

JUDGMENT OF THE COURT (Fourth Chamber)

8 July 2010*

In Joined Cases C-447/08 and C-448/08,

REFERENCES for a preliminary ruling under Article 234 EC from the Svea hovrätt (Sweden), made by decisions of 8 October 2008, received at the Court on 13 October 2008, in criminal proceedings against

Otto Sjöberg (C-447/08),

Anders Gerdin (C-448/08),

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, K. Schieman (Rapporteur), P. Küris and L. Bay Larsen, Judges,

* Language of the case: Swedish.

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2010,

after considering the observations submitted on behalf of:

- Mr Sjöberg, by U. Isaksson, advokat,
- Mr Gerdin, by S. Widmark and J. Gyllenberg, advokater,
- the Swedish Government, by A. Falk, acting as Agent,
- the Belgian Government, by L. Van den Broeck, acting as Agent, assisted by P. Vlaemminck and A. Hubert, avocaten,
- the Greek Government, by M. Tassopoulou and O. Patsopoulou, acting as Agents,

- the Spanish Government, by F. Díez Moreno, acting as Agent,
- the Austrian Government, by E. Riedl, acting as Agent,
- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the Portuguese Government, by L. Inez Fernandes, P. Mateus Calado and A. Barros, acting as Agents,
- the Norwegian Government, by K. Moen and K. Moe Winther, acting as Agents,
- the European Commission, by E. Traversa, K. Simonsson and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2010,

gives the following

Judgment

- 1 These references for a preliminary ruling concern the interpretation of Article 49 EC.
- 2 The references were submitted in the course of criminal proceedings brought against Mr Sjöberg and Mr Gerdin, who are accused of having infringed Paragraph 54(2) of the Law on Lotteries and Gambling (Lotterilagen, SFS 1994, No 1000), as applicable to the disputes in the main proceedings ('the Lotterilag').

National legal context

- 3 The Lotterilag governs all categories of gambling offered to the public in Sweden.

- 4 The objectives of Swedish gaming policy were summarised as follows in the *travaux préparatoires* for the Lotterilag:

‘The main purpose underlying the gaming policy is ... to have in future a healthy and safe gaming market in which social protection interests and the demand for gaming are provided for in controlled forms. Profits from gaming should be protected and always reserved for objectives which are in the public interest or socially beneficial, that is, the activities of associations, equestrian sports and the State. As has been the case hitherto, the focus should be on prioritising social protection considerations whilst offering a variety of gaming options and taking heed of the risk of fraud and unlawful gaming.’

- 5 According to the referring court, the Swedish legislation on gambling seeks to:

- counter criminal activity;
- counter negative social and economic effects;
- safeguard consumer protection interests, and
- apply the profits from lotteries to objectives which are in the public interest or socially beneficial.

The requirement of a licence to organise gambling

- 6 Paragraph 9 of the Lotterilag provides that a licence is, as a general rule, required to organise gambling in Sweden.

- 7 Under Paragraph 15 of the Lotterilag, a licence may be issued to a Swedish legal person which is a non-profit-making association and which under its statutes has as its main purpose the advancement of socially beneficial objectives in Sweden and carries on activities which serve mainly the advancement of that objective. Under Paragraph 45 of the Lotterilag, the Swedish Government may also grant a special licence to organise gambling in cases other than those provided for in that law.

- 8 In accordance with a fundamental principle of the Swedish legislation on gambling, which provides that the profits from the operation of gambling should be reserved for socially beneficial objectives or those which are in the public interest, the Swedish gambling market is shared between, on the one hand, non-profit-making associations whose purpose is the advancement of socially beneficial objectives in Sweden which have been granted licences under Paragraph 15 of the Lotterilag, and, on the other, two operators which are either State owned or mainly State controlled, namely, the State owned gaming company Svenska Spel AB and Trav och Galopp AB, which is jointly owned by the State and the equestrian sports organisations, those companies holding special licences under Paragraph 45 of the Lotterilag.

- 9 Under Paragraph 48 of the Lotterilag, a public authority, namely the Lotteriinspektion, is the central body responsible for monitoring compliance with the Lotterilag. On the basis of that law, the Lotteriinspektion is authorised to draw up the regulations relating to the monitoring and internal rules necessary for the various games. It exercises supervision over Svenska Spel AB's activity and carries out inspections and regular checks.

- 10 Under Article 52 of the Lotterilag, the Lotteriinspektion can issue the directions and prohibitions necessary for compliance with the provisions of that law and decide on the rules and conditions adopted on the basis of it. Such a direction or prohibition may be accompanied by an administrative penalty.

The prohibition on the organisation of gambling without a licence

- 11 Under Paragraph 14 of Chapter 16 of the Criminal Code (Brottsbalken, ‘the Brottsbalk’), the organisation without a licence of gambling in Sweden constitutes an offence of unlawful gaming. This is punishable with a fine or imprisonment of up to two years. If the infringement is deemed serious, it is punishable, as an offence of unlawful gaming set out in Paragraph 14a of Chapter 16, with imprisonment for between six months and four years.
- 12 In addition, under Paragraph 54(1) of the Lotterilag, anyone who, intentionally or through gross recklessness, organises unlawful gambling or unlawfully owns certain types of slot machines is liable to a fine or a prison sentence of up to six months.
- 13 The provisions of the Brottsbalk relating to the offence of unlawful gaming cover specifically described criminal offences. Criminal offences which are less serious and which, for this reason, do not fall within Paragraph 14 thereof, fall within the scope

of Paragraph 54(1) of the Lotterilag. Under Article 57(1) of the Lotterilag, that latter provision does not apply where the criminal offence is subject to a penalty provided for by the Brottsbalk.

- 14 Since the Lotterilag applies only in Sweden, the prohibition on organising a lottery without a licence does not apply to gambling operated abroad. Nor does that prohibition apply to gambling offered on the internet from another State to Swedish consumers and the same law does not prohibit Swedish consumers from participating in gambling organised abroad. Similarly, a licence granted under that law confers on its holder a right to offer gambling services only within the territorial scope of the Lotterilag, that is to say, within Sweden.

The prohibition on the promotion of gambling without a licence

- 15 Under Paragraph 38(1)(1) of the Lotterilag, it is prohibited, in commercial operations or otherwise to promote, without a special licence and for the purpose of profit, participation in unlicensed gambling, organised within Sweden or abroad.
- 16 Under Paragraph 38(2), a derogation from the prohibition referred to in Paragraph 38(1) may be granted as regards gambling which is organised on the basis of international cooperation with Swedish participation by a foreign operator authorised to organise gambling, under the rules applicable in the State where he is established, and to cooperate on an international level.

- 17 Paragraph 54(2) of the Lotterilag provides that a fine or a maximum of six months' imprisonment may be imposed on persons who, in commercial operations or otherwise for the purpose of profit, illegally promote participation in gambling organised abroad, if the promotion specifically relates to consumers resident in Sweden.
- 18 Under Paragraph (4)(1) of Chapter 23 of the Brottsbalk, it is not only the perpetrator of certain criminal acts who is liable for them, but also the person who promotes them by aiding or abetting them. Furthermore, under Paragraph (4)(2), even a person who is not regarded as the co-perpetrator of the offence is held responsible if he has encouraged a third party to commit it, if he has provoked it or if he has aided its perpetrator in any other way.

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

- 19 At the material time, Mr Sjöberg was the editor-in-chief and the publisher of the Expressen newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and August 2004, of advertisements for gambling organised abroad by the companies Expekt, Unibet, Ladbrokes and Centrebet.
- 20 Mr Gerdin, for his part, was, at the material time, the editor-in-chief and publisher of the Aftonbladet newspaper. In that capacity, he had sole responsibility for the publication by that newspaper, between November 2003 and June 2004, of advertisements for gambling organised abroad by those companies.

- 21 Expekt, Unibet, Ladbroke's and Centrebet are private operators established in Member States other than the Kingdom of Sweden who offer internet gambling, in particular to persons resident in Sweden. These games include, among others, sports betting and poker.
- 22 The Åklagaren (Public Prosecutor's Office) subsequently took proceedings against Mr Sjöberg and Mr Gerdin for infringement of Paragraph 54(2) of the Lotterilagen, for having promoted, unlawfully and for profit, the participation of Swedish residents in gambling organised abroad.
- 23 On 21 June and 6 September 2005, Mr Sjöberg and Mr Gerdin were each ordered by the Stockholms tingsrätt (District Court, Stockholm) to pay a criminal penalty of SEK 50 000 in respect of infringement of the Lotterilagen.
- 24 Mr Sjöberg and Mr Gerdin both appealed against the judgment concerning them before the Svea hovrätt (Court of Appeal, Svea). That court however refused to allow the admissibility of the appeal brought against those two judgments.
- 25 The parties concerned appealed against those decisions of the Svea hovrätt before the Högsta domstolen (Supreme Court) and that latter court, on 5 February 2008, issued a decision declaring that the appeals before the Svea hovrätt were admissible, thereby referring the two cases back to it.
- 26 In its decision, the Högsta domstolen held that it was unclear whether the provisions on fines in the Lotterilagen constitute a sanction which discriminates against the promotion of gambling according to whether it is organised in Sweden or in another Member State. In any event, the issue arises as to whether restrictions on the freedom to provide services, as they result from Paragraphs 38 and 54 of that law, can be

accepted because they come within the scope of the exceptions expressly provided for in the EC Treaty or whether they can be justified on the basis of overriding reasons in the general interest.

²⁷ In those circumstances, the Svea hovrätt decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

- ‘1. May discrimination on grounds of nationality be accepted, under some circumstances, on national gaming and lottery markets on the basis of overriding reasons in the general interest?
2. If there are a number of objectives pursued by the restrictive policy adopted on a national gaming and lottery market and one of them is the financing of social activities, can the latter then be said to be an incidental beneficial consequence of the restrictive policy? If this question is answered in the negative, can the restrictive policy pursued still be acceptable if the objective of financing social activities cannot be said to be the principal objective of the restrictive policy?
3. Can the State rely on overriding reasons in the general interest as justification for a restrictive gaming policy if State-controlled companies market gaming and lotteries, the revenue from which [partly] accrues to the State, and one of several objectives of that marketing is the financing of social activities? If this question is answered in the negative, can the restrictive policy pursued still be acceptable if

the financing of social activities is not found to be the principal objective of the marketing?

4. Can a total prohibition on the marketing of gaming and lotteries organised in another Member State by a gaming company established there and supervised by that Member State's authorities be proportionate to the objective of controlling and supervising gaming activity, when at the same time there are no restrictions on the marketing of gaming and lotteries organised by gaming companies established in the Member State which pursues the restrictive policy? What is the answer to the question if the objective of such an arrangement is to limit gaming?

5. Is a gaming operator who has been granted a licence to operate certain gaming activities in a State and is supervised by the competent authority in that State entitled to market its gaming products in other Member States through, for example, advertisements in newspapers, without first applying for a licence from those States' competent authorities? If this question is answered in the affirmative, does this mean that a Member State's rules which are based on the imposition of criminal penalties on the promotion of participation in lotteries organised abroad constitute an obstacle to the freedom of establishment and the freedom to provide services which can never be accepted on the basis of overriding reasons in the general interest? Is it of any significance for the answer to the first question whether the Member State where the gaming operator is established invokes the same overriding reasons in the general interest as the State where the operator wishes to market its gaming activities?

²⁸ By order of the President of the Court of Justice of 7 November 2008, the two cases C-447/08 and C-448/08 were joined for the purposes of the written and oral procedure and judgment.

The questions referred for a preliminary ruling

The second to fifth questions

- ²⁹ As a preliminary point, under Paragraph 38(1) of the Lotterilag, on the basis of which the proceedings in the main actions were initiated, it is not permitted, without a special licence and for the purpose of profit, to promote, in commercial operations or otherwise, participation in unlicensed gambling, organised within Sweden or abroad.
- ³⁰ However, it is clear that the proceedings at issue in the main actions only concern persons who have promoted gambling organised for the purpose of profit by private operators in Member States other than the Kingdom of Sweden. Accordingly, the Court need rule on the referring court's questions with regard to that situation only.
- ³¹ Consequently, by its second to fifth questions, which must be answered together before examining the first question, the referring court must be regarded as essentially asking whether Article 49 EC must be interpreted as precluding legislation of a Member State, such as that at issue in the main action, which prohibits the advertising of gambling organised for the purposes of profit by private operators in other Member States.

- ³² It must be recalled at the outset that 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. Moreover, the freedom to provide services covers both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited).
- ³³ It is common ground in this regard that the effect of Paragraph 38(1)(1) of the Lotterilag, which prohibits the promotion in Sweden both of gambling organised legally in other Member States and of unlicensed gambling in Sweden, is to restrict Swedish consumers' participation in such gambling. The purpose of that provision is to ensure that those consumers take part in gambling only in the context of the system licensed at national level, thereby in particular ensuring that private profit-making interests are excluded from that sector.
- ³⁴ That provision consequently constitutes a restriction on the freedom of Swedish residents to receive, on the internet, services offered in other Member States. It also imposes, so far as providers of gambling services established in Member States other than the Kingdom of Sweden are concerned, a restriction on their freedom to provide services in the Kingdom of Sweden.
- ³⁵ It is consequently necessary to examine to what extent the restriction at issue in the main action may be allowed pursuant to derogations expressly provided for by the EC Treaty or justified, in accordance with the case-law of the Court, by overriding reasons in the general interest.

- 36 Article 46(1) EC, applicable in this field by reason of Article 55 EC, allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the general 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 Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46 and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).
- 37 In that context, it must be observed that the legislation on gambling 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 to protect the interests in question (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 57).
- 38 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 level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).
- 39 The Member States are therefore free to set the objectives of their policy on 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 (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

⁴⁰ It is thus necessary to examine in particular whether, in the cases in the main action, the restriction on advertising imposed by the Lotterilag in respect of gambling organised in Member States other than the Kingdom of Sweden, by private operators for the purpose of profit, is suitable for achieving the legitimate objective or objectives invoked by that Member State, and whether it does not go beyond what is necessary in order to achieve those objectives. National legislation is moreover appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. In any event, those restrictions must be applied without discrimination (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 60 and 61).

⁴¹ In that regard, it is clear, according to the referring court, that the exclusion of private profit-making interests from the gambling sector is a fundamental principle of the Swedish legislation in this field. Those activities are reserved in Sweden to bodies pursuing objectives which are socially beneficial or in the public interest and licences for the operation of gambling have been granted exclusively to public or charitable bodies.

⁴² In that context, the objective of imposing strict limits on the carrying on of gambling operations for profit has been recognised by case-law, the Court having acknowledged the compatibility with European Union law of national legislation seeking to prevent lotteries from being operated exclusively on a commercial basis and managed by private organisers who themselves receive the profits from that activity (see, to that effect, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 to 59).

- 43 Considerations of a cultural, moral or religious nature can justify restrictions on the freedom of gambling operators to provide services, in particular in so far as it might be considered unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune. According to the scale of values held by each of the Member States and having regard to the discretion available to them, a Member State may restrict the operation of gambling by entrusting it to public or charitable bodies.
- 44 In the cases in the main proceedings, the gaming operators which caused the advertisements on account of which the criminal proceedings were initiated to be published are private undertakings run for profit, which could never, as the Swedish Government confirmed at the hearing, have obtained licences for the operation of gambling under Swedish legislation.
- 45 The prohibition on the promotion of the services of such operators to consumers resident in Sweden therefore reflects the objective of the exclusion of private profit-making interests from the gambling sector and may moreover be regarded as necessary in order to meet such an objective.
- 46 The answer to the second to fifth questions is therefore that Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.

The first question

- ⁴⁷ The first question concerns the fact that Paragraph 54(2) of the Lotterilag provides for criminal sanctions only in relation to the promotion of gambling organised in another Member State and does not apply to the promotion of gambling organised in Sweden without a licence, that latter offence being punishable under the Lotterilag only by an administrative penalty under Paragraph 52 thereof. The referring court inquires as to whether that difference as regards the penalties provided for by that law constitutes discrimination incompatible with Article 49 EC.
- ⁴⁸ It is consequently necessary to construe the first question as essentially seeking to ascertain whether Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence.
- ⁴⁹ Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that European Union law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by European Union law (*Placanica and Others*, paragraph 68).
- ⁵⁰ It follows moreover from the case-law of the Court that restrictive measures imposed by the Member States on account of the pursuit of objectives in the public interest must be applied without discrimination (*Placanica and Others*, paragraph 49, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 60).

- 51 In this connection, there is a disagreement between the Swedish Government, on the one hand, and Mr Sjöberg and Mr Gerdin, on the other, as to whether Swedish law, in particular Paragraph 4 of Chapter 23 of the Brottsbalk, provides for penalties for the promotion of gambling organised in Sweden without a licence which are equivalent to those applied under Paragraph 54(2) of the Lotterilag in respect of the promotion of gambling organised in another Member State.
- 52 According to the Swedish Government, the promotion of gambling organised in Sweden without a licence is punishable under Paragraph 4 of Chapter 23 of the Brottsbalk, in so far as it constitutes the offence of aiding and abetting either the offence of illegal gaming referred to in Paragraph 14 of Chapter 16 of that code, or the offence of organisation of unlicensed gambling or the possession of certain types of slot-machines provided for in Paragraph 54(1) of the Lotterilag.
- 53 Mr Sjöberg and Mr Gerdin, on the other hand, dispute that Paragraph 4 of Chapter 23 of the Brottsbalk is applicable to the promotion of gambling organised in Sweden without a licence. They submit that there is no measure which penalises such promotion, regardless of whether the gambling is licensed or not. Mr Gerdin submits in particular that that paragraph is only applicable to aiding the organisation of prohibited gambling, but does not apply to its promotion.
- 54 In that context, it must be recalled that the cooperation between the national courts and the Court of Justice established by Article 267 TFEU is based on a clear division of responsibilities. 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 (see, to that effect, *Placanica and Others*, paragraph 36, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 37).

- 55 Consequently, it is for the referring court to examine whether the two infringements at issue, although covered by different enactments, are nevertheless subject to equivalent treatment under the applicable national legislation. That court must in particular ascertain whether, on the facts, those infringements are prosecuted by the competent authorities with the same diligence and lead to the imposition of equivalent penalties by the competent courts.
- 56 As the Advocate General has observed in points 81 to 85 of his Opinion, if the two infringements at issue receive equivalent treatment, the national legislation cannot be regarded as discriminatory, regardless of the fact that the provisions on which the proceedings are based and which lay down the applicable penalties are contained in different enactments. On the other hand, if the persons carrying out the promotion of gambling organised in Sweden without a licence incur penalties which are less strict than those imposed on the persons who advertise gambling organised in other Member States, then it must be stated that those arrangements are discriminatory and that the provisions of Paragraph 54(2) of the *Lotterilag* are contrary to Article 49 EC and, consequently, unenforceable against the persons being prosecuted in the main actions.
- 57 The answer to the first question is therefore that Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.

Costs

⁵⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Article 49 EC must be interpreted as not precluding legislation of a Member State, such as that at issue in the main actions, which prohibits the advertising to residents of that State of gambling organised for the purposes of profit by private operators in other Member States.**
- 2. Article 49 EC must be interpreted as precluding legislation of a Member State subjecting gambling to a system of exclusive rights, according to which the promotion of gambling organised in another Member State is subject to stricter penalties than the promotion of gambling operated on national territory without a licence. It is for the referring court to ascertain whether that is true of the national legislation at issue in the main actions.**

[Signatures]