OPINION OF ADVOCATE GENERAL BOT delivered on 26 January 2010[1]

1. May legislation of a Member State which makes sports betting subject to an exclusive right system in order to protect consumers against the risk of addiction to gaming but which does not enable that aim to be attained, so that the legislation is contrary to the freedom to provide services, be kept in force for a transitional period and, if so, on what conditions and for how long?

2. With those questions, the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany) asks the Court whether and, if so, on what conditions it is possible to derogate from the obligation laid down in *Simmenthal*[2] and confirmed by settled case-law that a national court, when confronted by a conflict between a provision of domestic law and a directly applicable Community rule, must, in accordance with the principle of primacy, ensure the application of that rule, by refusing to apply its domestic law.

3. In this Opinion I shall propose, first, that the Court give the referring court some guidance which should enable it to ascertain whether its premiss that the legislation in question is contrary to the freedom to provide services is well founded.

4. Then, on the basis that the premiss is well founded, I shall set out the obstacles which as a matter of principle preclude the application and maintenance in force, even if only for a transitional period, of a rule of domestic law which is contrary to a directly applicable Community rule. Finally, assuming that it is possible to derogate from the obligation arising from *Simmenthal*, I shall set out the reasons why that possibility should be ruled out so far as the legislation in question is concerned.

1 — Original language: French.
2 — Case 106/77 [1978] ECR 629.

I — Legal context

5. Article 12(1) of the Grundgesetz (Basic Law) provides as follows:

'All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The pursuit of the occupation or profession may be regulated by or on the basis of a law.'

6. Paragraph 31 of the Bundesverfassungsgerichtsgesetz (Law on the Federal Constitutional Court) provides as follows:

'(1) The decisions of the Bundesverfassungsgericht shall bind the constitutional entities at federal and *Land* level, as well as all courts and authorities.

(2) … the decision of the Bundesverfassungsgericht shall have the force of law … when the Bundesverfassungsgericht declares that a law is compatible or incompatible with the Constitution or void. … the operative part of the decision shall be published in the *Bundesgesetzblatt* …'

7. Paragraph 284(1) of the Strafgesetzbuch (Criminal Code) reads as follows:

'Any person who, without administrative authorisation, organises games of chance open to the public or makes the facilities necessary for that purpose available shall be punished with a term of imprisonment of up to two years or with a fine.'

8. By means of the Staatsvertrag zum Lotteriewesen in Deutschland (Agreement between the *Länder* on lotteries in Germany), which came into force on 1 July 2004, the *Länder* created a uniform framework for the organisation and location of games of chance. It is apparent from Paragraph 5 of the agreement that the *Länder* are required to ensure a sufficient provision of games of chance, a function which can be performed through a legal person governed by public law or private law companies the majority of whose shares is held by a public authority. Paragraph 5 of the agreement also provides that, unless otherwise agreed with another *Land*, the activity of each *Land* is confined to its own territory.

9. Paragraph 1(1) of the Sportwettengesetz Nordrhein-Westfalen (North Rhine-Westphalia Law on sports betting) of 3 May 1955 provides as follows:

'The *Land* Government may authorise sports betting undertakings. Such an undertaking can only be a legal person governed by public

law or a legal person governed by private law the majority of whose shares is held by legal persons governed by public law …'

10. According to the information provided by the European Commission in its written observations, at the material time Westdeutsche Lotterie GmbH & Co. OHG [3] was the only undertaking to have obtained a licence to organise sports betting in the *Land* of North Rhine-Westphalia. [4]

11. Paragraph 14(1) of the Ordnungsbehördengesetz für das Land Nordrhein-Westfalen (Law of the *Land* NRW on public order authorities) reads as follows:

'The public order authorities may take the measures necessary in individual cases to avert a threat to public safety or public order.'

II — Main proceedings and order for reference

12. Since 1 June 2005, Winner Wetten GmbH, [5] which is established in Germany, has occupied business premises in Bergheim, in the *Land* NRW, where it dealt in particular with the placing of so-called 'Oddset' (odds betting) sports bets on behalf of Tipico Co. Ltd. [6] Tipico is established and registered in Malta, where it holds a national concession for the organisation of sports betting.

13. By order of 28 June 2005, the Bürgermeisterin der Stadt Bergheim (mayoress of the town of Bergheim) prohibited WW from continuing to carry out sports betting the organiser of which was not authorised by the *Land* NRW and warned WW that failure to comply with the order could lead to the closure of its business premises.

14. WW lodged an objection to the order, which was dismissed on 22 September 2005 by the Landrat des Rhein-Erft-Kreises (chief administrative officer for the Rhein-Erft district). WW then brought an action before the Verwaltungsgericht Köln against the order and the decision dismissing its objection.

3 — 'WestLotto'.
4 — 'The *Land* NRW'.
5 — 'WW'.
6 — 'Tipico'.

15. In those proceedings WW argued that the sports betting monopoly in force in the *Land* NRW was contrary to the freedom to provide services under Article 49 EC, as interpreted in *Gambelli and Others*.[7] WW stated that in that judgment the Court had affirmed that an operator established in national territory offering betting services as an intermediary of a provider of betting services established in another Member State could invoke the freedom to provide services. The Court also ruled that a State betting monopoly was compatible with Community law only if it limited that activity in a consistent and systematic manner. However, in WW's submission that was not the case in Germany because of the advertising by the national organisers of sports betting.

16. In the order for reference the Verwaltungsgericht Köln states, first, that WW did contravene the legislation of the *Land* NRW by offering sports betting as Tipico's intermediary although the two companies did not possess, and could not obtain, authorisation for that purpose.

17. Secondly, the referring court states that, in view of the requirements laid down by the Court in *Gambelli and Others*, the sports betting monopoly in the *Land* NRW is contrary to the EC Treaty provisions on the freedom of establishment and the freedom to provide services.

18. In that connection the Verwaltungsgericht Köln refers to the judgment of 28 March 2006 delivered by the Bundesverfassungsgericht (Federal Constitutional Court) and the latter's order of 2 August 2006 concerning, respectively, the legislation of Land Bayern (the *Land* of Bavaria) and that of the *Land* NRW. In those decisions the Bundesverfassungsgericht found that the monopolies on sports betting in those two *Länder* constituted disproportionate interference with the freedom to pursue an occupation guaranteed by Article 12(1) of the Basic Law because they did not effectively combat addiction to gaming. The Bundesverfassungsgericht added that the requirements and aims of the Basic Law converged with those of Community law, as set out in *Gambelli and Others*.

19. The referring court goes on to point out that the Bundesverfassungsgericht preserved the existing legal situation until 31 December 2007 on condition that, during that transitional period, the law applying to sports betting would be brought into line with the Basic Law. The Bundesverfassungsgericht thus directed that the entity responsible for organising sports betting should without delay establish a minimum level of consistency between the actual exercise of its monopoly and the aims of counteracting passion for gaming and addiction.

7 — Case C-243/01 [2003] ECR I-13031.

20. However, the referring court states that reorganisation of the actual arrangements for the national monopoly on sports betting in accordance with the requirements of the Bundesverfassungsgericht is not sufficient to remove the incompatibility with Community law. According to the referring court, it is necessary to amend the legal arrangements governing the monopoly in order to put an end to the infringement. It adds that the primacy of a directly applicable provision of Community law requires that contrary national law not be applied.

21. The referring court observes, however, that, in an order of 28 June 2006, the Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court of the *Land* NRW) decided to retain the legislation on sports betting in the *Land* NRW subject to the same temporal and substantive conditions as those laid down by the Bundesverfassungsgericht in relation to the Bavarian Law, so as not to create an 'unacceptable gap in the law'.

22. On the basis of those considerations, the Verwaltungsgericht Köln decided, by order of 21 September 2006, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are Articles 43 EC and 49 EC to be interpreted as meaning that national rules governing a State monopoly on sports betting which contain impermissible restrictions on the freedom of establishment and the freedom to provide services enshrined in Articles 43 EC and 49 EC, inasmuch as they do not serve to limit betting activities in a consistent and systematic manner within the terms of the Court's case-law [*Gambelli and Others*], may still continue to apply exceptionally for a transitional period, notwithstanding the primacy of directly applicable Community law?

(2) If Question 1 is to be answered in the affirmative: what conditions need to be met for the purpose of derogating from that primacy and how is the transitional period to be determined?'

III — Correspondence with the referring court

23. The referring court spontaneously wrote a letter dated 11 May 2007 to the Court in which it stated that 'according to settled case-law … the assessment of the action giving rise to the reference for a preliminary ruling turns on the legal and factual situation

obtaining at the date of the decision ruling on the objection (in the present case, 22 September 2005)'. The referring court added that 'should there have been subsequent changes in sports betting practice, for example, as a result of the Bundesverfassungsgericht decisions of 28 March 2006 and 2 August 2006, they would not affect the assessment of the main proceedings at all.'

24. In July 2008 the Court requested clarification from the referring court on the basis of Article 104(5) of the Rules of Procedure and asked whether the questions referred were still necessary for the outcome of the case, taking into account the Bundesverfassungsgericht's judgment of 22 November 2007.

25. In that judgment the Bundesverfassungsgericht found that the transitional measures provided for in its judgment of 28 March 2006, which permitted the legislation on sports betting applicable in the *Land* of Bavaria to be retained, subject to certain conditions, could not legalise the administrative prohibition decisions which were made before that judgment, so that such decisions had to be annulled.

26. In a letter of 8 August 2008 the referring court stated that a reply to the questions referred was still necessary for the outcome of the case. It observed that, in an order of 18 April 2007, the Oberverwaltungsgericht Nordrhein-Westfalen had taken the view that the legality of decisions prohibiting the offering of sports betting had to be assessed as at the date of the forthcoming judicial decision. The referring court also explained that, as the legal situation obtaining from 1 January 2008 was very different from the previous situation, the court would position itself at 31 December 2007 in order to assess the legality of the order of 28 June 2005 and the decision of 22 September 2005 which were the subject of the main proceedings, that is to say, at a date when the former legislation, contrary to Community law, still had to be applied.

IV — Assessment

27. Before I consider the questions submitted by the referring court, a few observations are called for with regard to, first, the admissibility of those questions and, secondly, the premiss upon which they are based.

A — *Admissibility of the questions referred*

28. The admissibility of the questions submitted by the referring court might appear doubtful in view of the Bundesverfassungsgericht's judgment of 22 November 2007. Their admissibility is also disputed by the Norwegian Government, which submits that they are hypothetical because it has not been shown that the legislation of the *Land* NRW is inconsistent with Community law.

29. On the first point, it was permissible to wonder whether the decisions contested in the main proceedings had to be annulled by virtue of the Bundesverfassungsgericht's judgment, so that the present order for reference would serve no purpose.

30. However, it must be observed that, in its reply of 8 August 2008, the referring court stated that its questions were still relevant to the outcome of the case. The court added that it had to position itself at 31 December 2007 in order to give a ruling in the main proceedings, that is to say, at a date when, by virtue of the transitional measures decided upon by the Bundesverfassungsgericht and the Oberverwaltungsgericht Nordrhein-Westfalen, the legislation prohibiting WW from offering sports betting on behalf of Tipico remained applicable.

31. The question of the date at which the Verwaltungsgericht Köln must place itself to give judgment on the application for annulment which has been brought before it and determination of the conclusions which must be drawn from the Bundesverfassungsgericht's judgment of 22 November 2007 as regards the measures which are the subject of the main proceedings depend on substantive and procedural rules of domestic law and are therefore a matter for assessment by the referring court.

32. Under the division of functions between the national court and the Court of Justice in the framework of the preliminary ruling procedure and in accordance with the spirit of cooperation governing that procedure, note must be taken of the fact that the Verwaltungsgericht Köln considers that it still has to deal with the dispute in the main proceedings, and that it still seeks a reply to its questions.

33. As the questions relate to the interpretation of Community law, the Court is, in my opinion, bound to give a ruling because, in accordance with settled case-law, in proceedings under Article 234 EC it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it

to deliver judgment and the relevance of the questions which it submits to the Court. [8]

34. On the second point, concerning the Norwegian Government's objection, it is true that, as the Commission and also the German Government have pointed out, the questions submitted to the Court by the referring court arise only if the legislation of the *Land* NRW on sports betting really is contrary to Community law. I also think, like those parties, that, in view of the explanations provided by the referring court, the correctness of its assessment in this respect can be doubted.

35. In my opinion, that circumstance is justification, in accordance with the spirit of cooperation which governs preliminary ruling proceedings and in order to inform the referring court of all the factors relating to the interpretation of Community law that may be helpful for deciding the case before it, for the Court to give the referring court guidance which will enable it to reconsider whether its premiss is well founded.

36. However, the possibility that the referring court may, in the light of that guidance, go back on its premiss must not lead the Court to rule that the questions referred are inadmissible and refuse to give a reply. While, on the basis of the case-file as it stands, that premiss is debatable, it may also be confirmed by the referring court since the question whether the *Land* NRW legislation was drafted and is in practice applied in such a way as to attain its objectives of protection in a consistent and systematic manner is, ultimately, a matter for assessment by the referring court. [9]

37. It has consistently been held that the Court may refuse to reply to a question referred for a preliminary ruling concerning the interpretation of Community law only in exceptional circumstances, where it is quite obvious that the interpretation of Community law that is sought is not relevant to the outcome of the main action, where the problem is hypothetical, or where the Court does not have before it sufficient factual or legal material to give the national court an answer that is useful for deciding the action. [10]

38. There are no such grounds for refusing to reply in the present case.

8 — For a recent instance, see Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 40.

9 — Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 37, and *Gambelli and Others*, paragraph 66.

10 — *Filipiak*, paragraph 42 and the case-law cited.

39. The referring court, which considers that the legislation on sports betting on the basis of which the contested measures were adopted is contrary to the freedom of establishment and the freedom to provide services, wishes to know whether and, if so, on what conditions it is possible to derogate from the obligation, imposed by the principle of the primacy of Community law, to leave that legislation unapplied and to annul those measures. The referring court has asked the Court this because the Bundesverfassungsgericht and the Oberverwaltungsgericht Nordrhein-Westfalen found that the abovementioned legislation had to be retained although it was contrary to the Basic Law.

40. In my view, the Court of Justice has sufficient factual and legal material to reply to that question. In addition, the fact that the premiss upon which the question is based arises from the determination of the national court and may be confirmed by it shows that the question has not been referred in relation to a purely hypothetical problem and that it does not manifestly have no bearing on the outcome of the main proceedings.

41. Therefore I think that the questions submitted by the referring court are admissible.

B — *The referring court's premiss that the legislation of the* Land *NRW is contrary to Community law*

42. The referring court considers that the sports betting legislation of the *Land* NRW is contrary to the freedom to provide services, as interpreted in *Gambelli and Others*, on the ground that such betting is encouraged by the authorised national bodies, so that the legislation does not effectively combat addiction to gaming. It adds that the changes made by WestLotto to the conduct of its business in accordance with the directions of the Bundesverfassungsgericht have not brought the situation into conformity with Community law because, to do so, it is also necessary to amend the legal arrangements governing the monopoly.

43. The stages in the legal reasoning which led the referring court to conclude that the legislation at issue is not consistent with Community law appear to be beyond dispute.

44. It follows from *Gambelli and Others* that WW, which offers sports betting as an

intermediary of a company established in Malta, can rely on the provisions of Article 49 EC. [11] Furthermore, I agree with the Commission that WW can rely only on the Treaty provisions concerning the freedom to provide services and not on those relating to the freedom of establishment because the company was formed under German law and carries on its business in Germany.

45. In addition, it is undisputed that national legislation such as that of the *Land* NRW, which prohibits the offering in the *Land* NRW of sports betting which is organised by a company established in another Member State, constitutes a restriction of the freedom to provide services.

46. Next, while such a restriction may be justified on public policy grounds or by an overriding reason in the general interest such as protecting consumers against being induced to squander money on gaming, that restriction must also be proportionate to the aim, which means that the aim must be pursued in a consistent and systematic manner. [12] In *Gambelli and Others* the Court found that that condition is not fulfilled where a Member State has enacted legislation restricting gaming with the sole aim of protecting consumers against the risks of excessive spending when, in actual fact, that State pursues a policy which strongly encourages those same consumers to participate in gaming. [13]

47. Finally, as I have already said, it is for the national court to ascertain whether the legislation at issue is in practice applied in conformity with the objectives pursued.

48. On the other hand, the conclusion reached by the referring court may be questioned in view of the following two considerations.

49. In the first place, as the Norwegian Government has submitted, the possibility cannot be ruled out that the conditions required by the Basic Law are more stringent than those of Community law, at least in the light of the clarification in the case-law following *Gambelli and Others*.

50. Thus, in *Placanica and Others*, [14] the Court ruled that, if the gaming legislation of a Member State aims to channel gaming activities into controllable systems in order to prevent their use for criminal purposes,

11 — *Gambelli and Others*, paragraph 58.
12 — Ibid., paragraph 67.
13 — Ibid., paragraph 69.
14 — Joined Cases C-338/04, C-359/04 and C-360/04 [2007] ECR I-1891.

authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity, and this may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques. [15]

51. At the present moment, in the pending cases *Sporting Exchange* (C-203/08) and *Ladbrokes Betting & Gaming and Ladbrokes International* (C-258/08), the Court is confronted by legislation of a Member State which subjects gaming to a monopoly system with the aim of protecting consumers against addiction to gaming and at the same time preventing crime.

52. I have proposed that the Court rule that the fact that the holders of exclusive rights to operate gaming in that Member State are authorised to make their offers attractive by creating new games and using advertising is not, as such, inconsistent with the aims of that State taken as a whole. What is important, in that particular case, is that the creation of new games and the advertising be strictly controlled by the Member State and limited so as to be compatible also with pursuit of the aim of protecting consumers against addiction to gaming.

53. As it is difficult in practice to strike a balance between those two aims, I have also proposed that the Court rule that the Member States have a broad discretion. Also, determination of the question whether the legislation in question, as actually applied by the competent authorities and the holder or holders of the exclusive right to offer gaming, pursues such aims in a consistent and systematic manner must be based on an analysis by the national court of the practical effects of that legislation.

54. In other words, the fact that the holder or holders of the right to offer gaming advertise in a Member State which has restricted gaming activity in order to protect consumers against being induced to spend excessive amounts and against the risk of addiction does not necessarily show a failure to observe the requirement that those aims must be pursued in a consistent and systematic manner nor, therefore, that the legislation in question is contrary to Community law. It is for the national court to take into consideration all the aims of the legislation in question and to assess its actual effects on consumers, having regard to the broad discretion which the Member States have in that matter.

55. In the second place, the referring court has not explained the reasons why the legal arrangements limiting the activity of the

15 — Paragraph 55.

holder of the right to offer sports betting are contrary to Community law so that, according to the referring court, the changes made by WestLotto to the conduct of its business in accordance with the directions of the Bundesverfassungsgericht cannot eliminate that failure to comply with Community law.

56. Finally, it must be observed that in the pending cases *Stoss and Others*[16] several questions have been referred to the Court for a preliminary ruling whose very object is a finding as to whether the sports betting legislation applicable in the *Länder* of Baden-Württemberg and Hesse, which is very similar to that in force in the *Land* NRW, is consistent with Community law.

57. The referring court might therefore also be led to reconsider its premiss as a result of the judgment to be given in those cases, which are being examined by the Court in parallel with the present proceedings.

58. Consequently I think it would be useful, before examining the questions submitted, to give the referring court the following guidance with regard to the premiss upon which those questions are based:

— Legislation of a Member State which restricts the provision of sports betting with the aim of defending interests referred to by the Treaty or considered legitimate by the case-law must, in order to be consistent with Community law, pursue its aims in a consistent and systematic manner.

— It is for the national court to ascertain whether that condition is met by taking into consideration all the aims of the legislation in question and by assessing its actual effect on consumers, having regard to the broad discretion which the Member States have in that matter.

— The referring court will also be able, where relevant, to take into account guidance provided in the judgment to be delivered in *Stoss and Others*.

C — *The substance of the case*

59. In examining the questions submitted by the referring court, it is necessary to proceed on the basis of the premiss that the legislation

16 — Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07.

in question is an unjustified restriction of the freedom to provide services on the ground that it does not serve to limit betting activities in a consistent and systematic manner.

60. The referring court rightly takes the view that, because of the conflict between its national legislation and a provision of Community law which is directly applicable, [17] it must refuse to apply that national law.

61. According to the position taken by the Court in *Simmenthal* and thereafter consistently followed by it, in the event of a conflict between a provision of domestic law and a rule of Community law which is directly applicable, the national court is under a duty to give full effect to that rule, if necessary refusing of its own motion to apply the conflicting provision of national legislation, even if adopted later, and it is not necessary for the national court to request or await the prior setting-aside of that provision by legislative or other constitutional means. [18]

62. The first question from the referring court is whether that obligation may be derogated from.

63. Accordingly, it asks, in substance, whether a court of a Member State may continue to apply its national legislation on sports betting for a transitional period by way of exception although that legislation constitutes an unjustified restriction of the freedom to provide services in that it does not serve to limit betting activities in a consistent and systematic manner.

64. The referring court states that it is submitting the question to the Court on the ground that, in the order of 28 June 2006, the Oberverwaltungsgericht Nordrhein-Westfalen provisionally excluded the primacy of Community law so as not to give rise to an 'unacceptable gap in the law'. The referring court explains that, by virtue of that order, the contested provisions of the Law on sports betting thus continue to apply provisionally in spite of the contravention of Article 49 EC, subject to the same temporal and substantive conditions as those adopted by the Bundesverfassungsgericht in relation to the Bavarian legislation in the light of the freedom to pursue an occupation provided for in Article 12(1) of the Basic Law.

65. It is also clear from the explanation provided by the referring court that, in the order of 2 August 2006, the Bundesverfassungsgericht adopted the same transitional measures in relation to the *Land* NRW legislation.

17 — The direct applicability of the Treaty provisions establishing the freedom to provide services was acknowledged in Case 33/74 *van Binsbergen* [1974] ECR 1299.

18 — *Simmenthal*, paragraph 24, and *Filipiak*, paragraph 81 and the case-law cited.

66. Those statements may be understood as meaning that the referring court wishes to ascertain whether the obligation imposed by the rule in *Simmenthal* may be derogated from on two separate grounds, namely, first, the Bundesverfassungsgericht's decision to uphold the legislation at issue until 31 December 2007 and, secondly, the need to avoid a gap in the law which could prejudice consumers in the *Land* NRW.

67. The reply to the question under consideration can, so far as the effect of the decisions of Germany's constitutional court is concerned, be very clearly inferred from *Filipiak*.

68. In that case, the Court was confronted with a situation in which income tax legislation of a Member State, which proved to be contrary to the freedom of establishment and the freedom to provide services, had been found by the constitutional court of that State to be incompatible with its constitution. However, the constitutional court had deferred the date on which the legislation in question would lose its binding force.

69. In proceedings between the tax authorities and a taxpayer who had exercised one of those freedoms of movement, the national court asked the Court of Justice whether the principle of primacy required it to refrain from applying the legislation in question although the constitutional court had prolonged its effect.

70. The Court pointed out how a conflict between a provision of national law and a directly applicable Community rule is to be resolved by a national court. In accordance with the rule in *Simmenthal*, a national court must resolve the conflict by applying Community law and refusing to apply the conflicting national provision, and not by a declaration that the national provision is invalid, which is a matter for the authorities and the courts of the Member State concerned. [19]

71. The Court stated that the deferral by the constitutional court of the date on which the national provisions at issue will lose their binding force cannot prevent the national court from respecting the principle of the primacy of Community law and declining to apply those provisions in the proceedings before it. [20]

72. In other words, review of constitutionality and review of conformity with Community law must be able to produce their effects without coming into conflict with each other.

19 — *Filipiak*, paragraph 82.
20 — Ibid., paragraph 84.

Thus, just as the task of the national court under the rule in *Simmenthal* is confined to situations of conflict between a Community rule and a provision of domestic law, a decision of the constitutional court deferring the consequences of inconsistency between national legislation and the constitution cannot interfere with the duty of the national court to uphold the primacy of Community law whenever it is faced with such a conflict.

73. In the present case, it follows that the fact that the disputed legislation is also contrary to the Basic Law and that the Bundesverfassungsgericht decided to keep it in force for a transitional period in no way diminishes the referring court's obligation to refrain from applying that legislation in the proceedings before it if it considers that the legislation in question is contrary to Article 49 EC.

74. In accordance with the rule in *Simmenthal*, the referring court must therefore refrain from applying the legislation in question in so far as it is raised against a service provider such as WW, which may rely on Article 49 EC. On the other hand, that rule in no way constitutes an obstacle to the continued application of the legislation to providers of sports betting established in non-member States, who cannot plead the freedom to provide services or the freedom of establishment.

75. With regard to the referring court's second reason for putting its question to the Court, I must now consider whether the legislation at issue can be kept in force, although it is contrary to the freedom to provide services, for the time necessary for the competent authorities to adopt new legislation consistent with Community law.

76. The purpose of keeping the existing legislation in force would be to prevent the creation, during that period, of a gap in the law which would enable all providers of sports betting established in other Member States to offer their betting services to consumers in the *Land* NRW without any regulatory measures other than those in force in their State of origin.

77. Therefore the consequence of preserving the disputed legislation would be not only to enable the national court to apply it in the context of the proceedings before it, but also to enable all the national authorities, including the courts, to continue to apply it for the whole of the transitional period which would thus be laid down.

78. To make the issue under consideration clear, it must also be borne in mind that, according to the premiss of the referring court, the legislation in question does not enable addiction to gaming to be combated effectively. In other words, according to that premiss, the legislation has the effect of prohibiting

providers established in other Member States from offering sports betting to consumers residing in the *Land* NRW, but it is unsuitable for protecting them against excessive inducement on the part of the authorised operator to place such bets.

79. Several Member States which have taken part in the present proceedings contended that the legislation in question of the *Land* NRW should continue to be applied until the enactment of legislation conforming with Community law. They based this position on a number of arguments which may be summarised briefly as follows.

80. First, a Community measure which is declared unlawful in the context of either a reference for a preliminary ruling concerning validity or an action for annulment may, on the basis of the second paragraph of Article 231 EC, have its effects maintained in force in order to preserve legal certainty and to avoid a gap in the law detrimental to the aims of that measure.

81. Secondly, the exclusion of any possibility of a transitional period would run counter to the discretion which the Member States are recognised as having as regards the safeguarding of the social order and their citizens against the risks arising from gaming.

82. Finally, the fact that a transitional period is permissible follows also from Article 228(2) EC, under which a Member State that has failed to comply with a judgment of the Court finding that it has failed to fulfil its obligations must be served with a reasoned opinion before a further action for failure to fulfil its obligations is brought, a fact which has the effect of allowing the Member State concerned a final period for compliance.

83. Contrary to those Member States, I consider that the referring court cannot be authorised to apply such legislation if it has found that it is not consistent with Article 49 EC.

84. I base my position on the following arguments. First, the very principle of maintaining such legislation in force, even if for a transitional period, would compromise the primacy of Community law and the right to an effective judicial remedy. Secondly, even assuming that a derogation from the obligation imposed by the rule in *Simmenthal* could be contemplated in exceptional circumstances, it cannot be applied where, as in the present case, first, the legislation in question is unsuitable for attaining its aims and, secondly, the reasons why the legislation is contrary to Community law arise from a judgment which was delivered, in response to a reference for a preliminary ruling, more than 18 months before the adoption of the measures contested in the main proceedings.

1. Obstacles of principle

85. First of all, it must be noted that hitherto the possibility of temporal modification of the effects of Community law on the law of the Member States has been accepted only in relation to the past.

86. Accordingly, since the judgment in *Defrenne*, [21] the Court has accepted that derogation from the principle that a judgment giving a preliminary ruling on a matter of interpretation has retroactive effect may be justified in exceptional circumstances, where retroactive effect would have serious economic repercussions for legal relationships entered into in good faith by reason of the uncertainty which existed as to the true implications of Community law. [22]

87. It has likewise been consistently held that Community law, in accordance with the principle of legal certainty, does not require the Member States to call into question administrative or judicial acts which have become final. [23]

88. Hitherto, the only situation in which national courts have been authorised to suspend the effects of a Community provision in the future is where a measure of secondary law is seriously contested before the national court and the validity of the measure is being examined by the Court of Justice. In addition, the applicant must have put forward cogent arguments in support of his plea of invalidity and must have satisfied the national court of the need to suspend application of the measure in question until the Court's decision.

89. However, that example is not relevant to the question under consideration in the present case because it relates to a provision of Community law whose legality is the subject of a serious dispute that is in the course of being examined.

90. It is true that, where a regulation is declared invalid in a direct action, the second paragraph of Article 231 EC makes express provision for the possibility of the temporal effects of a rule of law being prolonged although it is contrary to Community law.

91. It is also settled that the abovementioned provision has been extended by the Community judicature to all secondary legislation and that it is also applied in the context of references for a preliminary ruling on validity. Thus, where the Community judicature finds, in the context of a direct action for annulment or a reference for a preliminary ruling on validity, that a measure of Community secondary legislation is unlawful and must be

21 — Case 43/75 [1976] ECR 455.

22 — See, in particular, Joined Cases C-367/93 to C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 43.

23 — Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 24, and Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 51.

annulled, it may provide that that measure is to continue to produce certain effects until the entry into force of the measure which is to be adopted to replace it or for such period as the Community judicature may determine. [24]

92. The application of the abovementioned provision is based on considerations of legal certainty. It is necessary to avoid the calling into question of legal positions created before the judgment was delivered and to prevent the annulment of the measure at issue from giving rise to a gap in the law which could compromise the aims of the measure.

93. Accordingly, in the recent judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, [25] the Court, after finding that the regulation [26] providing for the freezing of the applicant's funds had been adopted, so far as the applicant was concerned, in breach of several fundamental rights and had to be annulled, decided to maintain its effects for a period of three months from the date of delivery of the judgment to allow the Council of the European Union to remedy the breaches found. [27]

94. Contrary to the Member States which have taken part in the present proceedings, I consider that transposition of the possibility provided for in the second paragraph of Article 231 EC to rules of domestic law which are contrary to a directly applicable rule of Community law comes up against obstacles of principle which are difficult to overcome.

95. Thus, upon examination of the grounds on the basis of which the Court has defined the task of a national court where it is confronted with a conflict between those two categories of rules, we find that the Court has made the following points.

96. First, a directly applicable Community rule must be fully and uniformly applied in all the Member States from the date of its entry into force and for so long as it continues in force because it is a direct source of rights and duties for all those affected thereby, whether Member States or individuals. [28]

24 — Case 4/79 *Providence agricole de la Champagne* [1980] ECR 2823, paragraphs 45 and 46; Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraphs 29 to 32; and Case C-166/07 *Parliament* v *Council* [2009] ECR I-7135, paragraphs 72 to 75.

25 — Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351.

26 — Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2002 L 139, p. 9).

27 — Paragraph 373 et seq.

28 — *Simmenthal*, paragraphs 14 and 15.

97. Secondly, by virtue of the principle of primacy, directly applicable rules of Community law have the effect by their entry into force of rendering automatically inapplicable any conflicting provision of national law. [29]

98. Thirdly, the effectiveness of Article 234 EC would be diminished if the national court were prevented from forthwith applying Community law in accordance with the preliminary ruling.

99. The Court has concluded from this that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law. [30]

100. In addition, in *Factortame and Others*, [31] the Court held that the requirements of effectiveness and uniform application of Community law conferred upon the national court power to suspend a provision of domestic law presumed to be incompatible with Community law in order to guarantee provisionally the rights conferred by the Treaty even though that was not permitted by its national law.

101. It is quite clear that to allow a rule of domestic law contrary to a directly applicable Community rule to continue to be applied impairs the effective and uniform application of Community law and, therefore, the very principle of the primacy of that law.

102. On that point, it must be recalled that, according to *Costa*, [32] 'the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty ... and giving rise to the discrimination prohibited by Article [12 EC]', a provision which bans any discrimination on grounds of nationality within the scope of application of the Treaty. [33]

103. Likewise, the application by the national court of a rule of domestic law when its conformity with Community law has been rightly disputed by the applicant is the very negation of the right to an effective judicial remedy and undermines the effectiveness of Article 234 EC.

29 — Ibid., paragraph 17.
30 — Ibid., paragraphs 22 and 23.
31 — Case C-213/89 [1990] ECR I-2433.
32 — Case 6/64 [1964] ECR 585.
33 — Ibid., p. 594.

104. In accordance with settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, this principle having furthermore been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice. [34]

105. The effectiveness of Article 234 EC, combined with the immediate effect of the rights conferred by the freedoms of movement, is specifically designed to enable an individual to challenge legislation of a Member State and to prevent it from being applied to himself when it is contrary to a provision of Community law such as a fundamental freedom of movement.

106. Thus, examination of the case-law relating to the limitation of the retroactive effect of a judgment giving a preliminary ruling shows that the Court has endeavoured to reconcile the safeguarding of the legal certainty of prior situations created in good faith with the right to an effective judicial remedy by providing for an exception to the non-retroactivity of the judgment in favour of persons who brought judicial proceedings or an equivalent claim before its judgment was delivered.

107. The Court has applied that case-law both in judgments ruling on interpretation [35] and in the context of references for a preliminary ruling in which it has found that a Community provision is invalid. [36]

34 — OJ 2000 C 364, p. 1. See *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 335 and the case-law cited.

35 — See, in particular, Case C-262/96 *Sürül* [1999] ECR I-2685, in which the Court ruled that the direct effect of Article 3(1) of Decision No 3/80 of the Association Council of 19 September 1980 on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families (OJ 1983 C 110, p. 60) could not be relied on in support of claims relating to benefits in respect of periods prior to the date of the judgment, by reason of the uncertainty that existed as to the scope of that provision and the risk of disruption of the social security schemes of the Member States, except as regards those persons who, before that date, initiated proceedings or made an equivalent claim (paragraphs 112 and 113).

36 — In Case C-228/92 *Roquette Frères* [1994] ECR I-1445, paragraphs 25 to 27, the Court stated as follows:
'It is for the Court, where it makes use of the possibility of limiting the effect on past events of a declaration in preliminary ruling proceedings that a Community regulation is invalid, to decide whether an exception to that temporal limitation of the effect of its judgment may be made in favour of the party to the main proceedings which brought the action before the national court against the national measure implementing the regulation, or whether, conversely, a declaration of invalidity applicable only to the future is an adequate remedy even for that party (see [Case 112/83 *Société de produits des maïs* [1985] ECR 719], paragraph 18).
In the case of a party who, like the plaintiff in the main proceedings, has brought an action before the national court challenging a notice to pay [monetary compensatory amounts] adopted on the basis of an invalid Community regulation, such a limitation of the effect on past events of a declaration of invalidity in a preliminary ruling would have the consequence that the national court would dismiss the action brought against the notice in question, even though the regulation on the basis of which that notice was adopted had been declared invalid by the Court in the same proceedings.
An economic agent such as the plaintiff in the main proceedings would thereby be deprived of its right to effective judicial protection in the event of a breach of Community law by the institutions, and the practical effect of Article [234 EC] would thereby be jeopardised.'

108. In the main proceedings, application of the contested legislation to WW, which would lead to the dismissal of its action as unfounded, would have the effect of depriving WW of effective judicial protection of the rights directly conferred upon it by the Treaty provisions relating to the freedom to provide services.

109. The fundamental right to effective judicial protection and the principle of the primacy of Community law are therefore, in my view, obstacles to the possibility of allowing a derogation from the obligation laid down by the rule in *Simmenthal* which are difficult to overcome.

110. In the alternative, even assuming that, after striking a balance between the interest protected by the rule of domestic law and the rights conferred by the Community provision, which would be comparable to the balancing exercise carried out by the Court in *Kadi and Al Barakaat International Foundation* v *Council and Commission* between the protection of fundamental rights and the fight against terrorism, such a derogation may be contemplated, it could not be allowed in the present case, in my opinion, for the following reasons.

2. The further obstacles in the present case

111. In my view there are two obstacles which preclude keeping in force national legislation such as that at issue even though it is contrary to Community law.

112. The first obstacle stems from the fact that, according to the premiss of the referring court, the national legislation does not serve to limit betting activities in a consistent and systematic manner. In other words, its effect is to prohibit organisers of sports betting established in other Member States from offering their gaming to consumers residing in the *Land* NRW, but it does not protect them against an excessive inducement to gamble on the part of the authorised operator.

113. The argument that the legislation in question must be kept in force in order to prevent a gap in the law cannot therefore succeed because that legislation is itself inappropriate for the protection of consumers. According to the premiss of the referring court, the legislation is, in reality, only a discriminatory, or at least a protectionist, measure.

114. The second obstacle stems from the fact that, according to the same premiss, the legislation at issue is contrary to the freedom to provide services in view of the criteria laid down by the Court in the judgment in *Gambelli*

and Others which was delivered more than 18 months before the adoption of the measures contested in the main proceedings.

115. Where the Court limits the retroactive application of its judgments, it endeavours to reconcile this derogation from effective application of Community law with the requirement of ensuring uniform interpretation of that law in all the Member States. To this end, it has consistently been held, first, that such limitation can be decided upon only by the Court itself. [37]

116. Secondly, and it is this that is important here, the limitation of the temporal effects can arise only from the judgment interpreting the Community rule. Thus, as the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought. [38]

117. That condition is required for the following reason. There must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation which the Court gives of a provision of Community law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment under that law of the Member States and of other persons subject to Community law, fulfilling, at the same time, the requirements arising from the principle of legal certainty. [39]

118. Consequently, where, in a judgment giving a preliminary ruling, the Court finds that the interpretation which it gives of Community law results from one of its earlier judgments in which it did not limit the temporal effects, it indicates that the temporal effects of the second judgment cannot be limited. [40]

119. Therefore, acceptance that the rule in *Simmenthal* may be derogated from in the present case would contradict the abovementioned case-law. Furthermore, its effect would be to release the Member States from their obligation, which stems from the duty to act in good faith under Article 10 EC, to amend their legislation to conform with Community case-law constantly and as soon as possible, without waiting for their legislation to be called into question in the context of a reference for a preliminary ruling or in proceedings for failure to fulfil obligations.

37 — Case C-212/94 *FMC and Others* [1996] ECR I-389, paragraph 56. Thus, according to the Court, the fundamental need for a general and uniform application of Community law implies that it is for the Court of Justice alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down (Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 18).

38 — Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 36 and the case-law cited.

39 — Ibid., paragraph 37.

40 — Ibid., paragraphs 38 to 41.

120. I therefore propose, in the light of all the foregoing observations, that the reply to the referring court should be that a court of a Member State cannot continue to apply its national legislation on sports betting for a transitional period by way of exception if that legislation constitutes an unjustified restriction of the freedom to provide services in that it does not serve to limit betting activities in a consistent and systematic manner.

121. Since as I propose that the reply to the question whether the obligation set out in the rule in *Simmenthal* may be derogated from should be in the negative, it does not appear necessary to consider the second question, relating to the conditions of such derogation.

V — Conclusion

122. In view of the foregoing, I propose that the Court reply as follows to the questions referred by the Verwaltungsgericht Köln:

Legislation of a Member State which restricts the provision of sports betting with the aim of defending interests referred to by the EC Treaty or considered legitimate by the case-law must, in order to be consistent with Community law, pursue its aims in a consistent and systematic manner.

It is for the national court to ascertain whether that condition is met by taking into consideration all the aims of the legislation in question and by assessing its actual effects on consumers, having regard to the broad discretion which the Member States have in that matter.

The referring court will also be able, where relevant, to take into account guidance provided in the judgment to be delivered in Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoss and Others*.

A court of a Member State cannot continue to apply its national legislation on sports betting for a transitional period by way of exception if that legislation constitutes an unjustified restriction of the freedom to provide services in that it does not serve to limit betting activities in a consistent and systematic manner.