OPINION OF ADVOCATE GENERAL BOT

delivered on 17 December 2009 [1]

1. The extent to which the powers of the Member States in the matter of gambling are curtailed by the freedoms of movement has already given rise to a relatively substantial body of case-law and it continues to give rise to numerous references to the Court. [2]

2. These two references for a preliminary ruling seek to determine whether the Netherlands legislation on that subject conforms with the EC Treaty rules on the freedom to provide services. As the references concern the same national provisions and the questions from the two referring courts overlap, I have decided to deal with them together.

3. The aim of the Netherlands legislation is to protect consumers against addiction to gambling and to combat crime. It provides, first, that it is prohibited to organise or promote gambling without having obtained a licence for that purpose and, second, that only one provider for each category of game may receive a licence.

4. The licence for the organisation of sports bets, the lottery and number games was granted to the foundation Stichting de Nationale Sporttotalisator. [3] It was extended for five years in December 2004. The licence for the organisation of a totalisator on horse races, which was granted to a limited company, Scientific Games Racing BV, [4] was extended in June 2005.

5. Case C-203/08 originates in a dispute between The Sporting Exchange Ltd, trading as Betfair, [5] established in the United Kingdom, and the Minister van Justitie (Netherlands Minister of Justice) concerning the rejection of the company's applications for a licence for the organisation of gambling in the Netherlands and its actions against the decisions to extend the licences of De Lotto and SGR.

1 — Original language: French.

2 — See the following cases pending before the Court: Case C-409/06 Winner Wetten; Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Markus Stoß and Others; Case C-46/08 Carmen Media Group; Case C-55/08 Santa Casa da Misericordia de Lisboa; Case C-212/08 Zeturf, and Joined Cases C-447/08 and C-448/08 Sjöberg and Gerdin.

3 — Foundation for the national sport totalisator ('De Lotto').

4 — 'SGR'. SGR is a subsidiary of Scientific Games Corporation Inc., established in New York (United States).

5 — 'Betfair'.

6. Case C-258/08 has arisen from actions brought against Ladbrokes Betting and Gaming Ltd and Ladbrokes International Ltd,[6] established in the United Kingdom, by De Lotto, seeking to prohibit them from offering on their internet site to persons residing in the Netherlands forms of gambling for which they hold no licence.

7. These two references for preliminary rulings raise the following four questions.

8. First, can the legislation of a Member State which restricts the provision of forms of gambling with the object of curbing gambling addiction and preventing fraud and which actually attains those objects be deemed to pursue those objects in a consistent and systematic manner where the holder or holders of the exclusive right are authorised to make their offer attractive by introducing new forms of gambling and by using advertising? (First question in Case C-258/08).

9. Second, where a national court has ascertained that its national legislation concerning gambling is compatible with Community law, is that court required to ascertain whether an enforcement measure aiming to secure compliance with that legislation is consistent with the principle of proportionality? (Second question, (a) and (b), in Case C-258/08).

10. Third, does the fact that an operator is authorised to offer on-line gaming in the territory of a Member State in which it is established preclude another Member State where gaming is subject to an exclusive rights system from prohibiting that operator from providing the same gaming services to persons residing in its territory? (First question in Case C-203/08 and third question in Case C-258/08).

11. Fourth, under Article 49 EC, do the principle of equal treatment and the associated obligation of transparency apply in the gambling sector in relation to a system for licensing a single operator? And, if the reply is in the affirmative, how far can a single operator's licence be extended without competitive tendering? [Questions 2 and 3(a) and (b) in Case C-203/08].

12. Those questions are based on the premise that the grant by a Member State of the exclusive right to operate a form of gambling to a single operator may be compatible with Community law. In the present opinion, I shall propose that the Court should confirm that premise.

13. I shall then propose, in reply to the first question, that the Court should rule that once the national court has found that the legislation of a Member State restricting the

6 — 'Ladbrokes'.

provision of forms of gambling in order to curb addition to gambling and to prevent fraud actually attains those two objectives, that legislation must be deemed to pursue those objectives in a consistent and systematic manner even if the holder or holders of the exclusive right to provide those forms of gambling are authorised to make their services attractive by introducing new games and using advertising.

14. In reply to the second question, I shall submit that, where the national court has found that the restrictions imposed by its national legislation conform with the Community principle of proportionality, that court is not compelled to ascertain and to show, in every particular case, that a measure simply enforcing that legislation is also consistent with that principle where that measure is strictly confined to ensuring that the legislation in question is applied, without creating any additional restriction. I shall also suggest that the fact that the measure in question is sought by an operator in the context of a dispute between private persons and not by official authority has no bearing on the reply to that question.

15. The reply to the third question is to be inferred, first, from the judgment in *Liga Portuguesa de Futebol Profissional and Bwin International*,[7] which states that the principle of mutual recognition does not apply to a licence to offer games on line and, second, from the case-law to the effect that a system of exclusive rights may be compatible with Community law.

16. Finally, with regard to the principle of equal treatment and the obligation of transparency, I shall propose that the Court should find that they apply to a licensing system which is limited to a single operator in the gambling sector. I shall also submit that they preclude the extension of a licence without competitive tendering unless the omission of a call for tenders is validly justified on one of the grounds laid down by the Treaty or accepted by the case-law, which is a matter to be verified by the national court.

I – The Netherlands law

17. Under Article 1 of the Law on games of chance (Wet op kansspelen)[8] and subject to

7 — Case C-42/07 [2009] ECR I-7633.

8 — 'The Netherlands Law'.

the provisions of its Title Va, the following are prohibited:

'(a) providing an opportunity to compete for prizes if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence, unless a licence therefor has been granted pursuant to this Law;

(b) promoting participation either in an opportunity as referred to under (a), provided without a licence pursuant to this Law, or in a similar opportunity, provided outside the Kingdom in Europe, or to maintain a stock of materials intended to publicise or disseminate knowledge of such opportunities;

...'

18. The Netherlands Law goes on to provide that a licence may be granted for different forms of gambling, in particular sports-related prize competitions and totalisators, which are governed by Titles III and IV respectively of the abovementioned Law.

19. 'Sports-related prize competitions' are defined as competitions for prizes in which participants are required to guess or predict the outcome of a previously announced sporting contest, with the exception of horse races.

20. Under Article 16(1) of the Netherlands Law, the competent national authorities may grant a licence to organise sports-related prize competitions to a single legal person with full legal capacity for a period to be determined by them. Article 16(2) provides that the income generated by a prize competition is to be allocated, after the deduction of distributed winnings and costs, to the causes which the legal person intends to serve by the organisation of sports-related prize competitions

21. Persons under 18 years of age are not allowed to bet. In addition, under Article 21 of the Netherlands Law, a licence is subject to conditions concerning the number of competitions to be organised, the method of determining substitute results and the list of prizes, the management and covering of organisation costs, the allocation of earnings, the articles of association and regulations of the legal person, the supervision of the application of the law by the authorities, and the delivery of the report to be drawn up each year by the legal person concerning its activities and the financial results, as well as the manner of publication of the report.

22. Totalisators are governed by Title IV of the Netherlands Law. They cover any opportunity offered to bet on the results of horse races. All the stakes must be shared among the persons who placed a bet on the winner or one of the winners, subject to the deductions provided for by the Law.

23. Under Article 24 of the Netherlands Law, the competent national authorities may grant a licence to organise totalisators to a single legal person with full legal capacity for a period to be determined by the authorities.

24. The licence for the organisation of totalisators may be subject to conditions concerning the number of horse races, the maximum stake per person, the percentage retained before distribution among the winners and the particular use of that percentage, the supervision of the application of the Law by the authorities, the obligation to prevent or take measures to prevent, so far as possible, unauthorised betting or the use of intermediaries at venues where horse races take place.

25. It is clear from the documents in the file, in particular the observations of the Netherlands Government, that licences are granted in principle for a period of five years.

26. The licences contain detailed provisions concerning the arrangements for organising the games to which they relate. A licence may be withdrawn before the expiry date if the licence-holder fails to comply with those conditions.

27. The licence for organising sports-related prize competitions has been held by De Lotto since 1961. It also holds a licence for organising the instant lottery, the lottery and numbers games.

28. De Lotto is a foundation and is non-profit-making. The entire net profits are paid to the beneficiaries for the benefit of sport, physical education, social welfare, public health and culture.

29. De Lotto's licence for organising sports-related prize competitions, the lottery and numbers games was extended for a period of five years, from 12 December 2004 to 11 December 2009, by decision of 10 December 2004.

30. The licence relating to totalisators has been held by SGR since 1998. Unlike De Lotto, SGR is profit-making. [9]

9 — The Commission of the European Communities points out that, according to the annual report of the Gaming Control Commission, in 2007 totalisators generated turnover of EUR 34.3 million which, after the deduction of EUR 25 million in distributed winnings and EUR 6.2 million in costs, left gaming income of EUR 3.1 million and net earnings of EUR 3.4 million. Of that total, EUR 3.2 million was paid, in accordance with the Netherlands Law and with the licence, to charitable institutions and organisations in the horse-racing sector and also to the Racing Federation. SGR's profit totalled EUR 200 000.

31. That licence was extended for a period of five years by decision of 21 June 2005.

II – Facts and questions referred

A – *Case C-258/08*

32. Ladbrokes organises betting on sports events, in particular fixed-odds betting. It offers several forms of gaming on its internet site (www.ladbrokes.com), mainly connected with sport. It also offers the possibility of participating by telephone in the betting activities which it organises.

33. Ladbrokes offered those forms of gaming on line to persons residing in the Netherlands.

34. As De Lotto took the view that Ladbrokes' conduct was contrary to Netherlands law and caused damage to De Lotto, it brought an action against Ladbrokes before the Rechtbank Arnhem (Netherlands). In particular, it sought an order requiring Ladbrokes to prevent Netherlands residents from participating in the games which it offers by internet, telephone or any other means, directly or through an intermediary. De Lotto also asked the court to prohibit Ladbrokes from offering its games on an internet site bearing a Netherlands address (in this case, www.ladbrokes.nl).

35. By judgment of 31 August 2005, the court allowed De Lotto's claim and ordered Ladbrokes, on pain of a periodic penalty, to put in place measures blocking access to its games via the internet and by means of a free telephone number.

36. Ladbrokes appealed to the Gerechtshof te Arnhem (Netherlands), which upheld the first instance decision by judgment of 17 October 2006.

37. The appeal court found that Ladbrokes had contravened the provisions of Article 1 of the Netherlands Law. The court dismissed as unfounded Ladbrokes' argument that the national court should determine whether the restrictions actually imposed on Ladbrokes, subject to the periodic penalty, were necessary and proportionate in the light of the aims of the Netherlands Law. The court also considered that the Netherlands Law genuinely contributes, in view of its provisions and the rules for its application, to the attainment of those aims, namely curbing addiction to gambling and preventing fraud. The court

dismissed as irrelevant Ladbrokes' argument that it is authorised to organise gambling in the United Kingdom. Finally, the court pointed out that the Netherlands Law is not discriminatory in so far as, first, the prohibition in Article 1 applies without differentiation to all undertakings, whether of Netherlands or foreign origin, and, secondly, legal persons established in other Member States can obtain a licence.

38. Ladbrokes appealed in cassation against that judgment to the Hoge Raad der Nederlanden (Netherlands).

39. In view of the submissions put forward in that appeal, the Hoge Raad der Nederlanden decided to stay judgment and to refer the following questions to the Court for a preliminary ruling:

'(1) Does a restrictive national gaming policy which is aimed at channelling the propensity to gamble and which in fact contributes to the achievement of the objectives pursued by the national legislation in question, namely the curbing of gambling addiction and the prevention of fraud, inasmuch as, by reason of the regulated offer of games of chance, participation in gambling activities occurs on a (much) more limited scale than would be the case if there were no national regulatory system, satisfy the condition set out in the case-law of the Court of Justice of the European Communities, particularly in the judgment in Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, that such restrictions must limit betting activities in a consistent and systematic manner, even where the licence holder/s is/are permitted to make the games of chance which they offer attractive by introducing new games, to bring the games which they offer to the notice of a wide public by means of advertising and thereby to keep (potential) gamblers away from the unlawful offer of games of chance (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 55, *in fine*)?

(2) (2a) Assuming that national legislation governing gaming policy is compatible with Article 49 EC, is it for the national courts to determine, on every occasion on which they apply that legislation in practice in an actual case, whether the measure to be imposed, such as an order that a particular website be made inaccessible to residents of the Member State concerned by means of software designed for that purpose, in order to prevent them from participating in the games of chance offered thereon, in itself and as such satisfies the condition, in the specific circumstances of the

case, that it should actually serve the objectives which might justify the national legislation in question, and whether the restriction resulting from that legislation and its application on the freedom to provide services is not disproportionate in the light of those objectives?

(2b) In answering Question 2a, does it make any difference if the measure to be implemented is not ordered and imposed in the context of the application of the national legislation by the authorities, but in the context of a civil action in which an organiser of games of chance operating with the required licence requests imposition of the measure on the ground that an unlawful act has been committed in regard to it under civil law, inasmuch as the opposing party contravened the national legislation in question, thereby gaining an unfair advantage over the party operating with the required licence?

(3) Should Article 49 EC be interpreted in such a way that the application of that article results in the competent authority of a Member State being unable, on the basis of the closed licensing system that exists in that State for the provision of gaming services, to prohibit a service provider which has already been granted a licence in another Member State for the online provision of such services from also offering those services online in the first Member State?'

B – *Case C-203/08*

40. Betfair facilitates the reciprocal negotiation and placing, directly or via the internet, of bets on sports events, in particular horse races. It has stated that it holds licences in the United Kingdom and several other States to provide such services.

41. It wished to be able to offer such services on the Netherlands market.

42. For that purpose, it applied to the Minister van Justitie for a licence to organise, whether or not via the internet, sports-related prize competitions and totalisators on the results of horse races. The Minister refused the applications and rejected Betfair's objection to the refusal. Betfair brought an action before the Rechtbank 's-Gravenhage (Netherlands).

43. Betfair also lodged an objection to the decision of 10 December 2004 extending De Lotto's licence relating to the organisation of sports-related prize competitions, the lottery and numbers games and also to the decision of 21 June 2005 extending SGR's licence relating to totalisators on the results of horse races.

44. The Minister van Justitie dismissed the objections as unfounded. Betfair also brought an action against the rejection decisions before the Rechtbank 's-Gravenhage.

45. By judgment of 8 December 2006, the Rechtbank 's-Gravenhage dismissed Betfair's actions as unfounded. Betfair appealed to the Raad van State (Netherlands).

46. In view of Betfair's submissions, the Raad van State decided to stay judgment and to refer the following questions to the Court for a preliminary ruling:

'(1) Should Article 49 EC be interpreted as meaning that, where a closed licensing system is applied in a Member State to the provision of services relating to games of chance, the application of that article precludes the competent authority of that Member State from prohibiting a service provider to whom a licence has already been granted in another Member State to provide those services via the internet from also offering those services via the internet in the first Member State?

(2) Is the interpretation which the Court of Justice has given to Article 49 EC, and in particular to the principle of equality and the duty of transparency arising therefrom, in a number of individual cases concerning concessions applicable to the procedure for the granting of a licence to offer services relating to games of chance under a statutorily established single-licence system?

(3) (a) Under a statutorily established single-licence system, can the extension of the licence of the existing licence-holder, without potential applicants being given an opportunity to compete for that licence, be a suitable and proportionate means of meeting the imperative requirements in the public interest which the Court of Justice has recognised as justifying restriction of the freedom to provide services in respect of games of chance? If so, under what conditions?

(b) Does it make a difference to the answer to Question 3(a) whether Question 2 is answered in the affirmative or the negative?'

III – Assessment

47. Before examining the various questions raised in the present cases, I think the following observations are called for with regard to the premises on which the questions referred by the Netherlands courts are based.

48. To begin with, it is indeed by the yardstick of Article 49 EC that the conformity of the Netherlands legislation must be examined.

49. First, gambling constitutes an economic activity within the meaning of Article 2 EC [10] and is regarded as a supply of services. The economic operators who provide them may therefore avail themselves of Articles 43 and 49 EC. [11] Legislation of a Member State which restricts the right to provide gambling services in the territory of that State may therefore constitute a restriction on the freedom of establishment and on the freedom to provide services, such restrictions being prohibited by those provisions. [12] In addition, gambling has not so far been the subject of any regulatory or harmonization measure at Community level.

50. Furthermore, it is clear from the factual context of the two cases under consideration that Betfair in Case C-203/08, and Ladbrokes in Case C-258/08, wish to provide gambling services for persons residing in the Netherlands without establishing themselves there, but from the United Kingdom by the internet or by telephone. Consequently those companies can only avail themselves of the Treaty provisions relating to the freedom to provide services.

51. Second, the referring courts are also justified in taking the view that, in so far as their national legislation provides that the right to offer gambling services to persons residing in Netherlands territory is open to a single operator with an exclusive right, that legislation may be compatible with Community law.

10 — Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraphs 46 and 47.

11 — See, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 59.

12 — Ibid.

52. Therefore it is common ground, first, that the Netherlands legislation which has the object and effect of preventing service providers such as Betfair and Ladbrokes, established in the United Kingdom, from offering their games to persons residing in Netherlands territory and thereby preventing the latter from having access to those services, is a restriction on freedom to provide services within the meaning of Article 49 EC.

53. Next, the Court has also consistently held that the Member States may restrict the organisation and exploitation of gaming in their territory in order to protect consumers from excessive expenditure on gaming and to preserve public order by reason of the risk of fraud created by the considerable amounts yielded by gaming. [13]

54. However, in order for the national legislation adopted for that purpose to conform with Community law, it must be applied in a non-discriminatory manner, it must be suitable for securing the attainment of the objective which it pursues and it must be proportionate, that is to say, it must not go beyond what is necessary in order to attain that objective. [14]

55. When reviewing compliance with those conditions, the Court has held that a Member State may legitimately grant a single operator the right to operate betting and gaming. [15] According to the Court, the grant of an exclusive right to a single operator, if that operator acts under State control and in conformity with its own objects, has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes. [16]

56. The choice between a system of an exclusive right granted to a single operator rather than to several operators whose activities are strictly limited is a matter to be assessed by the Member States. [17] On that point, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure. [18]

13 — Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2006] ECR I-1891, paragraph 46 and cases cited.

14 — Case C-65/05 *Commission* v *Greece* [2006] ECR I-10341, paragraph 49.

15 — Case C-124/97 *Läära and Others* [1999] ECR I-6067, paragraph 37. See also Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 35, and *Anomar and Others*, paragraph 74.

16 — *Läära and Others*, paragraph 37.

17 — *Läära and Others*, paragraphs 35 and 39; *Zenatti*, paragraph 33, and *Anomar and Others*, paragraph 87.

18 — *Läära and Others*, paragraph 36, and *Zenatti*, paragraph 34.

57. In my opinion, the abovementioned judgments merit full approval. As the referring court in Case C-203/08 correctly observes, licensing a single service provider not only simplifies the monitoring of that service provider and the monitoring of compliance with the rules associated with the licence, but also precludes competition among licenceholders for the same type of gaming, which would lead to the increased provision of services and to increased advertising.

58. The right of the Member States to opt for a system in which an exclusive right is granted to a single operator should also be maintained, in my view, because in the Community legal order competition is not an end in itself. It is a means of attaining the objectives pursued by the Community, as set out in Article 2 EC. Free competition promotes the harmonious development of economic activities and employment and thereby raises the standard of living of the citizens of the European Union because, where competition is fair, it ensures technological progress and improves the qualities of a service or a product, while guaranteeing the reduction of costs. It is thus to the advantage of consumers because they can have the benefit of better-quality products or services at a better price.

59. However, there are no such advantages in the area of gambling. Gambling can continue to function only if the very great majority of players lose more than they win. The very principle of that activity, in which the expectation of profit derives from the power of dreams, holds out the illusion of potential enrichment but leads to the impoverishment of those who indulge in it. Competition between service providers for the same type of game, which would be bound to lead them to offer consumers ever more attractive games in order to make the greatest profits, is likely to push households to spend more than their available resources for leisure purposes and even induce a real addiction to gaming. It could even be argued that purely economic logic would lead by nature to that attitude. Consequently this would be very far from the aims of Article 2 EC.

60. The Court's interpretation of the scope of the freedoms of movement in the sphere of gambling should not therefore lead to requiring the Member State to open the market in that field because it is not a source of progress and development; they should be left to take and to accept their responsibilities.

61. What I have said does not seek to call into question the case-law which states that the organisation and exploitation of gambling constitutes an economic activity or to question the right of operators to exercise the freedoms of movement. That case-law is called for in order that the exercise by the

Member States of their powers in that area, as in other areas of reserved competence, may be examined as to whether it is consistent with their Community obligations.

62. I merely wish to say that, because of the particular nature of gambling, a Member State should be required to open a specific form of gambling to free competition only if that State chooses to make that form of gambling a normal or ordinary economic activity in which the primary object is to make the maximum profit.

63. The questions referred in the present cases raise four issues which I shall examine in succession. They relate, first, to the consistency of a national law aiming to protect consumers against addiction to gambling and to prevent fraud when the holder of the exclusive right is authorised to introduce new games and to advertise (first question in Case C-258/08), second, to the extent of the review of proportionality which the national court is required to carry out when determining whether its national law is compatible with Community law (second question, (a) and (b), in Case C-258/08), third, to the application of the principle of mutual recognition to a licence for offering games on the internet (first question in Case C-203/08 and third question in Case C-258/08) and, fourth, the application of the principle of equal treatment and the obligation of transparency to the situation where a licence is granted to a single operator and where that licence is extended (second question and third question, (a) and (b), in Case C-203/08).

A – *Consistency of a national law aiming to protect consumers and to prevent fraud where that law permits the creation of new games and the use of advertising (first question in Case C-258/08)*

64. In essence, the first question from the referring court seeks to establish whether a national law which restricts the provision of gaming with the aim of curbing addiction to gaming and preventing fraud, and which actually contributes to the attainment of those objectives, can be deemed to pursue those objectives in a consistent and systematic manner where the holder or holders of the exclusive right are authorised to make their offer attractive by introducing new games and by using advertising.

65. That question has been raised by reason of the position adopted by the Court in *Gambelli and Others* and *Placanica and Others.*

In the former case, the Court found that the legislation of a Member State which restricts the organisation and operation of betting on sports events in order to protect consumers against excessive inducement to participate in gaming, when in actual fact the authorities of that Member State induce and encourage consumers to do so to the financial benefit of the public purse, does not pursue that objective in a consistent and systematic manner and is therefore contrary to Community law. [19]

66. In *Placanica and Others*, the Court observed that, if the betting and gaming legislation of a Member State aims to channel those activities into controllable systems in order to prevent their being used for criminal purposes, the authorised operators must constitute a reliable, but at the same time attractive, alternative to a prohibited activity, which may as such necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques. [20]

67. The referring court wishes to know how those two judgments can be reconciled in relation to its national law in so far as it aims, let me repeat, both to protect consumer against excessive inducement to gaming and to prevent fraud.

68. I think the national court's assessment in the order for reference, repeated in the wording of the question referred, that the legislation concerned actually contributes to the attainment of those two objectives clearly permits that question to be answered in the affirmative. My position is based on the following grounds.

69. As I have already said, the conformity with Community law of a Member State's legislation restricting the exercise of a freedom of movement depends, in particular, on its suitability for attaining the objective which it pursues. According to the case-law, it must pursue that objective in a consistent and systematic manner. [21]

70. That requirement is logical. A measure restricting a freedom of movement which does not pursue its underlying objective in a consistent and systematic manner is, for that reason, unsuitable for attaining that objective. Therefore the objective relied upon in support of that legislation cannot justify the restriction of a fundamental freedom provided for by Community law because that objective cannot be attained in any case. In other words, the ground relied upon, in such a situation, may be regarded as a mere pretext.

19 — *Gambelli and Others*, paragraph 69.

20 — *Placanica and Others*, paragraph 55.

21 — See, to that effect, *Gambelli and Others,* paragraph 67.

71. Accordingly the Court recently held that the legislation of a Member State was inconsistent in prohibiting advertising for medical and surgical treatments provided by private health care establishments on national television networks while at the same time permitting such advertisements, subject to certain conditions, on local television networks. [22] The same applied to the legislation of a Member State whereby the opening of an out-patient dental clinic was subject to authorisation, conditional on the existence of a need for the services offered, whereas the establishment of a group practice providing the same services was not subject to that condition. [23]

72. *Gambelli and Others* fits perfectly within that case-law, even though the inconsistency found by the Court in that case is not in the provisions of the legislation itself, but in its specific application by the national authorities. It is clear from *Gambelli and Others* that a Member State cannot legitimately bring in legislation restricting gaming with the sole object of protecting consumers against the risks of excessive expenditure when, in reality, it has a policy which is a strong inducement to those same consumers to participate in gaming.

73. In all those different situations, the national law in question thus proves to be unsuitable for attaining the aim which it pursues because either it is defective in principle or its specific application is contrary to that aim.

74. The situation is different in the present cases. Unlike the situation in *Gambelli and Others,* the Netherlands Law does not aim only to protect consumers against addiction to gambling, but also has the object of preventing fraud. In accordance with the case-law, the suitability of that legislation for attaining those two objects must be assessed by reference to both of them together. [24]

75. It follows that, when considering whether the Netherlands Law conforms with Community law, the conduct of the holders of exclusive rights to operate games must be assessed not only by reference to the aim of protecting consumers against an addiction to gaming, but also taking into account the aim of preventing fraud.

76. We have seen that in *Placanica and Others* the Court accepted that the latter aim could make it necessary for authorised operators to offer an extensive range of games, to advertise on a certain scale and to use new

22 — Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 40.

23 — Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 63.

24 — *Läära and Others,* paragraph 33, and *Zenatti,* paragraph 31.

games in order to provide an attractive alternative to clandestine and prohibited gaming. That position must be approved. The channelling of players into a legal system of gaming requires that system to be sufficiently attractive to satisfy the gaming wishes of the greatest number in order to prevent them from turning to unauthorised systems or encouraging their development.

77. Consequently the fact that the holders of exclusive rights to operate gaming in the Netherlands are authorised to make their offers attractive by creating new games and advertising is not, as such, inconsistent with the aims of the Netherlands legislation taken as a whole, because that standpoint contributes perfectly to the prevention of fraud.

78. However, in so far as the Netherlands legislation also aims to protect consumers against an addiction to gaming, the creation of new games and advertising must be strictly controlled by the Member State and limited so that they are also compatible with the pursuit of that aim. Accordingly, the reconciliation of the two aims pursued by the Netherlands legislation requires that the services offered by the holders of exclusive rights and advertising for authorised games be sufficient to induce consumers to remain within the legal gaming system without constituting an inducement to excessive gaming, which would lead consumers, or at least, the weakest among them, to spend more than the share of their income available for leisure pursuits.

79. It is quite clear that the exact balance to be struck between those two objectives is difficult to find. This begins with a complex evaluation of the foreseeable risks and the consequences of the games offered in the Member State concerned and the advertising for them. That is why the assessment of whether the legislation of a Member State, such as the Netherlands Law, achieves that balance and can therefore be regarded as pursuing the abovementioned objectives in a consistent and systematic manner must obey the principles set out below.

80. First, as the referring court observes, since such assessments represent a serious difficulty, Member States must be allowed a broad discretion. Furthermore, this fits in with the case-law concerning gaming, according to which Member States must be allowed a sufficient margin of discretion to determine the requirements entailed by the protection of players and, more generally, taking account of the social and cultural characteristics of each Member State and the preservation of public order. [25]

25 — *Gambelli and Others,* paragraph 63.

81. Second, it must be left to the national courts to determine whether the national legislation in question is suitable for attaining the objectives which it pursues as the national courts are the best placed to assess the specific rules applying that legislation and its actual effects. [26]

82. It follows that the the national legislation in question must be deemed suitable for attaining the objectives which it pursues if the national court states, as is the case here, that that legislation does indeed contribute to the attainment of those objectives. Such a finding implies that the court finds that the offer of authorised games and advertising does not constitute an inducement to consumers to play which is excessive and which, in reality, leads to getting into debt or addiction.

83. The Commission, in its written observations, does not entirely share that view. In particular, it questions whether the Netherlands legislation concerned can be justified by the aim of preventing fraud. The Commission refers to the case-law to the effect that the burden of proof rests with the Member State whose law restricts a freedom of movement. [27] The Commission submits that that case-law can be applied perfectly well in the gaming sector, as shown by the judgment in *Lindman*. [28]

84. The Commission observes that the order for reference contains nothing to indicate that clandestine gaming is a serious problem in the Netherlands. The Commission adds that, in the case which led to the judgment in *Placanica and Others*, the Italian Government cited facts showing that clandestine gaming and betting were a serious problem in Italy.

85. I do not share the Commission's doubts as to whether the Netherlands Government can justify its legislation with the prevention of fraud.

86. It is true that, in accordance with the case-law, it is incumbent upon a Member State whose legislation restricts a freedom of movement to show that such restriction is necessary and proportionate. However, the

26 — *Zenatti,* paragraph 37, and *Gambelli and Others,* paragraph 66.

27 — The Commission cites Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63, which states that 'it is for the national authorities which invoke a derogation from the fundamental principle of freedom of movement for persons to show in each individual case that their rules are necessary and proportionate to attain the aim pursued. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments.'

28 — Case C-42/02 *Lindman* [2003] ECR I-13519.

extent of that obligation must be assessed by reference to the interest which the law in question aims to protect.

87. Accordingly, where it is a question of protecting human health, it is accepted that a Member State may adopt legislation restricting a freedom of movement without having to wait until the reality of the risk becomes fully apparent. [29] It is sufficient if the risk to health is a potential one. In my opinion, the same must apply in relation to the protection of society against the risk of a serious disruption of public order.

88. With regard to gaming, a Member State has a right to find that its people have a liking for gaming and, if it is not provided for in a legal system, they will seek satisfaction through clandestine channels. Furthermore, the size of the amounts which such activity generates may give rise to a legitimate fear that clandestine networks will develop and cause serious disruption of public order.

89. On that point, the Court has found that lotteries organised on a large scale, [30] gaming machines, [31] betting on sporting events [32] and casino gambling and games [33] are likely to create a high risk of crime and fraud because of the considerable sums involved.

90. A Member State may also legitimately take the view that the liking among some of its population for gaming and the risks arising from the fact that such activity is not confined within a controlled channel are made greater by modern means of communication, particularly the internet, which enables those able to use it to have access to a considerable number of on-line games. The potential dangers of those games were clearly recognised by the Court in *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, where the Court observed that, because of the lack of direct contact between consumer and operator, games accessible via the internet involve different and more substantial risks of fraud by operators on consumers than the traditional markets for such games. [34]

91. We have also seen that the Member States have a sufficient discretion to determine the requirements entailed by the protection of players and of the social order, in line with their own particular social and cultural characteristics.

29 — Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 54, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 30.

30 — Case C-275/92 *Schindler* [1994] ECR I-1039.

31 — *Läära*.

32 — *Zenatti*.

33 — *Anomar and Others*.

34 — *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70.

92. Taking account of those considerations and the abovementioned case-law, I do not think that the defence of the fundamental freedoms of movement justifies expecting the Member States to wait until actual networks of clandestine gaming develop in their territory before taking measures to limit that activity and to prevent such practices. A Member State has the right to invoke the risk of fraud associated with gaming as the basis for legislation restricting that activity, without being required to show that fraud is actually being committed in its territory.

93. In other words, a Member State is justified in taking restrictive measures for the purpose of counteracting fraud in the gaming sector by way of prevention.

94. I therefore propose that the Court's reply should be that legislation of a Member State restricting the offer of gambling games in order to curb the addiction to gaming and to prevent fraud, whereby the holder or holders of the exclusive right is or are authorised to make their offer attractive by introducing new games and by using advertising, must be deemed to pursue those objectives in a consistent and systematic manner if, according to the assessment carried out by the national court, that law, in the light of its content and how it is applied, actually contributes to the attainment of those two objectives.

B – *Scope of the review of conformity of national law (Case C-258/08).*

95. At paragraph 75 of *Gambelli and Others* the Court observed that it is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes appear disproportionate in the light of those aims. The Hoge Raad der Nederlanden is uncertain as to the scope of that obligation.

96. Question 2(a) from the referring court is therefore whether the national court, after finding that its legislation is compatible with Article 49 EC, must also determine, on every occasion on which it applies that legislation in an actual case, whether the measure which is intended to secure compliance with it, such as an order requiring an operator to make its internet gaming site inaccessible to residents in national territory, is suitable for attaining the objectives pursued by that law and is proportionate.

97. In addition, question 2(b) asks whether the reply to question 2(a) would be different if the measure to be taken is sought in a civil action brought by the operator holding the exclusive right to operate games and not by the authorities.

98. Those questions arise from Ladbrokes' arguments in the context of its appeal to the referring court in Case C-258/08, to the effect that the condition laid down at paragraph 75 of *Gambelli and Others* should have been specifically considered by the trial court in relation to the injunction sought by De Lotto. According to Ladbrokes, the national court ought, in making that assessment, also to have taken into account the fact that it, Ladbrokes, was authorised to offer games on the internet in the United Kingdom.

99. I do not think that the trial court before which De Lotto brought its action was required to verify and to show that a mere enforcement measure, such as the injunction issued against Ladbrokes, was suitable for attaining the aims of the Netherlands Law or that it was proportionate. I also submit that this reply to the question does not depend on the fact that the injunction was sought and granted in the context of a private action and not upon application by the national authorities.

100. My conclusions are based on the scope of the national court's review of conformity with the principle of proportionality as required in the case-law and at paragraph 75 of *Gambelli and Others* in particular, and also on the terms and effects of the injunction issued against Ladbrokes.

101. In accordance with the case-law, where a Member State, in exercising its own powers, restricts a freedom of movement in order to protect an interest referred to in the Treaty or regarded as legitimate by the case-law, it must able to show that the restriction which it imposes is suitable for effective protection of that legitimate interest and that it is proportionate to that aim.

102. The condition concerning suitability determines whether that Member State may invoke the legitimate interest stated to be the basis of the restriction. The aim of the condition concerning proportionality, in the strict sense, is to limit the restriction to what is necessary for the protection of that interest. Those two conditions must be fulfilled because the Member States must exercise their powers in conformity with the commitments they undertook in the framework of the Treaty and, in particular, the fundamental freedoms of movement. Where a Member State restricts one of those freedoms, those conditions enable a fair balance to be struck between what is required for the protection of the interest in question and the fundamental freedom concerned.

103. At this stage of my assessment it may therefore be deduced that the effect of the existence of a restriction of a freedom of movement is that as any measure of a Member State acting under its own powers must comply with the two conditions mentioned above, namely the Community principle of

proportionality in the broad sense. [35] If there is no restriction, such a principle is not applicable and measures of domestic law must be reviewed in the light of the general principles of national law only. [36]

104. The case-law has explained the scope of the review of proportionality which is to be carried out by the national court. First, it must examine in turn each of the restrictions imposed by its domestic law. [37] Thus, with regard to the Italian legislation at issue in *Placanica and Others,* that obligation led the national court to consider in turn whether it was justified to require operators to obtain a licence, to examine the procedure for granting licences and, in particular, the exclusion of companies whose individual shareholders were not identifiable at any given moment, the obligation to obtain an administrative authorisation and, finally, the criminal penalties to defer offences under that law.

105. Secondly, the national court must carry out a dual examination. In the first place, it must examine the content of the legislation as written. A law restricting a freedom of movement cannot be compatible with Community law if, as worded by the national legislature, it is discriminatory or unsuitable for attaining its aims or, again, if it is disproportionate.

106. However, that abstract examination is not enough. The national court must, in the second place, also assess the conditions in which its national law is actually applied. Therefore the national court must ascertain that the legislation in question, when implemented by the competent authorities and, where relevant, by economic entities, is applied without discrimination, in conformity with its objectives and in a proportionate manner. [38]

107. This review of the application of the law in question is logically necessary in order to ensure that the restriction of the freedom of movement is genuinely justified by the defence of the legitimate interest invoked in support of that restriction. Therefore, in accordance with paragraph 69 of *Gambelli and Others*, if the authorities of a Member State in fact induce and encourage consumers to participate in gaming to the financial benefit of the public purse, that State cannot invoke public order concerns relating to the need to reduce opportunities for gaming in order to justify the restrictions laid down by its national law.

35 — See, to that effect, *Placanica and Others,* paragraph 49.

36 — See, to that effect, Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 63.

37 — *Placanica and Others,* paragraph 49

38 — *Zenatti,* paragraph 37, and *Gambelli and Others,* paragraph 75.

108. In the main proceedings, the referring court stated that, after carrying out such reviews, the trial court had found that the Netherlands Law was compatible with Article 49 EC. As we have already seen, that assessment is a matter for the national court.

109. Therefore, in the further discussion of the question under consideration, it is necessary to proceed from the premiss that that assessment is well founded, without prejudging, at this stage, the conclusions that should be drawn from the Court's reply to the fourth question, which concerns the implications, in this dispute, of the principle of equal treatment and the obligation of transparency arising from Article 49 EC.

110. The question that arises is therefore whether, after ascertaining, in accordance with the Court's case-law, that the Netherlands Law is compatible with Article 49 EC, the national court must also consider whether, and show that, the injunction requiring Ladbrokes to prohibit access to its internet site by persons residing in the Netherlands is suitable for attaining the aims of that Law and is proportionate to those aims.

111. I do not think that the national court is required to carry out such an examination because the injunction is strictly limited to ensuring the application of Article 1(a) of the Netherlands Law, which prohibits any unauthorised person from offering gaming in the Netherlands. The injunction does not in itself create any restriction of the freedom to provide services which is not already laid down by that provision. The only object and effect of the injunction is to ensure that the provision is applied.

112. Consequently it is unnecessary for the national court to determine whether, and to show that, the enforcement measure in question is compatible with the Community principle of proportionality in the circumstances of the case before that court and, in particular, with regard to the operator to whom that measure must be applied. The national court's finding that the Netherlands Law is compatible with Article 49 EC must extend logically to all measures which are strictly limited to ensuring that it is applied, whichever operator may be concerned and whatever the context of the dispute in which enforcement is sought.

113. To show that such examination is unnecessary, it is sufficient to note that, if Ladbrokes' argument is accepted, it would mean that the injunction at issue may have to be set aside, which would render the Netherlands Law ineffective as against Ladbrokes, although it has been ascertained that the restriction in that Law is compatible with Community law. In other words, Ladbrokes' argument in reality questions whether it is compatible.

114. Those considerations also justify my conclusion that that assessment cannot depend on whether the enforcement measure at issue is sought by the authorities or, as in the present case, in litigation between private persons, by the operator holding the licence to operate gaming in the Member State concerned.

115. What is important is that, the national law restricting a freedom of movement which is just being applied by the measure at issue is compatible with Community law. Where that condition has been verified in accordance with the Court's case-law, the Member State's choice of measures limited to ensuring strictly the application of that law is a matter for its own discretion. It is therefore free to decide whether such measures can be taken only on request by the public authority or upon application by a private person in litigation between private persons, as in the present case.

116. I therefore propose that the Court's reply to question 2(a) and (b) from the Hoge Raad der Nederlanden should be as follows. First, the national court, after finding that its legislation is compatible with Article 49 EC, is not required to determine, on every occasion on which that legislation is applied, whether a measure intended to ensure compliance with that legislation, such as an order that an operator make its internet site offering gaming inaccessible to persons residing in national territory, is suitable for attaining the aims of that legislation and is proportionate, provided that that enforcement measure is strictly limited to securing compliance with that legislation. Secondly, the reply to that question cannot differ according to whether the measure in question is sought by a public authority or by a private person in the context of litigation between private persons.

C – *Application of the principle of mutual recognition of a licence to offer gaming via the internet, granted to an operator by the Member State in which it is established (Cases C-203/08 and C-258/08)*

117. The first question from the Raad van State in Case C-203/08 and the third question from the Hoge Raad der Nederlanden in Case C-258/08 ask the Court, in substance, whether Article 49 EC must be interpreted as meaning that the fact that a provider of online gaming is authorised to engage in that activity by the Member State in whose territory the provider is established precludes the competent authorities of another Member State where gaming is subject to a licensing system limited to a single operator from prohibiting that operator from offering games via the internet to persons residing in the territory of that other Member State.

118. That question has been submitted to the Court because Betfair contended that, by virtue of the principle of mutual recognition set out in the *Cassis de Dijon* judgment, [39] the Kingdom of the Netherlands ought to have recognised the licences issued to Betfair by other Member States.

119. For two reasons, I am of the opinion that that argument cannot be upheld.

120. First, in accordance with the position adopted by the Court in *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, the principle of mutual recognition does not apply to a licence to offer games on the internet.

121. In that judgment, the Court observed that as games of chance offered via the internet have not been the subject of Community harmonisation, a Member State is entitled to take the view that the mere fact that an operator lawfully offers such services in another Member State in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State cannot be regarded as a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of such an operator. [40]

122. It follows that the fact that Ladbrokes and Betfair are authorised by the United Kingdom, in whose territory they are established, to offer games on line cannot cast doubt on the conformity with Community law of legislation such as the Netherlands Law, which makes the right to offer games of chance to persons residing in the Netherlands subject to a licensing system limited to a single operator.

123. Secondly, a system of exclusive rights has precisely the object of preventing any operator other than the holder or holders of those rights from engaging in the activity covered by that system. Such a system is justified and is therefore compatible with Community law, it is immaterial that the operators wishing to offer games in the Member State where such a monopoly exists are authorised to do so in the Member State where they are established.

39 — Case 120/78 *Rewe Zentral* [1979] ECR 649.

40 — *Liga Portuguesa de Futebol Profissional and Bwin International,* paragraph 69.

124. I therefore propose that the Court's reply should be that Article 49 EC must be interpreted as meaning that the fact that a provider of games on line is authorised to engage in that activity by the Member State in whose territory he is established does not preclude the competent authorities of another Member State, in which gaming is subject to a system of licences limited to a single operator, from prohibiting that provider from offering games on the internet to persons residing in the territory of that other Member State.

D – *Application of the principle of equal treatment and the obligation of transparency (Case C-203/08)*

125. The Raad van State wishes to assess the conformity with Community law of the extension of the licences of De Lotto and SGR by decisions of 10 June 2004 and 21 June 2005 respectively, on the assumption that the decisions were taken without a prior call for tenders.

126. The second question from the Raad van State is therefore whether the principle of equal treatment and the associated obligation of transparency which, according to the case-law, must be taken into account by the Member States when they grant public service concessions in relation to gaming, apply also in connection with a system for licensing a single operator.

127. With question 3(a), the referring court asks whether, in a system limited to a single operator, the extension of the licence of the authorised holder without a call for tenders from other providers can be an appropriate and proportionate means of attaining the aims which are considered by the case-law to be legitimate grounds for restricting freedoms of movement in the gaming sector and, if so, under what conditions.

128. Question 3(b) is whether the reply to the second question has any bearing on the reply to question 3(a).

129. I propose that the Court construe these three questions in the following way. First, the Raad van State is asking whether in principle the obligation of transparency should be applicable to a single-operator licensing system in the gaming sector. Second, if the reply is in the affirmative, it asks whether and, if so under what conditions, the extension of the licence to offer games without a call for tenders may be justified by legitimate grounds, such as the protection of consumers against the risk of addiction to gaming and the defence of public order.

130. Before I consider those two questions, I think it necessary to outline the case-law relating to the obligation of transparency in the context of public service contracts or concession contracts.

1. Outline of case-law on the obligation of transparency

131. Public authorities of a Member State which envisage awarding a public service contract or concession contract must comply with the fundamental rules of the Treaty and, in particular, the freedoms of movement. [41]

132. According to the case-law, in so far as the contract or concession in question may also be of interest to an undertaking located in a Member State other than the Member State of the contracting authority, the award, without transparency, of that contract or concession to an undertaking located in the Member State of the contracting authority amounts to a difference in treatment to the detriment of the first undertaking. [42]

133. Without transparency, the latter undertaking has no real opportunity to express its interest in obtaining the public contract or concession in question.

134. The Court concluded from this that, unless it is justified by objective circumstances, such a difference in treatment, which by excluding all undertakings located in another Member State operates mainly to their detriment, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 43 EC and 49 EC. [43]

135. Transparency is therefore necessary in order that all the undertakings situated in a Member State other than that of the contracting authority which would be potentially interested in the anticipated public contract or concession can obtain the award of the contract. The obligation of transparency is therefore a concrete and specific expression of the principle of equal treatment, which is intended to enable undertakings to exercise effectively the rights conferred upon them by Articles 43 and 49 EC.

136. Where the public service contracts or concession contracts which are envisaged are covered by one of the directives concerning public contracts, those directives lay down

41 — Case C-507/03 *Commission* v *Ireland* [2007] ECR I-9777, paragraph 26, and Case C-573/07 *Sea* [2009] ECR I-8127, paragraph 39.

42 — Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17, and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraph 59.

43 — *ASM Brescia,* paragraph 60 and cases cited.

the conditions and procedures for giving effect to the obligation of transparency and impose detailed rules for awarding contracts.

137. Where the public service contracts or concession contracts which are envisaged are not covered by one of the coordinating measures, the Member States must nevertheless comply with the obligation of transparency in so far as it follows from the fundamental rules of the Treaty and the principle of equal treatment. [44]

138. Accordingly in *Commission* v *Italy*, [45] cited by the Raad van State, the Court found that the award of the management and collection of horse-race bets in Italy was a public service concession and observed that these concessions were excluded from the scope of Council Directive 92/50/EC. [46] The Court added that the public authorities concluding such contracts are bound to comply with the fundamental rules of the EC Treaty in general, particularly Articles 43 and 49 EC, and with the principle of non-discrimination on the grounds of nationality in particular, which is a specific expression of the principle of equal treatment, and those two principles imply a duty of transparency. [47]

139. The extent of that obligation, where the contract envisaged is not covered by one of the directives on public contracts, was established by the Court by reference to the purposes of the obligation. It aims, first, to enable any undertaking with a potential interested to obtain information and to offer itself as a candidate. Second, it aims to ensure that the impartiality of the procurement procedure can be reviewed.

140. According to the case-law, the obligation of transparency, without necessarily implying an obligation to launch an invitation to tender, requires the contracting authority to ensure, for the benefit of any potentially interested undertaking, a degree of advertising sufficient to enable the public contract or service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed. [48]

141. An undertaking located in the territory of another Member State must therefore be able to have access to appropriate information regarding the contract or concession in question before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that contract or concession. [49]

142. Furthermore, the criteria on the basis of which the contract or concession

44 — See Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25 and cases cited.

45 — Case C-260/04 [2007] ECR I-7083.

46 — Directive of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

47 — Case C-260/04 *Commission* v *Italy,* paragraphs 22 to 24.

48 — *Coditel Brabant,* paragraph 25.

49 — *Coname,* paragraphs 21 and 28.

in question is awarded must be objective, non-discriminatory and known in advance, in such a way as to circumscribe the exercise of the contracting authority's discretion, so that it is not used arbitrarily. [50]

143. However, there are exceptions with regard to the obligation of transparency.

144. First, the obligation, as following from the Treaty rules, does not arise if the public contract or concession in question is not of cross-border interest. [51] In other words, it does not apply if the contract or concession cannot be of interest to an undertaking situated in another Member State, [52] particularly by reason of a very modest economic stake. [53]

145. Second, even if the contract or concession in question is covered by a directive, the obligation of transparency does not apply if the public authority which is the contracting authority exercises over the contracting entity a control similar to that which it exercises over its own departments and, at the same time, if that entity carries out most of its activity with the public authority or authorities which control it. [54]

50 — See, to that effect, Case C-389/05 *Commission* v *France* [2008] ECR I-5397, paragraph 94 and cases cited.

51 — *Commission* v *Ireland,* paragraph 33.

52 — Ibid., paragraph 32.

53 — *Coname,* paragraph 20.

54 — See, to that effect, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 50; Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, paragraph 49; and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 62.

146. This second exception is due to the fact that a public authority can perform the public interest tasks conferred on it by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. [55]

147. It is now necessary to determine whether the abovementioned case-law is applicable to gaming in the context of a system where a single operator is granted an exclusive right.

2. Application of the principle of transparency in the gaming sector in the context of a system where a single operator is granted an exclusive right

148. The second question from the Raad van State is whether Article 49 EC is to be interpreted as meaning that the principle of equal treatment and the associated obligation of transparency are also applicable to a licensing system in the gaming sector where the licence is granted only to a single operator.

55 — *Coditel Brabant,* paragraph 48.

149. According to the Netherlands Government, the principle and the associated obligation are not applicable in that particular case. It submits that they are confined to concessions which are not covered by the Community coordination measures because such concessions cannot escape the Treaty rules. However, that obligation cannot be extended to a licensing system which starts with an administrative authorisation and not a contract. The Government adds that putting the contract out to tender would have the same detrimental effects as competition in the market. In particular, the licence-holder, if the licence were temporary, would be tempted to make the maximum profit during the term of the licence.

150. The Netherlands Government and De Lotto also submit that the obligation of transparency is not applicable because, under the Netherlands legislation, licence holders must appropriate the operating income to specified organisations. They add that De Lotto cannot make a profit, so that no commercial undertaking could possibly be interested in operating in those circumstances.

151. The Danish, Greek, Austrian, Finnish and Norwegian governments are also of the opinion that the obligation of transparency is not applicable in a single-operator licensing system.

152. I do not share that view. For the following reasons the case-law concerning the obligation of transparency is, in my opinion, applicable to a licensing system limited to a single operator in the gaming sector.

153. First, the basis for the case-law is the consequences of a public service contract or concession for the freedoms of movement and not the fact that those consequences are contractual in origin. As we have already seen, such contracts must be preceded by a call for tenders because their object and effect is to award the pursuit of an economic activity to one or more economic operators in particular. Without adequate advertising, the principle of equal treatment would be disregarded because undertakings established in other Member States which would be potentially interested in such activity would not be able to express their interest and, therefore, to exercise their rights deriving from Articles 43 and 49 EC.

154. The obligation of transparency therefore appears to be a mandatory prior condition of the right of a Member State to award to one or more private operators the exclusive right to carry on an economic activity, irrespective of the method of selecting the operator or operators.

155. Therefore it should, in my opinion, apply also in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator because the effects of a such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a concession agreement.

156. In addition, the fact that the monopoly arises from a licence issued in an administrative procedure rather than by virtue of a concession agreement does not remove the risk of partiality which the obligation of transparency also aims to prevent.

157. Second, I think that the particular nature of gaming does not justify authorising a Member State to create an exception to that obligation.

158. The risks attaching to that activity and the moral considerations arising must, in my opinion, mean that a Member State has the right to carry on that activity itself through an entity belonging to it. It cannot be denied that a Member State can more easily control and direct the activity of such an entity than that of a private operator. Such a system may therefore provide better protection for consumers against the risk of addiction to gaming and safeguard public order against the risks of fraud and clandestine gaming. [56]

159. The particular nature of gaming also justifies authorising a Member State to confer a monopoly upon a private operator, as I have previously said.

160. However, once a Member State decides to entrust the operation of one kind of gaming to the private sector, that Member State must respect the principle of equal treatment of all the economic operators who would be potentially interested.

161. I do not think that a call for tenders for the contract would have detrimental effects comparable to those of competition in the market. The detrimental nature of competition in the market, that is to say, between several operators authorised to operate the same kind of gaming, arises from the fact that they would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing the expenditure on gaming and the risks of addiction. On the other hand, such consequences are not to be feared at the stage of granting a licence.

56 — See the judgment of the EFTA Court in Case E-1/06 *EFTA Surveillance Authority* v *Norway* [2007] EFTA Reports, p. 7, paragraph 51.

162. In the context of a system of an exclusive right granted to a single operator, protection for consumers against the risk of addiction to gaming and the prevention of fraud are ensured by means of the conditions imposed by the Member State on the single operator in order to put a strict limit on his activities. Those aims are also pursued by means of the machinery put in place by that State to assess the consequences of that activity and to monitor compliance with the conditions imposed on the operator. I do not see how a call for tenders at the stage of selecting the single operator would be bound to compromise the operator's compliance with the conditions limiting his activity.

163. I think it can also be accepted that a call for tenders would also enable the competent authorities to grant the licence to the provider who appears to be best able to comply with all the conditions in question. In addition, in view of the size of the financial stakes involved in gaming, it is highly desirable that the conditions under which a Member State decides to grant a monopoly to a private entity should be transparent and that their impartiality should be open to verification.

164. Finally, with regard to the argument of the Netherlands Government and De Lotto that the obligation of transparency should be waived by reason of the obligations imposed by the licences on the holders of the monopoly concerning the appropriation of revenue, I do not think that argument calls into question the application of the obligation in the circumstances of the present case.

165. No doubt a Member State has the right to provide that the revenue from the operation of gaming in its territory must be appropriated, entirely or in part, to causes of public interest. It is also true that, in accordance with the case-law, the obligation of transparency does not arise if the contract in question is not of cross-border interest, particularly by reason of a very modest economic stake.

166. However, in my view, the concept of very modest economic interest relates only to the economic value of the contract concerned. [57] It covers, for example, the construction of a modest structure at a relatively large distance from the frontiers of the Member State. The modest size of the structure to be built and the distance to be covered suggest that an undertaking established in another Member State would not be interested in the project. On the other hand, the concept of very modest economic interest does not cover a situation where the small economic interest of a

57 — See, to that effect, Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraph 31.

contract for a company established in another Member State is due to the application of the conditions limiting the activity in question and of the criteria for selecting the operator.

167. In my opinion, it is precisely those conditions and criteria which are amongst the matters which the obligation of transparency requires to be disclosed to service providers who would be potentially interested in the contract concerned. Even if, in practice, the conditions imposed by the Member State are such as to dissuade undertakings from expressing their interest in the activity in question, those conditions must still be actually made known to them so that they can make a decision.

168. Accordingly, in the present case, it appears beyond doubt that the contracts represented by the operation in the Netherlands of the lottery, betting on sports events and number games or betting on horse races, which, furthermore, is a monopoly, are likely to be of interest to gaming providers established in other Member States, in view of the considerable earnings from those activities. [58]

58 — The Commission points out that in 2007, according to the annual report of the Gaming Control Board, the turnover generated by sports betting totalled EUR 22.3 million and the total turnover of De Lotto was EUR 270 million. SGR's turnover in the same year was EUR 34.3 million.

169. In my opinion, therefore, the Netherlands Government's plea that there is no cross-border interest is unfounded.

170. I think this restrictive interpretation of the plea also appears justified in view of the broad discretion which the Member States must have in the gaming sector, both in determining the aims of their legislation and in choosing the means of attaining them. Transparency, which is growing ever more important in the public life of modern societies, to the point that it is becoming one of the visible marks of democracy, appears here as the fair counterpart of the constraints which the Member States, in exercising their sovereign rights in that sector of activity, may impose on the freedoms of movement. In other words, the obligation of transparency is essential particularly as, in the gaming sector, the Member States are given a broad discretion. Exclusive rights are not synonymous with opacity.

171. It follows that the competent Netherlands authorities responsible for issuing a licence to operate gaming in the Netherlands must put out an adequate call for tenders unless they are able to show that their control over the successful entity is similar to that which they have over their own departments and that that entity carries out most of its activity with those authorities.

172. It will be for the national court to ascertain the position in that respect with regard to De Lotto, if necessary.

173. I think therefore that Article 49 EC must be interpreted as meaning that the principle of equal treatment and the associated obligation of transparency apply also to the gaming sector in the context of a system where a licence is issued to a single operator.

3. Extension of a licence to operate a game without a call for tenders

174. Under Netherlands law, licences are issued in principle for a period of five years. Betfair submits that the licences held by De Lotto and SGR were extended in December 2004 and June 2005 respectively without Betfair having been able to offer itself as a candidate for the licences to be issued to it.

175. In essence, the Raad van State is asking whether and, if so, on what conditions, an extension of a licence for operating a game without a call for tenders may be justified on one of the legitimate grounds for restriction of the freedoms of movement in the gaming sector.

176. First of all, it must be observed that the competent national authorities argued, before the trial court, that the limitation of the licence to five years had the sole purpose of providing the competent public authorities with a reference date for adjusting, if necessary, the rules relating to the licence; consequently, in actual fact, the licences are more or less permanent.

177. The referring court, which has to interpret the relevant domestic law applicable and to assess the facts of the case before it, rejected that argument. In asking whether and, if so, to what extent, an exception may be allowed to the obligation of transparency, the referring court implicitly, but necessarily, accepts that the De Lotto and SGR licences have indeed been extended or renewed.

178. Otherwise, the referring court would have asked the Court whether a system involving a virtually permanent exclusive right is compatible with Community law.

179. If it had done so, I would have expressed my doubts as to whether such a system is compatible with the freedoms of movement.

180. The grounds capable of justifying a restriction of the freedom of movement in the gaming sector may, in my view, legitimise the grant of exclusive rights for a sufficiently long period of several years. Thus a Member State

may consider that the protection of consumers against the risks associated with unauthorised gaming, in particular, games on line, necessitates a degree of stability in the selection of the holder or holders of the exclusive rights.

181. Likewise we have seen that, in a monopoly system, the profits which can be gained must be limited. Where a Member State chooses to grant a monopoly to an independent private entity, the term of the licence may appear to be an appropriate means of compensating for the modest economic interest of the contract in order to arouse the interest of more than one operator and of being able to make a selection in that way.

182. However, I think the grant of exclusive rights for an unlimited period is difficult to justify in principle, because it closes the market of a Member State to all the operators who would be potentially interested with no limitation in time. Where a Member State decides to entrust the operation of gaming to an independent private entity, it is difficult to see what reasons there could be for granting that exclusive right indefinitely to a single operator. [59]

183. As the question in the present case is to what extent a licence granted for a limited period can be extended or renewed without a call for tenders, the case-law, in particular Case C-260/04 *Commission* v *Italy*, cited above, adumbrates a reply.

184. First, it is possible that the renewal of an exclusive licence to operate a game without a call for tenders may be justified by the defence of an essential interest referred to in Articles 45 and 46 EC or by a reason of overriding reason in the public interest, such as the protection of consumers against the risks of excessive expense and addiction to gambling, as well as the prevention of fraud. [60]

185. Second, it is for the Member State in question to show that the derogation from the principle of equal treatment and the obligation of transparency are justified on one of those grounds and that it conforms to the principle of proportionality. [61]

186. In the present case the Netherlands Government refers merely to its submissions in relation to the previous question. I have already indicated why I am not persuaded by those arguments.

59 — See, to that effect, Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, paragraph 73.

60 — Case C-260/04 *Commission* v *Italy,* paragraphs 26 to 32.

61 — Ibid., paragraph 33.

187. I do not see how competitive tendering for the award of a licence for a limited term of five years is likely to compromise the Netherlands legislation's aims of protecting consumers against addiction to gaming and preventing crime. Those aims, as I have already submitted, are effectively pursued by the grant of an operating monopoly and by the conditions governing the activity of the licensed operator and the evaluation and supervisory arrangements put in place by the Member State. The Netherlands Government has not shown that the effectiveness of such a system would be compromised by a call for tenders on the expiry of the licence.

188. It can also be argued that adherence to those conditions would be ensured further by a call for tenders if the capacity to adhere rigorously to those conditions forms part of the criteria on the basis of which a licence is issued.

189. The fact that the single-licence system set up by a Member State makes it possible, by virtue of its concept and implementation, as in the present case, to attain the aims in question should not therefore, in my view, be sufficient to justify the extension of licences without competitive tendering. It is for the Member State concerned to explain why the aims pursued by its national legislation on gaming rule out the possibility of considering a change of operator on the expiry of the licence.

190. Therefore I do not wish to exclude the possibility that such justification might be accepted in particular circumstances. I simply want to say that such justification may be accepted only if it is shown that competitive tendering would really impair one of the interests referred to in Articles 45 and 46 EC or recognised as overriding reasons in the public interest.

191. I therefore propose that, in reply to the question referred, the Court should follow the Commission's proposal and repeat paragraph 33 of the judgment in *Commission* v *Italy*, cited above, according to which Article 49 EC precludes the extension of a single authorised operator's licence without competitive tendering unless such extension addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement in the public interest as laid down in the case-law and unless it conforms to the principle of proportionality. It is for the national court to determine whether that is the case.

IV – Conclusion

192. I therefore propose that the Court rule as follows:

'(1) Legislation of a Member State restricting the offer of gambling games in order to curb the addiction to gaming and to prevent fraud, whereby the holder or holders of the exclusive right to provide those games is or are authorised to make their offer attractive by introducing new games and by using advertising, must be deemed to pursue those objectives in a consistent and systematic manner if, according to the assessment carried out by the national court, that law, in the light of its content and how it is applied, actually contributes to the attainment of those two objectives.

(2) The national court, after finding that its legislation is compatible with Article 49 EC, is not required to determine, on every occasion on which that legislation is applied, whether a measure intended to ensure compliance with that legislation, such as an order that an operator make its internet site offering gaming inaccessible to persons residing in national territory, is suitable for attaining the aims of that legislation and is proportionate, provided that that enforcement measure is strictly limited to securing compliance with that legislation.

The reply to that question cannot differ according to whether the measure in question is sought by a public authority or by a private person in the context of litigation between private persons.

(3) Article 49 EC must be interpreted as meaning that the fact that a provider of games on line is authorised to carry on that activity by the Member State in

whose territory he is established does not preclude the competent authorities of another Member State, in which gaming is subject to a system where a licence is limited to a single operator, from prohibiting that provider from offering games on the internet to persons residing in the territory of that other Member State.

(4) Article 49 EC must be interpreted as meaning that the principle of equal treatment and the associated obligation of transparency apply also to the gaming sector in the context of a system where a licence is issued to a single operator.

(5) Article 49 EC precludes a national law whereby a single authorised operator's licence is extended without competitive tendering unless such extension addresses an essential interest within the meaning of Articles 45 and 46 EC or an overriding requirement in the public interest as laid down in the case-law and unless it conforms to the principle of proportionality. It is for the national court to determine whether that is the case.'