JUDGMENT OF THE COURT (Third Chamber)

11 September 2003 *

In Case C-6/01,

REFERENCE to the Court under Article 234 EC by the Tribunal Cível da Comarca de Lisboa (Portugal) for a preliminary ruling in the proceedings pending before that court between

Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others

and

Estado português,

on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC,

* Language of the case: Portuguese.

THE COURT (Third Chamber),

composed of: J.-P. Puissochet (Rapporteur), President of the Chamber, C. Gulmann and F. Macken, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others, by R. Francês, advogado,

— the Portuguese Government, by L. Fernandes and J. Ramos Alexandre and by M.L. Duarte, acting as Agents,

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

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Spanish Government, by M. López-Monís Gallego, acting as Agent,

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

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

having regard to the Report for the Hearing,

after hearing the oral observations of: Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others, represented by R. Francês; the Portuguese Government, represented by M.L. Duarte; the Belgian Government, represented by P. De Wael and P. Vlaemminck, acting as Agents; the Spanish Government, represented by L. Fraguas Gadea, acting as Agent; the French Government, represented by P. Boussaroque, acting as Agent; and the Commission, represented by A. Caeiros and M. Patakia, at the hearing on 26 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2003,

gives the following

Judgment

1 By order of 25 May 2000, which was received at the Court on 8 January 2001, the Tribunal Cível da Comarca (Civil Court of First Instance), Lisbon, referred to the Court for a preliminary ruling under Article 234 EC 13 questions on the interpretation of Articles 2 EC, 28 EC, 29 EC, 31 EC and 49 EC.

2 Those questions were raised in the context of proceedings between the Associação Nacional de Operadores de Máquinas Recreativas (hereinafter 'Anomar'), established in Lisbon, and eight Portuguese companies involved in the marketing and operation of gaming machines (hereinafter together referred to as 'the applicants in the main action') and the Portuguese State. The questions concern Portuguese legislation relating to the operation and playing of games of chance or gambling under Decreto-Lei (Decree-Law) No 422/89 of 2 December 1989 (*Diário da República*, I, No 2777, of 2 December 1989), as amended by Decreto-Lei No 10/95 of 19 January 1995 (*Diário da República*, I, Series A, No 16, of 19 January 1995, hereinafter 'Decree-Law No 422/89'), and whether it complies with Community law.

Community law

3 Article 2 EC provides that '[t]he Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities'.

4 Under Articles 28 EC and 29 EC, quantitative restrictions on imports and exports and all measures having equivalent effect are to be prohibited between Member States.

5 According to Article 31 EC:

'1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.'

6 Article 49 EC provides:

'... 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.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.'

National law

7 Decree-Law No 422/89 governs, in particular, the operation and playing of games of chance or gambling and combinations of games of chance and other forms of gaming and makes the operation and playing thereof outside duly authorised areas an offence punishable by a period of imprisonment. The general principle underpinning the statutory scheme is laid down in Article 9 of Decree-Law No 422/89, which provides that '[t]he right to operate games of chance or gambling is reserved to the State'. Although the State alone is entitled to that right, it may be exercised, other than by the State or another public body, subject to authorisation in the form of an administrative licensing agreement.

8 Decree-Law No 422/89, which forms part of a consistent legislative policy concerning the granting of licences in respect of gaming areas which may be

traced back to Decree-Law No 14643 of 3 December 1937, provides that the operation and playing of games of chance or gambling are to be restricted to the games rooms of casinos located in permanent or temporary gaming areas created by decree-law.

9 Portuguese law distinguishes between various kinds of game arranged in four categories, according to the criteria laid down in the relevant provisions of Decree-Law No 422/89, governed by different legal rules.

10 The first category contains games of chance or gambling. Under Article 1 of Decree-Law No 422/89, 'games of chance or gambling are those whose result is uncertain because it depends exclusively or fundamentally on chance'.

11 That category makes provision for two types of gaming involving the use of machines. One is 'play on machines paying out tokens or cash' and the other 'play on machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling, or display a result in the form of points depending exclusively or essentially on chance' (Article 4(1)(f) and (g) of Decree-Law No 422/89).

12 The right to operate games of chance or gambling is reserved to the State and may be exercised only by undertakings incorporated as public limited companies, to which the Government grants the relevant licence by way of an administrative contract (Article 9 of Decree-Law No 422/89). The operating licence is granted on the basis of a tender procedure (Article 10 of Decree-Law No 422/89) which does not discriminate on grounds of nationality.

13 The only places where the operation and playing of games of chance or gambling are authorised are in casinos located in permanent or temporary gaming areas established under decree-law and, exceptionally and subject to ministerial authorisation, ships, aircraft, bingo halls and in halls reserved for major tourist events (Article 3(1), (6), (7) and (8) of Decree-Law No 422/89).

14 The second category covers combinations of games of chance or gambling and other forms of gaming, statutorily defined as 'transactions offered to the public in which the expectation of winning depends on either a combination of chance and the skill of the player or on chance only and where the winnings are in the form of goods having commercial value' (Article 159(1) of Decree-Law No 422/89). It includes, in particular, lotteries, tombolas, prize draws, promotional competitions, quizzes and contests (Article 159(2) Decree-Law No 422/89).

15 Operation of such combinations of games of chance or gambling and other forms of gaming is subject to authorisation of the Minster for Interior Affairs who is to lay down, for each case, the conditions he considers appropriate and establish the relevant monitoring system (Article 160(1) of Decree-Law No 422/89). In principle, such combinations of games of chance or gambling and other forms of gaming may not be operated by profit-making organisations (Article 161(1) of Decree-Law No 422/89). Nor may they concern matters inherent to games of chance or gambling (poker, fruit machines, roulette, dice, bingo, lottery draws, instant lottery, pools (*totobola* and *totoloto*)), or replace prizes with cash or tokens (Article 161(3) of Decree-Law No 422/89).

16 The third category includes games of skill offering prizes in cash, tokens or goods with commercial value (Article 162(1) of Decree-Law No 422/89).

17 It is not permitted to operate machines on which play depends exclusively or essentially on the skill of the player and which provide winnings in cash, tokens or goods having commercial of even little value other than free extended play won on points scored (Article 162(2) of Decree-Law No 422/89).

18 The fourth category, amusement machines, is subject to a special set of rules, laid down by Decree-Law No 316/95 of 28 November 1995 (*Diário da República*, I, Series A, No 275, 28 November 1995, hereinafter 'Decree-Law No 316/95').

19 Amusement machines are defined as machines which:

— 'while paying out prizes directly in tokens or goods with a commercial value, run games the result of which depends exclusively or essentially on the player's skill, enabling the latter to extend the time he can play the machine free of charge on the basis of the points he has obtained' (Article 16(1)(a) of the annex to Decree-Law No 316/95);

— 'possess the characteristics described in paragraph (a) above and make it possible to obtain items the commercial value of which is no more than three times the sum the player wagers' (Article 16(1)(b) of the annex to Decree-Law No 316/95).

20 The importation, manufacture, assembly and sale of amusement machines entails the categorisation of the kinds of game concerned, which is a matter for the Inspecção-Geral de Jogos (Inspectorate-General for Gaming and Betting) (Article 19 of the annex to Decree-Law No 316/95).

21 The operation of machines in that category — be they automatic, mechanical, electrical or electronic — is subject to a registration and licensing system, irrespective of whether they are imported, manufactured or assembled in the country (Article 17(1) of the annex to Decree-Law No 316/95).

22 The proprietor of the machine must apply to the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 17(2) of the annex to Decree-Law No 316/95).

23 Before the machine may be operated, an operating licence must also be issued, either annually or biannually, by the civil governor of the district in which the machine is located or where it may be operated in order to register it (Article 20(1) and (2) of the annex to Decree-Law No 316/95).

24 A licence may be refused, by reasoned decision, where such a protective measure is justified on grounds of protection of children and young persons, prevention of crime and the maintenance or restoration of public peace, order and security (Article 20(3) of the annex to Decree-Law No 316/95).

25 Amusement machines may be operated within a zone or an establishment holding a licence for the playing of legal games on amusement machines which may not be located near an educational establishment (Article 21(2) of the annex to Decree-Law No 316/95). If more than three amusement machines are to be operated together, the establishment concerned must hold a licence exclusively for the operation of games (Article 21(1) of the annex to Decree-Law No 316/95).

26 Machines which do not pay out either tokens or cash but involve matters proper to games of chance or gambling or display a result in the form of points depending exclusively or essentially on chance are not deemed to be amusement machines. That type of equipment falls within the category of games of chance or gambling (Article 4(1)(g) of Decree-Law No 422/89) and is governed by Decree-Law No 422/89 (Article 16(2) of the annex to Decree-Law No 316/95).

27 The rules governing the operation and playing of games are legally classified as public-policy rules justified in the public interest under Article 95(2) of Decree-Law No 422/89.

The main proceedings and the questions referred for a preliminary ruling

28 The applicants in the main action brought an action against the Portuguese State under Article 4(1) and (2) of the Portuguese Code of Civil Procedure seeking a

declaration that certain provisions of Portuguese law in the field of gaming do not comply with Community law, and claimed that the court should:

— acknowledge the right to operate and manage games of chance or gambling outside the prescribed gaming areas, and extinguish the monopoly held by the casinos and, accordingly, repeal Articles 1, 3(1) and (2) and 4(1)(f) and (g) of Decree-Law No 422/89, in view of the primacy of the rules and principles of Community law referred to in the application initiating proceedings;

— as a result of the repeal of the abovementioned provisions, also repeal the rules deriving from them, namely the criminal provisions defined in Articles 108, 110, 111 and 115 of that decree-law, as well as all provisions, whether substantive or procedural, laid down in any statute, prohibiting and restricting such activities.

29 The applicants in the main action base their claims, first, on the incompatibility of the abovementioned provisions of Portuguese legislation with Community law and, secondly, on the primacy of Community law over ordinary domestic law in accordance with Article 8(2) of the Portuguese Constitution.

30 The Portuguese State raised a preliminary objection to the admissibility of the application claiming, in particular, that none of the applicants in the main action has standing to bring proceedings in so far as they lack a direct interest linked to their claims, and that Anomar has no standing to bring proceedings in that a finding that the application is well founded can be of no benefit to it.

31 On the merits, the Portuguese State contends that the rules and principles of Community law on which the applicants in the main action rely were inapplicable to the purely internal circumstances in point and that the operation of gaming machines cannot in any event fall within the scope of the rules on the free movement of goods.

32 The preliminary plea of lack of standing of Anomar and the absence of interest in bringing proceedings of all the applicants in the main proceedings was upheld at first instance.

33 However, the Tribunal de Relação de Lisboa overturned the decision of the lower court and found that the applicant Anomar did have standing and that all the applicants in the main action had an interest in bringing proceedings.

34 Taking the view that, in light of the arguments of the parties, the interpretation of Community law was essential to enable it to settle the dispute before it, the Tribunal Cível da Comarca de Lisboa decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do games of chance or gambling constitute an "economic activity" within the meaning of Article 2 EC?

2. Do games of chance or gambling constitute an activity relating to "goods" which is covered, as such, by Article 28 EC?

3. Are activities relating to the manufacture, importation and distribution of gaming machines separate from the operation of such machines and, therefore, is the principle of the free movement of goods laid down by Articles 28 EC and 29 EC applicable to such activities?

4. Are the operation of and engagement in games of chance or gambling excluded from the scope of Article 31 EC, in view of the fact that that provision does not cover monopolies in the provision of services?

5. Does the operation of gaming machines constitute a "provision of services" and, as such, is it covered by Article 49 EC et seq.?

6. Does a body of legal rules (such as that established in Articles 3(1) and 4(1) of Decree-Law No 422 of 2 December 1989) according to which the operation of and engagement in games of chance or gambling (defined by Article 1 of that instrument as "those whose result is uncertain since it depends exclusively or fundamentally on chance") — which include (see Article 4(1)(f) and (g) of Decree-Law No 422/89) games played on machines which pay out prizes directly in tokens or money and games on machines which, while not paying out directly prizes in tokens or money, involve matters proper to games of chance or gambling or display the number of points awarded depending exclusively and fundamentally on chance — is authorised only in casinos in permanent or temporary gaming areas created by decree-law, constitute a barrier to the freedom to provide services, within the meaning of Article 49 EC?

7. Even if the restrictive rules described in question 6 constitute a barrier to freedom to provide services, within the meaning of Article 49 EC, are they compatible with Community law, given that they are applicable without distinction to Portuguese nationals and undertakings and to nationals and undertakings of other Member States and are, moreover, based on overriding reasons relating to the public interest (consumer protection, crime prevention, protection of public morality, restriction of demand for gambling and the financing of public-interest activities)?

8. Is the activity of operation of games of chance or gambling subject to the principles of freedom of access to and pursuit of any economic activity whatever and, consequently, does the possible existence of legislation in other Member States which lays down less restrictive conditions for the operation of gaming machines sufficient of itself to render invalid the Portuguese legal regime described in Question 6?

9. Do the restrictions laid down in the Portuguese legislation on the activity of operation of games of chance or gambling comply with the principle of proportionality?

10. Do the Portuguese rules making authorisation subject to conditions which are legal (conclusion of an administrative contract with the State following a tendering procedure: Article 9 of the abovementioned Decree-Law No 422/89) and logistical (operation and engagement in games of chance or gambling restricted to gaming areas: Article 3 of the abovementioned decree-law) in nature constitute a requirement which is appropriate and necessary for the attainment of the objectives pursued?

11. Does the use by the Portuguese legislation (Articles 1, 4(1)(g) and [162] of the abovementioned Decree-Law No 422/89 and Article 16(1)(a) of Decree-Law No 316/95 of 28 November 1995) of the word "fundamentally", in conjunction with the word "exclusively", in order to define games of chance or gambling and to draw a legal distinction between "gaming machines" and "amusement machines", affect the possibility of defining the concept in issue according to the rules of legal construction?

12. Do the imprecise legal concepts to which the Portuguese legislation resorts in defining "games of chance or gambling" (Articles 1 and 162 of Decree-Law No 422/89, cited above) and "amusement machines" (Article 16 of Decree-Law No 316/95, cited above) require an interpretation, for the purpose of categorising the various types of amusement machines, which must also take account of the margin of discretion which the national authorities enjoy?

13. Even if it were considered that the Portuguese legislation at issue does not lay down objective criteria to distinguish between gaming machines and amusement machines, does the conferring on the Inspecção-Geral de Jogos of a discretionary power to categorise games infringe any principle or rule of Community law?'

Admissibility

35 The Portuguese Government submits, first, that the questions referred for a preliminary ruling are inadmissible since they concern not the interpretation of

the Treaty but the interpretation or assessment of the validity of the provisions of Portuguese legislation governing the operation and playing of games of chance or gambling, which are matters for the national court alone.

36 Secondly, it considers that the main proceedings, which concern only the conditions for the operation of games of chance or gambling in Portugal, by Portuguese undertakings, in pursuance of Portuguese legislation, have no connection with Community law and relate to a purely internal situation.

37 As regards the first objection, although the Court has no jurisdiction under Article 234 EC to apply a rule of Community law to a particular case and thus to judge a provision of national law by reference to such a rule it may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of that provision (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 22).

38 However, in the main proceedings, the referring court asks the Court to interpret Treaty provisions solely for the purpose of determining whether those provisions are capable of having any bearing on the application of the relevant national rules in those proceedings. It cannot therefore be maintained that the purpose of the questions referred for a preliminary ruling in the main proceedings is anything other than the interpretation of provisions of the Treaty.

39 As for the second objection, it must be acknowledged that all the facts in the main proceedings are confined to a single Member State. However, national legislation

such as Decree-Law No 422/89, which applies without distinction to Portuguese nationals and to nationals of other Member States, may generally fall within the scope of the provisions on the fundamental freedoms established by the Treaty only to the extent that it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 9, and Case 98/86 *Mathot* [1987] ECR 809, paragraphs 8 and 9, and *Reisch and Others*, cited above, paragraph 24).

40 That finding does not, however, mean that there is no need to reply to the questions referred to the Court for a preliminary ruling in this case. In principle, it is for the national courts alone to determine, having regard to the particular features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they refer to the Court (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 22). A reference for a preliminary ruling from a national court may be rejected by the Court only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 18, and *Reisch and Others*, cited above, paragraph 25).

41 In this case, it is not obvious that the interpretation of Community law requested is not necessary for the referring court. Such a reply might be useful to it if its national law were to require that a Portuguese national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (*Guimont*, cited above, paragraph 23, and *Reisch and Others*, cited above, paragraph 26).

42 Accordingly, it is necessary to consider whether the provisions of the Treaty, interpretation of which is sought, preclude the application of national legislation such as that in issue in the main proceedings to the extent that it is applied to persons resident in other Member States.

The questions referred for a preliminary ruling

Question 1

43 By its first question, the national court is asking whether games of chance or gambling constitute an economic activity within the meaning of Article 2 EC.

44 The applicants in the main action, the governments which submitted observations and the Commission agree that games of chance or gambling are to be deemed an economic activity within the meaning of Article 2 EC, that is to say a for-profit activity which gives rise to a specific remuneration and which falls within the framework of the commercial freedoms enshrined in the Treaty.

45 The German Government submits that neither the chance nature of the winnings nor the use to which is put the profit made on games of chance or gambling prevent the latter from constituting an economic activity.

46 As the Portuguese Government in particular points out, the Court has already held that lotteries constitute an economic activity, within the meaning of the Treaty, inasmuch as they consist in the importation of goods or the provision of services for remuneration (Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 19). With particular regard to the activities in issue in the main proceedings, the Court has held that games consisting in the use, in return for a money payment, of slot machines must be regarded as gambling which is comparable to the lotteries forming the subject of the *Schindler* judgment (Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 18).

47 That assessment must be confirmed and all games of chance or gambling must be deemed to be economic activities within the meaning of Article 2 EC, since they fulfil the two criteria laid down by the Court in its case-law, namely provision of a particular service for remuneration and the intention to make a cash profit.

48 The answer to the first question must therefore be that games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

Questions 2, 3 and 5

49 By its second, third and fifth questions, the national court is asking in essence whether games of chance or gambling constitute an activity relating to goods or, on the contrary, provision of services, within the meaning of the Treaty and, if so, whether activities relating to the manufacture, importation and distribution of gaming machines are separable from the operation of such machines in order to determine whether the principle of free movement of goods as defined in Articles 28 EC and 29 EC is to be applied to those activities, which are indivisible, as a whole.

50 In contrast to the applicants in the main action, the governments which submitted observations and the Commission take the view that gaming activities do not come under the rules applicable to goods.

51 They draw a distinction between gaming machines and gaming activities, as the Court itself did at paragraph 20 of *Läärä and Others*, pointing out expressly that

slot machines constitute goods in themselves which may fall within the scope of Article 30 of the EC Treaty (now, after amendment, Article 28 EC). As regards gaming, that is to say the operation of gaming machines, those governments and the Commission, relying on *Schindler*, cited above, submit that they are not activities relating to goods but must instead be regarded as services.

52 The Court indeed held, in paragraphs 24 and 25 of *Schindler*, cited above, that lottery activities are not activities relating to goods, falling, as such, under Article 30 of the Treaty, but are however to be regarded as services within the meaning of the Treaty.

53 As regards the difference between activities relating, on the one hand, to the manufacture, importation and distribution of gaming machines which is within the scope of the free movement of goods and, on the other, the activity of operating gaming machines, which is within the scope of the freedom to provide services, the Portuguese, Belgian and German Governments submit that those various activities are not independent of each other. Since the manufacture and distribution of gaming machines cannot be considered independently from the operation of such machines — given that the latter, being manufactured for the purpose of organising games of chance or gambling, cannot serve for any other purpose — all the governments which submitted observations request the application of the maxim *accessorium sequitur principale.*

54 In connection to the similar activity of lotteries, the Court has held that the importation and distribution of advertisements and application forms, and possibly tickets, which are specific steps in the organisation or operation of a lottery, cannot, under the Treaty, be considered independently of the lottery to which they relate. Such activities are not ends in themselves; rather, their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery (*Schindler*, cited above, paragraph 22).

55 However, without there being any need, by approximate analogy with that reasoning, to regard the importation of slot machines as ancillary to the operation thereof, it suffices to state, as the Court did in paragraphs 20 to 29 of *Läärä and Others*, cited above, that, even though the operation of slot machines is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods.

56 The answer to the second, third and fifth questions must therefore be that the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

Question 4

57 By its fourth question, the national court is asking whether a monopoly in the operation of games of chance or gambling falls within the scope of Article 31 EC.

58 Article 31 EC requires the Member States to adjust any State monopolies of a commercial character so as to ensure that there is no discrimination between nationals of Member States.

59 It follows both from the place of this provision in the chapter relating to the prohibition of quantitative restrictions and from the use of the words 'imports' and 'exports' in the second subparagraph of Article 31(1) and of the word 'products' in Article 31(3) that it refers to trade in goods and cannot relate to a monopoly in the provision of services (see Case 155/73 *Sacchi* [1974] ECR 409, paragraph 10).

60 Given that games of chance or gambling constitute services, within the meaning of the Treaty, as held at paragraph 56 above, any monopoly in the operation of games of chance or gambling falls outside the scope of Article 31 EC.

61 The answer to the fourth question must therefore be that a monopoly in the operation of games of chance or gambling does not fall within the scope of Article 31 EC.

Questions 6, 7, 9 and 10

62 By its 6th, 7th, 9th and 10th questions, the national court is essentially asking whether, first, national legislation, such as the Portuguese provisions on games of chance or gambling, which restricts the operation and playing of such games to specific areas and applies without distinction to Portuguese nationals and

nationals of other Member States, constitutes a barrier to the freedom to provide services and, secondly, whether such legislation may be justified by overriding public-interest reasons relating, in particular, to consumer protection and to concerns over public morality and crime prevention, which justify it.

63 So far as concerns whether national legislation such as the Portuguese provisions in issue in the main proceedings constitutes a barrier to the freedom to provide services, both the applicants in the main action, the governments which submitted observations and the Commission consider that such legislation may constitute a barrier to the freedom to provide services, even where the restrictions it entails apply without discrimination on the grounds of nationality and are thus applicable without distinction to Portuguese nationals and nationals of other Member States.

64 The applicants in the main action submit, in particular, that in Portugal the betting and gaming industry is monopolised by the casinos, which is manifestly contrary to the economic principles and freedoms enshrined in the Treaty. The Finnish Government, for its part, is of the view that the legal provisions at issue in the main proceedings prevent, at least indirectly, operators established in another Member State from offering the services in question in Portugal.

65 It is common ground that national legislation may fall within the ambit of Article 49 EC, even if it is applicable without distinction, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (*Schindler*, cited above, paragraph 43).

66 That is the case of national legislation, such as the Portuguese provisions, which restricts the right to operate games of chance or gambling solely to casinos in permanent or temporary gaming areas created by decree-law.

67 Any justification of the Portuguese legislation relies on two elements. The first is based on the fact that the legal regime which it establishes is applicable without distinction to Portuguese nationals and nationals of other Member States, and the second on the fact that that regime is justified by the overriding reasons relating to the public interest on which it is based.

68 As the national court states in its order for reference, the Portuguese legislation does not discriminate between the nationals of the various Member States. That legislation must therefore be regarded as applying without distinction.

69 It is appropriate to inquire whether Article 49 EC precludes legislation such as that in issue in the main proceedings which, although it does not discriminate on grounds of nationality, restricts the freedom to provide services.

70 All the governments which submitted observations maintain that such legislation is compatible with Article 49 EC. According to them, it must be regarded as being justified by overriding reasons relating to the public interest such as the protection of consumers, prevention of fraud and crime, protection of public morality and the financing of public-interest activities.

71 By contrast, the applicants in the main action take the view that the restrictions referred to in Article 30 EC by way of exception are clearly derogations and cannot be applied in general, without any criteria. They also claim that the Portuguese State, although required to state precisely the sphere and the grounds prompting it to avail itself of Article 30 EC, has not given satisfactory reasons for

resorting to a legal regime such as that which it has laid down. The applicants in the main action are of the view that Portugal has not put forward any reservations of a moral or public-order nature such as to justify such a legal regime.

72 According to the information provided by the national court, the provisions of Portuguese law governing games of chance or gambling are legally classified as public-policy rules justified in the public interest. That legal regime has primacy, is highly symbolic and is designed to attain objectives of public interest and legitimate social purposes such as 'fair play' and the possibility of 'obtaining some benefit for the public sector'.

73 The various considerations leading to the adoption of such legislation to govern games of chance or gambling must be taken together, as the Court pointed out in paragraph 58 of the judgment in *Schindler*, cited above. In the present case, those considerations concern the protection of consumers, who are the recipients of the service, and the maintenance of order in society. The Court has already held that those objectives may justify restrictions on freedom to provide services (Case 220/83 *Commission* v *France* [1986] ECR 3663, paragraph 20; *Schindler*, cited above, paragraph 58; and *Läärä and Others*, cited above, paragraph 33).

74 Furthermore, as the Commission points out, the Portuguese legislation in issue in the main proceedings is substantially similar to the Finnish legislation on slot machines, in issue in *Läärä and Others*, in respect of which the Court found that it was not disproportionate, in view of the objectives which justified it (*Läärä and Others*, cited above, paragraph 42). Moreover, the Court considered that limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, falls within the ambit of such public-interest objectives (Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 35).

75 Accordingly, the answer to the 6th, 7th, 9th and 10th questions must be that national legislation, such as the Portuguese legislation, which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

Question 8

76 By its eighth question, the national court is asking in essence whether the mere fact that the operation and playing of games of chance or gambling are subject, in other Member States, to legislation which is less restrictive than the Portuguese legislation in issue in the main proceedings is sufficient to render the latter incompatible with the Treaty.

77 The applicants in the main action point out that legislation in other Member States is less restrictive than the Portuguese legislation and submit that there is no social or economic reason nor any reservations from a moral or public-order angle to justify the Portuguese legislation being more restrictive.

78 On the other hand, all the governments which submitted observations point out that the level of protection which a Member State intends providing in its territory in relation to games of chance or gambling falls within the discretion recognised as being enjoyed by the national authorities. It is therefore a matter for each Member State to arrange for the appropriate legislation to govern gaming, in particular in the light of the specific social and cultural features of each Member

State, and in accordance with the principles deemed best to suit the society concerned. The Portuguese Government points out that the special nature of gaming calls for and justifies a legal framework in keeping with the scale of fundamental values of each Member State.

79 It is common ground that it is for national authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them (*Läärä and Others*, cited above, paragraph 35, and *Zenatti*, cited above, paragraph 33).

80 Accordingly, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure (*Läärä and Others*, cited above, paragraph 36, and *Zenatti*, cited above, paragraph 34).

81 The answer to the national court's eighth question must therefore be that the possible existence, in other Member States, of legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

Questions 11, 12 and 13

82 By its 11th, 12th and 13th questions, the national court seeks to ascertain in essence whether legislation which makes the operation and playing of games of

chance or gambling subject to legal and logistical conditions such as conclusion of an administrative licensing contract with the State following a tendering procedure and restriction of gaming areas solely to casinos, which uses imprecise legal concepts in order to categorise different sorts of games and which confers on the Inspecção-Geral de Jogos a discretionary power to categorise games by theme is compatible with the Treaty, in particular Article 49 EC.

83 The Portuguese, Belgian, Spanish and Finnish Governments agree that the Treaty does not preclude the provisions of Decree-Law No 422/89 governing the operation and playing of games of chance or gambling provided such provisions meet conditions as to proportionality and necessity.

84 The applicants in the main action, for their part, submit that the restrictions on operation of games laid down in the Portuguese legislation do not comply with the principle of proportionality by virtue of the lack of precision regarding the reasons and aims pursued by that legislation, since no justification regarding public order or social protection has been advanced. They also challenge the conferring on the Inspecção-Geral de Jogos of a discretionary power to categorise types of gaming, gaming machines and games by theme. Such power, when it lacks objective and transparent rules, is arbitrary and thus contrary to the Treaty.

85 The Commission points out that measures restricting the operation and playing of games of chance or gambling must be proportionate and appropriate for ensuring achievement of the intended aim and proposes that the Court should declare those questions inadmissible. It submits that, in the absence of a definition, at Community level, of the various sorts of games and the various types of machines to play them on, it is for the national court to rule on the interpretation of the national provisions in issue in the main proceedings. Moreover, the national court alone is competent to determine whether conferring on the Inspecção-Geral de Jogos the power to characterise and categorise is likely to affect adversely the freedom to provide services.

86 As the Portuguese Government points out, the Court has held that national measures which restrict the freedom to provide services, which are applicable without distinction and are justified by overriding reasons relating to the public interest — as is the case here, as is evident from paragraphs 68 and 72 to 75 of this judgment — must, nevertheless, be such as to guarantee the achievement of the intended aim and must not go beyond what is necessary in order to achieve it (Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraphs 13 to 15, and *Läärä and Others*, cited above, paragraph 31).

87 None the less, it is a matter for the national authorities alone, in the context of their power of assessment, to define the objectives which they intend to protect, to determine the means which they consider most suited to achieve them and to establish rules for the operation and playing of games, which may be more or less strict (see, to that effect, *Schindler*, cited above, paragraph 61; *Läärä and Others*, cited above, paragraph 35, and *Zenatti*, cited above, paragraph 33) and which have been deemed compatible with the Treaty.

88 The answer to the 11th, 12th and 13th questions should therefore be that, in the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

Costs

89 The costs incurred by the Portuguese, Belgian, German, Spanish, French and Finnish Governments and by 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 (Third Chamber),

in answer to the questions referred to it by the Tribunal Cível da Comarca de Lisboa by order of 25 May 2000, hereby rules:

1. Games of chance and gambling constitute economic activities within the meaning of Article 2 EC.

2. The activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.

3. A monopoly in the operation of games of chance or gambling does not fall within the scope of Article 31 EC.

4. National legislation such as the Portuguese legislation which authorises the operation and playing of games of chance or gambling solely in casinos in permanent or temporary gaming areas created by decree-law and which is

applicable without distinction to its own nationals and nationals of other Member States constitutes a barrier to the freedom to provide services. However, Articles 49 EC et seq. do not preclude such national legislation, in view of the concerns of social policy and the prevention of fraud which justify it.

5. The fact that there might exist, in other Member States, legislation laying down conditions for the operation and playing of games of chance or gambling which are less restrictive than those provided for by the Portuguese legislation has no bearing on the compatibility of the latter with Community law.

6. In the context of legislation which is compatible with the EC Treaty, the choice of methods for organising and controlling the operation and playing of games of chance or gambling, such as the conclusion with the State of an administrative licensing contract or the restriction of the operation and playing of certain games to places duly licensed for that purpose, falls within the margin of discretion which the national authorities enjoy.

Puissochet Gulmann Macken

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Third Chamber