

OPINION OF ADVOCATE GENERAL  
MAZÁK  
delivered on 23 February 2010<sup>1</sup>

**I — Introduction**

1. The questions referred for a preliminary ruling by the Landesgericht Linz (Regional Court, Linz) (Austria) focus the Court's attention once again on the relationship between the Community freedoms and Member States' legislative policy on games of chance.

2. In the context of the case-law which is already quite extensive, the Court of Justice is called upon on this occasion to rule on whether Articles 43 EC and 49 EC are complied with by a national law which restricts the operation of games of chance in gaming establishments exclusively to public limited companies whose seat is in the Member State in question, limits the length of concessions to 15 years and allows holders of a concession to advertise to encourage participation in the games in question.

**II — Legal background**

*A — The Austrian Law on Games of Chance*

3. In Austria, games of chance are regulated by the Federal Law on Games of Chance (Glücksspielgesetz), in the 1989 version.<sup>2</sup>

**1. Objectives of the Law on Games of Chance**

4. The Law on Games of Chance contains no provision stating the goals which the Republic of Austria is pursuing in regulating games of chance. The preparatory documentation does, however, shed some light on the matter, stating that its objectives are regulatory and fiscal in nature.

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

<sup>2</sup> — BGBl. 620/1989.

5. With regard to the regulatory goal, the preparatory documents state that 'ideally, a total prohibition on gaming would be the most judicious form of regulation. However, given that, as is well known, a passion for gambling seems inherent in the human condition, ... it is far wiser for that passion to be channelled in the interests of the individual and society. Thus two goals are achieved: gaming is prevented from entering the realm of illegality, as may be observed to happen in States which prohibit games of chance entirely; at the same time, the State retains the possibility of supervising games of chance operated lawfully. The main objective of such supervision must be to protect the individual gambler.'

2. State monopoly on games of chance

7. Paragraph 1 of the Law on Games of Chance defines games of chance as those 'in respect of which winnings and losses are solely or principally dependent on chance.'

8. Paragraph 3 of the Law on Games of Chance establishes a 'State monopoly' over games of chance and provides that the right to organise and operate games of chance is in principle reserved to the State unless otherwise stated in that Law.

3. Liberalised games

9. Sports bets, 'small' slot machines and small-scale lotteries are not subject to the monopoly.

6. As to the fiscal objective, the preparatory documents identify 'an interest on the part of the federal State in being able to derive the maximum possible revenue from the gaming monopoly. ... Therefore, when regulating gaming, the federal government must – whilst observing and protecting the regulatory goal – have the objective that games of chance be operated in such a way that the monopoly produces the maximum possible revenue for it.'

10. Firstly, sports bets are not regarded in Austria as games of chance, as they are not based solely on chance but demand a degree of skill, as well as knowledge on the part of the gambler. They fall within the jurisdiction of the provinces and have been liberalised. Any person who satisfies the statutory conditions is entitled to obtain a licence to organise sports betting in the traditional way or on the internet.

11. Secondly, Paragraph 4 of the Law on Games of Chance excludes from the State monopoly slot machines in respect of which the stake does not exceed EUR 0.50 per game and possible winnings cannot exceed EUR 20 ('small' machines), together with small-prize lotteries, tombolas and raffles. Responsibility for regulating small slot machines was devolved to the provinces. Small-prize lotteries must be authorised by the Federal Ministry of Finance.

may be awarded.<sup>3</sup> The concessionaire must be a capital company with its seat in Austria. Where there are several candidates, the concession will be awarded to the one offering the most favourable prospects of tax revenue to the federal State.

14. Under Paragraph 20 of the Law on Games of Chance,<sup>4</sup> an amount equivalent to 3% of the revenue from the Austrian lotteries and of at least EUR 40 million is made available each year to a fund for the promotion of sporting activities.

#### 4. System of concessions

12. The Federal Minister for Finance may grant the right to organise and operate games of chance under the monopoly by granting concessions to organise lotteries and electronic draws (Paragraph 14 of the Law on Games of Chance) and to operate gaming establishments (Paragraph 21 of the Law on Games of Chance).

15. Paragraph 21 sets out the conditions for operating a casino. The number of casino concessions is limited to a total of 12.<sup>5</sup> Only one concession may be issued per municipal territory. The Law states that concessionaires must be public limited companies with a supervisory board having their seat in Austria and a capital of at least EUR 22 million; in the light of the circumstances they must also offer the local public authorities the best prospects

13. Paragraph 14 of the Law on Games of Chance lays down the conditions for the grant of concessions for lotteries and electronic draws. A single all-embracing concession

3 — Currently held by the Austrian company Österreichische Lotterien GmbH ('ÖLG').

4 — 10 December 2004 version of that Law (BGBl. I, 136/2004).

5 — Currently all held by Casinos Austria AG. They were initially granted to it by administrative order of 18 December 1991 for the maximum period of 15 years. In its written reply to the questions put by the Court of Justice, the Austrian Government confirmed that there had been 'no public call for applicants in respect of the grant of the concessions mentioned by the Court'. At the hearing it stated that the period of the concessions had been extended from 15 to 22 years without any competitive procedure or prior publicity.

of tax revenue, whilst observing the rules laid down in Paragraph 14 of the Law on Games of Chance on the protection of gamblers.

be submitted to the Federal Minister within six months of the end of the financial year.

16. Paragraph 22 of the Law on Games of Chance provides that concessions for games of chance are to be for a maximum period of 15 years.

17. Paragraph 24 of the Law on Games of Chance prohibits concessionaires from establishing branches outside Austria. According to Paragraph 24a of that Law, any extension of the matters covered by an existing concession must be authorised where such extension is not likely to have a negative impact on the tax revenue derived from payments by the gaming establishments.

19. Paragraph 25(3) of the Law on Games of Chance, in its 1989 version, required concessionaires to ban or restrict access to a casino in the case of Austrian nationals lacking the means to participate in games of chance or prohibited from participating therein. It was on the basis of that rule that, following a number of legal actions brought by gamblers, the concessionaire, Casinos Austria AG, was ordered to reimburse major gaming losses. Since the August 2005 reform of the Law on Games of Chance, the concessionaire's repayment obligation is limited to the gambler's actual subsistence needs and its liability is limited to cases in which there was premeditation or gross negligence, with the result that the Law no longer covers situations in which a gambler who, when asked in advance about his capacity to play games of chance, provides incomplete information. The Law also now contains a limitation period of six months.

18. Under Paragraphs 19 and 31 of the Law on Games of Chance, the Ministry of Finance has a general right of supervision over the concessionaire. In that connection, it may inspect the concessionaire's accounts, and its agents authorised for the purpose of exercise of the right of supervision may gain access to the concessionaire's business premises. The Ministry is also represented within the concessionaire undertaking by a 'State commissioner'. Finally, audited annual accounts must

20. Since an amendment to the Law on Games of Chance in 2008, Paragraph 56(1) provides that concessionaires are required to show a responsible attitude in their advertising material. Advertisements are also subject to monitoring by the supervisory authority.

B — *The Austrian Criminal Code*

21. Under Paragraph 168 of the Austrian Criminal Code (Strafgesetzbuch) ‘any person who organises a game which is expressly prohibited or in which the chances of winning depend exclusively or predominantly on luck, or who promotes a meeting organised with a view to such a game taking place, with the intention of making a personal financial gain from such organisation or meeting or of obtaining a financial gain for a third party’ commits an offence.

found Mr Engelmann guilty of unlawfully organising games of chance on Austrian territory in order to obtain a pecuniary advantage. It found him guilty of the offence of organising games of chance contrary to Paragraph 168(1) of the Criminal Code and ordered him to pay a fine of EUR 2000.

24. Mr Engelmann appealed against that judgment to the Landesgericht Linz. Since that court harbours doubts as to the compatibility of the Austrian provisions on games of chance with the Community freedom to provide services and freedom of establishment, it has referred three questions to the Court of Justice for a preliminary ruling under Article 234 EC.

**III — Facts, procedure and questions referred**

22. Mr Engelmann, a German national, operated gaming establishments in Linz, Austria, between the beginning of 2004 and 19 July 2006, and in Schärding, also in Austria, between April 2004 and 14 April 2005. He offered his customers various games including, among others, observation roulette and the card games poker and ‘Two Aces’. Mr Engelmann had not sought a concession to organise games of chance from the Austrian authorities, nor was he the holder of a lawful authorisation issued by the competent authorities of another Member State.

23. In its judgment of 5 March 2007, the Bezirksgericht Linz (District Court, Linz)

25. Those doubts are founded first of all on the fact that, to the best of the national court’s knowledge, the adoption of the applicable provisions of the Law on Games of Chance was not preceded by an analysis of the dangers of gambling addiction or of the possibilities of preventing it either *de jure* or *de facto*, which runs counter to the judgment in Case C-42/02 *Lindman* [2003] ECR I-13519, paragraphs 25 and 26.

26. Secondly, the national court harbours doubts as to whether Austrian policy in the sector of games of chance allowed under concessions is consistent and systematic. In its view there can be a consistent and systematic restriction on games of chance and wagers only where the legislature appraises all areas and sectors of games of chance and then

intervenes according to the potential level of risk or dependency for each type of game. According to the national court, this is not the case in Austria. The Austrian monopoly on games of chance permits substantial amounts of advertising in this sector, in particular for 'TOTO' bets on football matches and lotto jackpot stakes. To that extent, the national court continues, active encouragement to participate in games of chance and betting is thus accepted in Austria.

27. Thirdly, the Landesgericht Linz doubts whether granting concessions only to public limited companies whose seat is in national territory is compatible with the requirements of appropriateness, necessity and proportionality, and whether such a limitation is justified in light of the objectives of combating financial crime, money laundering and gambling addiction.

28. Finally, the Landesgericht Linz mentions Paragraph 24a of the Law on Games of Chance, which expressly seeks to prevent any negative impact on tax revenue from sums paid by gaming establishments. The national court wonders whether this conflicts with the Court's case-law under which restrictions

on the fundamental freedoms in the field of games of chance must pursue the goal of genuinely reducing gaming opportunities and not of creating a new source of finance.

29. According to the national court, if Community law permitted Mr Engelmann to be granted authorisation to operate a gaming establishment without being required, for that purpose, to set up or acquire a public limited company with its seat in Austria, he could in principle apply for a concession. If he had been granted a concession, the definition of an unlawful game of chance for the purposes of Paragraph 168 of the Criminal Code would therefore no longer be satisfied.

30. In those circumstances the Landesgericht Linz decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- '1. Is Article 43 EC ... to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?

2. Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming – such as public sports betting and lotteries – and advertise such gaming (on television and in newspapers and magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made (“TOI TOI TOI – Believe in luck!”)?

31. Written observations were lodged at the Court by Mr Engelmann, the Commission of the European Communities and the Austrian, Belgian, Greek, Spanish and Portuguese Governments. At the hearing on 14 January 2010, oral argument was heard from the representatives of Mr Engelmann, the Commission and the Austrian, Belgian, Greek and Portuguese Governments.

#### IV — Legal appraisal

*A – Preliminary issue: admissibility of the questions referred and potential effect of the Court's decision on Mr Engelmann's situation*

3. Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?

32. This case raises a preliminary issue as to the admissibility of the questions referred to the Court, in that the reply to be given by the Court might have no effect on Mr Engelmann's legal position, which is the subject-matter of the dispute in the main proceedings.

33. As to the first question referred, even if the Court were to rule that the requirement that a company have its seat in Austria is not in conformity with the EC Treaty, the fact is

that Mr Engelmann is a natural person. He would be affected by the Court's answer only if he had been in a position to set up a company in conformity with Austrian legislation (minimum capital and so forth). Nor does the second question referred, concerning advertising of games of chance, have any greater direct link with Mr Engelmann's situation and the facts of the dispute in the main proceedings. However, in both instances the case-law encourages the placing of trust in the national court, which has the task of assessing both the need for a preliminary ruling to enable it to give judgment and the relevance of the questions it refers to the Court.<sup>6</sup>

34. The relevance of the third question referred in regard to the duration of the concessions is much less doubtful and is directly linked to the facts of the dispute in the main proceedings. That is clear from paragraph 63 of the judgment in *Placanica and Others*,<sup>7</sup> in which the Court held that 'in the absence of a procedure for the award of licences which is open to operators who have been unlawfully barred from any possibility of obtaining a licence under the last tender procedure, the

lack of a licence cannot be a ground for the application of sanctions to such operators'.<sup>8</sup>

35. If the Court were to rule that a period of 15 years is not in conformity with the Treaty, the judgment in *Placanica and Others* would apply indirectly.

36. In line with that case-law, it is also appropriate to reply to a question not referred by the national court, but raised before the Court of Justice, which could have an effect on the outcome of the main proceedings: that is the question of the presumed lack of transparency in the renewal of the concessions to operate the casinos.

6 — See Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, paragraph 38; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 30).

7 — Joined Cases C-338/04, C-359/04 and C-360/04 [2007] ECR I-1891.

8 — In *Placanica and Others*, the Court referred to the lack of transparency in the issue of licences for organising sports betting in a case where the gaming undertaking had applied for such a licence. However, the judgment applies the same consequence to the lack of a police authorisation needed by the intermediary (Mr Placanica), who had not lodged an application. In paragraph 67 the Court stated that 'the lack of a police authorisation cannot, in any case, be a valid ground for complaint in respect of persons such as the defendants in the main proceedings, who were unable to obtain authorisations because the grant of an authorisation presupposed the award of a licence – a licence which, contrary to Community law, those persons were unable to obtain'. Nor was a lack of action on the part of the person concerned an obstacle to the admissibility of the question referred for a preliminary ruling in Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 18; see also my Opinion in that case, point 29.



B — *The first question referred*

37. By the first question, the national court wishes essentially to ascertain whether Article 43 EC prohibits legislation of a Member State under which only companies incorporated in the form of a public limited company which have their seat in the territory of that Member State may operate gaming establishments, with the result that that legislation makes it a requirement to set up or acquire such a company in that Member State.

40. The Austrian Government states in particular that the requirements laid down in its national legislation as to the location of the concessionaire undertaking's seat and its legal form are essential in order to ensure that its activity is really supervised. It adds that its legislation does not require the company to have its seat in Austrian territory at the time when it lodges its application or while the application is being examined.

41. The Portuguese Government considers that the order for reference does not contain sufficient information to enable a reply to be given to the first question and therefore that question is inadmissible.

1. Main arguments of the parties

38. Both the Commission and Mr Engelmann are of the view that the answer to this question should be in the affirmative. Nevertheless, the Commission also states that an overriding reason in the public interest, such as the protection of creditors, could none the less justify the requirement for a capital company.

2. Appraisal

(a) Preliminary observation concerning reliance upon freedom of establishment

39. The Austrian, Belgian, Greek and Spanish Governments maintain, on the other hand, that even if the Austrian legalisation restricts freedom of establishment, that restriction could be justified by a reason in the public interest and be proportionate.

42. The national court harbours doubts as to the compatibility with the freedom of establishment (Article 43 EC) of Paragraph 21 of the Law on Games of Chance, which provides

that casino concessionaires must be public limited companies with a supervisory board having their seat in Austria.

43. On an initial reading, this question could be taken to be raising the issue of the freedom to provide services (Article 49 EC), given that it is companies which do not have their seat in the State in which the services are to be provided that may be excluded from being awarded this kind of concession. However, a more detailed scrutiny of the facts of the case in the light of the case-law leads to the conclusion that the approach of the Landesgericht Linz is correct.

44. The case-law has clearly defined the respective scopes of those two freedoms, the key factor being whether the economic operator offers its services, 'on a stable and continuous basis', from an established professional base in the Member State in which the services are to be provided or from an established professional base in another Member State. In the former case the operator comes within the scope of freedom of establishment; in the latter, he is a cross-border service provider coming under the freedom to provide services.<sup>9</sup>

45. For the purposes of Article 43 EC, the concept of 'an established professional base' is to be interpreted widely, incorporating not only the principal physical base of the operator's activity but also any secondary base. As the Court expressly stated in *Gebhard*, 'a person may be established, within the meaning of the Treaty, in more than one Member State, in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries, and, as the Court has held, in the case of members of the professions, by establishing a second professional base' (paragraph 24).<sup>10</sup>

46. Consequently, the essence of Article 43 EC is constituted by '*the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*'.<sup>11</sup>

47. In the present case, the Austrian Law on Games of Chance prevents companies established in other Member States from establishing themselves in Austria by prohibiting them from opening a fixed establishment intended to operate a casino for the duration of any concession. As the Commission indicates in its statement in intervention, since the question referred by the national court relates

9 — See Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 21; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22; and Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraphs 24 and 25.

10 — To the same effect, see Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19, and Case C-101/94 *Commission v Italy* [1996] ECR I-2691, paragraph 12.

11 — Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 20.

solely to ‘physical’ casinos that have to have a commercial presence in Austria, it falls under Article 43 EC. For non-Austrian companies, it is the right to establish themselves in Austria by setting up a second professional base there which is at issue.

(b) The requirement to have a seat in Austria

50. I will examine first the requirement that companies establish their seat in Austria.

48. The obligation imposed on economic operators from other Member States to have their principal establishment in the State in which they wish to offer their services certainly constitutes ‘the very negation of the freedom to provide services’.<sup>12</sup> However the Court has already stated that ‘the provisions of the chapter on services are subordinate to those of the chapter on the right of establishment’.<sup>13</sup>

51. This requirement prevents any participation in the gaming sector in Austria by companies incorporated in another Member State which wish, for that purpose, merely to set up a fixed establishment in Austria (whether it be an agency, branch, subsidiary or other form of establishment). A foreign company which wishes to be a concessionaire of a casino in Austria must set up or acquire another company there; it cannot merely manage the casino in a cross-border fashion by maintaining the gaming establishment as a secondary commercial base only. Consequently, in the light of the case-law examined above, such a requirement constitutes a restriction on freedom of establishment as enshrined in Article 43 EC.

49. The Landesgericht Linz’s first question concerns two of the conditions that Paragraph 21 of the Law on Games of Chance imposes on companies wishing to apply to operate a casino. First, the concessions can be awarded to a public limited company only; secondly, the public limited company must have its seat in Austria. As these two requirements are very different in nature and scope, it is preferable to analyse them separately.

52. Moreover, this is a clear example of direct discrimination against companies whose seat is in another Member State.

53. It is settled case-law that Article 43 EC contains a prohibition on any restriction rendering the exercise of freedom of establishment less attractive; discriminatory measures are the most serious examples of such restrictions.

12 — To that effect, see *Commission v Germany*, paragraph 52; *Commission v Italy*, paragraph 31; and *C-222/95 Parodi* [1997] ECR I-3899, paragraph 31. All those judgments refer, however, to the obligation to open a fixed establishment to offer cross-border services which do not require it, such as certain financial services.

13 — *Gebhard*, paragraph 22.

54. Pursuant to Article 48 EC, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, the freedom of establishment guaranteed by Article 43 EC includes the right to pursue their activity in the Member State concerned through a branch or agency. A company's seat in the above sense therefore serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. Consequently, acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it different treatment solely by reason of the fact that its seat is situated in another Member State would deprive the provision of all meaning.<sup>14</sup>

56. In the present case, Austrian legislation on games of chance introduces direct discrimination in that it prohibits companies having their seat in another Member State from being holders of a concession to operate a casino.

57. Classification as 'direct discrimination' is plainly not neutral: as is well known, discriminatory measures can be justified only by one of the derogations expressly provided for in Articles 45 EC and 46 EC, whereas non-discriminatory restrictions and restrictions involving indirect discrimination may also be justified by 'overriding reasons in the public interest', which is certainly a wider concept.<sup>16</sup>

58. Of the derogations in Articles 45 EC and 46 EC, only public policy, public security or public health in Article 46 EC could possibly be invoked in this case.

55. It is also apparent from the case-law that the rules regarding equality of treatment forbid not only overt discrimination by reason of *nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result*.<sup>15</sup>

59. As in the case of any derogating rule, the Court has always interpreted Article 46 EC restrictively. Indeed, recourse to that justification presupposes the existence of a genuine

14 — See Case 270/83 *Commission v France* [1986] ECR 273, paragraph 18, and Case C-330/91 *Commerzbank* [1993] I-4017, paragraph 13.

15 — *Commerzbank*, paragraph 14, and Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 15.

16 — See Case C-263/99 *Commission v Italy* [2001] ECR I-4195, paragraph 15; Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 28; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraphs 36 and 37.

and sufficiently serious threat affecting a fundamental interest of society.<sup>17</sup>

60. Contrary to the assertions of the Austrian Government, it cannot be maintained that there is any such threat because the Austrian authorities would be unable, if the rule at issue did not exist, to supervise effectively the activities of a gaming undertaking whose principal seat is situated in another Member State. In fact any undertaking established in a Member State can be supervised, and also have sanctions imposed on it, regardless of the place of residence of its managers. Likewise, actual payment of any pecuniary penalty may be assured by setting up a prior guarantee.<sup>18</sup>

61. The Austrian Government also relies on the Court's case-law which, in regard to games of chance, leaves Member States a 'margin of discretion ...', sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of

public order', in accordance with the Member State's own scale of values.<sup>19</sup> That degree of discretion, though real, has its limits. The first is the very prohibition of any measure that is discriminatory in nature. The Austrian Government's argument is consequently not relevant in this case.

62. The Austrian Government submits, finally, that Paragraph 21 of the Law on Games of Chance does not oblige the applicant for a concession to have its seat in national territory during the period when the application is being examined, and that the requirement at issue applies only to the successful candidate and for the duration of the concession. Thus, according to the Austrian Government, it is a proportionate measure. However those arguments are unfounded. First, because that legislation may deter companies established in other Member States from applying, owing to the establishment and installation costs in Austria that they would have to incur if their application were successful. Secondly, and in any event, because the discrimination against foreign undertakings is indeed real as from the time when the concession is granted and any 'proportionality' of the discriminatory measure does not alter that.

17 — See Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, and Case C-114/97 *Commission v Spain* [1998] ECR I-6717, paragraph 46.

18 — See, to the same effect, *Commission v Spain*, paragraph 47.

19 — See Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 32 and 61; Case C-124/97 *Läära and Others* [1999] ECR I-6067, paragraph 14; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 15; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63; *Placanica and Others*, paragraph 47; and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 57.

(c) The public limited company requirement

establishment, it can be justified by objectives in the public interest.

63. The national court is also asking the Court of Justice whether the requirement that the holder of a concession to operate a casino must adopt the legal form of a public limited company is compatible with Article 43 EC.

64. That condition is such as to prevent Community operators – whether Austrian or otherwise – who are natural persons from setting up a secondary establishment in Austria for that purpose. It is therefore a restriction on freedom of establishment.<sup>20</sup>

65. None the less, unlike the nationality condition examined above, the requirement as to a specific legal form is not discriminatory, because it applies to Austrian nationals and those of other Member States without distinction. Consequently, notwithstanding that it constitutes a restriction on freedom of

66. More specifically, those restrictions may be justified by overriding reasons in the public interest where they are suitable for achieving the objective which they pursue and do not go beyond what is necessary in order to attain it. They must in any event, as already stated, be applied without discrimination.<sup>21</sup>

67. Among the ‘overriding reasons in the public interest’ accepted by the Court of Justice as being capable of justifying one of those restrictions are consumer protection and the prevention of fraud and of incitement to squander money on gambling. The Austrian Government relies in this regard on the ‘objective of effective State supervision’ of a sensitive sector such as that of games of chance. It will be for that Government to demonstrate before the national court that the requirement whereby the holder of a concession to operate a casino must be a public limited company is appropriate for attaining that objective, that this solution is proportionate and that the objective cannot be attained if the concessionaire opts for a different legal form.

20 — See, to this effect, *Commission v Portugal*, paragraph 42, and Case C-514/03 *Commission v Spain* [2006] ECR I-963, paragraph 31, which relate to pursuit of the business of private security. In the games of chance sector, see *Gambelli*, in which the Court found that the exclusion of the possibility for capital companies quoted on the regulated markets of the other Member States to obtain licences ‘constitutes prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State’ (paragraph 48).

21 — See, inter alia, *Gambelli*, paragraph 65.

68. I shall simply say that I share the Commission's view in this regard that 'subscription of a minimum amount of capital, as is required for public limited companies by [Community] company law could, for example, serve a social protection objective because it represents a certain threshold of reliability for the pursuit of business activities and ensures a certain degree of protection for creditors when those activities are taken up'. However, it is for the national court to assess whether this restriction on freedom of establishment under the Austrian law at issue in the main proceedings complies with the abovementioned conditions.

betting and lotteries – and advertise such gaming (on television and in newspapers and magazines)'.<sup>7</sup>

# 1. Main arguments of the parties

## C — *The second question referred*

69. The national court wishes to ascertain whether Articles 43 EC and 49 EC prohibit any national monopoly over certain games of chance, such as those played in gaming establishments, where the Member State concerned has no consistent and systematic policy restricting games of chance. The national court considers that the lack of consistency is attributable to the fact that 'the organisers holding a national concession encourage participation in gaming – such as public sports

70. Mr Engelmann contends that Austrian policy in regard to gaming is inconsistent and he offers as evidence of that the fact that there has been a steady increase in the games offered and in advertising expenditure incurred by the monopoly holders in recent years. Conversely, according to the Austrian Government, that growth reflects a desire for 'controlled expansion' in order to provide a substitute for prohibited activities that is at once reliable and attractive. The Austrian Government also submits that a single inappropriate advertising operation (as seems to be relied on by the national court) cannot call the consistency of a concession system into question.

71. The Belgian, Greek and Portuguese Governments observe, citing *Placanica and Others*, that the fact that a certain kind of advertising exists in respect of gaming services does not in itself mean that national policy in the matter is inconsistent for the purposes of Articles 43 EC and 49 EC.

72. Similarly, the Commission states that in order to assess whether the gaming policy applied is consistent and systematic, account must be taken, *inter alia*, of the monopoly holder's strategy in regard to products and advertising and of the existing supervisory machinery.

76. Secondly, the question must be asked whether any inconsistency resulting from advertising by lottery concessionaires can call into question the consistency, and thus the compatibility with the Treaty, of the decision to subject other games such as those played in casinos to a monopoly regime – the issue of sectoral analysis.

## 2. Appraisal

### (a) Advertising

73. The question raised by the national court has as its starting point an assessment of the overall consistency of gaming policy in a Member State. The national court suggests that the State monopoly over casinos is incompatible with the Treaty on the ground that holders of concessions in respect of other forms of gaming which are also subject to a monopoly (such as lotteries) advertise their products.

77. I will first examine whether advertising and a monopoly can coexist in compliance with the Treaties.

78. Examination of the consistency and proportionality of a restrictive measure such as the monopoly on gaming is obviously a broad question; it demands first of all that the objectives of the restrictive rules be determined.

74. The reply calls for a two-stage reasoning process.

75. First, it is necessary to examine to what extent it is possible to advertise games that are subject to a monopoly regime without undermining the consistency of gaming policy – the issue of advertising.

79. In the present case we have only indications as to those objectives. The preparatory documents for the Law on Games of Chance reveal that the legislature was pursuing the twofold objective of channelling gaming towards legality and thus preventing gamblers from being tempted to try illegal games of chance and, at the same time, of supervising gaming activity and protecting gamblers.



80. The preparatory documents show that, in addition to that twofold objective, the legislature was also pursuing a fiscal goal. Mr Engelmann maintains that Austrian policy in the matter lacks consistency because the monopoly's main objective is the fiscal one of obtaining revenue for the State. However, since the national court raises no express question on this point, I shall merely say that under the case-law such an objective 'must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted'.<sup>22</sup> The national court will have to determine the purport of Paragraphs 14 and 21 of the Law on Games of Chance inasmuch as they give priority in regard to the grant of concessions to the candidate who offers the best prospects in terms of tax yield. If that fiscal objective proved to be a principal objective, the monopoly system would, with or without advertising, be contrary to Community law.

81. I will therefore proceed on the basis of the 'channelling' objective which the preparatory documents for the Austrian legislation cite first of all. The intention here is to combat fraud and crime in the sector, orienting demand for gaming towards facilities controlled and supervised by the State.

82. The Court has already ruled on the compatibility between that objective of

'channelling' the demand for gaming and some advertising. In *Placanica and Others*, it ruled that 'a policy of controlled expansion in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming – and, as such, activities which are prohibited – to activities which are authorised and regulated. ... in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity. This may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques' (paragraph 55).

83. The principle has therefore already been established in the case-law.<sup>23</sup> The national court will have to determine whether the gaming facilities offered by the holders of a national concession and the advertising that they deploy are appropriate in scope to constitute an 'attractive' alternative to prohibited gaming, without thereby stimulating the demand for games of chance excessively – which would be contrary to the objective of protecting the individual gambler that is also referred to in the preparatory documents for

22 — *Zenatti*, paragraph 36, and *Gambelli*, paragraph 62.

23 — It would be otherwise if the objective of the restriction at issue were to reduce gaming opportunities, as that objective has not hitherto been set against advertising activity. None the less, the Court will be called upon to rule on this point in the near future in Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others*, pending before the Court. That does not seem to be so in the case of the Austrian legalisation, as the preparatory documents merely cite in general terms supervision of illegal gaming with the principal goal of protecting the individual player.

the Law. Advertising and expansion of gaming must in the final analysis be proportionate.

for which such disproportionate and incongruous advertising is deployed.

84. I am in agreement on this point with the opinion expressed by the Commission in its pleading, which states that ‘with regard to advertising, the national court must also verify whether the *de facto* monopoly holder’s strategies are merely intended to inform potential customers of the existence of products and serve to guarantee regulated access to games of chance, or whether those strategic measures invite and stimulate active participation in such games.’

87. Although, as is emphasised by settled case-law, ‘the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought’,<sup>24</sup> the compatibility of the restrictions on freedoms that they choose to impose must be analysed in an individual manner without any cross-over as between games.

85. Nonetheless, the Austrian Government pertinently notes in its pleading that ‘an individual advertising measure cannot compromise the lawfulness of a national system of protection even if it should as such be excessive’. I consider that the national court will have to examine the consistency of the restriction at issue in light of the concessionaires’ advertising strategy but taking account at the same time of the effectiveness of the control that the State exercises over that commercial activity.

88. In *Placanica and Others*, the Court expressly stated that, when carrying out the consistency and proportionality test, ‘the restrictive measures imposed by the national legislation should ... be examined in turn.’<sup>25</sup> That would exclude a joint examination of the monopoly over two different games of chance such as lotteries, on the one hand, and games played in casinos, on the other.

(b) Sectoral analysis

89. In addition, each game is different from the others. One games of chance sector may lend itself more readily to the development of fraudulent or criminal activities; another may be more dangerous from the point of view of addiction. The various sectors cannot

86. In any event, any lack of consistency would in my view affect only the monopoly

<sup>24</sup> — *Placanica and Others*, paragraph 48.

<sup>25</sup> — *Placanica and Others*, paragraph 49.

consequently be treated in the same way and it is for the Member State to justify its decision.

90. Thus a Member State is free to treat two gaming monopolies differently, just as it is free to ban television advertising for certain alcoholic beverages and not for others.<sup>26</sup>

91. This sectoral analysis is incompatible with the argument, relied on at the hearing by the Austrian Government, that more advertising of less dangerous games such as lotteries contributes to the objective of channelling gamblers towards those games and deterring them from playing other more addictive games such as those played in casinos.

the award of concessions for a period 15 years and the exclusion from the tendering procedure of candidates not possessing the nationality of the Member State are contrary to Articles 43 EC and 49 EC. In regard to the period of the concessions, Mr Engelmann relies on the primarily fiscal objective pursued by the Austrian legislation and in particular by Paragraphs 14(5) and 21(4) and (5) of the Law on Games of Chance, which provide that in the event that several applicants apply for a concession at the same time, it will be granted to the one offering the best prospects of tax revenue.

93. The Belgian and Austrian Governments and the Commission propose that the reply to the third question should be more qualified, distinguishing between any exclusion of non-nationals from the tendering procedure, on the one hand, and the duration of concessions, on the other.

#### D — *The third question referred*

##### 1. Main arguments of the parties

92. With regard to the third question referred, Mr Engelmann maintains that both

94. In regard, first of all, to the exclusion of candidates not possessing the nationality of the Member State, both the Commission and the Belgian Government state that such a discriminatory provision would be contrary to Articles 43 EC and 49 EC. The Austrian Government asserts that Austrian legislation does not exclude potential candidates having their seat in another Member State from the procedure for the award of concessions, since the requirements as to the candidate's legal form and seat do not need to be satisfied at the stage of submission of applications

<sup>26</sup> — See, to this effect, Case C-262/02 *Commission v France* [2004] ECR I-6569.

for the award of a concession. The Portuguese Government argues, on the other hand, that, under the Court's case law, the Treaty, whilst prohibiting discrimination, does not contain any obligation to treat foreign service providers more favourably than nationals of the Member State where the supplies of services are made.

95. As to the duration of concessions, both the Commission and the Austrian Government take the view that the limitation to a period of 15 years is reasonable and proportionate in the light of the investments which concessionaires have to make. Such a provision may therefore in their view constitute a justified restriction under Articles 43 EC and 49 EC.

## 2. Appraisal

96. By its third and last question, the national court is asking the Court of Justice about the compatibility with the Treaty of national legislation which sets the duration of all concessions for operating games of chance and gaming establishments at 15 years and which excludes from the tendering procedure

candidates from the Community who do not possess the nationality of that Member State.

97. In my view, there is nothing, first, to prohibit fixing the period of concessions in the field of gaming at 15 years. It is essential to lay down a limit in time on the length of concessions, in order to guarantee some measure of openness to competition in the medium term. None the less, a period of 15 years does not appear to be excessively long having regard to the level of investment which this type of activity generally requires. Too short a period would require concessionaires to pursue an aggressive commercial policy which would be irreconcilable with public interest objectives. It is therefore a non-discriminatory restriction which is both consistent and proportionate.

98. In the context of this question, Mr Engelmann has also maintained that concessions for games of chance in Austria 'are granted behind closed doors to CASAG and ÖLG', implying that the Austrian authorities extended the period of those concessions before the date of expiry in order to avoid a tendering procedure and consequently the possibility of other operators obtaining a concession.

99. When questioned on this point at the hearing, the Austrian Government did not deny its veracity, confirming that the period of the concessions to operate casinos had been extended to 22 years without prior publicity.

100. Pursuant to already well established case-law, the general principle of transparency requires ‘ensuring, for the benefit of any potential tenderer, 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>27</sup>

102. Secondly, the national court reiterates its concern in regard to the possible discriminatory effect of the rules on the grant of gaming concessions. The Landesgericht Linz here refers to the alleged exclusion of non-nationals at the stage of the award procedure (which the Austrian Government denies), whilst the first question referred relates to exclusion from operating activity under the concessions.

101. Accordingly, if it transpired that the concessions at issue were extended without publicity or being opened to competition, the Austrian authorities would be able to justify such a procedure only by reliance on one of the derogations in Articles 45 EC and 46 EC or on an overriding reason in the public interest and, in the latter case, provided that the lack of transparency is an appropriate means of attaining that public interest objective and does not go beyond what is necessary for realising the objective.<sup>28</sup>

103. Notwithstanding that nuance, I consider that the reply to the present question must be the same as the reply given to the first question, since the considerations set out above may readily be transposed to any restriction on Article 49 EC. The prohibition on nationals of other Member States from participating in the tendering procedure thus constitutes a restriction on the freedom to provide services (since mere participation in the procedure does not require a secondary establishment in the country in question) and it is a discriminatory restriction which cannot be justified in this case.

27 — Case C-324/98 *Teleaustria and Telefonadress* [2000] ECR I-10745, paragraphs 61 and 62, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 49.

28 — Case C-260/04 *Commission v Italy* [2007] ECR I-7083, whilst it concerned an action for failure to fulfil obligations and turned on different facts, could provide guidance for the national court. In that case, the Court ruled that it ran counter to Articles 43 EC and 49 EC to renew 329 licences for collecting bets on race courses without having recourse to a competitive procedure. It stated that such renewal could not be justified by the need to discourage clandestinely collecting and allocating bets, since it was not an appropriate means of attaining that objective, going beyond what was necessary in order to preclude operators in the horse-race betting sector from engaging in criminal or fraudulent activities (paragraph 34).

## V — Conclusion

104. I therefore propose that the Court reply to the questions referred as follows:

- ‘(1) Article 43 EC must be interpreted as precluding a legal provision of a Member State under which only public limited companies which have their seat in the territory of that Member State may operate games of chance in gaming establishments.
- (2) The fact that holders of a national concession encourage participation in games of chance and advertise does not necessarily mean that a national policy of restricting games of chance lacks consistency for the purposes of the case-law. It is for the national court to verify whether that advertising is consistent with the objective of providing an “attractive” alternative to prohibited gaming, without thereby stimulating the demand for games of chance excessively. In any event, any lack of consistency would affect only the monopoly engaging in the disproportionate and inconsistent advertising.
- (3) Articles 43 EC and 49 EC preclude a national provision under which all concessions to operate games of chance and gaming establishments are granted on the basis of rules which exclude from the tendering procedure candidates from the Community who do not possess the nationality of that Member State.

Articles 43 EC and 49 EC do not preclude concessions from being limited to a period of 15 years.’