

Court of Justice EU, 8 September 2009, Liga Portuguesa & Bwin International



GAMES OF CHANCE – FREEDOM TO PROVIDE SERVICES

Prohibition of legitimate foreign operators from offering games of chance via the internet

- [that Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.](#)

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Court of Justice EU, 8 September 2009

(V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann (Rapporteur), J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel)

Judgement of the Court (Grand Chamber)

8 September 2009 (*)

(Reference for a preliminary ruling – Article 49 EC – Restrictions on the freedom to provide services – Offer of games of chance via the internet)

In Case C-42/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de Pequena Instância Criminal do Porto (Portugal), made by decision of 26 January 2007, received at the Court on 2 February 2007, in the proceedings

Liga Portuguesa de Futebol Profissional,
Bwin International Ltd, formerly Baw International Ltd,
V

Departamento de Jogos da Santa Casa da Misericórdia de Lisboa,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Lenaerts, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Schiemann (Rapporteur), J. Klučka, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrars: K. Sztranc-Sławiczek and B. Fülöp, Administrators,

having regard to the written procedure and further to the hearing on 29 April 2008,

after considering the observations submitted on behalf of:

– the Liga Portuguesa de Futebol Profissional and Bwin International Ltd, by E. Serra Jorge, advogado, and by C.-D. Ehlermann and A. Gutermuth, Rechtsanwälte,

– the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, by V. Rodrigues Feliciano, procurador-adjunto,

– the Portuguese Government, by L. Inez Fernandes, M.L. Duarte and A. Matos Barros, acting as Agents,

– the Belgian Government, by A. Hubert and L. Van den Broek, acting as Agents, assisted by P. Vlaemminck, advocaat,

– the Danish Government, by J. Liisberg, acting as Agent,

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

– the Greek Government, by N. Dafniou, O. Patso-poulou and M. Tassopoulou, acting as Agents,

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

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

– the Netherlands Government, by C. Wissels and M. de Grave, acting as Agents,

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

– the Slovenian Government, by T. Mihelič, acting as Agent,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the Norwegian Government, by P. Wennerås and J.A. Dalbakk, acting as Agents,

– the Commission of the European Communities, by E. Traversa and M. Afonso, acting as Agents,

after hearing [the Opinion of the Advocate General at the sitting on 14 October 2008](#),

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 49 EC and 56 EC.

2 The reference has been made in the course of proceedings between, on the one hand, the Liga Portuguesa de Futebol Profissional ('the Liga') and Bwin International Ltd ('Bwin'), formerly Baw International Ltd, and, on the other, the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa ('Santa Casa') concerning fines imposed on the Liga and Bwin by the directors of Santa Casa on the ground that they had infringed the Portuguese legislation governing the provision of certain games of chance via the internet.

Legal framework

The regulation of games of chance in Portugal

3 In Portugal games of chance are, in principle, prohibited. However, the State has reserved the right to authorise, in accordance with the system which it deems most appropriate, the operation of one or more games directly, through a State body or a body con-

trolled directly by the State, or to grant the right to operate such games to private entities, whether profit-making or not, by calls for tender conducted in accordance with the Code of Administrative Procedure.

4 Games of chance in the form of lotteries, lotto games and sports betting are known in Portugal as games of a social nature ('jogos sociais') and the operation of such games is systematically entrusted to Santa Casa.

5 Each type of game of chance organised by Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the various games offered by it, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the method of selecting authorised distributors, and the methods and periods for payment of prizes, are covered by government regulation.

6 The first type of game in question was the national lottery (Lotaria Nacional), which was established by a royal edict of 18 November 1783, and a concession was awarded to Santa Casa, the concession being renewed regularly thereafter. Today that lottery consists in the monthly drawing of numbers by lot.

7 Following a number of legislative developments, Santa Casa acquired the right to organise other games of chance based on the drawing of numbers by lot or on sporting events. This led to the introduction of two games involving betting on football matches called 'Totobola' and 'Totogolo', respectively enabling participants to bet on the result (win, draw or loss) and the number of goals scored by the teams. There are also two lotto games, namely Totoloto, in which six numbers are chosen from a total of 49, and EuroMillions, a type of European lotto. Players of Totobola or Totoloto may also take part in a game called 'Joker', which consists in the drawing of a single number by lot. Lastly, there is also the Lotaria Instantânea, an instant game with a scratch card, commonly called 'raspadinha'.

The provision of games of a social nature via the internet

8 In 2003 the legal framework governing lotteries, lotto games and sports betting was adapted in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet. Those measures feature in Decree-Law No 282/2003 of 8 November 2003 (Diário da República I, series A, No 259, 8 November 2003). They seek essentially, first, to license Santa Casa to distribute its products by electronic means and, secondly, to extend Santa Casa's exclusive right of operation to include games offered by electronic means, in particular the internet, thereby prohibiting all other operators from using those means.

9 Article 2 of Decree-Law No 282/2003 confers on Santa Casa, through its Departamento de Jogos (Gaming Department), exclusive rights for the operation by electronic means of the games in question and for any other game the operation of which may be entrusted to Santa Casa, and states that that system covers all of the

national territory, and includes, in particular, the internet.

10 Under Article 11(1) of Decree-Law No 282/2003 the following are classed as administrative offences:

'(a) the promotion, organisation or operation by electronic means of games [the operation of which has been entrusted to Santa Casa], in contravention of the exclusive rights granted by Article 2 [of the present Decree-Law], and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not;

(b) the promotion, organisation or operation by electronic means of lotteries or other draws similar to those of the Lotaria Nacional or the Lotaria Instantânea, in contravention of the exclusive rights granted by Article 2, and also the issue, distribution or sale of virtual tickets and the advertisement of the related draws, whether they take place within national territory or not; ...'.

11 Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in, inter alia, Article 11(1)(a) and (b) of that Decree-Law. For legal persons, the fine is to be not less than EUR 2 000 or more than three times the total amount deemed to have been collected from organising the game in question, provided that the triple figure is greater than EUR 2 000 but does not exceed a maximum of EUR 44 890.

The organisation and activities of Santa Casa

12 The activities of Santa Casa were, at the material time, regulated by Decree-Law No 322/91 of 26 August 1991 adopting the statutes of Santa Casa da Misericórdia de Lisboa (Diário da República I, series A, No 195, 26 August 1991), as amended by Decree-Law No 469/99 of 6 November 1999 (Diário da República I, series A, No 259, 6 November 1999) ('Decree-Law No 322/91').

13 The preamble to Decree-Law No 322/91 emphasises the importance of the various aspects of Santa Casa – historical, social, cultural and economic – and concludes that the Government must pay 'specific and continuous attention in order to prevent negligence and failures ... while nevertheless granting [Santa Casa] the broadest possible autonomy in the management and operation of games of a social nature'.

14 Under Article 1(1) of its statutes, Santa Casa is a 'legal person in the public administrative interest'. The administrative organs of Santa Casa consist, by virtue of Article 12(1) of its statutes, of a director and a board of management. Pursuant to Article 13 of those statutes, the director is appointed by decree of the Prime Minister, the other members of Santa Casa's board of management being appointed by decree of the members of the Government under whose supervision Santa Casa falls.

15 Under Article 20(1) of its statutes, Santa Casa has been given specific tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social

situations of serious deprivation, and primary and specialised health care.

16 The earnings generated by the operation of games of chance are allocated between Santa Casa and other public-interest institutions or institutions involved in social projects. Those other public-interest institutions include associations of voluntary fire crews, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, and the cultural development fund.

17 The operation of games of chance falls within the responsibilities of the Gaming Department of Santa Casa. That department is governed by regulations adopted, as in the case of Santa Casa's statutes, by Decree-Law No 322/91, and it has its own administrative and control organs.

18 In accordance with Article 5 of the regulations governing the Gaming Department, the administrative organ of that department consists of the director of Santa Casa, who is the ex officio chairman, and two deputy directors appointed by joint decree of the Minister for Employment and Solidarity and the Minister for Health. Pursuant to Articles 8, 12 and 16 of the regulations of the Gaming Department, the majority of the members of the committees in charge of games, draws and complaints are representatives of the public authorities, that is to say, the General Tax Inspectorate and the District Government in Lisbon. Accordingly, the chairman of the complaints committee, who has a casting vote, is a judge appointed by decree of the Minister for Justice. Two of the three members of that committee are appointed by decree of the chief tax inspector and decree of the chief administrative officer (prefect) of the District of Lisbon respectively, while the third member of the committee is appointed by the director of Santa Casa.

19 The Gaming Department has the powers of an administrative authority to open, institute and prosecute proceedings concerning offences involving the illegal operation of games of chance in relation to which Santa Casa has the exclusive rights, and to investigate such offences. Decree-Law No 282/2003 confers upon the directors of the Gaming Department, inter alia, the necessary administrative powers to impose fines as provided for under Article 12(1) of that Decree-Law.

The actions in the main proceedings and the question referred for a preliminary ruling

20 Bwin is an on-line gambling undertaking which has its registered office in Gibraltar. It offers games of chance on an internet site.

21 Bwin has no establishment in Portugal. Its servers for the on-line service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's internet site or by some other means of direct communication. Stakes on that site are paid by credit card in particular, but also by other means of electronic payment. The value of any winnings is credited to the gambling account opened for the gambler by Bwin. The gambler may use that money in order to gamble or ask for it to be transferred to his bank account.

22 Bwin offers a wide range of on-line games of chance covering sports betting, casino games, such as roulette and poker, and games based on drawing numbers by lot which are similar to the Totoloto operated by Santa Casa.

23 Betting is on the results of football matches and other sporting events. The different games offered include bets on the result (win, draw or loss) of football matches in the Portuguese championship equivalent to the Totobola and Totogolo games operated exclusively by Santa Casa. Bwin also offers on-line betting in real time, in which the odds are variable and change as the sporting event in question unfolds. Information such as the match score, the time elapsed, yellow and red cards given, and so on, are displayed in real time on the Bwin internet site, thus enabling gamblers to place bets interactively as the sporting event unfolds.

24 The order for reference states that the Liga is a private-law legal person with the structure of a non-profit-making association, made up of all the clubs taking part in football competitions at professional level in Portugal. It organises, inter alia, the football competition corresponding to the national First Division and is responsible for the commercial operation of that competition.

25 The Liga and Bwin stated in the observations which they submitted to the Court that a sponsorship agreement, concluded by them on 18 August 2005 for four playing seasons starting in 2005/2006, made Bwin the main institutional sponsor of the First Football Division in Portugal. Under the terms of that agreement, the First Division, previously known as the 'Super Liga', changed its name first to the Liga betandwin.com, and then subsequently to the Bwin Liga. In addition, the Bwin logos were displayed on the sports kit worn by the players and affixed around the stadiums of the First Division clubs. The Liga's internet site also included references and a link allowing access to Bwin's internet site, making it possible for consumers in Portugal and other States to use the gambling services thus offered to them.

26 Subsequently, in exercising the powers conferred on them by Decree-Law No 282/2003, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines of EUR 75 000 and EUR 74 500 respectively on the Liga and Bwin in respect of the administrative offences referred to in Article 11(1)(a) and (b) of that Decree-Law. Those sums represent the aggregated amounts of two fines imposed on each of the Liga and Bwin for promoting, organising and operating, via the internet, games of a social nature reserved to Santa Casa or such similar games, and also for advertising such gambling.

27 The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, the relevant Community rules and case-law.

28 In those circumstances, the Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court, Oporto) (Portugal) decided to stay the proceedings and

to refer the following question to the Court for a preliminary ruling:

‘[Do] the exclusive rights granted to Santa Casa, when relied on against [Bwin], that is to say, against a provider of services established in another Member State in which it lawfully provides similar services, which has no physical establishment in Portugal, [constitute] an impediment to the free provision of services, in breach of the principles of freedom to provide services, freedom of establishment and the free movement of payments enshrined in Articles 49, 43 and 56 of the EC Treaty [?]’

[Is it] contrary to Community law, in particular to the abovementioned principles, for rules of domestic law such as those at issue in the main proceedings first to grant exclusive rights in favour of a single body for the operation of lotteries and off-course betting and then to extend those exclusive rights to “the entire national territory, including ... the internet”[?]

The application to have the oral procedure reopened

29 By document lodged at the Court Registry on 30 October 2008, Bwin requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.

30 In accordance with that provision, the Advocate General was heard in connection with that application.

31 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, *inter alia*, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37 and case-law cited).

32 However, neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General’s Opinion.

33 In its application, Bwin essentially confines itself to commenting on the Opinion of the Advocate General, emphasising in particular that, in relation to a number of points of fact, the Advocate General based himself on the observations submitted by Santa Casa and the Portuguese Government, without taking into account the arguments put forward by Bwin or the Liga in order to challenge those points, or noting that those points were the subject of dispute.

34 The Court takes the view that it has all the material necessary in the present case to enable it to reply to the question referred by the national court and that the case does not have to be examined in the light of an argument that has not been the subject of discussion before it.

35 Consequently, there is no need to order the reopening of the oral procedure.

The admissibility of the reference for a preliminary ruling

36 In its observations submitted to the Court, the Italian Government argues that the reference for a pre-

liminary ruling is inadmissible on the ground that the question referred by the national court requests the Court of Justice to give a ruling on the compatibility of a provision of national law with Community law.

37 In that connection, it should be noted that the co-operative arrangements established by Article 234 EC are based on a clear division of responsibilities between the national courts and the Court of Justice. In proceedings brought on the basis of that article, the interpretation of provisions of national law is a matter for the courts of the Member States, not for the Court of Justice, and the Court has no jurisdiction to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law ([Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others](#) [2007] ECR I-1891, paragraph 36).

38 It must be pointed out that, by its question, the national court is not asking the Court of Justice to rule on the compatibility with Community law of the specific Portuguese legislation on games of chance, but rather on certain aspects only of that legislation, which are set out in general terms. More specifically, these relate to the prohibition of all service providers other than Santa Casa, including service providers established in other Member States, from offering via the internet in Portugal games of chance which Santa Casa is authorised to operate, and any similar games. Such a reference is admissible.

39 In addition, the Italian, Netherlands and Norwegian Governments and the Commission of the European Communities question the admissibility of the reference for a preliminary ruling on the ground that it does not provide sufficient information on the content and objectives of the Portuguese legislation applicable to the dispute in the main proceedings.

40 With regard to the information that must be provided to the Court in connection with a reference for a preliminary ruling, it should be noted that that information does not serve only to enable the Court to provide answers which will be of use to the national court; it must also enable the Governments of the Member States, and other interested parties, to submit observations in accordance with Article 23 of the Statute of the Court of Justice. For those purposes, according to settled case-law, it is firstly necessary that the national court should define the factual and legislative context of the questions which it is asking or, at the very least, explain the factual circumstances on which those questions are based. Secondly, the order for reference must set out the precise reasons why the national court is unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. In consequence, it is essential that the national court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link which it establishes between those pro-

visions and the national legislation applicable to the dispute in the main proceedings (see [Placanica](#) and Others, paragraph 34 and the case-law cited).

41 In that connection, it is true that the precision, and even the usefulness, both of the observations submitted by the governments of the Member States and the other interested parties, and of the answer given by the Court, may depend on sufficient details being provided as to the content and objectives of the national legislation applicable to the dispute in the main proceedings. Nevertheless, in the light of the division of responsibilities between the national courts and the Court of Justice, the referring court cannot be required to make all the findings of fact and of law required by its judicial function first before it may then bring the matter before the Court. It is sufficient that both the subject-matter of the dispute in the main proceedings and the main issues raised for the Community legal order may be understood from the reference for a preliminary ruling, in order to enable the Member States to submit their observations in accordance with Article 23 of the Statute of the Court of Justice and to participate effectively in the proceedings before the Court.

42 In the main proceedings, the order for reference satisfies those requirements. The referring court has defined the factual and legislative context of the question which it has referred to the Court. In so far as the objectives of the Portuguese legislation on games of chance are not set out in the order for reference, the Court will be required to answer the question referred by having particular regard to the objectives referred to by the parties to the main proceedings and by the Portuguese Government before the Court. Accordingly, the Court takes the view that, in those circumstances, it has all the material necessary to enable it to reply to that question.

43 In the light of all those considerations, the reference for a preliminary ruling must be held to be admissible.

The question referred for a preliminary ruling

44 By its question, the national court seeks a ruling from the Court on the interpretation of Articles 43 EC, 49 EC and 56 EC.

The applicability of Articles 43 EC and 56 EC

45 In so far as the question referred by the national court refers not only to Article 49 EC but also to Articles 43 EC and 56 EC, it should be made clear from the outset that it is not apparent, in the light of the information in the file, that those last two articles might be applicable to the dispute in the main proceedings.

46 As to whether Article 43 EC is applicable, it is common ground that Bwin carries on its activities in Portugal exclusively via the internet, without resorting to intermediaries in Portugal and thus without having established a principal place of business or secondary establishment in that State. Similarly, it is not apparent from the file that Bwin had any intention to establish itself in Portugal. Consequently, there is nothing to suggest that the Treaty provisions on freedom of estab-

lishment might be applicable to the dispute in the main proceedings.

47 As to whether Article 56 EC is applicable, it must be noted that any restrictive effects which the national legislation at issue in the main proceedings might have on the free movement of capital and payments would be no more than the inevitable consequence of any restrictions on the freedom to provide services. Where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it (see, to that effect, Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 34 and case-law cited).

48 In those circumstances, the question referred by the national court must be answered in the light of Article 49 EC alone.

The scope of the question referred for a preliminary ruling

49 The dispute in the main proceedings concerns the marketing in Portugal of a number of games of chance played on an electronic medium, namely the internet. Bwin, a private operator established in another Member State, offers games of chance in Portugal exclusively via the internet, and the administrative offences laid down in Article 11(1)(a) and (b) of Decree-Law No 282/2003, of which the Liga and Bwin are accused in the main proceedings, concern exclusively conduct in relation to games of chance organised by electronic means.

50 The question referred by the national court must therefore be construed as asking in essence whether Article 49 EC precludes legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators, such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that first Member State.

The existence of restrictions on the freedom to provide services

51 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 (see, to that effect, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33). Moreover, the freedom to provide services is for the benefit of both providers and recipients of services (see, to that effect, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16).

52 It is accepted that the legislation of a Member State which prohibits providers such as Bwin, estab-

lished in other Member States, from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services enshrined in Article 49 EC (see, to that effect, [Case C-243/01 Gambelli](#) and Others [2003] ECR I-13031, paragraph 54).

53 Such legislation also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.

54 Consequently, as indeed the Portuguese Government expressly concedes, the legislation at issue in the main proceedings gives rise to a restriction of the freedom to provide services enshrined in Article 49 EC. The justification of the restriction of the freedom to provide services

55 It is necessary to consider to what extent the restriction at issue in the main proceedings 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.

56 Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. In addition, a certain number of overriding reasons in the public interest have been recognised by case-law, such as 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 (see, to that effect, [Placanica and Others](#), paragraph 46 and case-law cited).

57 In that context, as most of the Member States which submitted observations to the Court have noted, the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonisation in the field, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected (see, *inter alia*, [Case 34/79 Henn and Darby](#) [1979] ECR 3795, paragraph 15; [Case C-275/92 Schindler](#) [1994] ECR I-1039, paragraph 32; [Case C-268/99 Jany and Others](#) [2001] ECR I-8615, paragraphs 56 and 60, and [Placanica and Others](#), paragraph 47).

58 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 provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure ([Case C-124/97 Läärä and Others](#) [1999] ECR I-6067, paragraph 36, and [Case C-67/98 Zenatti](#) [1999] ECR I-7289, paragraph 34).

59 The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that

they impose must satisfy the conditions laid down in the case-law of the Court as regards their proportionality ([Placanica](#) and Others, paragraph 48).

60 In the present case, it is thus necessary to examine in particular whether the restriction of the provision of games of chance via the internet, imposed by the national legislation at issue in the main proceedings, is suitable for achieving the objective or objectives invoked by the Member State concerned, and whether it does not go beyond what is necessary in order to achieve those objectives. In any event, those restrictions must be applied without discrimination (see, to that effect, [Placanica](#) and Others, paragraph 49).

61 In that context, it must be recalled that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner ([Case C-169/07 Hartlauer](#) [2009] ECR I-0000, paragraph 55).

62 The Portuguese Government and Santa Casa submit that the main objective pursued by the national legislation is the fight against crime, more specifically the protection of consumers of games of chance against fraud on the part of operators.

63 In that connection, it should be noted that the fight against crime may constitute an overriding reason in the public interest that is capable of justifying restrictions in respect of operators authorised to offer services in the games-of-chance sector. Games of chance involve a high risk of crime or fraud, given the scale of the earnings and the potential winnings on offer to gamblers.

64 The Court has also recognised that limited authorisation of games on an exclusive basis has the advantage of confining the operation of gambling within controlled channels and of preventing the risk of fraud or crime in the context of such operation (see [Läärä and Others](#), paragraph 37, and [Zenatti](#), paragraph 35).

65 The Portuguese Government submits that the grant of exclusive rights to Santa Casa to organise games of chance ensures that the system will function in a secure and controlled way. First, Santa Casa's long existence, spanning more than five centuries, is evidence of that body's reliability. Second, the Portuguese Government points out that Santa Casa operates under its strict control. The legal framework for games of chance, Santa Casa's statutes and government involvement in appointing the members of its administrative organs enable the State to exercise an effective power of supervision over Santa Casa. That system, based on legislation and Santa Casa's statutes, provides the State with sufficient guarantees that the rules for ensuring fairness in the games of chance organised by Santa Casa will be observed.

66 In that regard, it is apparent from the national legal framework, set out in paragraphs 12 to 19 of the present judgment, that the organisation and functioning of Santa Casa are governed by considerations and requirements relating to the pursuit of objectives in the public interest. The Gaming Department of Santa Casa has been given the powers of an administrative author-

ity to open, institute and prosecute proceedings involving offences of illegal operation of games of chance in relation to which Santa Casa has the exclusive rights.

67 In that connection, it must be acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single operator, such as Santa Casa, which is subject to strict control by the public authorities, may, in circumstances such as those in the main proceedings, confine the operation of gambling within controlled channels and be regarded as appropriate for the purpose of protecting consumers against fraud on the part of operators.

68 As to whether the system in dispute in the main proceedings is necessary, the Portuguese Government submits that the authorities of a Member State do not, in relation to operators having their seat outside the national territory and using the internet to offer their services, have the same means of control at their disposal as those which they have in relation to an operator such as Santa Casa.

69 In that regard, it should be noted that the sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator such as Bwin 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.

70 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.

71 Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets and some of the teams taking part in those competitions may be in a position to influence their outcome directly or indirectly, and thus increase its profits.

72 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.

73 Consequently, the answer to the question referred is that Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin, which are established in other Member States, in which they lawfully provide similar services, from offering

games of chance via the internet within the territory of that Member State.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Grand Chamber) hereby rules:

Article 49 EC does not preclude legislation of a Member State, such as that at issue in the main proceedings, which prohibits operators such as Bwin International Ltd, which are established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State.

Opinion of advocate general Bot

delivered on 14 October 2008 1(1)

Case C-42/07

Liga Portuguesa de Futebol Profissional (CA/LPFP)
Baw International Ltd

v

Departamento de Jogos da Santa Casa da Misericórdia de Lisboa

(Reference for a preliminary ruling from the Tribunal de Pequena Instância Criminal do Porto (Portugal))

(Legislation of a Member State granting a single entity an exclusive right to organise and operate betting on the internet – ‘Technical regulation’ within the meaning of Directive 98/34/EC – Restriction of the freedom to provide services – Overriding reasons relating to the public interest – Protection of consumers and maintenance of public order – National legislation appropriate for attaining objectives – Proportionality)

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I – Introduction

A – General presentation of the case

1. The problem of the conformity with Community law of the Member States' legislation concerning games of chance and gambling has already given rise to a relatively large number of cases. Nevertheless it continues to give rise to numerous references from the courts of the Member States, as shown by the number of cases at present pending before the Court. (2)

2. In the present case, the referring court needs to be enabled to determine whether its domestic law, in so far as it grants a single operator the exclusive right to offer off-course bets on the internet, conforms with Community law.

3. The case concerns the Portuguese legislation which confers on the Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (3), a centuries-old non-profit-making organisation which has the object of financing causes in the public interest, the exclusive right to organise and operate lotteries and off-course betting in the whole of national territory. This exclusive right has been extended to all electronic means of communication, in particular the internet. The legislation also provides for penalties in the form of administrative fines on those who organise such games

in breach of the abovementioned exclusive right and who advertise such games.

4. Baw International Ltd, (4) an on-line betting company established in Gibraltar, and the Liga Portuguesa de Futebol Profissional (CA/LPFP) (5) were fined for offering off-course betting by electronic means and advertising it.

5. The referring court, before which Bwin and the Liga contested the fines, is uncertain as to whether its national legislation, in providing for such a system of exclusive rights for off-course betting on the internet, conforms with Community law.

6. In those circumstances, I shall submit, first, that legislation of a Member State which grants a single entity the exclusive right to offer off-course betting on the internet and which provides for penalties in the form of fines on persons disregarding that right, constitutes a 'technical regulation' within the meaning of Directive 98/43/EC of the European Parliament and of the Council. (6) I shall conclude from this that, if that legislation was not duly notified to the Commission of the European Communities, it cannot be relied on against private operators such as the Liga and Bwin.

7. Secondly, I shall state that such legislation constitutes a restriction of the freedom to provide services. I shall consider to what extent such legislation may be justified.

8. To begin with, I shall describe the effect which I think the restriction by Community law of the powers of the Member States in the field of betting and games of chance should have. I shall state that the aim of the freedoms of movement is not to open up the market in games of chance and gambling. I shall argue that a Member State should be required to open up this activity to the market only if, in law or in fact, it treats the gambling and games of chance as true economic activities which yield maximum profits. I shall also argue that the Member States should have a broad discretion in determining what measures to take in order to protect consumers and to maintain public order against the excesses of gambling, including determining the gambling services necessary for that purpose. I shall conclude that Community law should be confined to prohibiting situations in which restrictive measures taken to protect consumers against excessive gaming are manifestly distorting their purpose.

9. I shall state that Article 49 EC does not preclude legislation such as the Portuguese legislation at issue if it satisfies the following conditions, which must be verified by the referring court: the legislation must be justified by overriding reasons relating to the public interest, it must be appropriate for ensuring the attainment of the objectives which it pursues, it must not exceed what is necessary for attaining them and it must not be applied in a discriminatory way. I shall make the following points regarding those conditions.

10. First, with regard to the risks created by gambling and games of chance on the internet, a Member State may legitimately restrict the right to operate such games in order to protect consumers and to maintain public order.

11. Second, the grant of the exclusive right to organise and operate such games to a single entity may be an appropriate measure for pursuing those aims if, first, the Member State has the means of directing and controlling effectively the operation of gambling and games of chance by the entity holding that right and, second, if, in actually implementing that measure, the Member State does not manifestly exceed its margin of discretion.

12. Third, the grant of an exclusive right to a single non-profit-making entity controlled by the Member State may be a proportionate measure.

13. Fourth, the legislation in question, in so far as it grants a single entity the exclusive right to operate lotteries and off-course betting on the internet is not, in itself, discriminatory.

14. Before setting out the legal and factual context of the present case, followed by my analysis, I think it necessary to describe briefly the nature of games of chance and gambling in the European Union and then the issues to which those activities give rise.

B – Games of chance and gambling

15. I shall briefly make the following five points. Games of chance and gambling today include a wide variety of games. They have considerable economic significance. Nevertheless they give rise to serious risks to society. They are the subject of strict regulations of different kinds in the Member States. Finally, electronic means of communication, in particular the internet, are an important factor in the spread of such games.

1. A wide variety of games

16. The playing of games the result of which depends on chance, in which the players wager a stake with valuables or money, appears to be very ancient and common to many societies. Historians situate their origin in the third millennium BC in the Far East and Egypt. (7) Such games were common in ancient Greece and Rome. (8)

17. Games of chance and gambling have changed considerably in the course of history and there is a very wide variety of them today. They may be divided very broadly into four main categories.

18. The first category consists of lotteries, in which I include bingo games, which are based on the same principle. This is a pure game of chance in which knowledge and strategy play no part at all. The result of the game is determined by the drawing by lot of winning numbers, the result of which is known immediately or later.

19. Lotteries and bingo games may be organised on a very different scale, from the annual draw or bingo of a local association with prizes in kind of small value to games organised by national or regional lotteries aimed at the entire territory of a Member State or a region of a federal State and which offer a prize that could be as much as several million euros. They may also be organised in different forms, so that there is a very wide variety of them.

20. In the course of February 2004 the lotteries of several Member States decided to set up together a common lottery called ‘EuroMillions’. (9)

21. So-called ‘instant’ or ‘scratch card’ lotteries have also appeared in the last 20 years. These offer cards at a modest price on which the result is printed beneath a film which has to be scratched off with a fingernail or coin.

22. The second main category of games of chance and gambling is betting. This may be based on the result of a competition, the occurrence of an event or the existence of something.

23. The best known and oldest form of betting is on horse races. The punters are invited to bet on the result of a race in which those taking part, horses and jockeys, are known in advance. Consequently the punters can place their bets in reliance on luck and also on their knowledge of the characteristics and the performance of the horses and jockeys. In addition to betting on horse races, there is now also betting on sporting events.

24. The winnings depend either on the total amount of bets or on the odds agreed with the bookmaker.

25. In the third place we have casinos. Different games are authorised in these establishments, which are open to the public. They have long been regarded as reserved for wealthy clients who are able to gamble large sums in games that are complicated, or supposed to be such, surrounded by rites and ceremonial.

26. Gaming machines must be placed in fourth place. They were invented in the United States in the first half of the 19th century and were immediately successful. (10) They are slot machines into which the player is invited to insert a coin or token and which show a pre-programmed result by means of a random computer system. Consequently the moment and frequency with which the result shown by the machine corresponds to a winning combination depend on chance.

2. A significant economic factor

27. In recent years gambling and games of chance have increased significantly. They now constitute what may be described as a considerable economic factor. In the first place, they generate a very large income for the organisations that operate them. (11) Secondly, they provide a substantial number of jobs in the different Member States. (12)

3. An activity that gives rise to serious risks

28. However, games of chance and gambling give rise to serious risks to society in relation to the players and to the operators that organise them.

29. First, they may lead players to jeopardise their financial and family situation, and even their health.

30. Games of chance and gambling by nature allow only a very small number of players to win, failing which they will lose and cannot go on. In the great majority of cases, therefore, players lose more than they gain. However, the excitement of the game and the promise of winning, sometimes very large amounts, may lead players to spend on gambling more than the share of their budget available for leisure pursuits.

31. This behaviour may therefore have the consequence that players are no longer able to fulfil their social and family obligations. It may also lead to a situation of real addiction to games of chance and gambling, comparable to addiction caused by drugs or alcohol. (13)

32. Secondly, because of the very considerable stakes involved in gambling and games of chance, they are likely to be open to manipulation on the part of the organiser who may wish to arrange matters so that the result of the draw or the sporting event is the most favourable to himself. Furthermore, in that connection an individual player has no really effective means of verifying that the conditions in which gambling takes place actually conform with what is announced.

33. Finally, games of chance and gambling may be a means of 'laundering' money obtained illegally. Such money can be gambled in the hope of winning more. It can also be converted into profit if the criminal is also the owner of the gambling establishment.

4. An activity strictly regulated by the Member States

34. In the course of history games of chance and gambling have often been condemned on moral and religious grounds and also the maintaining of public order. (14) Nevertheless they have been accepted as a social fact.

35. The reaction of governing authorities has oscillated between total prohibition, strict regulation, while providing that the revenue from games of chance and gambling should serve exclusively to finance causes of public interest, and encouragement so as to profit from the manna represented by this voluntary tax.

36. Nowadays games of chance and gambling are subject to restrictive regulation in most Member States of the European Union.

37. In a number of those States (15) these restrictions take the form of a ban in principle on games of chance and gambling, with specific exceptions. Likewise in most Member States, (16) the operation of a game of chance or gambling by a private operator, where it is provided for, is subject to obtaining a licence from the appropriate authority. In addition, the number of operators who may be authorised to operate a particular game is normally limited, usually by a quota.

38. In several Member States the operation of games of chance and gambling may also be the subject of an exclusive right granted to a State organisation or a private operator. (17)

39. There are considerable differences in the legislation in force in the Member States. Apart from the differences in operating systems, there are exceptions to the general prohibition where it exists, and the definition of 'games of chance and gambling' and the scope of the national legislation are not uniform. The same game may therefore be authorised in one Member State and prohibited in another or be treated differently. (18)

40. Finally, the tax treatment of games of chance and gambling differs considerably from one Member

State to another because, in some Member States, the profits generated by the operation of such games and gambling must be appropriated, in varying proportions, to causes of general interest. Likewise, the share of the winnings distributed to players varies significantly.

5. The impact of new means of communication

41. Until about twenty years ago, games of chance and gambling were accessible only in specific places such as the numerous outlets for betting and lottery tickets, race courses and casinos. This meant that anyone wishing to bet or gamble had to make a journey and it could only be done during the opening times of the premises in question.

42. The appearance of electronic means of communication in the 1990s, such as mobile phones, interactive television and, above all, the internet, changed the situation radically. Thanks to these new means of communication, punters can play games at any time without leaving their home.

43. In this way betting and gaming have been considerably facilitated. Access to these pursuits has been encouraged by the following factors. First, the number of persons who can use electronic means of communication is increasing regularly. (19) Second, they are becoming easier and easier to use and they function in an integrated system. (20) Lastly, the financial transactions can be carried out very easily through those means of communication.

44. In addition, electronic means of communication, particularly the internet, enable persons residing in one Member State to gain physical access not only to on-line games offered by operators established in that State, but also to those offered by operators established in other Member States or non-member countries.

45. Therefore these new means of communication have permitted a significant increase in the provision of games of chance and gambling, which have become extremely successful. (21)

II – The legal context

A – Community law

1. Secondary law

a) No measures governing games of chance and gambling in particular

46. Games of chance and gambling have not so far been the subject of any regulation or harmonisation within the Union.

47. They are expressly excluded from the scope of Directive 2000/31/EC of the European Parliament and of the Council, (22) the last indent of Article 1(5)(d) of which provides that the Directive does not apply to 'gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions'.

48. Games of chance and gambling are also excluded from the ambit of Directive 2006/123/EC of the European Parliament and of the Council, (23) in which the twenty-fifth recital of the preamble states that 'gambling activities, including lottery and betting transactions, should be excluded ... in view of the specific nature of these activities, which entail

implementation by Member States of policies relating to public policy and consumer protection’.

49. However, a national law which prohibits internet service providers from offering games of chance and gambling in the territory of a Member State is likely to fall within the scope of Directive 98/34.

b) Directive 98/34

50. Directive 98/34 aims to remove or reduce barriers to the free movement of goods arising from the adoption by the Member States of different technical regulations, by promoting the transparency of national initiatives vis-à-vis the Commission, European standardisation bodies and the other Member States.

51. The ambit of Directive 98/34 was extended by Directive 98/48 to all services of the information society, that is to say, according to Article 1(2) of Directive 98/34, any service normally provided for remuneration by electronic means and at the individual request of a recipient of services.

52. The term ‘technical regulation’ is defined as follows in Article 1(11) of Directive 98/34:

‘Technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

53. Therefore Directive 98/34 provides for a system whereby each Member State must notify the Commission of its proposed technical regulations so as to enable the Commission and the other Member States to inform it of their viewpoint and to propose a standardisation which is less restrictive of trade. This system also gives the Commission the necessary time to propose, if necessary, a binding standardisation measure.

54. Article 8 of Directive 98/34 reads as follows:

‘1. ... Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.

... The Commission shall immediately notify the other Member States of the draft and all documents which have been forwarded to it; it may also refer this draft, for an opinion, to the Committee referred to in Article 5 and, where appropriate, to the committee responsible for the field in question.

... 2. The Commission and the Member States may make comments to the Member State which has for-

warded a draft technical regulation; that Member State shall take such comments into account as far as possible in the subsequent preparation of the technical regulation.

3. Member States shall communicate the definitive text of a technical regulation to the Commission without delay.

...’

55. Article 9 of Directive 98/34 provides as follows:

‘1. Member States shall postpone the adoption of a draft technical regulation for three months from the date of receipt by the Commission of the communication referred to in Article 8(1).

2. Member States shall postpone:

...

– without prejudice to paragraphs 4 and 5, for four months the adoption of any draft rule on services, from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of services or to the freedom of establishment of service operators within the internal market.

...

4. Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within the three months following that date, the Commission announces its finding that the draft technical regulation concerns a matter which is covered by a proposal for a directive, regulation or decision presented to the Council in accordance with Article 189 of the [EC] Treaty [now Article 249 EC].

...’

2. Primary law and its interpretation

56. The regulations of the Member States concerning games of chance and gambling must not interfere with the obligations of the Member States in the context of the EC Treaty, particularly in relation to the freedoms of movement.

a) The Treaty

57. The first paragraph of Article 49 EC prohibits restrictions on the freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

58. Under Articles 48 and 55 EC, Article 49 is applicable to the services offered by a company formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Community.

b) Case-law

59. The problem of whether the laws of the Member States concerning games of chance and gambling are consistent with the fundamental freedoms of movement have given rise to a relatively large body of case-law, the main outlines of which may be described as follows.

60. Games of chance and gambling are an economic activity within the meaning of Article 2 EC. (24) They consist in the provision of a particular service, namely the hope of making a cash profit, in return for remuneration.

61. They are also a service activity which falls within the scope of Articles 43 and 49 EC concerning the freedom of establishment and the freedom to provide services. National legislation prohibiting or restricting the right to operate games of chance and gambling in a Member State may therefore be a restriction of those freedoms of movement. (25)

62. However, the Court has consistently held that such games represent a particular economic activity for the following reasons. First, in all the Member States, moral, religious or cultural considerations tend to restrict, or even prohibit, such games to prevent them from being a source of private profit. Secondly, games of chance and gambling involve a high risk of crime or fraud, given the size of the potential winnings. In addition, they are an encouragement to spend which may have damaging individual and social consequences. Finally, although this cannot in itself be regarded as an objective justification, it is not without relevance that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture. (26)

63. Lotteries organised on a large scale, (27) gaming machines, (28) betting on sporting events (29) and casino gambling and games (30) have been considered likely to create a high risk of crime and fraud because of the considerable sums involved, and also a risk to consumers because they are an encouragement to spend. (31)

64. The Member States may legitimately provide for restrictions on the operation of games with those characteristics, on grounds of consumer protection (limiting the passion of human beings for gaming, preventing citizens from being tempted to spend excessively on gaming) and defending the social order (preventing the risks of crime and fraud created by gaming). These are reasons of overriding general interest which may justify restrictions on the freedoms of movement. (32)

65. On the other hand, using income from gaming to finance social activities cannot be a justification as such. The Court bases that assessment on the principle that the diminution or reduction of tax revenue is not one of the grounds listed in Article 46 EC and does not constitute a matter of overriding general interest. (33) Using the income from gaming in that way is only an incidental beneficial consequence of a restriction. (34)

66. Determining the necessary degree of protection for consumers and the maintenance of public order with regard to games of chance and gambling is a matter for the Member States.

67. According to the Court, the national authorities must be allowed a sufficient margin of discretion to determine the requirements entailed by the protection of gamblers and, more generally, taking account of the social and cultural characteristics of each Member State, the preservation of public order, with regard to

the organisational arrangements of gaming and betting and the amount of stakes, as well the use made of the profits to which they give rise. (35) The Member States are therefore free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the degree of protection sought. (36)

68. However, in order to be justified, a national measure restricting a freedom of movement must be applied in a non-discriminatory manner; must be appropriate for securing the attainment of the objective which it pursues; and must not go beyond what is necessary in order to attain that objective. (37)

69. In the context of monitoring compliance with those conditions, the Court has stated on several occasions that the reasons justifying the restrictions laid down by the measure in question must be considered together. (38)

70. The Court has accepted that the following restrictions may be justified.

71. A Member State has the right to prohibit entirely any gaming in its territory. (39) According to the Court, it is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them. (40)

72. A Member State may also grant a single entity or a limited number of operators an exclusive right to operate gaming and betting. (41)

73. The Court considers that the authorisation by a Member State for the operation of gaming and betting activities by an entity with an exclusive right or by a specified number of operators is not incompatible with the aims of protecting consumers from being tempted to spend excessively and maintaining public order. According to the Court, limited authorisation of games of chance and gambling on an exclusive basis, which has the advantage of confining the desire to gamble and the operation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such operation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives. (42)

74. In addition, 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 provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the degree of protection which they are intended to provide. (43)

75. In *Läärä and Others*, the Court also examined the question of whether, to attain the objectives pursued by the Finnish law concerning the operation of gaming machines, it was preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned.

76. The Court stated that that question was a matter to be assessed by the Member States, subject however

to the proviso that the choice made in that regard must not be disproportionate to the aim pursued. (44) The Court took the view that that condition was fulfilled because the body with the exclusive right to operate the slot machines was a public-law association the activities of which were carried on under the control of the State and which was required to pay over to the State the amount of the net distributable proceeds received from the operation of the slot machines. (45)

77. The Court added that, while it was true that the sums thus received by the State for public interest purposes could equally be obtained by other means, such as taxation of the activities of the various operators authorised to pursue them within the framework of rules of a non-exclusive nature; however, the obligation imposed on the licensed public body, requiring it to pay over the proceeds of its operations, constituted a measure which, given the risk of crime and fraud, was certainly more effective in ensuring that strict limits were set to the lucrative nature of such activities. (46)

78. In *Zenatti, Gambelli and Others, and Placanica and Others*, cited above, the Court spelt out more clearly the conditions which national legislation must satisfy in order to be justified with particular regard to the Italian law granting a limited number of organisations fulfilling certain criteria an exclusive right to organise betting.

79. In *Zenatti*, the Court observed that the Italian legislation in question sought to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports. (47)

80. The Court stated that such legislation could be justified only if, from the outset, it reflected a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constituted only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. (48) The Court added that it was for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives. (49)

81. In *Gambelli and Others*, cited above, the referring court stated that the Italian law on betting had been amended in 2000 and that the background documents of the amending measure showed that the Italian Republic was pursuing a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, while also protecting existing licensees.

82. The Court stated that restrictions on grounds of consumer protection and the prevention of both fraud and incitement to squander on gaming may be justified only if they are appropriate for achieving those objec-

tives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner. (50)

83. The Court added that, in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings. (51)

84. In view of the aim of avoiding gaming licensees being involved in criminal or fraudulent activities, the Court found that the Italian legislation on invitations to tender appeared disproportionate in so far as it prevented capital companies quoted on regulated markets of other Member States from obtaining licences to organise sporting bets in Italy. The Court pointed out there were other means of checking the accounts and activities of such companies. (52)

85. In *Placanica and Others*, the Court was once again confronted with the Italian law on betting on sporting events after the Corte Suprema di Cassazione (Italy) took the view that the law in question was compatible with Articles 43 and 49 EC. The Italian court found that that the true purpose of the Italian legislation was not to protect consumers by limiting their propensity to gamble, but to channel betting and gaming activities into systems that are controllable, with the objective of preventing their operation for criminal purposes.

86. The Court stated that, in so far as that was the only aim of the licensing system laid down by the Italian law, a 'policy of controlled expansion' in the betting and gaming sector may be entirely consistent with the objective of drawing players away from clandestine betting and gaming to activities which are authorised and regulated. According to the Court, in order to achieve that objective, authorised operators must represent a reliable, but at the same time attractive, alternative to a prohibited activity, and this may necessitate the offer of an extensive range of games, advertising on a certain scale and the use of new distribution techniques. (53)

87. As the facts referred to by the Italian Government showed that clandestine betting and gaming were a considerable problem in Italy, the Court concluded that a licensing system may constitute an efficient mechanism enabling operators active in the betting and gaming sector to be controlled with a view to preventing the operation of those activities for criminal or fraudulent purposes. (54)

88. However, the Court confirmed that the law in question appeared disproportionate in that it prevented companies whose shares are quoted on the regulated markets of other Member States from being able to obtain licences for the business of sporting betting in Italy. (55)

B – National law

a) Information provided by the referring court

89. Article 2 of Decree-Law No 282/2003 of 8 November 2003 (56) grants the Santa Casa the monopoly

for the operation by electronic means of State gambling of a social nature, that is to say, of lotteries and off-course betting. The monopoly covers the entire national territory, including radioelectric space, the internet and any other public telecommunications network.

90. Under Article 11(1)(a) and (b) of Decree-Law No 282/2003 the following are illegal:

- the promotion, organisation or operation by electronic means of State gambling of a social nature (that is to say, lotteries and off-course betting) in contravention of the monopoly rules;
- the advertising of those number lotteries, whether they take place in national territory or not

2. Additional information provided by the Portuguese Government

91. In Portugal games of chance and gambling are prohibited in principle. Nevertheless, the State has reserved the right to authorise, in accordance with the system it deems the most appropriate, the operation of one or more games, directly or through a body under its control, or to grant the right to operate games to private entities, whether non-profit-making or not, by calls for tender.

a) The types of games

92. The Portuguese legislation distinguishes between three categories of games of chance and gambling, namely casino games, lotteries, tombolas and publicity competitions, and games of lotto and betting.

i) Casino games

93. Casino games comprise table games such as roulette and poker, as well as other types of games such as bingo and slot machines.

94. The operation of these games is regulated by Decree-law No 422/89 of 2 December 1989, (57) which was considered by the Court in Anomar and Others.

95. The right to operate casino games is in principle reserved by the State and it can be exercised only by undertakings constituted in the form of limited companies licensed by the State, by an administrative contract. These games are permitted only in casinos in gaming zones created and defined by legislative measure.

96. There are at present nine casinos of that type operating in Portugal and licences have recently been granted for four others.

ii) Lotteries, tombolas and publicity competitions

97. This category of games comprises lotteries, tombolas, draws, publicity competitions, general knowledge contests and pastimes. They are subject to prior licensing by the Government, which is granted case by case on specific conditions.

98. In practice, this category of games has no commercial impact in Portugal.

iii) Lotto games and betting

99. This category of games comprises all games in which the contestants predict the results of one or more contests or draws. These games are known in Portugal as ‘games of a social nature’ or ‘State games of a social nature’

100. The operation of these games is regulated by Decree-Law No 84/85 of 28 March 1985. (58)

101. Under Article 1(1) of that Decree-Law, the right to promote lotto games and betting is reserved by the State, which grants the Santa Casa the exclusive right to organise and operate them throughout Portugal.

102. According to the statements in the preambles to the measures providing for this exclusive right, the Portuguese Government considered that it could no longer overlook the fact that such gaming was carried on clandestinely, together with the excesses to which it gave rise. The Government’s purpose was therefore to give it a legal framework so as to ensure that gaming was fair and to limit its excesses. The Government also intended that the revenue from gaming, which was morally reprehensible in the culture of that Member State, should not be a source of private profit, but should serve to finance social causes or causes of general interest.

103. Originally the Santa Casa organised contests called ‘Totobola’ and ‘Totoloto’. The former covers games in which the contestants predict the results of one or more sporting events. The latter covers all games in which the contestants predict the results of drawing numbers by lot.

104. The range of games was subsequently extended in 1993 to include ‘Joker’; (59) in 1994 ‘Lotaria instantânea’, an instant game with a scratch card, commonly called ‘raspadinha’; (60) in 1998 ‘Totogolo’, (61) and in 2004 ‘Euromilhões’, or European lotto. (62)

105. In 2003 the legal framework of lotto games and betting was adapted to take account of technical developments enabling the games to be offered by electronic medium, in particular the internet. These measures appear in Decree-Law 282/2003 and they aim, in substance, first, to license the Santa Casa to sell its products by electronic medium and, secondly, to extend the Santa Casa’s exclusive right of operation to include games offered by electronic medium, in particular the internet.

106. Article 12(1) of Decree-Law No 282/2003 sets the maximum and minimum fines for the administrative offences laid down in Article 11(1)(a) and (b) of that Decree-Law. For natural persons, the fine is to be not less than EUR 2 000 or more than three times the total amount deemed to have been collected from organising the game, provided that the triple figure is greater than EUR 2 000 but does not exceed a maximum of EUR 44 890.

b) The regulations of the Santa Casa

107. The Santa Casa is a social solidarity institution established on 15 August 1498. It has always been devoted to charitable work for assisting the most disadvantaged.

108. In Portugal, State games of a social nature are assigned to the Santa Casa. The ‘Lotaria Nacional’ (national lottery), established by a royal edict of 18 November 1783, was contracted out to that institution and the contract was renewed regularly. In 1961 the Santa Casa was granted the exclusive right to organise

other forms of lotto games and betting such as Totobola and, in 1985, Totoloto.

109. The activities of the Santa Casa are regulated by Decree-Law No 322/91 of 26 August 1991. (63)

110. According to its statutes, the Santa Casa is a 'legal person in the public administrative interest', that is to say, a private legal person, recognised by the authorities as pursuing non-profit-making objects of general interest.

111. The administrative organs of the Santa Casa consist of a director, appointed by decree of the Prime Minister, and a board of management whose members are appointed by decrees of the members of the Government under whose supervision the Santa Casa falls.

112. The operation of games of chance falls within the responsibilities of the Gaming Department of the Santa Casa, which has its own administrative and control organs.

113. The administrative organ of the Gaming Department consists of the director of the Santa Casa, who is the ex officio chairman, and two deputy directors appointed by joint decree of the Minister of Employment and Solidarity and the Minister of Health.

114. Each type of game of chance organised by the Santa Casa is instituted separately by a decree-law and the entire organisation and operation of the game, including the amount of stakes, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, methods of collecting stakes, the method of selecting authorised distributors, the methods and periods for payment of prizes, are governed by government regulation.

115. The members of the competition committee, the draw committee and the claims committee are mostly representatives of the public authorities. The chairman of the claims committee, who has a casting vote, is a judge.

116. The Gaming Department has a budget and its own accounts which are annexed to the budget and the accounts of the Santa Casa, and as such are under government supervision.

117. The Gaming Department has administrative authority powers to open and organise proceedings concerning offences of illegal operation of games of chance in relation to which the Santa Casa has the exclusive rights, and to investigate such offences.

118. Article 14 of Decree-Law No 282/2003 confers upon the Gaming Department the necessary administrative powers to impose fines such as those imposed on the Liga and Baw.

119. An appeal may be lodged against any decision of the Gaming Department in contravention cases and any other decision with effect outside the Gaming Department, such as decisions concerning the purchase of goods and services and the grant of authorisation to third parties to sell tickets for games of a social nature.

120. The Santa Casa has specific tasks in the areas of protection of the family, mothers and children, help for unprotected minors at risk, assistance for old people, social situations of serious deprivation and primary and specialised health care.

121. Under the law in force at the material time, the Santa Casa retains only 25% of the earnings from the various games. The balance is shared among other public-interest institutions such as associations of voluntary firemen, private social solidarity institutions, establishments for the safety and rehabilitation of handicapped persons, the cultural development fund or social projects. Accordingly 50% of the earnings from Totobola go towards the promotion and development of football and 16% of the earnings from Totoloto serve to finance sports activities.

III – The main proceedings and the question referred

122. The Liga is a private-law legal person with the structure of a non-profit-making association. It brings together all the clubs taking part in football competitions at professional level in Portugal. It is responsible for the commercial operation of the competitions it organises.

123. Bwin is an on-line gaming undertaking with registered office in Gibraltar. It offers games of chance on its Portuguese-language website. It is governed by the special legislation of Gibraltar on the regulation of games of chance and has obtained all the requisite licences from the Government of Gibraltar. Bwin has no establishment in Portugal. Its servers for the on-line service are in Gibraltar and Austria. All bets are placed directly by the consumer on Bwin's website or by some other means of direct communication.

124. Bwin offers a wide range of on-line games of chance covering sporting bets, lotto and casino games such as roulette and poker. Betting is on the results of football matches and other sports such as rugby, formula 1 motor racing and American basketball.

125. The referring court states that the Liga and Bwin are charged with the following offences:

– concluding a sponsorship agreement for four playing seasons starting in 2005/2006, under which Bwin is the institutional sponsor of the First National Football Division, previously known as the 'Super Liga', which is now called 'Liga betandwin.com';

– under that agreement, Bwin acquired rights allowing it to display the logo 'betandwin.com' on the sports kit worn by the players of the clubs whose teams take part in the Super Liga championship and to affix the logo 'betandwin.com' in the stadiums of those clubs; in addition, the Liga's internet site began to include a reference and a link enabling access to Bwin's website;

– the Bwin site makes it possible to place sporting bets electronically, whereby the participants predict the result of football matches taking place each day in the Super Liga, and of football matches abroad, in order to win money prizes; the same site also makes it possible to play lottery games electronically, in which the participants predict the results of drawing numbers by lot.

126. The directors of the Gaming Department of the Santa Casa fined the Liga and Bwin EUR 75 000 and EUR 74 500 respectively for promoting, organising and operating electronically, as accomplices, State gaming of a social nature, that is to say, off-course betting, and

for advertising such gaming electronically, contrary to the monopoly provided for by national law.

127. The Liga and Bwin brought an action for the annulment of those decisions on the basis of Community rules and case-law.

128. The Tribunal de Pequena Instância Criminal do Porto (Portugal) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘In essence, the question is whether the monopoly granted to the Santa Casa, when relied on against [Bwin], that is to say, against a provider of services established in another Member State in which it lawfully provides similar services, which has no physical establishment in Portugal, constitutes an impediment to the free provision of services, in breach of the principles of freedom to provide services, freedom of establishment and the free movement of payments enshrined in Articles 49 [EC], 43 [EC] and 56 [EC].

This court seeks therefore to know whether it is contrary to Community law, in particular to the abovementioned principles, for rules of domestic law such as those at issue in the main proceedings first to establish a monopoly in favour of a single body for the operation of lotteries and off-course betting and then to extend that monopoly to “the entire national territory, including ... the internet”.’

IV – Analysis

A – Admissibility of the question referred

129. The question from the national court seeks to establish whether its national law, whereby the exclusive right conferred on a single non-profit-making entity controlled by the State to organise and operate lotteries and off-course betting in the whole of Portuguese territory is extended to all electronic means of communication, in particular the internet, is compatible with Community law.

130. The Italian, Netherlands and Norwegian Governments and the Commission dispute or question the admissibility of the question on the ground that the order for reference does not provide sufficient information on the nature and the aims of the Portuguese legislation applicable to the main proceedings.

131. I do not think the question can be ruled inadmissible.

132. The national court’s description of its national legislation makes it clear that it, first, grants the Santa Casa an exclusive right to organise and operate lotteries and off-course betting on the internet and, second, provides for penalties for operators who disregard that monopoly. Likewise, the account of the facts describes the issue in the main proceedings. Furthermore, the order for reference shows that the national court is uncertain as to whether the Portuguese legislation is compatible with Community law in so far as the former prevents an operator legally pursuing its activities in a Member State of the European Union from providing services in Portugal.

133. No doubt, in the light of the criteria developed in the Court’s case-law on the basis of which the compatibility with Community law of a national measure

concerning games of chance and betting must be assessed, I could have expected the national court to give a fuller account of its domestic law and the implementation thereof, with regard to the Santa Casa’s monopoly, together with the reasons why the monopoly has been extended to games of chance and gambling on the internet. It would also have been desirable for the national court to state the reasons why the Court’s previous judgments did not answer those questions and did not enable the national court to give judgment in the main proceedings.

134. However, the lack of information in the order for reference does not justify dismissing the question as inadmissible.

135. The question concerns the interpretation of Community law as it is necessary to interpret the articles of the Treaty establishing the freedoms of movement. The question is relevant to the outcome of the main proceedings because, if the relevant freedom of movement were interpreted by the Court as meaning that it precludes the grant of exclusive rights of that kind, the action brought by the Liga and Bwin would have to be ruled well-founded.

136. Finally, the information provided by the national court is sufficient to enable the Court to give a helpful reply, at least to the question whether the grant of exclusive rights to a single entity in relation to the organisation and operation of games of chance and gambling on the internet is, in principle or necessarily, contrary to Community law.

137. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (64)

138. It is true that the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court. It is regularly observed in judgments giving preliminary rulings that ‘the spirit of cooperation which must prevail in [such] proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions’. (65)

139. Accordingly, the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or the assessment of the validity of a provision of Community law sought by that court bears no relation to the actual facts of the main action or its purpose, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (66)

140. The question at present before the Court does not fall within any of those cases.

141. I also wish to point out that, in spite of the lack of information from the national court concerning the nature and the purpose of its national law, nine Member States other than the Portuguese Republic have been able to submit written observations, in addition to the latter, the parties to the main proceedings and the Commission.

142. It transpires, however, that the Liga and Bwin, as well as the interveners, in particular the Portuguese Government, have set out in detail the substance and the aims of the legislation in question and that these matters were discussed at length in the oral procedure. Therefore the Court could go further than examining only the question whether a national measure granting a single entity the exclusive right to offer off-course betting on the internet is in principle compatible with Community law.

143. The Italian Government also argues that the question referred is inadmissible on the ground that the national court is requesting the Court of Justice to give a ruling on the compatibility of its domestic law with Community law.

144. No doubt, as the Italian Government says, and in accordance with settled case-law, in accordance with the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. (67)

145. However, even if the question referred has to be construed in the way suggested by the Italian Government, it would still not be inadmissible. Where the Court is expressly questioned on the compatibility of a national provision with Community law, the Court rewords the question in accordance with its powers and points out that it does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law. (68)

146. I therefore propose that the Court should find that the question from the national court is admissible.

B – Substance of the case

147. According to the information from the national court, the provisions of Article 11(1)(a) and (b) of Decree-Law No 282/2003 prohibit, first, the organisation and operation of lotteries and off-course betting on the internet, contrary to the exclusive right conferred upon the Santa Casa and, second, advertising them on line, contrary to that right.

148. It is also clear that the Liga and Bwin were fined EUR 75 000 and EUR 74 500 respectively for, first, organising and operating off-course betting on the internet, contrary to the Santa Casa's exclusive right, and, second, advertising such betting.

149. Consequently it seems to me that the compatibility of the national law in question with Community law

must be assessed by reference to two sets of provisions. First, in so far as it confers upon the Santa Casa an exclusive right to offer lotteries and betting on the internet and prevents any other service provider established within the Union from offering such services on line in Portugal, the legislation in question may be covered by Directive 98/34. Second, in so far as it prohibits all advertising for lotteries and off-course betting organised contrary to the Santa Casa's exclusive right, such legislation may fall within the ambit of Article 49 EC.

1. Application of Directive 98/34

150. It is necessary to determine whether Article 1(11) of Directive 98/34 must be interpreted as meaning that a national measure whereby the exclusive right to organise and operate lotteries and off-course betting in the whole of national territory is extended to all electronic means of communication, in particular the internet, is a technical rule within the meaning of that provision.

151. In its written observations, the Commission argued that the legislation in question was within the ambit of Directive 98/34.

152. The interveners, which were asked state their position on that point in the oral procedure, took different positions. The Liga and Bwin agree with the Commission's analysis.

153. The Portuguese Government points out that Directive 93/84 was not relied upon by the Liga and Bwin in the context of the main proceedings and that the national court raised no question concerning the directive. The Government adds that it is for the national court to ascertain the Community law applicable to the dispute which is to be determined and concludes that the Directive is not relevant in the present case.

154. In the alternative, the Portuguese Government claims that Directive 98/34 did not require Portugal to notify the Commission of the legislation in question. The Government notes that games of chance and gambling were excluded from the ambit of Directive 2000/31 on electronic commerce and Directive 2006/123 on services in the internal market.

155. The Danish Government, supported by the Greek Government, takes the same view as the Portuguese Government. In addition, it states that the disputed legislation, which prohibits the operation of a certain activity in the territory of a State, is similar to national law which makes an occupational activity conditional on the grant of authorisation and that, according to the case-law, such legislation does not constitute a technical regulation. The Danish Government submits that that term is interpreted by the case-law as meaning specifications defining the characteristics of products. (69)

156. The Greek Government also considers that a national law providing for a State monopoly of games of chance and gambling does not fall within the scope of Directive 98/34.

157. I do not agree with the position of those governments. First of all, I shall show that it is open to the Court to interpret the provisions of Directive 98/34 al-

though the national court's question does not relate to it. Next, I shall set out the reasons why, in my view, the disputed legislation falls within the scope of the Directive. I shall also describe the consequences of failure to give notice of such legislation. Finally, in view of the Member States' observations on the relevance of Directive 98/34 for the outcome of the main proceedings, it seems to me useful to mention that the judgment to be given binds the national court with regard, inter alia, to the interpretation of the Directive, as the case may be.

a) The Court's opportunity to interpret Directive 98/34, although the national court does not refer to it 158. The fact that the Court may interpret Directive 98/34 although the national court has not submitted a question on it is clear from settled case-law. Where the Court considers that the national court has not questioned it on the provision of Community law applicable in the main proceedings, it examines of its own motion the meaning of that provision. Accordingly, as has often been said, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question. (70)

159. It follows that where, as in the present case, the national court has questioned the Court on the meaning of the Treaty articles establishing the freedoms of movement, the Court may reply by interpreting a directive which specially regulates the facts of the main proceedings. (71)

b) The contested provisions fall within the scope of Directive 98/34

160. Contrary to the Member States which have stated their position on this question, I am of the opinion, like the Liga and Bwin as well as the Commission, that the contested provisions are 'technical regulations' within the meaning of Directive 98/34 in so far as they prohibit any other operator from offering lotteries and off-course betting on the internet in Portugal.

161. I base my position on, first, the definitions of 'service' and 'technical regulation' in the directive.

162. Thus an 'Information Society service', within the meaning of Article 1, point 2, of Directive 98/34, is any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. However, it is clear from the nineteenth recital of the preamble to the directive that it is also necessary to refer to the definition of 'services' in Article 50 EC, as interpreted in the Court's case-law.

163. As we have already seen, the case-law shows that a provider established in one Member State who offers by internet, without moving from that State, games on line to recipients established in another Member State provides services within the meaning of Article 50 EC. (72)

164. Next, Article 1(11) of Directive 98/34 expressly states that the term 'technical regulation' covers rules prohibiting the provision or use of a service. Therefore, contrary to the position adopted by several Member States, since the ambit of Directive 98/34 was extended to Information Society services, 'technical regulation'

has not been confined to specifications defining the characteristics of products, as was the case under Directive 83/189/EEC, (73) as interpreted in the judgments cited above, CIA Security International, (74) van der Burg, (75) and Canal Satélite Digital, (76) to which those States refer.

165. The contested provisions, which give the Santa Casa an exclusive right to organise and operate lotteries and off-course betting on the internet in the whole of Portugal and which lay down penalties for any operator which disregards that exclusive right, does have the effect of prohibiting a provider of games on the internet from providing its services.

166. Having regard to the abovementioned definitions, the provisions in question constitute a 'technical regulation' within the meaning of Article 1(11) of Directive 98/34.

167. In the second place, this conclusion seems to me to accord with the reasons why the ambit of the directive was extended to Information Society services.

168. It is clear from the preamble to Directive 98/48 that the Community legislature aimed to extend to specific services of that kind the system of transparency and supervision originally provided for in relation only to goods, so as to avoid the barriers to the free movement of such services which could be caused by national regulations.

169. The application of the mandatory notification system provided for by Directive 98/34 to such regulations does not mean that they are contrary to Community law.

170. As we have seen, Directive 98/34 aims only to establish a system of preventive control. First, by requiring Member States to notify the Commission of any draft technical regulation, the Community legislature asks them to carry out a prior detailed check of its conformity with Community law. Consequently the directive has the effect of making it clear that, if the proposed regulation impedes the free movement of goods or the freedom to provide Information Society services, the Member State must be able to justify it in conformity with the conditions laid down by the case-law.

171. The notification system provided for by Directive 98/34 then enables the Commission and the other Member States to examine the draft regulation to see whether it creates barriers. If so, the other Member States may propose that the author of the draft should amend it. The Commission for its part may propose or adopt joint measures regulating the topic which is the subject of the proposed measure.

172. Such a system reconciles the sovereign power of the Member States to adopt technical regulations in fields where they have not been harmonised with the obligation they have undertaken to each other in the Treaty to establish a common market, that is to say, a space within which goods and services in particular circulate freely.

173. It follows that Directive 98/34 is really effective only if all technical regulations are notified, (77) including those relating to games of chance and

gambling, because these constitute an economic activity and are covered by the freedom of establishment and the freedom to provide services.

174. In addition, we find that, where the Community legislature wished to exclude games of chance and gambling from a measure relating to services, such as Directive 2000/31 on electronic commerce and Directive 2006/123 on services in the internal market, it provided for such exclusion expressly. However, Directive 98/34 contains no provision excluding technical regulations concerning games of chance and gambling from its ambit.

175. In the third place, this reasoning seems to be in conformity with the Court's position in *Commission v Greece*, concerning the Greek law prohibiting the use of games on computers in undertakings providing internet services. The Court found that such measures must be considered to be 'technical regulations' within the meaning of Article 1(11) of Directive 98/34. (78)

176. In the abovementioned judgment the Court found that a measure of a Member State such as that in issue in the main proceedings, which prohibits access to internet games, concerns access to or the provision of Information Society services and is therefore within the ambit of Directive 98/34.

177. Consequently I propose that the Court's reply to the national court should be that Article 1(11) of Directive 98/34 must be interpreted as meaning that a measure of a Member State whereby an exclusive right to organise and operate lotteries and off-course betting in the entire territory of that State is extended to all means of electronic communication, in particular the internet, constitutes a 'technical regulation' within the meaning of that provision. (79)

c) The consequences of failing to give notice of the contested measures

178. Article 8(1) of Directive 98/34 requires the Member States to notify the Commission of any draft technical regulation. (80) Article 9 requires them to postpone the adoption of any such regulation for such period as the Commission may determine.

179. According to those provisions, the draft Decree-Law No 282/2003 which, first, extends the Santa Casa's exclusive right to operate games offered by electronic medium, in particular the internet, and, secondly, provides for administrative fines on operators who infringe that right, ought to have been notified to the Commission.

180. In its written observations, the Commission stated that it was not notified of the draft Decree-Law. The Portuguese Government confirmed that it had not notified the Commission.

181. In *CIA Security International*, the Court described the consequences of failure to notify the Commission. The Court took the view that the obligations of notification and postponement laid down in Articles 8 and 9 of Directive 83/189 are unconditional and sufficiently precise to be relied on by individuals before national courts. (81) A technical regulation which has not been notified is therefore inapplicable to individuals and national courts must decline to apply it. (82)

182. That case-law can be applied to Articles 8 and 9 of Directive 98/34 as they in similar terms to those of Directive 83/189.

183. As Directive 98/34 aims in particular to protect the freedom to provide Information Society services, an operator such as Bwin, established in Gibraltar, has a right to avail itself of those precise and unconditional provisions.

184. Gibraltar is a European territory for whose external relations the United Kingdom is responsible. Consequently the Treaty provisions are applicable to it in accordance with Article 299(4) EC, subject to the exclusions provided for in the Act concerning the conditions of accession of Denmark, Ireland and the United Kingdom and the adjustments to the treaties. (83)

185. The Court has concluded from the Act that the Treaty rules on free movement of goods and the rules of secondary Community legislation intended, as regards free circulation of goods, to ensure approximation of the laws of the Member States, do not apply to Gibraltar. (84)

186. However, those exclusions must, in my view, be deemed exceptions to the principle laid down in Article 299(4) EC that the provisions of the Treaty apply to a European territory such as Gibraltar. Therefore the Treaty provisions on the freedom to provide services and the secondary legislation adopted to ensure the establishment of that freedom apply to Gibraltar. To prove this, I wish to cite the judgments in actions brought by the Commission against the United Kingdom for failing to implement such directives on its territory. (85)

187. I conclude from this that an operator such as Bwin, established in Gibraltar, has a right to plead Articles 8 and 9 of Directive 98/34 in so far as they relate to technical regulations concerning Information Society services.

188. The fact that the provisions in question are included in a measure which also relates to the free movement of goods does not seem to me inconsistent with that conclusion. A technical regulation may be clearly connected with the free movement of goods or the freedom to provide Information Society services on the basis of the delimitation of the respective fields to which those freedoms apply, as defined by the Court.

189. In conformity with the position taken by the Court in *CIA Security International*, if the Commission was not duly notified of the national provisions in question, in so far as, first, they grant the Santa Casa an exclusive right to organise and operate lotteries and off-course betting on the internet and, second, they provide for administrative fines on providers of services who, in breach of that right, offer internet games to persons residing in Portugal, those national provisions are not applicable as against Bwin and the national court must decline to apply them.

190. This conclusion should also apply to the *Liga*, which was fined as Bwin's accomplice for organising and operating off-course betting by electronic means.

191. The national court, which alone has jurisdiction to establish the facts in the main proceedings, will have to determine whether the draft Decree-Law 282/2003 which aims, in substance, to extend the Santa Casa's exclusive right to operate games offered by electronic media, in particular the internet, and to impose a penalty in the form of a fine for infringing that exclusive right, was notified to the Commission in accordance with Article 8 of Directive 98/34.

192. The national court will also have to draw the appropriate conclusions with regard to the fines imposed on the Liga and Bwin as the fines relate to the organisation and operation of off-course betting on the internet, in breach of the Santa Casa's exclusive right.

d) The effects of the Court's judgment for the referring court

193. The replies given by several Member States in the course of the hearing to the question concerning the relevance of Directive 98/34 to the outcome of the main proceedings could be understood as meaning that the judgment which will give a preliminary ruling would not, according to those States, be binding on the referring court in so far as it relates to the interpretation of the abovementioned directive.

194. I take the opposite view. Judgments giving a preliminary ruling are binding on the referring court even where the Court of Justice rules on a Community-law measure to which the question from the national court does not refer.

195. I base this conclusion on, first, the relationship between Community law and national law and, secondly, the function of the preliminary ruling procedure.

196. On the first point, as the Court observed in *van Gend en Loos* (86) and *Costa* (87) by signing and ratifying the Treaty establishing the European Economic Community, the Member States agreed that the Treaty and the measures adopted on the basis thereof should form part of their national law, should take precedence to any contrary national rule, whatever it may be, and should be intended to create rights directly in favour of individuals.

197. They also undertook to take all appropriate measures to ensure the effective application of Community law and that obligation must be accepted by their judicial authorities. Consequently national courts have an obligation to maintain the rights conferred by measures of the Community legal order.

198. The national courts must of their own motion refuse to apply any provision of national legislation conflicting with directly applicable Community law, without having to request or await the prior setting-aside of such legislation in the internal system. (88) If a Community measure is not directly applicable, the national court must interpret the whole of its national law so far as possible so as to achieve the result intended by that measure, in accordance with the requirement of interpretation in conformity with Community law. (89)

199. Therefore the national court's task is to ensure the effective application of Community law.

200. It is true that the national court discharges those obligations in conformity with its domestic rules of

procedure, in accordance with the principle of procedural autonomy, subject to the principles of equivalence and effectiveness by virtue of which, first, those rules must not be less favourable than those applicable to maintain the rights conferred by domestic law and, second, they must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by Community law. (90)

201. Where, in the context of a dispute before a national court, the parties have not invoked the relevant Community rule, it may happen that that rule is not applied, as the Court's case-law concerning the significance of the principles of equivalence and effectiveness stands at present.

202. According to the Court's case-law, a national court must raise of its own motion the relevant point of Community law where, under national law, it must or may do so in relation to a binding rule of national law. (91) On the other hand, it is not obliged to do so where it has no such obligation or option under national law and where the parties were given a genuine opportunity to raise a plea based on Community law in the course of the proceedings. (92) Furthermore, national courts are not required to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties. (93)

203. However, those limits to the application of Community law cannot be transposed where the Court, in the context of preliminary ruling proceedings, examines of its own motion the rule applicable to the facts of the main proceedings.

204. The object of the preliminary ruling procedure is to secure the uniform interpretation of Community law by national courts and tribunals. (94) Uniform interpretation can be secured only if the Court's judgments are binding on national courts. As the Court observed in *Benedetti*, (95) a preliminary ruling is binding on the national court as to the interpretation of the Community provisions and acts in question.

205. The binding nature of the ruling is also the corollary of the national courts' obligation to ensure the effective application of Community law.

206. This reasoning is confirmed by the third paragraph of Article 234 EC, which states that a reference for a preliminary ruling is mandatory where a question on the interpretation of Community law arises before a court or tribunal against whose decisions there is no judicial remedy under national law. In order to prevent Community law from being infringed, a court against whose decisions there is no judicial remedy under national law, which is by nature the last judicial body before which individuals may assert the rights conferred on them by Community law, is required to make a reference to the Court of Justice. (96)

207. This reasoning is supported by the judgment in a case where it was held that a manifest infringement of Community law by a court adjudicating at last instance was likely to give rise to liability on the part of the

State, (97) and also where an action for failure to fulfil obligations could be brought against a Member State by reason of a national judicial interpretation contrary to Community law, where that interpretation is confirmed or not disowned by the supreme court. (98)

208. Consequently the object of the preliminary ruling procedure itself is to ensure the effective application of Community law. That is why, contrary to the submissions of the Portuguese Government, the Court cannot be bound by the national court's assessment with regard to the Community provisions applicable to the facts of the main proceedings. The Court's task is to give the national court a reply which is of help to the outcome of the dispute which it must determine, that is to say, which enables it to perform its function of ensuring the effective application of Community law.

209. In addition, the Court's examination of a point of Community law of its own motion which was not raised by the national court would be of little use if the preliminary ruling, in so far it related to that point, were not binding on that court.

210. The fact that the parties to the main proceedings did not refer, before the national court, to the provision of Community law examined by the Court of its own motion is not an obstacle to the binding effect of the preliminary ruling in so far as the parties had an opportunity to make their observations on that provision known in the course of the preliminary ruling procedure. It must be observed that, in the present case, the parties were asked by the Court, prior to the hearing, to submit in the course of the hearing their observations on the relevance of Directive 98/34 to the outcome of the main proceedings.

211. It follows that preliminary rulings are, in my opinion, necessarily binding where the Court interprets a provision of Community law to which the national court has not referred.

212. Consequently I propose that the Court's reply to the national court should, in addition, rule that a preliminary ruling binds the referring court even in so far as the ruling relates to a provision of Community law that was not referred to in the national court's question.

2. The compatibility of the national legislation in issue with the freedoms of movement

213. Even if the Court concurs with my reasoning concerning the relevance of Directive 98/34 to the present case and the consequences of failure to notify the Commission, an examination of the compatibility of the national law in question with the freedoms of movement, in so far as it prohibits advertising of on-line games organised and operated in breach of the Santa Casa's exclusive right, does not appear to be manifestly irrelevant to the outcome of the main proceedings.

214. It is for the national court to determine whether the fact that Decree-Law No 282/2003, in so far as it grants the Santa Casa an exclusive right to organise and operate lotteries and off-course betting on the internet, is unenforceable as against the Liga and Bwin, must lead to setting aside the whole of the single fine imposed on each of them or whether the amount of the fine should be divided between what is due on account

of organising on-line games and what is due on account of advertising them.

215. The question therefore is whether a national measure prohibiting advertising for on-line games organised and operated in breach of an exclusive right conferred on a single non-profit-making entity, is inconsistent with the freedom to provide services.

216. To reply to that question, it would certainly appear to be helpful to consider the question from the referring court as to whether its national legislation granting the Santa Casa an exclusive right to organise and operate in Portugal lotteries off-course betting on the internet is compatible with the freedoms of movement. If that exclusive right is consistent with Community law, the question whether the prohibition of advertising lotteries and off-course betting organised and operated in breach of that right is compatible with Community law no longer arises.

217. The national court's question seeks to establish whether its national legislation which provides that the Santa Casa's exclusive right to organise and operate lotteries and off-course betting in the entire State territory is extended to all means of electronic communication, in particular the internet, is inconsistent with Community law and, in particular, the freedom to provide services, the freedom of establishment and the free movement of capital and payments, as laid down in Articles 43 EC, 49 EC and 56 EC.

218. At this stage of the discussion, it could be asked whether the freedoms of movement are relevant to the main proceedings in view of the fact that the Santa Casa has been granted a monopoly of the operation of lotteries and off-course betting on the internet on grounds of consumer protection and safeguarding public order against the adverse effect of such gaming. A national monopoly based on such grounds could be regarded as pursuing a public interest aim. (99)

219. It could therefore have been asked whether the Santa Casa could avail itself of Article 86(2) EC, which states that undertakings entrusted with the operation of services of general economic interest are to be subject to the rules of the Treaty in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

220. However, neither the referring court nor the Portuguese Government have mentioned those provisions. Assuming that they had done so, I do not think an examination of the present case from the viewpoint of Article 86(2) EC would have led to a different result from the reply which I am going to propose should be given by the Court to the question from the referring court.

221. In view of the case-law on the implications of Article 86(2) EC, the exception, provided for by that Article, to the application of the rules of the Treaty aiming to establish a common market can apply only if the task of the entity holding the monopoly makes it necessary to set aside those rules. In other words, the applicability of the exception is subject to proof that application of the rules would make it impossible to perform that task. (100)

222. I believe that examination of that condition would have led to consideration of the adequacy of the disputed legislation for achieving its aims and of its proportionality comparable with the examination which I shall make in the context of its compatibility by reference to the relevant freedom of movement.

223. I shall show that the disputed legislation should, with regard to the facts of the main proceedings, be examined by reference to Article 49 EC because it constitutes a restriction within the meaning of that Article. I shall then consider whether such legislation can be justified.

a) The relevant freedom of movement

224. Like the *Liga*, *Bwin*, the Netherlands, Austrian and Portuguese Governments and also the Commission, I am of the opinion that the compatibility of the legislation in question with Community law must be examined by reference to the articles of the Treaty concerning the freedom to provide services, and by reference to them alone.

225. It is clear from the information provided by the referring court that *Bwin* is established in Gibraltar and that it carries on its activities in Portugal by means of the internet. We have already seen that it has been held that a provider established in one Member State who offers by internet, without moving from that State, games on line to recipients established in another Member State, provides services within the meaning of Article 50 EC. (101)

226. It is true that the contested provisions, in so far as they reserve such activities for the *Santa Casa*, are also capable of constituting a restriction of the freedom of establishment. However, as *Bwin* has not sought to establish itself in Portugal, that freedom of movement is not relevant to the outcome of the main proceedings. The Belgian Government's claim that the *Liga* acts de facto as *Bwin*'s intermediary does not refute this conclusion.

227. It must be borne in mind that the freedom of establishment confers upon companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency, (102) that is to say, a secondary establishment controlled by the company or firm in question. However, the agreement between the applicants in the main proceedings does not have the object or effect of placing the *Liga* under *Bwin*'s control or of making it a secondary establishment of *Bwin*.

228. Finally, with regard to the free movement of capital and payments, it cannot be denied that the contested provisions are capable of restricting payments between persons residing in Portugal and *Bwin*. However, that is only a consequence of the fact that the latter is prohibited from supplying on-line games services to persons residing in Portuguese territory.

229. As the Commission correctly observes, given that the restrictive effects of national legislation on the free movement of payments are merely an inevitable conse-

quence of the restriction imposed on the provision of services, it is not necessary to consider whether that legislation is compatible with Article 56 EC. (103)

230. I therefore propose that Court should construe the referring court's question in the following way: must Article 49 EC be interpreted as meaning that it precludes legislation of a Member State whereby the exclusive right to organise and operate lotteries and off-course betting in the entire territory of that State conferred on a single non-profit-making entity controlled by that State is extended to all means of electronic communication, in particular the internet?

b) The existence of a restriction

231. There appears to be no doubt, and the Portuguese Government does not deny, that the provisions in question constitute a restriction of the freedom to provide services.

232. Those provisions prohibit a provider of on-line games established in a Member State other than the Portuguese Republic from offering lotteries and off-course betting on the internet to consumers residing in the latter State. As we have seen, Article 49 EC requires the elimination of measures prohibiting the activities of a provider of services established in another Member State where he lawfully provides similar services. Moreover, Article 49 EC is for the benefit of both providers and recipients of services. (104)

233. Finally, it has already been held that legislation of a Member State prohibiting an undertaking established in another Member State collecting bets from offering its services on the internet to recipients established in the first State constitutes a restriction within the meaning of Article 49 EC. (105)

c) The justification for the restriction

234. A restriction such as that provided for by the legislation in question conforms with Community law if it is justified by an overriding reason relating to the public interest, if it is appropriate for ensuring the attainment of the aim which it pursues and if it does not exceed what is necessary for attaining it. In any event, it must not be applied in a discriminatory way.

235. In accordance with that principle common to all economic activities which have not been harmonised, the Member State responsible for the restriction in question must demonstrate that it is necessary in order to achieve the declared objective, and that that objective could not be achieved by less restrictive measures. (106)

i) Arguments of the parties

236. The *Liga* and *Bwin* assert that the *Santa Casa*'s exclusive right to offer lotteries and off-course betting on the internet to consumers residing in Portuguese territory amounts to the complete closure of the market for on-line games in that State, which constitutes the most serious breach of the freedom to provide services. They claim that the restriction is not justified.

237. According to the *Liga* and *Bwin*, Portugal ought to have demonstrated, first, that the problem alluded to by the restrictive measure is really a serious problem in its territory, second, that that measure is capable of reme-

dying the problem and, finally, that there was no less restrictive way of resolving it.

238. The Liga and Bwin contend that the Santa Casa's exclusive rights are unlikely to achieve the desired purposes because Portugal is not pursuing a consistent and systematic policy of restricting gaming activities, as required by the case-law. In reality, it is only aiming to increase the revenue from games of chance and gambling. The Liga and Bwin assert that the games offered by the Santa Casa have expanded considerably in recent years, encouraged by aggressive advertising. They also state that the Portuguese Republic is actively pursuing a policy of increasing the level of gaming taking place in casinos.

239. Finally, the Liga and Bwin submit that the objectives pursued by the Portuguese legislation in question could be attained in the same way, if not better, by a less restrictive measure, such as opening the market to a limited number of private operators who would have specific obligations. In that connection, the Liga and Bwin point out that the Gibraltar legislation to which Bwin is subject is some of the strictest in Europe. In addition, Bwin is said to be a pioneer in drawing up rules intended to ensure responsible gaming to protect consumers, and also in setting up internal procedures to prevent money laundering.

240. The Portuguese Government observes that the monopoly which the Santa Casa has had since the 18th century is a legitimate expression of the Government's discretionary power. The grant of an exclusive right to the Santa Casa accords with the aim of restricting the practice of lotteries and off-course betting in order to limit the social risks associated with gaming of that kind and to employ the revenue from them for social causes. The extension of the monopoly to internet games was a necessary and appropriate measure for offering such games on line in a safe and controlled way.

241. The Portuguese Government submits that the Santa Casa's monopoly conforms with Community law because it is a non-discriminatory and proportionate measure. The Government adds that the grant of an exclusive right to a body such as the Santa Casa, which functions under the strict control of the Government, is more likely to attain the objectives pursued.

ii) My assessment

242. I shall begin by indicating what ought to be the effect, in my view, of the limits imposed on the powers of the Member States by the freedoms of movement in the area of games of chance and gambling. I shall then set out the reasons why the protection of consumers and the maintaining of public order may justify measures restricting the freedom to provide off-course betting on the internet. Next I shall describe the criteria for determining whether the legislation in question is appropriate for attaining the aims it pursues and whether it goes beyond those aims. Finally, I shall point out that the referring court must ensure that the contested restriction is applied in a non-discriminatory way.

– The effect of the limits imposed on the powers of the Member States in the area of games of chance and gambling

243. It is not disputed that, in the absence of harmonised rules at Community level in the gaming sector, Member States remain competent to define the conditions for the pursuit of activities in that sector. However, they must, when exercising their powers in this area, respect the freedoms of movement. (107)

244. I think an assessment of the effect of that limitation on the powers of the Member States should start from the following premise.

245. In my view, Community law does not aim to subject games of chance and gambling to the laws of the market. The establishment of a market which would be as open as possible was intended by the Member States as the basis of the European Economic Community because competition, if it is fair, generally ensures technological progress and improves the qualities of a service or product while ensuring a reduction in costs. It therefore benefits consumers because they can also benefit from products and services of better quality at a better price. In that way competition is a source of progress and development.

246. However, these advantages do not arise in the area of games of chance and gambling. Calling for tenders from service providers in that field, which would necessarily lead them to offer ever more attractive games in order to make bigger profits, does not seem to me a source of progress and development. Likewise I fail to see what progress there would be in making it easier for consumers to take part in national lotteries organised in each Member State and to bet on all the horse races or sporting events in the Union.

247. The situation is not comparable in any way with, for example, the movement of patients within the Union, which the Court has perfectly legitimately promoted because it extends the range of medical treatment offered to every citizen of the Union by giving him or her access to the health services of other Member States.

248. Games of chance and gambling, for their part, can only function and continue if the great majority of players lose more than they win. Opening the market in that field, which would increase the share of household budgets spent on gaming, would only have the inevitable consequence, for most of them, of reducing their resources.

249. Therefore limiting the powers of the Member States in the field of games of chance and gambling does not have the aim of establishing a common market and the liberalisation of that area of activity.

250. This is shown by the fact that the Court has consistently held that the Member States have a broad discretion, not only to determine the level of consumer protection and to maintain public order in relation to games of chance and gambling, but also in relation to the arrangements for organising them.

251. This conclusion also appears to be corroborated by the fact that the Court has held that the Member States may legitimately determine the appropriation of the

revenue from games of chance and gambling and may thus decide that private interests should not profit from them.

252. Consequently a Member State has sovereign power to prohibit a game in its territory, as the Court held with regard to the prohibition of large-scale lotteries in the United Kingdom in *Schindler*. In order to channel the provision of games into a controlled system and to protect consumers from being exposed to improper encouragement, a Member State may also grant an exclusive right to organise a game to a single entity or to a limited number of operators.

253. The difficulties in determining whether national law conforms with Community law arise mainly where Member States grant a single entity or a limited number of operators an exclusive right to operate games of chance and gambling.

254. The problem for national courts is in ascertaining the level above which the provision of games in the context of an exclusive right exceeds what is justified by the aim of channelling them into a controlled system to maintain public order and to protect consumers from harmful gambling habits.

255. The national courts must therefore determine whether the restrictive measures laid down by their domestic law are appropriate for attaining their objectives of protection and proportionate when the single entity or the operators with the exclusive right to operate a game of chance or gambling offer a certain range of games and carry out some advertising.

256. In considering whether the restrictive measures can attain the objectives pursued and whether they are proportionate, I think account must be taken of the fact that, as there is no Community harmonisation, determining the range of games offered and the conditions for operating them are matters within the discretion of the Member States. It falls to each Member State to assess, having regard to its own situation and its social and cultural characteristics, the balance to find between, on the one hand, an attractive range of games in order to satisfy the desire to gamble and to channel it into a lawful system and, on the other, a range which encourages too much gambling.

257. With regard to my premiss concerning the role of competition in relation to the aims of the Union, I think that the power of the Member States should be limited by Community law only to the extent of prohibiting conduct whereby a Member State deflects restrictive measures from their purpose and seeks the maximum profit. In other words, a Member State should be constrained to open to the market the activity of games of chance and gambling only if that State treats it, in fact and in law, as a true economic activity from which the maximum profits should be derived.

258. Therefore control of the suitability and proportionality of restrictive measures for attaining the objectives pursued in the area of games of chance and gambling should consist in ascertaining that the State in question has not manifestly exceeded its margin of discretion in the context in which those measures were adopted and applied.

259. Whether legislation such as the rules at issue can be justified will now be discussed on the basis of those considerations.

– Consumer protection and the maintaining of public order may justify measures restricting the freedom to provide off-course betting on the internet

260. The referring court has not stated the particular reasons underlying the extension, by Decree-Law No 282/2003, of the Santa Casa's monopoly to lotteries and off-course betting offered in Portuguese territory by means of electronic communication, in particular the internet. The reasons may nevertheless be inferred from the information provided by the Portuguese Government in its written observations.

261. It states that the extension of the Santa Casa's monopoly to on-line gaming has the same aims as the grant to that entity of the exclusive right to organise such gaming in a traditional form, in 1961 with regard to off-course betting and in 1985 with regard to lotteries.

262. Consequently the Portuguese legislation arises from taking account of the fact that internet games also now actually exist and the legislation fulfils the intention of channelling them into a legal framework so as to prevent their operation for criminal or fraudulent purposes and to limit the supply, and also to use the revenue from such games to finance social causes or causes of general interest.

263. In *Anomar and Others*, the Court examined similar reasons in relation to the Portuguese legislation on casino games. It took the view that those reasons are connected with the protection of consumers and the maintenance of order in society and those objectives may justify restrictions of the freedom to provide services. (108) We have also seen that, according to the case-law, although the financing of social causes cannot, as such, be a legitimate ground for restrictions of one of the freedoms of movement, it may nevertheless be regarded as an incidental beneficial consequence of a restrictive national law. (109)

264. The question that arises is therefore whether the protection of consumers and the maintenance of public order may be legitimate reasons for restricting the freedom to provide off-course betting on the internet. In other words, it is necessary to determine whether games of chance and gambling on the internet are likely to give rise to risks to consumers and to public order. I believe that the reply to this question should be in the affirmative for the following reasons.

265. As we have seen, the Member States have a broad discretion in determining the degree of protection to be provided in relation to games of chance and gambling which constitute a temptation to spend and which allow the collection of considerable sums of money.

266. Those are the characteristics of games of chance and gambling on the internet, such as off-course betting. The extension of the Santa Casa's exclusive right to lotteries and off-course betting on the internet seems to me all the more justified in that the risks to consumers and to public order are, in my opinion, potentially

greater with regard to on-line games than in relation to games offered in the traditional way.

267. So far as dangers to consumers are concerned, it is generally accepted that the risks of excessive spending and a real addiction to gaming are generally aggravated by the following circumstances, namely the permanent availability of the opportunity to play, the frequency of wins, their enticing or attractive nature, the possibility of staking large sums, the availability of credit in order to play, the location of games at places where people can play on an impulse and, finally, the fact that there is no information campaign regarding the risks of gaming. (110)

268. It must be observed that the offer of games on the internet combines several of these risk factors. First, the offer may be available at any moment and the player can have access to it without moving away from where he is. There is no barrier of space or time between the consumer and the offer of gaming or gambling. In addition, the internet enables the act of playing to be carried out in a context where the player is completely isolated.

269. Secondly, the internet enables the player to have access technically to all the providers of on-line gaming services. Furthermore, on-line games do not require the production of material goods, so that the range of games offered may be very extensive. Consequently the range of internet games is much greater than that of traditional games. Likewise operators can offer on the internet bets or lotto games the results of which can be made known immediately, so that consumers can play many times in a short period of time.

270. In addition, internet relationships do not permit the on-line service provider to check the identity of the consumer in the same way as in the case of a sale between natural persons. Prohibition measures for the protection of minors or vulnerable persons can be circumvented much more easily. Internet relationships are anonymous.

271. Finally, players may be offered credit in order to play on line (111) and payments can be made very easily by internet.

272. The combination of these different factors shows, in my view, that internet gaming potentially represents a higher risk for consumers, particularly minors and the weaker consumers who cannot overcome their gaming habit.

273. Games of chance and gambling by internet may also present significant risks to public order. These have been described in the context of the proceedings before the dispute resolution body of the World Trade Organisation (WTO) between Antigua and Barbuda and the United States of America concerning the prohibition by the latter of the cross-border provision of on-line gaming and betting services. (112)

274. In the abovementioned proceedings the United States of America claimed that the provision of on-line games facilitates the laundering of the proceeds of crime because of the volume, rapidity and international range of distance gaming transactions, combined with the extra-territorial location of service providers. In addition, the risk of fraud is increased because on-line

games can be set up very rapidly, so that dishonest operators can appear and disappear in a few minutes. (113)

275. Therefore the increased risks to consumers and to public order arising from internet gaming justify a Member State giving itself the means of controlling such gaming effectively and of setting up quickly any adjustments that may be found necessary.

276. It follows that the Portuguese Republic could legitimately restrict the freedom to provide lotteries and off-course betting on the internet to protect consumers and maintain public order.

– The suitability of the legislation in question for attaining its objectives

277. It is now necessary to examine the question whether the Portuguese legislation at issue is appropriate for providing effective protection for consumers and for maintaining public order in relation to the risks created by lotteries off-course betting on the internet.

278. According to the case-law, the fact that Portugal decided to authorise lotteries and off-course betting on the internet in the framework of a monopoly instead of prohibiting it entirely does not rule out the possibility that Portugal is really aiming to protect its consumers and to maintain public order in view of the risks connected with that kind of gambling. As the Court stated in *Läära and Others*, the limited authorisation of such games on an exclusive basis, which has the advantage of confining within controlled channels the desire to gamble and the operation of gambling, of preventing the risk of fraud and crime in the context of such operation, and of using the resulting profits for public interest purposes, likewise falls within the ambit of those objectives. (114)

279. It is clear from the reasoning of the abovementioned judgment that the grant of an exclusive right to a single entity enables objectives such as those of the Portuguese legislation in question to be attained only if that entity is under the control of the State. It is because the entity with the exclusive right to operate gaming machines in Finland was a public-law association pursuing its activities under the control of the Republic of Finland that the Court found, in the abovementioned judgment, that such a monopoly made it possible to confine the desire to gamble and the operation of gambling within controlled channels.

280. It follows that the first condition to be verified by the national court in order to determine whether measures such as the Portuguese legislation in issue are appropriate for attaining its objectives is, in my view, the Member State's right to direct and control effectively the activities of the entity which has the exclusive right of operation.

281. The second condition which the national court must also assess concerns the implementation of those measures. It is necessary to ascertain whether, in doing so, the Member State is distorting the purpose of those measures in seeking to obtain the maximum profit.

282. Regarding the first condition, I think the legal framework determining the functioning of the Santa Casa does enable the Portuguese Republic to direct and

control the organisation and operation of lotteries and off-course betting on the internet.

283. This is proved by the fact that the director of the Santa Casa and the members of its board of management are appointed by the Portuguese Government. More importantly, it is also the Government which, by decree-law, creates every lottery and off-course betting game, determines their organisation and operation, including the rates for stakes and bets, the system for awarding prizes, the frequency of draws, the specific percentage of each prize, the methods of collecting stakes and bets, the method of selecting authorised distributors and the methods and time-limits for payment of prizes.

284. In addition, the legislation applying to the Santa Casa lays down a number of safeguards to ensure fairness in gambling and betting because it provides for competition panels consisting of representatives of the public administration in the majority, and a complaints committee, chaired by a judge.

285. Finally, the legislation provides for the formation of a gaming council. This advisory body, which has the task of ruling on the organisation and operation of gambling and betting of a social nature by the Santa Casa, and the task of delivering opinions on business plans and the associated budget plans, strengthens those safeguards. The council may also provide the Government with the information necessary to enable it to make all the modifications to the conditions for gambling and betting which are necessary for pursuing objectives of general interest.

286. Consequently these factors may be such as to demonstrate, in my view, that the Portuguese Republic has sufficient powers to direct and control effectively the organisation and operation of lotteries and off-course betting on the internet by the Santa Casa.

287. As regards the second condition, it is for the national court to decide whether those powers have been exercised in conformity with the objectives pursued and have not been deflected from their aims in order to obtain the maximum profits.

288. In that connection the national court could take the following factors into account. First, Portugal limited the Santa Casa's exclusive right on the internet to games it already offered in the traditional way. No additional on-line game was created when the Santa Casa's monopoly was extended to on-line lotteries and off-course betting. Secondly, the Santa Casa does not offer instant lotteries on the internet because lotteries of that kind may create considerable risks of addiction by reason of the small stakes, immediate results and high frequency of wins of small amounts. Finally, the Santa Casa does not offer credit for gaming on line.

289. The Liga and Bwin deny that the disputed measures are appropriate for attaining their objectives because the objectives are not supported by a coherent and systematic policy.

290. First, the Liga and Bwin point out that in recent years the Portuguese Republic has had a policy of expansion in the field of lotteries and off-course betting, supported by very appealing advertising. They state

that the range of the State's games of a social nature for which the Santa Casa has a monopoly on operation and which was originally confined to Totobola and Totoloto was enlarged in 1993 to include 'Joker', in 1994 the 'Lotaria instantânea', in 1998 'Totogolo' and in 2004 'Euromilhões'. They observe that the last mentioned doubled its profits between 2003 and 2006.

291. The Portuguese Government asserts that, on the contrary, it has a responsible gambling policy and that the Santa Casa's profits, mainly because of EuroMilhões, fell significantly in 2007.

292. I am of the opinion that the arguments of the Liga and Bwin do not show, as such, that the Portuguese Republic is failing in its obligation to attain the objectives underlying the restrictions imposed by its legislation in a coherent and systematic manner.

293. It must be observed that the aims of the legislation in issue do not preclude a policy of controlled expansion. The extension of the Santa Casa's monopoly to on-line gaming arises from the fact that it actually exists. The extension of the monopoly is in response to the wish to channel gaming into a legal framework in order to prevent its operation for fraudulent or criminal purposes and to limit the supply, as well as to keep the revenue from gaming for financing social causes or causes of general interest.

294. These different interests, as indicated by settled case-law, must be examined together. The aim of channelling the supply of games of chance and gambling into a controlled system to prevent the risks of operation for fraudulent or criminal purposes can be pursued through such a policy of expansion.

295. Accordingly the Court has stated that, in order to draw players away from prohibited betting and gaming activities to activities which are authorised, a Member State is justified in offering them a reliable, but at the same time attractive, alternative which may entail offering an extended range of games, advertising on a certain scale and the use of new distribution techniques. (115)

296. Furthermore, the condition requiring the implementation of the contested restriction by means of a coherent and systematic policy must be applied by reference to the situation confronting the Member State in question.

297. The Portuguese Government stated that it had to cope with a worrying increase in illegal gaming and increasing risks of fraud. In that connection the Santa Casa observed that it had brought about ten prosecutions in the third quarter of 1995, 400 in 2005 and 600 in 2006.

298. Consequently the Portuguese Government could legitimately take the view that the increase in illegal gaming made it necessary to create new games of a social nature to satisfy Portuguese consumers' desire to gamble and to channel that desire into a legal framework. The Government was also justified in considering that the creation of new games could achieve that result only if it was accompanied by advertising on a certain scale to inform the public of their existence.

299. It will be for the national court to decide whether, having regard to those circumstances, the additional games created by the Portuguese Government and the scale on which they have been advertised manifestly exceeded what was necessary in order to pursue the objectives on which the Santa Casa's monopoly is based. In particular, the national court may take into account the study carried out at the Portuguese Government's request by the Centre for Applied Studies of the Portuguese Catholic University, which was referred to in the course of the hearing.

300. Secondly, the Liga and Bwin also claim that the Portuguese Government has extended gaming in casinos, increasing the number of operating licences, installing more than 800 slot machines in the new Lisbon casino and announcing its opening in a wide advertising campaign. Between 1996 and 2006 the gross revenue of casinos in Portugal rose by 150%. Furthermore, negotiations are said to be in progress for permitting casinos to offer their games on the internet.

301. I do not think that these arguments are such as to demonstrate that the grant to the Santa Casa of a monopoly of the operation of lotteries and off-course betting on the internet is inappropriate for attaining the objectives for which that exclusive right was conferred.

302. The coherent and systematic nature of the pursuit of those objectives would be called into question only if the Portuguese Government authorised the operation on the internet of gaming similar to the lotteries and off-course betting for which the Santa Casa has the right of operation. The question could arise, as the case may be, if Portugal authorised companies holding a licence to operate casino games to offer on the internet lotteries similar in their mode of operation to those offered by the Santa Casa.

303. On the other hand, the question does not arise, in my opinion, with regard to the expansion of casino games in their traditional form. The conditions in which gaming of that kind is carried on are completely different from those of internet lotteries and off-course betting. It is sufficient to observe that casino gaming entails the physical presence of the player inside a gaming establishment, on the days and at the times when it is open. Furthermore, such establishments are situated in Portugal in well-defined gaming areas.

304. No doubt casino gaming can also involve risks to consumers and to public order. However, in so far as it is based on a mode of operation entirely different from that of on-line gaming, the Portuguese Government's decision to organise its operation by means of a licensing system instead of restricting it to the Santa Casa is within its margin of discretion.

305. As the degree of protection against the risks connected with games of chance and gambling is to be determined at the discretion of the Member States, a Member State has the right to provide for different modes of operation for the different games. The national lottery, betting on horse races, casino gaming and slot machines may all constitute different games in respect of the place where they are accessible, their mode

of operation and the public to whom they appeal, depending on the culture of each country.

306. In my view, a Member State therefore has a right to provide for different modes of organisation which are more or less restrictive for each of those types of games. (116) That discretion is comparable to that which the Court found the Member States to have in the field of health in the case of *Commission v France*.

307. In that case, the Commission claimed that the French law making television broadcasting in France by French television channels of sporting events taking place in other Member States conditional on the prior removal of advertising for alcoholic beverages did not conform with Community law. In support of its action against France for failure to fulfil its Treaty obligations, the Commission argued that the French law was inconsistent in that it did not apply to advertising for tobacco.

308. The Court dismissed that argument as unfounded because it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. (117)

– The proportionality of the legislation in question

309. At this stage it is necessary to ascertain whether the aims of the Portuguese legislation can clearly be achieved by a less restrictive measure, such as granting concessions to various operators, as claimed by the Liga and Bwin.

310. I find that, in the main proceedings, Bwin sponsors sporting events on which Bwin offers bets which enable considerable amounts to be won. (118)

311. Like the Portuguese Government, I am of the opinion that, in view of the abovementioned circumstance, a Member State may legitimately consider that fair play is secured more effectively by the grant of an exclusive right to an entity operating under the Government's control and which, like the Santa Casa, is non-profit-making.

312. This conclusion is supported by other factors. As we have seen, a responsible policy concerning games of chance and gambling means that the Member State can exercise effective control of those activities. The need to take action and to be able to enforce the rapid application of measures may also prove to be more important in relation to on-line gaming, taking account of the development of that activity and the speed with which unscrupulous operators can create such games.

313. A single operator, acting under the direct and effective control of the Member State, certainly appears to be able to apply new protection measures such as, where necessary, the removal of one of its on-line games more effectively and more rapidly than private operators whose obligations would have to be determined beforehand. A similar conclusion was reached by the EFTA Court with regard to the Norwegian legislation granting a public undertaking an exclusive right to operate gaming machines in order to protect consumers and maintain public order. (119)

314. Furthermore, I agree with the Portuguese Government's argument that consumers are better protected

against the risks connected with the games offered by unscrupulous operators by the grant of an exclusive right to the Santa Casa, the sole and historic holder to operate the monopoly to operate lotto games and betting, than by a licensing system open to several operators. The Portuguese system has the advantage of simplicity because consumers residing in Portugal can easily be warned that the lotteries and off-course betting offered by any provider of on-line games, other than the Santa Casa, are prohibited and are potentially risky.

315. Next, with regard to the ban on advertising on-line games organised and operated in breach of the Santa Casa's exclusive right, the ban is obviously justified if the grant of such a right conforms with Community law.

316. Finally, with regard to the proportionality of the administrative fines provided for by the Portuguese law as sanctions on operators who contravene the Portuguese legislation, it has not been the subject of particular comment by the parties to the main proceedings and it does not call for any on my part either.

– Non-discriminatory application

317. The legislation in issue is not, as such, discriminatory in so far as it grants the Santa Casa the exclusive right to operate lotteries and off-course betting on the internet.

318. In so far as the legislation prohibits any person other than the licensed public body from operating the games in question; it involves no discrimination on grounds of nationality and applies without distinction to operators who might be interested in that activity, whether they are established in national territory or in another Member State. (120)

319. However, the referring court must ascertain that, when it is implemented, the legislation is also applied in a non-discriminatory way.

320. I therefore propose that the Court should reply as follows to the question referred by the Tribunal de Pequena Instância Criminal do Porto:

– Article 49 EC must be interpreted as meaning that it does not preclude legislation of a Member State by virtue of which the exclusive right to organise and operate lotteries and off-course betting on the entire territory of that State, conferred on a single non-profit-making body controlled by that State, is extended to all electronic means of communication, in particular the internet, if that legislation is justified by overriding reasons relating to the public interest, if it is appropriate for ensuring the attainment of the objectives which it pursues, if it does not exceed what is necessary for attaining them and if it is applied in a non-discriminatory way;

– it is incumbent upon the national court to ascertain that those conditions are fulfilled;

– in view of the risks created by games of chance and gambling on the internet, a Member State may legitimately restrict the right to organise and operate such games with the aim of protecting consumers and maintaining public order;

– such legislation is appropriate for attaining those objectives if it enables the Member State to direct and control effectively the organisation and operation of those games and if, in the actual arrangements for applying the legislation, the Member State does not manifestly exceed its margin of discretion;

– the grant of an exclusive right to a single non-profit-making entity controlled by the Member State may constitute a measure proportionate to the attainment of such objectives;

– that legislation is not, as such, discriminatory.

V – Conclusions

321. I therefore propose that Court should rule as follows:

(1) Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that legislation of a Member State by virtue of which the exclusive right to organise and operate lotteries and off-course betting on the entire territory of that State is extended to all electronic means of communication, in particular the internet, constitutes a 'technical regulation' within the meaning of that provision.

(2) If such legislation is not notified in accordance with Directive 98/34, as amended by Directive 98/48, it cannot be relied upon as against individuals such as the Liga Portuguesa de Futebol Profissional and Baw International Ltd. It is for the national court to ascertain whether the legislation has been notified or not.

(3) A preliminary ruling is binding on the referring court even if it relates to a provision of Community law which is not referred to in the question from the national court.

(4) (a) Article 49 EC must be interpreted as meaning that it does not preclude legislation of a Member State by virtue of which the exclusive right to organise and operate lotteries and off-course betting on the entire territory of that State, conferred on a single non-profit-making body controlled by that State, is extended to all electronic means of communication, in particular the internet, if that legislation is justified by overriding reasons relating to the public interest, if it is appropriate for ensuring the attainment of the objectives which it pursues, if it does not exceed what is necessary for attaining them and if it is applied in a non-discriminatory way;

(b) It is incumbent upon the national court to ascertain that those conditions are fulfilled.

(5) In view of the risks created by games of chance and gambling on the internet, a Member State may legitimately restrict the right to organise and operate such games with the aim of protecting consumers and maintaining public order.

(6) Such legislation is appropriate for attaining those objectives if it enables the Member State to direct and control effectively the organisation and operation of

those games and if, in the actual arrangements for applying the legislation, the Member State does not manifestly exceed its margin of discretion.

(7) The grant of an exclusive right to a single non-profit-making entity controlled by the Member State may constitute a measure proportionate to the attainment of such objectives.

(8) Such legislation is not, as such, discriminatory.

1 – Original language: French.

2 – See Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Markus Stoß and Others, and Case C-525/06 Nationale Loterij and Case C-212/08 Zeturf, pending before the Court.

3 – ‘The Santa Casa’.

4 – ‘Bwin’.

5 – ‘Liga’.

6 – Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18, ‘Directive 98/34’).

7 – The games found by archaeologists in Egyptian tombs include dice, the Arabic name of which, ‘azard’, is the origin of the words ‘azzardo’ in Italian, ‘azar’ in Spanish and ‘hasard’ in French.

8 – In a letter to his son Tiberius, the Emperor Augustus writes that games should be stopped and that he has himself lost 20 000 sesterces (Damals, Würfeln, wetten, Karten spielen – Die Geschichte des Glücksspiels, April 2008, pp. 13 and 19).

9 – EuroMillions is available in Belgium, Spain, France, Ireland, Luxembourg, Austria, Portugal and the United Kingdom. It is also available in Switzerland.

10 – Martignon-Hutin, J.-P.G., *Faites vos jeux*, L’Harmattan, Logiques sociales, Paris, 1993, p. 149.

11 – According to the Study of games of chance in the European Union, carried out by the Swiss Institute of Comparative Law at the request of the Commission on 14 June 2006, in 2003 in the 25 Member States of the European Union the four main categories of games described above generated, in the 25 Member States of the Union from 1 May 2004, gross earnings, after deduction of the payment of winnings, EUR 51 500 million.

(http://ec.europa.eu/internal_market/services/gambling_en.htm).

12 – For example, in Belgium 321 persons worked or the national lottery in 2004, 709 in casinos in 2003, 8 220 persons in connection with slot machines and 1 000 persons in the Belgian Pari Mutuel Urbain (State-controlled betting system) (PMU) (see Study of games of chance in the European Union, pp. 1133, 1134, 1137 and 1139). In Germany, Lotto and Totoblock employed approximately 58 000 persons, 4 700 persons worked in casinos and approximately 3 000 in hotels and restaurants associated with casinos (see Study of games of

chance in the European Union, pp. 1203 and 1206). In the United Kingdom, the number of persons working full time in the sector of gambling and games of chance was estimated at 100 000 in 2004 (see Study of games of chance in the European Union, p. 1404).

13 – ‘Fundamentally the punter does not bet to win ..., he bets in order to bet again. The spiral is endless. The more the racegoer wins, the more he bets, the more he wants to bet and nothing stops him from betting because he is winning. If he loses, that is a further reason for betting again in order to recoup his losses’ (see Martignon-Hutin, J.-P.G., *op. cit.*, p. 133). The problems connected with gambling have been the subject of several scientific studies, particularly since the 1990s (see the numerous references in the Study of games of chance in the European Union, Chapter 9, entitled ‘Problem gambling’). The social impact of gambling and games of chance has also been the subject of investigations and studies in several Member States. These problems have necessitated the setting up of assistance and care services, particularly direct lines for assistance to compulsive gamblers.

14 – In Rome measures were taken at the beginning of the second century AD to prohibit gambling, gamblers were fined and exiled. In the Middle Ages, the church disapproved of gambling, which was charged with encouraging lying, treason, theft, brawling, murder, addiction, greed and drunkenness. Several English and French sovereigns prohibited gambling, as did those of the Holy Roman Empire. In 1215 the Fourth Lateran Council banned all games except chess (Damals, *op. cit.*, p. 25).

15 – In Belgium, Denmark, Germany, Greece, France, Ireland, Cyprus, Luxembourg, the Netherlands, Austria, Slovakia and Finland.

16 – In Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Slovenia, Finland and the United Kingdom.

17 – This applies to the national lotteries in Belgium, France, Ireland, Cyprus, Luxembourg, Malta, Portugal and the United Kingdom.

18 – For example, according to the Study of games of chance in the European Union, casinos are prohibited in Ireland, Cyprus and the United Kingdom; betting with bookmakers is prohibited in France, Cyprus, Luxembourg and the Netherlands; several Member States authorise gaming machines only on the premises of casinos, etc.

19 – The average percentage of households in the 27 Member States of the European Union with access to the internet rose from 49% in 2006 to 54% in 2007. The average percentage of households in those States who have a broadband connection, that is to say, connected to a centre appropriate for xDSL technology, to a cable network appropriate for internet traffic or other broadband technologies, rose from 14% in 2004 to 23% in 2005, 30% in 2006 and 42% in 2007 (see the Survey of the Use of Information and Information Technolo-

gies in Undertakings, Eurostat – Share of households with broadband access).

20 – It is now possible to access the internet from a laptop computer and a hand-held phone.

21 – Regarding on-line betting, in 2003 this generated gross earnings of EUR 810 million, after deduction of winnings, in the 25 Member States of the European Union from 1 May 2004. Regarding lotteries, Camelot, the financial operator of the national lottery in the United Kingdom, stated that the total sales by the new means of electronic communication rose from EUR 17.8 million in the period 2003-2004 to EUR 126.7 million in the period 2004-2005 (see Survey of Games of Chance in the European Union, pp. 1406 and 1407). With regard to gambling in casinos, the Belgian Gambling Commission estimated that in 2003, 25 000 persons played on line and spent EUR 27 million in doing so.

22 – Directive of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Electronic Commerce Directive') OJ 2000 L 178, p. 1.

23 – Directive of 12 December 2006 on services in the internal market (JO 2006 L 376, p. 36).

24 – Case C-6/01 Anomar and Others [2003] ECR I-8621, paragraphs 46 and 47.

25 – Case C-243/01 Gambelli and Others [2003] ECR I-13031, paragraph 59.

26 – Case C-275/92 Schindler [1994] ECR I-1039, paragraph 60; Case C-124/97 Läärä and Others [1999] ECR I-6067, paragraph 13; Case C-67/98 Zenatii [1999] ECR I-7289, paragraph 14; and Gambelli and Others, paragraph 63.

27 – Schindler.

28 – Läärä and Others.

29 – Zenatti.

30 – Anomar and Others.

31 – On the other hand, the Court has found that periodicals offering readers an opportunity to take part in games for prizes do not have those two characteristics, Case C-368/95 Familiapress [1997] ECR I-3689, paragraphs 21 to 23.

32 – Joined Cases C-338/04, C-359/04 and C-360/04 Placanica and Others [2007] ECR I-1891, paragraph 46 and cases cited.

33 – Gambelli and Others, paragraph 61.

34 – Zenatti, paragraph 36.

35 – Gambelli and Others, paragraph 63.

36 – Placanica and Others, paragraph 48.

37 – Case C-65/05 Commission v Greece [2006] ECR I-10341, paragraph 49.

38 – Schindler, paragraph 58; Läärä and Others, paragraph 33; and Zenatti, paragraph 31.

39 – In Schindler, the Court found that the United Kingdom could legitimately prohibit large-scale lotteries in its territory.

40 – Zenatti, paragraph 33.

41 – See, with regard to the grant of an exclusive right to a single entity, Läärä and Others, concerning the Finnish law granting a public-law association controlled by the State an exclusive right to operate gaming machines. In relation to the grant of exclusive

rights to a limited number of operators, see Zenatii and Gambelli and Others, concerning the Italian law on betting on the results of sporting events and horse racing, and Anomar and Others, concerning the Portuguese law subjecting casino gaming to a licensing system.

42 – Läärä and Others, paragraph 37, and Zenatti, paragraph 35.

43 – Läärä and Others, paragraph 36, and Zenatti, paragraph 34.

44 – Läärä and Others, paragraph 39.

45 – Ibid., paragraph 40.

46 – Ibid., paragraph 41.

47 – Paragraph 30.

48 – Zenatii, paragraph 36.

49 – Ibid., paragraph 37.

50 – Gambelli and Others, paragraph 67.

51 – Ibid., paragraph 69.

52 – Ibid., paragraph 74.

53 – Placanica and Others, paragraph 55.

54 – Ibid., paragraphs 56 and 57.

55 – Ibid., paragraph 64.

56 – Diário da República I, series A, n° 259, 8 November 2003, 'Decree-Law No 282/2003'.

57 – Diário da República I, No 2777, 2 December 1989, as amended by Decree-Law No 10/95, 19 January 1995 (Diário da República I, series A, No 16, 19 January 1995).

58 – Decree-Law as amended and republished by Decree-Law No 317/2002, of 27 December 2002 (Diário da República I, series A, No 299, 29 December 2002).

59 – See Article 1 of Decree-Law No 412/93 of 21 December 1993.

60 – See Article 1(1) of Decree-Law No 314/94 of 23 December 1994.

61 – See Article 1(1) of Decree-Law No 225/98 of 17 July 1998.

62 – See Article 1 of Decree-Law No 210/2004 of 20 August 2004.

63 – Decree-Law adopting the statutes of the Santa Casa at present in force, as amended by Decree-Law No 469/99 of 6 November 1999.

64 – See Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I-905, paragraph 41, and cases cited.

65 – Ibid. (paragraph 42 and cases cited).

66 – Ibid. (paragraph 43 and cases cited).

67 – Placanica and Others, paragraph 36.

68 – Case C-241/89 SARPP [1990] ECR I-4695, paragraph 8, and Placanica and Others, paragraph 36.

69 – The Danish Government refers to Case C-194/94 CIA Security International [1996] ECR I-2201, paragraph 25; Case C-278/99 van der Burg [2001] ECR I-2015, paragraph 20, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 45.

70 – See Joined Cases C-228/01 and C-289/01 Bourrasse and Perchicot [2002] ECR I-10213, paragraph 33 and cases cited.

71 – See SARPP, paragraph 10 et seq., and Case C-60/03 Wolff and Müller [2004] ECR I-9533, paragraph 24 et seq.

- 72 – See, to that effect, Gambelli and Others, paragraphs 52 to 54.
- 73 – Directive of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8).
- 74 – Paragraph 25.
- 75 – Paragraph 20.
- 76 – Paragraph 45.
- 77 – CIA Security International, paragraph 40.
- 78 – Commission v Greece, paragraph 61.
- 79 – On the other hand, the prohibition in Decree-Law No 282/2003 on advertising such games by displaying a logo on the kit worn by football players and by means of posters in stadiums is not, in my view, a ‘technical regulation’ within the meaning of Directive 98/34. Even if a prohibition of such advertising may be classified as a restriction of the freedom to provide on-line games services, that is not in itself a criterion used by Directive 98/34 for defining its scope (see, to that effect, Case C-267/03 Lindberg [2005] ECR I-3247, paragraph 51). The prohibition of advertising may have the effect of closing the market for on-line games in the State where it applies, but it does not prevent the supply or use of on-line games services, within the meaning of Article 1 of Directive 98/34 (van der Burg, paragraph 20).
- 80 – Commission v Greece, paragraph 60.
- 81 – CIA Security International, paragraph 44.
- 82 – Ibid., paragraphs 48 and 55.
- 83 – OJ 1972 L 73, p. 14.
- 84 – Case C-30/01 Commission v United Kingdom [2003] ECR I-9481, paragraph 59.
- 85 – See, regarding the implementation of a directive on the recognition of professional qualifications, Case C-505/04 Commission v United Kingdom, not published in ECR. See also, in relation to the freedom of establishment, Case C-489/01 Commission v United Kingdom [2003] ECR I-12037, and in relation to the failure to implement in Gibraltar Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes (OJ 1997 L 84, p. 22).
- 86 – Case 26/62 [1963] ECR 1.
- 87 – Case 6/64 [1964] ECR 1141.
- 88 – Case 106/77 Simmenthal [1978] ECR 629, paragraphs 24 and 26.
- 89 – Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, paragraphs 113 and 114, and, applied in a recent case, Case C-188/07 Commune de Mesquer [2008] ECR I-0000, paragraph 84.
- 90 – Case C-234/04 Kapferer [2006] ECR I-2585, paragraph 22.
- 91 – Case C-2/06 Kempter [2008] ECR I-0000, paragraph 45.
- 92 – Joined Cases C-222/05 to C-225/05 van der Weerd and Others [2007] ECR I-4233, paragraph 41.
- 93 – Kempter, paragraph 45.
- 94 – van Gend en Loos, p. 23.
- 95 – Case 52/76 [1977] ECR 163, paragraph 26.
- 96 – Case C-224/01 Köbler [2003] ECR I-10239, paragraphs 34 and 35.
- 97 – Ibid., paragraph 59.
- 98 – Case C-129/00 Commission v Italy [2003] ECR I-14637, paragraphs 29 and 32.
- 99 – See, to that effect, Case C-189/95 Franzén [1997] ECR I-5909, paragraph 41.
- 100 – See, to that effect, Case C-209/98 Sydhavnens Sten & Grus [2000] ECR I-3743, paragraphs 74 to 81.
- 101 – See, to that effect, Gambelli and Others, paragraphs 52 and 54.
- 102 – See Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-7995, paragraph 41.
- 103 – See, to that effect, Case C-452/04 Fidium Finanz [2006] ECR I-9521, paragraph 49.
- 104 – Case C-262/02 Commission v France [2004] ECR I-6569, paragraph 22.
- 105 – Gambelli and Others, paragraph 54.
- 106 – See, inter alia, Case C-170/04 Rosengren and Others [2007] ECR I-4071, paragraph 50.
- 107 – Commission v Greece, paragraph 47.
- 108 – Anomar and Others, paragraph 73.
- 109 – See the case-law cited in point 65 of this Opinion.
- 110 – See the Study of games of chance in the European Union, p. 1450.
- 111 – At the hearing the Portuguese Government stated that this was done by Bwin.
- 112 – Case DS285.
- 113 – In view of these risks to public order and the dangers of on-line games to consumers, the Appellate Body of the WTO found that the restrictive measures taken by the United States of America were necessary for the protection of public morality and the maintenance of public order (see the Report of the Appellate Body of the WTO, United States – Measures affecting the cross-border supply of gambling and betting services, WT/DS285/AB/R, 7 April 2005, paragraph 327).
- 114 – Läärä and Others, paragraph 37.
- 115 – Placanica and Others, paragraph 55.
- 116 – This is the main question in Markus Stoß and Others.
- 117 – Commission v France, paragraph 33.
- 118 – According to the information in the written observations of the Liga and Bwin, the Bwin group employs approximately 1 000 persons and has a turnover of approximately EUR 1 000 million. It offers its services to several million consumers every year, it operates on more than 20 markets and had a gross global profit (after payment of winnings to consumers) of EUR 382 million in 2006.
- 119 – The EFTA Court found that, ‘in the Court’s view, it is reasonable to assume that a monopoly operator in the field of gaming machines subject to effective control by the competent public authorities will tend to accommodate legitimate concerns of fighting gambling addiction better than a commercial operator or organisations whose humanitarian or socially beneficial activities partly rely on revenues from gaming machines. Furthermore, it is plausible to assume that in

principle the State can more easily control and direct a wholly State-owned operator than private operators. Through its ownership role, the State has additional ways of influencing the behaviour of the operator besides public law regulations and surveillance' (judgment of the EFTA Court, 14 March 2007, EFTA Surveillance Authority/Norway, E-1/06, EFTA Court Report, p. 7, paragraph 51).

120 – Läärä and Others, paragraph 28.
