JUDGMENT OF THE COURT (Second Chamber)

3 June 2010 *

In Case C-203/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decision of 14 May 2008, received at the Court on 16 May 2008, in the proceedings

Sporting Exchange Ltd, trading as 'Betfair',

v

Minister van Justitie,

intervening party:

Stichting de Nationale Sporttotalisator,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues (Rapporteur), President of the Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: Y. Bot,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 12 November 2009,

after considering the observations submitted on behalf of:

— Sporting Exchange Ltd, trading as 'Betfair', by I. Scholten-Verheijen, O. Brouwer, A. Stoffer and J. Franssen, advocaten,

— Stichting de Nationale Sporttotalisator, by W. Geursen, E. Pijnacker Hordijk and M. van Wissen, advocaten,

— the Netherlands Government, by C. Wissels, M. de Grave and Y. de Vries, acting as Agents,

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

— the Danish Government, by J. Bering Liisberg and V. Pasternak Jørgensen, acting as Agents,

— the German Government, by M. Lumma, acting as Agent,

— the Greek Government, by M. Tassopoulou, Z. Chatzipavlou and A. Samoni-Rantou, acting as Agents,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

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

— the Finnish Government, by A. Guimaraes-Purokoski and J. Heliskoski, acting as Agents,

— the Norwegian Government, by P. Wennerås and K. Moen, acting as Agents,

— the Commission of the European Communities, by E. Traversa, A. Nijenhuis and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 49 EC.

2 The reference has been made in proceedings between Sporting Exchange Ltd, a company trading as 'Betfair' established in the United Kingdom ('Betfair'), and the Minister van Justitie (Minister for Justice; 'the Minister') concerning the latter's rejection of (i) Betfair's applications for a licence to organise games of chance in the Netherlands, and (ii) Betfair's objections to licences granted to two other operators.

National legal context

3 Article 1 of the Law on games of chance (Wet op de kansspelen; 'the Wok') provides:

'Subject to the provisions of Title Va of this Law, the following are prohibited:

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

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

4 Article 16(1) of the Wok is worded as follows:

'The Minister for Justice and the Minister for Welfare, Public Health and Culture may grant to one legal person with full legal capacity a licence, for a period to be determined by them, to organise sports-related prize competitions in the interests of bodies operating for public benefit, particularly in the area of sport and physical education, culture, social welfare and public health.'

5 Article 23 of the Wok states:

‘1. A licence to organise a totalisator may be granted only in accordance with the provisions of this Title.

2. “Totalisator” shall mean any opportunity provided to bet on the outcome of trotting or other horse races, on the understanding that the total stake, apart from any deduction permitted by or by virtue of the law, will be distributed among those who have bet on the winner or on one of the prize winners.’

6 According to Article 24 of the Wok, the Minister for Agriculture and Fisheries and the Minister for Justice may grant to one legal person with full legal capacity a licence to organise a totalisator for a period to be determined by them.

7 Article 25 of the Wok provides:

‘1. The Ministers referred to in Article 24 shall impose certain conditions on a licence to organise a totalisator.

2. Those conditions relate, inter alia, to:

a. the number of trotting and other horse races;

b. the maximum stake per person;

c. the percentage retained before distribution among the winners and the particular use of that percentage;

d. the supervision of the application of the Law by the authorities;

e. the obligation to prevent or take measures to prevent, so far as possible, unauthorised betting or the use of intermediaries at venues where trotting or other horse races take place.

3. The conditions may be amended or supplemented.'

8 Under Article 26 of the Wok:

'A licence granted in accordance with Article 24 may be withdrawn before its expiry by the Ministers referred to in that article in the event of a breach of the conditions imposed pursuant to Article 25.'

9 Article 27 of the Wok prohibits the offer or provision to the public of an intermediary service in the placing of bets with the operator of a totalisator.

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

10 Netherlands legislation in relation to games of chance is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

11 Furthermore, it is apparent from the case-file in the main proceedings as supplied to the Court by the referring court that there is no possibility at all of offering games of chance interactively via the internet in the Netherlands.

12 The Stichting de Nationale Sporttotalisator ('De Lotto'), which is a non-profit-making foundation governed by private law, has held the licence for the organisation of sports-related prize competitions, the lottery and numbers games since 1961. The licence for the organisation of a totalisator on the outcome of horse races was granted to a limited company, Scientific Games Racing BV ('SGR'), which is a subsidiary of Scientific Games Corporation Inc., a company established in the United States.

13 It is apparent from the case-file submitted to the Court that, according to De Lotto's constitution, its objects are the collection of funds by means of the organisation of games of chance and the distribution of those funds among institutions working in the public interest, particularly in the fields of sport, physical education, general welfare, public health and culture. De Lotto is managed by a five-member commission whose chairman is appointed by the Minister. The other members are designated by the Stichting Aanwending Loterijgelden Nederland (Foundation for the Use of Lottery Funds) and by the Nederlands Olympisch Comité/Nederlandse Sport Federatie (Netherlands Olympic Committee/Netherlands Sports Federation).

14 Betfair operates within the gaming sector. Its services are provided solely via the internet and by telephone. From the United Kingdom, it provides the recipients of its services with a platform for betting on sporting events and horse races, known as a 'betting exchange', on the basis of British and Maltese licences. Betfair has no office or sales outlet in the Netherlands.

15 As Betfair wished actively to offer its services on the Netherlands market, it requested the Minister to determine whether it required a licence in order to carry on such activities. It also applied to the Minister for a licence to organise sports-related prize competitions and a totalisator on the outcome of horse races, whether or not via the internet. By decision of 29 April 2004, the Minister refused those requests.

16 The objection lodged in respect of that decision was dismissed by the Minister on 9 August 2004. In particular, the Minister took the view that the Wok provides for a closed system of licences which does not allow for the possibility of licences being granted to provide opportunities for participating in games of chance via the internet. As Betfair could not obtain a licence for its current internet activities under the Wok, it was prohibited from offering those services to recipients established in the Netherlands.

17 Betfair also lodged two objections to the Minister's decisions of 10 December 2004 and 21 June 2005 concerning the renewal of licences granted to De Lotto and to SGR, respectively.

18 Those objections were dismissed by decisions of the Minister dated 17 March and 4 November 2005, respectively.

19 By judgment of 8 December 2006, the Rechtbank 's-Gravenhage (District Court, The Hague) declared Betfair's appeals against the dismissal decisions referred to above to be unfounded. Betfair subsequently appealed against that judgment to the Raad van State (Council of State).

20 In its appeal, Betfair submitted, in essence, that the Netherlands authorities were obliged (i) to recognise the licence which it held in the United Kingdom, and (ii) on the basis of the judgment in Case C-260/04 *Commission* v *Italy* [2007] ECR I-7083, to respect the principle of transparency when granting a licence for the provision of games of chance.

21 The Raad van State took the view that an interpretation of European Union law was required to enable it to determine the dispute before it, and decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

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

Consideration of the questions referred

The first question

22 By its first question, the national court asks, in essence, whether Article 49 EC must be interpreted as precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.

23 Article 49 EC requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 51 and the case-law cited).

24 It is common ground that legislation of a Member State such as the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 52, and Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-4757, paragraph 16).

25 However, it is necessary to assess whether such a restriction may be allowed as a derogation expressly provided for by 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 (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 55).

26 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 56).

27 In that context, 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 serve to justify a margin of discretion for the national authorities, sufficient to enable them to determine what is required in order to ensure consumer protection and the preservation of public order (Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 47).

28 The Member States are free to set the objectives of their policy on betting and gambling according to their own scale of values and, where appropriate, to define in detail the level of protection sought. The restrictive measures that they impose must, however, satisfy the conditions laid down in the case-law of the Court, in particular as regards their proportionality (see, to that effect, *Placanica and Others*, paragraph 48, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 59).

29 According to the case-law of the Court, it is for the national courts to determine whether Member States' legislation actually serves the objectives which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives (*Gambelli and Others*, paragraph 75, and *Placanica and Others*, paragraph 58).

30 Referring specifically to the judgments in *Gambelli and Others* and *Placanica and Others*, the national court found that the objectives – of ensuring the protection of consumers and combating both crime and gambling addiction – underpinning the system of exclusive licences provided for by the Wok can be regarded as overriding reasons in the public interest within the meaning of the case-law of the Court.

31 The national court also considers that the restrictions which result from that system are neither disproportionate nor applied in a discriminatory way. As regards proportionality, specifically, it states that the fact that only one operator is licensed simplifies not only the supervision of that operator, thus enabling monitoring of the rules associated with licences to be more effective, but also prevents strong competition from arising between licensees and resulting in an increase in gambling addiction. The national court adds that no distinction is made in the application of the prohibition against anyone other than the licensee offering games of chance as between undertakings established in the Netherlands and those whose seats are in other Member States.

32 The national court's doubts arise from the fact that, in the main proceedings, Betfair claims that it does not need to be the holder of a licence issued by the Netherlands authorities in order to offer its sports betting services via the internet to betters residing in the Netherlands. The Kingdom of the Netherlands is obliged to recognise the licences which have been granted to Betfair by other Member States.

33 It should be noted in that regard that the internet gaming industry has not been the subject of harmonisation within the European Union. A Member State is therefore entitled to take the view that the mere fact that an operator such as Betfair lawfully offers services in that sector via the internet 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 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 (see, to that effect, *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 69).

34 In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 70).

35 The fact that an operator who offers games of chance via the internet does not pursue an active sales policy in the Member State concerned, particularly because he is not making use of advertising in that State, cannot be regarded as running counter to the considerations set out in the two preceding paragraphs. Those considerations are based solely on the effects of the mere accessibility of games of chance via the internet and not on the potentially different consequences of the active or passive provision of services by that operator.

36 It follows that, in the light of the specific features associated with the provision of games of chance via the internet, the restriction at issue in the main proceedings may be regarded as justified by the objective of combating fraud and crime (*Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 72).

37 Therefore, the answer to the first question is that Article 49 EC must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.

The second and third questions

38 By its second and third questions, which should be examined together, the national court asks whether the case-law developed by the Court in relation to the interpretation of Article 49 EC and to the principle of equal treatment, and the consequent obligation of transparency, in the field of service concessions is applicable to the procedure for the grant of a licence to a single operator in the field of games of chance. Moreover, it asks whether the renewal of that licence without competitive tendering can be a suitable and proportionate means of meeting objectives based on overriding reasons in the public interest.

39 As European Union law now stands, service concession contracts are not governed by any of the directives by which the Union legislature has regulated the field of public procurement. However, the public authorities concluding them are bound to comply with the fundamental rules of the EC Treaty in general, including Article 49 EC and, in particular, the principles of equal treatment and of non-discrimination on the ground of nationality and with the consequent obligation of transparency (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 to 62; Case C-206/08 *Eurawasser* [2009] ECR I-8377, paragraph 44; and Case C-91/08 *Wall* [2010] ECR I-2815, paragraph 33).

40 That obligation of transparency applies where the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is awarded (see, to that effect, Case C-231/03 *Coname* [2005] ECR I-7287, paragraph 17, and *Wall*, paragraph 34).

41 Without necessarily implying an obligation to launch an invitation to tender, that obligation of transparency requires the concession-granting authority to ensure, for the benefit of any potential concessionaire, a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of the procurement procedures to be reviewed (see, to that effect, Case C-324/07 *Coditel Brabant* [2008] ECR I-8457, paragraph 25, and *Wall*, paragraph 36).

42 It follows both from the order for reference and from the wording of the second question put by the national court that the intervention of the Netherlands public authorities that is designed to enable certain economic operators to provide services in the field of games of chance in the Netherlands is considered by that court to be the issue of a single licence.

43 As indicated in paragraph 10 of the present judgment, the Wok is based on a system of exclusive licences under which (i) the organisation or promotion of games of chance is prohibited unless an administrative licence for that purpose has been issued, and (ii) only one licence is granted by the national authorities in respect of each of the games of chance authorised.

44 The single licence constitutes an intervention by the public authorities, the purpose of which is to regulate the pursuit of an economic activity which, in the present case, is the organisation of games of chance.

45 The decision granting the licence includes conditions imposed by those authorities relating, inter alia, to the maximum number of sports-related prize competitions permitted per year, to the amounts thereof, to the distribution of net funds to bodies operating for public benefit and to the relevant operator's own income, inasmuch as the latter may keep only the amount of costs incurred without making any profit. That operator is also authorised to establish a reserve fund every year, corresponding to no more than 2.5 % of funds obtained in the previous calendar year, in order to ensure the continuity of his activities.

46 The fact that the issue of a single licence is not the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC, in particular the principle of equal treatment and the obligation of transparency, when granting an administrative licence such as that at issue in the main proceedings.

47 As the Advocate General stated in points 154 and 155 of his Opinion, the obligation of transparency appears to be a mandatory prior condition of the right of a Member State to award to an operator the exclusive right to carry on an economic activity, irrespective of the method of selecting that operator. Such an obligation should apply in the context of a system whereby the authorities of a Member State, by virtue of their public order powers, grant a licence to a single operator, because the effects of such a licence on undertakings established in other Member States and potentially interested in that activity are the same as those of a service concession contract.

48 As the answer to the first question shows, the Member States have sufficient discretion to determine the level of protection sought in relation to games of chance and, consequently, it is open to them to choose a single-operator licensing system, as in the case underlying the main proceedings.

49 Nevertheless, such a system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to a fundamental freedom such as the freedom to provide services.

50 It has consistently been held that if a prior administrative authorisation scheme is to be justified, even though it derogates from a fundamental freedom, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the authorities' discretion so that it is not used arbitrarily (Case C-389/05 *Commission* v *France* [2008] ECR I-5397, paragraph 94, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 64). Furthermore, any person affected by a restrictive measure based on such a derogation must have a judicial remedy available to them (see, to that effect, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 38).

51 Compliance with the principle of equal treatment and with the consequent obligation of transparency necessarily means that the objective criteria enabling the Member States' competent authorities' discretion to be circumscribed must be sufficiently advertised.

52 With regard to the procedure for extending the exclusive licences granted pursuant to the Wok, the Netherlands Government explained in its written observations that licences are always granted on a temporary basis, generally for periods of five years. That approach is adopted in the interests of continuity, with fixed reference dates allowing decisions to be taken as to whether any adjustment of the licence conditions may be justified.

53 It is common ground that, by the decisions of 10 December 2004 and 21 June 2005, the Minister renewed the licence granted to De Lotto for a period of five years, and that granted to SGR for a period of three years, without any competitive tendering procedure.

54 In that regard, there is no need to draw a distinction according to whether the restrictive effects of a single licence arise from the grant of that licence in disregard of the requirements set out in paragraph 50 of the present judgment or from the renewal of such a licence under the same conditions.

55 A licence renewal procedure, such as that at issue in the main proceedings, which does not fulfil those conditions, in principle precludes other operators from being able to express their interest in carrying on the activity concerned and, as a result, those operators are prevented from enjoying their rights under European Union law, in particular the freedom to provide services that is enshrined in Article 49 EC.

56 The Netherlands Government observes that the referring court found that the restrictions resulting from the system of granting licences to a single operator are justified by overriding reasons in the public interest, and that they are appropriate and proportionate.

57 It should be pointed out, however, that the findings of the national court to which the Netherlands Government refers relate, in general, to a system of exclusive licences as provided for by the Wok and not, specifically, to the procedure for the renewal of a licence granted to an operator who has the exclusive right to organise and promote games of chance.

58 As the Advocate General observed in point 161 of his Opinion, it is important to distinguish the effects of competition in the market for games of chance, the detrimental nature of which may justify a restriction on the activity of economic operators, from the effects of a call for tenders for the award of the contract in question. The detrimental nature of competition in the market, that is to say, between several operators authorised to operate the same game of chance, arises from the fact that those operators would be led to compete with each other in inventiveness in making what they offer more attractive and, in that way, increasing consumers' expenditure on gaming and the risks of their addiction. On the other hand, such consequences are not to be feared at the stage of issuing a licence.

59 In any event, the restrictions on the fundamental freedom enshrined in Article 49 EC which arise specifically from the procedures for the grant of a licence to a single operator or for the renewal thereof, such as those at issue in the main proceedings, may be regarded as being justified if the Member State concerned decides to grant a licence to, or renew the licence of, a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities (see, to that effect, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraphs 40 and 42, and *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraphs 66 and 67).

60 In such situations, the grant to such an operator of exclusive rights to operate games of chance, or the renewal of such rights, without any competitive tendering procedure would not appear to be disproportionate in the light of the objectives pursued by the Wok.

61 It is for the national court to ascertain whether the holders of licences in the Netherlands for the organisation of games of chance satisfy the conditions set out in paragraph 59 of the present judgment.

62 In the light of the foregoing considerations, the answer to the second and third questions is that Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a licence to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.

Costs

63 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 (Second Chamber) hereby rules:

1. **Article 49 EC must be interpreted as not precluding legislation of a Member State, such as the legislation at issue in the main proceedings, under which exclusive rights to organise and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another Member State, from offering via the internet services within the scope of that regime in the territory of the first Member State.**

2. **Article 49 EC must be interpreted as meaning that the principle of equal treatment and the consequent obligation of transparency are applicable to procedures for the grant of a licence to a single operator or for the renewal thereof in the field of games of chance, in so far as the operator in question is not a public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities.**

[Signatures]