

JUDGMENT OF THE COURT
21 October 1999 *

In Case C-67/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Consiglio di Stato (Italy) for a preliminary ruling in the proceedings pending before that court between

Questore di Verona

and

Diego Zenatti

on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and H. Ragnemalm, Judges,

* Language of the case: Italian.

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the Italian Government, by Professor U. Leanza, Head of the Department of Contentious Diplomatic Affairs, Ministry of Foreign Affairs, acting as Agent, assisted by D. Del Gaizo, *Avvocato dello Stato*,

- Mr Zenatti, by R. Torrisi Rigano, of the Catania Bar, and A. Pascerini, of the Bologna Bar,

- the German Government, by E. Röder, Ministerialrat in the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor in the same ministry, acting as Agents,

- the Spanish Government, by N. Díaz Abad, Abogado del Estado, acting as Agent,

- the Portuguese Government, by L.I. Fernandes, Director of the Legal Service of the Directorate-General for the European Communities of the Ministry of Foreign Affairs, and M.L. Duarte, Legal Adviser in the same directorate, and A.P. Barros, Legal Coordinator in the gaming department of Santa Casa da Misericórdia de Lisboa, acting as Agents,

- the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Affairs Department in the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser in the same Ministry, acting as Agents,

- the Swedish Government, by E. Brattgård, Departmental Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Norwegian Government, by J. Bugge-Mahrt, Deputy Director-General in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by M. Patakia and L. Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, represented by D. Del Gaizo, Mr Zenatti, represented by R. Torrisi Rigano and A. Pascerini, of the Belgian Government, represented by P. Vlaeminck, of the Ghent Bar, of the Spanish Government, represented by N. Díaz Abad, of the French Government, represented by F. Million, Chargé de Mission in the Legal Affairs Directorate in the Ministry of Foreign Affairs, acting as Agent, of the Portuguese Government, represented by M.L. Duarte, of the Finnish Government, represented by H. Rotkirch and T. Pynnä, of the Swedish Government, represented by A. Kruse, Departmental Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by M. Patakia and L. Pignataro, at the hearing on 10 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1999,

gives the following

Judgment

- 1 By order of 20 January 1998, received at the Court on 13 March 1998, the Consiglio di Stato (Council of State) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of the provisions of the EC Treaty concerning the freedom to provide services to enable it to determine the compatibility of those provisions with national legislation which, subject to exceptions, prohibits the taking of bets and reserves to certain bodies the right to organise the taking of such bets as are authorised.
- 2 That question was raised in proceedings between the Questore di Verona (the police prosecuting authority of Verona) and Mr Zenatti concerning the prohibition imposed on the latter from acting as an intermediary in Italy for a company established in the United Kingdom specialising in the taking of bets on sporting events.

Legal background

- 3 In Italy, under Article 88 of Royal Decree No 773 of 18 June 1931 approving the consolidated version of the laws on public order (GURI No 146 of 26 June 1931, 'the Royal Decree'), '[n]o licence shall be granted for the taking of bets, with the exception of bets on races, regattas, ball games and other similar contests where the taking of bets is essential for the proper conduct of the competitive event'.

- 4 It is clear from the Italian Government's reply to the question put to it by the Court concerning the arrangements for applying the exception so provided for that bets may be placed on the outcome of sporting events taking place under the supervision of the Comitato Olimpico Nazionale Italiano (National Olympic Committee, 'CONI') or on the results of horse races organised through the Unione Nazionale Incremento Razze Equine (National Union for the Betterment of Horse Breeds, 'UNIRE'). The use of the funds collected in the form of bets and allocated to those two bodies is regulated and must in particular serve to promote sporting activities through investments in sports facilities, especially in the poorest regions and in peripheral areas of large cities, and support equine sports and the breeding of horses. Under various legislative provisions adopted between 1995 and 1997, arrangements for and the taking of bets reserved to CONI and UNIRE may be entrusted, following tendering procedures and on condition of payment of the prescribed fees, to persons or bodies offering appropriate safeguards.
- 5 Article 718 of the Italian Penal Code makes it a criminal offence to conduct or organise games of chance and Article 4 of Law No 401 of 13 December 1989 (GURI No 401 of 18 December 1989) prohibits the unlawful participation in the organisation of games or betting reserved to the State or to organisations holding a State concession. Moreover, unauthorised gaming and betting are covered by Article 1933 of the Civil Code, according to which no action lies for the recovery of a gaming or betting debt. Nor, except in the event of fraud, can any sum paid voluntarily be reclaimed.

The main proceedings

- 6 Since 29 March 1997, Mr Zenatti has acted as an intermediary in Italy for the London company SSP Overseas Betting Ltd ('SSP'), a licensed bookmaker. Mr Zenatti runs an information exchange for the Italian customers of SSP in relation to bets on foreign sports events. He sends to London by fax or Internet forms

which have been filled in by customers, together with bank transfer forms, and receives faxes from SSP for transmission to the same customers.

7 By decision of 16 April 1997 the Questore di Verona ordered Mr Zenatti to cease that activity on the ground that it was not one that could be licensed under Article 88 of the Royal Decree, since that provision allows betting to be licensed only where it is essential for the proper conduct of competitive events.

8 Mr Zenatti initiated proceedings for judicial review of that decision before the Tribunale Amministrativo Regionale (Regional Administrative Court), Veneto and applied for an interim order suspending its enforcement. On 9 July 1997 the Tribunale Amministrativo Regionale granted an interim order to that effect.

9 The Questore di Verona appealed to the Consiglio di Stato for that order to be set aside.

10 The Consiglio di Stato considers that the decision to be given calls for an interpretation of the Treaty provisions on the freedom to provide services. In its view, the principles expounded in the judgment of the Court of Justice in Case C-275/92 *Schindler* [1994] ECR I-1039 to the effect that those provisions do not preclude legislation like the United Kingdom legislation on lotteries, in view of the concerns of social policy and the prevention of fraud which justify it, appear to be applicable by analogy to the Italian legislation on betting.

11 However, since the Community judicature has not given any judgment on legislation of that kind, the Consiglio di Stato, whose decisions are not open to

appeal, considers that Article 177 of the Treaty requires it to seek a ruling from the Court of Justice. It therefore stayed proceedings pending a preliminary ruling from the Court on the following question:

‘Do the Treaty provisions on the provision of services preclude rules such as the Italian betting legislation in view of the social-policy concerns and of the concern to prevent fraud that justify it?’

The question

- 12 The Italian Government and all the other Governments that have submitted observations, and also the Commission, contend that the *Schindler* judgment provides all that is needed for that question to be answered in the negative.
- 13 Mr Zenatti, on the other hand, contends that the taking of bets on sporting events cannot be equated with the running of lotteries, with which *Schindler* was concerned, in particular because bets do not amount to games of pure chance but require the person laying the bet to use his skill in predicting results. He also considers that the social-policy concerns and the concern to prevent fraud referred to by the national court are not sufficient to justify the legislation at issue in the main proceedings.
- 14 It must be borne in mind that, in paragraph 60 of *Schindler*, the Court laid emphasis on the moral, religious and cultural aspects of lotteries and other types of gambling in all the Member States. The general tendency of national legislation is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit. The Court also observed that lotteries involve a high risk of crime and fraud, given the size of the amounts which can be staked and of the winnings which they can hold out to players, particularly when they

are operated on a large scale. They also constitute an incitement to spend which may have damaging individual and social consequences. A final consideration which, although it cannot in itself be regarded as an objective justification, the Court held to be relevant 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.

- 15 In paragraph 61 of the judgment in *Schindler* the Court held that the special features of lotteries justify allowing national authorities a sufficient margin of appreciation to determine what is required to protect participants and, more generally, in the light of the specific social and cultural features of each Member State, to maintain order in society, taking into account the manner in which lotteries are operated, the size of the stakes and the allocation of the profits they yield. In such circumstances, it is for the national authorities 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.

- 16 Even though the *Schindler* judgment concerns the organisation of lotteries, those considerations also apply, as is clear also from the very terms of paragraph 60 of that judgment, to other comparable forms of gambling.

- 17 It is true that in its judgment in Case C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689, the Court declined to treat certain games in the same way as the lotteries considered in *Schindler*. However, that case was concerned with magazine competitions involving crosswords or other puzzles in which a number of readers who had given correct answers received a prize following a draw. As the Court held in particular, in paragraph 23 of that judgment, such draws, which are organised on a small scale and in which the stakes are small, do not constitute an economic activity in their own right but are merely one aspect of the editorial content of a magazine.

- 18 In this case, on the other hand, 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.
- 19 In those circumstances, the betting at issue in the main proceedings must be regarded as gambling of a kind comparable to the lotteries at issue in *Schindler*.
- 20 However, the present case differs from *Schindler* in at least two respects.
- 21 First, although the laws at issue in the two cases both impose a prohibition, subject to exceptions, upon the transactions involved, their scope is not the same. As the Advocate General observes in paragraph 24 of his Opinion, whilst the national legislation considered in *Schindler* involved a total prohibition on the type of gambling at issue, namely large lotteries, the legislation at issue in this case does not totally prohibit the taking of bets but reserves to certain bodies the right to organise betting in certain circumstances.
- 22 Second, as pointed out in some of the observations submitted to the Court, the Treaty provisions on the right of establishment may fall to be applied in a situation such as that at issue in the main proceedings in view of the nature of the relationship between Mr Zenatti and SSP, the company for which he acts.

- 23 On the latter point, however, since the question raised by the national court is limited to the provisions on the freedom to provide services, it is not appropriate to consider the possible applicability of other provisions of the Treaty.
- 24 As the Court held in *Schindler*, the Treaty provisions on the freedom to provide services apply, in the context of running lotteries, to an activity which enables people to participate in gambling in return for remuneration. Such an activity therefore falls within the scope of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) if at least one of the providers is established in a Member State other than that in which the service is offered.
- 25 In this case, the services at issue are provided by the organiser of the betting and his agents by enabling those placing bets to participate in a game of chance which holds out prospects of winnings. Those services are normally provided for remuneration consisting in payment of the stake and they are cross-frontier in character.
- 26 It is not disputed by the parties to the main proceedings, the various Governments which have submitted observations or the Commission that the Italian legislation, inasmuch as it prohibits the taking of bets by any person or body other than those which may be licensed to do so, applies without distinction to all operators who might be interested in such an activity, whether established in Italy or in another Member State.
- 27 However, such legislation, preventing as it does operators in other Member States from taking bets, directly or indirectly, in Italian territory, constitutes an obstacle to the freedom to provide services.

- 28 It is therefore necessary to consider whether that restriction on the freedom to provide services is permissible under the exceptions expressly provided for by the Treaty or is justified, in accordance with the case-law of the Court, by overriding reasons relating to the public interest.
- 29 Articles 55 of the EC Treaty (now Article 45 EC) and 56 of the EC Treaty (now, after amendment, Article 46 EC), which are applicable in this area by virtue of Article 66 of the EC Treaty (now Article 55 EC), allow restrictions justified by a connection, even if occasional, with the exercise of official authority or for reasons of public policy, public security or public health. Moreover, according to the case-law of the Court (see, to that effect, Case C-288/89 *Collectieve Antennevoorziening Gouda and Others* [1991] ECR I-4007, paragraphs 13 to 15), restrictions on the freedom to provide services deriving from national measures which apply without distinction are acceptable only if those measures are justified by overriding reasons relating to the public interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.
- 30 According to the information given in the order for reference and the observations of the Italian Government, the legislation at issue in the main proceedings pursues objectives similar to those pursued by the United Kingdom legislation on lotteries, as identified by the Court in *Schindler*. 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.
- 31 As the Court acknowledged in paragraph 58 of *Schindler*, those objectives must be considered together. They concern the protection of the recipients of the service and, more generally, of consumers as well as the maintenance of order in society and have already been held to rank among those objectives which may be regarded as constituting overriding reasons relating to the public interest (see Joined Cases 110/78 and 111/78 *Ministère Public v Van Wesemael* [1979] ECR 35, paragraph 28, Case 220/83 *Commission v France* [1986] ECR 3663, paragraph 20, and Case 15/78 *Société Générale Alsacienne de Banque v Koestler*

[1978] ECR 1971, paragraph 5). Moreover, as held in paragraph 29 of this judgment, measures based on such reasons must be suitable for securing attainment of the objectives pursued and not go beyond what is necessary to attain them.

- 32 As noted in paragraph 21 of this judgment, the Italian betting legislation differs from the legislation at issue in *Schindler*, in particular in that it does not totally prohibit the transactions at issue but reserves them for certain bodies under certain circumstances.
- 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.
- 34 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.
- 35 As the Court pointed out in paragraph 37 of its judgment of 21 September 1999 in Case C-124/97 *Läärä and Others* [1999] ECR I-6067 in relation to slot machines, 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.

36 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.

37 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.

38 Accordingly, the answer to the question put by the national court must be that the Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

Costs

- 39 The costs incurred by the Italian, Belgian, German, Spanish, French, Portuguese, Finnish, Swedish and Norwegian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Consiglio de Stato by order of 20 January 1998, hereby rules:

The EC Treaty provisions on the freedom to provide services do not preclude national legislation, such as the Italian legislation, which reserves to certain bodies the right to take bets on sporting events if that legislation is in fact justified by social-policy objectives intended to limit the harmful effects of such activities and if the restrictions which it imposes are not disproportionate in relation to those objectives.

Rodríguez Iglesias

Moitinho de Almeida

Edward

Schintgen

Kapteyn

Puissochet

Hirsch

Jann

Ragnemalm

Delivered in open court in Luxembourg on 21 October 1999.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President