OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 3 March 2010[1]

I — Introduction

1. In a non-harmonised sector such as gambling, in which each of the Member States applies different rules the only common element of which is the existence of measures intended to supervise the development of the activity, the major challenge facing the Courts of the Union is to find common ground allowing for some observance of the freedoms enshrined in the Treaty.

2. The impact of new technologies makes this point of law much more complex. As a result of new means of communication, gambling enthusiasts no longer have to go to a casino or a gambling house; they can play in their own homes over the internet or even on their mobile phones. What is more, this type of online gambling takes no account of borders; players are no longer limited to the supply of games of chance available in their own Member State as they have access to foreign operators, some established in the European Union and others outside it. The problem of cross-border gambling is a highly topical one and operators offering their services via the internet are in some doubt as to whether or not the Member State of destination is entitled to prohibit their activities.

3. However, the problems are not confined to the field of online gambling. The existence of a State monopoly on certain games of chance and restrictions on the acquisition of licences may also adversely affect the freedom of establishment and the freedom to provide services. The question for the Court, therefore, is once again whether such restrictive regimes are justified.

4. The Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein) has referred some of these questions to the Court as a direct consequence of the new rules adopted by the Länder in respect of lotteries and sports betting following the judgment of the Bundes-

1 — Original language: French.

verfassungsgericht (German Federal Constitutional Court) of 28 March 2006 [2].

5. The case at issue here bears a clear connection with *Markus Stoß and Others*, [3] although the latter relates to national legislation predating the abovementioned judgment. The similarity of the questions raised in these two cases and the concern for procedural economy by which we must always be guided therefore prompt me to refer, in relation to many aspects of this case, to the more detailed account contained in my Opinion in *Markus Stoß and Others*.

II — Legal framework

A — *The EU rules*

6. The gaming sector has not as yet been harmonised in European Union law. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [4] expressly excludes games of chance from its scope:

'[t]his Directive shall not apply to the following activities:

…

(h) gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions' (Article 2(2)).

7. This lack of secondary legislation means that recourse must be had to primary law and, in particular, *in casu*, to Article 49 EC, the first paragraph of which provides that 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

2 — BVerfG, I BvR 1054/01.

3 — Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07, in which I delivered my Opinion today.

4 — OJ 2006 L 376, p. 36; (the 'Services Directive').

B — *The German rules*

8. In Germany, competence in respect of gambling is divided between the Federal State and the Länder. In most of the Länder, there is a regional monopoly on the organisation of sports betting and lotteries, while the operation of slot machines and casinos is entrusted to duly licensed private operators.

1. Federal law

9. Paragraph 284 of the Strafgesetzbuch (Criminal Code) (the 'StGB') provides:

'(1) Anyone who, without an official licence, publicly organises or operates a game of chance or makes available the facilities for doing so shall be liable to imprisonment for a term not exceeding two years or to a fine.

...

(3) Anyone who, in the cases provided for under subparagraph 1, acts

1. on a commercial basis...

... shall be liable to imprisonment for a term of between three months and five years.

...'

10. Competence to determine the conditions under which the licences referred to in Paragraph 284 of the StGB may be issued lies with the Länder, with the exception of betting on official horse races and slot machines. The organisation of the former may be licensed under the Rennwett und Lotteriegesetz (Law on betting and lotteries) (the 'RWLG'), and the installation and operation of the latter under the Gewerbeordnung (Trade and Industry Code) (the 'GewO').

11. With regard to the licensing of horse-race betting, Paragraph 1 of the RWLG provides as follows:

'1. An association which wishes to operate a totalisator business at public horse races or other public equine performance events must be licensed by the competent authority under the law of the Land.

...

3. Licences may be granted only to associations which guarantee that they will use the revenue exclusively for the benefit of horse breeding in the Land.'

12. Paragraph 2(1) of the RWLG stipulates:

'Anyone who wishes to place or take bets on public equine performance events on a commercial basis (as a bookmaker) must be licensed by the competent authority under the law of the Land.'

2. The judgment of the Bundesverfassungsgericht of 28 March 2006

13. On 28 March 2006, the Bundesverfassungsgericht delivered a judgment [5] in which it declared the monopoly on sports betting in place in the Land of Bavaria to be incompatible with the fundamental freedom to pursue an occupation enshrined in Paragraph 12 of the Grundgesetz (Basic Law), in so far as the legal structure, marketing methods and form of that monopoly did not have the aim of contributing effectively and actively to the objective of reducing the gambling instinct and combating addiction.

14. The judgment, which related to the Land of Bavaria, may none the less also be extended to monopolies on sports betting with the same characteristics in place in other Länder. The Verfassungsgericht gave the competent legislatures a transitional period, expiring on 31 December 2007, within which to restructure the monopoly in question in order to introduce a minimum level of consistency with the objective of combating addiction. [6]

3. The law of the Länder

(a) The GlüStV

15. The Staatsvertrag zum Glücksspielwesen in Deutschland (State Treaty on the gambling industry in Germany) (the 'GlüStV'), which has been in force since 1 January 2008, is

5 — BVerfG, I BvR 1054/01.

6 — BVerfG, 1 BvR 1054/01, paragraph 148 et seq, in which that court specifies the conditions necessary for bringing the betting monopoly into line with the Grundgesetz from a regulatory and organisational point of view.

the new uniform framework created by the Länder to regulate the sector following the judgment of the Bundesverfassungsgericht. [7]

16. Article 1 of the GlüStV sets out the objectives of that agreement concluded by the Länder:

'1. to prevent the emergence of addiction to gaming and betting and to create the conditions necessary for combating addiction effectively;

2. to restrict the supply of games available and to steer the gambling instinct of the population along ordered, supervised lines, in particular to prevent any deviation towards unlicensed gambling;

3. to safeguard the protection of minors and players;

4. to ensure that games of chance are operated in accordance with the relevant rules, that players are protected against fraudulent practices and that crime resulting from and associated with gambling is prevented.'

17. In accordance with Paragraph 10 of the GlüStV, in order to attain those objectives, 'the Länder are under a statutory obligation to ensure a sufficient supply of games of chance' (subparagraph 1), which task they may perform 'themselves, through the intermediary of legal persons under public law or private law companies in which legal persons under public law had a direct or indirect controlling shareholding' (subparagraph 2).

18. Paragraph 4 of the GlüStV provides that public gaming may be organised or brokered only under licence from the competent authority of the relevant Land (subparagraph 1). A licence is to be refused if the organisation or brokering runs counter to the objectives of subparagraph 1 and, in any event, there is no legal entitlement to the grant of a licence (subparagraph 2).

19. That paragraph also prohibits the organisation and brokering of public gaming on the internet (subparagraph 4). However, Paragraph 25 of the GlüStV, which contains a series of transitional provisions, provides that the Länder may license the organisation or brokering of online lotteries for a limited period of one year following the entry into force of the GlüStV, provided that there are no grounds for refusing to grant a licence and that certain additional conditions are fulfilled (guaranteed exclusion of minors

7 — The GlüStV replaces the Staatsvertrag zum Lotteriewesen in Deutschland (State Treaty on the lottery industry in Germany) (the 'LottStV'), which entered into force on 1 July 2004.

and prohibited players, restriction of stakes to EUR 1 000 per month, ban on credit and interactive participation with real-time publication of results in particular).

(b) The legislation of the Land Schleswig-Holstein

20. The Gesetz des Landes Schleswig-Holstein zur Ausführung des Staatsvertrages zum Glücksspielwesen in Deutschland (Law of the Land of Schleswig-Holstein implementing the GlüStV) (the 'GlüStV AG') of 13 December 2007 applies to the organisation, operation or brokering of lotteries and sports betting, but not to the operation or brokering of betting at public horse races (Paragraph 3). Under Paragraph 4(2) of the GlüStV AG, the Land performs that task through the NordwestLotto Schleswig Holstein GmbH & Co. KG.

III — The dispute in the main proceedings and the questions referred for a preliminary ruling

21. Carmen Media Group Ltd ('Carmen Media') was granted by the Government of Gibraltar, where it is established, an extraterritorial gambling licence restricted to '*remote gambling / fixed-odds bets for offshore bookmaking*', which, therefore, authorised it to organise bets only outside the territory of Gibraltar.

22. Carmen Media wished to offer sports bets in the Federal Republic of Germany over the internet and therefore applied to the Land of Schleswig-Holstein on 10 February 2006 for a declaration as to the lawfulness of that activity under the licence which it holds in Gibraltar or, in the alternative, for the grant of a licence under national law.

23. Its application having been turned down, on 30 June 2006, Carmen Media brought an action before the Schleswig-Holsteinisches Verwaltungsgericht claiming that the State monopoly on sports betting is contrary to European Union law in that it is incompatible with the freedom to provide services laid down in Article 49 EC.

24. In the order for reference, that court expresses the considerable doubts it has as to the compatibility of the German rules on gambling with European Union law and

refers the following questions to the Court for a preliminary ruling under Article 234 EC:

'1 Is Article 49 EC to be interpreted as meaning that reliance on the freedom to provide services requires that a service provider be permitted, in accordance with the provisions of the Member State in which it is established, to provide that service there as well – in the present case, restriction of the Gibraltar gambling licence to "offshore bookmaking"?

2 Is Article 49 EC to be interpreted as precluding a national monopoly on the operation of sports betting and lotteries (with more than a low potential risk of addiction), justified primarily on the grounds of combating the risk of gambling addiction, whereas other games of chance, with considerable potential risk of addiction, may be provided in that Member State by private service providers, and the different legal rules for sports betting and lotteries, on the one hand, and other games of chance, on the other, are based on the differing legislative powers of the Bund and the Länder?

Should the second question be answered in the affirmative:

3 Is Article 49 EC to be interpreted as precluding national rules which make entitlement to the grant of a licence to operate and arrange games of chance subject to the discretion of the competent licensing authority, even where the conditions for the grant of a licence as laid down in the legislation have been fulfilled?

4 Is Article 49 EC to be interpreted as precluding national rules prohibiting the operation and brokering of public games of chance on the Internet, in particular where, at the same time, although only for a transitional period of one year, their online operation and brokering is permitted, subject to legislation protecting minors and players, for the purposes of the principle of proportionality and to enable two commercial gambling brokers who have previously operated exclusively online to switch over to those distribution channels permitted by the [GlüStV]?'

IV — The procedure before the Court of Justice

25. The reference for a preliminary ruling was lodged at the Court Registry on 8 February 2008.

26. The claimant (Carmen Media) and the defendant (the Land Schleswig-Holstein) in the main proceedings, the European Commission and the Governments of Belgium, Germany, Greece, the Netherlands and Norway submitted written observations.

27. At the hearing, which was held on 8 December 2009, oral argument was presented by the representatives of Carmen Media, the Land Schleswig-Holstein and the Innenminister des Landes Schleswig-Holstein (Minister for the Interior of the Land Schleswig-Holstein), the Belgian, German, Greek, Italian, Portuguese and Norwegian Governments and the Commission.

V — Analysis of the first question

28. By its first question, the referring court asks the Court whether Article 49 EC makes the possibility of relying on the freedom to provide services subject to the requirement that the service provider must also be able to carry on its activity in the Member State in which it is established, in accordance with the law of that State.

29. The uncertainty comes from the fact that Carmen Media obtained from the authorities in Gibraltar, where it is established, a gambling licence limited to '*offshore bookmaking*', that is to say an extraterritorial licence, which does not permit it to organise betting in the territory of Gibraltar but only – or at least theoretically so – abroad.

30. When questioned on that point at the hearing, Carmen Media's representative denied that, at the material time, the company was subject to a ban on organising games of chance in Gibraltar. However, it is clear from its written intervention that such a restriction did indeed exist, if not strictly in the form of a ban, certainly in the form of a limitation on its freedom of action. [8]

31. In the same statement, Carmen Media points out that that limitation [9] was due exclusively to tax reasons, more specifically the fact that it had opted for a particularly advantageous tax regime (known as 'exempt company status'), subject to the condition that it did 'not... carry on or transact any trade or business in Gibraltar'. [10] It also states that that restriction was not aimed at protecting Gibraltar citizens against offers from gaming operators and that it could have been abolished without the need for it to undergo a new licensing procedure, even though

8 — 'The licence issued in Gibraltar for the organisation of sports betting via the internet was initially limited... to offers made available outside Gibraltar' (statement in intervention by Carmen Media, paragraph 11).

9 — Which in any event ceased to apply in 2006.

10 — Section 3(c) of the Companies (Tax and Concessions) Act.

Carmen Media would have had to relinquish its particular tax status in order to obtain such a licence.

32. The Schleswig-Holsteinisches Verwaltungsgericht is attempting to determine whether, under Article 49 EC, a licence of that type authorised Carmen Media to carry on its activity in German territory without the need to obtain a new licence from the authorities of the Land in question, or whether the fact that it was not allowed to organise gaming in its own place of origin precluded application of the principle of mutual recognition.

33. Mutual recognition is an instrument aimed at guaranteeing operators market access in all the Member States, even in sectors where there are substantial differences in the rules applicable. [11] According to case-law, in order to attain that objective, it is necessary to find a balance between the requirements of the various Member States concerned, so that the Member State in which the service is provided cannot duplicate the controls and conditions already imposed in the Member State of origin of the service provider.

34. This follows from Case [12] *Webb*, in which the Court held that 'the freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by overriding reasons in the general interest... in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment'. [13]

35. In the context of mutual recognition, that statement presupposes that the Member State of destination may, in the light of a given general interest, [14] make the provision of services subject to the acquisition of a licence, but it must consider a licence issued by the authorities of another Member State to be appropriate where that licence ensures that the conditions objectively necessary to pursue the same general-interest objective are satisfied. In short, if the requirement of prior authorisation is lawful within the context of the Union (in so far as it may be justified, in accordance with case-law, on grounds of general interest), it is also lawful in relation to an undertaking established in another Member State, in so far as that undertaking has not

11 — Armstrong, K. A., 'Mutual Recognition' in *The Law of the Single European Market Unpacking Premises*, under the editorship of Barnard, C. and Scott, J., Hart Publishing, 2002, p. 230.

12 — 279/80.

13 — To the same effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 16; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 11; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 34; and Case C-165/98 *André Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189, paragraph 25.

14 — For example, consumer protection, or combating crime in a given sector.

already complied with the aforementioned conditions aimed at attaining the same objective in the Member State of establishment.

36. It is difficult for an extraterritorial licence such as that at issue in the main proceedings to fulfil such conditions. In so far as the authorities of the Member State of origin do not themselves permit that activity to be carried on in the territory of that State, the idea that, by their intervention, the general interest which is of concern to another Member State is sufficiently protected is inherently flawed. Mutual recognition is possible only if the Member State of origin has performed checks similar to those required in the Member State of destination.

37. It follows that the freedom to provide services may be relied on only where the activity in question may also lawfully be provided in the Member State of establishment.

38. That idea has been expressly adopted by the Court's case-law on the freedom to provide services to the effect that restrictions under Article 49 EC are not only those which involve discrimination on grounds of nationality but also those which, even though they are not discriminatory, are liable to 'prohibit, impede or render less advantageous the activities of a provider of services established in another Member State *where he lawfully provides similar services*'.[15]

39. To counter that argument, the Commission relies on *Inspire Art Ltd*,[16] where the Court held that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the Member State where its branch is established is not sufficient to... deny that company the benefit of the provisions of Community law relating to the right of establishment.[17]

40. To my mind, reliance on that judgment is irrelevant as the criteria are different in the case of the freedom to provide services. Moreover, the Court draws a clear distinction in this regard between the two freedoms and takes a stricter approach in the context of the freedom of establishment. Thus, in *Säger*, cited above, it found that 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment' (paragraph 13), while a restriction on the freedom to provide services in the form of a national administrative licence may be justified by reasons relating to the public interest (paragraphs 14 and 15).

15 — My emphasis. To the same effect, Case 76/90 *Denmeyer* [1991] ECR I-4239, paragraph 12; *Guiot*, cited above, paragraph 10; and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 25.

16 — Case C-167/01 [2003] ECR I-10155.

17 — Paragraph 139.

41. Consequently, an undertaking may establish itself in Member State A, which has less rigorous company-law provisions, and conduct the entirety of its business in another Member State B by virtue of the freedom of establishment enshrined in the Treaty (Article 43 EC). From the point of view of the freedom to provide services, however, the situation is different, and it cannot under any circumstances be inferred from *Inspire Art* that the undertaking in question may operate without a licence on the market in B on the sole ground that it is established in A, notwithstanding that the authorities in the latter State do not permit it to provide the same service in the territory of that State.

42. Nor, to my mind, can that conclusion be refuted by reference to *VT4 Ltd*, [18] in paragraph 22 of which the Court held that '[t]he Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established.' [19] In this case, the important point is not the fact that Carmen Media did not offer the service of organising betting in the territory of its Member State of establishment (which, in itself, would not prevent reliance on the freedom to provide services, in accordance with the above case-law), but the fact that it could not do so because its licence was exclusively extraterritorial or *offshore*.

43. The fact that that restriction was due to the voluntary choice made by Carmen Media in order to benefit from a more advantageous tax regime does not in any way alter the fact that, when it asked to be recognised as a legal gambling operator in Germany, it only held a licence which did not permit it to provide that same service in its place of origin. Moreover, even though the undertaking could have obtained a licence to operate in Gibraltar simply by relinquishing the tax benefits which it enjoyed, the fact remains that it chose to retain those benefits and, consequently, to submit to the restrictions attached to them.

44. Whatever reasons – fiscal or otherwise – a Member State may have for acting in this way, why would that Member State, which issues extraterritorial licences, assume the obligation to exercise adequate control over the provision of the service in question? Why should the Member States automatically accept a licence which is not valid for those who issued it?

45. In those circumstances, the view may legitimately be taken that the Gibraltar authorities may not have guaranteed controls and conditions which might make intervention by the German authorities pointless. The principle of mutual recognition involves placing trust in the control which the Member State of establishment exercises over an

18 — Case C-56/96 [1997] ECR I-3143, paragraph 22.

19 — To the same effect, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 27.

undertaking established in its territory; however, if a Member State has granted only an offshore licence, it is reasonable to ask whether its controls should be trusted. The control exercised by the German authorities is not therefore redundant, and mutual recognition to prevent control being duplicated is not appropriate.

46. Another solution might, at least in theory, encourage undesirable abuse of the internal market, as the Belgian Government rightly points out in its statement in intervention. It is true that the Court takes a strict approach to this type of abuse, [20] but extraterritorial licences of this kind can hardly be regarded as constituting conduct which fosters mutual trust between Member States.

47. For those reasons, I take the view that the possibility of relying on the freedom to provide services is subject to the essential requirement that the licence granted by the Member State of establishment authorises the service provider to provide the service in question in that Member State where it is established.

48. However, the problem does not arise in those terms in the gaming sector, since, as I explain at length in my Opinion in *Markus Stoß and Others*, [21] as European Union law currently stands, mutual recognition is not applicable in the field of gambling licences. Three factors lead me to this conclusion.

49. First, the uniform functioning of a system for the mutual recognition of gambling licences proves to be irreconcilable with the case-law of the Court, which clearly and resolutely accepts monopolies and other restrictions on the number of operators in the gaming sector, provided that certain conditions are met. [22] If a Member State in which a gambling monopoly compliant with the requirements of Treaty has been established were under an obligation to take into consideration licences issued by the other Member States, the above case-law would be inapplicable and would be rendered meaningless.

50. Secondly, mutual recognition seems to be impossible in the absence of harmonisation of the gambling sector, of which there is no immediate prospect. Without harmonisation, application of the freedom of movement would continue to be limited, and the task of the Courts of the Union is specifically to

20 — For example, *Inspire Art*, cited above, paragraph 139, concerning the freedom of establishment.

21 — Points 90 to 105.

22 — Case C-124/97 *Läärä* [1999] ECR I-6067; Case 6/01 *Anomar* [2003] ECR I-8621; and Case C-42/07 *Liga Portuguesa de Futebol Profissional* [2009] ECR I-7633 ('*Liga Portuguesa*').

define the restrictions which are compatible with the provisions of the Treaty in that non-harmonised sphere.

51. Thirdly, the non-existence of a sufficiently well-organised system of administrative cooperation makes it difficult to establish a system of mutual recognition in the sector.

52. Consequently, the first question raised by the Schleswig-Holsteinisches Verwaltungsgericht is based on an erroneous premiss and the answer to it should refute the principal premiss, given that the German authorities are not, in the circumstances of the case at issue, required to recognise a gambling licence issued by the authorities of another Member State, whatever the conditions which are attached to it.

VI — Analysis of the second question

A — *Individualised analysis of the restrictions on gambling: reference to the Opinion in Markus Stoß and Others*

53. By its second question, the referring court asks the Court whether Article 49 EC precludes a national monopoly on the organisation of sports betting and lotteries which was established primarily with a view to combating the risk of gambling addiction where, in the same Member State, there are other games of chance with a high risk of addiction which may be provided by private service providers.

54. That question was raised in identical terms in *Markus Stoß and Others*, cited above. In the interests of procedural economy, I therefore refer, essentially, to my analysis in the Opinion in those cases. [23] In them, I take the view that, in the light of the copious case-law on the matter, the legal systems governing gambling in the Member States must be examined from a sectoral point of view, by analysing each restriction and each game in isolation. Consequently, the question whether the choice of a monopoly in relation to certain games is lawful or unlawful in the light of European Union law will be determined by its consistency or inconsistency with the objective pursued, and by whether or not it is discriminatory and proportionate, but it should not under any circumstances be determined by reference to the regulatory choice made in relation to other games of chance in the same Member State.

23 — Points 61 to 76.

55. In any event, and irrespective of that discussion, I take the view that the legislative decision to establish a monopoly on certain games and to leave others in the hands of the private sector is not *a priori* inconsistent either with the objective of combating fraud or with that of limiting gaming opportunities in a Member State, provided that the public authorities ensure that some control is exercised over the operators and that the supply of games covered by the monopoly is smaller than it might be in the case of a private provider. [24] If those conditions are fulfilled, the circumstances mentioned do not stand in the way of a consistent and systematic gambling policy within the meaning of case-law. It is for the national courts to determine whether those conditions are fulfilled.

B — *The territorial structure of the State has no bearing on this assessment*

56. The question referred by the Schleswig-Holsteinisches Verwaltungsgericht is, however, different from that raised by the Verwaltungsgericht Giessen since the former court also mentions the possible bearing on the above conclusion of the fact that the different legal rules on sports betting and lotteries, on the one hand, and other games of chance, on the other, are due to the different legislative competences of the Länder and the Federal State.

57. It follows from settled case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify, within the context of infringement proceedings, a failure to comply with Community law, [25] or, in the case of damage caused to individuals by a failure to comply with Community law, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis. [26] The State, as a unitary entity, is liable, whatever the agency of the State which is the cause of the failure to fulfil its obligations, even in the case of a 'constitutionally independent institution.' [27]

58. To my mind, that case-law is also applicable to a situation such as that in this case, where the question under examination is

24 — Point 74 of my Opinion in *Markus Stoß and Others*.

25 — Case 106/82 *Commission* v *Netherlands* [1982] ECR 4637, paragraph 4; Case 280/83 *Commission* v *Italy* [1984] ECR 2361, paragraph 4; Case 215/83 *Commission* v *Belgium* [1985] ECR 1039, paragraph 25; Case C-326/97 *Commission* v *Belgium* [1998] ECR 6107, paragraph 7; and Case C-298/97 *Commission* v *Spain* [1998] ECR I-3301, paragraph 14.

26 — Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 62.

27 — Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraph 15.

whether a national policy and its corresponding legislation infringe the provisions of the Treaty on freedoms. Consequently, I consider that the territorial distribution of competences within a State must have no bearing on the assessment of the compatibility of a national rule with European Union law.

59. The complexity of the internal territorial structure of a Member State and, in particular, the distribution of competences relating to the same subject-matter between two different territorial entities (in this case, the Federal State and the Länder) does not in itself jeopardise the consistency of the national policy under analysis (which must be examined at national level) but cannot, on the other hand, serve as an excuse for any inconsistency or discrimination. [28]

VII — Analysis of the third question

60. By its third question, the national court asks the Court whether Article 49 EC precludes a national rule which leaves to the discretion of the licensing authority the decision whether to grant a licence to organise and broker games of chance, even where the conditions for the grant of the licence laid down by law have been fulfilled.

61. The referring court considers that this question is relevant only if the German monopoly system is held to be contrary to the Treaty. In my view, however, the question is relevant even if the national court, in accordance with the criteria set out in the judgment of the Court of Justice, declares that the coexistence of a monopoly on certain games and the operation of other games by private operators is not contrary to the Treaty. In that event, the licensing procedure would be applicable to the latter.

62. The scheme of prior administrative authorisation also constitutes a restriction on the freedom of movement which may be justified in so far as it is non-discriminatory, seeks to ensure the attainment of an objective in the general interest, and is suitable for its attainment and proportionate to it. [29]

28 — To that effect, Case C-428/07 *Horvath* [2009] ECR I-6355, paragraphs 47 to 58.

29 — Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 65; Case C-42/02 *Lindman* [2003] ECR I-13519, paragraph 29; Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, paragraph 49; and *Liga Portuguesa*, cited above, paragraph 60.

63. None the less, in accordance with settled case-law, it is necessary to add to those criteria others intended to ensure that that authorisation, in so far as it is capable of requiring that the freedom in question be subject to the discretion of the administrative authorities, does not render that freedom illusory. [30]

64. Thus, the Court has held that, in order for a prior administrative authorisation scheme to be justified even though it derogates from a fundamental freedom, it must:(1) be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily; and (2) be based on a procedural system which is easily accessible and capable of ensuring vis-à-vis the interested parties that their request for authorisation will be dealt with objectively and impartially within a reasonable time, allowing refusals to grant authorisation to be challenged in judicial or quasi-judicial proceedings. [31]

65. The powers of the administrative authorities must therefore be subject to certain limits which ensure that they are not exercised improperly, but the Courts of the Union do not require the licensing option to be fully regulated. Otherwise, the restriction on the number of operators, permitted on occasion by case-law, [32] would be redundant and the attainment of objectives in the general interest justifying that restriction on the freedom to provide services might even be impeded. [33]

66. Consequently, provided that the procedure established is objective, transparent and non-discriminatory, and the decision adopted is capable of being challenged, the administrative authority may retain a certain margin of discretion in order to find the solution best suited to each situation. That is why Paragraph 4(2) of the GlüStV stipulates that there is no legal entitlement to the grant of a licence.

30 — Joined Cases 286/82 and 26/83 *Luisi* and *Carbone* [1984] ECR 377, paragraph 34; Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37; and Case C-385/99 *Müller-Fauré* [2003] ECR I-4509, paragraph 84.

31 — *Müller-Fauré*, cited above, paragraph 85; *Analir and Others*, cited above, paragraph 38; and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 90.

32 — *Placanica*, cited above, paragraphs 53 to 58.

33 — The case-law on gambling frequently refers to the need for the national authorities to have 'a sufficient margin of discretion' to determine the requirements associated with the general-interest objective on which they rely (*Schindler*, paragraph 61; *Zenatti*, paragraph 15; *Gambelli*, paragraph 63; *Läärä*, paragraph 14; *Placanica*, paragraph 47; and *Liga Portuguesa*, paragraph 57, cited above).

VIII — Analysis of the fourth question

67. By its fourth and final question, the referring court asks whether an absolute ban on the organisation and brokering of games of chance on the internet is in conformity with Article 49 EC where, at the same time, the national rules permit certain operators to continue to offer those games on the internet for a transitional period of one year.

68. By that question, the Schleswig-Holsteinisches Verwaltungsgericht wishes to ascertain whether Paragraph 4(4) of the GlüStV, which prohibits the organisation or brokering of any public gaming on the internet, is compatible with the Treaty. [34]

69. The Court has ruled that other general bans, such as those relating to a particular form of gambling, are compatible with the Treaty. [35] It follows that there is nothing to preclude the potential lawfulness of a ban on a particular gambling medium, such as the internet. The measure is not discriminatory since it applies to both German and foreign operators [36] and it might be capable of protecting players and reducing gambling addiction, in view of the specific characteristics of internet gambling (particular risk of dependency given that the gambling takes place in private, the supply of games available is virtually unlimited – a number of gambling windows can be opened at the same time – and it is available 24 hours a day, 365 days a year).

70. Consequently, a ban of that type, like other bans having a less pronounced effect on the freedom to provide services, might be justified on grounds of general interest and compatible with the Treaty, provided that it is non-discriminatory and satisfies the criteria of consistency and proportionality. It is true that certain aspects of it might call into question its proportionality since, alongside other less restrictive measures (such as the monopoly itself), a total ban could have the effect of driving the demand for gambling towards unlawful internet pages. Similarly, the decision might prove to be at odds with the prospect of simultaneously maintaining a monopoly on the same games (even if they are not provided on the internet) on the basis

34 — The German Government stated at the hearing that the ban on internet gambling applies not only to sports betting and lotteries but also to casinos and slot machines. Any web pages of that kind which exist in Germany (some of which are cited in the case-file) are therefore unlawful.

35 — For example, *Schindler*, cited above, concerning the ban on lotteries formerly applicable under UK law.

36 — Subject to the clarification contained in point 31. Moreover, it does not appear, as Carmen Media argues, that there is any 'latent discrimination' deriving from the fact that foreign operators are 'dependent' on the internet, given that they enjoy the same right to exercise their activities in Germany as German undertakings do.

of the need to channel the desire to gamble. However, it is for the national court to assess all those questions.

71. None the less, the referring court does not call into question the ban on internet gambling in abstract and general terms, but rather in relation to the transitional provision which permits the Länder to maintain the organisation and brokering of lotteries on the internet for a period of one year following the entry into force of the GlüStV, provided that there are no objective grounds for refusal and that other, supplementary requirements are fulfilled.

72. According to the explanatory memorandum to the GlüStV, the purpose of that transitional measure was to permit operators of games of chance which exercised their activities almost exclusively via the internet to adapt to the new legal framework by switching to the new marketing channels authorised by that framework. [37] It is therefore a decision aimed at protecting the legal certainty of the operators which, up until the date of the ban, were acting within the framework of a non-restrictive regime.

73. The Court has on various occasions drawn attention to the importance of the principle of legal certainty, which forms part of the legal order [of the European Union] and must be observed by the institutions [of the European Union], but also by the Member States when they exercise the powers conferred on them by [European Union] law. [38]

74. In the light of the requirements flowing from that principle, EU directives normally allow a reasonable period of time, starting from their entry into force, for their transposition and implementation, and the Court has taken the view in its case-law that the temporary deferral by the Member States of the adaptation of their different – factual and legal – situations to European Union law may be justified.

75. In *ASM Brescia*, [39] for example, the Court, in accordance with the principle of legal certainty, allowed the validity of a gas distribution concession to be extended, contrary

37 — The referring court considers that this is 'compensation out of fairness to two commercial gambling operators' which were referred to by name in the explanatory memorandum to the GlüStV. However, the German Government challenges that argument in its statement in intervention, arguing that the application of Paragraph 25(6) of the GlüStV is not confined to those two operators but also extends to'foreign gambling operators which organise licensed lotteries in accordance with the conditions laid down by the law of their country'. It is for the national court to verify the truth of that statement, since, if Paragraph 25(6) were an *ad nominem* provision, that is to say applicable exclusively to certain undertakings, this would constitute discrimination contrary to the Treaty.

38 — Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26; Cases C-487/01 and C-7/02 *Gemeente Leusden* and *Holin Groep* [2004] ECR I-5337, paragraph 57; and Case C-376/02 *Goed Wonen* [2005] ECR I-3445, paragraph 32.

39 — Case C-347/06 [2008] ECR I-5641.

to Articles 49 EC and 86 EC. There are also many judgments in which the Court of Justice, in reliance on the principle of legal certainty, exercises the power conferred on it by the second paragraph of Article 231 EC, indicating which of the effects of an annulled regulation must be considered as definitive. [40]

76. In so far as the principle of legal certainty is considered to be one of the overriding reasons in the general interest which may be relied upon by the Member States in order provisionally to maintain a rule or a situation contrary to the freedoms of the Treaty, the case in favour of the lawfulness of a decision which defers the restriction of one of those freedoms, by granting the persons concerned a period of time within which to adapt to the new requirements of the national legislation, is all the stronger.

77. Similarly, I take the view that the decision to defer the entry into force of the ban on internet gambling would not adversely affect the consistency of that restrictive measure, nor jeopardise the attainment of the general-interest objectives which it pursues.

78. First, even though the ban on games of chance on the internet is justifiable on grounds of the high risk of dependency associated with such games, the need to eliminate them does not appear to be so urgent that it must take precedence over the requirements flowing from the principle of legal certainty.

79. Next, it should be borne in mind that the transitional period laid down in Paragraph 25(6) of the GlüStV is subject to significant conditions and requirements. First, it applies only to lotteries and not to sports betting, the organisation and brokering of which on the internet are prohibited as from the entry into force of the GlüStV because of the particular risks associated with them. Secondly, the transitional licensing of lotteries on the internet is subject to a number of requirements and restrictions intended to prevent the risks which that type of gambling may pose: thus, that provision stipulates that a guarantee must be given that minors and prohibited players will be excluded, limits the level of stakes to EUR 1 000 per month, and prohibits credit and interactive participation with real-time publication of results, for example.

80. Finally, as the order for reference states, the transitional provision introduced by the GlüStV constitutes compensation out of

40 — Cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 373 et seq. The Court applies that provision, by analogy, in the context of references for a preliminary ruling and to all acts of secondary law. See to this effect Case 4/79 *Providence agricole de Champagne* [1980] ECR 2823, paragraphs 45 and 46, and Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraphs 29 to 32. The question which remains to be settled is whether that possibility may also be applied to rules of domestic law which are contrary to a directly applicable rule of European Union law; that question was put to the Court in Case C-409/06 *Winner Wetten GmbH*, still pending. Advocate General Bot has already replied to that question in the negative in his Opinion in that case.

fairness which has due regard to the provisions on the protection of young people and players. That is why I take the view that the fact that such a provision has been laid down is not inconsistent with the ban on internet gambling, given that that provision is intended to facilitate transition towards the new legal framework with maximum possible regard for the general-interest objectives pursued and the principle of legal certainty.

IX — Conclusions

81. In accordance with the foregoing considerations, I propose that the Court's answers to the questions referred by the Schleswig Holsteinisches Verwaltungsgericht should be that:

'(1) Article 49 EC is to be interpreted as meaning that reliance on the freedom to provide services presupposes that the licence granted by the Member State of establishment authorises the service provider to provide the service in question in the Member State in which it is established. However, the mutual recognition of gambling licences is not feasible as European Union law stands at present.

(2) Article 49 EC is compatible with a state monopoly on the organisation of sports betting and lotteries, justified primarily on the grounds of combating the risk of gambling addiction, even where, in that same Member State, other games of chance, with considerable potential risk of addiction, may be provided by private service providers, provided that the public authorities ensure that some control is exercised over the private operators and that the supply of games covered by the monopoly is smaller than it might be in the case of a private supplier. If those conditions are fulfilled, the circumstances described do not stand in the way of a

consistent and systematic gambling policy within the meaning of the case-law. It is for the national court to determine whether those conditions are fulfilled.

The distribution of legislative competences in the field of gambling between the Federal State and the Länder does not in itself jeopardise the consistency of the national policy under analysis (which must be examined as a whole at national level), but it cannot, on the other hand, serve as an excuse for any inconsistencies.

(3) Article 49 EC is to be interpreted as not precluding national legislation leaving the grant of a licence to organise and broker games of chance to the unfettered discretion of the competent licensing authority, provided that the procedure established is objective, transparent and non-discriminatory, and that the decision adopted is capable of being challenged.

(4) Article 49 EC does not preclude national legislation prohibiting the organisation and brokering of public games of chance on the internet, provided that the measure is consistent with the general-interest objective relied on by way of justification, and proportionate to that objective, notwithstanding that, at the same time, their organisation and brokering on the internet is permitted, in accordance with the provisions on the protection of minors and players, out of fairness, specifically to persons who have hitherto operated exclusively via the internet.'