JUDGMENT OF THE COURT

6 November 2003 *

In Case C-243/01,

REFERENCE to the Court under Article 234 EC by the Tribunale di Ascoli Piceno (Italy) for a preliminary ruling in the criminal proceedings before that court against

Piergiorgio Gambelli and Others,

on the interpretation of Articles 43 EC and 49 EC,

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward (Rapporteur), R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: S. Alber,

Registrar: H.A. Rühl, Principal Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Mr Gambelli and Others, by D. Agnello, avvocato,

— Mr Garrisi, by R.A. Jacchia, A. Terranova and I. Picciano, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by D. Del Gaizo, avvocato dello Stato,

— the Belgian Government, by F. van de Craen, acting as Agent, assisted by P. Vlaemminck, avocat,

— the Greek Government, by M. Apessos and D. Tsagkaraki, acting as Agent,

— the Spanish Government, by L. Fraguas Gadea, acting as Agent,

— the Luxembourg Government, by N. Mackel, acting as Agent,

— the Portuguese Government, by L. Fernandes and A. Barros, acting as Agents,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Swedish Government, by B. Hernqvist, acting as Agent,

— the Commission of the European Communities, by A. Aresu and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gambelli and others, represented by D. Agnello; of Mr Garrisi, represented by R.A. Jacchia and A. Terranova; of the Italian Government, represented by A. Cingolo, avvocato dello Stato; of the Belgian Government, represented by P. Vlaemminck; of the Greek Government, represented by M. Apessos; of the Spanish Government, represented by L. Fraguas Gadea; of the French Government, represented by P. Boussaroque, acting as Agent; of the Portuguese Government, represented by A. Barros; of the Finnish Government, represented by E. Bygglin; and of the Commission, represented by A. Aresu and M. Patakia, at the hearing on 22 October 2003,

after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1 By order of 30 March 2001, received at the Court on 22 June 2001, the Tribunale di Ascoli Peceno referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 43 and 49 EC.

2 The question was raised in criminal proceedings brought against Mr Gambelli and 137 other defendants (hereinafter 'Gambelli and others'), who are accused of having unlawfully organised clandestine bets and of being the proprietors of centres carrying on the activity of collecting and transmitting betting data, which constitutes an offence of fraud against the State.

Legal background

Community legislation

3 Article 43 EC provides as follows:-

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of

another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

4 The first paragraph of Article 48 EC provides that 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall... be treated in the same way as natural persons who are nationals of Member States'.

5 Article 46(1) EC provides that 'the provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

6 The first paragraph of Article 49 EC provides that 'within the framework of the provisions set out below, 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'.

National legislation

7 Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931, hereinafter 'the Royal Decree'), no licence is to be granted for the taking of bets, with the exception of bets on races, regatta, ball games or similar contests where the taking of the bets is essential for the proper conduct of the competitive event.

8 Under Legge Finanziaria No 388 (Finance Law No 388) of 23 December 2000 (ordinary supplement to the GURI of 29 December 2000, hereinafter 'Law No 388/00'), authorisation to organise betting is granted exclusively to licence holders or to those entitled to do so by a ministry or other entity to which the law reserves the right to organise or carry on betting. Bets can relate to the outcome of sporting events taking place under the supervision of the Comitato olimpico nazionale italiano (Italian National Olympic Committee, hereinafter 'the CONI'), or its subsidiary organisations, or to the results of horse races organised through the Unione nazionale per l'incremento delle razze equine (National Union for the Betterment of Horse Breeds, hereinafter 'the UNIRE').

9 Articles 4, 4a and 4b of Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests (GURI No 294 of 18 December 1989 as amended by Law No 388/00, (hereinafter Law

No 401/89), Article 37(5) of which inserted Articles 4a and 4b into Law No 410/89, provide as follows:

'Unlawful participation in the organisation of games or bets

Article 4

1. Any person who unlawfully participates in the organisation of lotteries, betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

...

Article 4a

The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

Article 4b

... the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.'

The main proceedings and the question referred for a preliminary ruling

10 The order for reference states that the Public Prosecutor and the investigating judge at the Tribunale di Fermo (Italy) established the existence of a widespread and complex organisation of Italian agencies linked by the internet to the English bookmaker Stanley International Betting Ltd ('Stanley'), established in Liverpool (United Kingdom), and to which Gambelli and others, the defendants in the main proceedings, belong. They are accused of having collaborated in Italy with a

bookmaker abroad in the activity of collecting bets which is normally reserved by law to the State, thus infringing Law No 401/89.

11 Such activity, which is considered to be incompatible with the monopoly on sporting bets enjoyed by the CONI and which constitutes an offence under Article 4 of Law No 401/89, is performed as follows: the bettor notifies the person in charge of the Italian agency of the events on which he wishes to bet and how much he intends to bet; the agency sends the application for acceptance to the bookmaker by internet, indicating the national football games in question and the bet; the bookmaker confirms acceptance of the bet in real time by internet; the confirmation is transmitted by the Italian agency to the bettor and the bettor pays the sum due to the agency, which sum is then transferred to the bookmaker into a foreign account specially designated for this purpose.

12 Stanley is an English capital company registered in the United Kingdom which carries on business as a bookmaker under a licence granted pursuant to the Betting, Gaming and Lotteries Act by the City of Liverpool. It is authorised to carry on its activity in the United Kingdom and abroad. It organises and manages bets under a UK licence, identifying the events, setting the stakes and assuming the economic risk. Stanley pays the winnings and the various duties payable in the United Kingdom, as well as taxes on salaries and so on. It is subject to rigorous controls in relation to the legality of its activities, which are carried out by a private audit company and by the Inland Revenue and Customs and Excise.

13 Stanley offers an extensive range of fixed sports bets on national, European and world sporting events. Individuals may participate from their own home, using various methods such as the internet, fax or telephone, in the betting organised and marketed by it.

14 Stanley's presence as an undertaking in Italy is consolidated by commercial agreements with Italian operators or intermediaries relating to the creation of data transmission centres. Those centres make electronic means of communication available to users, collect and register the intentions to bet and forward them to Stanley.

15 The defendants in the main proceedings are registered at the Camera di Commercio (Chamber of Commerce) as proprietors of undertakings which run data transfer centres and have received due authorisation from the Ministero delle Poste e delle Comunicazioni (Minister for Post and Communications) to transmit data.

16 The judge in charge of the preliminary investigations at the Tribunale di Fermo made an order for provisional sequestration and the defendants were also subjected to personal checks and to searches of their agencies, homes and vehicles. Mr Garrisi, who is on the Board of Stanley, was taken into police custody.

17 The defendants in the main proceedings brought an action for review before the Tribunale di Ascoli Piceno against the orders for sequestration relating to the data transmission centres of which they are the proprietors.

18 The Tribunale di Ascoli Piceno makes reference to the case-law of the Court, in particular its judgment in Case C-67/98 *Zenatti* [1999] ECR I-7289. However, it considers that the questions raised in the case before it do not quite correspond to the facts already considered by the Court in *Zenatti*. Recent amendments to Law No 401/89 demand re-examination of the issue by the Court of Justice.

19 The Tribunale di Ascoli Piceno refers in this context to the parliamentary working papers relating to Law No 388/00 which show that the restrictions inserted by that law into Law No 401/89 were dictated chiefly by the need to protect sports 'Totoricevitori', a category of private sector undertakings. The court states that it cannot find in those restrictions any public policy concern able to justify a limitation of the rights guaranteed by Community or constitutional rules.

20 The court emphasises that the apparent legality of collecting and forwarding bets on foreign sporting events, on the initial wording of Article 4 of Law No 401/89, had led to the creation and development of a network of operators who have invested capital and created infrastructures in the gaming and betting sector. Those operators suddenly find the legitimacy of their position called in question following amendments to the rules in Law No 388/00 prohibiting on pain of criminal penalties the carrying on of activities by any person anywhere involving the collection, acceptance, registration and transmission of offers to bet, in particular on sporting events, without a licence or permit from the State.

21 The national court questions whether the principle of proportionality is being observed, having regard first to the severity of the prohibition, breach of which attracts criminal penalties which may make it impossible in practice for lawfully constituted undertakings or Community operators to carry on economic activities in the betting and gaming sector in Italy, and secondly to the importance of the national public interest protected and for which the Community freedoms are sacrificed.

22 The Tribunale di Ascoli Piceno also considers that it cannot ignore the extent of the apparent discrepancy between national legislation severely restricting the acceptance of bets on sporting events by foreign Community undertakings on the one hand, and the considerable expansion of betting and gaming which the

Italian State is pursuing at national level for the purpose of collecting taxation revenues, on the other.

23 The court observes that the proceedings before it raise, first, questions of national law relating to the compatibility of the statutory amendments to Article 4 of Law No 401/89 with the Italian constitution, which protects private economic initiative for activities which are not subject to taxes levied by the State, and secondly questions relating to the incompatibility of the rule laid down in that article with the freedom of establishment and the freedom to provide cross-border services. The questions of national law raised have been referred by the Tribunale di Ascoli Piceno to the Corte costituzionale (the Italian Constitutional Court).

24 In those circumstances, the Tribunale di Ascoli Piceno has decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is there incompatibility (with the repercussions that that has in Italian law) between Articles 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and on the other domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning concessions and authorisations prescribed by domestic law have been complied with?'

The question

Observations submitted to the Court

25 Gambelli and others consider that by prohibiting Italian citizens from linking up with foreign companies in order to place bets and thus to receive the services offered by those companies by internet, by prohibiting Italian intermediaries from offering the bets managed by Stanley, by preventing Stanley from establishing itself in Italy with the assistance of those intermediaries and thus offering its services in Italy from another Member State and, in sum, by creating and maintaining a monopoly in the betting and gaming sector, the legislation at issue in the main proceedings amounts to a restriction on both freedom of establishment and freedom to provide services. No justification for the restriction is to be found in the case-law of the Court of Justice stemming from Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-124/97 *Läärä and Others* [1999] ECR I-6067 and *Zenatti*, cited above, because the Court has not had occasion to consider the amendments made to that legislation by Law No 388/00 and it has not examined the issue from the point of view of freedom of establishment.

26 The defendants in the main proceedings emphasise in that regard that the Italian State is not pursuing a consistent policy whose aim is to restrict, or indeed abolish, gaming activities within the meaning of the judgments in *Läärä*, paragraph 37, and *Zenatti*, paragraph 36. The concerns cited by the national authorities relating to the protection of bettors against the risk of fraud, the preservation of public order and reducing both opportunities for gaming in order to avoid the damaging consequences of betting at both individual and social level and the incitement to spend inherent therein are groundless because Italy is increasing the range of betting and gaming available, and even inciting people to engage in such activities by facilitating collection in order to increase tax revenue. The fact that the organising of bets is regulated by financial laws shows that the true motivation of the national authorities is economic.

27 The purpose of the Italian legislation is also to protect licensees under the national monopoly by making that monopoly impenetrable for operators from other Member States, since the invitations to tender contain criteria relating to ownership structures which cannot be met by a capital company quoted on the stock exchange but only by natural persons, and since they require applicants to own premises and to have been a licence holder over a substantial period.

28 The defendants in the main proceedings argue that it is difficult to accept that a company like Stanley, which operates entirely legally and is duly regulated in the United Kingdom, should be treated by the Italian legislation in the same way as an operator who organises clandestine gaming, when all the public-interest concerns are protected by the United Kingdom legislation and the Italian intermediaries in a contractual relationship with Stanley as secondary or subsidiary establishments are registered as official suppliers of services and with the Ministry of Post and Telecommunications with which they operate, and which subjects them to regular checks and inspections.

29 That situation, which falls within the scope of freedom of establishment, contravenes the principle of mutual recognition in sectors which have not yet been harmonised. It is also contrary to the principle of proportionality, *a fortiori* because criminal penalties ought to constitute a last resort for a Member State in cases where other measures and instruments are not able to provide adequate protection of the interests concerned. Under the Italian legislation, bettors in Italy are not only deprived of the possibility of using bookmakers established in another Member State, even through the intermediary of operators established in Italy, but are also subject to criminal penalties.

30 The Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments, as well as the Commission, cite the case-law of the Court of Justice, in particular the judgments in *Schindler*, *Läärä* and *Zenatti*.

31 The Italian Government relies on the judgment in *Zenatti* to show that Law No 401/89 is compatible with the Community legislation in the sphere of freedom to provide services, and even in that of freedom of establishment. Both the matter considered by the Court in that case, namely administrative authorisation to pursue the activity of collecting and managing bets in Italy, and the question raised in the main proceedings, namely the existence of a criminal penalty prohibiting that activity where it is carried on by operators who are not part of the State monopoly on betting, pursue the same aim, which is to prohibit such activities and to reduce gaming opportunities in practice, other than in situations which are expressly provided for by law.

32 The Belgian Government observes that a single market for gaming will only incite consumers to squander more and will have significant damaging effects for society. The level of protection introduced by Law No 401/89 and the restrictive authorisation scheme serve to ensure the attainment of objectives which are in the general interest, namely limiting and strictly controlling the supply of gaming and betting, is proportionate to those objectives and involves no discrimination on grounds of nationality.

33 The Greek Government considers that the organisation of games of chance and bets on sporting events must remain within the control of the State and be operated by means of a monopoly. If it is engaged in by private entities, that will have direct consequences such as disturbance of the social order and incitement to commit offences, as well as exploitation of bettors and consumers in general.

34 The Spanish Government submits that both the grant of special or exclusive rights under a strict authorisation or licensing regime and the prohibition on opening foreign branches to process bets in other Member States are compatible with the policy of limiting supply, provided that those measures are adopted with a view to reducing opportunities for gaming and stimulation of supply.

35 The French Government maintains that the fact that in the main proceedings the collection of bets is effected at a distance by electronic means and the sporting events to which the bets relate take place exclusively in Italy — which was not the case in *Zenatti* — does not affect the Court's case-law under which national laws which limit the pursuit of activities relating to gaming or lotteries and cash machines are compatible with the principle of the freedom to provide services where they pursue an objective that is in the general interest, such as the prevention of fraud or the protection of bettors against themselves. Member States are therefore justified in regulating the activities of operators in the area of betting in non-discriminatory ways, since the degree and scope of the restrictions are within the discretion enjoyed by the national authorities. It is thus for the courts of the Member States to determine whether the national authorities have acted proportionately in their choice of means, having regard to the principle of freedom to provide services.

36 As regards freedom of establishment, the French Government considers that the restrictions on the activities of the independent Italian companies in a contractual relationship with Stanley do not undermine Stanley's right to establish itself freely in Italy.

37 The Luxembourg Government considers that the Italian legislation constitutes an obstacle to the pursuit of the activity of organising bets in Italy because it prohibits Stanley from carrying on its activities in Italy either directly, under the freedom to provide cross-border services, or indirectly through the intermediary of Italian agencies linked by internet. It also constitutes a restriction on the freedom of establishment. However, those obstacles are justified in so far as they pursue objectives which are in the general interest, such as the need to channel and control the desire to engage in gaming, and are appropriate and proportionate for the attainment of those objectives inasmuch as they do not discriminate on grounds of nationality, because both Italian entities and those established abroad have to obtain the same permit from the Minister for Finance to be allowed to engage in the organisation, taking and collecting of bets in Italy.

38 The Portuguese Government notes that the main proceedings have serious implications as regards the maintenance not only in Italy but in all the Member States of a system for running lotteries by public monopoly and as regards the need to preserve a significant source of revenue for the States, which replaces the compulsory levying of taxes and serves to finance social, cultural and sporting policies. In the activity of gaming, the market economy and free competition operate a redistribution of sums levied in the context of that activity which is contrary to the social order, because they are likely to move from countries where overall involvement is low to countries where it is higher and the amount of winnings more attractive. Bettors in the small Member States would therefore be financing the social, cultural and sporting budgets of the large Member States and the reduction in revenue from gaming would force governments in the smaller Member States to finance public initiatives of a social nature and other State social, sporting and cultural activities by other means, which would mean an increase in taxes in those Member States and a reduction in taxes in the big States. Furthermore, dividing up the State betting, gaming and lotteries market between three or four large operators in the European Union would produce structural changes in distribution networks for gaming lawfully carried on by those States, destroying an enormous number of jobs and distorting unemployment levels in the various Member States.

39 The Finnish Government cites in particular the judgment in *Läärä*, in which the Court acknowledged that the need for and proportionality of provisions adopted by a Member State are to be assessed solely in the light of the objectives pursued by the national authorities in that State and the level of protection they seek to provide, so that it is for the national court to determine whether, in the light of the specific detailed rules for its application, national legislation enables the aims relied on to justify it to be attained and whether the restrictions are proportionate to those aims, having regard to the fact that the legislation must be applied to all operators alike, whether they are from Italy or another Member State.

40 The Swedish Government observes that the fact that restrictions on the free movement of services are introduced for tax purposes is not sufficient to support the conclusion that those restrictions are contrary to Community law, provided

that they are proportionate and do not involve discrimination as between operators, a matter for the national court to determine. The amendments to the Italian legislation made by Law No 388/00 enable an entity which has been refused authorisation to collect bets in Italy to circumvent the legislation by carrying on its activity from another Member State and prohibit foreign entities which organise bets in their own country from pursuing their activities in Italy. As the Court held at paragraph 36 of the judgment in *Läärä* and at paragraph 34 of the judgment in *Zenatti*, the mere fact that a Member State has opted for a protection scheme which is not the same as that adopted in another Member State cannot influence the assessment of the need for and proportionality of the provisions adopted in that area.

41 The Commission of the European Communities takes the view that the legislative amendments effected by Law No 388/00 merely make explicit what was already contained in Law No 401/89 and do not introduce a genuinely new category of offences. The public-order grounds for limiting the damaging effects of betting activities relating to football matches which are relied on to justify the fact that the national legislation reserves the right to collect those bets to certain organisations are the same regardless of the Member State in which those activities take place. The fact that the sporting events to which the bets related in the case of *Zenatti* took place abroad whereas in the main proceedings here the football matches take place in Italy is irrelevant. The Commission adds that Directive No 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1) does not apply to bets, so that the outcome should be no different to that in *Zenatti*.

42 The Commission considers that the issue is not to be examined from the point of view of freedom of establishment because the agencies run by the defendants in the main proceedings are independent and act as collection centres for bets and as intermediaries in relations between their Italian customers and Stanley, and are not in any way subordinate to the latter. However, even if the right of

establishment were to apply, the restrictions in the Italian legislation are justified on the same grounds of social policy as those accepted by the Court in *Schindler*, *Läärä* and *Zenatti* with regard to the restriction on the freedom to provide services.

43 At the hearing the Commission informed the Court that it had initiated the procedure against the Italian Republic for failure to fulfil obligations in regard to the liberalisation of the horse-race betting sector managed by the UNIRE. As regards the lottery sector, which is liberalised, the Commission referred to the judgment in Case C-272/91 *Commission* v *Italy* [1994] ECR I-1409, in which the Court held that by restricting participation in an invitation to tender for the concession of a lottery computerisation system to bodies, companies, consortia and groupings the majority of whose capital, considered individually or in aggregate, was held by the public sector, the Italian Republic had failed to fulfil its obligations inter alia under the EC Treaty.

The Court's reply

44 The first point to consider is whether legislation such as that at issue in the main proceedings (Law No 401/89) constitutes a restriction on the freedom of establishment.

45 It must be remembered that restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries, are prohibited by Article 43 EC.

46 Where a company established in a Member State (such as Stanley) pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment.

47 Furthermore, in reply to the questions put to it by the Court at the hearing, the Italian Government acknowledged that the Italian legislation on invitations to tender for betting activities in Italy contains restrictions. According to that Government, the fact that no entity has been licensed for such activities apart from the monopoly-holder is explained by the fact that the way in which the Italian legislation is conceived means that the licence can only be awarded to certain persons.

48 In so far as the lack of foreign operators among licensees in the betting sector on sporting events in Italy is attributable to the fact that the Italian rules governing invitations to tender make it impossible in practice for capital companies quoted on the regulated markets of other Member States to obtain licences, those rules constitute prima facie a restriction on the freedom of establishment, even if that restriction is applicable to all capital companies which might be interested in such licences alike, regardless of whether they are established in Italy or in another Member State.

49 It is therefore possible that the conditions imposed by the legislation for submitting invitations to tender for the award of these licences also constitute an obstacle to the freedom of establishment.

50 The second point to consider is whether the Italian legislation in that respect constitutes a restriction on the freedom to provide services.

51 Article 49 EC prohibits restrictions on freedom to provide services within the Community for nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. Article 50 EC defines 'services' as services which are normally provided for remuneration, in

so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

52 The Court has already held that the importation of lottery advertisements and tickets into a Member State with a view to the participation by residents of that State in a lottery operated in another Member State relates to a 'service' (*Schindler*, paragraph 37). By analogy, the activity of enabling nationals of one Member State to engage in betting activities organised in another Member State, even if they concern sporting events taking place in the first Member State, relates to a 'service' within the meaning of Article 50 EC.

53 The Court has also held that, on a proper construction, Article 49 EC covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 22).

54 Transposing that interpretation to the issue in the main proceedings, it follows that Article 49 EC relates to the services which a provider such as Stanley established in a Member State, in this case the United Kingdom, offers via the internet — and so without moving — to recipients in another Member State, in this case Italy, with the result that any restriction of those activities constitutes a restriction on the freedom of such a provider to provide services.

55 In addition, the freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member State without being hampered by restrictions (see, to that effect, Joined Cases

286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16, and Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraphs 33 and 34).

56 In reply to the questions put by the Court at the hearing, the Italian Government confirmed that an individual in Italy who from his home connects by internet to a bookmaker established in another Member State using his credit card to pay is committing an offence under Article 4 of Law No 401/89.

57 Such a prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor is established constitutes a restriction on the freedom to provide services.

58 The same applies to a prohibition, also enforced by criminal penalties, for intermediaries such as the defendants in the main proceedings on facilitating the provision of betting services on sporting events organised by a supplier such as Stanley, established in a Member State other than that in which the intermediaries pursue their activity, since the prohibition constitutes a restriction on the right of the bookmaker freely to provide services, even if the intermediaries are established in the same Member State as the recipients of the services.

59 It must therefore be held that national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services.

60 In those circumstances it is necessary to consider whether such restrictions are acceptable as exceptional measures expressly provided for in Articles 45 and 46 EC, or justified, in accordance with the case-law of the Court, for reasons of overriding general interest.

61 With regard to the arguments raised in particular by the Greek and Portuguese Governments to justify restrictions on games of chance and betting, suffice it to note that it is settled case-law that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56).

62 As stated in paragraph 36 of the judgment in *Zenatti*, the restrictions must in any event reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.

63 On the other hand, as the governments which submitted observations and the Commission pointed out, the Court stated in *Schindler*, *Läärä* and *Zenatti* that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.

64 In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37).

65 According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which

they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination.

66 It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs.

67 First of all, whilst in *Schindler*, *Läärä* and *Zenatti* the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.

68 In that regard the national court, referring to the preparatory papers on Law No 388/00, has pointed out that the Italian State is pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting CONI licensees.

69 In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.

70 Next, the restrictions imposed by the Italian rules in the field of invitations to tender must be applicable without distinction: they must apply in the same way and under the same conditions to operators established in Italy and to those from other Member States alike.

71 It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination.

72 Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate in the light of the Court's case-law (see Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraphs 34 to 39, and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 89 to 91), especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.

73 The national court will also need to determine whether the imposition of restrictions, accompanied by criminal penalties of up to a year's imprisonment, on intermediaries who facilitate the provision of services by a bookmaker in a Member State other than that in which those services are offered by making an internet connection to that bookmaker available to bettors at their premises is a restriction that goes beyond what is necessary to combat fraud, especially where the supplier of the service is subject in his Member State of establishment to a regulation entailing controls and penalties, where the intermediaries are lawfully constituted, and where, before the statutory amendments effected by Law No 388/00, those intermediaries considered that they were permitted to transmit bets on foreign sporting events.

74 As to the proportionality of the Italian legislation in regard to the freedom of establishment, even if the objective of the authorities of a Member State is to avoid the risk of gaming licensees being involved in criminal or fraudulent activities, to prevent capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets, especially where there are other means of checking the accounts and activities of such companies, may be considered to be a measure which goes beyond what is necessary to check fraud.

75 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 are disproportionate in the light of those aims.

76 In the light of all those considerations the reply to the question referred must be that national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

Costs

77 The costs incurred by the Italian, Belgian, Greek, Spanish, French, Luxembourg, Portuguese, Finnish and Swedish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunale di Ascoli Piceno by an order of 30 March 2001, hereby rules:

National legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those objectives.

Skouris	Jann	Timmermans
Cunha Rodrigues	Edward	Schintgen
Macken	Colneric	von Bahr

Delivered in open court in Luxembourg on 6 November 2003.

R. Grass — Registrar

V. Skouris — President