OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 4 March 1999 *

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* Original language: Italian.

I — The questions referred in the present case and the legislative and factual background to the dispute in the main proceedings

1. In the questions it refers for a preliminary ruling, the Vaasan Hovioikeus asks the Court to define the principles which it laid down in the *Schindler* judgment. [1] The proceedings pending before the national court relate to an appeal against the judgment delivered at first instance, by which Mr Läärä, chairman of the board of directors of the Oy Transatlantic Software Limited (hereinafter referred to as 'TSL'), was sentenced for an offence under Article 6 of the Arpajaislaki (Law on Gaming; [2] see paragraphs 2 and 5 below).

2. The Law on Gaming imposes administrative authorisation requirements for the operation of lotteries, betting and casino activities and the management of machines giving cash prizes and of other gaming machines which, in exchange for a sum of money, allow the player to receive a prize in the form of cash, goods or other benefits of money's worth, or tokens exchangeable for money. The holder of a licence for one of the above activities is, however, required to collect funds for charity or for other non-profit-making purposes (see Article 1(1) and (2)). In particular, in order to limit the potential profits that can be obtained by exploiting the urge to gamble, [3] the provision to the public, against payment, of slot machines offering cash prizes and the operation of casino activities are subject to an *exclusive* licence, to be granted to a public-law body set up for that purpose. The purpose of granting such a licence is to collect funds for various public-interest objectives: the promotion of public health, the protection of children, assistance for the disabled, old and infirm, the education of young people, contingency planning for the saving and protection of human life in the event of major disasters, the establishment of recreation centres open to all and the promotion of alternative forms of holiday, the treatment of alcoholism and drug addiction (see Article 3(3) and (4)). The unauthorised organisation of games of chance is punishable by a fine or a term of up to six months' imprisonment (see Article 6(1)). As the national court observes, it is doubtful whether machines in which the possibility of winning a cash prize depends not solely on chance but wholly or partly on the player's skill fall within the scope of the Law on Gaming described above. [4]

3. The public-law body entitled to receive the above-mentioned exclusive licence is

1 — See Case C-275/92 *Her Majesty's Customs and Excise* v *Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039.

2 — See Law No 491 of 1 September 1965, as subsequently amended.

3 — See draft Law No 142/1964 presented by the Finnish Government with a view to regulating games of chance.

4 — Finnish legislation does, however, give holders of licences for commercial businesses freedom to install on their premises amusement machines from which players may receive as a prize only extended playing time or a repeat game (see Law No 164 of 10 February 1995 on amusement machines).

the Raha-automaattiyhdistys (Slot Machine Operators' Association; hereinafter referred to as 'the RAY'), [5] which was formed in 1937 and which now comprises 96 organisations operating at national level in the fields of health and social activities. The object of the RAY is to raise funds to meet the needs indicated in Article 3(4) of the Law on Gaming (see paragraph 2 above). Seven of the fourteen members of the Board of Directors of the RAY (including the Chairman and the First Vice-Chairman) are elected by the Council of State and a further three represent respectively the Minister of Social Affairs and Health, the Minister of Internal Affairs and the Minister of Finance. [6] The RAY has also been granted the right to manufacture and sell slot machines and amusement machines; [7] in fact, the RAY uses machines which it manufactures itself. Through its subsidiary company Pelika RAY Oy, the RAY also operates in the open market in the management of amusement machines and jukeboxes. [8] Finally, on 14 November 1996 the Council of Ministers also granted the RAY a five-year licence to carry on casino activities in Helsinki. That licence, which is the only one of its kind to be granted in Finland so far, sets the maximum number of games and machines permitted (50 roulette tables and other games and 300 slot machines) and lays down adequate supervisory measures.

4. As the Finnish authorities stated in reply to the question put to them by the Court pursuant to Article 21(2) of the Protocol on the EC Statute of the Court of Justice, the RAY has laid down general contractual conditions governing relations with outlets (such as bars, restaurants, supermarkets, kiosks, service stations and railway station waiting rooms) in which one or more slot machines are installed. According to those general conditions, the outlet must: (i) ensure that machines are not used by players aged less than 15 years except in the presence of an adult relative, [9] and (ii) where necessary adopt an appropriate supervision plan. The outlets in question are also required by law: (i) to notify the installation of the slot machines on their premises to the head of the district police before they are brought into operation, and (ii) in the event of a reasoned request from the latter, to apply for an administrative authorisation for the operation of individual machines. Responsibility for monitoring compliance with the regulations applying in this sector rests with the Ministry of Internal Affairs, which also sets the maximum level of stakes (currently FIM 5, equivalent to about 1 euro). [10]

5. Under the contract concluded between TSL and the English company Cotswold Microsystems Limited (hereinafter 'CML') dated 25 January 1996, TSL has the exclusive right to install and operate in Finnish

5 — See Article 1(3) of the Raha-automaattiasetus (Decree No 676 of 29 December 1967 on slot machines, as subsequently amended).

6 — See Articles 6(1) and 16(1) of the Raha-automaattiasetus (cited in footnote 5 above).

7 — See Article 6(1) of the Raha-automaattiasetus (cited in footnote 5 above).

8 — See the RAY's web-site (Internet address: *http://www.ray.fi/english/brieflyldefault.htm*).

9 — This condition in fact reiterates the content of Article 3 of the Raha-automaattiasetus (cited in footnote 5 above).

10 — See Articles 2 and 34 of the Raha-automaattiasetus (cited in footnote 5 above).

territory the machines marketed and made available to it by CML.[11] These are amusement machines which distribute small cash prizes. The above mentioned contract provides that TSL is to receive a commission as remuneration for the services rendered to CML; the amount of the commission, which is based on the income from the machines, is determined in a separate agreement between the parties. In the months following the signing of the contract, TSL installed and provided for the use of customers in its own premises ten 'Golden Shot' amusement machines.[12] In its judgment of 17 September 1996, the Jyväskylan Käräjäoikeus acceded to the request of the public prosecutor, sentencing Mr Läärä to a fine and ordering the 10 gaming machines seized, belonging to CML, together with the money they contained, to be forfeited to the State.[13]

6. In the appeal proceedings pending before the national court, Mr Läärä contended, *inter alia*, that the Finnish legislation on gaming infringes the Community rules on the free movement of goods and services. In particular, he argued that the granting to the RAY of the exclusive right to operate slot machines on national territory was disproportionate in relation to the aim of combatting compulsive gambling and tax fraud. Unlike the court seised of the matter at first instance, the Vaasan Hovioikeus considered it appropriate to seek an interpretation from the Court in order to resolve the dispute and referred the following questions to the Court for a preliminary ruling:

'(1) Is the judgment of the Court of Justice of 24 March 1994 in Case C 275/92 *Her Majesty's Customs and Excise* v *Gerhart Schindler and Jörg Schindler* to be interpreted in such a way that it may be regarded as analogous to the present case (compare the judgment 6 October 1982 in Case 283/81 *CILFIT and Lanificio di Gavardo* v *Ministry of Health*), and that the provisions of the EC Treaty should be interpreted in the present case in the same way as in the aforesaid case?

answer to the first question is wholly or partly in the negative:

(2) Do the provisions of the EC Treaty on the free movement of goods and ser-

11 — Under paragraph 7 of the English version of the contract in question, TSL 'is the exclusive representative of the CM[L]-machines.' Paragraph 8 gives TSL the right to conclude agreements with the operators of commercial and other undertakings for the installation of the products covered by the contract.

12 — The order for reference states that winning a prize as a result of playing a Golden Shot machine of the AWP type (amusement with prizes) depends on the final rest position of 'rotating discs in the machine which are marked with pictures of fruit. If the discs stop at an arrangement which corresponds to the table of wins, either by themselves or if the player has succeeded in stopping or moving them by a handle into such an arrangement, the player may receive from the machine a win of up to 200 Finnish marks [equivalent to about 40 euro] at a time. The player can choose between one mark and five marks [equivalent to about 0.20 and 1 euro respectively] as the price of a game'. In their written observations to the Court, Mr Läärä, TSL and CML claimed that this ratio between the amount of the stake and that of the prize was identical to that of the slot machines operated by the RAY.

13 — Under Chapter 2, Article 16(2) of the Finnish Penal Code, the perpetrator of the offence or the person in whose interest or for whose profit the perpetrator acted is liable to confiscation of the instrument belonging to them which was used to commit the offence or which was prepared or obtained for that sole purpose.

vices (Articles 30, 59 and 60) also apply to gaming machines of the type in isssue here?

(3) If the answer to the second question is in the affirmative,

(a) do Articles 30, 59 or 60 or any other article of the EC Treaty preclude Finland from restricting the right to manage slot machines to the monopoly operated by the Raha-automaattiyhdistys (Public-Law Assocation for the Management of Slot Machines), irrespective of whether the restriction applies under that Law to domestic and foreign organisers of gaming alike, and

(b) can that restriction be justified, having regard to the reasons set out in the Law on Gaming or the measures implementing that Law, or on any other grounds, by the principles contained in Articles 36 or 56 or any other article of the EC Treaty; in addition, is the answer to that question affected by the amount of the winnings which may be obtained from the machines and by the question whether the opportunity of winning is based on chance or on the player's skill?'

II — Legal analysis

The principles established by the Court in Schindler

7. The national court asks whether, and, if so, to what extent, the principles established in *Schindler* can be applied to the present case. I therefore consider that I must begin by recalling those principles. In *Schindler* the questions raised by the High Court of Justice with regard to Articles 30 and 59 of the Treaty concerned United Kingdom legislation, which at the material time, in other words, before the introduction of amendments in 1993 (see footnote 50 below), prohibited the organisation of lotteries in the territory of the United Kingdom and the importation of tickets, order forms and advertising material intended to enable United Kingdom players to take part in legally organised foreign lotteries. The disputed national legislation did, however, lay down exceptions to the prohibition, thus allowing small-scale lotteries organised by societies or local communities for charitable and non-profit-making purposes.

8. In its judgment in *Schindler*, the Court stated first of all that lotteries are to be regarded as 'economic activities' within the meaning of the Treaty if they entail an importation of goods or the provision of services for remuneration. Some of the national governments involved in the case took the opposite view, observing that

gaming contracts may be regarded as void under the laws of certain Member States and, in particular, that lotteries, which consist of operations of pure chance by way of recreation or amusement, are traditionally prohibited in the Member States or operated either directly by the public authorities or under their control, solely in the public interest. [14] According to the Court, however, neither the entertainment that a lottery provides for the players who participate nor the element of chance inherent in the correlation between the stake and the prize prevents the transaction having an economic nature. Moreover, lotteries, which are operated in various Member States, cannot be regarded as activities whose harmful nature causes them to be prohibited; nor can they be likened to activities involving illegal products. [15] The Court stated that even if the morality of lotteries was at least questionable, it was not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity was practised legally.

9. The Court went on to rule that the lottery activities carried out by Messrs Schindler did not relate to 'goods' within the meaning of Article 30 et seq. of the Treaty. The importation and distribution of advertisements, order forms and tickets on behalf of a lottery operator from another Member State were not ends in themselves, the Court explained, but merely instrumental operations, 'specific steps in the organisation or operation of a lottery and [could not], under the Treaty, be considered independently of the lottery to which they [related]'. The Court thus concluded that the activities performed by the defendants in the main proceedings related to a 'service' (within the meaning of Article 60) and fell within the scope of Article 59 of the Treaty. [16] The correctness of that conclusion and of the other conclusion that a lottery constituted an economic activity, was not, in the opinion of the Court, called in question by the fact that in many Member States the law provides that gaming profits may be used only for certain purposes in the public interest, or may even be required to be paid into the public purse. [17]

10. Moving on to examine the compatibility of the national legislation at issue in that judgment with the prohibition on discrimination based on nationality laid down in Article 59, the Court stated that that prohibition may be infringed even by legislation that is 'applicable without distinction' when it is liable wholly to preclude (as in the case of the United Kingdom legislation on lotteries) or otherwise impede the activities of persons lawfully providing services

14 — See *Schindler* (cited in footnote 1 above), paragraphs 16 to 19.

15 — Ibid., paragraphs 31 to 37.

16 — Ibid., paragraphs 21 to 30, especially paragraph 22. In assessing whether all the requirements of the definition contained in Article 60 of the Treaty were met in the case in point, the Court observed: 'The services at issue are those provided by the operator of the lottery to enable purchasers of tickets to participate in a game of chance with the hope of winning, by arranging for that purpose for the stakes to be collected, the draws to be organised and the prizes or winnings to be ascertained and paid out'. The price of the ticket normally constituted the remuneration for such services. Finally, with regard to the residual nature of the Community concept of 'services', the Court ruled that lotteries did not come within the protection of any other fundamental freedom, in particular that provided by the rules on free movement of capital, which do not concern all monetary transfers necessary to economic activities (ibid., paragraphs 27, 28 and 30).

17 — Ibid., paragraph 35.

of that kind and established in a Member State other than that in which the intended recipients of the services in question reside. [18] With regard to the description of the national legislation disputed in that case as being applicable without distinction, the Court held that it was 'common ground that a prohibition such as that laid down in the United Kingdom legislation... [applied] irrespective of the nationality of the lottery operator or his agents and whatever the Member State or States in which the operator or his agents are established'. [19]

11. The Court then considered whether the national legislation at issue was nevertheless compatible with the rules of the Treaty on freedom to provide services in that it was justified by overriding public interest considerations. According to the High Court of Justice, the objectives of the contested legislation were: (i) to prevent crime and fraud at the expense of players; (ii) to control demand in the gambling market which has damaging social consequences when taken to excess; and (iii) to protect public morality, in that it is repugnant that the activity in question, if operated as a commercial enterprise, should entail personal profit where the proceeds could be used to finance charitable, sporting or cultural purposes of public interest.

The Court noted that the practice of gambling is subject to restrictions, if not outright prohibition, in all Member States. On moral, religious and cultural grounds, national legislatures have generally treated lottery operations no differently from games of chance: the rule is that those who operate a lottery may not derive personal profit from it. [20] In my opinion, however, this is only an incidental aspect. [21] This I deduce from the observation that, in identifying the overriding public interest considerations regarded in the case in question as being 'such as to justify restrictions, as regards Article 59 of the Treaty, which may go so far as to prohibit lotteries in a Member State', the Court confined itself to stating the reasons, 'taken together', concerning the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society. [22] The operative part of the judgment then refers to 'concerns of social policy and of the prevention of fraud' (see paragraph 3 thereof). It appears to me that the need to prevent personal enrichment by means of the supply of games of chance for commercial

18 — Ibid., paragraphs 39 to 45.

19 — Ibid., paragraph 48.

20 — Ibid., paragraph 60. The Court noted, in particular, that large-scale lotteries, given the size of the sums collected and the prizes offered, involve a high risk of crime and fraud and may have damaging individual and social consequences for those who are more inclined to purchase a large number of tickets, despite the uncertainty of winning.

21 — V. Hatzopoulos (see the commentary on *Schindler* in *Comm. Mkt. L. Rev.*, 1995, p. 841, in particular p. 851) observes that the negative wording used in paragraph 60 of the judgment in question ('First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States') detracts both from the importance that should, according to the Court, be attached to such considerations and from the possible *legal* consequences of such an interpretation. According to the author, the passage in the judgment in question is all the more surprising in that in paragraph 32 of the judgment, which examines whether lottery activities come under Article 59 et seq. of the Treaty, the Court adopted a neutral position, stating: 'Even if the morality of lotteries is at least questionable, it is not for the Court to substitute its assessment for that of the legislatures of the Member States where that activity is practised legally' (see point 8 above).

22 — See *Schindler* (cited in footnote 1 above), paragraphs 57 to 60, especially paragraphs 58 and 59.

purposes cannot be attributed to either of these two categories except by distorting the interpretation.

12. The fact that lotteries may be an important means of financing benevolent, sporting or cultural activities or social and charitable works is, according to the Court, not without relevance, although under Community law — and I regard this reminder as important — *it cannot in itself be regarded as an objective justification* of the restrictions imposed at national level on the economic activities under consideration here. [23]

13. Lastly, the judgment in *Schindler* laid down two criteria for assessing legislation in view of the specific nature of lotteries: the national legislature has a degree of latitude to protect the players in accordance with the public interest considerations it is pursuing and, more generally — 'in the light of the specific social and cultural features of each Member State' — to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. Hence, it is for each Member State to assess whether the economic activity involved in the lottery should be restricted or even prohibited, *provided that any restriction or prohibition is not discriminatory*. On that supposition, the Court concluded that the grounds of protecting the recipients of the service and maintaining order in society, taken together, were, in that judgment, such as to justify restrictions that could go as far as prohibiting lotteries on the territory of the Member State concerned. In adopting the disputed measures, the United Kingdom legislature had erected safeguards against risks and adverse developments, the assessment of which lay within its discretion, and those safeguards could not be considered an unlawful interference with the freedom to provide services. [24]

23 — Ibid., paragraph 60.

Reply to Questions 1, 2 and 3(a)

14. I consider it appropriate to analyse together the first and second questions and part (a) of the third question referred by the national court. That court asks, first, whether the rules of the Treaty — *including but not exclusively* those governing the free movement of goods and services, as interpreted by the Court, in particular in the *Schindler* judgment — are applicable to the factual and legislative background of the case in the main proceedings. We are dealing here with a case which differs from that decided in *Schindler* in essentially two ways: here the game offered to the public consists in participation not in the draw for

24 — Ibid., paragraphs 60 and 61, in particular paragraph 61. Consequently, the prohibition on the importation of materials intended to enable nationals of the importing Member State to participate in large-scale lotteries organised in another Member State constituted, according to the Court, a necessary part of the protection which the first Member State sought to secure in its territory in relation to games of chance. Such a prohibition could therefore not be regarded as a measure involving an unjustified limitation on the freedom to provide services (ibid., paragraphs 62 and 63).

a lottery but in one or more games on a slot machine; furthermore, the contested State measure does not impose a general and absolute prohibition on offering the service but grants an exclusive right for the operation of the game to a national public-law body. In my opinion, these very aspects caused the referring court to doubt whether it was possible simply to transpose the *Schindler* principles to the facts of the criminal proceedings concerning Mr Läärä.

15. Before embarking on an analysis of the questions indicated above, it would be well — at the risk of partly anticipating the answer to part (b) of the third question — to clear up an ambiguity which I have to regard as nascent, at least judging from the tenor of the observations submitted to the Court by the appellants, certain national governments and the Commission. In one of the questions submitted in the present case the national court asks the Court whether and how two aspects on which the appellants have greatly insisted can be of relevance in assessing possible justifications for the restrictive nature of the Finnish legislation on gaming (assuming, of course, that the legislation at issue is recognised as being of such a restrictive nature). I am alluding to the size of the prizes that can be won from slot machines of the type installed in Finland by TSL and the impact of the player's skill on the chances of winning.

In my opinion, these two criteria are of relevance essentially at the preliminary stage, so to speak, in order to establish whether the slot machines are 'games of chance' within the meaning of the Finnish law (in the absence of any Community concept or definition in this regard). [25] Moreover, the order for reference raises a doubt as to whether or not slot machines in which the possibility of winning depends wholly or partly on the player's skill come within the purview of the Law on Gaming (see point 2). However, in one instance this involves an examination of fact and in the other it is a question of interpreting the national legislation, which in any event falls outside the competence of this Court and remains the preserve of the national court. [26] Here it is necessary to answer the questions referred by the national court. For my part, I therefore consider it necessary to assume that the slot machines imported and provided for public use by TSL come within the category of games of chance prohibited by the Finnish legislation. Having clarified that point, I shall now proceed to examine the compatibility of that prohibition with Community law.

25 — What I have just remarked in the text does not, however, preclude the possibility that the size of the available prizes may also be of relevance in analysing the scope for invoking exemptions from the prohibitions laid down in the Treaty (see point 32 below).

26 — See, *ex multis*, Case C-235/95 *AGS Assedic* v *Dumon and Froment* [1998] ECR I-4531, paragraph 25, Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947 and Case 32/76 *Saieva* [1976] ECR 1523.

16. Having arrived at this point, it is necessary to see whether and how the principles established in *Schindler* can be adapted to the case in point. First of all, the installation, operation and provision of slot machines for the paying public entails, it seems to me, a provision of services against payment and possibly also an importation of goods, thus coming within the concept of 'economic activities' within the meaning of the Treaty (see point 8 above). On this point, moreover, there is common ground between the parties, the Member States and the Commission.

It follows from this finding, as TSL and Mr Läärä have argued, that a public-law body such as the RAY must be classified as an 'undertaking' [27] — more precisely as a public undertaking, [28] or an undertaking *to which a Member State grants exclusive rights* (see point 3 above) — within the meaning of Article 90(1) of the Treaty. Article 90(1), which is included among the rules on competition, provides that in relation to such undertakings Member States may neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, *in particular* to those rules provided for in Article 6 and relating to competition. This has an immediate and important consequence for the present analysis. Although the *existence* of a monopoly in the provision of services such as that granted by the Finnish legislature to the RAY is not as such incompatible with Community law, a problem arises if the monopoly in question is *organised or exercised* in a manner which infringes the rules of the Treaty, in particular those relating to the free movement of goods and the freedom to provide services, which are expressly mentioned by the national court. [29]

27 — The concept of an 'undertaking', particularly in the context of competition law, encompasses every entity engaged in an economic activity, *regardless of its legal status and the way in which it is financed*. This classification was therefore held to be applicable to a public employment agency engaged in employment procurement activities (see Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraphs 21 to 25) and to a *non-profit-making* organisation which manages an old-age insurance scheme established by law as an optional scheme and intended to supplement a basic compulsory scheme and which operates according to the principle of capitalisation in keeping with the rules laid down by the authorities, in particular with regard to conditions for membership, contributions and benefits (see Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* [1995] ECR I-4013). On the other hand, according to the Court, organisations involved in the management of the public social security system, which fulfil an *exclusively social function* in the performance of a non-profit-making activity based on principles of solidarity, are not undertakings (see Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 17 to 19).

28 — It should be recalled that in its judgment in Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545 (paragraphs 24 to 26, in particular paragraph 25), the Court approved the definition of a public undertaking ['any undertaking over which the public authorities may exercise directly or indirectly a dominant influence.... Such influence is to be presumed when the public authorities directly or indirectly hold the major part of the undertakings' subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body'] contained in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35, as subsequently amended).

29 — See, *ex multis*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 10 and 11.

Does the present case come within the scope of Article 30 et seq. of the Treaty?

17. The first aspect to consider is therefore whether Article 30 et seq. of the Treaty are applicable to the case before us. The appellants contend that the Finnish legislation under examination impinges upon the free movement of goods. All the national governments taking part in the present case maintain the opposite. The Commission, for its part, observes that restricting the operation of slot machines to the RAY may be equivalent to a quantitative restriction on imports if that association favours Finnish undertakings and products in its purchases of goods. The Commission notes, however, that the dispute in the present case does not touch upon the purchases of goods by the RAY. Apart from that, it adds, the slot machines whose confiscation was ordered at first instance were exported by CML with a view not to their resale but to their use in the provision of the service encapsulated in the gaming activity.

18. As the appellants observe, the grounds on which the Court ruled in *Schindler* that lottery activities do not relate to 'goods' cannot be extended to the gaming machines with which we are dealing in the present case. In *Schindler* Advocate General Gulmann expressed the view which was later espoused by the Court. As we read in his Opinion, 'there is no particular reason for treating lottery tickets as goods. They represent the evidence that the owner of the lottery ticket has paid for the right to take part in the lottery, that is to say, has paid for the chance of being drawn as the winner of one of the prizes in the lottery in question. The purchase of a lottery ticket corresponds in that context to the signing of an insurance contract or the purchase of personal travel services where the documents issued by the provider of services for the purchase of the services — the policy and the travel ticket — are not goods within the meaning of the Treaty.' [30]

However, unlike a ticket, which is an instrument representing the (conditional) right to receive the prize promised by the organiser in the event of winning, slot machines are, it should be noted, the capital good which makes it possible to provide the service. Once the game is over, lottery tickets revert to being simply printed paper of no economic value. The products at issue here, by contrast, are 'products which can be valued in money' and thus in abstract terms are capable of forming the subject of sales or other lawful commercial transactions. [31] The fact that slot machines are regarded as goods for the

30 — See the Opinion of Advocate General Gulmann in *Schindler*, cited in footnote 1 above, point 27.

31 — See Case 7/68 *Commission* v *Italy* [1968] ECR 423, relating to objects of artistic or historic interest. According to the Court, 'objects which are shipped across a frontier for the purposes of commercial transactions are subject to Article 30, whatever the nature of those transactions' and are therefore 'goods' within the meaning of Article 30 et seq. of the Treaty, including non-recyclable waste (see Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 26).

Community customs nomenclature [32] also proves, in my opinion, that there can be no doubt in this regard.

19. As to the fact that CML did not transfer ownership of its machines to TSL, I would not say — as the Commission and the Governments of the Netherlands, the United Kingdom, Sweden and Spain claim — that this necessarily prevents us from holding that Article 30 of the Treaty is applicable to this case. We should ask ourselves, at most, whether CML and TSL resorted to the atypical contractual arrangement of *cooperation in the provision of services* (see point 5 above) precisely because of what could be regarded as the distorting effects of the legislation on games of chance in force in Finland: it is reasonable to ask why an undertaking in the position of TSL should have had to invest large sums of money to acquire the ownership of capital goods which are not lawfully usable in that country in order subsequently to provide gaming services. The important point here is different: does the import or export of goods for the sole purpose of providing services mean that such an operation forms part of the services themselves and accordingly escapes the rules governing the free movement of goods? On the basis of the Court's recent judgment in Case C-158/94, [33] it should be held that a case such as the one before us comes within the scope of Article 30 et seq. of the Treaty. Surgeons purchase scalpels, too, for the sole purpose of providing a service, but it could not seriously be argued that intra-Community flows of such products fall outside the scope of those provisions. The present case does not concern a main transaction of which another purely ancillary and incidental transaction forms a part, [34] but rather a commercial transaction involving goods which is instrumental to and linked to a provision of services but *quite distinct in conceptual and economic terms*. This is clear, in particular, from the fact that the contracting parties to the transactions in question are different: the intended recipients of the service (that is to say, players) would by definition not be involved in the sale of slot machines, even if, given a different legislative framework, such a transaction made economic sense. For all that the activity performed jointly by the appellants in the main proceedings falls within the scope of Article 59 of the Treaty, it cannot be excluded that Arti-

32 — See CN code 9504 30 50.

33 — See Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraphs 15 to 20 and the Opinion of Advocate General Cosmas in Joined Cases C-157/94 to C-160/94 *Commission* v *Netherlands*, *Commission* v *Italy*, *Commission* v *France* and *Commission* v *Spain* [1997] ECR I-5699, point 15.

34 — Such as, for example, the supply of oil, parts and other goods in conjunction with the conduct of roadworthiness tests for motor vehicles (see Case C-55/93 *Van Schaik* [1994] ECR I-4837, paragraph 14).

cle 30 applies to the 'goods element' of the overall service.[35] Moreover, the fact that, in applying the national legislation at issue, the Finnish court at first instance also ordered the seizure of the imported goods, which CML had *lawfully produced and marketed in another Member State* (the United Kingdom), is to my mind far from irrelevant.

Does the RAY's monopoly infringe the principle of the free movement of goods?

20. It now remains to be seen in what manner, according to the appellants, the national legislation at issue could constitute a measure equivalent to a quantitative restriction on imports. By law, the RAY holds not only the exclusive right to install and operate slot machines provided for public use but also the right to produce and sell automated gaming machines of the same type as those used for the activities which the RAY alone is licensed to carry on (see point 3 above). The case therefore presents strong similarities, from several points of view, with the facts in *ERT*, referred to above (see footnote 29). In *ERT* radio and television broadcasting by a legal monopoly in Greece 'entail[ed] a prohibition for all other Community citizens on the export, leasing or distribution, by whatever means, to the Member State in question of materials, sound recordings, films, television documentaries or other products which [could] be used to make television broadcasts, except in order to serve the purposes' of the broadcasting body which held the exclusive rights. When asking the Court for the interpretation necessary to reach a decision in the main proceedings — with regard, in that context, to Articles 9 and 30 of the Treaty — the national court referred expressly to the fact that the legislation at issue left the monopoly operator free 'to select and favour national materials and products in preference to those of other Member States of the Community'.[36] The Court accepted that 'the grant to a single undertaking of exclusive rights in relation to television broadcasting and the grant for that purpose of an exclusive right to import, hire or distribute material and products necessary for that broadcasting does not as such constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the

35 — See F. Blum and A. Logue, *State Monopolies Under EC Law*, Chichester 1998, pp. 106 and 137. See also Case 155/73 *Sacchi* [1974] ECR 409, paragraphs 6 and 7, and Case 260/89 (cited in footnote 29 above), paragraphs 13 and 14, in which the Court stated that the transmission of television signals, including those in the nature of advertisements, must be regarded as provision of services, whereas cross-border trade in material, sound recordings, films, apparatus and other products used for the provision of the services in question are subject to the rules relating to the free movement of goods; see also Case 45/87 *Commission* v *Ireland* [1988] ECR 4929, paragraph 17, in relation to the question whether Article 30 of the Treaty precluded the inclusion in an invitation to tender for a public works contract of a clause stipulating that some of the materials to be used had to comply with Irish technical standards. The Court confirmed that 'the fact that a public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article 30'.

36 — In the text I have referred to the second and third questions referred to the Court by the Monomeles Protodikio Thessalonikis (see *ERT*, cited in footnote 29 above, paragraph 5).

Treaty.' However, it went on to say that 'it would be different if the grant of those rights resulted, directly or indirectly, in discrimination between domestic products and imported products to the detriment of the latter. It is for the national court, which alone has jurisdiction to determine the facts, to consider whether that is so in the present case.' [37]

21. Another aspect of the *ERT* judgment which I consider it appropriate to recall, by analogy, for the purposes of the present analysis concerns the compatibility between the Community rules on the *freedom to provide services* and the manner in which the aforementioned ERT monopoly was organised. That entity had the exclusive right both to broadcast its *own programmes* and to receive and retransmit programmes from other Member States. The Court observed that 'the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking gives that undertaking the possibility both of broadcasting its own programmes and of restricting the retransmissions of programmes from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programmes from other Member States, may lead the undertaking to favour its own programmes to the detriment of foreign programmes. Under such a system equality of opportunity as between its own programmes and programmes to be re-transmitted from other Member States is therefore liable to be seriously compromised'. [38] Reiterating the principle set out in its ruling on the free movement of goods, [39] the Court then stated that 'the question whether the aggregation of the exclusive right to broadcast and the right to retransmit actually leads to discrimination to the detriment of programmes from other Member States is a matter of fact which only the national court has jurisdiction to determine.' [40]

22. The principles recalled above are also relevant, in my opinion, for assessing whether the Finnish legislation on gaming

37 — Ibid., paragraphs 15, 16 and 18, in particular, paragraphs 15 and 16. See also *Sacchi* (cited in footnote 35 above), paragraphs 7 and 8. The Court also established, when interpreting Article 37 of the Treaty, that it cannot be ruled out that a monopoly over the provision of services (*in casu* 'external services' for funerals) may have an indirect influence on trade in goods between Member States (*in casu*, hearses, coffins, external hangings for the house of the deceased and conveyances for mourners), 'in particular where the monopoly over the provision of services established by an undertaking or by a group of undertakings leads to discrimination against imported goods as opposed to products of domestic origin' (see Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 10; see also Case C-17/94 *Gervais and Others* [1995] ECR I-4353, paragraphs 36 to 38).

38 — See *ERT*, cited in footnote 29 above, paragraphs 19 to 22, in particular paragraph 22.

39 — See footnote 37 above and the part of the text to which it relates.

40 — See *ERT*, cited in footnote 29 above, paragraph 23. Nevertheless, the Court also pointed out that the objective of avoiding disturbances due to the restricted number of channels available could not in the case at issue constitute justification for national rules with discriminatory effects for the purposes of Article 56 of the Treaty, since ERT used only a limited number of the channels (ibid., paragraph 25). Finally, the Court concluded that Article 59 prohibits national rules which create a monopoly of the kind described 'where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers' (ibid., paragraph 3 of the operative part).

is compatible with the provisions of the Treaty governing the free movement of goods. Like the ERT in the above case (see point 21), the RAY operates a monopoly in the downstream market in the service and is the only possible *purchaser* of the necessary capital goods (slot machines) in Finnish territory. The legislation relied upon gives rise, at the economic level, to a situation in which there is no guarantee (there being no obligation, for example, to put supplies out to tender) that slot machines lawfully produced and marketed in other Member States will be purchased by the monopoly service provider. As a consequence, the RAY appears to operate as a *(de facto) monopolist also in the upstream market* in the production and marketing of such equipment in Finland. Indeed, although the right to manufacture the machines, which the law grants to the RAY, is not exclusive, no other foreign Community (or Finnish) producer who decided to compete with the RAY by exporting to Finland machines lawfully produced and marketed in another Member State could enjoy comparable assured and continuous commercial outlets for their products. Not without reason, the appellants observe that the RAY uses exclusively slot machines which it has itself designed, developed and produced, a fact which that association emphasises in its own commercial literature (see footnote 8 and the passage in the text to which it relates). If that is indeed the case, the discrimination against slot machines produced in other Member States, to the benefit of similar domestic products, appears to arise not merely as a result of autonomous commercial conduct on the part of the RAY but as an actual [41] and *inevitable* effect of the national legislation at issue. Admittedly, since the RAY does not hold an exclusive right to produce and sell slot machines and amusement machines, the possibility cannot in principle be ruled out that any discriminatory effect of the Finnish legislation would also affect machines produced in Finland by competitors. Nevertheless, even if the national court were to find that such domestic production existed, the fact that the restrictive effect on imports would benefit not all domestic products but only some of them would not be enough, according to the case-law of the Court, to enable the national legislation at issue to escape the prohibition set out in Article 30. [42]

23. The Finnish court has not expressly asked whether the national legislation on gaming infringes the Treaty in the manner I have just indicated. And it is also true that the Court is required to base its reply to the questions submitted to it on the facts given in the order for reference. In addition, the procedure laid down by Article 177 of the Treaty also requires the Court to reach an interpretation of Community law which gives the national court as complete and

41 — According to settled case-law, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, *actually or potentially*, intra-community trade' come within the concept of measures having an effect equivalent to quantitative restrictions (see Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; my italics). However, it is not necessary that such measures have an appreciable effect on intra-community trade for there to be a breach of the prohibition laid down in Article 30 of the Treaty (see Case 16/83 *Prantl* [1984] ECR 1299, paragraph 20).

42 — See Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 2 of the operative part.

useful guidance as possible for the purpose of resolving the dispute in the main proceedings. In the present case, moreover, the Vaasan Hovioikeus did not omit to mention Article 30 of the Treaty among the provisions of Community law referred to. The Court is therefore entitled (and in my opinion it is in fact required) to provide that court with as full an interpretation as possible, even if it must draw information from the case-file, in particular from the observations of the parties, to supplement the meagre details of the factual and legal situation given in the order. In so doing, the Court does not alter the substance of the questions submitted but assembles the elements needed to reply to them. Most significantly in the present case, when the Finnish Government submitted its oral observations to the Court it was unable to refute the appellants' assertions on the point at issue. It is also significant that the aspect concerning possible discrimination in the purchase of the necessary capital goods by the RAY was not lost on the Commission (see point 17 above) which alluded to that possibility as early as the written procedure.

24. Question 3(a) refers not only to the Community rules on the free movement of goods and services but also to 'any other article' of the EC Treaty. The national legislation at issue therefore also invites scrutiny from the point of view of its compatibility with the Treaty's rules on competition. More precisely, given the findings of fact described above (see point 22), the question arises as to whether as a result of regulation the RAY's dominant position in the market reserved for it *ex lege* is extended to the (competitive) upstream market in the production and marketing of slot machines, and whether such an extension is lawful.[43] However, that is an aspect of the case which I mention only in passing. Bearing in mind the conclusions I reach in examining the disputed legislation in the light of Arti-

43 — According to the case-law of the Court, an undertaking which has a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty and the territory of a Member State over which the monopoly extends may constitute a substantial part of the common market (see, *ex multis*, Case C-260/89, cited in footnote 29 above, paragraph 31). Moreover, a Member State is in breach of the prohibitions contained in Articles 90(1) and 86 if the dominant undertaking, *merely by exercising the exclusive rights granted to it*, cannot avoid abusing its dominant position or when such rights are *liable to create a situation in which that undertaking is induced* to commit such abuses (see, *ex multis*, Case C-41/90, cited in footnote 27 above, paragraph 29, Case C-260/89, cited in footnote 29 above, paragraph 37, and Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 17). An abuse within the meaning of Article 86 is committed where, *without any objective necessity*, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, the attendant risk being that all competition from the latter undertaking may be eliminated (see Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261, paragraph 2 of the operative part, and Case C-18/88 *Régie des Télégraphes et des Téléphones* v *GB-Inno-BM* [1991] ECR I-5941, paragraphs 18 to 28). For the sake of completeness, I would mention also the case-law of the Court, according to which a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Article 30 of the Treaty in so far as it 'has the effect of making more difficult and hence of impeding imports of goods from other Member States' (see Case C-179/90, cited above, paragraph 21).

cle 30 et seq. (see points 17 to 22 above and point 29 below) and Article 59 et seq. (see points 25 to 27 and 30 to 41 below), I consider it unnecessary to burden this Opinion further by examining that aspect in detail. I shall therefore refrain from enquiring whether, from that point of view, the Finnish Law on Gaming also contravenes the prohibitions laid down in Articles 90(1) and 86 of the Treaty.

Applicability of the rules of the Treaty on the right of establishment or freedom to provide services

25. It remains true, however, that the compatibility of the Finnish legislation on gaming with the obligations arising from the Treaty must be examined, in line with the order for reference, from the point of view of freedom to provide services. The national court is alluding here to the services provided by an undertaking which installs and operates slot machines. The service consists in enabling paying players to take part in a single game (or a series of games) and in offering them the hope of winning something by means of an automated mechanism for the collection of stakes and the payment of prizes. [44] According to the Finnish and United Kingdom Governments and the Commission, however, it is doubtful whether Article 59 et seq. are applicable to the present case, because in all likelihood we are dealing with a purely internal situation, as the service in question is provided by a Finnish undertaking (TSL) to recipients established in Finnish territory. Correctly, however, Finland and the United Kingdom add that it is for the national court to make an assessment (in practical and economic terms) of the legal situation on which the main proceedings hinge. In view of the

44 — The Spanish Government and the Commission have argued, however, that in the context of the main proceedings it is possible to identify another cross-border service, consisting in the leasing of the slot machines by CML to TSL. This interpretation does not seem to me to take due account of the fact that the contract dated 25 January 1996 (see point 5) does not oblige TSL to pay a rental fee but rather gives the Finnish company a right to receive a commission as remuneration for the services which *that company* renders to CML. I note incidentally that this latter service also seems to fit the description of a provision of cross-border services if the national court refuses to accept that CML, the recipient of the services in question, is established in Finland (see point 26 below).

circumstances and leaving aside the reasons which may have induced CML and TSL to arrange their contractual relationship in the way I have described (see point 5 above), the Vaasan Hovioikeus considers that the playing of slot machines — the activity out of which the prosecutions brought before it arose — is in the nature of a (cross-border) service for the purposes of the Treaty. I therefore consider it appropriate to examine the questions submitted by the Finnish court in that light. [45]

26. It is well to note that it is also for the national court, depending on how it categorises the contractual relationship between CML and TSL, to resolve the question — raised by the Commission and the Belgian Government — whether the provisions of the Treaty relating to freedom of establishment (*in alternativa* to those relating to freedom to provide services) [46] are applicable to the present case. The Commission considers that the situation of the United Kingdom company should be analysed on the basis of Article 52 et seq. of the Treaty if it transpires that TSL operated in Finland — the Member State in which the services were provided — as a local establishment or infrastructure of the United Kingdom undertaking, in particular as its commercial agent or permanent representative. Article 52 permits companies to establish themselves, in the sense used in the Treaty, in more than one Member State by opening agencies, branches or subsidiaries. Furthermore — as the Commission points out, referring to the judgment in Case 205/84 — a provider of services (*in casu* an insurance undertaking) 'of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. In the light of the aforementioned definition contained in the first paragraph of Article 60, [47] such [a provider of services] cannot therefore avail itself of

45 — See, *ex multis*, Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 9.

46 — 'The provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are "established" in two different Member States and, second, as the first paragraph of Article 60 specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply' (see Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22). In the same judgment, moreover, the Court clarified that a provider of services may equip himself in the host Member State with the infrastructure necessary for performing the services in question without thereby becoming subject to the rules on the right of establishment; however, it must be possible to regard the provision of services in question as temporary, in the light of its duration, regularity, periodicity and continuity ibid., paragraphs 1 and 2 of the operative part).

47 — See footnotes 16 and 46 above and the passages in the text to which they relate.

Articles 59 and 60 with regard to its activities in the Member State in question.' [48]

However, the rules of the Treaty on the right of establishment and the free movement of services respectively provide for the abolition of State measures restricting fundamental freedoms. Leaving aside the different ways in which they are exercised in practice, these freedoms are two aspects of the same phenomenon, that is to say the geographical mobility which the Treaty guarantees within the Community for the economic operators of the Member States. Equally, the express derogations sanctioned by the Treaty and the public interest considerations which can be invoked in abstract terms to justify restrictive national measures are similar. [49] Consequently, even though I shall confine myself in the remainder of this Opinion to examining the compatibility of the Finnish legislation on gaming with Article 59, that is to say, with the provision expressly mentioned in the second and third questions in the order for reference, the conclusions I reach should, as a matter of principle, if the national court considers it must analyse the case on the basis of the Treaty provisions on the right of establishment, be capable of being transposed to such an analysis.

Is the Finnish Law on gaming compatible with Articles 90(1) and 59 of the Treaty?

27. As requested by the national court, I shall also use the principles established in *Schindler* as a basis for examining whether or not the national legislation at issue, which makes it impossible for slot machine gaming services to be provided in the recipient State by providers established in other Member States, restricts the freedom to provide cross-border services guaranteed by the Treaty to Community citizens and companies. In *Schindler*, the Court ruled that the prohibition on offering large-scale lottery services within the national territory — applied irrespective of the nationality of the lottery operator or his agents, and in whichever Member State or States the operator or his agents were esta-

48 — See Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21. In *Gebhard* the Court added that 'the concept of establishment within the meaning of the Treaty is... a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (see Case C-55/94, cited in footnote 46 above, paragraph 25).

49 — As can be deduced from the recent case-law of the Court, moreover, all of the four fundamental freedoms established by the Treaty are now governed by more or less uniform principles as regards both infringements and justification (see V. Hatzopoulos, *Exigences essentielles, impératives ou impérieuses:* une *théorie,* des *théories ou pas de théorie du tout?*, in *Rev. trim. dr. eur.* 1998, p. 191, in particular p. 233). See also, *ex multis*, Case 90/76 *Van Ameyde* v *UCI* [1977] ECR 1091, paragraphs 27 and 28; Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraphs 12 and 13; Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 18 to 27; Case 3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 13; Case C-306/89 *Commission* v *Greece* [1991] ECR I-5863, paragraphs 7 and 8; Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, paragraphs 6, 13 and 35; Case C-55/94, cited in footnote 46 above, paragraph 37; and Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraphs 34 to 37.

blished — constituted a measure applicable without distinction (see point 10 above).[50] Referring to established case-law, the Court went on to state that legislation may infringe Article 59 of the Treaty, even if it is applicable without distinction to the provision of services from any source. Article 59 would be infringed by a State measure which, albeit making no distinction between foreign or non-resident providers of services and others, is nevertheless liable to impede or discourage, without objective and relevant justification, the exercise of the fundamental freedom involved if the service in question is provided in the Member State in which the provider is established in accordance with the legal requirements in force in that State.[51]

28. In contrast to the national legislation at issue in *Schindler*, which completely prohibited the conduct of the type of lottery to which it related, the Finnish Law on Gaming which the Vaasan Hovioikeus is called upon to apply in the main proceedings reserves the activity in question to a single *national* operator, more precisely to a public law body created for that purpose, and requires the holder of the exclusive licence to allocate the profits entirely to financing 'good causes'. Such a law prevents persons established in other Member States from providing (*exporting*, if you will) in the recipient State the service which he offers in the Member State in which he is established. At first sight, it could therefore be concluded that, within the meaning of Community law, the granting to a national operator of exclusive rights such as those held by law by the RAY and the consequent requirement that players resident in the Member State in question purchase the service from the monopolist constitute discriminatory measures in breach of Articles 90(1) and 59 of the Treaty in that they operate to the detriment of providers of services from other Member States.

The case-law of the Court does not go along with that view, however. In fact, a different criterion has been adopted, according to which a State measure which grants exclusive rights to a national undertaking — which has restrictive effects on *all* providers of services *other than the monopolist*, whether established in the Member State in question or another — must for that very reason be classified as a restric-

50 — The Court thus did not espouse the opposing view put forward by the Commission and Messrs Schindler that the national legislation at issue should be regarded as substantively discriminatory because it permitted the simultaneous operation by the same person *established in the United Kingdom* of several small lotteries, which together were equivalent to one large lottery, and moreover authorised economic operators established in the territory of the United Kingdom to operate games comparable in nature and scale to large lotteries, such as football pools or bingo. The Court merely observed in this regard that 'even though the amounts at stake in the games so permitted in the United Kingdom may be comparable to those in large-scale lotteries and even though those games involve a significant element of chance they *differ in their object, rules and methods of organisation* from... large-scale lotteries [organised in other Member States and, from 1993 onwards, in the United Kingdom itself]. They are therefore not in a comparable situation to the lotteries prohibited by the United Kingdom legislation and... cannot be assimilated to them' (see Case C-275/92, cited in footnote 1 above, paragraphs 49 to 51; my italics). Without adding other considerations, the Court therefore concluded that these aspects differentiating large-scale lotteries from authorised games (including local small-scale lotteries) were sufficient to exclude *comparability in the situations involved*, hence to justify the application of restrictive internal rules only to lottery activities at national level, in other words, only to services of a kind similar to those which, but for the prohibition, could have been offered to United Kingdom players by suppliers from other Member States.

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

tion applicable without distinction.[52] Above all, if the approach outlined above is to be applied correctly to the case before the Court, it is necessary to have regard to

52 — See Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraphs 21 to 25, in which the Court examined the question whether the obligation for national broadcasting bodies to use the technical resources of a Dutch undertaking for the production of their programmes could be justified by overriding reasons relating to the public interest (in that instance, the protection of pluralism in the radio and television sector and of the freedom of expression). Similarly, the rule requiring national treatment to be extended to the beneficiaries of the freedom of establishment ('under the conditions laid down for its own nationals by the law of the country where such establishment is effected') gives rise, in my opinion, to the obligation for the Member State involved to permit the nationals and companies of other Member States to establish themselves locally *under the same conditions as govern the establishment of the national monopoly operator*, subject to the possibility of invoking, as justification for the monopoly regime, one of the derogations specified in Articles 55 and 56 of the Treaty or overriding reasons relating to the public interest. See Blum and Logue (op. cit. in footnote 35 above), pp. 160 and 161. However, if the principle endorsed by the Court in Case C-353/89, cited above, is applied by analogy, it should be concluded that national legislation which reserves a particular activity to a single operator does not infringe the freedom of establishment where the consequent prohibition on forming or operating undertakings competing with the monopoly applies to nationals of that Member State (and companies: see Article 58) as well as to those of other Community countries. Such an approach would thus respect the right to treatment as nationals which Article 52 guarantees to the beneficiaries of the freedom of establishment (see the Opinion of Advocate General Lenz in Case C-260/89, cited in footnote 29 above, points 13 and 14). In the absence of previous rulings by the Court on the compatibility with Article 52 et seq. of the Treaty of State measures relating to public undertakings and/or holders of exclusive rights, I shall simply mention Commission Decisions 85/276/EEC of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks (OJ 1985 L 152, p. 25) and 97/606/EC of 26 June 1997 pursuant to Article 90(3) of the EC Treaty on the exclusive right to broadcast television advertising in Flanders (OJ 1997 L 244, p. 18). The national measures at issue in the context of the former Decision were the provisions laying down, first, that all public property, including the assets of Greek public undertakings, had to be insured exclusively with Greek public-sector insurance companies and, secondly, that the Greek State-owned banks were required to recommend their customers to take out insurance with a State-owned insurance company. In contrast to the present case, the discrimination against nationals and companies of other Member States derived not from the granting of exclusive rights to a single national operator but from the reservation of a large part of the relevant market to numerous State-controlled undertakings. The Commission decided, pursuant to Article 90(3) of the Treaty, that the provisions in question were incompatible with Articles 90(1), 52, 53, 5(2) and 3(f) [now Article 3(g)] of the Treaty. As regards in particular the infringement of the rules on establishment, the Commission noted that 'this measure makes it impossible for insurance companies from other Member States to set up in business in Greece as public property insurers while Greek public-sector insurers can continue to insure such risks and at the same time acquire new business previously underwritten by private companies. The Greek public property insurance market accounts for approximately 25% of annual premium income in Greece, which is a large proportion of the total.... The loans made by Greek State-owned credit banks account for same 80% of the credit market in Greece. By requiring the staff of State-owned credit banks to recommend their customers to take out insurance with a public-sector insurance company, Greece favours the latter to the detriment of non-public-sector insurance companies and hence also of insurance companies from the other Member States' (see the sixth and seventh recitals). In Decision 97/606/CE (see above), which is currently the subject of an action brought under Article 173 of the Treaty by Vlaamse Televisie Maatschappij (VTM) in Case T-266/97, the Commission ordered the Belgian authorities to bring to an end the infringement of Articles 90(1) and 52 of the Treaty resulting from the Flemish rules on radio and television broadcasting, advertising, sponsorship and cable distribution. The provisions of national law at issue enabled the Flemish Government to authorise only one private broadcasting body (*in casu*, VTM) to broadcast its programmes and advertising to the Flemish Community as a whole. The Commission established that even if the measures in question applied without distinction to non-Belgian operators and to Belgian operators other than VTM, they constituted a disguised form of discrimination whose effects were protectionist. 'This is so because the fact that television advertising is restricted to a single, domestic undertaking means that all of the market in television advertising, or at least most of it, benefits the home economy.' Moreover, the fact that under the legislation at issue television companies established in other Member States were permitted to broadcast Dutch-language programmes and advertising aimed at the Flemish public as a whole was not enough to nullify the infringement of the freedom of establishment, given that the non-Belgian competitors of VTM would have to operate at a distance from their Flemish viewers and from their advertisers' market, and would thus be at a disadvantage as compared with VTM (see paragraph 12). Lastly, the Commission rejected the argument that VTM's monopolisation of advertising revenue was justified for overriding reasons relating to the public interest, such as ensuring the pluralism of the Flemish press, and that the exception provided for in Article 90(2) of the Treaty was applicable to the case ('Even if it were to be accepted that VTM has a public service function, the means by which it is to be performed, namely the exclusive rights which are the subject of this Decision, affect trade to an extent which is disproportionate and contrary to the interests of the Community, and such as to deprive Article 52 of any effect'; see paragraph 14).

the factual and legal situation *only of profit-making operators*, leaving aside the special situation of monopolist public-law organisations. [53] The treatment envisaged for the undertakings affected by the national legislation at issue in the main proceedings appears, from that point of view, to be no different and is to be regarded as being applicable without distinction to services of whatever origin, the provision of slot machine games being prohibited by law in the case of operators established either in Finland or in another Member State.

Reply to Question 3(b):

(A) *Possible justifications for the restrictions which the Finnish legislation places on the free movement of goods*

29. If the answer to part a) of the third question is affirmative, as I propose, the Vaasan Hovioikeus must also be provided with the interpretations it has sought, in part (b) of that question, regarding possible justifications for the restrictions placed on the free movement of goods and the freedom to provide services.

30. As to the first aspect, the restrictions on the free movement of goods under consideration here, which derive from the discriminatory measures adopted by the Finnish legislature (see point 22 above), cannot, it seems to me, be justified on grounds of public morality, public policy or public security or by other derogations permitted by Article 36 of the Treaty, or on the basis of Article 90(2) of the Treaty. In particular, according to the case-law of the Court, Article 36 must be interpreted strictly. Accordingly, the exceptions it lists may not be extended to cases other than those expressly referred to. For example, whatever interpretation is to be given to the term 'public policy' under Article 36, it cannot in any event relate to consumer protection. [54] Furthermore, that provision refers exclusively to non-economic matters. [55] A further point to note is that the second sentence of Article 36 is designed to prevent restrictions on free movement based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as either to discriminate against goods originating in other Member States or indirectly to protect certain domestic products. Thus, for example, if in the Member State in

53 — See, *mutatis mutandis*, Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, in which the Court examined the compatibility with the Treaty of national legislation laying down that the participation of private operators in the running of the social welfare system by concluding contracts which entitled them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature was subject to the condition that they were non-profit-making. In stating the reasons for its conclusion that that condition complied with Articles 52 and 58, the Court observed, *inter alia*, that 'the fact that it is impossible for profit-making companies automatically to participate in the running of a statutory social welfare system of a Member State by concluding a contract [of the kind indicated above] is not liable to place profit-making companies from other Member States in a less favourable factual or legal situation than profit-making companies from the Member State in which they are established' (ibid., paragraph 33). See footnote 62 below.

54 — See Case 177/83 *Kohl* v *Ringelhan* [1984] ECR 3651, paragraph 19.

55 — See, *ex multis*, Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 22.

question there is lawful trade in the same goods on which an import ban is placed, purportedly on grounds of public morality, it must be held that the application of the national measure constitutes arbitrary discrimination or a disguised restriction on trade between Member States, giving rise to an infringement of the Treaty. [56]

It does not appear to me that the facts of the present case permit Article 90(2) of the Treaty to be invoked in derogation from the prohibition laid down in Article 30; despite what the Belgian Government maintains, there is no reason to hold that slot machine games constitute a service of general economic interest. [57] Moreover, the RAY holds a simple licence and could not be regarded as an undertaking required to manage such a service under a mandate from the public authorities. [58] Furthermore, even if the RAY were a monopoly in the strict sense, it would not satisfy the two conditions necessary if the exceptions contemplated by Article 90(2) are to apply, namely that (i) application of the rules of the Treaty regarding the free movement of goods obstruct the performance, in law or in fact, of an obligation to realise profits to be transferred to the public purse, [59] and (ii) the interests of the Community would not be jeopardised.

(B) *Possible justifications for the restrictions which the Finnish legislation places on freedom to provide services:*

(i) *Is the prohibition on the installation and operation of slot machines in Finland applied in a discriminatory manner?*

(ii) *Are there in the present case overriding reasons relating to the public interest such as to render the disputed legislation compatible with Article 59?*

56 — See, *a contrario*, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraphs 21 and 22.

57 — According to Blum and Logue (op. cit. in footnote 35 above, p. 23), such a service must satisfy essential needs of the population. It should be remembered that as Article 90(2) permits, in certain circumstances, derogation from other rules of the Treaty, the definition of those undertakings which can take advantage of it must be interpreted strictly (see Case 127/73 *BRT (II)* [1974] ECR 313, paragraph 19). See also Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 53, in which it was held that dock work consisting of loading, unloading, trans-shipment, storage and general movement of goods or material of any kind in a port is not necessarily of general economic interest exhibiting special characteristics compared with that of other economic activities. According to the case-law of the Court, the term 'services of general economic interest' covers: (i) management of a Member State's most important waterway (see Case 10/71 *Hein and Others* [1971] ECR 723, paragraph 11); (ii) the operation of the television service, including advertising and commercial activities (see *Sacchi*, cited in footnote 35 above, paragraph 15); (iii) the operation of air routes which are not commercially viable but which it is necessary to operate for reasons of the general interest (see Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraph 55); (iv) employment procurement (see Case C-41/90, cited in footnote 27 above, paragraph 24); (v) the establishment and operation of the public telecommunications network (see Case C-18/88, cited in footnote 43 above, paragraph 16); (vi) the collection, carriage and distribution of mail (see Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15); and (vii) the supply of electricity in part of the national territory (see Case C-393/92 *Municipality of Almelo and Others* [1994] ECR I-1477, paragraphs 47 and 48).

58 — The Court recently observed that Article 90(2) 'seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market. The Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them *by means of obligations and constraints which they impose on such undertakings* (see, *ex multis*, Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraphs 39 and 40; my italics).

59 — Ibid., paragraphs 43 and 58.

31. It is necessary, on the other hand, to investigate whether the restrictions which the Finnish Law on Gaming places on the freedom to provide services can be said to be justified. The conclusion I have reached above is that the national legislation at issue applies to slot machine gaming services without distinction as to their origin (see point 28 above). That, according to the case-law of the Court, has an important practical consequence: national rules which discriminate against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is to be provided are compatible with Community law only if they can be brought within the scope of some of the express exemptions provided for by Article 55 of the Treaty ('activities which [in the Member State concerned] are connected, even occasionally, with the exercise of official authority') and Article 56 there of ('grounds of public policy, public security or public health'), to which Article 66 then refers. [60] However, if the restrictive measure at issue is not discriminatory, as is the case here, it may be justified, in the absence of Community harmonisation measures, [61] also on the grounds of overriding requirements relating to the public interest, [62] provided that those requirements are not already satisfied by the rules imposed on the providers of the service in the Member State in which they are established and that the limitation thus placed on the freedom guaranteed by Article 59 of

60 — See, *ex multis*, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 and 33. Since Article 56 entails a derogation from a fundamental principle of the Treaty, it must be interpreted strictly. For it to be applicable therefore requires there to be a genuine and sufficiently serious threat to one of the fundamental interests of society (see, *ex multis*, Case C-114/97, cited in footnote 49 above, paragraph 46). It cannot therefore be invoked in order to pursue economic aims (see, *ex multis*, Case 352/85, cited above, paragraph 34). Furthermore, the measures taken to protect the interests which they seek to safeguard must be no more than are strictly necessary and must respect the principle of proportionality (see, *ex multis*, Joined Cases 115/81 and 116/81 *Adoui* v *Belgian State and City of Liège* and *Cornuaille* v *Belgian State* [1982] ECR 1665, paragraph 9, and Case C-352/85, cited above, paragraph 36).

61 — See Case C-288/89 *Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, paragraph 12, and Case C-353/89, cited in footnote 52 above, paragraph 16; see also, with reference to the right of establishment, Case 71/76 *Thieffry* [1977] ECR 765, paragraph 16.

62 — For example: professional rules to protect the recipients of a service, the protection of intellectual property, the protection of workers, consumer protection, the conservation and turning to account of the national historic and artistic heritage, the widest possible dissemination of knowledge of the artistic and cultural heritage of a country and reasons relating to cultural policy (see, *ex multis*, Case 288/89, cited in footnote 61 above, paragraphs 14 and 27); protection of the recipients of services for monitoring and renewing patents (see Case 76/90, cited in footnote 51 above, paragraph 17); protecting the cohesion of tax systems (see Case C-204/90 *Bachmann* [1992] ECR I-249); the prevention of fraud and the maintenance of order in society (see Case C-275/92, cited in footnote 1 above, paragraphs 58 and 59); road safety (see Case C-55/93, cited in footnote 34 above, paragraph 19); maintaining the good reputation of the national financial sector (see Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 44); the safeguarding of the proper administration of justice (see, *ex multis*, Case C-3/95 *Reisebüro Broede* v *Sandker* [1996] ECR I-6511, paragraph 31); the effectiveness of fiscal supervision (see Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31); fair trading (see Joined Cases C-34/95, C-35/95 andC-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 53).

the Treaty is necessary and proportionate. [63]

32. It therefore remains to be seen whether the second condition required for a measure restricting the freedom to provide services to be compatible with the Treaty is met: given that the exemptions provided for in Articles 55 and 56 of the Treaty are not applicable, [64] can it be held in the present case that the Finnish legislation is justified by overriding reasons relating to the public interest? The Vaasan Hovioikeus stated in the order for reference that the exclusive licence regime for the provision of slot machines to the public had been established primarily in order to limit the profit that could be made by exploiting the urge to gamble. This emerges from the preparatory work on the Law on Gaming (see footnote 3 above and the part of the text to which it relates). According to the Finnish Government, the monopoly on the operation of such machines accords with the social and cultural traditions of the country. It maintains that the system makes it possible to control 'gambling fever' and reduce the risk of criminal or fraudulent infiltration into such activities. The analysis carried out by the Court at the time of the *Schindler* judgment should, in the view of the Finnish authorities, be extended to the present judgment in that it is compatible with the features of this present case.

33. I concede that the Court's judgment in *Schindler* is relevant from several points of view for the purposes of reaching a decision in the present case. The Finnish authorities have laid great emphasis on the fact that the national legislation at issue prevents private profit-making activities based on the exploitation of the urge to gamble and that the proceeds from the services in question are an important means of financing social or charitable works and welfare and cultural activities. It must, however, be reiterated that on the basis of the principles established in *Schindler* the reasons put forward here — leaving aside the doubt, in my view unfounded, as to whether the

63 — As the Court has stated — in *Mediawet*, for example — restrictions on the freedom to provide services as a result of national legislation applicable to any person established in the national territory 'come within the scope of Article 59 if the application of the national legislation to foreign persons providing services is not justified by overriding reasons relating to the public interest or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established'. Furthermore, 'the application of national legislation to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules' (see Case C-288/89, cited in footnote 61 above, paragraphs 13 and 15, and Case C-353/89, cited in footnote 52 above, paragraphs 17 and 19). See also, *ex multis*, Case 279/80 *Webb* [1981] ECR 3305, paragraph 7; Case 76/90, cited in footnote 51 above, paragraphs 12 and 15; Case 3/95, cited in footnote 62 above, paragraph 28; and Case C-398/95 *SETTG* v *Ypourgos Ergasias* [1997] ECR I-3091, paragraph 21). Similar principles are also applicable with regard to national legislation restricting the right of establishment (see, *ex multis*, Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32). In *Sodemare* (cited in footnote 53 above, paragraph 32), for example, the Court held that the national legislation at issue, while restricting the right of establishment, did not infringe Article 52 of the Treaty in that 'as Community law stands at present, a Member State may, in the exercise of the powers it retains to organise its social security system, consider that a social welfare system [based on the principle of solidarity and which determines the quality of the services to be provided to welfare recipients and the level of the contribution to the related costs to be borne by beneficiaries who are not in a state of need] necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they be non-profit-making'.

64 — See footnote 60 above and the part of the text to which it relates. I note that the Netherlands, Portuguese and Spanish authorities have relied upon Article 56 of the Treaty in the present proceedings to justify restrictive regulations such as the Finnish Law on Gaming.

Finnish legislation is genuinely in line with those principles [65] — do not in themselves constitute overriding requirements relating to the public interest which can justify possible restrictions on a fundamental freedom guaranteed by the Treaty (see points 11 and 12 above). Moreover, to my mind, that view is consistent with the general principle established by the case-law of the Court, according to which objectives of an economic nature — such as that of reducing disbursements from the public purse by assigning funds earmarked *ex lege* for the conduct of particular activities entrusted in principle to the State — are not in any case overriding reasons such as to limit the scope of the principle of non-discrimination laid down in Article 59. [66]

On the other hand, *Schindler* recognised that the Member States have a discretion to ascertain which requirements of public interest deserve to be protected from the economic activity considered in that case: the national legislature may protect not only players but also society in general, taking account of the social and cultural features and the moral perceptions prevailing in its country (see point 13 above). The Court reasoned in this manner with regard to the prohibition of large lotteries on a national scale. And it is the reasoning on the basis of principles that counts. It can also be applied to the present case. Of course, by that I do not mean that the reasons which justified the measures adopted by the United Kingdom legislature — which the Court had in mind in *Schindler* — arise in exactly the same way in the present instance. The reasons for the requested protection of gaming activities are not exactly the same in both cases. In *Schindler* those reasons related to the large financial interests involved, on account of both the proceeds and the prizes distributed by large lotteries, which could have led to a high risk of criminal activity and fraud. The turnover of slot machine gaming is much smaller. [67] That form of gaming offers entertainment (which is entirely absent in lotteries) rather than large prizes, a fact which, in my opinion, could reduce the importance of considerations linked to the aim of not encouraging gambling, an activity which, the Court has noted, has damaging social consequences when taken to excess. However, it cannot be assumed that the installation and operation of such machines entails no risk of infiltration by organised crime, particularly given the attraction of gambling as a potential vehicle for money-laundering. In any case, games of chance in general, including those in which there is an element of amusement or which require some degree of skill on the part of players, can cause personal resources to be diverted to activities which are commonly considered to be socially unproductive. Furthermore, those who play slot machines are in a weak contractual position, partly because they have no effective means of checking whether the prizes paid out overall to winners by each

65 — See point 34 above, footnote 68 and the part of the text to which it relates.

66 — See, *ex multis*, Case C-398/95, cited in footnote 63 above, paragraph 23. See also V. Hatzopoulos (op. cit. in footnote 21 above), p. 852.

67 — I note, given the absence of more up-to-date figures, that in 1989 the share of the total Community market in games of chance accounted for by slot machine games was less than one-third of that of lotteries (about 11%, compared with around 36%); see the study *Gambling in the Single Market — A Study of the Current Legal and Market Situation*, referred to in the Opinion of Advocate General Gulmann, cited in footnote 30 above, point 6.

machine correspond to a certain percentage of the stakes collected from all the players, as promised by the provider of the service. In short, even in the case of slot machines there can be reasons to justify restrictive measures which the national legislature decides to adopt, either by regulating the conditions of play, in particular the size of stakes and prizes, or by laying down the manner in which the profits are to be used.

34. The above conclusions should, however, be qualified by a *caveat* which I consider essential for the correct conduct of the examination to be carried out by the national court. It is clear, in my view, that Member States are not permitted to exempt themselves from the prohibition laid down in Article 59 simply by invoking *in abstract terms* one or more of the overriding reasons recognised by the case-law of the Court. The measures adopted must *in concrete terms* further the public interest objectives which purportedly inspired them or which the national authority expressly had in mind when limiting the cross-border provision of the service in question, which is otherwise guaranteed by the Treaty. Albeit adopted in the discretion of the Member State, the restrictive measures selected remain amenable to judicial review; their appropriateness vis-à-vis the public interest requirements is, in fact, subject to scrutiny by the national courts called upon to apply them, which in the course of such enquiry have to refer to the rules on justification — including those on proportionality — developed by Community case-law as regards the limits which may legally be imposed on the exercise of rights and freedoms deriving from the Treaty. In the present case, the national court is therefore required to appraise the Finnish Law on Gaming taking into account the *actual* means of organising and operating the monopoly held by the RAY and to assess whether the provisions introduced for that purpose, as they operate in practice, are consistent with and appropriate to the reasons relied upon by the national authorities to justify them. The considerations which follow focus precisely on this aspect of the problem before us.

(iii) *Is the prohibition on the installation and operation of slot machines in Finland objectively necessary in order to ensure achievement of the objectives pursued?*

35. That said, it is a matter of seeing whether the national legislation at issue is an appropriate means of protecting consumers and maintaining order in society — the objectives which the Finnish Government states it is pursuing. Let us consider, first of all, the need for a monopoly in order to limit the demand for games of chance, and specifically for the playing of slot machines, in the Finnish market. The total number of such machines is currently around 16 000, spread over some 8 200 locations throughout the national territory, including sparsely populated regions. [68] As the Finnish Government itself has acknowl-

68 — See *http://www.ray.fi/english/games.default.htm*.

edged, in the absence of strict legislative provision on this point, it is the RAY itself which sets, on the basis of commercial criteria, the maximum number of machines it installs in Finland. Moreover, the appellants have alleged that in order to promote the game in question the RAY resorts to massive and aggressive advertising campaigns, while controls on the use of slot machines by minors, imposed on commercial establishments by the general contractual conditions drawn up by the RAY (see point 4 above) are largely ignored in practice. Above all, they maintain that there is a clear economic incentive for the proprietors of the retail outlets involved not to limit the number of machines installed in the hope that the machines will attract more customers for their main commercial activity and to encourage as many stakes as possible, even by relaxing checks on the age and spending habits of users. The fee paid to such establishments for the installation of the machines is, in fact, calculated as a percentage of the proceeds from the game (currently 16%). [69] This, I note in passing, sits badly with the Finnish authorities' claim that one of the guiding objectives of the disputed legislation is to prevent the urge to gamble from being exploited by private entrepreneurial activity.

If the examination of the facts which it is for the Vaasan Hovioikeus to carry out bears out the above account of the circumstances of this case, it will disprove the initial proposition under examination here: far from applying stringent controls on 'gambling fever', the RAY encourages it, albeit to acquire financial resources for allocation to the objectives referred to in Article 3(4) of the Law on Gaming (see point 2 above). Obviously, it cannot be ruled out that the RAY may have fallen into the practices of which the appelllants complain — assuming that this is confirmed — precisely because it believed itself to be none the less covered by the umbrella of 'good causes'. Given the uses to which the Law requires the related profits to be direct, action to stimulate demand for games of chance could be construed as a kind of *venial sin*, in other words, a means of exercising the monopoly which, when examining the need for the prohibition, we should view less harshly than would be appropriate if the system permitted the personal enrichment of those organising the game. However, I have already pointed out (see point 32) that the fact that Member States can ensure that the profits from games of chance are directed towards purposes of general utility is not an overriding reason such as to justify restrictions on the free provision of services. The *Schindler* judgment makes this clear. Thus, this aspect has no bearing on the question whether the restrictive measure at issue is necessary and adequate. At least in this case, one would be tempted to say that the end does *not* justify the means. As a consequence, it must be concluded that, given the actual way in which the RAY's

69 — In support of their assertion regarding the high level of usage of such machines, Mr Läärä and TSL have also observed before the Court that, as disclosed by the annual accounts of the RAY for 1996, the proceeds earned in the gaming machines sector amounted to FIM 2 171 000 000 (equivalent to about EUR 439 million). The slot machines operated by the RAY or on its behalf return on average 87% of the value of stakes to players (see *http://www.ray.fi/english/games.default.htm*).

monopoly is conducted and organised, the prohibition on installing and operating slot machines in Finland is not in itself such as to limit effectively demand for the game.

36. By contrast, the statutory reservation of the provision of the service to a public-law body such as the RAY appears, in my opinion, appropriate to the other and concurrent objective of the Finnish legislation, which is to protect players (and society in general) from the risk that the activity in question will be engaged in for fraudulent or even criminal purposes (see points 31 and 32 above). However, as laid down in the case-law of the Court referred above (see footnote 63 and the part of the text to which it relates), in assessing whether the contested State measure is necessary and appropriate to its purposes one must also check whether the underlying requirements to be satisfied are already met by the rules to which a provider of services from another Member State is subject in the Member State in which he is established. Consequently, the prohibition on installing and operating slot machines in Finland could be said to be necessary for the purposes relevant here only if the law of the home Member State of the provider of the service does not already embody adequate controls 'corresponding to the rules and controls applying in the State of destination'. [70] However, as some academic lawyers have pointed out, the *Schindler* judgment did not consider closely the criterion for examining the equivalence of controls. [71] It is therefore all the more interesting to note the reasons for which Advocate General Gulmann, in his Opinion on that case, dismissed the possibility that the prohibition on organising lotteries of the type marketed by Messrs Schindler in the United Kingdom was necessary in order to protect consumers and society from fraud. He maintained that not only did the rules applying in Germany to that type of lottery and the control exercised over it offer a high level of protection against abuse, but the service in question did not appear to give rise to greater risks of abuse than those considered acceptable in the

70 — See the Opinion of Advocate General Gulmann, cited in footnote 30 above, point 93.

71 — According to L. Gormley (see *Pay your money and take your chance?*, in *Eur. L. Rev.*, 1994, p. 644, in particular pp. 651 and 652), the *Schindler* judgment does not appear on this point to fit easily with the established case-law of the Court on the compatibility of legisalation applied without distinction with rules on the freedom to provide services. He emphasises, in particular, that the Court completely ignored both the criterion of the balancing of home and host State control and the notion of the mutual acceptance of home State legislation, and discussed in a rather superficial way the proportionality of the restrictive measure at issue. According to Gormley, the approach adopted in *Schindler* indicates that the Court was aware of the practical limits of the criterion of equivalence, which it considered to be more easily applied to concrete socio-economic concepts than to more abstract public-interest objectives, such as those considered by the Court in that case. V. Hatzopoulos (op. cit. in footnote 21 above, p. 850), for his part, maintains that the Court's minimalist approach to reviewing the existence and authenticity of the overriding reasons adduced in the case by the State of destination appears to mirror the approach adopted in its rulings on the protection of public morality. Indeed, he considers that the Court applied the relevant overriding reasons as though they related to public morality and then sought its justify the transposition of that approach to the issues raised in *Schindler* by making reference to order in society and the 'peculiar nature' of lottery activities.

United Kingdom for similar activities, such as local lotteries and football pools (as well as the national lottery introduced in 1993). [72] In my opinion, it is criteria such as these that the national court should take as the basis for applying the principle of equivalence in the main proceedings. It must compare the level of protection for players and society which the Finnish legislature intends to ensure on the national territory [73] with the protection made possible by the controls and legislation applying in the home State of the service. Thus, in this instance, the national court will have to consider in particular the fact — emphasised in the observations submitted by the United Kingdom authorities — that in the United Kingdom the sale, provision and maintenance of slot machines are subject to controls aimed at ensuring that the machines in question are not 'rigged' and cannot be used for criminal purposes.

(iv) *Is the prohibition on the installation and operation of slot machines in Finland proportionate to the objectives pursued?*

37. As can be seen from the case-law mentioned above (see point 30), even if the national court were to find that the Finnish Law on Gaming was necessary and appropriate in the terms outlined above (see points 34 and 35), this would not be sufficient to preclude its infringing Article 59. It would still be necessary to establish that the overriding requirements relating to the protection of consumers and society could not be satisfied as effectively using less restrictive means. According to the Spanish Government, however, the question whether or not in this instance the rule of proportionality can be said to be satisfied can have no bearing on the outcome of the case. The Spainish Government maintains that, by analogy with the approach adopted by the Court in *Schindler*, even an absolute prohibition on the provision of gaming services — allowing of no exceptions even in the case of a public-law body in a situation comparable to that of the RAY — should be held to be compatible with the Treaty. Such a finding would accordingly be even more compelling in the case of the Finnish Law on Gaming, for the restriction which this places on the freedom to provide services is similar to that resulting from the United Kingdom legislation at issue in *Schindler* and, in fact, subject to certain conditions, the Finnish Law permits the services in question to be provided by a monopoly operator.

72 — See the Opinion of Advocate General Gulmann, cited in footnote 30 above, points 92 to 97. That finding did not, however, prevent Advocate General Gulmann from concluding that the restrictive nature of the national legislation at issue was justified by *other* overriding requirements (the need to limit the supply of games in the State of destination and to ensure that Member States remain free to issue regulations on the use of the profits from lotteries). The Advocate General reached this conclusion on the ground that, although each of the public interests in question had to be considered separately, that did not rule out the possibility 'that the factors taken together may justify the restrictions even if, considered separately, they cannot do so' (ibid., point 91).

73 — In order to determine that standard of protection, it will be necessary to take into consideration, on the one hand, the way in which the playing of slot machines is organised and the volume of stakes permitted under Finnish law in the case of similar activities organised by the RAY and, on the other, the level of protection afforded to Finnish consumers for comparable activities, such as lotteries and pools relating to sporting events.

38. Although that line of argument is appealing at first sight, I cannot go along with it: in the final analysis it goes too far. It is one thing to note that the Finnish Law on Gaming and the United Kingdom legislation on lotteries, at issue in *Schindler*, pursue similar public-interst objectives; it is quite another to urge, on the strength of that analogy, that the conclusion in *Schindler* should, by force of logic, apply *a fortiori* to the case in point. It does not. The differences between the restrictive measures at issue in *Schindler* and those at issue here cannot be overlooked. To my mind, there can be no question of protectionist motives in the case of a prohibition on the provision of a given service to recipients established in a given Member State which allows of no exception, even for a single operator holding the nationality of that State or established in its territory. The national authorities consider the service in question to be undesirable and intend to ban it for reasons which are prima facie legitimate, such as, so far as is relevant for our purposes, the *peculiar nature* of games of chance. If the prohibition is consistently enforced, a kind of presumption will arise as to its proportionality in relation to the reasons invoked.

The position is different, however, in the case of a *selective* prohibition such as that at issue here, which permits the service to be provided, subject to rigorous organisational and operational conditions, but solely by one national operator. Here it is the Member State itself which demonstrates, by providing for an exception to the prohibition, that in the national authorities' own estimation the overriding public-interest considerations are of only relative seriousness and urgency and should be interpreted with a degree of flexibility. That assessment is bound to influence any appraisal of the possibility that the public interest might be just as effectively protected — even in relation to potential competitors from other Member States — by measures that restrict the free movement of services to a lesser extent than an absolute prohibition on market access.

It is no accident that, although the *Schindler* judgment recognises not only the Member States' competence to define the requirements for the protection of players and, more generally, for the protection of society, but also their discretionary power to prohibit or limit gaming activities in their own territory in a manner consistent with national social and cultural traditions, it contains one important *caveat*: if restrictive State measures are to be exempted from the prohibition established by Article 59 of the Treaty on the grounds of overriding considerations recognised by the Court, the limitations thereby placed on the freedom to provide services *must not be*

discriminatory (see point 13 above). That clause appears in paragraph 61 of the *Schindler* judgment, towards the end of the Court's analysis as to whether legitimate justifications existed. How is it to be interpreted? In my opinion, it is not an unnecessary repetition of the principle (already laid down in a previous section of the judgment; see paragraphs 47 to 52), that only measures which are applicable without distinction can be justified by reference to the public interest. On the contrary, I believe that the Court intended to formulate, albeit in an elliptical form, a *further* principle: namely, that when the national authorities are given discretionary power to adopt prohibitions, or measures which otherwise restrict a fundamental freedom guaranteed by the Treaty, on the basis of the special characteristics of a good or service, any discriminatory effects of those provisions, even if they stem from criteria not dictated by protectionist intentions, acquire dual relevance. What I mean is that the effects to which they give rise are subject to *twofold scrutiny*. It is necessary, first and foremost, to see whether or not the measure with which they are associated is applicable without distinction; those effects must then be assessed in another light, for the purposes of determining whether the measure in question is adequate, necessary and proportional to the overriding objectives at which it is directed. It will be said that this principle of double-testing is an extremely rigorous standard of verification in the context of a discretionary power accorded to Member States. So it should be, in my view. The fact that a measure applies without distinction does not close off *all* the ways in which State measures aimed at restricting or impeding the free movement of goods or services may apply unlawful discrimination within the meaning of the Treaty. The range of acceptable justifications must not be widened unduly, as would happen if the Member States were free to regulate or even preclude access to an economic activity solely on the basis of the special nature of that activity. The present case, I repeat, relates to a selective prohibition: the activity in question is reserved for a single national operator. The *Schindler* judgment does not permit us to assume that a measure of that kind automatically escapes censure. On the contrary, such legislation must be scrutinised independently, as I have explained, from the points of view of necessity, adequacy and proportionality. Let us now consider closely the proportionality of the measures adopted in relation to the purpose pursued.

39. The Finnish Government, the authorities of the other 'intervening' Member States and the Commission submit that in this instance the national legislation satisfies that requirement. If slot machine gaming took place in a context of free competition, they assert, the Member States could not, at their discretion, limit or otherwise control supply in their own territory, or prevent the harmful social consequences of excessive demand. Furthermore, according to the Commission and the Member States, liberalisation of the market would not allow them adequately to protect players against the risk of fraud and society against criminal infiltration into gaming activities. The appellants, for

their part, object that the attempt to reformulate the question as though it necessarily implied a choice between two extremes — monopoly or complete deregulation of the market — is an unacceptable distortion. In any case, in order to obtain a revision of the judgment at first instance the appellants do not appear to have to argue that the market in slot machine gaming is open to competition. They would merely have to demonstrate that they cannot hope to be granted a licence to exercise the activity in question, because the current legislation reserves this to the RAY.

40. The arguments adduced by Mr Läärä and the appellant companies seem to me to be well-founded. Once it has been accepted that the urge to play games of chance is a fact of life, it can be subjected to appropriate control by means of rules aimed at limiting and controlling market supply. Contrary to the assertions of the Spanish Government, the controls and checks needed to achieve the priority objectives pursued — and which, as I have observed (see point 35), must not unnecessarily duplicate those which may already have been established by the State of origin of the services — could, in my opinion, be applied by means of a less restrictive regulatory regime than that currently in force. As the Belgian authorities submit, this could, for example, take the form of a system of non-exclusive licences, open also to private entrepreneurs; under such a system the licence to install and operate the machines in question would be granted on application to interested operators for the entire national territory or only a part of it, but subject to conditions laid down by the national legislature in the light of the interests to be protected. It would therefore be a question of extending to the operators applying for such a licence the controls and checks currently applied to the managers of the establishments in which slot machines are provided for public use. The solution already adopted in legislation in the Netherlands, Germany and Portugal is of this kind, albeit with national variations. In this way, the increase in administrative costs as a result of extending the circle of operators subject to supervision should be kept within reasonable bounds. It would certainly be more proportionate to the objectives which the Finnish legislature purportedly pursues than the current monopolistic system can ever be. [74] That the replacement of the RAY's monopoly with a system of non-exclusive licences would have less drastic effects on the freedom to provide services is such a clear proposition that it does not call for extensive comment. Once the maximum number of available licences has been set in relation to the level of overall supply deemed desirable by the

74 — In any event, as the Court has stated when interpreting Article 30 of the Treaty, Member States may not derogate from a fundamental freedom by introducing or maintaining rules or practices which, even though they are beneficial, embody restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required (see Cases 104/75 *De Peijper* [1976] ECR 613, paragraph 18, and Case C-128/89 *Commission* v *Italy* [1990] ECR I-3239, paragraph 22).

Finnish legislature, all suppliers (both Finnish and from other Member States) who satisfy the requirements of respectability and integrity laid down by law would, as a matter of principle (subject to the need to carry out appropriate selection procedures), have access to the national market in the service on a transparent and non-discriminatory basis. Furthermore, the operation of gaming activities by private concession-holders would be subject to the police supervision and general administrative checks required to verify compliance with the relevant legal provisions (regarding, for example, the size of stakes and prizes and the use of meters) and the conditions of the licence (in particular, those relating to the prohibition on the use of machines by unaccompanied minors or to the depositing of a surety to guarantee payment of any fines), thus making it possible to prevent fraud and other criminal offences. A system of non-exclusive licences would, moreover, be perfectly compatible with the Member States' discretionary power to regulate the use of the profits, and specifically with the objective of involving licence holders, possibly via taxation, in the financing of works of public interest. I am therefore of the view that Article 59 of the Treaty should be interpreted as meaning that a prohibition on the operation and installation of slot machines such as that laid down in the Finnish Law on Gaming does not satisfy the criterion of proportionality.

41. Finally, I suggest that the Court should reply in the negative to the question regarding the applicability of Article 90(2) of the Treaty to the present case for the purpose of exempting an undertaking such as the RAY from the application of Articles 90(1) and 59. The considerations I have set out above on the compatibility of the method of organising and operating the monopoly in question with the provisions of the Treaty on the free movement of goods (see point 29 above) apply *mutatis mutandis*.

III — Conclusions

For the reasons I have set out above, I propose that the Court should reply as follows to the questions referred by the Vaasan Hovioikeus:

(1) Articles 90(1) and 30 of the Treaty preclude national legislation which grants a body governed by public law in circumstances such as those which apply to the Raha-automaattiyhdistys the exclusive right to supply slot-machine gaming services and the right to produce and sell the machines necessary for the provision of those services where the grant of such rights to that body gives rise to unjustified discrimination against imported products as compared with domestic products, unless that legislation is justified on one of the grounds indicated in Article 36 or the application of Article 30 raises an obstacle to performance of the particular task entrusted to the body concerned.

(2) Articles 90(1) and 59 of the Treaty preclude national legislation which grants a body governed by public law in circumstances such as those which apply to the Raha-automaattiyhdistys the exclusive right to supply slot-machine gaming services where, having regard to the specific rules governing the organisation and operation of that monopoly, it is found that the provisions restricting the freedom to provide services do not in any consistent, adequate or proportionate manner reflect the requirements of social policy or of fraud prevention invoked by the national authorities to justify the legislation in question.