OPINION OF ADVOCATE GENERAL
BOT
delivered on 23 February 2010[1]

1. These cases again concern the assessment of conformity with Community law of a Member State's legislation on gaming in the particular case of gaming offered on the internet.

2. They concern the provisions of the Swedish legislation on betting, which, within the framework of a system of exclusive rights, prohibit and make subject to criminal penalties the promotion in Sweden of lotteries organised outside that Member State. They arise from criminal proceedings brought against two editors of two Swedish daily newspapers in connection with advertisements published in their newspapers for betting offered on the internet by a number of gambling companies established in other Member States.

3. The national court is uncertain as to the conformity with freedom to provide services and freedom of establishment of the legislation forming the basis of those proceedings and, in particular, of the provisions which fix the penalties applicable to the promotion in Sweden of gaming organised outside that Member State. It refers five questions to the Court for a preliminary ruling, which cover the following two questions.

4. Firstly, can the Swedish legislation which makes gambling subject to a system of exclusive rights in order to combat crime and protect consumers be considered proportionate to those objectives when it also has the objective of financing social activities, when the profits obtained by the suppliers of licensed gaming accrue in part to the State and when the marketing of gaming by licensed providers is not subject to any restriction on the part of the competent authorities? Also, does the fact that an internet gaming company is licensed, in the Member State where it is established, to carry on its activities in that State preclude another Member State from prohibiting the promotion of that company's online gaming within its territory?

5. Secondly, does the legislation at issue comply with Community law even though it imposes criminal penalties only for promoting lotteries organised in other Member States

1 — Original language: French.

and not for advertising lotteries organised in Sweden without a licence?

6. Subsequently to the decisions making the reference, the Court delivered the judgment of 8 September 2009 in *Liga Portuguesa de Futebol Profissional and Bwin International*.[2] In that judgment, the Court stated in essence that, because of the particular risks posed by gambling offered on the internet, a Member State which chose to reserve the exclusive right to operate such gaming to an operator carrying on its activities under the strict control of the public authorities in order to protect consumers against the risks of fraud and crime was legitimately entitled to prohibit other operators established in other Member States, in which they lawfully provide similar services, from offering their internet games to persons residing within its territory.

7. In this Opinion, I shall suggest that the answer to the national court's questions as regards the proportionality of its legislation, in so far as the latter prohibits the promotion of internet games offered by companies established in other Member States, can be inferred from the judgment in *Liga Portuguesa de Futebol Profissional and Bwin International*. I shall propose that the Court should rule that Community law, in this case Article 49 EC, does not preclude such legislation, provided that its purpose and effect are to protect consumers against the risks of fraud and crime posed by internet gaming.

8. I shall then suggest, in answer to the second question, that the measures adopted for the purpose of ensuring the effective application of such rules must be non-discriminatory. I shall infer from this that Article 49 EC precludes a Member State's rules which impose criminal penalties for promoting internet gaming organised by a company established in another Member State and not for advertising such gaming organised within the national territory without a licence.

I – Legal background

9. The Law on Lotteries (Lotterilagen)[3] governs, in principle, all forms of gambling offered to the general public in Sweden, such as football pools, betting on horse races, bingo games, slot machines and roulette.

2 — Case C-42/07 ECR I-7633.

3 — SFS 1994, No 1000, 'the Lotterilagen'.

10. The purposes of Swedish gaming policy were summarised in the *travaux préparatoires* for the Lotterilagen as follows:

'The main purpose underlying the gaming policy is … to have in future a healthy and safe gaming market in which social protection interests and the demand for gaming are provided for in controlled forms. Profits from gaming should be protected and always reserved for objectives which are in the public interest or socially beneficial, that is, the activities of associations, equestrian sports and the State. As to date, the focus should be on prioritising social protection considerations whilst offering a variety of gaming options and taking heed of the risk of fraud and unlawful gaming.'

11. The Lotterilagen thus aims, according to the national court, to counter criminal activity, counter negative social and economic effects, safeguard consumer protection interests, and apply the profits from lotteries to objectives which are in the public interest or socially beneficial.

12. The provisions of the Lotterilagen which are relevant to these cases concern, on the one hand, the requirement of a licence to organise gambling and, on the other, the prohibition on promoting such games.

A – *The requirement of a licence to organise gambling*

13. Paragraph 9 of the Lotterilagen provides that a licence is required, as a principal rule, in order to organise gambling in Sweden.

14. Under Paragraph 15 of the Lotterilagen, a licence may be issued to a Swedish legal person which is a non-profit-making association and which under its statutes has as its main purpose the advancement of socially beneficial objectives in Sweden and carries on activities which serve mainly the advancement of that objective. Under Paragraph 45 of the Lotterilagen, the Swedish Government may also grant a special licence to organise gambling in cases other than those provided for in the Lotterilagen.

15. In keeping with the principle that the gambling market should be reserved for objectives which are in the public interest or for the benefit of everyone, the Swedish market is shared between, on the one hand, non-profit-making associations whose purpose is the advancement of socially beneficial objectives in Sweden, which have been granted special licences under Paragraph 15 of the Lotterilagen, and, on the other, two operators which are either State-owned or mainly State-controlled, namely, the State-owned gaming company AB Svenska Spel and AB Trav och Galopp, which is jointly owned by the State and the equestrian sports organisations,

which hold special licences under Paragraph 45 of the Lotterilagen.

16. The Swedish Government has provided the following additional information.

17. With regard to internet sports betting and poker, these may be organised only with a special licence issued under Paragraph 45 of the Lotterilagen. Only AB Svenska Spel and AB Trav och Galopp were therefore eligible to be authorised to organise those forms of gambling. At the material time, no licences for internet poker games had been issued. It was only in November 2005 that AB Svenska Spel was granted such a licence for a two-year period.

18. The conditions applicable to the licence include requirements relating to the social responsibility taken on, to the protection of consumers, in particular minors, and to the limits on winnings paid out so as to counter gambling dependence and prevent crime. The licences also impose restrictions on operators as regards arrangements for marketing their games.

19. Under Paragraph 48 of the Lotterilagen, a public authority, the Lotteriinspektionen (Inspectorate of Lotteries), is the central body responsible for monitoring compliance with the Lotterilagen. Moreover, the Lotteriinspektionen has been authorised, on the basis of the Lotterilagen, to draw up the regulations relating to the monitoring and internal rules necessary for the various games. It also exercises supervision over AB Svenska Spel's activity and carries out inspections and regular checks.

20. In addition, the State exercises control over AB Svenska Spel, in its capacity as a shareholder, by giving it directives. Under those directives, that company must have a responsible attitude in the marketing of its games, which also implies a social mission, with the objective of not appearing too aggressive.

21. Under Chapter 16, Paragraph 14, of the Criminal Code (Brottsbalken), [4] the organisation of gambling without a licence in Sweden constitutes an offence of unlawful gaming. This is punishable with a fine or imprisonment for up to two years. If the offence is deemed serious, it is punishable, as an offence of unlawful gaming under Chapter 16, Paragraph 14a, of the Brottsbalken, with imprisonment for between six months and four years.

4 — 'the Brottsbalken'.

22. In addition, under Paragraph 54(1) of the Lotterilagen, anyone who, intentionally or through gross recklessness, organises unlawful gambling or unlawfully owns certain types of slot machines is liable to a fine or to a prison sentence of up to six months.

23. Since the Lotterilagen applies only in Sweden, the prohibition on organising gambling without a licence does not apply to games organised abroad. Nor does that prohibition apply to games offered on the internet to Swedish consumers from another Member State and the Lotterilagen does not prohibit Swedish gamblers from participating in foreign gambling. Similarly, a licence granted under the Lotterilagen creates on the part of its holder a right to offer gaming services only within the territorial scope of the Lotterilagen, that is to say, in Sweden.

B – *The prohibition on the promotion of gambling*

24. Under Paragraph 38(1)(1) of the Lotterilagen, it is not permitted, without express consent, in commercial operations or otherwise for the purpose of profit, to promote participation in unlicensed gambling organised in Sweden or in gambling organised abroad.

25. Paragraph 54(2) of the Lotterilagen provides that a fine or a maximum of six months' imprisonment may be imposed on persons who, in commercial operations or otherwise for the purpose of profit, illegally promote participation in gambling organised abroad, if the promotion specifically relates to participation from Sweden.

26. The national court points out that that provision was introduced through a legislative amendment which came into force on 1 January 1999. The court states that the former legislation on lotteries [5] imposed criminal penalties for the promotion of gambling, whether organised in Sweden or abroad. When the Lotterilagen was introduced, promotion was decriminalised because of the small number of offences and because, in many cases, an administrative penalty was sufficient to achieve the desired result.

27. The promotion of gambling organised abroad again became subject to criminal penalty because the administrative penalties proved not to be sufficiently effective and also because the Lotteriinspektionen is unable to

5 — SFS 1982, No 1011.

monitor foreign gaming and protect Swedish consumers.

28. According to the national court, the Swedish Government further stated that the goal of directing the profits from gaming to objectives in the public interest or of a socially beneficial nature could not continue to be pursued if organisers abroad were allowed access to the Swedish market and considerable amounts of profits risked being taken out of the territory of the Kingdom of Sweden.

II – The facts, the main proceedings and the questions referred

29. Mr Sjöberg and Mr Gerdin were the editors-in-chief and publishers of, respectively, the *Expressen* and *Aftonbladet* newspapers. Between November 2003 and August 2004, they published on the sports pages of their newspapers, aimed at the Swedish public, advertisements for lotteries offered on the internet sites of the companies Expekt, Unibet, Ladbrokes and Centrebet, established in other Member States. According to the Swedish Government, those companies are established in Malta or in the United Kingdom.

30. The Åklagaren (Public Prosecutor's Office) took proceedings against Mr Sjöberg and Mr Gerdin under Paragraph 54(2) of the Lotterilagen for promoting intentionally, in an unlawful manner and for profit, participation in games of chance organised abroad. The Stockholms tingsrätt (District Court, Stockholm) imposed a total of 50 daily fines of SEK 1 000 on each of them for offences under the Lotterilagen.

31. Mr Sjöberg and Mr Gerdin appealed to the Svea hovrätt (Court of Appeal, Stockholm) (Sweden), which initially refused to grant leave to appeal in both cases. They challenged that refusal before the Högsta domstolen (Supreme Court), which granted leave to appeal and referred the case back to the Svea hovrätt.

32. The Högsta domstolen based that decision on the principal ground that '[i]t is unclear whether the provisions on fines in the Lotterilagen provide a basis for a non-discriminatory application with regard to promotion of participation in, on the one hand, lotteries organised without a licence in Sweden and, on the other, lotteries organised abroad. … In all the circumstances, the question also arises whether the restrictions on the freedom to provide services contained in Paragraphs 38 and 54 of the Lotterilagen may be accepted because they come within the scope of the exceptions expressly provided for in the EC Treaty or whether they can be justified on the basis of overriding reasons in

the general interest and therefore be regarded as proportionate'.

33. Before the Svea hovrätt, Mr Sjöberg and Mr Gerdin maintained, firstly, that the Lotterilagen is clearly discriminatory because Paragraph 54(2) of that law refers only to the promotion of lotteries organised abroad and the promotion of gaming organised without a licence in Sweden is subject only to an administrative penalty.

34. They submitted, secondly, that the Lotterilagen is also contrary to Article 49 EC on the ground that one of its objectives, as is apparent from the *travaux préparatoires* for that legislation, is to ensure income for the State purse and non-governmental organisations. That objective therefore cannot be regarded as a mere 'incidental beneficial consequence' within the meaning of the judgment in *Gambelli and Others*. [6] In addition, in the view of Mr Sjöberg and Mr Gerdin, the gaming companies controlled by the Kingdom of Sweden are involved in intensive and quantitatively-significant marketing with a view to inciting and encouraging consumers to participate in their gaming activities, so that the Lotterilagen does not meet the objective of restricting gaming opportunities in a consistent and systematic manner, as is required by the case-law. [7]

6 — Case C-243/01 [2003] ECR I-13031, paragraph 62.
7 — Ibid., paragraph 69.

35. The Åklagaren, for its part, maintained that the Lotterilagen does not infringe the principle of non-discrimination because, firstly, Paragraph 38(1)(1) of that law prohibits without distinction the promotion of gambling organised in Sweden without a licence and the promotion of gambling organised outside Sweden and, secondly, any person who promotes participation in gambling organised in Sweden without a licence may be convicted of complicity in a crime.

36. In the light of those considerations, the Svea hovrätt decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May discrimination on grounds of nationality be accepted, under some circumstances, on national gaming and lottery markets on the basis of overriding reasons in the general interest?

(2) If there are a number of objectives pursued by the restrictive policy adopted on a national gaming and lottery market and one of them is the financing of social activities, can the latter then be said to be an incidental beneficial consequence of the restrictive policy? If this question is answered in the negative, can the restrictive policy pursued still be acceptable if the objective of financing social

activities cannot be said to be the principal objective of the restrictive policy?

(3) Can the State rely on overriding reasons in the general interest as justification for a restrictive gaming policy if State-controlled companies market gaming and lotteries, the revenue from which accrues in part to the State, and one of several objectives of that marketing is the financing of social activities? If this question is answered in the negative, can the restrictive policy pursued still be acceptable if the financing of social activities is not found to be the principal objective of the marketing?

(4) Can a total prohibition on the marketing of gaming and lotteries organised in another Member State by a gaming company established there and supervised by that Member State's authorities be proportionate to the objective of controlling and supervising gaming activity, when at the same time there are no restrictions on the marketing of gaming and lotteries organised by gaming companies established in the Member State which pursues the restrictive policy? What is the answer to the question if the objective of such an arrangement is to limit gaming?

(5) Is a gaming operator who has been granted a licence to operate certain gaming activities in a State and is supervised by the competent authority in that State entitled to market its gaming products in other Member States through, for example, advertisements in newspapers, without first applying for a licence from those States' competent authorities? If this question is answered in the affirmative, does this mean that a Member State's rules which are based on the imposition of criminal penalties on the promotion of participation in lotteries organised abroad constitute an obstacle to the freedom of establishment and the freedom to provide services which can never be accepted on the basis of overriding reasons in the general interest? Is it of any significance for the answer to the first question whether the Member State where the gaming operator is established invokes the same overriding reasons in the general interest as the State where the operator wishes to market its gaming activities?'

III – Analysis

37. Before examining the questions referred for a preliminary ruling by the national court, I shall argue, firstly, that the conformity of

the provisions at issue with the freedoms of movement must be examined using the yardstick of the free movement of services provided for in Article 49 EC and, secondly, set out the broad lines of the case-law concerning gambling, on the basis of which those questions must be examined.

38. On the first point, it is apparent from the information provided by the national court that the advertising of which the appellants in the cases at issue in the main proceedings are accused relates to gambling offered on the internet sites of a number of gaming providers established in other Member States. In accordance with the case-law, gambling offered by such providers on their internet sites – and so without moving – to recipients residing in a Member State, in this case the Kingdom of Sweden, fall within the scope of freedom to provide services. [8]

39. Subsequently, the Court accepted that an economic operator acting as an intermediary for a gaming provider established in another Member State may rely, as against its State, in connection with that activity as an intermediary, on the provisions of Article 49 EC. [9] The same analysis may also be applied to providers of advertising services when they promote an economic operator established in another Member State in order to enable that operator to develop its activity in their State.

40. In addition, the relevant provisions of the Lotterilagen, that is to say, those of Paragraph 38, which prohibit the promotion in Sweden of gambling organised in that Member State without a licence and in other Member States, and those of Paragraph 54(2), which impose criminal penalties for the promotion in Sweden of gambling organised abroad, have the purpose and effect of restricting the participation of Swedish consumers in such gambling. They are designed to ensure that Swedish consumers indulge in gambling only within the framework of the authorised national system. Those provisions therefore constitute, so far as concerns gambling providers established in other Member States, a restriction on the freedom to provide their services in Sweden.

41. On the second point, it is not disputed that gambling is not an ordinary economic activity.

42. In accordance with settled case-law, in the absence of any Community harmonisation in this field, Member States may restrict the organisation and operation of this activity within their territory in order to preserve public order against the risks of fraud and crime and consumers against excessive

8 — See, inter alia, *Gambelli and Others*, cited above, paragraph 54.

9 — Ibid., paragraph 58. See also Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 27.

incitement to gamble. [10] They may also, for moral, religious or cultural reasons, decide that gambling should not be a source of private profit but benefit exclusively public interest causes. [11]

43. It is important, however, in order for the restrictions on freedoms of movement adopted by a Member State for that purpose to be in conformity with Community law, that they are non-discriminatory. [12] They must also be appropriate for ensuring attainment of the objectives pursued by them and proportionate. [13]

44. As regards the latter requirement, it is acknowledged, however, that, in the particular sphere of gambling, Member States have a wide discretion not only in determining the level of preservation of public order and consumer protection which they intend to establish within their territory, but also in the choice of the means to be used to that end. [14]

45. Within the limits of that discretion, a Member State, such as the Kingdom of Sweden, may reserve the exclusive right to operate gambling to companies owned by it or to non-profit-making entities acting under its control. A Member State can direct and control the activities of such bodies more easily than it can do so in regard to a private operator pursuing an economic interest, with the result that such a system may serve to ensure better protection for consumers against a risk of gambling addiction and more effective preservation of public order against the risks of fraud and clandestine gambling. [15] It also makes it possible to use the resulting profits in full for public interest purposes. [16]

46. In *Liga Portuguesa de Futebol Profissional and Bwin International*, the Court provided the following clarifications concerning the measures which a Member State is entitled to adopt with regard to gambling activities offered on the internet by companies established in other Member States.

47. In the case which gave rise to that judgment, the Court found itself faced with the Portuguese legislation which reserves to the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Santa Casa'), a legal person in the public administrative interest, the exclusive right to operate gambling in

10 — Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 46 and the case-law cited.

11 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 60.

12 — *Schindler*, cited above, paragraph 61, and *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, paragraph 60.

13 — *Liga Portuguesa de Futebol Profissionaland and Bwin International*, paragraph 59.

14 — Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 39.

15 — See, to that effect, *Läärä and Others*, cited above, paragraphs 39 to 41, and *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, paragraph 67. See also the judgment of the EFTA Court of 14 March 2007 in *EFTA Surveillance Authority* v *Norway*, E-1/06, EFTA Court Report, p. 7, paragraph 51.

16 — *Läärä and Others*, cited above, paragraph 37.

the form of lotteries, lotto games and sports betting. That exclusive right was extended to include the operation of those games via the internet.

48. The issue was whether that monopoly could be relied on against a provider of online games established in Gibraltar, which wanted to offer internet gambling to consumers residing in Portugal. Both that provider and the Liga Portuguesa de Futebol Profissional, with which it had concluded a sponsorship agreement, were challenging the fines which had been imposed on them by Santa Casa for having infringed its operating monopoly for internet gambling.

49. The Portuguese Government and Santa Casa maintained that the main objective of the national legislation was the fight against crime, more specifically the protection of gambling consumers against fraud on the part of operators. They argued that the statutory conditions under which Santa Casa carried on its activities provided the State with sufficient guarantees that the rules for ensuring fairness in the games organised by Santa Casa would be observed. The Portuguese Government maintained that the authorities of a Member State do not have the same means of control at their disposal in relation to internet gaming providers established outside the national territory.

50. The Court began by noting that the fight against crime may constitute a legitimate ground of restriction as regards operators authorised to offer gambling and that it had accepted that the containment of gaming within a system of exclusive rights served to confine its operation within controlled channels and to prevent the risk of crime in the context of such operation.

51. It then found that, under the provisions governing the functioning of Santa Casa, the grant of an operating monopoly for internet gambling on such an operator, subject to strict control by the public authorities, served to confine the operation of gambling within controlled channels and could be regarded as appropriate for the purpose of protecting consumers against fraud. [17]

52. As to the need for such a monopoly, the Court held that, in the absence of harmonisation in the internet gambling sector, a Member State was entitled to take the view that the mere fact that an operator lawfully offers such games in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties encountered by the authorities of the Member State of establishment in

17 — *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, paragraph 67.

assessing the personal qualities and integrity of operators. [18]

53. In addition, the Court stated that, because of the lack of direct contact between consumer and operator, gambling accessible via the internet involves different and more substantial risks of fraud by operators against consumers compared with the traditional gambling markets. [19]

54. It inferred from this that, in the light of the specific features associated with the provision of gaming via the internet, the restriction at issue in that case could be regarded as justified by the objective of combating fraud and crime.

55. The following lessons can, in my view, be drawn from that judgment. Firstly, the Court held that internet gaming poses greater risks of fraud and crime than gambling offered though the traditional channels. Such risks may include, for example, that of fraudulent use of on-line means of payment or that of fixing of the results of games of chance. Because of the particular risks which it poses, internet gambling may therefore be the subject of special measures.

56. Secondly, because of the significance of those risks, the proportionality of a restriction on access to a Member State's market, based, inter alia, on the preservation of public order against the risks of fraud and crime associated with that type of gambling must be examined solely in the light of that objective.

57. It also follows that, from the time when the national arrangements prove appropriate for the purpose of effectively protecting consumers against the risks of fraud and crime posed by internet gaming, as a monopoly granted to an entity strictly controlled by the public authorities may be, a restriction, which may go as far as an outright prohibition on operators established in other Member States entering the market, whatever the statutory framework by which their activities may be controlled in their State of establishment, may comply with Community law. Furthermore, that compliance does not depend on whether or not that entity carries on its activity as an ordinary economic activity by seeking to show maximum profits and whether, where relevant, the legislation at issue is appropriate for attaining its other objectives, such as the protection of consumers against excessive incitement to gamble.

58. It is in the light of those considerations that I shall examine the questions raised by the national court as regards, firstly, the

18 — Ibid., paragraph 69.
19 — Ibid., paragraph 70.

proportionality of its rules in so far as they prohibit the advertising of internet gaming supplied by providers established in other Member States then, secondly, the conformity with freedom to provide services of the penalties laid down by those rules.

gaming by the Member State within whose territory they are established (fifth question).

60. In so far as the main proceedings concern prosecutions brought against providers of advertising services for having promoted gambling offered on the internet, I propose to construe the national court's questions as seeking to ascertain whether its domestic legislation, inasmuch as it prohibits the promotion in Sweden of gambling offered on the internet by companies established in other Member States, can be regarded as proportionate to those objectives.

A – *The proportionality of the prohibition on advertising*

61. The reply to those questions can be inferred, in my view, from the judgment in *Liga Portuguesa de Futebol Profissional and Bwin International*.

59. By its second to fifth questions referred for a preliminary ruling, the national court seeks to ascertain whether its national rules are proportionate in the light of the following circumstances: firstly, the fact that those rules, which are designed to combat crime and protect consumers, also have the objective of financing social activities and provide that the revenue from authorised gaming is to accrue directly, in part, to the State (second and third questions), secondly, the fact that gaming suppliers licensed in Sweden incite and encourage consumers to participate in gambling without any restriction on the part of the competent authorities (fourth question), and, finally, the fact that the companies whose internet gaming is the subject of the promotion at issue are licensed to supply such

62. As in the case which gave rise to that judgment, the rules at issue are designed, inter alia, to protect consumers against the risk of crime associated with gambling. Their purpose, as is apparent from their objectives, is to ensure a healthy and safe market and to take account of the risks of fraud and unlawful gaming.

63. Similarly, like the rules at issue in that case, they provide to that end for a system of exclusive rights reserved to bodies whose activities are strictly controlled by the public authorities. Thus, the Lotterilagen provides

that gambling must be operated not by companies pursuing private interests, but only by non-profit-making bodies or State-owned companies. They also establish a system of detailed inspection by an authority specifically created for that purpose.

64. With regard, more specifically, to internet gaming, the explanations of the Swedish Government show that the operation of such gaming is made subject to a system of special licenses which are issued only to companies owned by the State or mainly controlled by it.

65. We have seen that, in *Liga Portuguesa de Futebol Profissional and Bwin International*, the Court held that, in the context of such a system, a Member State, in order to protect consumers against the risks of fraud and crime, was entitled to prohibit internet gaming providers established in other Member States from offering their games to consumers residing within its territory.

66. I have also pointed out that it is apparent from that judgment that that analysis does not depend on whether the rules at issue are appropriate for the purpose of achieving their other objectives, such as the protection of consumers against excessive incitement to gamble. The Court has ruled that, in the light of the particular risks posed by internet gaming, a Member State which establishes an effective system in order to protect consumers against the risks of fraud and crime posed by such gaming is entitled to restrict its supply to persons residing within its territory by providers established in other Member States.

67. The grounds on which the Court based that ruling apply *a fortiori* to a measure less restrictive than an outright prohibition of activity, such as the prohibition on promoting internet gaming organised by companies established in other Member States.

68. The particular risks of fraud and crime posed by internet gaming, since they allow a Member State to prohibit operators established in other Member States from entering its market on the ground that it cannot itself check the integrity of those providers, also justify its prohibiting the promotion to consumers residing in its territory of gaming offered by those providers, in order to channel those consumers towards bodies which are subject to its control.

69. Admittedly, as is apparent from the explanations given by the Swedish Government at the hearing, the Swedish legislation does not prohibit foreign newspapers sold in Sweden from advertising foreign internet gaming. Nor does it oblige foreign operators

to make their internet sites inaccessible to consumers residing in Sweden.

70. Nevertheless, those circumstances cannot call into question the consistency of the Swedish arrangements or their appropriateness for the purpose of achieving the objective pursued, which is to protect consumers against the risks of fraud and crime associated with internet gaming. The measures adopted, despite those limits, do have the effect of restricting access by consumers residing in Sweden to such gaming. Furthermore, the Swedish Government explained clearly that it was carrying out an evaluation of those measures, in particular as regards the impact of internet poker offered by companies licensed in Sweden.

71. The system thus developed falls within the scope of a State's own assessment and approach which are in keeping with its wide discretion. To decide otherwise amounts to obliging Member States to adopt an all-or-nothing policy.

72. In the light of the case-law cited above, the prohibition resulting from Paragraph 38 of the Lotterilagen on advertising internet gaming offered by companies established in other Member States may therefore be regarded as justified by the objective of combating fraud and crime, irrespective of whether those rules are in fact proportionate to their other objectives relating to the protection of consumers against excessive incitement to gamble and to the allocation of the revenue from gambling to the financing of public interest causes.

73. I therefore propose that the answer to the second to fifth questions referred by the national court should be that Article 49 EC must be interpreted as not precluding a Member State's rules reserving the right to operate gambling to licensed operators carrying on their activity under the strict control of the public authorities for the purpose of protecting consumers against the risks of fraud and crime, which prohibit the advertising of internet gaming offered by companies established in other Member States.

B – *The conformity of the criminal penalties*

74. By its first question referred for a preliminary ruling, the national court asks, in essence, whether Article 49 EC must be interpreted as meaning that it precludes a Member State's legislation making gambling subject to a system of exclusive rights for the purpose of combating crime and protecting consumers, under which anyone who promotes participation in internet gaming organised by companies established in other Member States is

subject to criminal penalties whereas anyone who promotes participation in such gaming organised within the national territory without a licence does not incur such penalties.

75. In accordance with settled case-law, although a Member State is entitled to restrict activities associated with gambling within its territory, the measures which it adopts for that purpose must not be discriminatory, even if they are based on the preservation of public order.[20] That condition applies with the same strictness as regards measures intended to protect consumers against the particular risks posed by internet gaming.

76. It is not disputed that Paragraph 38(1) of the Lotterilagen prohibits without distinction the promotion of gambling organised abroad and the promotion of gambling organised in Sweden without a licence. On the other hand, the question does arise with regard to the penalties prescribed for infringements of that prohibition.

77. Thus, whereas Paragraph 54(2) of the Lotterilagen imposes penalties of a fine and imprisonment for up to six months on persons who advertise gaming organised abroad, those who advertise gaming organised in Sweden without a licence do not incur any equivalent criminal penalties, but only administrative penalties.

78. The Swedish Government disputes that interpretation of its domestic law. It argues that, in the case of promotion of gambling organised in Sweden without a licence, the Lotterilagen penalises primarily the game's organiser, which it cannot do in regard to gaming organised abroad. Nevertheless, in that government's view, a person who promotes gambling organised in Sweden without a licence can be the subject of criminal proceedings under Paragraph 54(1) of the Lotterilagen and Chapter 23, Paragraph 4 of the Brottsbalken, for complicity in a crime and that person incurs penalties equivalent to or even greater than those provided for in Paragraph 54(2) of the Lotterilagen.

79. Whether the interpretation of domestic law argued for by the Swedish Government is valid is exclusively for the national court to assess. It is for that court to assess whether, in the light of all of the provisions of its domestic law, the conditions under which a person who promotes internet gaming organised without a licence by a company established in Sweden may be prosecuted and the penalties incurred by that person are equivalent to those which

20 — *Schindler*, cited above, paragraph 61, and *Liga Portuguesa de Futebol Profissional and Bwin International*, cited above, paragraph 60.

apply in relation to a person who advertises such gaming organised by companies established in other Member States.

80. If so, the national court should also, in my view, satisfy itself that those two offences are in fact prosecuted by the competent authorities with the same diligence.

81. If that review leads to the conclusion that both offences at issue receive equivalent treatment, the national arrangements are clearly not discriminatory, even though the provisions justifying prosecutions and laying down the applicable penalties are contained in different enactments. It is necessary, for the purposes of that assessment, to take into account all of the provisions of national law and to focus on their practical effects on persons who commit either of the offences at issue.

82. On the other hand, if that review confirms the national court's premise that persons promoting internet gaming organised in Sweden without a licence incur only administrative fines, the inevitable conclusion will be that the national law at issue contains discrimination which renders the provisions of Paragraph 54(2) of the Lotterilagen contrary to Article 49 EC and, consequently, unenforceable against the persons being prosecuted in the main proceedings, in accordance with the judgment in *Simmenthal*.[21]

83. If that premise is confirmed, the national legislation concerned contains a difference in treatment of comparable situations, to the detriment of companies established in other Member States.

84. Consequently, as regards the difference in treatment, it is clearly apparent, firstly, from the fact that a criminal fine, by its very nature and afflictive purpose, is, in principle, more punitive in character than an administrative penalty, even if the amount of the latter is identical. Secondly, and above all, it stems from the fact that Paragraph 54(2) of the Lotterilagen also imposes a penalty of imprisonment for up to six months, or even two years in the most serious cases.

85. In addition, even though, in the two cases referred to in Paragraph 38 of the Lotterilagen, the persons prosecuted may be advertising agents carrying on their activity in Sweden, Paragraph 54(2) of the Lotterilagen,

21 — Case 106/77 [1978] ECR 629, paragraph 24.

by referring only to the promotion of gaming organised abroad, affects more those gaming companies which are established in other Member States. That provision can therefore be equated to indirect discrimination on grounds of nationality.

86. Finally, it is not apparent from the material in the file, and the Swedish Government has not sought to demonstrate, that the two categories of offence in question display significant differences, in terms of the disruption caused by them or the conditions under which they may be found to have been committed, capable of justifying such a difference in treatment.

87. Thus, internet gaming organised by a company established in another Member State does not necessarily or in general pose greater risks of fraud and crime to the detriment of consumers than gaming organised clandestinely by a company established within the national territory. The fact that the State in question does not have any direct means of action and control available to it in relation to companies established in other Member States does not seem to me to be capable of invalidating that analysis.

88. Furthermore, in so far as the promotion referred to in Paragraph 38 of the Lotterilagen is carried out, in both cases, in Sweden by providers established in that Member State, I do not see in what respect the investigations necessary for the discovery of the perpetrators would involve a greater degree of complexity in the case of foreign gaming, capable of justifying, with a view to deterrence, more severe penalties.

89. I therefore propose that the Court should rule that Article 49 EC precludes a Member State's rules which make gambling subject to a system of exclusive rights for the purpose of combating crime and protecting consumers, under which anyone who promotes participation in internet gaming organised by a company established in another Member State is liable to criminal penalties whereas anyone who promotes participation in such gaming organised within the national territory without a licence does not incur such penalties.

IV – Conclusion

90. In the light of the foregoing considerations, I propose that the Court should rule as follows:

'(1) Article 49 EC must be interpreted as not precluding a Member State's rules reserving the right to operate gambling to licensed operators carrying on their activity under the strict control of the public authorities for the purpose of protecting consumers against the risks of fraud and crime, which prohibit the advertising of internet gaming offered by companies established in other Member States.

(2) Article 49 EC precludes a Member State's rules which make gambling subject to a system of exclusive rights, under which anyone who promotes participation in internet gaming organised by a company established in another Member State is liable to criminal penalties whereas anyone who promotes participation in such gaming organised within the national territory without a licence does not incur such penalties.'