OPINION OF ADVOCATE GENERAL ALBER

delivered on 13 March 2003 [1]

Table of contents

1 — Original language: German.

I — Introduction

1. This case was brought before the Court of Justice by way of a reference for a preliminary ruling from the Tribunale di Ascoli Piceno (District Court, Ascoli Piceno (Italy)). It arises from criminal proceedings instituted against Mr Piergiorgio Gambelli and over 100 others [2] for the infringement, *inter alia*, of Article 4 of Italian Law No 401/89, which makes it a criminal offence to collect and forward bets reserved to the State or to undertakings operating under concession from the State. Bets placed in Italy are forwarded to a British bookmaker. The case therefore raises questions as to the compatibility of the national provisions concerned with the Community law on the freedom of establishment and the freedom to provide services. The relevant Italian provisions were examined by the Court to some extent in *Zenatti*. [3] This case, however, has to do with a different aspect of the issue addressed in *Zenatti*, since it relates to measures of criminal law and is primarily concerned with whether those measures are proportionate. Furthermore, the Italian provisions are to be considered from the point of view of the freedom of establishment, whereas the

2 — According to the order for reference, there are 137; according to the written submissions of Mr Gambelli's counsel, there are 140 others. In view of this uncertainty, I shall henceforth refer simply to 'Mr Gambelli and over 100 others' or 'Mr Gambelli and the other defendants'.

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

Court has hitherto examined issues involving lotteries, [4] gambling, [5] and betting on sporting events [6] only from the point of view of the freedom to provide services. Lastly, a law adopted in 2000 [7] and effective from 2001 reinforced the Italian provisions in a manner which may in its own right be problematic in terms of Community law.

(The judgments in *Zenatti, Schindler* and *Läärä*, cited in footnotes 3 to 5, are referred to repeatedly below. The source references are given only occasionally.)

II — Relevant legislation

A — *Provisions of Community law*

2. Article 43 EC provides:

'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.'

3. Article 48 EC provides:

'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....'

4 — See the judgment in Case C-275/92 *Schindler* [1994] ECR I-1039.

5 — See the judgment in Case C-124/97 *Läärä and Others* [1999] ECR I-6067.

6 — See the judgment in *Zenatti* (cited above in footnote 3).

7 — See Law No 388/2000 of 23 December 2000 (Legge Finanziaria (Finance Law)); Supplemento ordinario (Ordinary Supplement) No 302 to the GURI (Official Journal of the Italian Republic) of 29 December 2000 (hereinafter 'Law No 388/00').

4. Article 46(1) EC provides:

'1. 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.'

5. The first paragraph of Article 49 EC provides:

'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.'

Under Article 55 [EC], the provisions of Articles 45 to 48 applicable to freedom of establishment are also to apply to the freedom to provide services.

B — *Provisions of national law*

6. Under Article 88 of the Regio Decreto No 773, Testo Unico delle Leggi di Pubblica Sicurezza (Royal Decree No 773 approving a single text of the laws on public security), of 18 June 1931 (GURI No 146 of 26 June 1931, hereinafter 'the Royal Decree'), [8] no licence is to be granted for the taking of bets, with the exception of bets on races, regattas, ball games or similar contests where the taking of the bets is essential for the proper conduct of the competitive event. Authorisation to organise betting is granted exclusively to concession holders or to those entitled to do so by a ministry or another entity to which the law reserves the organisation or management of betting. Bets can relate to the outcome or the result of sporting events taking place under the supervision of the Italian National Olympic Committee (Comitato olimpico nazionale italiano, hereinafter 'CONI'), or to the results of horse races organised through the National Union for the Betterment of Horse Breeds (Unione italiana per l'incremento delle razze equine, hereinafter 'UNIRE').

7. Article 4 of Law No 401/89 [9] on gaming, clandestine betting and ensuring the proper conduct of sporting contests, as amended by Article 37(5) of Law No 388/00, states as follows:

1. Any person who unlawfully participates in the organisation of lotteries,

8 — Royal Decree No 773 of 18 June 1931 GURI No 146 of 26 June 1931 in the version of Law No 388/00 of 23 December 2000 (the Finance Law) (Supplemento ordinario (Ordinary Supplement) No 302 to the GURI of 29 December 2000).

9 — Law of 13 September 1989 (GURI No 294 of 18 December 1989; hereinafter 'Law No 401/89').

betting or pools reserved by law to the State or to entities operating under licence from the State shall be liable to a term of imprisonment of 6 months to 3 years. Any person who organises betting or pools in respect of sporting events run by CONI, by organisations under the authority of CONI or by UNIRE shall be liable to the same penalty. Any person who unlawfully participates in the public organisation of betting on other contests between people or animals, as well as on games of skill, shall be liable to a term of imprisonment of 3 months to 1 year and a minimum fine of ITL 1 000 000.

2. Any person who advertises competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months and a fine of between ITL 100 000 and ITL 1 000 000.

3. Any person who participates in competitions, games or betting organised in the manner described in paragraph 1 without being an accomplice to an offence defined therein shall be liable to a term of imprisonment of up to 3 months or a fine of between ITL 100 000 and ITL 1 000 000.

4. Paragraphs 1 and 2 shall also be applicable to gaming on machines prohibited under Article 110 of Royal Decree No 773 of 18 June 1931, as amended by Law No 507 of 20 May 1965 and as most recently amended by Article 1 of Law No 904 of 17 December 1986.

4 (a) [10] The penalties laid down in this article shall be applicable to any person who without the concession, authorisation or licence required by Article 88 of [the Royal Decree] carries out activities in Italy for the purpose of accepting or collecting, or, in any case, assisting in the acceptance or collection in any way whatsoever, including by telephone or by data transfer, of bets of any kind placed by any person in Italy or abroad.

4 (b) Without prejudice to the powers conferred on the Finance Minister by Article 11 of Decree Law No 557 of 30 December 1993, now, after amendment, Law No 133 of 26 February 1994, and pursuant to Article 3(228) of Law No 549 of 28 December 1995, the penalties provided for by this article shall be applicable to any person who carries out the collection or registration of

10 — Subparagraphs 4a and 4b were inserted into Law No 401/89 as subparagraphs 4 bis and 4 ter by Law No 388/00 of 23 December 2000. According to the order for reference, this extended the consequences under criminal law of the offences in question to any person who carries out prohibited betting of any kind in Italy.

lottery tickets, pools or bets by telephone or data transfer without being authorised to use those means to effect such collection or registration.

III — Facts and procedure

8. According to the order for reference, the Public Prosecutor and the investigating judge attached to the Tribunale di Fermo (District Court, Fermo) (Italy) have identified 'the operation of a widespread and complex organisation of Italian agencies', linked via the internet to the British bookmaker Stanley International Betting Ltd of Liverpool (hereinafter 'Stanley') and including Mr Gambelli and over 100 others among its members, which is involved in 'the collection in Italy of bets reserved by law to the State'. It does this as follows: the bettor notifies the person in charge of the agency of the games on which he wishes to bet and how much he intends to bet. The person in charge of the agency forwards a request for acceptance of the bet via the internet to the British bookmaker and indicates the football matches in question and the bets placed. The bookmaker forwards confirmation of the acceptance of the bet via the internet immediately (literally: 'in real time'). That confirmation is forwarded to the bettor, whereupon he pays the amount owed which is then forwarded to the British bookmaker and paid into a special foreign account. That means of collecting and forwarding bets was considered to be in breach of the monopoly held by CONI in respect of sports betting and therefore deemed to infringe Article 4 of Law No 401/89.

9. The Public Prosecutor's Office attached to the Tribunale di Fermo began an investigation into the handling and acceptance by Mr Gambelli and the other defendants of prohibited bets within the meaning of Article 4(1) of Law No 401/89. The investigating judge attached to the Tribunale di Fermo also made an order for preventive sequestration and instructed that Mr Giovanni Garrisi, a director of Stanley in Italy, be taken into police custody. The agencies and the defendants' homes and vehicles were also searched. An application for review of the orders for preventive sequestration was submitted to the referring court.

10. Stanley is a British company limited by shares which is registered in the United Kingdom and which acts as a bookmaker. It is authorised to exercise that activity under a licence granted, pursuant to the Betting, Gaming and Lotteries Act, by the City of Liverpool for the purposes of gaming in the United Kingdom and abroad. The bookmaker organises betting under that British licence and advertises in daily and weekly newspapers and magazines. The British undertaking organises and manages bets, identifies events and sets the betting prices, takes the economic risk and collects bets, *inter alia*, by telephone and data transfer. The company pays the taxes due in the United Kingdom (betting

duty, VAT and corporation tax), as well as the taxes on and deductions from salaries, and pays out any winnings. The company is subject to strict scrutiny from both internal and private sector auditors and from the tax authorities.

11. The British undertaking trades on the Italian market by concluding with operators established there contracts for the setting-up of data transfer centres under which those Italian undertakings become agents for sports betting. According to the order for reference, these centres 'give users an electronic means of contacting the bookmaker, collect and register the intentions to bet and forward them to Liverpool'. The British bookmaker offers an extensive range of sports bets, that is to say not only on events managed by CONI or its subsidiary organisations, but also on other foreign and international sporting events. Italian nationals can also place sports bets from home, which the bookmaker organises and markets by various means such as the internet, fax, telephone and the like.

12. The defendants are registered with the Italian Chamber of Commerce as corporate owners of data transfer centres and have duly received authorisation from the Minister for Post and Telecommunications to transmit data (within the meaning of Decision 467/2000/Cons of 19 July 2000 and Presidential Decree No 318 of 19 September 1997).

13. The referring court takes the view that Community law confers on Stanley the right to set up principal places of business or branches in the Member States of the European Community. Those principal places of business or branches make it possible for users to transmit data to the bookmaker. It is also of the opinion that the defendants not only assisted the bookmaker in collecting bets but also carried out an economic activity and performed a service for the foreign undertaking. It states that the application for review before it raises preliminary issues regarding the compatibility of national provisions with Community law. In its view, it is noteworthy that many Italian courts have reached conflicting and opposing decisions on this issue.

14. The referring court further points out that the provisions of Article 4(1) of Law No 401/89 do not exclude criminal liability where the agent is a foreign Community undertaking licensed to transmit data by the competent authorities of its own country. Consequently, it submits, there could conceivably be unacceptable discrimination against national operators which, on the basis of concessions or authorisations granted to them, perform

identical tasks in collecting and accepting sports bets on behalf of CONI. The referring court takes the view that this may be in conflict with the principles of freedom of establishment and freedom to provide cross-border services.

15. In the light of the judgment of the Corte di Cassazione (Italian Court of Cassation) in Case No 1680/2000, the referring court considers that, with regard to the potential risk to public order that could result from the unrestricted exercise of activities connected with gambling, such requirements can be adequately taken into account where the operator is an undertaking already subject in its own country to supervision which guarantees the propriety of its operations.

16. With regard to the risk feared by the Corte di Cassazione of a further incitement to wager, the referring court pointed out that gambling and betting opportunities are progressively increasing in Italy. However, the 'phenomenon' of placing bets with foreign operators is 'marginal' in comparison with the national gambling market. An 'analysis of taxation revenues deriving from authorised national gambling', it states, confuses the issue even further. Under the new rules contained in subparagraphs 4a and 4b [of Article 4] of Law No 401/89, the collection of bets on international sporting events, world events or events of other kinds, in which the State has no fiscal interest, is also penalised.

17. According to the referring court, it is clear from the parliamentary papers relating to the amendment of the 2000 Finance Law that the subsequent restrictions were dictated mainly by the need to protect 'Totoricevitori' (a category of private undertakings [engaged in the taking of sports bets]), whilst there is no evidence of any public policy concerns that could justify a restriction of rights under Community law or constitutional law.

18. The lawfulness of collecting and forwarding bets on foreign sporting events which can be inferred from the original wording of Article 4 has, the referring court goes on to state, 'led to the development of a network of operators which have invested capital and resources in this sector'. Those operators have been deprived of the legitimacy and lawfulness of their position by a change in the law which they could not have anticipated. In its view, there is a clear conflict between Article 4 and the protection of the Community law principles of freedom of establishment and freedom to provide services where private sector economic initiatives are pursued in the context of activities that do not generate revenue for the Italian State, such as betting on foreign sporting or non-sporting events.

19. The referring court is unsure on two points. First, it considers it necessary to raise the question whether the principle of proportionality can be said to have been observed when 'the extreme nature of the prohibition (it is enforced by a criminal penalty)' chosen by the national legislature

is compared with the 'importance of the national interest that is protected by sacrificing the freedoms attributed to individuals by the EC Treaty'. Secondly, it considers it necessary to examine the extent of the apparent imbalance between domestic legislation that rigorously restricts the activity of accepting sports bets by foreign Community undertakings and an opposing policy of considerably expanding gambling and betting pursued by the Italian State at national level for the purpose of generating State revenue.

20. The referring court has therefore referred the following question to the Court for a preliminary ruling:

'Is there incompatibility (with the repercussions that that has in Italian law) between Articles 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 concessions and authorisations prescribed by domestic law have been complied with?'

IV — Observations of the parties to the proceedings

21. The defendants Mr Gambelli and Others and the defendant Mr Garrisi — who is a member of the board of directors of Stanley in Italy — contend that this case differs fundamentally from previous cases before the Court, and, in particular, from *Zenatti*. The Governments of the Member States which are parties to the proceedings, and the Commission, on the other hand, are unanimously of the view that the solution to the dispute is to be found in the existing case-law of the Court as defined in the judgments in *Schindler*, *Läärä* and, in particular, *Zenatti*.

A — *Mr Gambelli*

22. Mr Gambelli points out that the betting activity carried on by CONI and UNIRE exhibits a typical monopolistic structure. An undertaking such as the foreign company Stanley offers those who enter into contracts with it a guarantee of quality and reliability. The undertaking, which trades through centres which it organises itself, holds a certificate and a licence, is subject to supervision, operates on the basis of the latest technology and in accordance with United Kingdom legislation and Community law, and does not infringe the Italian rules.

23. It contends that the Italian authorities' concerns regarding the protection of gamblers against the risks of fraud are unfounded. By contrast, legislation enacted by Italy in recent years, which has made possible an ever-growing number of games of chance ('Lotto', 'Totocalcio', 'Totip', betting on horse racing, 'Totogol', 'Corsa tris', 'Totosei', 'Superenalotto', bingo, 'Totobingol', 'Gratta e vinci', etc.), cannot be regarded as limiting gambling opportunities in order to avert any damaging effects gambling may have on individuals and society and inhibit the incitement to wager, or to protect public security and public policy.

24. In Mr Gambelli's view, a criminal penalty is essentially the last resort and should be relied on only where adequate protection of the interests to be protected cannot be guaranteed otherwise. The threat of imprisonment for the mere act of collecting bets blatantly infringes the principle of proportionality.

25. With regard to the freedom of establishment, Mr Gambelli submits that the data transfer centres are dependent agencies or branches which are contractually bound to Stanley. A Member State may not refuse a national of another Member State the right to establish himself in such a way. He contends that, by requiring authorisation in the context of a system of concessions, the Italian legislature confuses the activity of the data transfer centres with the overseas management and organisation of betting. Moreover, companies limited by shares are automatically excluded from the system of concessions.

26. With regard to the freedom to provide services, Mr Gambelli argues that the material transferred by Stanley to the centres, the betting prices, the calendar of events, the confirmations of receipt, and everything else necessary for the confirmation, identification and acceptance of bets organised and managed abroad, as well as the transfer by the centres of the intentions to bet and the stakes collected, constitutes cross-border services for the purposes of the fundamental freedoms of the EC Treaty. In his view, the Italian legislation disregards that Community principle by prohibiting Italian nationals from using a foreign company to choose the games or most interesting combinations thereof they wish to play or to place bets by telephone or data transfer. According to Mr Gambelli, it also infringes the Community principle of the protection of legitimate expectations inasmuch as the legitimate expectation of the owners of the data transfer centres that their activities are lawful, in relation to gambling on international events at any rate, is frustrated.

27. Next, in the light of the judgments in *Schindler*, *Läärä* and *Zenatti*, Mr Gambelli examines what grounds would be capable of justifying a restriction of the fundamental freedoms. He submits that, although the political objective of Member States to regulate gambling activities is not necess-

arily an overriding reason in the general interest, the restrictive measure must nevertheless be the expression of a coherent policy of the Member State concerned to limit or prevent gambling activities. Moreover, the restrictive measure may not either directly or indirectly be intended to discriminate or give rise to discrimination against nationals or undertakings of other Member States. In any event, it must be proportionate.

28. However, Mr Gambelli submits, the Italian State is undoubtedly stimulating and supporting its fiscal policy. The monopoly that it grants to the system comprising CONI and its bookmakers does not serve overriding reasons in the general interest. By refusing to give any recognition to the legislative measures of other Member States — in this case the United Kingdom, whose legislation is regarded as strict and is widely respected — the Italian legislation is discriminatory and infringes the principles fundamental to the establishment of the common market.

29. In addition to the doubts raised by the referring court — with regard to the proportionality of the penalty and the contradiction between the legal restriction on betting outside Italy and the encouragement of gambling within Italy — Mr Gambelli contends that this case raises issues hitherto unresolved by the Court. For example, the Court has not yet examined the compatibility with Community law of the Italian provisions laying down penalties in respect of betting. Moreover, the 2000 Finance Law, which the Court has not yet had occasion to examine, significantly reinforced the Italian legislation, even as regards international events, in which the Italian State cannot claim a fiscal interest. Similarly, the Court has not previously examined either the compatibility of the Italian legislation with the freedom of establishment or the issue of discrimination against Italian citizens, who are prevented from using foreign operators to gamble or bet online.

30. With regard to possible risks to public policy, Mr Gambelli contends that other suitable and effective means of monitoring foreign service providers can be found to ensure that the European market is opened up in a forward-looking and natural fashion. In the light of developments in technology, changes in legislation and the objectives of the Community in the field of online communications and trade, Mr Gambelli contends that a fresh examination of this issue by the Court is essential.

31. Mr Gambelli proposes that the question referred for a preliminary ruling be answered as follows:

(1) The legislation enacted by the Italian Republic in Article 88 of Royal Decree No 773 of 18 June 1931 (Teste Unico delle Leggi di Pubblica Sicurezza), as

amended on several occasions, and Article 4 of Law No 401 of 13 December 1989, as amended on several occasions (most recently by Article 37(4) and (5) of Law No 388 of 23 December 2000), is incompatible with Article 43 et seq. of the EC Treaty concerning freedom of establishment and/or Article 49 et seq. of the EC Treaty concerning freedom to provide services; discriminates against Community operators; infringes the principles of proportionality, mutual recognition, legal certainty and the protection of legitimate expectations; infringes Community directives on the freedom to offer online and telecommunications services; infringes the principle of reasonable cooperation and the obligation under Article 10 of the EC Treaty; conflicts with the general interest; is not justified by the principles of public security and public policy; must not pursue fiscal objectives; limits the freedom of Community citizens and undertakings; and discriminates against Italian nationals.

(2) In the alternative, national legislation such as that at issue is incompatible with Article 43 et seq. or Article 49 et seq. of the Treaty and with the principles of Community directives in so far as it is not disapplied by the authorities or national courts or in so far as it is not applied in a manner which is compatible with the principles, directives and abovementioned Community measures.

B — *Mr Garrisi*

32. Mr Garrisi is a member of Stanley's board of directors and is responsible for the group's activities in the field of sports betting. He adds to Mr Gambelli's submissions that the amendments made to the Italian legislation in 2000 made the Italian market for services in the collection and taking of sports bets absolutely impenetrable to operators from other Member States.

33. Mr Garrisi points out in this regard that the conditions for participating in the invitations to tender issued by CONI in connection with 1 000 new concessions for the organisation of betting on sporting events other than horse racing could in practice be met only by those bookmakers which already belonged to the UNIRE or CONI system, since only natural persons or partnerships who were able to exhibit the different structures required and who already had business premises in Italian territory could be awarded concessions. Moreover, he contends, both before and after that process, many Italian bookmakers received concessions for betting on horse racing and on sporting events other than horse racing without having to take part in public invitations to tender. They thus received firm concessions for new betting, while other Community operators were unable to acquire that 'status', which bookmakers operating under concession from UNIRE were assumed to have.

34. With regard to the possible justification for the restrictions of the fundamental freedoms laid down by the EC Treaty, Mr Garrisi refers to the principle confirmed by recent case-law that economic grounds cannot constitute reasons relating to the general interest which justify a restriction of the fundamental freedoms. In that regard, Mr Garrisi refers to the judgments in *SETTG*, [11] *Bond van Adverteerders and Others* [12] and *Gouda and Others*. [13]

35. According to Mr Garrisi, a study carried out by the London-based, independent economic consulting firm, NERA (National Economic Research Associates), entitled 'Expansion of the Italian betting industry', which was updated in 2001, shows that the Italian State is resolutely pursuing a policy of large-scale expansion with the aim of increased revenue for the public purse. He submits that, far from actually reducing gambling opportunities, the Italian State intends to develop them further. The extensive restrictions which the Italian legislation imposes on the fundamental freedoms relating to the provision of services and establishment, he contends, were adopted on fiscal rather than social policy grounds.

36. Mr Garrisi criticises the Italian legislation for having failed to examine fully whether service providers are subject in their State of origin to similar rules and prohibitions which both aim to protect the same interests — that is to say public policy and public morality — and provide for preventive and punitive measures under criminal law. As a result, he contends, operators who want to penetrate the Italian market are exposed to the same charges, checks and penalties twice. This constitutes serious discrimination in favour of national operators. The legislation at issue therefore infringes the principle of mutual recognition.

37. Mr Garrisi takes the view that the legislative amendments introduced in 2000 also infringe the legitimate expectations and legal certainty of persons who, like the defendants in the main proceedings, were, at the time when Law No 388/00 entered into force, operating in Italy as agents responsible for transferring data in connection with sports betting other than that reserved to CONI and UNIRE. In addition, he contends, Directive 1999/42/EC [14] is also infringed.

11 — Judgment in Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23.

12 — Judgment in Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 32 to 34.

13 — Judgment in Case C-288/89 *Gouda and Others* [1991] ECR I-4007, paragraph 11.

14 — Reference is made here to Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications (OJ 1999 L 201, p. 77).

38. In his submission, the Italian legislation contains elements which are incompatible with Directives 90/388/EEC, [15] 97/13/EC [16] and 97/66/EC [17] and therefore conflicts not only with the fundamental freedoms relating to the provision of services and establishment, but also with the freedom to offer telecommunications services.

39. Mr Garrisi proposes that the question referred for a preliminary ruling be answered as follows:

The Italian legislation on sports betting is incompatible with Articles 43 et seq. EC and 49 et seq. EC:

(A) It constitutes positive discrimination to the detriment of Community operators who are not Italian nationals and/or, although applicable without distinction in theory, gives rise, in fact or in law, to obstacles which make it impossible or disproportionately difficult for operators from other Member States to provide the relevant services either directly or through the intermediary of an agency, branch or subsidiary; and/or infringes the principles of proportionality, mutual recognition and non-conflict with other domestic policies; and/or infringes the principles of legal certainty and the protection of legitimate expectations.

(B) It conflicts with Directive 1999/42 in the field of mutual recognition of qualifications.

(C) It conflicts with the directives on the freedom to offer liberalised telecommunications services other than voice telephony.

In the alternative, the Italian legislation on sports betting is incompatible with Articles 43 et seq. EC and 49 et seq. EC and/or with the provisions of Directive 1999/42 and/or the provisions of Directive 90/388, Directive 97/13 and Directive 97/66, in so far as it is not applied by the national authorities and courts in a manner consistent with the principles of non-discrimination, proportionality, mutual recognition, consistency with other national policies, legal certainty and the protection of legitimate expectations.

15 — Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ 1990 L 192, p. 10), in the version contained in Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ 1996 L 74, p. 13).

16 — Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services (OJ 1997 L 117, p. 15).

17 — Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1).

C — *The Italian Government*

40. The Italian Government takes the view that, in the light of the principles developed in the judgment in *Zenatti*, the Italian legislation is compatible with the provisions of Community law on freedom to provide services and freedom of establishment. The judgment in *Zenatti* concerns the provisions relating to a licence issued under administrative law for the activity of collecting and managing bets in Italy (Article 88 of the Royal Decree). This case concerns the enforcement in criminal law of the prohibition on the collection and management of bets. Both rules, it contends, pursue the same aim, that is to say to prohibit the activity in question in circumstances other than those expressly permitted by law.

41. The Italian Government points out that, in judgment No 1680 of 28 April 2000, the Corte di Cassazione examined the legislation in the light of the principles established in *Zenatti* and came to the conclusion that it was lawful in so far as it is intended to restrict gambling opportunities and to protect public policy.

D — *The Belgian Government*

42. The Belgian Government points out that, for the purposes of the case-law of the Court, the activity carried on by the centres is to be regarded as an economic activity within the meaning of the EC Treaty. It submits, however, that a common market for gambling can only incite consumers to waste more money and give rise to the damaging social consequences which that entails; it refers in particular in that connection to paragraphs 60 and 61 of the judgment in *Schindler*. With reference to the judgments in *Kraus* [18] and *Gebhard*, [19] the Belgian Government points out that the Italian legislation falls outside the prohibition contained in Article 49 EC if the four conditions laid down in those judgments as having to be fulfilled in order for a restriction on the freedom to provide services to be permissible are met. The Belgian Government submits that the attempt to curb gambling and its damaging consequences can be regarded as an objective in the general interest within the meaning of the judgments in *Schindler*, *Läärä* and *Zenatti*. Moreover, the fact that gambling is not completely prohibited does not mean that that objective is not being pursued. In its view, the Italian legislation is not discriminatory either. Only operators who hold an authorisation from the Italian Ministry of Finance may organise gambling. This, it says, applies to both Italian and foreign operators. It states that the Italian legislation is also proportionate. Even if it proves ultimately to be a restriction on the freedom of establishment, it is justified on the same grounds as the restriction on the freedom to provide services.

18 — Judgment in Case C-19/92 *Kraus* [1993] ECR I-1663.

19 — Judgment in Case C-55/94 *Gebhard* [1995] ECR I-4165, sixth indent of paragraph 39. See point 92 of this Opinion for the four conditions in detail.

E — *The Greek Government*

43. The Greek Government draws a parallel between the Italian legislation at issue and the relevant Greek legislation. It considers both to be compatible with Community law. In its view, the liberalisation of gambling activities brings with it new risks for society. It submits that there is therefore good reason for gambling and, in particular, sports betting to be subject to State control in the form of a monopoly.

F — *The Spanish Government*

44. The Spanish Government also considers that, in the light of existing case-law, the Italian legislation is justified on grounds relating to the general interest. Both the granting of special or exclusive rights by means of a strict system of authorisations or concessions and the prohibition on the operation of branches belonging to foreign operators are compatible with Community law if those measures were adopted with the aim of reducing gambling opportunities. It submits that gambling opportunities must be regulated in order to prevent the risks associated with that activity. Member States have latitude in determining how they organise lotteries and gambling and how they allocate the profits they yield.

G — *The Luxembourg Government*

45. The Luxembourg Government takes the view that, although the Italian legislation at issue appears to constitute a restriction on the freedom to provide services and the freedom of establishment, it is justified in so far as it meets the four conditions laid down by case-law as having to be fulfilled in order for a restriction to be permissible. In its view, that is true of the Italian legislation in so far as it can be assumed that it was adopted for the sole purpose of confining gambling opportunities within controlled channels.

H — *The Portuguese Government*

46. The Portuguese Government points out that there is evidence in all Member States of conduct that infringes the relevant laws restricting gambling, be it the sale of tickets for foreign lotteries or the collection of bets on horse racing. That conduct pursues a strategy of liberalising and privatising the gambling market which was expressly rejected at the Edinburgh European Council in 1992. The Portuguese Government submits that the significance of this case lies in the fact that, in Italy, as in other Member States, the organisation of lotteries is kept under the control of a State monopoly in order to ensure for Member States an important source of income which takes the place of other taxes and which serves to finance social, cultural and sports policies in all Member States and to secure a high level of prosperity for the citizens of the Union.

47. The Portuguese Government points out that the principle of subsidiarity, by virtue of which the Community has not taken action to harmonise legislation in this field up to now, must be the guideline for interpreting the relevant Community law. It submits that, when it comes to examining the proportionality of national measures restricting gambling, it must be borne in mind that it is for the national legislature to define the objectives and the legal interests which it intends to protect. Similarly, it can choose the means which it deems appropriate, provided that they are not discriminatory. The Portuguese Government too relies in this respect on the judgments in *Schindler*, *Läärä* and *Zenatti*.

48. In the Portuguese Government's view, lenient gambling legislation could lead to serious social problems caused by loss of individual or family wealth. In general terms, gambling harbours risks of fraud and other criminal activities, such as money laundering. The unproductive nature of gambling precludes arguments based on entrepreneurial freedom and free competition. Since gambling is not a productive activity, the freedoms which operate for the good of the Community cannot apply here.

49. The Portuguese Government relies on the case-law of the Court [20] to demonstrate that imperative requirements in the general interest are in each case a response to a specific situation. It refers to its written observations in *Anomar and Others* [21] where it stated that public policy encompasses moral, ethical and political values and these are dependent on a national system which cannot be assessed either at supranational level or in a uniform manner.

50. According to the Portuguese Government, it is apparent from paragraph 30 of the judgment in *Zenatti* that the Italian legislation is capable of combating the risks of fraud and the damaging social consequences of gambling, and of allowing it only where it is useful in connection with the conduct of sporting events.

51. The Portuguese Government further submits that the effect of open competition on the market in gambling would be to shift income from the poorer to the richer countries. Gamblers would play wherever there were higher winnings to be had. As a result, gamblers from the smaller States would co-finance the social, cultural and sports budgets of the larger States. This

20 — See the judgments in *Schindler* (cited above in footnote 4), *Läärä* (cited above in footnote 5) and *Zenatti* (cited above in footnote 3), and the judgments in Case 120/78 *Cassis de Dijon* [1979] ECR 649, paragraph 8, Case C-76/90 *Säger* [1991] ECR I-4221, and *Gouda* (cited above in footnote 13).

21 — See Case C-6/01 [2003] ECR I-8621, paragraph 90 of those observations.

would cause revenue in the smaller States to fall and force those States to make further tax increases. Moreover, it submits, dividing up the lottery and betting market in each State between three or four large operators in Europe could bring about structural changes which would lead to job losses and a greater social divide between States.

52. The Portuguese Government takes the view that the Italian legislation, like the Portuguese legislation, is compatible with the principle of proportionality since it is necessary to protect the general interest. In its view, the only alternative is either to ban gambling activities altogether or to liberalise them. The grounds on which the Court based its judgment in *Zenatti* remain valid. Restricting the freedom of establishment of a British undertaking is therefore not disproportionate. It contends that putting an end to the State monopoly on gambling would have serious economic effects and damaging individual and social consequences.

I — *The Finnish Government*

53. Relying on the judgments in *Schindler*, *Läärä* and *Zenatti*, the Finnish Government submits that the prohibition in question, which is laid down by law and enforced by criminal penalties, protects a monopoly compatible with Community law, subject to certain conditions, which prevents operators from other Member States from establishing themselves or offering services in Italy. It points out that the Court accords Member States extensive discretion as regards the free movement of goods, the freedom to provide services and the freedom of establishment. In its view, the legislation at issue is justified provided that it is not discriminatory and is applied without distinction to national and foreign operators.

54. The Finnish Government submits that, from the point of view of Community law, it is immaterial that the penalty in question is a criminal one and that it also applies to the collection of bets, in which the Italian State has no fiscal interest, on behalf of an operator authorised to pursue the activity in question in another Member State. It points out that, in accordance with paragraph 36 of the judgment in *Läärä*, the proportionality of a measure may be assessed only by reference to the objectives pursued by the national authorities and the level of protection they are intended to provide, which is ultimately a matter for the referring court to examine.

J — *The Swedish Government*

55. The Swedish Government takes the view that the Court should follow the approach it prescribed in the judgments in *Schindler*, *Läärä* and *Zenatti*. Although the

Italian legislation does constitute an obstacle to the freedom to provide services, it is neither discriminatory nor applied in a discriminatory manner. The fact that the measures serve fiscal interests does not therefore pose any problems in Community law, provided that those measures are proportionate and not discriminatory, which is a matter for the referring court to examine. The Swedish Government is of the opinion that the interests protected by the Italian legislation cannot be safeguarded by the checks to which the betting offices are subject in their State of origin. In its view, the amended Italian legislation makes it possible to prevent an undertaking which has not been granted authorisation in Italy from circumventing the law. It follows from the judgments in *Läärä* (paragraph 36) and *Zenatti* (paragraph 34) that the fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end, which must be assessed solely by reference to the objectives pursued and the level of protection which they are intended to provide. The Swedish Government submits that the restrictions on the freedom of establishment are also justified.

K — *The Commission*

56. The Commission submits that the issue in this case was disposed of by the judgment in *Zenatti*. In its view, the legislative amendments introduced in 2000 merely supplement the existing prohibition without introducing new grounds for criminal prosecution. It also contends that Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') [22] does not apply to betting. With regard to the expansion of the betting market, which does not serve the fiscal interests of the Italian State, the Commission states that the betting in question relates to national football matches, not foreign sports events as in *Zenatti*. However, it submits, that difference is not such as to lead to a different assessment of the protective objectives pursued by the legislation at issue. On the basis of paragraph 33 of the judgment in *Zenatti*, the Commission adds that the level of protection pursued by a Member State falls within its margin of appreciation. It is therefore a matter for the Member State in question to decide whether to prohibit the activity in full or in part or merely to subject it to specific restrictions.

57. With regard to the freedom of establishment, the Commission points out that the agencies managed by Mr Gambelli are technically independent and are not subordinate to Stanley. The Commission contends that it is appropriate, therefore, to consider the issue henceforth from the

22 — Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 (OJ 2000 L 178, p. 1).

point of view of the freedom to provide services, particularly as, according to the case-law of the Court,[23] that freedom includes the freedom of the person for whom a service is provided to go to the Member State where the service is provided or to contact a service provider in another Member State by electronic means. Even if the provisions on the freedom of establishment were applicable, the Commission submits that the Italian legislation would be justified on the same grounds as those applicable in the context of the freedom to provide services.

V — Assessment

58. The Commission proposes that the question referred for a preliminary ruling be answered as follows:

(a) The provisions of the EC Treaty on the freedom of establishment and the freedom to provide services do not preclude domestic legislation such as the Italian legislation which reserves to specific entities the right to collect bets on sporting events, *inter alia* by electronic means, provided that that legislation is justified by social policy objectives aimed at restricting the damaging effects of such activities, and the restrictions adopted to that end are not disproportionate to the objective pursued.

(b) It is a matter for the national court to examine, in the light of those conditions of application, whether the national legislation pursues the objectives which justify it, and whether the restrictions which it imposes are disproportionate to the objective pursued.

59. Although the governments of the Member States which are parties to the proceedings and the Commission take the view that the solution of this case is to be found in the judgments in *Schindler*, *Läärä* and *Zenatti*, the referring court and the defendants in the main proceedings have profound doubts as to the compatibility of the national legislation with Community law. The Italian courts too seem highly uncertain about the correct interpretation to be given to the Community law applicable in this field, given the dire consequences this has for legal certainty. The economic freedom of individuals is seriously impaired as a result. A business practice which is classified as lawful in some countries is liable to criminal prosecution and penalties as severe as imprisonment in others.

23 — See the judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 10.

60. Even the judgment in *Zenatti*, which has been said to offer a solution to this dispute, was unable to provide definitive clarity in the Italian legal system, particularly since the action in the main proceedings in *Zenatti* was withdrawn after the Court delivered its judgment. A declarative judgment by the Court, based on previous case-law but taking into account the particular features of the dispute at issue, is of fundamental importance in each case. It should therefore make clear the approach to be taken both to the referring court and to all other national courts dealing with the same issue.

61. In fact, this case goes beyond the issue addressed in *Zenatti* in many respects. For example, the subject of cross-border gambling has not previously been discussed by the Court from the point of view of the freedom of establishment. The only — vague — indications as to the applicability of the provisions on the freedom of establishment are to be found in the Opinions of Advocates General Gulmann,[24] La Pergola[25] and Fennelly[26] in *Schindler*, *Läärä* and *Zenatti*, and in the judgment in *Zenatti*.[27] In any event, the question whether the freedom of establishment is applicable to cross-border gambling depends on the specific circumstances of each case. That is what must be examined here.

Nor has the criminal law aspect of the issue been assessed by the Court before. The fact that a prohibition is enforced by criminal penalties cannot be disregarded when considering whether the provision is in principle permissible or potentially incompatible with Community law. Consequently, what must be clarified first of all, in any event, is the fundamental question of the permissibility of national prohibitions under Community law. Then comes the further and separate question of the proportionality of the provision imposing penalties.

Lastly, the recent reinforcement of the national provisions will also necessitate a separate assessment. Even though the Court has held that certain restrictions of the fundamental freedoms are in theory compatible with Community law, nevertheless, measures to reinforce legislation which run counter to the spirit of the fundamental freedoms cannot be justified under any circumstances.

62. However, before I examine the questions raised themselves, I must first summarise the principal findings contained in the judgments in *Schindler*, *Läärä* and *Zenatti* for the purposes of my subsequent assessment of the case at issue.

24 — Opinion of Advocate General Gulmann in Case C-275/92 *Schindler* [1994] ECR I-1042, point 42 et seq.

25 — See the Opinion of Advocate General La Pergola in Case C-124/97 *Läärä and Others* [1999] ECR I-6069, point 26.

26 — See the Opinion of Advocate General Fennelly in Case C-67/98 *Zenatti* [1999] ECR I-7291, points 21 and 22.

27 — See paragraphs 22 and 23 of that judgment (cited above in footnote 3).

A — *The* Schindler, Läärä *and* Zenatti *judgments*

1. The *Schindler* judgment

63. At the time of the events at issue in *Schindler*, lotteries were the subject of a total prohibition on the gambling market in the United Kingdom. All activities relating to the organisation and operation of lotteries, including the advertising of participation in them, were prohibited. That is not called into question by the fact that smaller lotteries were permissible within very strict material and regional limits, or by the fact that legislation was subsequently introduced which made possible a large-scale national lottery in the United Kingdom. Those details were immaterial to the judgment of the Court in *Schindler*. The Court therefore had to proceed on the assumption that lotteries were totally prohibited on the market concerned.

64. The Schindler brothers, who wished to have large quantities of advertising material relating to the Süddeutsche Klassenlotterie imported by post from the Netherlands to the United Kingdom, were prevented from doing so by the United Kingdom customs authorities. The Court considered the prohibition on the import of the material in question to be lawful and held in that respect in paragraph 62 of its judgment that:

'When a Member State prohibits in its territory the operation of large-scale lotteries and in particular the advertising and distribution of tickets for that type of lottery, the prohibition on the importation of materials intended to enable nationals of that Member State to participate in such lotteries organised in another Member State cannot be regarded as a measure involving an unjustified interference with the freedom to provide services. Such a prohibition on import is a necessary part of the protection which that Member State seeks to secure in its territory in relation to lotteries.'

65. The Court first, in paragraphs 33 and 35, started from the premiss that lottery activities were economic in nature, and then, in paragraph 37, classified those activities as a service. The United Kingdom legislation on lotteries, although applicable without distinction (paragraphs 43 and 47), was nevertheless an obstacle to the freedom to provide services (paragraph 45). As regards the considerations raised by way of justification for that restriction (paragraph 57), the Court held, on the basis of the 'peculiar nature of lotteries' (paragraph 59), that restrictions as extreme as the prohibition of lotteries could be justified.

66. The parties to the proceedings have at several points relied upon these findings by the Court in paragraphs 60 and 61 of its

judgment in *Schindler*, and the Court has itself made reference to them in its case-law.[28] They should therefore be cited verbatim here:

'First of all, it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States. The general tendency of the Member States is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. Secondly, lotteries involve a high risk of crime or fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to the players, particularly when they are operated on a large scale. Thirdly, they are an incitement to spend which may have damaging individual and social consequences. A final ground which is not without relevance, although it cannot in itself be regarded as an objective justification, is that lotteries may make a significant contribution to the financing of benevolent or public interest activities such as social works, charitable works, sport or culture.

Those particular factors justify national authorities having a sufficient degree of latitude to determine what is required to protect the players and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.'

2. The *Läärä* judgment

67. The case at issue in the judgment in *Läärä* was different in many respects. It concerned Finnish legislation on gambling by means of slot machines — the organisation of which was reserved to undertakings by way of a monopoly — which was also capable of being regarded as a game of skill. The Court's ruling in that case too was based on the provisions on the freedom to provide services and not, for instance, on the free movement of goods, even though the case concerned the import of slot machines and an examination of the free movement of goods would have been appropriate.[29]

68. The considerations raised by the Finnish Government by way of justification for the national legislation were similar to those raised in *Schindler*. In the context of those considerations, which it was necess-

28 — See the judgments in *Läärä* (cited above in footnote 5), paragraph 13 et seq., and *Zenatti* (cited above in footnote 3), paragraph 33.

29 — See paragraphs 24, 25, 26 and 35 of the judgment in *Läärä* (cited above in footnote 5).

ary to take together (paragraph 33), the Court expressly took into account the crucial fact that the activity in question was not totally prohibited but was in certain circumstances to be regarded as authorised (paragraph 34). It therefore granted the national authorities extensive powers of assessment, which it did in the following terms in paragraph 35 of its judgment in *Läärä*:

'However, the power to determine the extent of the protection to be afforded by a Member State on its territory with regard to lotteries and other forms of gambling forms part of the national authorities' power of assessment.... It is for those authorities to assess whether it is necessary, in the context of the aim pursued, totally or partially to prohibit activities of that kind or merely to restrict them and, to that end, to establish control mechanisms, which may be more or less strict.'

The Court continued in paragraphs 36 and 37:

'In those circumstances, the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the national authorities of the Member State concerned and the level of protection which they are intended to provide.

Contrary to the arguments advanced by the appellants in the main proceedings, the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of such games on an exclusive basis, which 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, likewise falls within the ambit of those objectives.'

69. As regards the grant of a monopoly for the authorised exploitation of gambling, the Court held in paragraph 39 of its judgment in *Läärä* that:

'The question whether, in order to achieve those objectives, it would be preferable, rather than granting an exclusive operating right to the licensed public body, to adopt regulations imposing the necessary code of conduct on the operators concerned is a matter to be assessed by the Member States, subject however to the proviso that the choice made in that regard must not be disproportionate to the aim pursued.'

The Court then held in paragraph 42 that the provisions did 'not appear to be disproportionate... to the objectives they pursue[d]'.

3. The *Zenatti* judgment

70. It is in fact *Zenatti* which bears the closest resemblance to this case. It concerned the original prohibition on the taking of sports bets in Italy under Article 88 of the Royal Decree, which is also of relevance here. The reference for a preliminary ruling in *Zenatti* arose from administrative proceedings and concerned the question whether it was permissible for a company established in the United Kingdom and specialising in the taking of bets on sporting events to act as an intermediary in Italy. The Italian legislation — like the Finnish legislation in *Läärä* — imposed a prohibition qualified by a reservation of authorisation for a sales organisation with a monopoly on sports betting.

71. Sports bets are not dependent on chance in the same way as lotteries. A bettor's chances of winning may also be affected by his skill and, above all, his knowledge. There is therefore some debate among legal commentators as to whether betting is to be classified as a game of skill or a game of chance. The fact that the events involved are largely dependent on chance, particularly in the case of bets placed on entire blocks of games, would suggest that it is a game of chance. The question of classification can ultimately remain unresolved for the purposes of the examination to be carried out here, however, since the Court adopted the same approach when assessing the national legislation at issue in *Läärä* — which concerned games of skill — as it did in *Schindler*, which concerned a lottery, and therefore clearly a game of chance.

72. In paragraph 18 of its judgment in *Zenatti*, the Court held as follows with regard to that issue:

'In this case... bets on sporting events, even if they cannot be regarded as games of pure chance, offer, like games of chance, an expectation of cash winnings in return for a stake. In view of the size of the sums which they can raise and the winnings which they can offer players, they involve the same risks of crime and fraud and may have the same damaging individual and social consequences.'

73. The Court nevertheless pointed out some essential differences between *Zenatti* and *Schindler*. Firstly, as indicated above, *Zenatti* concerned only a partial rather than a total prohibition and, secondly, the freedom of establishment was conceivably applicable in the latter case (paragraphs 21 and 22 of the judgment in *Zenatti*).

74. Notwithstanding the fact, as provided for by the Treaty,[30] that the freedom to provide services is subordinate to the freedom of establishment, the Court was unable to consider the freedom of establishment since the question referred by the national court was expressly limited to the freedom to provide services (paragraph 23). As regards the prohibition, which was partial and did not therefore apply to everybody (paragraph 32), the Court held as follows in paragraph 33:

'However, determination of the scope of the protection which a Member State intends providing in its territory in relation to lotteries and other forms of gambling falls within the margin of appreciation which the Court, in paragraph 61 of *Schindler*, recognised as being enjoyed by the national authorities. It is for those authorities to consider whether, in the context of the aim pursued, it is necessary to prohibit activities of that kind, totally or partially, or only to restrict them and to lay down more or less rigorous procedures for controlling them.'

75. In examining whether the national legislation deemed to restrict the freedom to provide services was justified, the arguments raised by the Italian Government to support its justification having been based on pursuit of largely the same objectives as those pursued by the legislation at issue in *Schindler* (paragraph 30), the Court further held in paragraphs 34 to 37 of its judgment in *Zenatti*:

'In those circumstances, the mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted. They must be assessed solely in the light of the objectives pursued by the national authorities of the Member State concerned and of the level of protection which they seek to ensure.

As the Court pointed out in paragraph 37 of its judgment... in *Läärä*..., the fact that the games in issue are not totally prohibited is not enough to show that the national legislation is not in reality intended to achieve the public-interest objectives at which it is purportedly aimed, which must be considered as a whole. Limited authorisation of gambling on the basis of special or exclusive rights granted or assigned to certain bodies, which 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, likewise falls within the ambit of those objectives.

30 — See Article 50 EC and also the judgment in *Gebhard* (cited above in footnote 19), paragraph 22.

However, as the Advocate General observes in paragraph 32 of his Opinion, such a limitation is acceptable only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence and not the real justification for the restrictive policy adopted. As the Court observed in paragraph 60 of *Schindler*, even if it is not irrelevant that lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive cannot in itself be regarded as an objective justification for restrictions on the freedom to provide services.

It is for the national court to verify whether, having regard to the specific rules governing its application, the national legislation is genuinely directed to realising the objectives which are capable of justifying it and whether the restrictions which it imposes do not appear disproportionate in the light of those objectives.'

B — *Freedom of establishment*

76. It must now be examined whether and how the principal findings contained in those three judgments can be applied to this case. As the question referred by the national court relates expressly to the application of the freedom of establishment and to how the application of that freedom affects the national legislation at issue in these proceedings, and since, under the hierarchy of provisions established by the Treaty, the freedom of establishment takes precedence over the freedom to provide services, [31] it is necessary first of all to examine the compatibility of the national legislation with the freedom of establishment.

1. Conditions for establishment

77. It may be inferred from the uncontested submissions of the parties to the proceedings that the centres which were the subject of the searches and seizures in the main proceedings are contractually bound to Stanley, and that Stanley has thus built up an entire network of operators offering and accepting sports bets on Italian territory. It must therefore be examined whether, by so doing, Stanley has established itself in Italy.

78. According to the judgment of the Court in *Factortame and Others*, [32] establishment consists in 'the actual pursuit of an economic activity through a fixed establishment in [a] Member State for an indefinite period'. Under Article 43 EC, restrictions on the freedom of establishment of nationals of a Member State in the territory

31 — See Article 50 EC and the judgments in *Gebhard* (cited above in footnote 19), paragraph 22, and in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21, last sentence.

32 — Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraph 20.

of another Member State are prohibited within the framework of the provisions subsequent to that article. Under Article 48 EC, 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 must, for the purposes of the chapter on the freedom of establishment, be treated in the same way as natural persons who are nationals of Member States.

79. Stanley is a company limited by shares and incorporated under English law which, as a profit-making legal person, is capable of enjoying the freedom of establishment under the second paragraph of Article 48 EC. The second sentence of the first paragraph of Article 43 EC prohibits restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

80. Under the broad definition which the Court gave to the scope of freedom of establishment in *Commission* v *Germany*,[33] an undertaking[34] which maintains a permanent presence in another Member State is covered by the provisions of the Treaty on the right of establishment, 'even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency'.

81. There is, therefore, no doubt at all that a dependent body acting on behalf of the central organisation may be regarded as that undertaking's 'secondary establishment'. In so far as it is to be regarded as an establishment within the meaning of the Treaty, that body can rely on the freedoms associated with its status as such.

82. It must be positively established whether the economic activity pursued in this case constitutes establishment within the meaning of the Treaty, since, as the Court held in *Commission* v *Germany*, an undertaking that acts within the scope of the freedom of establishment may not rely on the freedom to provide services.[35]

83. In some circumstances, reliance on one or other of the freedoms may therefore also make a difference to the conditions applicable to the pursuit of an economic activity in the market of the country of destination, in so far as any special conditions governing authorisation to pursue the activity in

33 — Judgment in *Commission* v *Germany* (cited above in footnote 31), paragraph 21.

34 — In that case, an insurance undertaking.

35 — See the judgment in *Commission* v *Germany* (cited above in footnote 31), paragraph 21; see also the judgment in *Gebhard* (cited above in footnote 19), paragraph 20, which states that the chapters on the right of establishment and the freedom to provide services are mutually exclusive.

question in the State of establishment cannot as such be imposed on a provider of services and the checks carried out and guarantees given in respect of a provider of services in the State of origin must be recognised. It is generally sufficient for a provider of services from another Member State to fulfil the conditions governing authorisation to pursue an activity applicable in the State of origin. In those circumstances, restrictions on the freedom to provide services are permissible only in so far as they meet the four conditions governing justification set out below in point 91.

84. The determination as to whether the freedom being relied on is the freedom of establishment or the freedom to provide services must always be effected in the light of the particular circumstances of the case in question, since there is no definition covering all the different forms of cross-border economic activity that can be used for the purposes of distinguishing between the freedoms in question. On the basis of the definition of establishment laid down by the Court and cited above in point 78, the economic activity pursued in this case constitutes a fixed establishment set up for an indefinite period.

2. The data transfer centres as establishments of the undertaking Stanley

85. The data transfer centres are very likely to be fixed establishments. Whether they are intended to represent Stanley on the Italian market on a permanent basis [36] depends on the nature of the contracts concluded between Stanley and the centres. It is, however, questionable whether the centres participate on a permanent basis in the business activities of the central organisation, that is to say whether they act on a permanent basis as outposts of the central organisation, since they merely pass on information relating to transactions managed in the United Kingdom. It follows from the submissions of the parties to the proceedings that the server offering, accepting and processing the bets is in Liverpool and that the centres merely act as intermediaries. Where dependent auxiliary services are provided in this way, an undertaking's presence in the territory of another State is permissible only where the establishment is dependent on the undertaking, 'as would be the case with an agency'. [37] Where the establishment acts purely as an intermediary, that is to say as a mere receiving outlet, it should therefore be exclusively bound, or at least predominantly linked, to the managing undertaking.

86. However, an undertaking whose activity as an intermediary for the managing undertaking is just one of many activities it pursues can hardly be regarded as having been charged with the task of acting on behalf of the undertaking on a permanent basis in the manner of an agency, since, in such circumstances, the intermediary is at liberty, depending on its contract with the undertaking, to opt out of the cooperative

36 — See the requirement laid down in the judgment in *Commission* v *Germany* (cited above in footnote 31), paragraph 21.

37 — See the judgment in *Commission* v *Germany* (cited above in footnote 31), paragraph 21.

relationship, in which case there is no dependence upon the central organisation. It is apparent from the documents before the Court that the data transfer centres offer a wide range of services in the data transfer sector, only *one* of which is to act as an intermediary for Stanley.

87. In those circumstances, I am inclined towards the view that the data transfer centres are not secondary establishments of the firm Stanley, but operate by providing services. Ultimately, however, this is a matter for the national court to decide. In reaching that decision, the national court should not fail to take account of the national authorities' perception of the centres in the preliminary investigation pending.

88. If, because of the strength of their link to the British undertaking, the centres are nevertheless to be regarded as establishments of Stanley, the question arises to what extent their activities on Italian territory may be restricted by the national legislation.

3. Restrictions on the pursuit of an economic activity

89. The Court has already held that the gambling sector in principle constitutes an economic activity falling within the scope of the Treaty. [38]

90. It must further be observed, first of all, that the restrictions at issue do not constitute special treatment on grounds of public policy or public security within the meaning of Article 46(1) EC. In its judgment in *Zenatti*, the Court held that, by virtue of Article 55 EC, Article 46 EC is also applicable in the context of the provisions on the freedom to provide services. However, it drew no conclusions from that with regard to the assessment of the provisions at issue in that case, but addressed itself directly to an examination of the overriding reasons in the general interest. Consequently, in accordance with the approach adopted by the Court in that case, it must be assumed here too that the national provisions are not justified under Article 46 EC.

91. It can also be inferred from the case-law of the Court that, where an economic activity is taken up and pursued in another Member State within the framework of the freedom of establishment in an area which is subject to certain conditions in the host Member State, those conditions must in principle be complied with. [39] However, 'national measures' — in the sense of imperative requirements, that is to say where the exceptions under Article 46(1) EC do not apply — 'liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and

38 — Judgment in *Schindler* (cited above in footnote 4), paragraph 33 et seq.

39 — See the judgment in *Gebhard* (cited above in footnote 19), paragraph 39.

they must not go beyond what is necessary in order to attain it'.[40] Furthermore, any equivalence on the part of the knowledge acquired[41] and guarantees given[42] in the State of origin must be taken into account. Consequently, the fact that a Member State regulates its gambling sector by means of a system of concessions is not objectionable *per se*. However, a foreign economic operator must be able to apply for a concession in the same way as a national of that Member State,[43] and the system of concessions itself must meet the four conditions applicable to national legislation restricting the pursuit of an economic activity.

(a) Discrimination

92. Consequently, it is necessary first of all to assess whether the national legislation is discriminatory in nature or in effect.

93. It has been submitted that the Italian legislation on the regulation of sports betting has a 'monopolistic structure'. I take this to mean that it exhibits traits associated with a monopoly but is nevertheless not to be regarded as a monopoly in the narrower sense of the term. The discriminatory effects of a monopoly can be viewed in two ways. On the one hand, it can be said that a monopoly does not have a discriminatory effect for the purposes of the second paragraph of Article 43 EC, since both national and foreign economic operators are excluded from the activity in question in the same way. On the other hand, however, it is also argued that discrimination on grounds of nationality exists where foreign economic operators are automatically excluded from the activity in the Member State concerned. The question is whether the same is true of a 'monopolistic structure'.

94. It must be assumed that other economic operators at least have the possibility of participating in the 'monopolistic structure' at issue here in that they can apply for a concession. The decisive factor, therefore, is the nature of the conditions governing the award of the concession. Even if the invitation to tender for a concession contains no conditions that discriminate directly on grounds of nationality, some of its conditions — for instance the requirement of existing business premises on Italian territory — may nevertheless have the effect of favouring national economic operators, thus placing foreign economic operators at a disadvantage. This must be regarded as indirect discrimi-

40 — Sixth indent of paragraph 39 of the judgment in *Gebhard* (cited above in footnote 19).

41 — See the judgment in *Gebhard* (cited above in footnote 19), fourth indent of paragraph 39.

42 — *Commission* v *Germany* (cited above in footnote 31), paragraph 47.

43 — See the prohibition on discrimination laid down in the second paragraph of Article 43 EC.

nation, which is likewise prohibited under Community law.

95. There are several factors which support the claim that the conditions governing the award of concessions for accepting sports bets in Italy are discriminatory in nature. The very condition mentioned above (which has been criticised in these proceedings), to the effect that the potential concession holder must already have business premises in Italian territory, has a discriminatory effect. That is all the more so because it is illegal to take up and pursue the activity in question without a concession and because previous experience of it in a relevant context — in Italian business premises — is impossible in any event.

96. The fact that certain types of company are automatically excluded from being concession holders also has a discriminatory effect. Furthermore, the Commission has already identified this as being contrary to Community law and, as indicated in its press release of 17 October 2002, has instituted proceedings for failure to fulfil obligations and addressed a reasoned opinion to the Italian Republic. That press release reads as follows:

'The European Commission has decided to make a formal request to Italy to comply with Community law when awarding concessions for sports betting operations. At present, share-capital companies listed on EU regulated markets are excluded from obtaining such concessions, and the Commission does not consider such an exclusion to be a necessary part of the effort to combat fraud and other crimes. What is more, Italy has renewed around 300 horse-race betting concessions without issuing a call for competition. When a major public concession is awarded without the contract being opened up to all potential European tenderers (as required by the EC Treaty and the public procurement directives), European enterprises are unfairly deprived of their right to submit a bid. Moreover, the public authorities awarding the concession — and in this case the punters too — run the risk of receiving a service of a lower quality than might have been provided by a tenderer who has been improperly excluded from the award procedure....'

97. If the award procedure at issue were regarded as discriminatory for the purposes of the second paragraph of Article 43 EC, it would in itself be considered an obstacle to the freedom of establishment under the Treaty, in breach of Community law. In that event, the fact that an obstacle to establishment is also enforced by a prohibition under criminal law would all the more conclusively have to be regarded as an infringement of Community law.

(b) Overriding reasons in the general interest — objectives, suitability of the measures and proportionality

98. If, on the other hand, the conditions in question are not considered to be discrimi-

natory, the legislation at issue still constitutes a restriction which can be justified only if it fulfils the four stringent conditions laid down by the Court and set out in point 91 above. The Court has already recognised the protection of consumers and the maintenance of order in society as being overriding reasons in the general interest which are capable of justifying very extensive national rules governing the gambling sector. [44] Consequently, even if the legislation at issue is exclusively concerned with the pursuit of legitimate objectives aimed at ensuring that concession holders are not involved in criminal or fraudulent practices, the question nevertheless arises whether the specific exclusion of companies limited by shares is capable of serving that objective in the first place.

99. The integrity of a company limited by shares can be established by means of checks such as obtaining information on the integrity of the undertaking's representatives and major shareholders. The complete refusal of access seems in any event to be disproportionate. However, if complete exclusion is contrary to Community law, its enforcement by criminal penalties will to that extent be all the more conclusively so.

100. Moreover, in that event, checks already carried out and guarantees already given in another Member State would have to be taken into consideration in the concession award procedure. [45] Mr Garrisi's submission that lottery activities are also covered by Directive 1999/42 is of interest in this context. [46] Article 1 of that directive requires the Member States to adopt certain measures in respect of establishment and the provision of services. The directive applies to the activities listed in Annex A, Part 1, list VI, point 3 of which contains, *inter alia*, the following entry:

'ex 84 Recreation services

843 Recreation services not elsewhere classified:

— sporting activities (sports grounds, organising sporting fixtures, etc.), except for the activities of sports instructors

— games (racing stables, areas for games, racecourses, etc.)

44 — See the judgment in *Schindler* (cited above in footnote 4), paragraph 58.

45 — See the judgment in *Commission* v *Germany* (cited above in footnote 31), paragraph 47.

46 — Directive cited above in footnote 14.

— other recreational activities (circuses, amusement parks and other entertainments).'

101. It is true that that provision does not contain the express references to 'bookmakers' and 'betting offices' which Mr Garrisi claims it does. As can be seen, the activities most closely resembling such activities are classified not under 'ex 859' of the ISIC nomenclature, as stated by Mr Garrisi, but under 843.

102. A broad interpretation of the group in question would support the view held by Mr Garrisi. However, the fourth recital in the preamble to the directive reads:

'Whereas the main provisions of the said directives should be replaced in line with the conclusions of the European Council held in Edinburgh on 11 and 12 December 1992 regarding subsidiarity, simplification of Community legislation and, in particular, the reconsideration by the Commission of the relatively old directives dealing with professional qualifications...;'

The aforementioned European Council conclusions expressly state in Part A, Annex 2 that:

'[The Commission] will not, for instance, be going ahead with... the regulation of gambling.' [47]

103. It is not unlikely that that decision, to which reference has been made on a number of occasions in these proceedings, will have an impact on the interpretation of the directive adopted in 1999 on the recognition of qualifications. The Member States are in any event required, whether pursuant to the procedures provided for in Directive 1999/42 or directly under primary law, to take account of 'knowledge and qualifications' acquired in another Member State, [48] that is to say 'checks and guarantees', [49] professional qualifications, authorisations to practise and supervision.

104. It can therefore be stated, by way of a preliminary conclusion, that, in the event that pursuit of the activity at issue constitutes establishment, a question which the national court must determine, the prohibition contained in the Italian provisions at

47 — See *Bulletin of the European Communities*, No 12/1992, p. 18.

48 — Judgment in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357.

49 — *Commission* v *Germany* (cited above in footnote 31), paragraph 47.

issue on the pursuit of that activity by sports bookmakers duly authorised in other Member States infringes the principle of the freedom of establishment within the meaning of the EC Treaty.

C — *Freedom to provide services*

105. If, however, on purely factual grounds, the data transfer centres are not to be regarded as establishments of the undertaking Stanley, they are in any event involved in providing the services offered by Stanley. Assuming that Stanley has no representation in Italian territory which can be regarded as the maintenance of an establishment on its part, the business activities it pursues are a classic example of a service provided by correspondence. The provider of the service and the recipient of the service are established in two different Member States, and the service alone is cross-border in character.

1. Obstacles to the freedom to provide services and their justification

106. The Court has already recognised that enabling people to participate in gambling (deemed by the Court to include sports betting) in return for remuneration constitutes a service, and this should no longer be called into question for the purposes of these proceedings. [50] The Court also took it as read that legislation preventing operators in other Member States from taking bets in Italian territory constituted an obstacle to the freedom to provide services. [51]

107. Obstacles to the freedom to provide services are acceptable as such only where they are permissible under the exceptions expressly provided for by the EC Treaty — in which case even discriminatory legislation is possible — or are justified, in accordance with the case-law of the Court, by imperative requirements. [52] As indicated above in point 90, the Court made reference in *Zenatti* to Articles 45 EC, 46 EC and 55 EC, which permit restrictions where the activity is connected, even only occasionally, with the exercise of official authority or in so far as those restrictions are justified on grounds of public policy, public security or public health. However, it did not examine those articles but proceeded directly to an assessment of the overriding reasons in the general interest. It may be concluded from this that, in the view of the Court, betting activities, irrespective of how they are regulated by the State, are not connected with the exercise of official authority and do not jeopardise public policy, public security or public health in

50 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 24 et seq.

51 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 27.

52 — Judgment in *Zenatti* (cited above in footnote 3), paragraph 28.

such a way as is capable of justifying such regulation.

108. However, the idea in particular that public security and public order are capable of justifying the kind of strict rules which reserve for the State very extensive powers of organisation in the gambling sector does not seem misplaced. Part of the rationale for the legislation applicable in Italy, and for the equivalent legislation in almost all the Member States, [53] is the prevention of crime. [54] The fact that, in Italy and in other Member States, the provisions establishing the State control of gambling are enforced by criminal penalties is likewise indicative of the legislatures' assessment of the dangers of that activity. Nevertheless, the Court has not deemed the Italian legislation, which formed the subject-matter of the judgment in *Zenatti*, to be justified on grounds of public security and public policy; nor has this been seriously contended by the parties to the present proceedings.

109. It is therefore necessary, following the example of the Court, [55] to proceed directly to an examination of whether national legislation which is applicable without distinction — and is therefore non-discriminatory — but which restricts the freedom to provide services is justified. That question accordingly hangs on the existence or otherwise of overriding reasons in the general interest which are capable of justifying the national measures. In previous cases before the Court concerning the gambling sector, a whole range of arguments has always been put forward by way of justification for the national legislation at issue.

110. In paragraph 57 of its judgment in *Schindler*, the Court summarised those arguments as follows: 'to prevent crime and to ensure that gamblers would be treated honestly; to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to excess; and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.'

111. The objective of the legislation at issue in *Läärä* was, according to paragraph 32 of the judgment in that case, 'to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only

53 — See the general remarks of Advocate General Gulmann in his Opinion in *Schindler* (cited above in footnote 24), point 1 et seq.

54 — See the judgments in *Schindler* (cited above in footnote 4), paragraph 57; in *Läärä* (cited above in footnote 5), paragraph 32; and in *Zenatti* (cited above in footnote 3), paragraph 30.

55 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 29.

with a view to the collection of funds for charity or for other benevolent purposes'.

112. According to the order for reference and the observations of the Italian Government, the Court held in relation to the original legislation, which is also at issue in these proceedings, that it pursued objectives similar to those pursued by the United Kingdom legislation on lotteries. 'The Italian legislation seeks to prevent such gaming from being a source of private profit, to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend which it represents and to allow it only to the extent to which it may be socially useful as being conducive to the proper conduct of competitive sports.' [56]

113. No new or different grounds for the legislation have been put forward in these proceedings. The Court has to date refrained from examining each ground individually. It has instead expressly considered them together. [57] It considers that they 'concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society', [58] which can be regarded as constituting overriding reasons relating to the public interest.

114. In *Schindler* (paragraph 61), those grounds were capable of justifying a total prohibition on lotteries. As regards legislation such as that at issue in *Zenatti*, which, crucially, did not impose a total prohibition on the trade in question, the Court afforded Member States the discretion to decide whether they wanted to prohibit activities of that kind totally or partially, or only to restrict them. To that end, they could lay down procedures for controlling them the rigour of which was for them to decide (paragraph 33 of the judgment in *Zenatti*). To that extent — according to paragraph 34 — it falls to the Member State to determine the objectives and level of protection.

115. Limited authorisation of gambling, which has the aim 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', also serves public-interest objectives. The Court nevertheless held that 'such a limitation is acceptable only if, *from the outset*, it reflects a concern to bring about a *genuine* diminution in gambling opportunities and if the financing of social activities through a levy on the proceeds of authorised games constitutes only an incidental beneficial consequence ...'. [59]

56 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 30.

57 — See the judgments in *Schindler* (cited above in footnote 4), paragraph 58, and in *Zenatti* (cited above in footnote 3), paragraph 31.

58 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 31.

59 — See the judgment in *Zenatti* (cited above in footnote 3), paragraphs 35 and 36; emphasis added.

116. It therefore seems entirely consistent with the case-law of the Court to subject the objectives pursued and the means employed to attain them to closer inspection, even though the Court has hitherto left that task to the national courts. [60] As indicated above, it is a task which they clearly find difficult.

2. Suitability of the means employed to attain the objective pursued

117. The objectives cited can be divided into different groups. On the one hand, there are the potential dangers posed by operators, such as fraudulent practices and criminal activities. On the other hand, there is the protection of players from themselves. This includes the efforts to restrict gambling opportunities, the purpose of which is to prevent the wagering of excessive stakes and the practice of habitual or even compulsive gambling, together with the damaging financial and social consequences that follow from this. The feared negative effects on society can be classified under that objective, since the limitation of gambling opportunities is intended to counter such effects. Finally, consideration must be given to the not insignificant economic dimension of gambling as represented by the generation of substantial funds for the public purse or in any event for public-interest purposes.

(a) Dangers posed by operators

118. Potential dangers posed by operators can be countered by means of checks at the time of authorisation and, where appropriate, by monitoring their activities. To that extent, an authorisation procedure is not objectionable *per se*. However, in the context of the freedom to provide services, it becomes problematic when it is implemented in such a way that an operator which is authorised in another Member State and complies with the rules applicable there is effectively prevented from pursuing its activity. It is safe to assume that gambling is regulated in most if not all Member States, [61] and that the grounds given for such regulation are largely the same. [62] The fact that an operator from another Member State meets the requirements applicable in that State should therefore satisfy the national authorities of the Member State in which the service is provided and should be accepted by them as a sufficient guarantee of the integrity of the operator.

60 — See the judgment in *Zenatti* (cited above in footnote 3), paragraph 37.

61 — See the general remarks made by Advocate General Gulmann, on the basis of a Commission study, in his Opinion in *Schindler* (cited above in footnote 24), point 1 et seq.

62 — Reference is made here to the observations of the Member States in *Schindler*, *Läärä*, *Zenatti* and the present proceedings.

(b) Prevention of the passion for gambling

119. As regards the dangers feared to be posed by the diversification and extension of gaming opportunities, it must be examined whether the Member State has a coherent policy on the subject, particularly where the prohibition in question is not absolute but is qualified by a reservation of authorisation. A total prohibition on a particular branch of the gambling sector clearly has the effect of limiting those gambling opportunities. However, where gambling — in this case sports betting — is permitted, albeit within clear limits laid down by law, the stated objective of producing a limiting effect must be examined much more closely. Limited authorisation cannot, as the Court held in paragraph 35 of its judgment in *Zenatti*, serve to show that national legislation is not in reality intended to achieve public-interest objectives. Nor can regulation alone serve to show that the stated objective is being pursued, for, as the Court again held (in paragraph 36 of its judgment in *Zenatti*), such regulation is acceptable 'only if, from the outset, it reflects a concern to bring about a genuine diminution in gambling opportunities'.

120. However, whether that is the case can be determined only by an overall assessment taking into account the image and conduct of gambling operators in the Member State. This is borne out by the fact that, in *Zenatti*, the Court left that assessment to the national court. Where, however, the Court has sufficient facts at its disposal to enable it to make an assessment, it is not prevented from doing so.

121. It has been submitted in these proceedings that sports betting operators trading under a concession make themselves known by means of aggressive advertising. Such conduct is intended to instil and foster a desire to gamble. That is not all, however. The *Italian State* itself has made it possible, through the legislation it has adopted, for the range of gambling opportunities on the Italian market to be substantially extended. [63] It has further been submitted, without contradiction, that the Italian State has also made it easier to collect bets. Reference was made earlier to the fact that the infrastructure has been expanded through the award of 1 000 new concessions.

122. Against that background, there can no longer be any talk of a coherent policy to limit gambling opportunities. Moreover, the objectives stated but not in reality pursued (any more) are not therefore capable of justifying the restriction of the

63 — See Mr Gambelli's submissions in this respect, reproduced in point 23 above.

freedom to provide services enjoyed by service providers established and duly authorised in other Member States.

123. As regards the amendments made to the Italian legislation in 2000 by the Finance Law, and the circumstances surrounding the adoption of that law, which reinforced the provisions previously applicable (as examined by the Court in *Zenatti*), it should be pointed out that, according to the legislation cited in the written observations, those amendments were made at least partly in order to protect Italian concession holders. These are clearly protectionist motives which are not capable of justifying the legislative amendments in question and, what is more, cast doubt on the legislation as a whole. In so far as the original legislation must in any event be regarded as no longer being underpinned by the objectives which the legislature may or may not have had in mind at the time of its adoption, because the legal and factual situation has changed, those provisions should not under any circumstances have been reinforced as they were.

(c) Relevance of State revenue

124. The fact that the legislation was introduced in a finance law also indicates that the Member State has a not inconsiderable interest in gambling for economic reasons.

125. In paragraph 60 of its judgment in *Schindler*, the Court held it to be 'not without relevance' — although incapable of being regarded as justification — 'that lotteries may make a significant contribution to the financing of benevolent or public-interest activities such as social works, charitable works, sport or culture'. Although that finding might support the assumption in certain circumstances that economic grounds — at least when combined with other grounds — are recognised as reasons in the general interest, the Court dispelled such speculation in its judgment in *Zenatti*, which was consistent with its previous case-law to the effect that economic grounds are incapable of justifying restrictive measures. [64] The Court held in paragraph 36 of that judgment that 'the financing of social activities through a levy on the proceeds of authorised games [may constitute] only an incidental beneficial consequence and not the real justification for the restrictive policy adopted'.

126. The favourable financial consequences of gambling for the public purse cannot, therefore, be regarded as overriding reasons in the general interest which are capable of justifying the exclusion from the gambling market of operators from other Member States. Nevertheless, the fact

64 — See the judgments in Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 26, and in Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 50, both with further references.

remains that the favourable economic effects of gambling on the revenue of Member States are highly significant. This emerges with varying degrees of clarity from the observations of the Member States, and was most clearly expressed by the Portuguese Government, which vividly describes the almost dramatic consequences which it is feared the liberalisation of gambling at European level would have for the smaller Member States. Such concerns certainly cannot be dismissed out of hand.

127. However, it is clear from the submissions of the Member States that what they fear most is the economic consequences of changes within the gambling sector. Little reference is made in this context to any dangerous effects that gambling might have on gamblers and their social environment. Consequently, such fears likewise cannot be regarded as an interest in the protection of consumers that would constitute an overriding reason in the general interest.

128. If fears of a shift in the sources of State revenue were realised as a result of a partial opening-up of national gambling markets, other suitable measures would, if necessary, have to be taken in order to counter this. Economic considerations alone, however, cannot serve to prevent outright the exercise of the freedom to provide services by operators authorised in another Member State.

129. Consequently, the restriction of the freedom to provide services cannot, on the grounds given and in the circumstances obtaining, be regarded as justified by overriding reasons in the general interest.

3. Gambling and electronic media

130. The legislative amendments introduced in 2000, which were apparently intended only to enforce the existing prohibitions, must also be viewed, at the very least, in the context of technological advances. It is common ground that such advances are making it increasingly difficult to monitor whether legitimate systems of regulation are being complied with. Even without the intervention of an intermediary, a person who wishes to gamble can place a bet with a European service provider of his choice by phone, fax, or internet. Those media, which mean that a change of location is no longer a prerequisite for participating in foreign gambling activities, have prompted a variety of reactions from national legislatures. For example, the United Kingdom passed the Lotteries Act 1993, referred to in *Schindler* but not directly relevant to that case, which introduced a national lottery in order to make available in the United Kingdom a facility similar to those offered by foreign service providers. In other Member States,

such as Italy and Germany,[65] existing legislation was reinforced, primarily by means of enforcement under criminal law.

4. Consequences

131. However, the acceptability of those criminal penalties stands or falls by the lawfulness of the restrictions and prohibitions on which they are based, their assessment under Community law being dictated entirely by the objectives pursued. Where, as in this case, the alleged objectives of the relevant legislation are called into question by the inconsistent conduct of the national authorities themselves, that is to say, where those objectives cannot be regarded as imperative requirements in the public interest, legislation which reinforces such measures by means of criminal penalties must be considered disproportionate.

132. It must therefore be concluded that national legislation like the Italian legislation at issue in these proceedings, which imposes prohibitions enforced by criminal penalties on the pursuit, by any person and at any place, of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, is, in the circumstances obtaining in this case, inconsistent with the freedom to provide services under Article 49 et seq. EC.

133. Finally, for the sake of completeness, it is necessary to examine the defendants' submission that the Italian legislation in question infringes secondary Community law concerning electronic commerce and the directives listed in point 39. In that connection, it is sufficient to refer first of all to Directive 2000/31 on electronic commerce,[66] the third indent of Article 1(5)(d) of which provides that the directive must not apply to 'gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions'. Furthermore, as regards Directive 96/19 amending Directive 90/388 with regard to the implementation of full competition in telecommunications markets, Directive 97/13 on a common framework for general authorisations and individual licences in the field of telecommunications services and Directive 97/66 concerning the processing of personal data and the protection of privacy in the telecommunications sector, it should be noted that these directives have no bearing, either explicitly or implicitly, on the organisation of gambling. Consequently, it cannot be assumed that the field at issue is governed by secondary law. The assumption must therefore be that no specific Community legislation is applicable, and that the field at issue is governed by primary law, in the light of which, moreover, secondary law too must be interpreted.

65 — See the Sechstes Gesetz zur Reform des Strafrechts (Sixth Law Reforming the Criminal Code) of 26 January 1998, BGBl. I, p. 164, Paragraph 287 of which extended the grounds for prosection under the criminal offence of operating a lottery or draw without authorisation.

66 — Cited above in point 56.

VI — Conclusion

134. In the light of the foregoing considerations, I propose that the question referred for a preliminary ruling be answered as follows:

The provisions of Article 49 et seq. EC concerning the freedom to provide services are to be interpreted as precluding national legislation like the Italian legislation contained in Article 4(1) to (4), 4a and 4b of Law No 401 of 13 December 1989 (as most recently amended by Article 37(5) of Law No 388 of 23 December 2000), which provides for prohibitions enforced by criminal penalties on the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, where such activities are effected by, on the premises of, or on behalf of, a bookmaker which is established in another Member State and which duly carries out those activities in accordance with the legislation applicable in that State.