legislation at issue in the main proceedings might have on the free movement of capital and payments would be no more than the inevitable consequence of any restrictions on the freedom to provide services. Where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it (see, to that effect, Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34 and case-law cited).

48 In those circumstances, the question referred by the national court must be answered in the light of Article 49 EC alone.

*The scope of the question referred for a preliminary ruling*

49 The dispute in the main proceedings concerns the marketing in Portugal of a number of games of chance played on an electronic medium, namely the internet. Bwin, a private operator established in another Member State, offers games of chance in Portugal exclusively via the internet, and the administrative offences laid down in Article 11(1)(a) and (b) of Decree-Law No 282/2003, of which the Liga and Bwin are accused in the main proceedings, concern exclusively conduct in relation to games of chance organised by electronic means.

50 The question referred by the national court must therefore be construed as asking in essence whether Article 49 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators, such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that first Member State.

*The existence of restrictions on the freedom to provide services*

- 51 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).
- 52 It is accepted that the legislation of a Member State which prohibits providers such as Bwin, established in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 54).
- 53 Such legislation also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.
- 54 Consequently, as indeed the Portuguese Government expressly concedes, the legislation at issue in the main proceedings gives rise to a restriction of the freedom to provide services enshrined in Article 49 EC.

*The justification of the restriction of the freedom to provide services*

- 55 It is necessary to consider to what extent the restriction at issue in the main proceedings may be allowed as a derogation expressly provided for by Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest.
- 56 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (see, to that effect, *Placanica and Others*, paragraph 46 and case-law cited).
- 57 In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (see, inter alia, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraph 15; Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 32; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraphs 56 and 60, and *Placanica and Others*, paragraph 47).
- 58 The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 36, and Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34).

- 59 The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).
- 60 In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, *Placanica and Others*, paragraph 49).
- 61 In that context, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55).
- 62 The Portuguese Government and Santa Casa submit that the main objective pursued by the national legislation is the fight against crime, more specifically the protection of consumers of games of chance against fraud on the part of operators.
- 63 In that connection, it should be noted that the fight against crime may constitute an overriding reason in the public interest that is capable of justifying restrictions in respect of operators authorised to offer services in the games-of-chance sector. Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers.

- 64 The Court has also recognised that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation (see *Läärä and Others*, paragraph 37, and *Zenatti*, paragraph 35).
- 65 The Portuguese Government submits that the grant of exclusive rights to Santa Casa to organise games of chance ensures that the system will function in a secure and controlled way. First, Santa Casa's long existence, spanning more than five centuries, is evidence of that body's reliability. Second, the Portuguese Government points out that Santa Casa operates under its strict control. The legal framework for games of chance, Santa Casa's statutes and government involvement in appointing the members of its administrative organs enable the State to exercise an effective power of supervision over Santa Casa. That system, based on legislation and Santa Casa's statutes, provides the State with sufficient guarantees that the rules for ensuring fairness in the games of chance organised by Santa Casa will be observed.
- 66 In that regard, it is apparent from the national legal framework, set out in paragraphs 12 to 19 of the present judgment, that the organisation and functioning of Santa Casa are governed by considerations and requirements relating to the pursuit of objectives in the public interest. The Gaming Department of Santa Casa has been given the powers of an administrative authority to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.
- 67 In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.
- 68 As to whether the system in dispute in the main proceedings is necessary, the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the

internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.

- 69 In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offers services in that sector via the internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.
- 70 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.
- 71 Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.
- 72 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime.

73 Consequently, the answer to the question referred is that Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

### **Costs**

74 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Grand Chamber) hereby rules:

**Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.**

[Signatures]