OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 16 May 2006 [1]

I — Introduction

1. 'Rien ne va plus'. The Court of Justice can no longer avoid carrying out an in-depth examination of the consequences of the fundamental freedoms of the EC Treaty for the betting and gaming sector.

2. This is the third time the Court has had to give a ruling on this matter in relation to the current legislation in Italy. It first did so at the request of the Consiglio di Stato (Council of State) in the judgment of 21 October 1999 in *Zenatti*, [2] declaring that the EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

3. The guidelines provided in that judgment failed to dispel the doubts raised by the Italian legislation and gave rise to a second reference for a preliminary ruling, this time from the Tribunale di Ascoli Piceno, which referred, as well as to the freedom to provide services, to the right of establishment. The judgment of 6 November 2003 in *Gambelli and Others* [3] qualified the previous judgment to the effect that 'national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a licence or authorisation from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively'. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, is justified and whether the restrictions it imposes are disproportionate in the light of those objectives.

1 — Original language: Spanish.

2 — Case C-67/98 *Zenatti* [1999] ECR I-7289.

3 — Case C-243/01 *Gambelli and Others* [2003] ECR I-13031.

4. The questions referred for a preliminary ruling by the Tribunale di Larino and the Tribunale di Teramo give the Court of Justice the opportunity to define its doctrine, knowing that the Corte suprema di cassazione (Supreme Court of Cassation) has held that the system is compatible with Community law and aware of the circumstances surrounding the grant of licences to organise betting in Italy.

5. Against that background, the content of the judgments cited and of the Opinions of the Advocates General makes it possible for me, although I may make specific references, to omit some details and focus on the problems which remain unsolved or which have arisen independently since.

II — Legal framework

A — *Community law*

6. Under Article 3(c) EC, the activities of the Community are to include, for the purpose of achieving its objectives, 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. The last three areas are governed by Title III of Part Three of the Treaty, of which Chapter 2 is devoted to the 'Right of Establishment' and Chapter 3 to 'Services'.

1. Right of establishment

7. The parameters of this principle are to be found in Article 43 EC:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is

effected, subject to the provisions of the Chapter relating to capital.'

8. Article 46(1) contains several reservations:

'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

...'

9. Article 48 EC assimilates legal persons with natural persons for the exercise of the right:

'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 shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

2. Freedom to provide services

10. The general principle is stated in the first paragraph of Article 49 EC:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

...'

(d) activities of the professions.

11. This is supplemented by the provisions of Article 50 EC:

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

'Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

12. Article 55 refers to rules governing the right of establishment:

"Services" shall in particular include:

'The provisions of Articles 45 to 48 shall apply to the matters covered by this Chapter.'

(a) activities of an industrial character;

(b) activities of a commercial character;

B — *The Italian legislation*

(c) activities of craftsmen;

13. The national legislation is to a large extent the same as that examined in

Gambelli and Others; however, it is appropriate to take another look at its provisions as updated.

1. Licences and authorisations for exercising the activity

14. Under Article 88 of the Testo Unico delle Leggi di Pubblica Sicurezza (Single text of the laws on public security, hereinafter 'TULPS'), [4] in the version set out in Article 37(4) of the Legge financiaria (Finance law) for 2001, [5] authorisation to organise betting is granted exclusively to licence holders or to those empowered to do so by a Ministry or another entity to which the law reserves the right to organise betting. Consequently, anyone wishing to carry on an activity in the public betting field must obtain a licence, as well as an authorisation to which the TULPS refers as a 'police authorisation'.

(a) Licences

15. It is the State's responsibility to supervise betting and gaming, through the Ministerio dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance), which uses the Amministrazione Autonoma dei Monopoli di Stato ('AAMS') (Independent Authority for the Administration of State Monopolies). [6]

16. However, that exclusive reservation to the State has two exceptions: the Comitato olimpico nazionale italiano ('CONI') (Italian National Olympic Committee), and the Unione italiana per l'incremento delle razze equine ('UNIRE') (National Union for the Improvement of Horse Breeds), [7] authorised to organise bets, [8] and to entrust their management to third parties, in relation to events supervised by them. [9]

17. The award of licences by these bodies is subject to specific guidelines, which have

4 — Approved by Royal Decree No 773 of 18 June 1931 (*GURI* No 146 of 26 June 1931).

5 — Law No 388 of 23 December 2000 (*GURI* No 302 of 29 December 2000, Ordinary Supplement No 219). The text which appears in paragraph 7 of the judgment in *Gambelli and Others* does not reflect the amendment, which is mentioned in paragraph 8 as if it were a different provision.

6 — Article 1 of Presidential Decree No 33 of 24 January 2002 (*GURI* No 63 of 15 March 2002) and Article 4 of Decree-Law No 138 of 8 July 2002 (*GURI* No 158 of 8 July 2002) — which became Law No 178 of 8 August 2002 (*GURI* No 158 of 8 July 2002).

7 — Rossi, G., 'Il mercato unico europeo e il monopolio del CONI sui giuochi e concorsi pronostici connessi alle manifestazioni sportive', *Rivista di diritto sportivo*, 1992, p. 229 et seq.

8 — Article 6 of Legislative Decree No 496 of 14 April 1948 (*GURI* No 118 of 22 May 1948)

9 — Article 3(229) of Law No 549 of 28 December 1995 (*GURI* No 302 of 2 November 1995) — CONI — and Article 3(78) of Law No 662 of 23 December 1996 (*GURI* No 303 of 28 December 1996) — UNIRE.

changed over time. Originally, the selection of recipients depended on the transparency of the ownership of the interested parties, which is why companies faced various restrictions, in that shares carrying the right to vote had to be issued in the name of natural persons, general partnerships or limited partnerships and could not be transferred simply by endorsement, [10] with the result that companies quoted on the stock exchange were prevented from participating in tendering procedures.

18. Nowadays, Article 22(11) of the Financial Law for 2003 [11] allows any legal person to tender, without any restriction as to its legal form.

(b) Police authorisations

19. In order to operate in the betting sector, it is necessary to have, in addition to the licence, an authorisation (Article 88 of the TULPS). The authorisation can be revoked, and it is refused to anybody who has had certain penalties imposed on him or who has been convicted of certain offences, for example, those relating to public morality and decency or to the infringement of the betting and gaming legislation (Articles 11 and 14 of the TULPS).

20. Once the authorisation has been issued, its holder must, at any time, allow the forces of law and order access to the premises in which the authorised activity is pursued (Article 16 of the TULPS).

2. Penalties

21. Law No 401 of 13 December 1989 on gaming, clandestine betting and ensuring the proper conduct of sporting contests ('Law No 401/89') [12] defines certain kinds of conduct.

22. Article 4 of Law No 401/89 provides that any person who unlawfully participates in

10 — Article 2(1)(a) and (6) of Decree No 174 of the Ministry of Finance of 2 June 1998 (*GURI* No 129 of 5 June 1998) — CONI — and Article 2(1)(a) and (8) of Decree No 169 of the President of the Republic of 8 April 1998 (*GURI* No 125 of 1 June 1998) — UNIRE.

11 — Law No 289 of 27 December 2002 (*GURI* No 305 of 31 December 2002, Ordinary Supplement No 240).

12 — *GURI* No 294 of 18 December 1989.

the organisation of lotteries or betting reserved by law to the State or to entities operating under licence from the State or who organises betting or pools in respect of sporting events run by CONI or by UNIRE is liable to a term of imprisonment of six months to three years; any person who unlawfully participates in the public organisation of betting on other contests is liable to a term of imprisonment of three months to one year and a fine (Article 4(1)). Any person who advertises such gaming is liable to a term of imprisonment of up to three months and a fine (Article 4(2)); and any person who merely participates in such gaming is liable to one or other of those last two penalties (Article 4(3)).

23. Article 4(4a) and (4b) [13] of Law No 401/89 extends the penalty to any person who, without the authorisation required by Article 88 of the TULPS, takes or collects — including by telephone or by data transfer — bets of any kind placed in Italy or abroad, or who facilitates such acts (paragraph 4a) and to any person who collects lottery tickets or other bets by the same means without being authorised to use those means for those purposes (paragraph 4b).

13 — Added by Article 37(5) of Law No 388/00. Paragraph 9 of the judgment in *Gambelli and Others* refers to 'Article 4a' and 'Article 4b' when, in fact, they are both paragraphs of Article 4.

III — Background to the case: the judgment in *Gambelli and Others* and the reply of the Corte suprema di cassazione

24. As I pointed out at the beginning of this Opinion, the Court of Justice has already been asked about the cross-border aspect of gambling To the aforementioned judgments in *Gambelli and Others* and *Zenatti* we must add the judgments in *Schindler* [14] and *Läärä and Others* [15] although, apart from *Gambelli and Others*, they all centred on the freedom to provide services. [16]

25. The case of the Schindler brothers dealt with the total prohibition on lotteries in the United Kingdom; the case of *Läärä and Others* examined Finnish legislation concerning slot machines; and the *Zenatti* case considered the operation of betting by Italian agencies on behalf of an undertaking established in another Member State. This latter

14 — Case C-275/92 *Schindler* [1994] ECR I-1039.

15 — Case C-124/97 *Läärä and Others* [1999] ECR I-6067.

16 — The Court has also examined other areas: in Case C-6/01 *Anomar and Others* [2003] ECR I-8621, gaming machines; and in Case C-42/02 *Lindman* [2003] ECR I-13519, the taxation in Finland on an amount won in a game of chance held in another Member State. Pending judgment is Case C-89/05 *United Utilities*, in which the House of Lords (United Kingdom) asks 'whether the exemption of the bets, operated by Article 13(B)(f) of the Sixth Council Directive of 17 May 1977 (Directive 77/388/EEC) in respect of "betting, lotteries and other forms of gambling" applies to the services of a person ("the representative"), who carries out those activities on behalf of another person ("the principal") ...'.

situation was quite similar to the *Gambelli and Others* case, which is the same in many respects as the case under consideration here, especially as regards the facts and the Community and national legal framework.

26. It is therefore necessary to examine the reasons why the courts have referred these questions for a preliminary ruling. To do so requires an explanation of *Gambelli and Others* and the application of its criteria by the Corte suprema di cassazione.

A — *Gambelli and Others*

27. Criminal proceedings were brought against Mr Gambelli and 137 other persons for unlawfully organising unauthorised gaming and of managing premises from which bets were forwarded, without authorisation, to a British bookmaker.

28. The Tribunale (District Court), Ascoli Piceno, referred a question to the Court of Justice because it entertained doubts as to whether the Italian penalties which had to be imposed were compatible with Articles 43 and 49 EC. [17]

29. In *Gambelli and Others*, after setting out the observations submitted (paragraphs 25 to 43), the Court considered the matter from two viewpoints: that of the freedom of establishment (paragraphs 44 to 49) and that of the freedom to provide services (paragraphs 50 to 58). [18]

30. From the first viewpoint, the Court took as a reference the United Kingdom undertaking which operated in Italy through Italian agencies (paragraph 46), because it was unable to do so directly, since the national rules made it impossible for companies quoted on the stock exchanges of other Member States (such as the under-

17 — It posed this question: 'Is there incompatibility (with the repercussions that that has in Italian law) between Article 43 et seq. and Article 49 et seq. of the EC Treaty regarding freedom of establishment and freedom to provide cross-border services, on the one hand, and, on the other, domestic legislation such as the provisions contained in Article 4(1) et seq., Article 4a and Article 4b of Italian Law No 401/89 (as most recently amended by Article 37(5) of Law No 388/00 of 23 December 2000) which prohibits on pain of criminal penalties the pursuit by any person anywhere of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, unless the requirements concerning licences and authorisations prescribed by domestic law have been complied with?'

18 — In his Opinion, Advocate General Alber considers that the data transmission centres were not secondary establishments of the British undertaking, but operated by providing services (point 87); he therefore suggested a reply limited to the freedom to provide services.

taking concerned) to obtain licences — which constituted a restriction on the right of establishment (paragraph 48).

31. From the second viewpoint, the Court carried out a more in-depth analysis and held that the Italian rules restricted the freedom to provide services in three cases: (a) that of the British company, which accepted the bets from Italy, an activity which, for the purposes of Article 50 EC (paragraph 52) it described as a 'service', even though it was provided via the Internet (paragraphs 53 and 54); (b) that of the Italian citizens who placed the bets, who were subject to criminal penalties (paragraphs 55 to 57); and (c) that of the intermediaries, who were also penalised (paragraph 58).

32. As a corollary, the Court declared that Article 4 of Law No 401/89 constituted a restriction on the freedom of establishment and on the freedom to provide services (paragraph 59), and that it was necessary to consider whether such restrictions could be recognised as exceptional measures, as expressly provided for in Articles 45 and 46 EC, or justified for reasons of overriding general interest (paragraph 60).

33. Neither the diminution of tax revenue (paragraph 61) nor the financing of social activities through a levy on the proceeds of authorised games, which must constitute only 'an incidental beneficial consequence' (paragraph 62) fall within the scope of either of these exceptions.

34. The restrictions must satisfy the conditions laid down in the case-law (paragraph 64). After listing those conditions (paragraph 65), the Court held in *Gambelli and Others* that it is for the national court to decide whether the restrictive measures at issue in the main proceedings satisfy those conditions.[19] To that end, it provided guidelines (paragraph 66), requiring the restrictions:

— to be justified by imperative requirements in the general interest, such as 'consumer protection', 'the prevention of fraud' and the prevention of 'incitement to squander on gaming', or 'the need to preserve public order', provided that the measures adopted served 'to limit betting activities in a consistent and systematic manner' (paragraph 67), so

19 — In *Zenatti* the Court used similar terms to hold, at paragraph 37, that it was for the national court to verify whether the national legislation was justified and whether the restrictions which it imposed did not appear disproportionate. In his Opinion in *Gambelli and Others*, Advocate General Alber states that it has hitherto been left to the national courts to make that assessment, but that it is a task 'which they clearly find difficult' (point 116).

that, where a Member State pursues a policy of substantially expanding betting and gaming at national level with a view to obtaining funds, it cannot invoke public order concerns relating to the need to reduce opportunities for betting (paragraphs 68 and 69); [20]

— to be applicable in the same way and under the same conditions to all operators within the Community (paragraph 70), since, if Italian operators may meet those conditions more easily, the requirement of non-discrimination is not satisfied (paragraph 71);

— not to go beyond what is necessary to attain the end in view. Proportionality must be observed in respect of the criminal penalty imposed on persons placing bets (paragraph 72) and on intermediaries who facilitate the provision of services by a bookmaker in another Member State (paragraph 73), and in respect of the opportunities for companies quoted on regulated markets of other Member States to obtain licences to organise bets (paragraph 74).

20 — It should be pointed out that, although the judgment held that it was for the national court to assess whether, in the main proceedings, the legal criteria were satisfied, the Court of Justice did itself express an opinion on the matter.

B — *The response of the Corte suprema di cassazione*

35. A few months after giving judgment in *Gambelli and Others,* the Corte suprema di cassazione had the opportunity to lay down its guidelines in an appeal brought by the Pubblico ministero (Public Prosecutor) against a decision of the Tribunale di Prato (District Court) of 15 July 2003, which, in criminal proceedings against Mr Gesualdi and Others for an offence under Article 4(4a) of Law No 401/89, had cancelled the seizure of the centres managed by the accused, on the grounds that the aforementioned provision infringed Community law. [21]

36. The Corte suprema di cassazione had consistently held that the national rules were compatible with the Community rules. [22] *Gambelli and Others* led the Sezione unite penali (Chambers for criminal matters sitting in plenary session) to hear the appeal, at the instance of the Third Chamber, before which

21 — According to the judgment of the Corte suprema di cassazione, this was because the national legislation was not justified: on the one hand, it did not ensure the preservation of public order, since, instead of reducing the opportunities for betting, it expanded betting and increased the number of persons authorised to pursue that activity; and, on the other hand, it was likewise not designed to increase public safety, because it provided no means of preventing the infiltration of criminal associations. The Tribunale di Prato took the view that those restrictions on the Community freedoms were imposed solely in the financial interests of the State.

22 — Judgments of Sezione III No 124 of 27 March 2000, *Foglia,* rv. 216223; No 7764 of 4 July 2000, *Vicentini,* rv. 216986; and No 36206 of 6 October 2001, *Publiese,* rv. 220112.

it was pending, and to deliver judgment No 111/04 of 26 April 2004 ('*Gesualdi*'). [23]

37. In *Gesualdi* the Corte suprema di cassazione expressed no surprise at the reasoning in *Gambelli and Others* since it regarded this as consistent with the case-law (paragraph 11.1). However, it did point out two innovations: the examination of the freedom of establishment and the freedom to provide services in the gambling sector; and the express finding that Article 4 of Law No 401/89 limits those freedoms (paragraph 11.2.3).

38. Subsequently, taking as its starting-point the fact that for years the Italian legislature has pursued a policy of expansion in the sector, in order to increase State revenues, the Corte suprema di cassazione found that that approach was adopted for reasons of public order and safety which justify the restrictions on the Community freedoms, since the gaming laws do not seek to limit supply and demand but to channel them into controllable systems in order to prevent crime (paragraph 11.2.3).

39. In that connection, the Italian court argued that the British bookmaker was already subject to supervision by a Member State, since the authorisation issued in that country had territorial implications and the adoption of a regime for betting licences had not been discussed at Community level (paragraph 11.2.4).

40. The Corte suprema di Cassazione also pointed out that the Italian system has a dual basis: licences and authorisations. The reasons of general interest which justify restricting the grant of licences are evident, at least in part. However, those relating to authorisations reflect subjective conditions geared to ex ante controls and continuous supervision in order to combat involvement in crime, such as fraud, money-laundering and racketeering (paragraph 11.2.5).

41. As regards the assessment of the appropriateness and proportionality of the restrictions, the Italian court drew a distinction in *Gesualdi* between licences and criminal penalties, holding that it was not for the courts to decide whether the latter were appropriate or proportionate (paragraph 12).

23 — This has been included as Annex 6 to the observations submitted by Mr Placanica and may be consulted on: http://www.ictlex.net/index.php/2004/04/26/cass-su-sent-11104/.

42. It also denied that the national rules were discriminatory, since those which ensure the transparency of the share ownership of the licensees apply both to Italians and to foreigners. Furthermore, since 1 January 2004 all companies have been able to participate in tendering procedures, because all the obstacles in that connection have been withdrawn (paragraph 13).

43. Finally, the Corte suprema di cassazione held that the contention regarding the mutual recognition of diplomas, certificates and other qualifications mentioned in Article 47 EC is irrelevant (paragraph 14).

44. On those grounds, the Italian court declared that Article 4 of Law No 401/89 and, in particular, Article 4(4a) thereof read in conjunction with Article 88 of the TULPS, is not incompatible with the Community principles of freedom of establishment and the freedom to provide services (paragraph 15). [24]

IV — The facts in the main proceedings

45. The similarity between the events in *Zenatti* and *Gambelli and Others* and the facts in the main proceedings makes it easier to set out the facts, which may be summarised briefly.

46. The 'data transnmission centres' are run on premises open to the public, making available various electronic means of accessing the servers of betting companies established in other Member States. At these centres the bettor places his bet; it is taken; he pays his stake; and, if he wins, he receives his winnings.

47. These companies are run by independent operators, who merely facilitate the bets, acting as intermediaries between the individual and the bookmaker, to whom they are contractually bound. [25]

24 — The Consiglio di Stato (Council of State) expressed itself in the same terms in decisions of 1 March 2005 (N. 5203/2005, Appeal NRG.4587 of 2004) and 14 June 2005 (N. 5898/2005, Appeal NRG. 2715 of 1998).

25 — According to the Tribunale di Teramo, the accused 'received at his agency lists of events and the relevant odds from the English company, circulated them, took the bets from individuals and forwarded the details to that company'.

48. Mr Placanica, Mr Palazzese and Mr Sorrichio manage outlets of this kind for Stanley International Betting Ltd., which has its registered office in Liverpool; it is authorised to exercise that activity in the United Kingdom and abroad under a licence granted by the Liverpool authorities; [26] it does not have an Italian authorisation, which would have enabled it to trade for a period of six years, extendable for a further six years, and which it had tried to obtain following the call for tenders issued in Italy in 1999 from which it was excluded because it is a company quoted on the stock exchange.

49. The Pubblico ministero (Public Prosecutor) brought criminal proceedings against Mr Placanica before the Tribunale di Larino on a charge of having committed an offence under Article 4(4a) of Law No 401/89 to the effect that, as the sole administrator of Neo Service srl, and without a licence, he collected bets on sporting and non-sporting events over the internet, on behalf of Stanley International Betting Ltd.

50. Similar proceedings were brought before the Tribunale di Teramo against Mr Palazzese and Mr Sorricchio, who also collected bets on behalf of the English company, although, before starting the business, they had applied to the Questura (Police Headquarters) of Atri for authorisations, but had received no reply.

V — The questions referred for a preliminary ruling and the procedure before the Court of Justice

51. The Tribunale di Larino has stayed the proceedings before it, because it has doubts as to whether the licensing system can be justified by the need to channel games of chance into controllable systems. In the order for reference of 8 July 2004, which has given rise to Case C-338/04, it asks the Court of Justice the following question:

'Does the Court of Justice consider Article 4(4a) of Law No 401/89 to be compatible with the principles enshrined in Article 43 [EC] et seq and 49 [EC] concerning the freedom of establishment and the freedom to provide cross-border services, having regard to the difference between the interpretation emerging from the decisions of the Court [...] (in particular the judgment in *Gambelli and Others*) and the decision of the Corte

26 — Points 10 and 11 of the Opinion of Advocate General Alber and paragraphs 12 to 14 of the judgment in *Gambelli* give a detailed account of the characteristics of that company and of the way it operates in the Italian market.

Suprema di Cassazione, Sezione Uniti, in Case No 23271/04? In particular, the Court is requested to rule on the applicability in Italy of the rules on penalties referred to in the indictment and relied upon against [Mr] Placanica.'

52. The Tribunale di Teramo — in two orders of 23 July 2004 with similar content, which form the basis of Cases C-359/04 and C-360/04 — has also stayed proceedings and, from the perspective of the conditions for participating in the tendering procedures for the award of licences, has referred the following question for a preliminary ruling:

'May the first paragraph of Article 43 and the first paragraph of Article 49 of the Treaty be interpreted as allowing the Member States to derogate temporarily (6 to 12 years) from the principle of freedom of establishment and of freedom to provide services within the European Union, by:

(1) allocating to certain persons licences for the pursuit of certain activities involving provision of services, valid for 6 or 12 years, on the basis of a body of rules which excluded from the tender procedure certain kinds of (non-Italian) competitors;

(2) amending that system, after subsequently noting that it was not compatible with the principles enshrined in Articles 43 and 49 of the Treaty, so as to allow in future the participation of those persons who had been excluded;

(3) not revoking the licences granted on the basis of the earlier system which, as stated, infringed the principles of freedom of establishment and of free movement of services or setting up a new tender procedure pursuant to the new rules which now comply with the abovementioned principles;

(4) continuing, on the other hand, to pursue anyone carrying on business via a link with anyone who, despite being entitled to pursue such an activity in the Member State of origin, was excluded from the tender procedure precisely under the exclusions contained in the earlier rules, later removed?'

53. By order of 14 October 2004, the President of the Court of Justice joined Case C-359/04 with Case C-360/04 and, by order of 27 January 2006, joined those cases with Case C-338/04. [27]

54. In Case C-338/04 written observations have been submitted, within the period prescribed for the purpose by Article 23 of the Statute of the Court of Justice, by Mr Placanica, by the Belgian, German, Spanish, French, Italian, Austrian, Portuguese and Finnish Governments and by the Commission; in Cases C-359/04 and C-360/04 they have been submitted by Mr Palazzese and Mr Sorricchio, by the Spanish, Italian, Austrian and Portuguese Governments and by the Commission.

55. At the hearing held on 7 March 2006, oral argument was presented by the representatives of Mr Placanica, Mr Palazzese and Mr Sorrichio, as well as those of the Belgian, Spanish, French, Italian and Portuguese Governments and of the Commission.

56. It should also be pointed out that a case currently pending before the Court of Justice (Case C-260/04) concerns an action brought by the Commission against Italy for failure to comply with its obligations under the Treaty, which concerns licences for the collection and taking of bets on horse races. [28]

VI — The admissibility of the questions referred for a preliminary ruling

A — *The meaning of the questions referred for a preliminary ruling*

57. The two national courts have departed from the same point — criminal proceedings brought against persons acting, with neither licence nor authorisation, as intermediaries in the placing and taking of bets — and arrived at the same point — that is to say, with doubts regarding the compatibility of the national legislation with the freedom of establishment and the freedom to provide services — but they are following different routes.

58. The Tribunale di Larino disagrees with the application by the Corte suprema di cassazione of the ratio in *Gambelli and*

27 — Awaiting the ruling in the present case are other similar references for a preliminary ruling, also made by Italian courts (Case C-395/05 *D'Antonio and Others*, Case C-397/05 *Di Maggio and Buccola*, and Case C-466/05 *Damonte*).

28 — OJ 2004 C 217, p. 14.

Others, since it is not convinced that the national legislation seeks to preserve public order nor that it prevents discrimination against operators from other Member States.

59. The Tribunale di Teramo stresses the crucial fact that the bookmaker on whose behalf the accused were operating cannot obtain an authorisation until those granted in 1999 expire. If this interval entails a 'temporary exception' to the fundamental freedoms of the Community, the Tribunale doubts whether that is lawful.

60. These explanations help in considering the obstacles which have arisen with regard to the non-substantive aspects of the references.

B — *Analysis*

61. The Governments which have submitted observations in Case C-338/04, with the exception of the Belgian Government, consider that the question referred for a preliminary ruling is inadmissible, though for different reasons: the Portuguese and Finnish agents, because they think that it does not contain sufficient information for a reply to be given; the German, Spanish, French and Italian representatives, because, in their view, it concerns the interpretation of national law, not of Community law; the Austrian agent, because he believes that it is identical to the question on which the Court ruled in *Gambelli and Others* (he suggests that the Court give its decision by reasoned order pursuant to Article 104(3) of the Rules of Procedure). That suggestion is supported, in the alternative, by Germany, Italy and Finland.

62. In Cases C-359/04 and C-360/04, the Governments of Spain and Italy repeat the argument they use in the other case to establish inadmissibility; if it is not successful, the Italian Government agrees with the aforementioned solution of giving a decision by reasoned order pursuant to article 104(3) of the Rules of Procedure.

63. In the circumstances, it is necessary to determine whether the Court of Justice should admit the references.

C — *The grounds invoked for inadmissibility*

1. The formal correctness of the order for reference

64. The Court of Justice has frequently held that it is bound to give a ruling on a question referred to it, except where the interpretation of the Community provision or the consideration of its validity which have been requested bear no relation to the actual facts of the main action or its purpose, where the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer. [29]

65. It must be pointed out that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based, [30] setting out the reasons why it considered it necessary to refer questions to the Court for a preliminary ruling, providing 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 between those provisions and the national legislation. [31]

66. Those requirements are intended to enable the Court of Justice to give a useful reply [32] and the Governments of the Member States and the parties concerned to submit observations in accordance with Article 23 of the Statute. [33]

67. In the present case, the orders for reference comply adequately with those conditions, since they set out both the factual and legal background to the case. It is true that they fail to transcribe the relevant Italian rules, but that omission is easily remedied by reference to the judgment in *Gambelli and Others*. What is more, they focus on the crux of the dilemma, which is the divergence

29 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61; Case C-105/94 *Celestini* [1997] ECR I-2971, paragraph 22; Case C-355/97 *Beck and Bergdorf* [1999] ECR I-4977, paragraph 22; Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20; Case C-35/99 *Arduino* [2002] ECR I-1529, paragraphs 24 and 25; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraphs 19 and 20; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 37; Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00, C-491/00 and C-497/00 to C-499/00 *Azienda Agricola Ettore Ribaldi and Others* [2004] ECR I-2943, paragraph 72; or Case C-316/04 *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, paragraphs 29 and 30.

30 — Order in Case C-190/02 *Viacom* [2002] ECR I-8287, paragraph 15; and judgments in Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 22; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 29; and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA* [2005] ECR I-10423, paragraph 45.

31 — Order in *Viacom*, paragraph 16; judgments in Case 244/80 *Foglia* [1981] ECR 3045, paragraph 17; Joined Cases 98/85, 162/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 14; Case C-258/98 *Carra and Others* [2000] ECR I-4217, paragraph 19; and Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 43.

32 — Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

33 — Orders in Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 6; Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5; Case C-325/98 *Anssens* [1999] ECR I-2969, paragraph 8; Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 15; and in *Viacom*, paragraph 14; judgments in Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 40; Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraph 25; and *Keller*, paragraph 30.

between that judgment of the Court of Justice and the arguments of the Corte suprema di cassazione, thus showing the extent to which the interpretation requested is necessary for the actions pending before them.

2. Application of the national legislation

68. It is settled case-law that, in accordance with the division of responsibilities between the Court of Justice and the courts of the Member States, it is for the national court to interpret and apply provisions of national law, assessing their scope and their compatibility with Community law, [34] subject to the particular circumstances of the present case, where the national legislature, in regulating purely internal situations, refers to the Community provisions. [35]

69. I do not think that the questions which have been referred should be declared inadmissible, even though the actual wording of the order of the Tribunale di Larino supports the view of the aforementioned States.

70. A simple reformulation of the word order used presents the question from the Community perspective, so that it is not a matter of analysing whether Article 4(4a) is compatible with Articles 43 EC and 49 EC — the actual wording of the order — but of determining the meaning of those Treaty provisions in order to connect them to the national rules and to the events which gave rise to the action, although the problem, which is examined below, actually arises from the fact that some Italian courts disagree with the Corte suprema di cassazione.

71. The Tribunale di Teramo refers to the amendment of the current national system for awarding licences for organising betting, so that any company may participate in future tender procedures on the expiry of the authorisations issued as a consequence of tender procedures in which they were not allowed to participate. These matters appear to be linked to the Community freedoms and were not tackled in the judgment in *Gambelli and Others*.

34 — Case 296/84 *Sinatra* [1986] ECR 1047, paragraph 11; Case C-188/91 *Deutsche Shell* [1993] ECR I-363, paragraph 27; Case C-45/94 *Ayuntamiento de Ceuta* [1995] ECR I-4385, paragraph 26; Case C-341/94 *Allain* [1996] ECR I-4631, paragraph 11; Case C-435/93 *Dietz* [1996] ECR I-5223, paragraph 39; Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 21; or Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 51.

35 — Case 166/84 *Thomasdünger* [1985] ECR 3001; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127; Case C-346/93 *Kleinwort Benson* [1995] ECR I-615; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161; and Case C-170/03 *Feron* [2005] ECR I-2299. Bartoloni, M.E., 'La competenza della Corte di giustizia ad interpretare il diritto nazionale 'modellato' sulla normativa comunitaria', *Il diritto dell'Unione europea*, year VI, No 2-3, 2001, pp. 311 to 349.

72. Moreover, the Community Court has the task of supplying a full interpretation of the Community provisions so as to enable the national court to evaluate them in the case before it. [36]

3. Decision by reasoned order

73. Under Article 104(3) of the Rules of Procedure, the Court may, in the interests of procedural economy, give its decision by reasoned order where a question referred for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, or where the answer admits of no reasonable doubt.

74. The Court of Justice uses this process carefully, [37] since it involves the omission of certain steps which reduce the possibilities of defence. For this reason, if there is any doubt as to the existence of the circumstances described, the process is not applied.

75. In this Opinion I have pointed out that this case has certain similarities with *Gambelli and Others*, but that finding does not justify bringing the preliminary ruling proceedings to a close with an order which repeats previous declarations. The national courts are not asking questions to which they already know the answers; they are seeking clarification of the judgment in *Gambelli and Others* which, it must be remembered, followed in the wake of the judgment in *Zenatti*. The difficulties facing the Italian courts will continue if the Court of Justice merely harks back to its case-law. [38]

D — *The jurisdiction of the Court of Justice*

76. In my view, the real dilemma lies in deciding whether the Court of Justice has

36 — Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22; and Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48.

37 — Examples of the use of Article 104(3) of the Rules of Procedure are the orders in Case C-297/03 *Sozialhilfeverband Rohrbach* [2005] ECR I-4305, and Case C-177/05 *Guerrero Pecino* [2005] ECR I-10887, on the ground that the answer could be clearly deduced from existing case-law; and in the orders in Case C-52/04 *Personalrat der Feuerwehr Hamburg* [2005] ECR I-7111 and Case C-447/04 *Ostermann* [2005] ECR I-10407, on the ground that there was no reasonable doubt. The other criterion envisaged in the provision — that the question is identical to a previous one — rarely arises, but did so in Joined Cases C-405/96 to C-408/96 *Beton Express and Others* [1998] ECR I-4253.

38 — Part 6 of the observations submitted by Mr Placanica and Mr Palazzese and Part 2, Chapter 9, of those submitted by Mr Sorricchio contain information regarding the conflicting interpretations of the Italian courts. In footnote 27, I mention other similar references for preliminary rulings, also made by Italian courts, which await the ruling to be given on this one.

jurisdiction to decide questions referred for a preliminary ruling where they are based on the disagreement of lower courts with the application by the Corte suprema di cassazione of the criteria laid down in *Gambelli and Others*. [39] In other words, it must be ascertained whether one of the functions of the Court of Justice is to settle disputes between national courts, by interpreting Community provisions with a view to establishing whether they are compatible with national provisions, where it has already outlined the parameters which are to govern such matters.

77. Several arguments support a negative response to that dilemma: first, in the context of preliminary ruling proceedings, it is for the courts of the Member State to interpret the national provision — since they are best placed to do so — always in the light of the case pending before them and in compliance with the interpretative guidelines provided by the Court of Justice.

78. In accordance with this notion, the judgment in *Gambelli and Others* expressly urged the Italian courts to assess whether the provisions of Italian law were consistent with the Community freedoms. [40]

79. Secondly, if the courts reach different or conflicting conclusions, it is the responsibility of their own legal system to provide the means of harmonising their views. In that context, a decision of a supreme court would be binding on the lower courts, which would be prohibited from resorting, *per saltum*, to the Community Court, since the Treaty makes no provision for direct actions against the decisions of national courts, even if they act at final instance and misapply the law of the Union. [41]

80. However, that solution, although relatively simple, is open to significant objections.

81. On the one hand, when the Court of Justice directs the courts of the Member States to evaluate the provisions of national law in the light of Community law, it is not waiving its own jurisdiction in that sphere, [42] but implementing the principles underlying the cooperative aspect of preliminary ruling

39 — The Tribunale di Teramo has brought further subtle distinctions to that disagreement by introducing new aspects, as I have already pointed out. The controversy has been noted by academic legal writers; Botella, A.S., 'La responsabilité du juge national', *Revue trimestrielle de droit européen*, No 2, 2004, p. 307, mentions possible disagreements between different legal orders or between courts within the same jurisdiction, and cites a French example.

40 — Paragraphs 66, 71, 73 and 75 in particular.

41 — Advocate General Léger, in his Opinion in Case C-224/01 *Köbler* [2003] ECR I-10239, points out that, in 1975, in its opinion on the European Union, the Court suggested that the Treaty should contain an appropriate guarantee to protect the rights of individuals in the event of the infringement of Article 234 EC by a supreme court (footnote 125).

42 — Ossenbühl, F., 'Der Entwurf eines Staatsvertrages zum Lotteriewesen in Deutschland — Verfassungs- und europarechtliche Fragen', *Deutsches Verwaltungsblatt*, July 2003, pp. 892, argues that, although the national courts may review the truthfulness of the excuses used by the Member States to justify the national restrictions, and the observance of the principle of proportionality, the Court of Justice has not completely abandoned that review, and he considers it incorrect to presume that the Court has delegated that responsibility.

proceedings, recognising the advantages of proximity to the case, but retaining the right to take the final decision on that matter. Accordingly, the Court has admitted further questions when the national court encounters difficulties in understanding or applying the judgment of the Court of Justice, when it refers a further question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer. [43]

82. The same approach must be followed where the problems stem from a judgment of a higher national court which applies the guidelines of the Court of Justice.

83. If the Italian courts are prevented from having recourse to the Court of Justice in cases such as the present one, divergences can be remedied only by an action for failure to fulfil obligations, as in *Commission* v *Italy*. [44]

84. The use of that method raises certain concerns: (1) it leaves the decision as to whether there has been an infringement [45] and the choice of the right moment for bringing the matter before the Court of Justice in the hands of the party with capacity to bring proceedings, although the national courts are in a suitable position to carry out both operations; (2) at the pre-litigation stage of an action for failure to fulfil obligations — initiated by the Commission — it causes the judicial power of the Member State to depend on the legislature and the executive, with the risk that its independence may be compromised; and (3) it provokes reflections on the content and consequences of the declaration of failure to fulfil obligations, since the aforementioned judgment in *Commission* v *Italy* was justified, in part, by the inclusion in the national legal system of a rule which allowed an interpretation contrary to the Community approach.

85. Nor must we forget individuals, who may press for a reference for a preliminary ruling, although it is for the court hearing the case to take the decision to refer. [46] If

43 — Order in Case 69/85 *Wünsche* [1986] ECR 947, paragraph 15; judgments in Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 12; and Case C-466/00 *Kaba II* [2003] ECR I-2219, paragraph 39, in which the Immigration Adjudicator raised a question identical to that referred for a ruling in Case C-356/98 *Kaba I* [2000] ECR I-2623, with some of whose conclusions she disagreed.

44 — Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637.

45 — The Commission has been reluctant to bring actions against Member States for failure to fulfil obligations attributable to their courts, Cobreros Mendazona, E., 'La responsabilidad por actuaciones judiciales. El último gran paso en la responsabilidad de los Estados por el incumplimiento del derecho comunitario', *Revista Española de Derecho Europeo*, No 10, 2004, especially pp. 291 to 299; on the background, see Ortúzar Andéchaga, L., *La aplicación judicial del derecho comunitario*, Trivium, Madrid, 1992, pp. 184 and 185.

46 — Even though the Court of Justice, if necessary, examines the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see *Foglia*, paragraphs 21 and 27; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 17; Case C-379/98 *Preussen Elektra* [2001] ECR I-2099, paragraph 39; Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 31; and Case C-293/03 *My* [2004] ECR I-12013, paragraph 25.

individuals knew beforehand that a reference was inappropriate, their only option would be an action for liability of a Member State for damage caused to individuals by an infringement of Community law for which it is responsible, as declared in *Köbler*. [47]

86. The use of this mechanism is also unsatisfactory because, since it was established in order to protect Community law in especially serious situations, [48] it is subject to very stringent requirements, [49] such as the condition that there has to have been a 'manifest' breach, but it is still a complicated remedy which often ends in a reference for a preliminary ruling like the one it was sought to prevent.

87. A weightier argument needs to be taken into account. The primary role of the Court of Justice is solely to ensure the uniform interpretation and application of Community law. According to the judgment of 24 May 1977 in *Hoffmann-La Roche,* the aim of the reference for a preliminary ruling is 'to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State'. [50] A direct means of achieving this might be to mediate in the legal dispute between national courts regarding the interpretation of the law of the Union carried out by a higher court.

88. In line with this view, the Court acknowledged in *Rheinmühlen Düsseldorf* [51] that the essential role of preliminary ruling proceedings is to ensure that the law established by the Treaty produces the same effects throughout the Community; it added that they also tend to ensure uniform application 'by making available to the national court a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States' (paragraph 2),

47 — Martín Rodríguez, P., 'La responsabilidad del Estado por actos judiciales en derecho comunitario', *Revista de Derecho Comunitario Europeo,* No 19, 2004, p. 859, points out the difficulty of attributing failure to fulfil Community obligations in relation to that matter, since it would have to be attributed to the legislature, which approves the provision establishing the discriminatory element, to the executive, in so far as the Austrian Administration should have given priority to the provisions of Community law, or to the judicial power, as in fact happened, for not giving effective protection to the rights granted to the citizen by Community law.

48 — Simon, D., 'The Sanction of Member States' Serious Violations of Community Law', in O'Keefe, ed., *Judicial Review in European Law. Liber Amicorum Lord Slynn of Hadley,* Kluwer, The Hague, 2000, pp. 275 et seq.

49 — *Köbler* classifies these cases as 'exceptional' (paragraph 53).

50 — Case 107/76 *Hoffmann-La Roche* [1977] ECR 957, paragraph 5.

51 — Case 166/73 *Rheinmühlen Düsseldorf* [1974] ECR 33. It concerned applications for export refunds which had been rejected by the German Intervention Board for cereals and grains and upheld in legal proceedings before the Hessisches Finanzgericht (Finance Court, Hesse). In the appeal, the Bundesfinanzhof (Federal Finance Court) referred several questions for a preliminary ruling; after they had been answered (Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823) it allowed the appeal in part, remitting the case to the court at first instance for a fresh judgment; however, before delivering that judgment, the Hessisches Finanzgericht referred questions to the Court of Justice by an order which was appealed before the Bundesfinanzhof which, in turn, again referred questions to the Court of Justice, the subject of the ruling which I have cited — the questions referred by the Hessisches Finanzgericht were considered in Case 146/73 *Rheinmühlen Düsseldorf* [1974] ECR 139.

with the widest discretion in referring matters to the Court of Justice (paragraph 3), so that 'the lower court must be free, if it considers that the ruling on law made by the higher court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it', since, if lower courts were bound and unable to refer matters for a preliminary ruling, the jurisdiction of the Court of Justice and the application of Community law at all levels of the national judicial systems 'would be compromised' (save in the case of questions which are substantially the same as questions already put by the higher court) (paragraph 4). [52]

89. That approach certainly presents problems, such as an increase in the number of references for a preliminary ruling or a clear schism in the hierarchy of the judicial organisation within the State. The first disadvantage is irrelevant because the accumulation of work must not affect the selection of the appropriate legal option. [53] The second overlooks the role of the Court of Justice as principal interpreter of European law, the apex essential to a true Community of law. In any event, there would be fewer difficulties if another alternative were adopted.

90. I am also perfectly aware that, owing to the imprecision of the organisation of judicial power in the Union, confusion is sometimes caused by the Court of Justice itself, since it is not easy to achieve the appropriate level of accuracy in every situation, bearing in mind that, in law, what matters is to get the boundaries right.

VII — Analysis of the questions referred for a preliminary ruling

91. If the Court of Justice admits the references for a preliminary ruling from the Tribunale di Larino and the Tribunale di Teramo, some observations are required regarding the law, and betting and gaming.

A — *The law, betting and gaming*

92. Nowadays nothing could be further from the notion of 'law' than 'chance', since it does

52 — The Court of Justice declared that 'the existence of a rule of domestic law whereby a court is bound on points of law by the rulings of the court superior to it cannot of itself take away the power provided for by [Article 234 EC] of referring cases to the Court'.

53 — Although the selection lends itself to discussion, a legislative change may establish that it is for courts of last instance to make references for a preliminary ruling, as happens in certain sectors (Article 68 EC).

not originate in Man's will or from general convictions; nor are its actions intentional, but capricious and arbitrary.[54] However, in times past there was a marked interdependence between the two concepts, since, in order to keep the peace in a community, legal decisions had to be obeyed and those who pronounced them were invested with 'magical' or 'priestly' power.[55]

93. Ordeals or trials by ordeal, which are of ancient origin,[56] illustrate this symbiosis, making a decision depend on a fortuitous event. Later decisions tended to be based on rational grounds, culminating in the modern legal systems, which have put aside such acts of fate, except in some situations[57]

94. There are other areas in which that paradoxical link may be seen, like natural obligations, of which a bet is a good example, conditional transactions, when a future and uncertain event depends on chance, unforeseeable circumstances or, as now under consideration, aleatory contracts.

95. Gambling, as entertainment, has existed in every community throughout history; from a legal perspective, it has four levels. The first is the most spontaneous and basic, pure entertainment and amusement.[58] On the second level, there is competition, which gives the winner self-esteem and social prestige, as well as the pleasure of competing with others. On the third, entertainment and a display of skill are not enough; there is a financial interest[59] On the fourth level is

54 — Rivas Torralba, R.A., *Juegos de azar*, Real Academia de Legislación y Jurisprudencia de Murcia, Murcia, 1996, p. 11.

55 — Díez Picazzo, L., *Experiencia jurídica y teoría del derecho*, Ariel, Barcelona, 1987, pp. 18 and 21.

56 — The Code of Hammurabi, at the height of the Babylonian Empire during the eighteenth century B.C., frequently resorted to ordeal by water: the accused was thrown into the river and, if he survived, he was declared innocent.

57 — A 'draw' is normally used to select the members of a jury or to appoint legal experts. On occasions, extreme solutions are found, as in the case *U.S.* v *William Holmes*, in which, following a shipwreck, the crew had thrown 14 passengers over the side of an overloaded lifeboat; the court held that everyone — sailors and passengers — should have participated in the dramatic draw to choose the victims.

58 — The bet is often used merely to provoke or ridicule a companion, as when Don Quixote taunts his squire with: 'I should be prepared to bet you a goodly sum, Sancho, ... that now you are talking away without anyone to stop you, you do not feel a single pain anywhere in your body' (Cervantes Saavedra, M., *El ingenioso hidalgo Don Quijote de la Mancha*, Part II, Chapter XXVIII, translated by John Rutherford, Penguin books, London 2001).

59 — Kant, I., refers to these aspects when he says that childhood games — playing ball, tug-of-war, running races, playing soldiers — all provide diversion and aid personal development; later, men play their games, chess and cards, just to win; and finally, a citizen tries his luck in society with roulette or dice; all these games are driven, unconsciously, by human nature (*Anthropologie in pragmatischer Hinsicht*, 1798).

betting, which, as well as involving the risk of losing money, has become a compulsion. [60]

96. Of those four levels, the first is unconnected with the law and the second practically so as well. However, when gaming involves risking money, the legislature intervenes, for two reasons. On the one hand, to deal with the repercussions for the participant's property [61] and health, [62] and for the stability of his family; and, on the other, because of the commercial nature of the centres in which the gambling is conducted.

97. These reasons explain the attention afforded by the law to gaming and its effect on Community law. At this level, the Court of Justice has held that 'lotteries constitute an economic activity, within the meaning of the Treaty' [63] inasmuch as they constitute 'provision of a particular service for remuneration' [64] and are to be regarded as services within the meaning of the Treaty. [65] We must not disregard the impact on other spheres, such as the economic sector, the right of establishment or, away from financial environments, the human aspects already touched upon.

B — *Restrictions on the fundamental freedoms*

98. In *Gambelli and Others,* Advocate General Alber suggests that it is necessary first of all to examine the compatibility of the national legislation with the right of establishment, since, under the Treaty, this is

60 — Dostoevsky, F., who was noted for gambling, gives a masterly portrayal of those who are caught in its net: '... in gambling circles it is well known that a player caught in that passionate struggle against chance can sit for twenty-four hours at a stretch without lifting his eyes from the cards or the roulette table' (The Gambler, free translation), adding that 'I realised, suddenly, that it was no longer the money that mattered, but the desire to take risks, the sense of adventure in acting contrary to all logic. I have thought a lot about it since then and come to the conclusion that if the spirit has experienced a great many sensations, instead of being sated, it grows more excited, and demands stronger and stronger sensations, and stronger and stronger ones, until it finally falls from exhaustion (free translation). The same sentiment is expressed in the text of Gabriel y Galan J.A. '... admittedly, he spent all day thinking about money, dependent on it, living at its pace, and yet, like all gamblers, he felt no attachment to the money, only to the chips ...' (*Muchos años después,* free translation). Chateaubriand, F. admits to a similar feeling on losing most of the cash he had just been lent: 'I had never gambled before: the play produced a kind of painful intoxication in me; if the passion had seized me completely, it would have turned my brain' (*Mémoires d'outre-tombe,* translated by A.S. Kline, 2005).

61 — The protagonist of Dostoevsky's novel muses: 'Why should gambling be worse than any other way of acquiring money, such as trade, for example? True, out of a hundred gamblers, only one can win, but ... what does that matter to me, if I feel fated to win?' (*The Gambler,* free translation).

62 — D. Juan Tenorio, José Zorrilla's famous character, voices this concern when, after winning a bet, he is challenged by the loser, to whom he responds: 'You mean that, because I won the bet and you lost it, you still want to end the day with a fight?' (*D. Juan Tenorio,* free translation).

63 — *Schindler,* paragraph 19; and *Anomar and Others,* paragraph 46.

64 — *Anomar and Others,* paragraph 47; and, by analogy, in *Zenatti,* paragraph 24.

65 — *Schindler,* paragraphs 25 and 34; *Läärä and Others,* paragraph 27; and *Anomar and Others,* paragraph 52.

given precedence over the freedom to provide services (point 76),[66] although the data transfer centres should not be regarded as secondary establishments (point 87) because, if they were, the legislation would be in breach of the right of establishment (point 104) and of the freedom to provide services (point 132).

99. The Court of Justice, when considering the position of the bettors, the companies operating these businesses and the intermediaries, did not regard the two freedoms as mutually exclusive but, after weighing them up, held that 'national rules such as the Italian legislation on betting, in particular Article 4 of Law No 401/89, constitute a restriction on the freedom of establishment and on the freedom to provide services' (paragraph 59) and went on to consider whether such restrictions constituted exceptional measures as provided for in the Treaty or were justified for reasons of overriding general interest (paragraph 60).

100. There is no need to question these references, which are also included in the judgment in *Zenatti* in so far as concerns the provision of services, but it is appropriate to examine the restrictions and the persons to whom they apply.

101. In this regard, the Court found in *Gambelli and Others* that the conditions imposed by Italian law on participants in tender procedures for licences to open betting agencies constituted obstacles to the freedom of establishment, since they excluded certain kinds of companies (paragraphs 46 to 48); and it described as restrictions on the freedom to provide services those encountered by a provider established in another Member State in order to provide services (paragraph 54), and also the prohibition for citizens on participating in betting games organised in other countries in the Community (paragraph 57) and for those who facilitated the business of the providers established in those territories (paragraph 58), the latter two prohibitions enforceable by criminal penalties.[67]

102. It is surprising that, although the question referred for a preliminary ruling has arisen in criminal proceedings against the bookmaker's agents, the focus should be on the three persons involved in the activity.[68] However, we must not forget the role of the Court of Justice or the *erga omnes* effect of its preliminary rulings, since mere players can be prosecuted; what is more, the foreign company is unable to establish itself in the country, so it pursues its activity by entering into contracts with other traders, who are blamed for fulfilling what they have contracted to do.

66 — He relies on Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 22.

67 — Korte, S., 'Das Gambelli-Urteil des EuGH', *Neue Zeitschrift für Veraltungsrecht*, 2004, p. 1449, writes that such threats of retribution for organising betting activities constitute an obstacle to the services market.

68 — Korte, S., op. cit., p. 1451.

C — Concerning whether there is justification

1. Analysis

103. In *Gambelli and Others*, instead of following the suggestion made by Advocate General Alber in his Opinion, the Court examined together the restrictions contained in the Italian legislation, and stated that restrictions, whichever freedom they are considered to encroach upon, must satisfy certain conditions: they must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue, not go beyond what is necessary to attain that objective, and be applied without discrimination (paragraph 65). [69]

104. The judgment in *Gambelli and Others*, in greater detail than the judgment in *Zenatti*, left it to the national court to decide whether the Italian legislation satisfied those conditions, although it did set out parameters for carrying out that assessment.

105. The Court of Justice should have been more specific and adjudicated on the implications of the Community freedoms for the provisions of national law, as suggested by the Advocate General, who had warned that the national courts found it difficult to carry out the task entrusted to them. [70]

106. I have no doubt that the judgment in *Gambelli and Others* gauged the degree of thoroughness which the Court of Justice could employ without exceeding its powers, but, with the precedent of the judgment in *Zenatti*, which did not avoid a further reference, it erred on the side of caution, since it had sufficient details at its disposal to make a more in-depth analysis, which would have made the present references for a preliminary ruling unnecessary. [71]

107. It is now necessary to take that missing step and put the finishing touches to the reply so as to dispel the uncertainty which has arisen, even if the task is more complicated, because we must examine whether there is any justification for the aforementioned restrictions on the Community free-

69 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and *Gebhard*, paragraph 37.

70 — Point 116 of the Opinion of Advocate General Alber in *Gambelli and Others*; he emphasises this view at point 120, since, where the Court of Justice has sufficient facts at its disposal to enable it to make an assessment, nothing should prevent it from doing so.

71 — Brouwer, L., and Docquir, B., commenting on *Gambelli and Others* in *Revue de droit commercial belge*, No 3, 2004, p. 314, point 7, argue that the Court of Justice left no room for doubt: although it was for the national court to assess compatibility, the Court clearly thought that the Italian legislation did not satisfy the conditions for compatibility with Community law.

doms, assessing whether they are discriminatory, appropriate and proportional.

2. Reasons of overriding general interest

108. The judgment in *Gambelli and Others* gave a positive and a negative definition of the reasons which justify restrictions on the freedom of establishment or the freedom to provide services, since it rejected 'the diminution or reduction of tax revenue' and 'the financing of social activities through a levy on the proceeds of authorised games' (paragraphs 61 and 62),[72] but allowed 'consumer protection', 'the prevention of both fraud and incitement to squander on gaming' and 'the need to preserve public order' (paragraph 67).

109. According to the Corte suprema di cassazione, the Italian legislation is based on the belief that the supervision of betting reduces crime.[73]

110. The Italian Government maintains that it is based on the need to preserve public order[74] to protect the consumer and to prevent fraud.[75]

111. The Court of Justice has pointed out the contradiction in attempting to avoid the harm resulting from an action by promoting that action,[76] as happens where a Member State pursues a policy of substantially expanding gaming and betting;[77] therefore,

72 — The Court of Justice has ruled that economic aims cannot constitute grounds of public policy within the meaning of Article 46 EC (inter alia, Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11; and Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 16).

73 — *Gesualdi*, paragraph 11.2.3. In academic legal writing, Beltrani, S., *La disciplina penale dei giochi e delle scommesse*, Giuffrè, Milan, 1999, p. 313, maintains that the system is designed, first and foremost, to safeguard the financial and fiscal interests of the State; the same view is held by Coccia, M., 'Rien ne va plus': la corte di giustizia pone un freno alla libera circolazione dei giochi d'azzardo', *Foro italiano*, 1994, p. 521.

74 — Paragraph D(a) of the observations submitted in *Placancia* and in *Palazzese* and *Sorricchio*.

75 — Paragraph D(b) of the same observations.

76 — *Gambelli and Others*, paragraphs 68 and 69.

77 — In paragraph 11.2.3 of *Gesualdi*, the Corte suprema di cassazione mentioned the lotteries 'Gratta e vinci', introduced in 1994 by AAMS; 'Totogol', launched by CONI also in 1994; 'SuperEnalotto', granted to the company Sisal in October 1997; 'Totosei', initiated by CONI in 1998; 'Formula 101', governed by a Decree of August 1999 and implemented by the Ministry of Economic Affairs and Finance in April 2000; 'Totobingo 1', managed by CONI since January 2001; and 'Bingo', authorised by the Ministry of Economic Affairs and Finance in 2000.

fraud prevention seems to be the only excuse for the restrictions at issue.

112. In that regard, no further evidence is adduced to show the effect of criminal activities on gambling, for example, fraud or money-laundering. [78]

113. In *Läärä and Others*, the Court maintained that '[l]imited authorisation' of betting on an exclusive basis has the advantage of confining the desire to gamble and the exploitation of gambling within controlled channels, of preventing the risk of fraud or crime in the context of such exploitation, and of using the resulting profits for public interest purposes (paragraph 37). [79]

114. However, in order to comply with Community law, powerful reasons for regulating gambling in a way that, without prohibiting it absolutely, restricts it in a particular way, do not suffice, since the measures decreed also have to be non-discriminatory, appropriate and proportionate.

3. Possible discrimination

115. The judgment in *Gambelli and Others* did not express a view as to whether the principle of non-discrimination had been infringed, [80] leaving it to the national court to make that assessment. [81]

116. The Tribunale di Teramo has now supplemented the evidence available to the Court when it delivered that judgment, which will help the Court of Justice to decide the question itself, without taking refuge in the excuse that the legal reforms of 2003 have altered the situation in the country, since it understands that the effects of those amendments have been postponed, probably until 2011, so that the effects of the previous system still apply, with the corresponding consequences for the criminal proceedings from which the references stem. Moreover, the legislative changes have affected only one element in the system (licences), not the others (authorisations and penalties).

78 — Buschle, D., 'Der Spieler' — Schreckgespenst des Gemeinschaftsrechts', *European Law Reporter*, No 12, 2003, p. 471, considers that crime prevention is a ground relating to public order and, at the same time, a reason of overriding general interest.

79 — *Zenatti*, paragraph 35; and *Anomar and Others*, paragraph 74, reiterated this view.

80 — In points 95 to 97 of the Opinion, Advocate General Alber sets out various arguments establishing the infringement.

81 — Paragraphs 70 and 71.

117. In the light of the evidence presented in these proceedings and contained in the preceding judgments, licences and authorisations appear to be treated differently

(a) Licences

118. Companies quoted on the regulated markets of the Community could not participate in the tender procedures for licences. The conditions applied to all interested parties, including those established in Italy, [82] but companies established in other Community territories were more adversely affected by the restrictions of the Italian legislation [83] since, if they wished to participate, they had to adapt their internal structure, with the result that they had no real possibility of establishing themselves in that country. [84]

119. This situation is aggravated by the meanness with which licences are granted, [85] which does not reflect the pressing need to fight crime, [86] given that for authorisations certain prior checks are made but, for admission to the tender procedures all that is required is a deposit to guarantee payment of the relevant fees. [87]

120. The inequality of treatment extends to the intermediaries, who are prohibited, on pain of criminal penalties, from providing services to bookmakers established in another Member State, who are unable to establish themselves or obtain permits to pursue their activity in Italy.

(b) Authorisations

121. The Court of Justice has held that a prior administrative authorisation scheme

82 — *Zenatti*, paragraph 26.

83 — As was pointed out in *Schindler*, paragraph 43, and *Anomar and Others*, paragraph 65, Community law also precludes national legislation which, even if it is applicable without distinction on grounds of nationality, prohibits or otherwise impedes the activities of a provider established in another Member State where he provides similar services. *Zenatti* declared, at paragraph 27, that the Italian legislation prevented 'operators in other Member States from taking bets, directly or indirectly, in Italian territory'.

84 — Korte, S., op. cit., p. 1450. In that regard, the representative of the Italian government, in reply to one of the questions I put to him at the hearing, admitted that eight foreign companies had obtained licences, most of them by purchase from the successful bidder.

85 — CONI offered 1 000 licences in 1998; the Minister for Economic Affairs and Finance and the Minister for Agricultural and Forestry Policy, within their respective competences, offered 671 new licences and automatically renewed the 329 already granted. The latter measure has prompted the Commission to bring an action against Italy for failure to fulfil its obligations — Case C-260/04, currently pending — to which I have already referred.

86 — Calls for tenders for licences for organising betting on horse races issued by Ministerial Decree of 7 April 1999, Approvazione del piano di potenziamento della rete di raccolta ed accettazione delle scommesse ippiche (*GURI* No 86 of 14 April 1999), suggest that the number was determined on the basis of other criteria.

87 — This point is stated in the order for reference from the Tribunale di Teramo in Case C-359/04.

cannot legitimise discretionary decisions taken by the national authorities which are liable to negate the effectiveness of provisions of Community law. [88] It must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily; such a prior administrative authorisation scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time. [89]

122. It looks at first sight as if the authorisation required under Article 88 of the TULPS satisfies the conditions described, but a closer analysis of Articles 8 to 14 of the TULPS reveals a margin of discretion at odds with objectivity, as, for example, where Article 10 provides for revocation 'in the event of misuse by the authorised person', without specifying further. [90] No comprehensive list of the criteria for refusing authorisations is either provided or may be deduced, which is also an indication of lack of conformity.

123. Moreover, the police authorisation presupposes possession of the licence and inherits any defects it may have, precisely because licensing is the prior measure.

4. Appropriateness and proportionality

124. The Italian provisions restrict the right of establishment and the freedom to provide services in the interests of a legitimate aim, but they are discriminatory, which is sufficient grounds for not applying them. Nor are they suitable for achieving the objectives they pursue or proportionate to the legitimate good they seek to bring about.

(a) Restrictions on the right of establishment

125. The exclusion of certain kinds of company from the tender procedures for licences is based on the transparency of undertakings, but there are other solutions which are less restrictive and more compatible with the Treaty. [91] As the Court held in

88 — Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 23 to 28; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 37; and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 90.

89 — *Smits and Peerbooms*, paragraph 90.

90 — The Commission refers to Article 11(2) of the TULPS, which permits refusal of the authorisation if there is no evidence of good conduct, but the Corte constituzionale (Constitutional Court), in Judgment No 440 of 16 December 1994, held that the provision is incompatible with the Constitution, since it places the burden of proof on the applicant.

91 — Hoeller, B., and Bodemann, R., 'Das Gambelli"-Urteil des EuGH und seinen Auswirkungen auf Deutschland', *Neue Juristische Wochenschrift*, 2004, p. 125, claim, in relation to the German legislation — which is somewhat similar to the Italian legislation — that legislation which does not allow all undertakings access to the betting market, irrespective of their legal form, must be regarded as disproportionate interference with the freedom of establishment.

Gambelli and Others, 'there are other means of checking the accounts and activities of such companies', [92] confirming on this point the Opinion of Advocate General Alber, who suggested that the integrity of a company can be established, for example, by means of obtaining information about the undertaking's representatives and major shareholders. [93]

126. In contrast to this reasoning, the Italian State has not compared the measures at issue with others, and has not shown that they are the best means of achieving their purpose.

(b) Restrictions on the freedom to provide services

127. The fact that it is virtually impossible for an undertaking established in one Member State to pursue its activity in another, and the prohibition on intermediaries and on using the services they provide, goes way beyond what is necessary to achieve the aims set out in the Italian legislation. [94]

128. To disregard or pass over in silence investigations already carried out and guarantees provided in other countries in the Union with the excuse, used by the Corte suprema di cassazione, that the authorisation is of a territorial nature, slows down European integration and undermines its basic tenets, infringing the mandate of Article 10 EC to 'abstain from any measure which could jeopardise the attainment of the objectives of this Treaty' and the principle of mutual trust which governs intra-Community relations.

129. In this regard, the judgment of 4 December 1986 in *Commission* v *Germany* [95] declared that the authority of the State in which the service is provided must 'take into account supervision and verifications which have already been carried out in the Member State of establishment' (paragraph 47), in keeping with the principle of equivalence; [96] and the judgment in *Alpine Investments*, [97] referring to telephone calls to

92 — Paragraph 74.

93 — Point 99.

94 — Brouwer, L., and Docquir, B., op.cit., p. 314, point 8.

95 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

96 — Advocate General La Pergola, in point 36 of his Opinion in *Läärä and Others*, draws attention to this criterion, although the Court of Justice subsequently made no mention of it.

97 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141, especially paragraphs 46 to 49.

potential clients in other Member States, implicitly alluded to the principle of efficiency.

130. Both principles lead me to share the view expressed by Advocate General Alber in point 118 of his Opinion in *Gambelli and Others,* when he points out that gambling is regulated in all Member States, and that the grounds given for such regulation are largely the same. [98] Therefore, if an operator from another Member State meets the requirements applicable in that State, the national authorities of the Member State in which the service is provided should accept that as a sufficient guarantee of the integrity of the operator. [99]

131. The Corte suprema di cassazione itself stated that the British company on whose behalf the Italian defendants are acting was granted a licence by the Liverpool Betting Licensing Committee pursuant to the Betting Gaming and Lotteries Act 1963, it pays the taxes due on the bets (General Betting Duty) and is subject to scrutiny by the English tax authorities (Inland Revenue and Customs and Excise), by private sector auditors and by the authorities which monitor companies quoted on the stock exchange.

132. In these circumstances, on which most of the States which have submitted observations in these preliminary ruling proceedings are silent, it is clear that the British authorities are in a better position than the Italian authorities to check that the activities are lawful, and there appears to be no reason for a double check. [100] The judgment in *Säger* [101] allowed restrictions on the freedom to provide services for reasons relating to the public interest, provided that 'that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established' (paragraph 15).

133. In so far as concerns the intermediaries, they have obtained from the Ministero dei Comunicazioni (Ministry of Communications) the authorisations to transmit data via the Internet, for which they have to be registered with the Chamber of Commerce, obtain the certificate *nulla osta antimafia,* have no criminal record, and be subject to tax inspection by the relevant national

98 — This point is dealt with in detail in the first points of the Opinion of Advocate General Gulmann in *Schindler.*

99 — On a broader plane, the Report from the Commission to the Council and the European Parliament on the state of the internal market for services, presented under the first stage of the Internal Market Strategy for Services (COM(2002) 441 final) especially p. 36 et seq.

100 — Schütz, H.-J., Bruha, T., and König, D., *Europarecht Casebook,* Munich, 2004, p. 752, maintains that where a Member State introduces stricter conditions, the proportionality of those conditions should be examined rigorously, especially as regards evidence that less restrictive measures cannot be adopted.

101 — Case C-76/90 *Säger* [1991] ECR I-4221.

authorities. In spite of this, they are prohibited from providing services on behalf of a company lawfully established in another Member State.

5. Rules relating to penalties

134. The actions penalised under Article 4(4a) and (4b) of Law No 401/89 relate to the exercise of betting activities without authorisation. They are the corollary of the system, conceived by the Italian legislature, giving itself a wide degree of latitude, from permissibility to prohibition, [102] so that, in the light of the aspects considered, the level of protection deemed necessary and the particular characteristics of the country, it opts for a specific level of protection. However, that option must comply with Community law. [103]

135. Therefore, it is not a matter of questioning the *ius puniendi* of the State, which is in the best position to assess the feasibility, appropriateness and effectiveness of a punitive response; [104] the point is that, where the punishment imposes a measure contrary to Community law, the enforcement of that measure by criminal penalties must all the more conclusively [105] have to be regarded as an infringement of Community law, since both rules are interstices in a net which has to interlace with another further up: they are not watertight compartments. It is not for the Court of Justice to choose, [106] but it does have to make sure that the choice made is compatible with Community law.

136. On a more general level, it is interesting that Article 4 of Law No 401/89 imposes a harsher penalty for encroachment on betting reserved to the State, CONI or UNIRE or their licensees, which has less to do with crime prevention than with the economic incentive which gambling represents for the State coffers.

137. Nevertheless, we must also consider the proportionality of the penalties, in the terms expressed in *Gambelli and Others,* particu-

102 — *Schindler,* paragraph 61; *Läärä and Others,* paragraph 35; *Zenatti,* paragraph 33; and *Anomar and Others,* paragraphs 79 and 87.

103 — As Advocate General La Pergola points out at point 34 of his Opinion in *Läärä and Others,* '[a]lbeit adopted in the discretion of the Member State, the restrictive measures selected remain amenable to judicial review; their appropriateness vis-à-vis the public interest requirements is, in fact, subject to scrutiny by the national courts called upon to apply them, which in the course of such enquiry have to refer to the rules on justification — including those on proportionality — developed by Community case-law as regards the limits which may legally be imposed on the exercise of rights and freedoms deriving from the Treaty'. That, as I have said, does not rule out review by the Court of Justice.

104 — As I state at point 48 of my Opinion in Case C-176/03 *Commission* v *Council* [2005] ECR I-7879.

105 — I have borrowed the expression used by Advocate General Alber in points 97 and 99 of his Opinion in *Gambelli and Others.*

106 — *Schindler,* paragraph 32.

larly in paragraphs 72 and 73, which drew a distinction between players and intermediaries.

138. As regards the bettor, the Court recommended in *Gambelli and Others* that the national court should weigh up the penalties imposed on any person who from his home in Italy places bets by internet with a bookmaker established in another Member State, especially where involvement in betting is encouraged in the context of games organised by licensed national bodies, in respect of which it referred to several judgments. [107]

139. With regard to the intermediary, the Court also advised the national court to determine whether the restrictions went beyond what was necessary to combat fraud, since the supplier of the services was subject in his Member State of establishment to a regulation entailing controls and penalties.

140. The Corte suprema di cassazione has not completed the task entrusted to it, on the pretext that it was prohibited from doing so. It is surprising that, although it identified the three fundamental parts of the Italian betting legislation, when it took its decision it took account only of authorisations, leaving penalties out of its examination entirely and considering licences only in part.

141. At this juncture, the Court of Justice should give a ruling, since it has all the information necessary to do so, and unreservedly declare that a penalty which consists in loss of liberty for up to three years is disproportionate to the circumstances described throughout this Opinion, in particular those relating to the legitimate good protected by criminal penalties and those relating to the State measures to encourage betting. [108]

142. Furthermore, a conviction means a criminal record which, under Articles 11 and 14 of the TULPS, prevents the issue of the compulsory police authorisation, making it impossible for the person concerned to pursue any activity connected with betting.

107 — Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraphs 34 to 39; and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 89 to 91.

108 — Korte, S., op. cit., p. 1451, expresses serious doubts as to the usefulness of criminal penalties, in respect of the policy of expansion of betting in Italy; Mignone, C.I., 'La Corte di giustizia si pronuncia sul gioco d'azzardo nell'era di Internet', *Diritto pubblico comparato ed europeo*, 2004, p. 401, considers the balance between the interests which are protected and the personal freedom which is sacrificed; Hoeller, B., and Bodemann, R., op. cit., p. 125 take the view that, in German law, the disproportion is evident in that the State undermines its own objectives.

143. Nor must we forget that fundamental Community freedoms are affected, so that any exception must be interpreted restrictively, [109] and that imprisonment constitutes an obstacle to the free movement of persons. [110]

D — *Final observations*

144. The lack of secondary legislation applicable to gambling means that the questions referred for a preliminary ruling must be given a reply based on primary legislation although, in view of the sectors concerned, harmonisation of the matter in the jurisdictions of the Community would be an advantage, and there has been no shortage of opportunities to achieve this.

145. A first attempt was made in 1991, when the Commission, on the basis of the study 'Gambling in the single market: a study of the current legal and market situation', [111] suggested that the regulation of gambling should be subject to the common market regime; but it did not proceed owing to the reluctance of some Member States. [112]

146. Another opportunity arose with Directive 2000/31/EC on electronic commerce, [113] but it expressly excluded 'gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions' (Article 1(5)(d), third indent).

147. At the moment consideration is being given to a proposal for an important Directive on services, [114] by which it is hoped to create a legal framework 'facilitating exercise of the freedom of establishment for

109 — Inter alia, Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 23, referring specifically to the public policy exception.

110 — Case 157/79, *Pieck* [1980] ECR 2171, paragraph 19; Case C-265/88 *Messner* [1989] ECR I-4209, paragraph 14; and *Skanavi and Chryssanthakopoulos*, paragraph 36.

111 — Office for Official Publications of the European Communities, Luxembourg, 1991. It was commented on by Advocate General Gulmann in his Opinion in *Schindler*.

112 — Coccia, M., op. cit., p. 524. The Commission put forward the principle of subsidiarity as an argument for abandoning the initiative (Conclusions of the Presidency of the European Council in Edinburgh, 11-12 December 1992, Part A, Annex 2: 'Subsidiarity — Examples of the Review of Pending Proposals and Existing Legislation', included in the periodical publication *Bulletin of the European Communities*, No 2, 1992).

113 — Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

114 — Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final).

service providers and the free movement of services' (Article 1), which would affect games of chance (Article 2, *a contrario sensu*), although it provides for a transitional period, in which the 'country of origin principle' [115] would not apply to 'gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions' (Article 18(1)(b)), for which it envisages the possibility of additional harmonisation 'in the light of a report by the Commission and a wide consultation of interested parties' (Article 40), [116] in view of the importance of the subject-matter which has to be discussed. [117]

148. If it were possible to achieve this harmonisation in the Community, many of the problems of internet betting would be resolved. Meanwhile, measures adopted unilaterally have to be analysed from the perspective of the Treaty. [118]

149. Moreover, the cross-border dimension of these games goes beyond the territory of the European Union, as is shown by the friction within the World Trade Organisation, [119] whose agreements, particularly the General Agreement on Trade in Services, affect Community law if a non-member country is involved, which is not the situation in the present case.

115 — In accordance with that principle, service providers are subject only to the law of the Member State of origin, which is also responsible for supervising the provider where he carries on the activity in another Member State.

116 — I am well aware that the liberalisation of the sector is far from peaceable. For example, Ohlmann, W., 'Lotterien, Sportwetten, der Lotteriestaatsvertrag und Gambelli', *Wettbewerb in Recht Und Praxis*, No 1, 2005, pp. 55 and 58, maintains that there should not be competition; Walz, S., 'Gambling um Gambelli? — Rechtsfolgen der Entscheidung Gambelli für das staatliche Sportwettenmonopol', *Europäische Zeitschrift für Wirtschaftsrecht*, 2004, p. 524, reveals a reluctance to accept the validity of foreign authorisations; and Campegiani, C., and Pati, C., 'Il sistema di monopolio statale delle scommesse e la sua compatibilità con la normativa comunitaria in materia di libertà di stabilimento e di libera prestazione di servizi (arts. 43 e 49 CE)', *Giustizia civile*, 2004-1, p. 2532, provide arguments to support State control of betting management. Geeroms, S., 'Cross-border Gambling on the Internet under the WTO/GATS and EC Rules Compared: A Justified Restriction on the Freedom to Provide Services?', *Cross-Border Gambling on the Internet — Challenging National and International Law*, Zurich/Basle/Geneva, 2004, p. 180., is inclined to favour the creation of a liberalised market under supranational or international legislation with strict rules in order to prevent crime.

117 — Buschle, D., op.cit., p. 471, points out that, in Germany, there are between 90 000 and 500 000 compulsive gamblers, two thirds of them men on low incomes. According to the newspaper El País, reproducing data from the consultancy Christiansen Capital Advisers, there are between 1 800 and 2 500 Internet sites devoted to games of chance, which invoice more than 8 200 million dollars worldwide, a figure which will reach 23 500 million in 2009 (Ciberpaís, 13 October 2005).

118 — For the moment, the debate is running its course. The French courts recently met problems similar to those of their Italian colleagues in connection with bets on horse races organised on the Internet by Zeturf, a company registered in Malta; the Cour d'appel (Court of Appeal), Paris, by judgment of 4 January 2006, confirmed the judgment of the Tribunal de grande instance (Regional Court), Paris, and — without referring a question to the Court of Justice for a preliminary ruling — held that the national legislation was compatible with Community law; this has already attracted criticism (Verbiest, T., 'Paris hippiques en ligne; la Cour d'appel de Paris confirme la condemnation de Zeturf', *Droit et Nouvelles Technologies*, http://www.droit-technologie.org/1_2.asp?actu_id=1150).

119 — For example, the confrontation between the United States and Antigua, which was settled by the report of the Appellate Body of that Organisation, United States — Measures affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted on 7 April 2005.

VIII — Conclusion

150. In the light of all the above, I suggest that the Court of Justice give the following reply to the questions referred for a preliminary ruling by the Tribunale di Teramo and the Tribunale di Larino:

Articles 43 and 49 EC are to be interpreted as precluding national legislation which provides for prohibitions, enforced by criminal penalties of up to three years' imprisonment, on the activities of collecting, taking, booking and forwarding offers of bets, without a licence or authorisation granted by the Member State concerned, on behalf of a company which is not allowed to obtain them in order to provide those services in that country, but which holds a permit to supply them issued by another Member State, in which it is established.