Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

12 September 2013*

(Freedom of establishment — Freedom to provide services — Articles 43 EC and 49 EC — Betting and gaming — Collection of bets — Conditions of authorisation — Requirement of police authorisation and a licence — National legislation — Mandatory minimum distances between bet collection points — Cross-border activities analogous to those covered by the licence — Prohibition — Mutual recognition of betting and gaming licences)

In Joined Cases C-660/11 and C-8/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Toscana (Italy), made by decisions of 5 December 2011 received at the Court on 27 December 2011 and 2 January 2012 respectively, in the proceedings

Daniele Biasci,

Alessandro Pasquini,

Andrea Milianti,

Gabriele Maggini,

Elena Secenti,

Gabriele Livi

v

Ministero dell'Interno,

Questura di Livorno

Other party to the proceedings:

SNAI – Sindacato Nazionale Agenzie Ippiche SpA (C-660/11),

and

Cristian Rainone,

Orentino Viviani,

Miriam Befani

* Language of the case: Italian.

v

Ministero dell'Interno,

Questura di Prato,

Questura di Firenze,

Other party to the proceedings:

SNAI – Sindacato Nazionale Agenzie Ippiche SpA,

Stanley International Betting Ltd,

Stanleybet Malta Ltd (C-8/12),

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 April 2013,

after considering the observations submitted on behalf of:

— D. Biasci, A. Pasquini, A. Milianti, G. Maggini, E. Secenti, G. Livi, C. Rainone, O. Viviani and M. Befani, by A. Dossena and F. Donati, avvocati,

— SNAI – Sindacato Nazionale Agenzie Ippiche SpA, by G. Viciconte, C. Sambaldi, A. Fratini and F. Filpo, avvocati,

— Stanley International Betting Ltd, by D. Agnello, A. Piccinini and M. Mura, avvocati,

— Stanleybet Malta Ltd, par R. Jacchia, A. Terranova, F. Ferraro, D. Agnello and A. Piccinini, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato, and A. Bizzarai, esperto,

— the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, assisted by P. Vlaemminck and R. Verbeke, advocaten,

— the Maltese Government, by A. Buhagiar, acting as Agent, assisted by G. Kimberley, avukat,

— the Portuguese Government, by L. Inez Fernandes, A.P. Barros and A. Silva Coelho, acting as Agents,

— the European Commission, by E. Traversa, D. Nardi and I.V. Rogalski, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 43 EC and 49 EC.

2 The requests have been made in proceedings between, in Case C-660/11, Messrs Biasci, Pasquini, Milianti, Maggini, Ms Secenti and Mr Livi and the Ministero dell'Interno (Minister for the Interior) and the Questura di Livorno (Police Headquarters, Livorno) and, in Case C-8/12, Messrs Rainone and Viviani and Ms Befani and the Ministero dell'Interno and Questura di Prato (Police Headquarters, Prato) and the Questura di Firenze (Police Headquarters, Florence).

Legal context

3 The Italian legislation provides in substance that the collecting and managing of bets are activities which may be engaged in only by the holder of a licence, granted through a public tendering procedure, and police authorisation. Any infringement of that legislation carries criminal penalties.

The licences

4 Until amendments were made to the relevant legislation in 2002, operators in the form of companies whose shares were listed on the regulated markets could not obtain a betting or gaming licence. As a consequence, such operators were excluded from the tendering procedures for the award of licences, held in 1999. The unlawfulness of that exclusion under Articles 43 EC and 49 EC was established inter alia in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891).

5 Decree-Law No 223 of 4 July 2006 laying down urgent measures for economic and social revival, the control and rationalisation of public expenditure, and providing for initiatives in relation to tax revenue and the combating of tax evasion, converted into statute by Law No 248 of 4 August 2006 (GURI No 18 of 11 August 2006) ('the Bersani Decree') reformed the betting and gaming sector in Italy, with the aim of bringing it into line with the requirements of European Union law.

6 Under paragraph 1 of Article 38 of the Bersani Decree, which is entitled 'Measures to counter unlawful betting and gaming', a series of provisions are to be adopted by 31 December 2006 'in order to counter the spread of irregular and illicit betting and gaming, tax evasion and avoidance in the betting and gaming sector and to ensure the protection of gamblers and players'.

7 Article 38(2) and (4) of the Bersani Decree lays down the new rules governing the marketing of betting and gaming on (i) events other than horse racing and (ii) horse racing. Provision was made in particular for:

— the opening of at least 7 000 new outlets for gaming and betting on events other than horse racing and at least 10 000 new outlets for gambling on horse racing events;

— the setting of a maximum number of outlets per municipality according to the number of inhabitants and the number of outlets for which a licence was awarded previously following the 1999 tendering procedure;

— a requirement of a minimum distance between the new outlets and those for which a licence was awarded previously following the 1999 tendering procedure; and

— the Independent Authority for the Administration of State Monopolies ('AAMS'), acting under the supervision of the Ministry of Economic Affairs and Finance, was made responsible for 'laying down measures for the protection' of the holders of licences awarded under the 1999 tendering procedure.

The police authorisations

8 The licensing system is closely linked to the system of police authorisations governed by Royal Decree No 773 approving a consolidated version of the laws on public security (Regio Decreto n. 773 – Testo unico delle leggi di pubblica sicurezza) of 18 June 1931 (GURI No 146 of 26 June 1931), as amended by Article 37(4) of Law No 388 of 23 December 2000 (Ordinary Supplement to GURI No 302 of 29 December 2000) ('the Royal Decree').

9 Under Article 88 of that royal decree, a police authorisation, which presupposes that a number of checks have been made as to the applicant's personal and professional qualities, may, in the betting and gaming sector, be granted only to holders of a licence. The Italian legislation further provides that the offering of betting or gaming without the required licence or police authorisation is a criminal offence punishable by a custodial sentence of up to one year.

The tendering procedures under the Bersani Decree

10 The provisions of the Bersani Decree were implemented through tendering procedures held by the AAMS during the course of 2006. The tendering documents included tender specifications, comprising eight annexes, and the model contract between the AAMS and the successful tenderer for the licence for betting on events other than horse races ('the model contract').

11 Under Article 23(3) of the model contract, the AAMS is required to withdraw the licence when the licence-holder markets, directly or indirectly, data transmission sites located outside Italian territory, games analogous to public games or to other games managed by the AAMS, or games which are prohibited under Italian law.

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

12 The applicants in the main proceedings operate as Data Transfer Centres ('DTCs') on behalf of Goldbet Sportwetten GmbH ('Goldbet'), a company governed by Austrian law and holder of a bookmaker licence issued by the Government of Tyrol.

13 The applicants in the main proceedings stated before the Tribunale amministrativo regionale per la Toscana that Goldbet is a company established in Innsbrück (Austria), which operates as a bookmaker authorised in various countries of the world and is subject to strict checks by the competent authorities with regard to its proper operation.

14 As regards the relationship between Goldbet and the applicants in the main proceedings, the latter state that organisation of the bets lies solely with Goldbet which, having received an offer of a bet forwarded by the DTC, reserves the discretion to take it or not, whilst the operator of the DTC has the sole task of putting the better in contact with the foreign bookmaker. Thus, the service provided consists merely in offering the betting public data connection and transfer in order to facilitate the forwarding to the bookmaker of the offer of a bet from an individual better.

15 Although the activity which they carry on cannot be classified as a business of acting as intermediaries for bets, the applicants in the main proceedings applied to the competent authorities for the authorisation required by Article 88 of the Royal Decree. All of those applications were rejected on

the grounds that Goldbet did not hold in Italy the licence granted by the AAMS, which remains required by Article 88 of the Royal Decree for the purposes of granting the aforementioned authorisation.

16 The applicants in the main proceedings brought separate actions before the referring court, seeking the annulment, following suspension of their effect, of those rejection decisions, alleging, inter alia, infringement of the principle of mutual recognition between the Member States. In their submission, Italian law infringes that principle in not granting companies which are duly authorised in other Member States an authorisation to operate beyond the borders of those States.

17 In four of the actions at issue here, which have given rise to Case C-660/11, SNAI – Sindacato Nazionale Agenzie Ippiche SpA has intervened in support of the forms of order sought by the defendant, the ministero dell'Interno, as the company granted a licence by the State to collect bets and organise gaming and the supplier of hi-tech electronic services for the collection and management of betting on horse racing and sports, and pools. Stanley International Betting Ltd and Stanleybet Malta Ltd have also intervened in support of the forms of order sought by the defendant in the actions which have given rise to Case C-8/12.

18 The referring court considers that the legal and factual aspects of the cases in the main proceedings are, in essence, identical to those which gave rise to Joined Cases C-72/10 and C-77/10 *Costa and Cifone* [2012] ECR, with the result that it wishes to refer questions to the Court of Justice which are, in essence, identical to those referred previously by the Corte suprema di cassazione in the cases which led to that judgment concerning the compatibility with EU law of national legislation which protected licences granted before the legislative amendments. It also wishes to refer questions to the Court of Justice concerning the compatibility with EU law of the police authorisation procedure provided for in Article 88 of the Royal Decree, and the non-application in Italian law of mutual recognition of betting and gaming licences.

19 In those circumstances, the Tribunale amministrativo regionale per la Toscana decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 43 EC and 49 EC to be interpreted as in principle precluding legislation of a Member State, such as Article 88 of the [Royal Decree], under which "a permit to organise betting may be granted exclusively to persons holding a licence or authorisation issued by a Ministry or another body to which the law reserves the right to organise and manage betting, and also to persons to whom that responsibility has been entrusted by the licence-holder or by the holder of an authorisation, by virtue of such licence or authorisation", and Article 2(2b) of Decree-Law No 40 of 25 March 2010, converted by Law No 73/2010, under which "Article 88 of the [Royal Decree], is to be interpreted as meaning that the permit provided for therein, where it is granted for commercial businesses involving gaming and the collection of bets for cash prizes, shall be deemed to be effective only after the operators of those businesses have been granted the appropriate licence to carry on such gaming and collect such bets by the [Independent Authority for the Administration of State Monopolies of the] Ministry of Economic and Financial Affairs [AAMS]"?

(2) Are Articles 43 EC and 49 EC to be interpreted as in principle also precluding national legislation, such as Article 38(2) of [the Bersani Decree], under which Article 1(287) of Law No 311 of 30 December 2004 [2005 Finance Law] is to be replaced by the following:

"287.
By measures of the Ministry of Economic and Financial Affairs – [AAMS] – the new rules for distributing gambling on events other than horse racing shall be laid down in accordance with the following criteria:

(a) inclusion, among betting on events other than horse racing, of totalisator and fixed betting on events other than horse racing, on sports-based pools, 'totip' betting and horse race betting within the meaning of paragraph 498, and any other gaming based on events other than horse racing;

(b) possibility of collecting bets on events other than horse racing by operators collecting bets within a Member State of the European Union, by operators in Member States of the European Free Trade Association, and also by operators of other States, only if they satisfy the requirements of trustworthiness defined by the [AAMS];

(c) collection of bets through outlets whose principal activity is the marketing of gaming products and collection of bets through outlets whose secondary activity is the marketing of gaming products; the provision of certain types of betting can be reserved exclusively to outlets whose principal activity is the marketing of gaming products;

(d) provision for the establishment of at least 7 000 new outlets, at least 30% of which have as their principal activity the marketing of gaming products;

(e) determination of the maximum number of outlets per municipality in proportion to the number of inhabitants and having regard to the outlets already authorised;

(f) siting of outlets whose principal activity is the marketing of gaming products in municipalities with over 200 000 inhabitants at a distance of not less than 800 metres from outlets already authorised and in municipalities with less than 200 000 inhabitants at a distance of not less than 1 600 metres from outlets already authorised;

(g) siting of outlets whose secondary activity is the marketing of gaming products in municipalities with over 200 000 inhabitants at a distance of not less than 400 metres from outlets already authorised and in municipalities with less than 200 000 inhabitants at a distance of not less than 800 metres from outlets already authorised, without prejudice to outlets at which sports-based pools are collected on 30 June 2006;

(h) allocation of outlets by means of one or more tendering procedures open to all operators, whose bid may not be less than EUR 25 000 in respect of each outlet whose principal activity is the marketing of gaming products and EUR 7 500 in respect of each outlet whose secondary activity is the marketing of gaming products;

(i) acquisition of the possibility of collecting distance bets, including games of skill offering prizes in cash, subject to the payment of not less than EUR 200 000;

…

(l) laying down of procedures for safeguarding licensees for the collection of bets at fixed odds on events other than horse racing governed by the regulations contained in Decree No 111 of 1 March 2006 of the Minister for Economic and Financial Affairs."

The question concerning the compatibility of Article 38(2) [of the Bersani Decree] with the abovementioned principles of Community law relates solely to the parts of that provision in which: (a) there is a general tendency to protect licences issued before the legal framework was amended; (b) obligations are introduced to open new outlets at a certain distance from those already authorised which could ultimately ensure de facto the maintenance of pre-existing commercial positions. The question further relates to the general interpretation placed on Article 38(2) [of the Bersani Decree] by the [AAMS] by inserting in licensing agreements (Article 23(3)) a clause relating to withdrawal of the licence where analogous cross-border activities are engaged in directly or indirectly;

(3) If the answer is in the affirmative, that is to say that the national legislation cited in the preceding paragraphs is not manifestly contrary to Community law, is Article 49 EC also to be interpreted as meaning that, where the freedom to provide services is restricted for reasons in the public interest, consideration must be given in advance to whether sufficient account is not already taken of this public interest by the legal provisions, checks and investigations to which the service provider is subject in the State in which he is established?

(4) If the answer is in the affirmative, as set out in the preceding paragraph, must the referring court take account, in the context of its examination of the proportionality of a similar restriction, of the fact that the relevant provisions of the State in which the service provider is established provide for a degree of control which is equal to or actually exceeds that of the State in which the services are provided?'

Consideration of the questions referred

Consideration of the first question

20 By its first question, the referring court asks, in essence, whether Articles 43 EC and 49 EC must be interpreted as precluding national legislation which requires companies wishing to pursue activities linked to gaming and betting to obtain police authorisation in addition to a State-issued licence in order to pursue such activities and which restricts the grant of such authorisation inter alia to applicants who already hold such a licence.

21 The Court has ruled previously that, in so far as the national legislation at issue in the main proceedings prohibits – under penalty of criminal sanction – the pursuit of activities in the betting and gaming sector without a licence or police authorisation issued by the State, it constitutes a restriction on the freedom of establishment and the freedom to provide services (*Placanica and Others*, paragraph 42 and the case-law cited).

22 Such restrictions may, however, be allowed as a derogation as expressly provided for under Articles 45 EC and 46 EC, which are applicable in the area of freedom to provide services by virtue of Article 55 EC, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (Joined Cases C-186/11 and C-209/11 *Stanleybet International and Others* [2013] ECR, paragraph 22 and the case-law cited).

23 As regards the national legislation at issue in the main proceedings, the Court has held previously that only the objective of combating criminality linked to betting and gaming is capable of justifying restrictions on fundamental freedoms under those rules, provided that those restrictions comply with the principle of proportionality and in so far as the means employed are coherent and systematic (see, to that effect, *Placanica and Others*, paragraphs 52 to 55, and *Costa and Cifone*, paragraphs 61 to 63).

24 It should be borne in mind in that regard that, according to the Court's case-law, a licensing system may constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes (see *Placanica and Others*, paragraph 57).

25 It is, however, for the referring court to determine whether, in limiting the number of operators active in the betting and gaming sector, the national legislation genuinely contributes to the objective of preventing the exploitation of activities in that sector for criminal or fraudulent purposes. By the same token, it for that court to ascertain whether those restrictions satisfy the conditions laid down by the case-law of the Court as regards their proportionality (see *Placanica and Others*, paragraph 58).

26 The Court has held previously that the requirement of a police authorisation, by virtue of which operators active in the betting and gaming sector, as well as their premises, must be subject to ex ante controls as well as to ongoing supervision, clearly contributes to the objective of preventing the involvement of those operators in criminal or fraudulent activities and appears to be a measure that is entirely commensurate with that objective (see, to that effect, *Placanica and Others*, paragraph 65).

27 Thus, the fact that an operator must have both a licence and a police authorisation in order to access the market in question is not, per se, disproportionate in the light of the objective pursued by the national legislature, which is to combat criminality linked to betting and gaming.

28 However, where police authorisations are granted only to licence-holders, irregularities in the licence-granting procedure also vitiates the procedure for granting police authorisations. Consequently, the lack of a police authorisation cannot be held against persons who were unable to obtain authorisations because the grant of an authorisation presupposed the award of a licence – a licence which, contrary to European Union law, those persons were unable to obtain (see *Placanica and Others*, paragraph 67).

29 Consequently, the answer to the first question is that Articles 43 EC and 49 EC must be interpreted as not precluding national legislation which requires companies wishing to pursue activities linked to gaming and betting to obtain a police authorisation in addition to a licence issued by the State in order to pursue such activities and which restricts the grant of such authorisation, inter alia, to applicants who already hold such a licence.

Consideration of the second question

30 By its second question, the referring court asks, in essence, whether Articles 43 EC and 49 EC must be interpreted as precluding national legislation such as Article 38(2) of the Bersani Decree and Article 23(3) of the model contract which, first, protects commercial positions acquired by existing operators by providing, inter alia, for minimum distances between the establishments of new licence-holders and those of existing operators and, second, provides for the licence to be withdrawn for bet collection and management activities should the licence-holder engage directly or indirectly in cross-border activities analogous to those managed by the AAMS or in betting and gaming prohibited under national law.

31 The content of this question is, in essence, identical to the questions on which the Court has ruled previously in *Costa and Cifone*.

32 As regards the first part of that question, the Court held in paragraph 66 of that judgment that Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of EU law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that

breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing, inter alia, that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.

33 As regards the second part of that same question, concerning Article 23(3) of the model contract, the Court held in paragraphs 89 and 90 of that judgment that that provision was not drawn up in a clear, precise and unequivocal manner and that, in those circumstances, an operator cannot be criticised for deciding not to apply for a licence in the absence of legal certainty, with uncertainty remaining as to whether its business model complied with the provisions of the contract to be signed if a licence were to be granted.

34 However, the parties to the proceedings before the Court disagree as to whether or not the situations at issue in the main proceedings are comparable to those which gave rise to that judgment and, in particular, whether Goldbet and the applicants in the main proceedings were affected by the national provisions which the Court found to be incompatible with EU law.

35 Moreover, although the Court has observed previously that the situation of a DTC manager linked to Goldbet forms part of a specific legal and factual framework which is, in all essential respects, identical to that which gave rise to the judgment in *Costa and Cifone* (order of 16 February 2012 in Case C-413/10 *Pulignani and Others*, paragraph 3), in that case it based itself on a finding made by the referring court. In the present cases it is thus for the referring court to assess the facts and the consequences for it resulting from *Costa and Cifone*.

36 If the referring court should find in the present case that Goldbet, before being deprived of its rights, participated in procedures for the grant of licences and was granted licences though a holding company governed by Italian law, it must determine whether that finding means that Goldbet must be held to be among the existing operators which, in reality, gained an advantage through the rule on minimum distance to be kept between bet collection points which affected only new licence-holders. If, by contrast, the referring court should find that Goldbet did not take part in those procedures, it will have to ascertain inter alia whether that operator opted not to submit an application for a licence due to the lack of legal certainty arising from Article 23(3) of the model contract.

37 If that court were also to find that Goldbet had its rights withdrawn due to the application of that article, it will have to determine whether that withdrawal was effected on the ground that Goldbet was offering unauthorised games or solely because it was engaging in cross-border activities. If the latter, it must be borne in mind that national legislation which in fact precludes all cross-border activity in the betting and gaming sector, irrespective of the form in which that activity is undertaken and, in particular, in cases where there is the possibility of direct contact between consumer and operator and where physical checks for police purposes can be made of an undertaking's intermediaries who are present on national territory, is contrary to Articles 43 EC and 49 EC.

38 In the light of all of the foregoing considerations, the answer to the second question is that:

— Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of European Union law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.

— It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court and, in particular,

the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(3) of the model contract, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.

— National legislation which in fact precludes all cross-border activity in the betting and gaming sector, irrespective of the form in which that activity is undertaken and, in particular, in cases where there is the possibility of direct contact between consumer and operator and where physical checks for police purposes can be made of an undertaking's intermediaries who are present on national territory, is contrary to Articles 43 EC and 49 EC. It is for the referring court to verify whether that is the case as regards Article 23(3) of the model contract.

Consideration of the third question

39 By its third question, the referring court asks, in essence, whether Articles 43 EC and 49 EC must be interpreted as meaning that, in the current state of European Union law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer betting and gaming does not prevent another Member State, while complying with the requirements of European Union law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.

40 The Court has held previously in that regard that, in the light of the wide discretion the Member States have in relation to the objectives they wish to pursue and the level of consumer protection they seek and in the absence of any harmonisation in the sphere of betting and gaming, in the present state of development of European Union law there is no obligation of mutual recognition of authorisations issued by the various Member States (see, to that effect, Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 112, and Case C-347/09 *Dickinger and Ömer* [2011] ECR I-8185, paragraphs 96 and 99).

41 Thus, each Member State retains the right to require any operator wishing to offer betting and gaming to consumers in its territory to hold an authorisation issued by its competent authorities, without the fact that a particular operator already holds an authorisation issued in another Member State being capable of constituting an obstacle (see *Stoß and Others*, paragraph 113).

42 The various Member States do not necessarily have the same technical means available for controlling betting and gaming, and do not necessarily make the same choices in this respect. The fact that a particular level of protection of consumers may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not allow the conclusion that the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not control (see, to that effect, *Dickinger and Ömer*, paragraph 98).

43 It follows that the answer to the third question is that Articles 43 EC and 49 EC must be interpreted as meaning that, under the current state of EU law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer betting and gaming does not prevent another Member State, while complying with the requirements of EU law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.

Consideration of the fourth question

44 In view of the answer to the third question, there is no need to reply to the fourth question put by the referring court

Costs

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

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

1. **Articles 43 EC and 49 EC must be interpreted as not precluding national legislation which requires companies wishing to pursue activities linked to gaming and betting to obtain a police authorisation in addition to a licence issued by the State in order to pursue such activities and which restricts the grant of such authorisation inter alia to applicants who already hold such a licence.**

2. **Articles 43 EC and 49 EC and the principles of equal treatment and effectiveness must be interpreted as precluding a Member State which, in breach of European Union law, has excluded a category of operators from the award of licences to engage in a particular economic activity and which seeks to remedy that breach by putting out to tender a significant number of new licences, from protecting the market positions acquired by the existing operators, by providing inter alia that a minimum distance must be observed between the establishments of new licence holders and those of existing operators.**

   It follows from Articles 43 EC and 49 EC, the principle of equal treatment, the obligation of transparency and the principle of legal certainty that the conditions and detailed rules of a tendering procedure such as that at issue in the cases before the referring court and, in particular, the provisions concerning the withdrawal of licences granted under that tendering procedure, such as those laid down in Article 23(3) of the model contract, must be drawn up in a clear, precise and unequivocal manner, a matter which it is for the referring court to verify.

   National legislation which in fact precludes all cross-border activity in the betting and gaming sector, irrespective of the form in which that activity is undertaken and, in particular, in cases where there is the possibility of direct contact between consumer and operator and where physical checks for police purposes can be made of an undertaking's intermediaries who are present on national territory, is contrary to Articles 43 EC and 49 EC. It is for the referring court to verify whether that is the case as regards Article 23(3) of the model contract.

3. **Articles 43 EC and 49 EC must be interpreted as meaning that, under the current state of EU law, the fact that an operator holds, in the Member State in which it is established, an authorisation permitting it to offer betting and gaming does not prevent another Member State, while complying with the requirements of EU law, from making such a provider offering such services to consumers in its territory subject to the holding of an authorisation issued by its own authorities.**

[Signatures]