JUDGMENT OF THE COURT (Fourth Chamber)

15 September 2011 *

In Case C-347/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bezirksgericht Linz (Austria), made by decision of 10 April 2009, received at the Court on 31 August 2009, in the criminal proceedings against

Jochen Dickinger,

Franz Ömer,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

* Language of the case: German.

having regard to the written proceedings and further to the hearing on 27 January 2011,

after considering the observations submitted on behalf of:

— Mr Dickinger and Mr Ömer, by W. Denkmair and O. Plöckinger, Rechtsanwälte,

— the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and A. Hubert and P. Vlaemminck, avocats,

— the Greek Government, by E.-M. Mamouna, M. Tassopoulou and G. Papadaki, acting as Agents,

— the Maltese Government, by A. Buhagiar and J. Borg, acting as Agents,

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

— the European Commission, by E. Traversa and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC.

2 The reference was made in the course of criminal proceedings brought against Mr Dickinger and Mr Ömer alleging failure by bet-at-home.com Entertainment GmbH ('bet-at-home.com Entertainment'), a company incorporated under Austrian law of which they are the directors, to comply with the Austrian legislation on the operation of games of chance, more precisely the offering of casino games over the internet.

Legal context

3 The Federal Law on games of chance (Glücksspielgesetz, BGBl. 620/1989), in the version applicable in the main proceedings ('the GSpG'), provides in Paragraph 3, 'Monopoly of games of chance', that the right to organise games of chance is reserved to the Austrian State. Paragraphs 14 and 21 of the GSpG provide in parallel that the

Federal Finance Minister may grant concessions for the organisation of lotteries and the operation of casinos respectively. Since sporting bets are not regarded as gambling in the strict sense, they, with the exception of a form of totalisator betting called 'Toto', are not subject to the rules laid down by the GSpG.

4 Casino games marketed over the internet are, under Paragraph 12a of the GSpG, treated as lotteries and are consequently subject to the concession rules for lotteries rather than those for casinos. Paragraph 12a, which was inserted in the GSpG in 1997 (BGBl. I, 69/1997), contains the following definition of the term 'electronic lotteries':

'lotteries where the gaming contract is concluded via electronic media, the decision on winning or losing is centrally brought about or made available, and the player can discover the outcome immediately after taking part in the game'.

5 A concession for the organisation of lotteries may, under Paragraph 14(2) of the GSpG, be granted only to an operator which:

'1. is a capital company established in Austria,

2. has no owners (partners) who have a dominant influence and whose influence does not ensure reliability from a regulatory point of view,

3. has a supervisory board and paid-up nominal or share capital of at least EUR 109 million; the lawful origin of the funds must be shown in proper form,

4. appoints managers who, on the basis of corresponding previous training, are qualified, have the necessary characteristics and experience for running the business properly, and are not subject to any ground of exclusion under Paragraph 13 of the Trade Code (Gewerbeordnung) 1973 … and

5. may on the basis of the circumstances (in particular experience, knowledge and funds) be expected to produce the best federal tax revenue (concession levy and betting duty), and

6. in whose case the structure of any group to which the owner or owners of a qualified holding in the undertaking belong does not prevent effective supervision of the holder of the concession.'

6 A concession may, under Paragraph 14(3)(1) of the GSpG, be granted for a maximum period of 15 years.

7 The first sentence of Paragraph 14(5) of the GSpG provides that, as long as a lottery concession is in force, no other concessions may be granted.

8 If several applicants who satisfy the conditions set out in Paragraph 14(2) of the GSpG apply for a concession, the Federal Finance Minister is required, under the second sentence of Paragraph 14(2), to decide on the basis of the criterion in Paragraph 14(2)

(5), in other words to award the contract to the operator who may be expected to produce the best federal tax revenue.

9 Under Paragraph 15(1) of the GSpG, the holder of the concession is not allowed to set up branches outside Austria. Moreover, the acquisition of qualified holdings in other companies by the holder of the concession requires the authorisation of the Federal Finance Minister. Under Article 15a of the GSpG, such authorisation is also required for the expansion of the holder's business, and may be granted only if no reduction of federal revenue from the concession levy or betting duty is to be expected.

10 Paragraph 16 of the GSpG requires the holder of the concession to establish conditions for playing the games of chance whose organisation he is entrusted with. Those conditions, which must be approved by the Federal Finance Minister, are to be published in the *Amtsblatt zur Wiener Zeitung* and displayed for consultation in the business premises and sales points of the holder of the concession.

11 The holder of the concession must, in accordance with Paragraph 18(1) of the GSpG, inform the Federal Finance Minister each year of the identity of the persons holding the undertaking's share capital. Also, in accordance with Paragraph 19(1) of the GSpG, the holder is subject to the supervision of the Federal Finance Minister. The minister is entitled for that purpose inter alia to examine the accounts and other documents of the holder, and to carry out inspections on the spot or to require accountants or other experts to make inspections. The costs of supervision are to be borne by the holder of the concession and are invoiced to him annually by the Federal Finance Minister.

12 Paragraph 19(2) of the GSpG further provides for the Federal Finance Minister to appoint a State commissioner (Staatskommissär) who is entitled under Paragraph 26 of the Law on credit (Kreditwesengesetz, BGBl. 63/1979) to attend general meetings and board meetings of the holder of the concession. The State commissioner must be either an employee of a local authority or a lawyer or accountant, and he is subject to the directions of the Federal Finance Minister and may be removed from office at any time. The task of the State commissioner is in particular to oppose any decision of the company which he considers to be unlawful. Such opposition has the consequence of suspending the effects of the decision until a decision is made by the competent authorities.

13 Under Paragraph 19(3) of the GSpG, the Federal Finance Minister and the Federal Sport Organisation each have the right to nominate a member of the supervisory board of the holder of the concession.

14 Paragraph 19(4) of the GSpG requires the holder of the concession to submit the balance sheet, the annual report and the consolidated balance sheet of the group, as well as the auditors' reports on those documents, to the Federal Finance Minister within six months from the end of each financial year.

15 Paragraphs 17 and 20 of the GSpG concern the appropriation of income from games of chance. Paragraph 17(3)(6) fixes the concession levy on electronic lotteries at 24 % of gross annual income less winnings distributed. Paragraph 20 provides that 3 % of the income of lotteries, which must be not less than EUR 40 million, is assigned to the development of sport.

16 Paragraphs 21 to 31 of the GSpG contain similar provisions governing the grant of 12 concessions for the operation of casinos, supervision of the holders of concessions, and the operation of casino games.

17 The organisation of games of chance for commercial purposes by a person who does not hold a concession is a criminal offence in Austria. In accordance with Paragraph 168(1) of the Austrian Criminal Code (Strafgesetzbuch, 'the StGB'), 'any person who organises a game in which winning and losing depend exclusively or predominantly on chance or which is expressly prohibited, or who promotes a meeting organised with a view to such a game taking place, in order to obtain a pecuniary advantage for himself or another person from that organisation or meeting' commits an offence. The penalties are imprisonment for up to six months or a fine of up to 360 daily rates.

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

18 Österreichische Lotterien GmbH ('Österreichische Lotterien') is a limited liability company governed by private law. By decision of the Federal Finance Minister of 16 March 1995, it was granted the sole concession for the organisation of lotteries in Austria for the period from 1 December 1994 to 31 December 2004. After the establishment of 'electronic lotteries' by the insertion of Paragraph 12a into the GSpG in 1997, that company's concession was expanded to include lotteries of that kind and extended to 2012, by decision of the Federal Finance Minister of 2 October 1997. The duration of the concession was defined, having regard to the maximum of 15 years authorised by the law, as 1 October 1997 to 30 September 2012.

19 The majority shareholder in Österreichische Lotterien is Casinos Austria AG ('Casinos Austria'), a share company governed by private law which holds the 12 conces-

sions for casinos provided for by the GSpG (see Case C-64/08 *Engelmann* [2010] ECR I-8219, paragraphs 13 to 15). At the material time for the main proceedings, one third of the shares in the capital of Casinos Austria were held indirectly by the State and the remainder by private investors.

20 Mr Dickinger and Mr Ömer, who are Austrian nationals, are the founders of the multinational on-line games group bet-at-home.com. The group's parent company is bet-at-home.com AG, a company governed by German law and established in Düsseldorf (Germany).

21 The Austrian company bet-at-home.com Entertainment, established in Linz (Austria), operating in the field of 'automatic data processing and information technology services', is one of the subsidiaries of bet-at-home.com AG. Mr Dickinger and Mr Ömer are the directors of bet-at-home.com Entertainment. That company has an Austrian licence to offer sporting bets.

22 Bet-at-home.com Entertainment owns, as a subsidiary, the company governed by Maltese law bet-at-home.com Holding Ltd, which in turn has three subsidiaries, the Maltese companies bet-at-home.com Internet Ltd, bet-at-home.com Entertainment Ltd and bet-at-home.com Internationale Ltd (referred to together as 'the Maltese subsidiaries').

23 Two of the Maltese subsidiaries offer games of chance and sporting bets on the internet at the website www.bet-at-home.com. They hold a valid Maltese 'Class One Remote Gaming License' for online games of chance and a valid Maltese 'Class Two Remote Gaming License' for online sporting bets. The website is accessible in Span-

ish, German, Greek, English, Italian, Hungarian, Dutch, Polish, Slovene, Russian and Turkish, but not in Maltese. The games offered on that site include casino games such as poker, blackjack, baccarat and roulette and games on virtual one-armed bandits. All these games can be played for unlimited stakes.

24 The www.bet-at-home.com website is operated exclusively by the Maltese subsidiaries, which organise the games in question and hold licences for the software needed for operating the games platform.

25 The Maltese subsidiaries used, until December 2007 at least, a server in Linz made available to them by bet-at-home Entertainment, which also maintained the website and the software needed for the games and provided customer support.

26 Criminal proceedings were brought against Mr Dickinger and Mr Ömer in their capacity as directors of bet-at-home Entertainment, alleging infringements of Paragraph 168(1) of the StGB. The indictment is worded as follows:

'[Mr] Dickinger and [Mr] Omer, as decision-makers of [bet-at-home-com Entertainment], have from 1 January 2006 to date committed the offence of gaming under Paragraph 168(1) of the StGB for the benefit of [bet-at-home-com Entertainment] by offering over the internet, for unlimited stakes, games in which winning and losing depend exclusively or predominantly on chance or which are expressly prohibited, namely various kinds of poker (Texas Hold'Em, Seven Card Stud, etc), blackjack, baccarat, table games such as roulette and virtual "one-armed bandits", in order to obtain a pecuniary advantage for themselves or another person, in particular [bet-at-home-com Entertainment].'

27 Mr Dickinger and Mr Ömer pleaded that the national legislation applicable to games of chance was unlawful from the point of view of Articles 43 EC and 49 EC.

28 The Bezirksgericht Linz (District Court, Linz) is uncertain whether the provisions of the StGB, read in conjunction with the Austrian rules on games of chance at issue in the main proceedings, are compatible with European Union law, in view in particular of what it describes as Casinos Austria's 'intensive advertising' of the games of chance offered by it.

29 In those circumstances, the Bezirksgericht Linz decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Are Articles 43 EC and 49 EC to be interpreted as in principle precluding legislation of a Member State, such as Paragraph 3 in conjunction with Paragraph 14 et seq. and Paragraph 21 of the [GSpG], under which

— a concession for lotteries (e.g. lotteries, electronic lotteries, etc.) may be granted only to a single applicant for a period of up to 15 years, and the applicant must inter alia be a capital company established in Austria, must not set up branches outside Austria, must have a paid-up nominal or share capital of at least EUR 109 000 000, and may in the circumstances be expected to achieve the best yield in terms of federal taxation;

— a concession for casinos may be granted to no more than 12 applicants for a period of up to 15 years, and an applicant must inter alia be a share company established in Austria, must not set up branches outside Austria, must have a paid-up share capital of EUR 22 000 000, and may in the circumstances be expected to achieve the best yield in terms of taxation for the local authorities?

These questions arise particularly against the background that [Casinos Austria] holds all 12 casino concessions, which were granted on 18 December 1991 for the maximum period of 15 years and have since been extended without a public tendering procedure or notice.

(b) If so, can such legislation be justified for reasons in the public interest in a restriction of betting activities even if the holders of concessions in a quasi-monopoly structure for their part pursue an expansionist policy in the field of games of chance by means of an intensive advertising effort?

(c) If so, must the referring court, when examining the proportionality of such legislation, which aims to prevent criminal offences by monitoring the economic operators active in this sector and thereby steering gaming activities into channels subject to such monitoring, take account of the fact that the legislation also covers cross-border service providers who are subject in any event in the Member State of establishment to the strict obligations and checks associated with their concessions?

2. Are the fundamental freedoms of the EC Treaty, in particular the freedom to provide services under Article 49 EC, to be interpreted as meaning that, irrespective of the fact that the Member States in principle remain competent for the regulation of criminal law, a provision of a Member State's criminal law is nevertheless to be measured against Community law if it is liable to prohibit or obstruct the exercise of one of the fundamental freedoms?

3. (a) Is Article 49 EC in conjunction with Article 10 EC to be interpreted as meaning that the checks carried out in a service provider's State of establishment, and the safeguards provided there, must be taken into account in the State in which the services are provided, on the basis of the principle of mutual trust?

   (b) If so, is Article 49 EC to be interpreted further as meaning that, where the freedom to provide services is restricted for reasons in the public interest, consideration must be given to whether sufficient account is not already taken of this public interest by the legal provisions, checks and investigations to which the service provider is subject in the State in which he is established?

   (c) If so, when examining the proportionality of a provision of a Member State imposing penalties for the cross-border provision of gaming services without a licence granted in that State, must consideration be given to the fact that the regulatory interests on which the State in which the services are provided relies in order to justify the restriction of the fundamental freedom are already sufficiently taken into account in the State of establishment by a strict authorisation and supervision procedure?

(d) If so, must the referring court take account, in the context of its examination of the proportionality of such a restriction, of the fact that the relevant provisions of the State in which the service provider is established provide for a degree of control which actually exceeds that of the State in which the services are provided?

(e) Does the principle of proportionality, in the case of a prohibition on pain of criminal penalties of games of chance that is imposed for regulatory reasons such as the protection of gamblers and the fight against crime, further require the referring court to draw a distinction between providers who offer games of chance without any authorisation whatsoever and those who are established and hold concessions in other Member States of the European Union and conduct their activities in the exercise of their freedom to provide services?

(f) In the examination of the proportionality of a provision of a Member State prohibiting on pain of criminal penalties the cross-border provision of gaming services without a concession or authorisation granted in that State, must account be taken, finally, of the fact that, as a result of objective, indirectly discriminatory barriers to access, it was not possible for a provider of games of chance duly licensed in another Member State to obtain a licence in the first Member State, and the licensing and supervisory procedure in the State of establishment offers a level of protection that is at least comparable to that of the first Member State?

4. (a) Is Article 49 EC to be interpreted as meaning that the temporary nature of the provision of services precludes the service provider from equipping himself with a certain infrastructure (such as a server) in the host Member State without being regarded as established in that Member State?

(b) Is Article 49 EC to be interpreted further as meaning that a prohibition directed at support service providers within a Member State of facilitating the provision of services by a provider established in another Member State constitutes a restriction of that service provider's freedom to provide services even if the support service providers are established in the same Member State as some of the recipients of the service?'

Consideration of the questions referred

Question 2

30 By its second question, which should be considered first, the referring court asks essentially whether legislation of a Member State providing for criminal penalties for persons infringing a monopoly of operating games of chance, such as the monopoly laid down by the national legislation at issue in the main proceedings, must be compatible with the fundamental freedoms guaranteed by the Treaty, and in particular with Article 49 EC.

31 As the Advocate General observes in points 45 to 50 of his Opinion, it is settled case-law of the Court that European Union law sets certain limits to the powers of Member States in criminal matters, since criminal legislation may not restrict the fundamental freedoms guaranteed by European Union law (see, to that effect, Case 186/87 *Cowan* [1989] ECR 195, paragraph 19, and Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 17).

32 The answer to Question 2 is therefore that European Union law, in particular Article 49 EC, precludes the imposition of criminal penalties for infringing a monopoly of operating games of chance, such as the monopoly of operating internet casino games laid down by the national legislation at issue in the main proceedings, if such legislation is not compatible with European Union law.

Question 4

33 By its fourth question, which should be considered next, the referring court seeks to determine which fundamental freedoms apply to the restrictions imposed on the Maltese subsidiaries by the national legislation at issue in the main proceedings. It asks essentially whether Article 49 EC must be interpreted as applying to gaming services marketed over the internet in the territory of a host Member State by an operator established in another Member State despite the fact that the operator:

— has set up certain computer support infrastructure, such as a server, in the host Member State, which could entail the application of the provisions on freedom of establishment, and

— makes use of support services of a provider established in the host Member State in order to provide his services to consumers in that Member State, which could have the consequence that Article 49 EC is not applicable.

34 As the Advocate General observes in points 57 to 62 of his Opinion, the mere fact that a provider of games of chance marketed over the internet makes use of material

means of communication supplied by another undertaking established in the host Member State is not in itself capable of showing that the provider has, in that Member State, a fixed establishment similar to an agency, which would have the consequence that the Treaty provisions on freedom of establishment would apply.

35 According to the Court's case-law, for there to be establishment within the meaning of the Treaty, a commercial relationship entered into by an operator established in a Member State with operators or intermediaries established in the host Member State must make it possible for the operator to participate, on a stable and continuous basis, in the economic life of the host Member State, and must thus be such as to enable customers to take advantage of the services offered through a permanent presence in the host Member State, which may be done by means merely of an office managed by a person who is independent but authorised to act on a permanent basis for the operator, as would be the case with an agency (see, to that effect, Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraphs 59 and 60).

36 It is common ground that, far from being authorised to act on a permanent basis for the Maltese subsidiaries in the market for games of chance in Austria, bet-at-home.com Entertainment does not intervene in the relationship between those subsidiaries and their customers. The internet platform www.bet-at-home.com is operated exclusively by the Maltese subsidiaries, which are responsible for arranging the games and with which the customers conclude the corresponding contracts. In those circumstances, the computer support services supplied by bet-at-home.com Entertainment could be entrusted to another operator established in another Member State without Austrian consumers even noticing.

37 It follows, moreover, from the Court's case-law that Article 49 EC applies to an operator of games of chance established in one Member State who offers his services in

another Member State, even if he makes use for that purpose of intermediaries established in the same Member State as the recipients of those services (Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 58). That article applies *a fortiori* where the operator of games of chance makes use not of intermediaries but of a mere provider of computer support services in the host Member State.

38 The answer to Question 4 is therefore that Article 49 EC must be interpreted as applying to services of games of chance marketed over the internet in the territory of a host Member State by an operator established in another Member State despite the fact that the operator:

— has set up certain computer support infrastructure, such as a server, in the host Member State and

— makes use of computer support services of a provider established in the host Member State in order to provide his services to consumers who are likewise established in that Member State.

Questions 1 and 3

39 The first and third questions, which should be considered together, relate to the conditions under which Article 49 EC allows a monopoly of the organisation of casino games marketed over the internet to be set up for the benefit of a single operator, such as that at issue in the main proceedings.

40 To give a proper answer to those questions, first, the conditions should be recalled under which Article 49 EC allows a monopoly of games of chance, such as that at issue in the main proceedings, to be established. Secondly, it must be ascertained to what extent the pursuit of an expansionist commercial policy by the entity enjoying the monopoly of games of chance may be consistent with the aims pursued by the monopoly system. Thirdly, the referring court should be provided with guidance on the compatibility with Article 49 EC of a series of specific restrictions imposed by national legislation on the holder of the monopoly, concerning its legal form, the amount of its share capital, the location of its registered office and the possibility of setting up branches in other Member States. Finally, the Court will consider the relevance for the examination of the proportionality of restrictive measures imposed by a Member State seeking to regulate games of chance, pursuing one or more aims recognised by the Court's case-law, of checks on operators of games of chance carried out in other Member States and the guarantees provided there.

41 It is common ground that legislation of a Member State such as that at issue in the main proceedings under which exclusive rights to organise and promote games of chance are conferred on a single operator, and whereby all other operators, including operators established in another Member State, are prohibited from offering over the internet services falling within the scope of that regime in the territory of the first Member State, constitutes a restriction on the freedom to provide services guaranteed by Article 49 EC (see, to that effect, Case C-203/08 *Sporting Exchange* [2010] ECR I-4695, paragraphs 22 and 24 and the case-law cited).

42 However, such a restriction of the freedom to provide services may be allowed as a derogation expressly provided for in Articles 45 EC and 46 EC, applicable in this area by virtue of Article 55 EC, or justified in accordance with the case-law of the Court by overriding reasons in the public interest (Case C-42/07 *Liga Portuguesa de Futebol*

Profissional and Bwin International [2009] ECR I-7633, paragraphs 55 and 56, and Case C-212/08 *Zeturf* [2011] ECR I-5633, paragraph 37).

43 It should be emphasised at the outset, in the context of the case at issue in the main proceedings, that, where a monopoly system has been established in a Member State for games of chance and that system is incompatible with Article 49 EC, an infringement by an economic operator cannot be penalised by criminal penalties (Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 63 and 69).

The conditions for establishing a monopoly of games of chance

44 As regards the justifications which may be accepted, the Court has observed that the objectives pursued by national legislation adopted in the area of betting and gaming, considered as a whole, usually concern the protection of the recipients of the services in question and of consumers more generally, and the protection of society. It has also found that such objectives are among the overriding reasons in the public interest which are capable of justifying obstacles to the freedom to provide services (*Stoß and Others*, paragraph 74 and the case-law cited).

45 The Court has, moreover, repeatedly held that moral, religious or cultural factors, as well as the morally and financially harmful consequences for the individual and for society associated with betting and gaming, may be capable of justifying a sufficient margin of discretion for the national authorities for them to determine, in accordance with their own scale of values, what is required in order to ensure consumer protection and the protection of society (*Stoß and Others*, paragraph 76 and the case-law cited).

46 The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 58).

47 The Member States are therefore in principle free to set the objectives of their policy on games of chance and, where appropriate, to define in detail the level of protection sought (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

48 A Member State seeking to ensure a particularly high level of protection may consequently, as the Court has acknowledged in its case-law, be entitled to take the view that it is only by granting exclusive rights to a single entity which is subject to strict control by the public authorities that it can tackle the risks connected with the gambling sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness (see, to that effect, *Stoß and Others*, paragraphs 81 and 83, and *Zeturf*, paragraph 41).

49 The public authorities of a Member State may legitimately consider that the fact that, in their capacity as overseers of the entity holding the monopoly, they will have additional means of influencing its conduct outside the statutory regulating and monitoring mechanisms is likely to secure for them a better command over the supply of games of chance and better guarantees that their policy will be implemented effectively than in the case where those activities are carried on by private operators in a situation of competition, even if the latter are subject to a system of authorisation and a regime of supervision and penalties (*Stoß and Others*, paragraph 82).

50 The fact remains, however, that the restrictions imposed by the Member States must satisfy the conditions laid down in the Court's case-law as regards their proportionality, a matter which it is for the national courts to determine (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 59 and 60, and *Stoß and Others*, paragraphs 77 and 78).

51 It must be noted that the question of which objectives are in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the referring court.

52 According to the Austrian Government, the legislation at issue in the main proceedings pursues, first, the objective of fighting crime, in particular by protecting consumers of games of chance against fraud and other offences, and, secondly, the objective of preventing incitement to squander money on gambling by taking appropriate measures to protect gamblers, such as setting mandatory limits on stakes, and thus contributes to the protection of society in general.

53 Mr Dickinger and Mr Ömer and the Maltese Government submit, on the other hand, that it follows from the express wording of the GSpG that its principal objective is to increase the tax revenue generated by games of chance. They observe specifically that under Paragraph 14(5) of the GSpG the concession is to be attributed systematically to the operator who may be expected to produce the best federal tax revenue. Moreover, any territorial or material extension of the concession holder's business requires authorisation by the Federal Finance Minister, which may be granted only if no reduction of federal revenue is to be expected.

54 It is for the referring court to ascertain that the national authorities really did intend at the material time to ensure a particularly high level of protection with regard to the objectives relied on, and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary (*Zeturf*, paragraph 47). In this connection, it is the Member State wishing to rely on an objective capable of justifying the restriction of the freedom to provide services which must supply the court called on to rule on that question with all the evidence of such a kind as to enable the court to be satisfied that the measure does indeed comply with the requirements deriving from the principle of proportionality (*Stoß and Others*, paragraph 71).

55 The objective of maximising public revenue alone cannot permit such a restriction of the freedom to provide services.

56 It should be recalled in this connection, in particular, that national legislation is appropriate for ensuring attainment of the objective relied on only if it genuinely reflects a concern to attain it in a consistent and systematic manner. It is therefore for the referring court to satisfy itself, having regard inter alia to the actual rules for applying the restrictive legislation concerned, that the legislation genuinely meets the concern to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner (see, to that effect, *Stoß and Others*, paragraphs 88, 97 and 98).

57 The referring court will therefore have to ascertain, in the light inter alia of the development of the market for games of chance in Austria, whether the State controls to which the monopoly holder's activities are subject are suitable for ensuring that the holder will in fact be able to pursue, in a consistent and systematic manner, the objectives relied on by means of a supply that is quantitatively measured and

qualitatively planned by reference to those objectives (see, to that effect, Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757, paragraph 37, and *Stoß and Others*, paragraph 83).

58 In addition, the commercial policy pursued by the holder of the monopoly is of some relevance for assessing the manner in which those objectives are pursued.

The pursuit of an expansionist commercial policy by the entity holding a monopoly of games of chance

59 The referring court expresses doubts as to whether the monopoly set up by the national legislation at issue in the main proceedings may be regarded as appropriate for ensuring realisation of the objective of preventing incitement to squander money on gambling and of fighting against addiction to gambling, in view of the expansionist commercial policy pursued by the holder of the monopoly by means of an intensive advertising effort.

60 Mr Dickinger and Mr Ömer and the Maltese Government submit that the Austrian system has permitted a constant expansion of the offer of games of chance and a continual increase in the advertising expenditure directed to new targets, young people above all, in particular in connection with the internet games platform www.win2day.at launched by Österreichische Lotterien, whose income has very considerably exceeded that of all the traditional casinos.

61 It must be observed here that an increase in the commercial activity of an operator who has been granted exclusive rights in the field of games of chance and a substantial increase in the income received from those games require particular attention in the examination of whether the legislation at issue is consistent and systematic, and hence whether it is appropriate for pursuing the objectives recognised by the Court's case-law. According to that case-law, the financing of activities in the public interest by means of income from games of chance must not be the real aim of a restrictive policy in that sector, but can only be regarded as an incidental beneficial consequence (see, inter alia, Case C-275/92 *Schindler* [1994] ECR I-1039, paragraphs 57 and 60; Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 32 and 37; Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraphs 35 and 36; and *Gambelli and Others*, paragraphs 61 and 62).

62 A Member State is not therefore entitled to rely on reasons of public policy relating to the need to reduce opportunities for gambling in so far as the public authorities of that State incite and encourage consumers to participate in games of chance so that the public purse can benefit (see, to that effect, *Gambelli and Others*, paragraph 69).

63 The Court has also held, however, that a policy of controlled expansion of gambling activities may be consistent with the objective of channelling them into controlled circuits by drawing gamblers away from clandestine, prohibited betting and gaming to activities which are authorised and regulated. Such a policy may be consistent both with the objective of preventing the use of gambling activities for criminal or fraudulent purposes and with that of preventing incitement to squander money on gambling and of combating addiction to gambling, by directing consumers towards the offer emanating from the holder of the public monopoly, that offer being deemed to be free from criminal elements and designed to safeguard consumers more effectively against squandering of money and addiction to gambling (*Stoß and Others*, paragraphs 101 and 102).

64 In order to achieve that objective of channelling into controlled circuits, the authorised operators must provide a reliable, but at the same time attractive, alternative to non-regulated activities, which may as such necessitate the offer of an extensive range of games, advertising on a certain scale, and the use of new distribution techniques (*Placanica and Others*, paragraph 55, and *Stoß and Others*, paragraph 101).

65 It is for the referring court to assess, in the light of the circumstances of the dispute pending before it, whether the commercial policy of the holder of the monopoly may be regarded, both with regard to the scale of advertising undertaken and with regard to the creation of new games, as forming part of a policy of controlled expansion in the sector of games of chance, aiming in fact to channel the propensity to gamble into controlled activities (see *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 37, and *Zeturf*, paragraph 69).

66 In the context of that assessment, it is for the referring court to ascertain in particular whether, first, criminal and fraudulent activities linked to gambling and, second, addiction to gambling could have been a problem in Austria at the material time and whether the expansion of authorised and regulated activities could have solved that problem (see, to that effect, *Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 29).

67 Since the objective of protecting consumers from addiction to gambling is in principle difficult to reconcile with a policy of expanding games of chance characterised inter alia by the creation of new games and by the advertising of those games, such a policy cannot be regarded as being consistent unless the scale of unlawful activity is significant and the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful (*Ladbrokes Betting & Gaming and Ladbrokes International*, paragraph 30).

68 In any event, any advertising by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order thus to channel consumers towards controlled gaming networks. Such advertising cannot, on the other hand, aim to encourage consumers' natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image because revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of gambling by means of enticing advertising messages holding out the prospect of major winnings (*Stoß and Others*, paragraph 103).

69 In particular, a distinction should be drawn between strategies of the holder of a monopoly which are intended solely to inform potential customers of the existence of products and serve to ensure regular access to games of chance by channelling gamblers into controlled circuits, and those which invite and encourage active participation in such games. A distinction must therefore be drawn between a restrained commercial policy seeking only to capture or retain the existing market for the organisation with the monopoly, and an expansionist commercial policy whose aim is to expand the overall market for gaming activities.

The compatibility with Article 49 EC of the specific restrictions imposed on the holder of the monopoly

70 The referring court questions the Court as to the compatibility with Article 49 EC of a number of specific restrictions imposed on the holder of the monopoly by the national legislation at issue in the main proceedings, concerning its legal form, the amount of its share capital, the location of its registered office, and the possibility of setting up branches in Member States other than that in which it is established.

71 It should be recalled to begin with, as the Advocate General notes in point 97 of his Opinion, that, as a monopoly is an unusually restrictive measure, it must aim to ensure a particularly high level of consumer protection and must be accompanied by a legislative framework suitable for ensuring that the holder of the monopoly will in fact be able to pursue, in a consistent and systematic manner, the objectives thus determined by means of a supply that is quantitatively measured and qualitatively planned by reference to those objectives and subject to strict control by the public authorities (*Stoß and Others*, paragraph 83, and *Zeturf*, paragraph 58).

72 The imposition of certain restrictions on the holder of a monopoly of games of chance is consequently, in principle, not only compatible with European Union law but required by that law. The restrictions must, however, comply with the requirements of European Union law as regards proportionality: in particular, they must be suitable for ensuring that the objectives pursued by setting up a monopoly system will be achieved and must not go beyond what is necessary for that purpose. While it is in principle for the referring court to ascertain whether that is so, the following indications may be of use to it.

— Legal form and amount of share capital of the holder of the monopoly

73 Under Paragraph 14(2)(1) and (3) of the GSpG, the holder of the monopoly of operating electronic lotteries must be a capital company and have a paid-up nominal or share capital of at least EUR 109 000 000.

74 The Austrian Government submits that the condition regarding legal form is intended to compel the holder of the monopoly to have a transparent corporate structure, so as to prevent money laundering and fraud. European Union law similarly lays down a requirement as to legal form in the field of insurance. As to the amount of share capital, the government submits that it is proportionate in view of the amount of the winnings the holder of the monopoly may have to pay out in the various games it is authorised to market over the internet, which may include a jackpot of several million euros.

75 Mr Dickinger and Mr Ömer submit that the amount of share capital required of EUR 109 000 000 is disproportionate in view of the fact that the capital required of a credit institution in Austria is only EUR 5 000 000.

76 As the Court held in *Engelmann*, paragraph 30, the requirement of a particular legal form for operators of games of chance may, by virtue of the obligations binding certain kinds of company with respect in particular to their internal organisation, the keeping of their accounts, the scrutiny to which they may be subject and their relations with third parties, be justified by the objective of preventing money laundering and fraud, relied on by the Austrian Government in the present case.

77 Similarly, the requirement for a share capital of a certain amount may prove to be of use in order to ensure a certain financial capacity on the part of the operator and to guarantee that he is in a position to meet the obligations he may contract towards winning gamblers. It must be recalled, however, that observance of the principle of proportionality requires that the restriction imposed does not go beyond what is necessary for achieving the aim pursued. It will be for the referring court to ascertain, having regard to other possible ways of ensuring that the claims of winning gamblers will be honoured by the operator, whether the requirement at issue is proportionate.

— Location of the registered office of the holder of the monopoly

78 Paragraph 14(2)(1) of the GSpG provides that the holder of the monopoly of operating lotteries must have its registered office in national territory.

79 As the Advocate General observes in point 120 of his Opinion, that requirement is a discriminatory restriction which can therefore be justified only on one of the grounds set out in Article 46 EC, namely public policy, public security or public health.

80 The Austrian Government submits that the registered office must be in national territory in order to allow effective monitoring of online gambling, and that the Austrian authorities do not have the same possibilities of supervising economic operators established in other Member States. It also submits that the presence of a State commissioner in the supervisory bodies of the holder of the monopoly, in accordance with Paragraph 19(2) of the GSpG, enables the competent national authorities to monitor effectively the decisions and management of the holder of the monopoly. Those authorities can thus be aware of those decisions before they are put into effect, and can oppose them if they conflict with the national policy objectives relating to gambling. The government submits that those authorities would not have the same possibilities with regard to an operator established in another Member State.

81 As stated in paragraph 53 above, Mr Dickinger and Mr Ömer and the Maltese Government, referring in particular to Paragraph 14(5) of the GSpG, submit that the principal objective of the legislation at issue is to increase the tax revenue generated by games of chance. While the interpretation of that provision of national law is within the jurisdiction of the referring court, it must in any event be stated that a system of awarding concessions based on the criterion of maximising public revenue, which systematically works to the disadvantage of operators established in Member States

other than the Republic of Austria simply because an operator whose registered office is in Austria will be liable to pay more tax in Austria than an operator established in another Member State, cannot be regarded as compatible with European Union law.

82 With respect more specifically to the objective of monitoring and supervising the holder of the monopoly and the Austrian Government's argument that it is necessary to ensure effective supervision of economic operators, inter alia by the presence of State commissioners, it is settled case-law that the concept of public policy, first, presumes that there is a genuine and sufficiently serious threat to a fundamental interest of society and, second, must, as a justification for a derogation from a fundamental principle of the Treaty, be narrowly construed (see, to that effect, Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 8; *Calfa*, paragraphs 21 and 23; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 59; and Case C-161/07 *Commission* v *Austria* [2008] ECR I-10671, paragraph 35 and the case-law cited).

83 It is therefore for the referring court to determine, first, whether the objectives relied on by the Austrian Government are capable of falling within that concept and, if so, secondly, whether the obligation concerning the registered office at issue in the main proceedings satisfies the criteria of necessity and proportionality laid down in the Court's case-law.

84 In particular, the referring court will have to ascertain whether there are other less restrictive means of ensuring a level of supervision of the activities of operators established in Member States other than the Republic of Austria equivalent to that which can be carried out in respect of operators whose registered office is in Austria.

— Prohibition of setting up branches in other Member States

85 In accordance with Paragraph 15(1) of the GSpG, the holder of the concession is not allowed to set up branches outside Austria.

86 In the Austrian Government's view, that prohibition does no more than give expression to the idea that it is for each Member State to regulate the operation of games of chance in its territory.

87 The freedom of each Member State to regulate the operation of games of chance in its territory does not, however, in itself constitute a legitimate objective in the public interest which could justify a restriction of the fundamental freedoms guaranteed by the Treaty.

88 Accordingly, no valid justification of the prohibition imposed on the holder of the monopoly at issue in the main proceedings of setting up branches outside Austria has been pleaded before the Court.

Taking into account the checks on operators of games of chance carried out in other Member States

89 The referring court raises the question, in the context of the main proceedings, whether checks on operators of games of chance carried out in other Member States are relevant to assessing the proportionality of the national legislature's decision to introduce a monopoly of internet casino games.

90 The wording of Question 3 suggests that the referring court is starting from the premiss that, first, the regulatory interests relied on by the host Member State, the Republic of Austria, to justify the restriction of the freedom to provide services at issue in the main proceedings are already sufficiently taken into account in the Member State of establishment, the Republic of Malta, and, second, the provisions in force in that State are even more rigorous than those applicable in the host Member State.

91 The Maltese Government states in this connection that Malta was the first State to develop a regulatory system specifically aimed at controlling and monitoring online games of chance which, while based on the same principles and objectives as the regulation of traditional channels for the distribution of those services, was designed with the objective of addressing the risks inherent in those modern modes of operation. The controls carried out in Malta go beyond, in particular, the superficial examination performed in Gibraltar in the *Liga Portuguesa de Futebol Profissional and Bwin International* case.

92 Mr Dickinger and Mr Ömer and the Maltese Government further submit that games of chance marketed over the internet can be controlled more effectively than those distributed via traditional channels because all operations performed on electronic media can be tracked, which makes it easy to detect problematic or suspicious operations. Moreover, because consumers need a bank account in order to be paid their winnings, it is possible to ensure greater transparency than with traditional channels of games.

93 They submit that the Maltese operators in the bet-at-home.com group were the subject of strict access controls involving an examination of their professional qualities and their integrity. Those operators remain subject to continued checks and monitoring by the competent Maltese regulatory authorities, in particular the Lotteries and Gaming Authority. That authority has always implemented advanced and robust

systems of regulation which include checks on the persons involved as well as the systems and processes used by the operator.

94 Mr Dickinger and Mr Ömer and the Maltese Government rely on the consistent case-law of the Court which states that it is incompatible with the freedom to provide services to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded by the rules to which the provider is subject in the Member State where he is established (see, inter alia, Case 279/80 *Webb* [1981] ECR 3305, paragraph 17; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35; and Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 38).

95 They consequently submit that, since the professional qualities and integrity of the Maltese subsidiaries are already guaranteed by the checks applied to them in Malta, it is contrary to Article 49 EC for the Austrian authorities to exclude them from the Austrian market on the purported ground of the objective of protecting gamblers against fraud on the part of operators of games of chance.

96 It must be recalled in this respect that no duty of mutual recognition of authorisations issued by the various Member States can exist in the current state of European Union law (*Stoß and Others*, paragraph 112). In the absence of harmonisation at European Union level of legislation in the sector of games of chance, and in view of the substantial differences between the objectives pursued and the levels of protection sought by the legislation of the various Member States, the mere fact that an operator lawfully offers services in one Member State, in which it is established and is in principle already subject to statutory conditions and controls on the part of the competent authorities of that State, cannot be regarded as a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in view of the difficulties

liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

97 Moreover, as noted in paragraph 46 above, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions, which must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.

98 The various Member States do not necessarily have the same technical means available for controlling online games of chance, and do not necessarily make the same choices in this respect. While the Maltese Government has itself asserted that the Republic of Malta was the first Member State to develop a system of regulation specifically aimed at controlling and monitoring games of chance on the internet, the fact that a particular level of protection of consumers against fraud by an operator may be achieved in a particular Member State by applying sophisticated control and monitoring techniques does not permit of the conclusion that the same level of protection can be achieved in other Member States which do not have those technical means available or have made different choices. A Member State may legitimately wish, moreover, to monitor an economic activity which is carried on in its territory, and that would be impossible if it had to rely on checks done by the authorities of another Member State using regulatory systems which it itself does not grasp.

99 Consequently, the case-law relied on by Mr Dickinger and Mr Ömer and the Maltese Government which states that it is not compatible with Article 49 EC to make a provider subject to restrictions for safeguarding the public interest in so far as that interest is already safeguarded in the Member State where he is established does not apply, in the present state of development of European Union law, in a field such as that of games of chance, which is not harmonised at European Union level, and in which the

Member States have a wide discretion in relation to the objectives they wish to pursue and the level of protection they seek.

100 The answer to Questions 1 and 3 is therefore that Article 49 EC must be interpreted as meaning that:

(a) a Member State seeking to ensure a particularly high level of consumer protection in the sector of games of chance may be entitled to consider that it is only by setting up a monopoly for a single entity subject to strict control by the public authorities that it can tackle crime linked to that sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness;

(b) to be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly of games of chance which allows the holder of the monopoly to follow an expansionist policy must:

— be based on a finding that the crime and fraud linked to gaming and addiction to gambling are a problem in the Member State concerned which could be remedied by expanding authorised regulated activities, and

— allow only moderate advertising limited strictly to what is necessary for channelling consumers towards monitored gaming networks;

(c) the fact that a Member State has opted for a system of protection that differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions, which must be assessed

solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.

Costs

101 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. European Union law, in particular Article 49 EC, precludes the imposition of criminal penalties for infringing a monopoly of operating games of chance, such as the monopoly of operating online casino games laid down by the national legislation at issue in the main proceedings, if such legislation is not compatible with European Union law.

2. Article 49 EC must be interpreted as applying to services of games of chance marketed over the internet in the territory of a host Member State by an operator established in another Member State despite the fact that the operator:

— has set up certain computer support infrastructure, such as a server, in the host Member State and

— **makes use of computer support services of a provider established in the host Member State in order to provide his services to consumers who are likewise established in that Member State.**

3. Article 49 EC must be interpreted as meaning that:

(a) a Member State seeking to ensure a particularly high level of consumer protection in the sector of games of chance may be entitled to consider that it is only by setting up a monopoly for a single entity subject to strict control by the public authorities that it can tackle crime linked to that sector and pursue the objective of preventing incitement to squander money on gambling and combating addiction to gambling with sufficient effectiveness;

(b) to be consistent with the objective of fighting crime and reducing opportunities for gambling, national legislation establishing a monopoly of games of chance which allows the holder of the monopoly to follow an expansionist policy must:

— **be based on a finding that the crime and fraud linked to gaming and addiction to gambling are a problem in the Member State concerned which could be remedied by expanding authorised regulated activities, and**

— **allow only moderate advertising limited strictly to what is necessary for channelling consumers towards monitored gaming networks;**

(c) the fact that a Member State has opted for a system of protection that differs from that adopted by another Member State cannot affect the assessment of the need for and proportionality of the relevant provisions, which must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the level of protection which they seek to ensure.

[Signatures]