

Case C-64/08

Criminal proceedings

against

Ernst Engelmann

(Reference for a preliminary ruling from the

Landesgericht Linz (Austria))

(Freedom to provide services – Freedom of establishment – National rules establishing a system of concessions for the operation of games of chance in casinos – Concessions obtainable solely by public limited companies established in national territory – All concessions granted without any competitive procedure)

Summary of the Judgment

1. *Freedom of establishment – Restrictions*

(Ars. 43 EC and 46 EC)

2. *Freedom to provide services – Freedom of establishment – National legislation on concessions to operate gaming establishments*

(Arts 43 EC and 49 EC)

1. Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State. The obligation for persons holding concessions to operate gaming establishments to have their seat in national territory constitutes a restriction of freedom of establishment within the meaning of that provision inasmuch as it discriminates against companies which have their seat in another Member State and prevents those companies from operating gaming establishments in the territory of the Member State concerned by way of an agency, branch or subsidiary.

Without it being necessary to determine whether the objective of permitting effective control of operators in the gaming sector with a view to preventing those activities from being carried out for criminal or fraudulent purposes can fall within the definition of public policy, so as to render the restriction in question compatible with European Union law, it need merely be pointed out that the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime. There are indeed various measures available to monitor the activities and accounts of such operators, such as, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders. In addition, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers.

(see paras 32, 34-38, 40, operative part 1)

2. The obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.

On the one hand, even though, as European Union law now stands, service concessions are not governed by any of the directives by which the European Union legislature has regulated public procurement, the public authorities which grant such concessions are nonetheless bound to comply with the fundamental rules of the Treaties, in particular Articles 43 EC and 49 EC, as well as the obligation of transparency which flows therefrom. Without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed.

On the other hand, the fact that the issue of licences to operate gaming establishments may not be the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC, in particular the principle of equal treatment and the obligation of transparency. The obligation of transparency thus amounts to a condition that must be met before a Member State can exercise its right to award licences to operate gaming establishments, irrespective of the method of selecting operators, because the effects of the award of such licences on undertakings which are established in other Member States and potentially interested in engaging in that activity are the same as those of a service concession contract.

(see paras 49-50, 52-53, 58, operative part 2)

JUDGMENT OF THE COURT (Fourth Chamber)

9 September 2010 (*)

(Freedom to provide services – Freedom of establishment – National rules establishing a system of concessions for the operation of games of chance in casinos – Concessions obtainable solely by public limited companies established in national territory – All concessions granted without any competitive procedure)

In Case C-64/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht Linz (Austria), made by decision of 23 January 2008, received at the Court on 19 February 2008, in the criminal proceedings against

Ernst Engelmann,

THE COURT (Fourth Chamber),

composed of J. C. Bonichot, President of the Chamber, C. Toader, K. Schiemann (Rapporteur), P. K?ris and L. Bay Larsen, Judges,

Advocate General: J. Mazák,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2010,

after considering the observations submitted on behalf of:

- Mr Engelmann, by P. Ruth and T. Talos, Rechtsanwälte, and by A. Stadler,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Belgian Government, by L. Van den Broeck, acting as Agent, assisted by P. Vlaemminck and A. Hubert, advocaten,
- the Greek Government, by A. Samoni?Rantou, M. Tassopoulou, O. Patsopoulou and E.?M. Mamouna, acting as Agents,
- the Spanish Government, by F. Díez Moreno, acting as Agent,
- the Portuguese Government, by L. Inez Fernandes, P. Mateus Calado and A. Barros, acting as Agents,
- the European Commission, by P. Dejmek, and subsequently by E. Traversa and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2010,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 43 EC and 49 EC.

2 The reference has been made in the context of criminal proceedings against Mr Engelmann for failure to comply with the Austrian legislation concerning the operation of gaming establishments.

Legal context

3 In Austria, games of chance are regulated by the Federal Law on Games of Chance (Glücksspielgesetz), in the version published in the Bundesgesetzblatt für die Republik Österreich 620/1989 ('the GSpG').

4 According to the preparatory documents for the GSpG, this Law, first, is designed to regulate games of chance and, secondly, pursues a fiscal objective.

5 With regard to the goal of regulating games of chance, the general part of the explanatory

notes to the GSpG states that, ideally, a total prohibition on gaming would be the most judicious form of regulation but given that, as is well known, a passion for gambling seems inherent in the human condition, it is far wiser for that passion to be channelled in the interests of the individual and society. It is stated that two goals are thus achieved: first, gaming is prevented from entering the realm of illegality, as may be observed to happen in States which prohibit games of chance entirely; at the same time, the State is enabled to retain the possibility of supervising games of chance operated lawfully, the main objective of such supervision having to be to protect the gambler.

6 As to the fiscal objective, the explanatory notes identify an interest on the part of the federal State in being able to derive the maximum possible revenue from the gaming monopoly and, therefore, when adopting rules on gaming, the federal government must, whilst observing and protecting the goal of regulating gaming, ensure that games of chance are operated in such a way that the monopoly produces the maximum possible revenue for it.

7 Paragraph 3 of the GSpG establishes a 'State monopoly' over games of chance and provides that the right to organise and operate games of chance is in principle reserved to the State unless otherwise stated in that Law.

8 Pursuant to Paragraph 21(1) of the GSpG, the Federal Minister for Finance may grant the right to organise and operate games of chance by issuing concessions to operate gaming establishments. The number of concessions which may be granted is limited to a total of 12 and only one concession may be issued for each municipal territory.

9 Paragraph 21(2) of the GSpG sets out the conditions for granting such concessions. It states that concessionaires must be public limited companies having their seat in Austria and with a share capital of at least EUR 22 million; in the light of the circumstances the concessionaire must also offer the local public authorities the best prospects of maximising tax revenue, whilst observing the rules laid down in the GSpG on the protection of gamblers.

10 Paragraph 22 of the GSpG provides that concessions are to be for a maximum period of 15 years.

11 Under Paragraph 31(1) of the GSpG, the Federal Finance Ministry has a general right of supervision over the concessionaire. In that connection, it may inspect the concessionaire's accounts and its agents may, for the purpose of exercising the right of supervision, gain access to the concessionaire's business premises. Pursuant to Paragraph 31(2), the Ministry also appoints a State commissioner to the concessionaire undertaking. In accordance with Paragraph 31(3), audited annual accounts must be submitted to the Federal Minister for Finance within six months of the end of the financial year.

12 The organisation of games of chance by a person who does not hold an operating concession and commercial participation in games so organised may give rise to criminal proceedings. Under Paragraph 168 of the Austrian Criminal Code (Strafgesetzbuch; 'the StGB'), 'any person who organises a game which is expressly prohibited or in which the chances of winning depend exclusively or predominantly on luck, or who promotes a meeting organised with a view to such a game taking place, with the intention of making a personal financial gain from such organisation or meeting or of obtaining a financial gain for a third party', commits an offence.

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

13 The 12 operating concessions for gaming establishments provided for in Paragraph 21 of the GSpG are currently held by Casinos Austria AG.

14 The concessions were initially granted to that company by administrative order of 18 December 1991 for a maximum period of 15 years.

15 The concessions to operate the six gaming establishments in Bregenz, Graz, Innsbruck, Linz, Salzburg and Vienna were renewed early, for 15 years, from 1 January 1998, with the result that they expire on 31 December 2012. Similarly, the concessions for the six gaming establishments in Baden, Bad Gastein, Kitzbühel, Kleinwalsertal, Seefeld and Velden were renewed, for 15 years, from 1 January 2001, with the result that they expire on 31 December 2015.

16 In reply to a question put by the Court, the Austrian Government confirmed that there had been no public call for tenders before the grant of any of those concessions.

17 Mr Engelmann, a German national, operated gaming establishments in Austria, from the beginning of 2004 to 19 July 2006 in Linz and from April 2004 to 14 April 2005 in Schärding. In those establishments, he offered his customers, inter alia, a game called 'observation roulette' and the card games 'Poker' and 'Two Aces'. He had not sought a concession to organise games of chance, nor was he the holder of a lawful authorisation in another Member State.

18 By judgment of 5 March 2007, the Bezirksgericht Linz (District Court, Linz) found Mr Engelmann guilty of organising games of chance on Austrian territory in order to obtain a pecuniary advantage. It thus found him guilty of the offence of unlawfully organising games of chance contrary to Paragraph 168(1) of the StGB. It therefore ordered him to pay a fine of EUR 2 000.

19 Mr Engelmann appealed against that judgment to the Landesgericht Linz (Regional Court, Linz). That court had doubts as to the compatibility of the provisions of the StGB, read in conjunction with the Austrian provisions on games of chance, with European Union law, more specifically with Articles 43 EC and 49 EC.

20 Those doubts are founded first of all on the fact that, to the best of the national court's knowledge, the adoption of the applicable provisions of the GSpG was not preceded by an analysis of the dangers of gambling addiction or of the possibilities of preventing it either de jure or de facto. According to the Landesgericht Linz, those provisions run counter to the Court's case-law that the reasons which may be invoked by a Member State by way of justification for a restriction on the freedom to provide services must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State.

21 Secondly, the Landesgericht Linz harbours doubts as to whether Austrian policy in the sector of games of chance allowed under concessions is consistent and systematic. In its view there can be a consistent and systematic restriction on activity related to games of chance and wagers only where the legislature appraises all areas and sectors of games of chance and then intervenes according to the potential level of risk or dependency for each type of game. It states that this is not the case in Austria. The Austrian monopoly on games of chance permits substantial amounts of advertising in this sector and, to that extent, even active encouragement to participate in games of chance and betting is accepted.

22 Thirdly, the Landesgericht Linz doubts whether it is compatible with the requirements of appropriateness, necessity and proportionality to grant concessions only to public limited

companies whose seat is in national territory in order to combat financial crime, money laundering or gambling addiction.

23 Fourthly, the Landesgericht Linz refers to the active pursuit, by the national authorities, of tax revenue from the sums paid by the gaming establishments. That situation conflicts with the Court's case-law that restriction of the fundamental freedoms in the domain of games of chance must genuinely be intended to limit gambling opportunities and not to create a new source of finance.

24 According to the Landesgericht Linz, if the provisions of European Union law permit Mr Engelmann to be granted authorisation to operate a gaming establishment without being required to set up or acquire a public limited company with its seat in Austria, he could in principle apply for a concession. If he were granted such authorisation, there would no longer be an offence of unlawfully organising a game of chance for the purposes of Article 168 of the StGB.

25 In those circumstances the Landesgericht Linz decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 43 EC ... to be interpreted as precluding a provision which lays down that only public limited companies established in the territory of a particular Member State may there operate games of chance in casinos, thereby necessitating the establishment or acquisition of a company limited by shares in that Member State?

(2) Are Articles 43 EC and 49 EC to be interpreted as precluding a national monopoly on certain types of gaming, such as games of chance in casinos, if there is no consistent and systematic policy whatsoever in the Member State concerned to limit gaming, inasmuch as the organisers holding a national concession encourage participation in gaming – such as public sports betting and lotteries – and advertise such gaming (on television and in newspapers and magazines) in a manner which goes as far as offering a cash payment for a lottery ticket shortly before the lottery draw is made ('TOI TOI TOI – Believe in luck!')?

(3) Are Articles 43 EC and 49 EC to be interpreted as precluding a provision under which all concessions provided for under national gaming law granting the right to operate games of chance and casinos are issued for a period of 15 years on the basis of a scheme under which Community competitors (not belonging to that Member State) are excluded from the tendering procedure?'

Consideration of the questions referred

26 Mr Engelmann, who does not deny that he did not seek a concession to operate a gaming establishment in Austria, could not, in any event, obtain a concession since, first, he did not fulfil the conditions laid down by the national legislation at issue, namely he had not established a public limited company with its seat in Austria, and, secondly, all the concessions provided for by national legislation had already been granted to an Austrian company. According to the national court, the question whether facts satisfying the definition of the offence with which Mr Engelmann has been charged are present is linked to the issue of the lawfulness of that exclusion. The first and third questions should consequently be considered first.

The first question

27 By its first question, the national court asks, in essence, whether Article 43 EC prohibits two of the conditions imposed by the national legislation on holders of concessions to operate gaming establishments, namely, the obligation to adopt the legal form of a public limited company and the obligation to have their seat in national territory.

The obligation on concessionaires to adopt the legal form of a public limited company

28 The condition that persons wishing to operate gaming establishments must adopt the legal form of a public limited company is a restriction on freedom of establishment within the meaning of Article 43 EC. Such a condition prevents, *inter alia*, operators who are natural persons and undertakings which, in the country in which they are established, have chosen another corporate form from setting up a secondary establishment in Austria (see, to that effect, Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19; Case 143/87 *Stanton and L'Étoile* 1905 [1988] ECR 3877, paragraph 11; and Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paragraph 42).

29 It is necessary to consider to what extent that restriction may nevertheless be allowed as a derogation expressly provided for by the EC Treaty, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest. Article 46(1) EC allows restrictions justified on grounds of public policy, public security or public health. A certain number of overriding reasons in the public interest which may also justify such restrictions have been recognised by the case-law of the Court, including, in particular, the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve public order.

30 As the European Commission has pointed out in its observations, and the Advocate General has stated in point 68 of his Opinion, certain objectives might justify requiring operators to adopt a particular legal form. The obligations binding public limited companies in regard, in particular, to their internal organisation, the keeping of their accounts, the scrutiny to which they may be subject and relations with third parties could justify such a requirement, having regard to the specific characteristics of the gaming sector and the dangers connected with it.

31 The assessment to be made of whether such objectives are, in the present case, in fact being pursued by the requirement that the operator adopt the legal form of a public limited company and whether they are capable of constituting a justification, by way of a derogation expressly provided for by the Treaty or by way of an overriding reason in the public interest recognised by the Court's case-law, and, as the case may be, whether that requirement respects the principle of proportionality cannot be carried out in the absence of additional information. In such circumstances, it is for the national courts to carry out that assessment.

The obligation on persons holding concessions to operate gaming establishments to have their seat in national territory

32 As the Advocate General has observed, in essence, in points 51 and 52 of his Opinion, the obligation on persons holding concessions to operate gaming establishments to have their seat in national territory constitutes a restriction on freedom of establishment within the meaning of Article 43 EC inasmuch as it discriminates against companies which have their seat in another Member State and prevents those companies from operating gaming establishments in Austria by way of an agency, branch or subsidiary.

33 Doubt is not in any way cast on that finding by the fact, raised by the Austrian Government, that the obligation in question is imposed on operators only from the time that they are selected and for the duration of the concession. As the Advocate General has stated in point 62 of his

Opinion, such an obligation may deter companies established in other Member States from applying, owing to the establishment and installation costs in Austria that they would have to incur if their application were successful. Nor can that system avoid a company whose seat is located in another Member State being prevented from operating gaming establishments in Austria through an agency, a branch or a subsidiary.

34 It is apparent from the Court's case-law that, to the extent that a restriction, such as that which has been found to exist in the present case, is discriminatory, it is compatible with European Union law only if it is covered by an express derogating provision, such as Article 46 EC, namely public policy, public security or public health (Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 19, and Case C-153/08 *Commission v Spain* [2009] ECR I-9735, paragraph 37).

35 Moreover, such a restriction must satisfy the conditions which flow from the Court's case-law in regard to proportionality and may be regarded as appropriate for ensuring attainment of the objective relied upon only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see, to that effect, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraphs 59 to 61).

36 The Austrian Government claims that the purpose of the obligation imposed on holders of concessions to operate gaming establishments to have their seat in national territory is to permit effective control of operators in the gaming sector with a view to preventing those activities from being carried out for criminal or fraudulent purposes. In its submission, that obligation permits, in particular, a degree of control to be exercised over the decisions taken by the company's organs by reason of the presence of representatives of the State in organs such as the supervisory board.

37 Without it being necessary to determine whether that objective can fall within the definition of public policy, it need merely be pointed out in this respect that the categorical exclusion of operators whose seat is in another Member State appears disproportionate, as it goes beyond what is necessary to combat crime. There are indeed various measures available to monitor the activities and accounts of such operators (see, to that effect, Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 74; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 62; and *Commission v Spain*, paragraph 39).

38 Inter alia, the possibility of requiring separate accounts audited by an external accountant to be kept for each gaming establishment of the same operator, the possibility of being systematically informed of the decisions adopted by the organs of the concession holders and the possibility of gathering information concerning their managers and principal shareholders may be mentioned. In addition, as the Advocate General has stated in point 60 of his Opinion, any undertaking established in a Member State can be supervised and have sanctions imposed on it, regardless of the place of residence of its managers.

39 Moreover, having regard to the activity at issue, namely the operation of gaming establishments located in Austrian territory, there is nothing to prevent supervision being carried out on the premises of those establishments in order, in particular, to prevent any fraud being committed by the operators against consumers.

40 The answer to the first question is therefore that Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State.

The third question

41 Although the wording of the third question refers to the discriminatory conditions applicable under national legislation to the tendering procedure for the grant of concessions to operate gaming establishments in Austria, it is common ground, in the light of the information supplied by the Austrian Government, that no tendering procedure was organised and that there was no transparency in regard to the grant to Casinos Austria AG, with effect from 1 January 1998 and 1 January 2001 respectively, of the 12 concessions which existed at the material time. Furthermore, those 12 concessions were the only ones provided for by the national legislation.

42 The third question should therefore be understood as seeking a ruling as to whether Articles 43 EC and 49 EC preclude the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State for 15 years.

43 Three distinct restrictions can be identified in this context, namely, first, the limitation of the number of concessions to operate gaming establishments, secondly, the grant of those concessions for 15 years and, thirdly, the fact that they have been granted in the absence of any transparency. Those restrictions must be examined in turn in order to determine in each case in particular whether the restriction is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it goes beyond what is necessary in order to achieve those objectives (*Placanica and Others*, paragraph 49, and Case C-46/08 *Carmen Media Group* [2010] ECR I-0000, paragraph 60).

44 With regard, first, to the fact that the number of concessions to operate gaming establishments is limited, it is clear that such a limitation involves obstacles to the freedom of establishment and the freedom to provide services (*Placanica and Others*, paragraphs 50 and 51).

45 It none the less appears, subject to verification by the national court, that, in the sector concerned, a limit of 12 on the number of concessions and, therefore, of gaming establishments, which, according to information provided by the Austrian Government, represents one establishment for 750 000 inhabitants, of its very nature makes it possible to limit opportunities for gambling and thus to attain an objective in the public interest recognised by European Union law (see, to that effect, *Gambelli and Others*, paragraphs 62 and 67; *Placanica and Others*, paragraph 53; and *Carmen Media Group*, paragraph 84). Since consumers must travel to the premises of an establishment in order to be able to take part in the games of chance in question, the consequence of a limitation on the number of such establishments is to reinforce the barriers to taking part in such games.

46 With regard, secondly, to the duration of the concessions, it is clear from the Court's case-law that the grant of concessions for a duration of up to 15 years is liable to impede or even prohibit the exercise of the freedoms guaranteed by Articles 43 EC and 49 EC by operators in other Member States and therefore constitutes a restriction on the exercise of those freedoms (see, to that effect, Case C-323/03 *Commission v Spain* [2006] ECR I-2161, paragraph 44).

47 As regards the determination of whether that restriction is compatible with European Union law, it must be pointed out that freedom of establishment and the freedom to provide services, as fundamental principles of the Treaty, may be restricted only by rules which are justified by overriding reasons in the public interest and are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation in question must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (Case C-323/03 *Commission v Spain*, paragraph 45 and the case-law cited).

48 That appears to be so in the present case, since the grant of concessions for a duration of

up to 15 years appears, subject to verification by the national court, to be justified having regard, in particular, to the concessionaire's need to have a sufficient length of time to recoup the investments required by the setting up of a gaming establishment.

49 With regard, thirdly, to the procedure for the grant of the concessions at issue in the main proceedings, it must first be recalled that although, as European Union law now stands, service concessions are not governed by any of the directives by which the European Union legislature has regulated public procurement, the public authorities which grant such concessions are none the less bound to comply with the fundamental rules of the Treaties, in particular Articles 43 EC and 49 EC, and with the consequent obligation of transparency (see, to that effect, Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraphs 60 and 61; Case C-231/03 *Coname* [2005] ECR I-7287, paragraphs 16 to 19; Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraphs 46 to 48; Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 33; and Case C-203/08 *Sporting Exchange* [2010] ECR I-0000, paragraph 39).

50 Without necessarily implying an obligation to call for tenders, that obligation of transparency, which applies when the service concession in question may be of interest to an undertaking located in a Member State other than that in which the concession is granted, requires the concession-granting authority to ensure, for the benefit of any potential tenderer, a degree of publicity sufficient to enable the service concession to be opened up to competition and the impartiality of the award procedures to be reviewed (*Sporting Exchange*, paragraphs 40 and 41 and the case-law cited).

51 The grant of a concession, in the absence of any transparency, to an operator located in the Member State of the awarding authority constitutes a difference in treatment to the detriment of operators located in other Member States, who have no real possibility of manifesting their interest in obtaining the concession in question. Such a difference in treatment is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality, and constitutes indirect discrimination on grounds of nationality prohibited by Articles 43 EC and 49 EC, unless it is justified by objective circumstances (see, to that effect, *Coname*, paragraph 19; *Parking Brixen*, paragraph 50; and Case C-347/06 *ASM Brescia* [2008] ECR I-5641, paragraphs 59 and 60).

52 The fact that the issue of licences to operate gaming establishments may not be the same as a service concession contract does not, in itself, justify any failure to have regard to the requirements arising from Article 49 EC, in particular the principle of equal treatment and the obligation of transparency (see, to that effect, *Sporting Exchange*, paragraph 46).

53 Indeed, the obligation of transparency amounts to a condition which must be met before a Member State can exercise its right to award licences to operate gaming establishments, irrespective of the method of selecting operators, because the effects of the award of such licences on undertakings which are established in other Member States and potentially interested in engaging in that activity are the same as those of a service concession contract.

54 Furthermore, it must be recalled that, when a licensing system pursuing legitimate objectives recognised by the case-law is introduced in a Member State, such a licensing system cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of European Union law, in particular those relating to the fundamental freedoms such as those at issue in the main proceedings (see, in particular, *Sporting Exchange*, paragraph 49, and *Carmen Media Group*, paragraph 86).

55 It has consistently been held that if a prior administrative authorisation scheme is to be justified even though it derogates from such fundamental freedoms, it must be based on objective, non-discriminatory criteria known in advance, in such a way as to circumscribe the exercise of the

national authorities' discretion so that it is not used arbitrarily. Furthermore, any person affected by a restrictive measure based on such a derogation must have an effective judicial remedy available to him (see *Sporting Exchange*, paragraph 50, and *Carmen Media Group*, paragraph 87).

56 In the main proceedings, the total absence of transparency for the purposes of the grant of the concessions to operate the gaming establishments with effect from 1 January 1998 and 1 January 2001 does not comply with Articles 43 EC and 49 EC.

57 The Austrian Government has merely pointed out in that regard that the procedure for the grant of the concessions was in accordance with national law as it then stood and has argued that no obligation of transparency could have been deduced, at that time, from the Court's case-law. The Austrian Government has also argued that operators who fulfilled the conditions laid down by the applicable legislation could have spontaneously lodged an application for a concession. However, none of those circumstances constitutes a justification in the form of a derogation expressly provided for by the Treaty or of an overriding reason in the public interest recognised by the Court's case-law which can justify the grant of the concessions at issue in the main proceedings in the complete absence of transparency.

58 In the light of all of those considerations, the answer to the third question is that the obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.

The second question

59 In view of the answers given to the first and third questions and of the fact that the national court, as pointed out in paragraph 26 of the present judgment, has established a link between the facts satisfying the definition of the offence with which Mr Engelmann has been charged and the question whether he was lawfully excluded from the possibility of obtaining a concession, it is not necessary to answer the second question.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Article 43 EC must be interpreted as precluding legislation of a Member State under which games of chance may be operated in gaming establishments only by operators whose seat is in the territory of that Member State.

2. The obligation of transparency flowing from Articles 43 EC and 49 EC and from the principle of equal treatment and the prohibition of discrimination on grounds of nationality precludes the grant without any competitive procedure of all the concessions to operate gaming establishments in the territory of a Member State.

[Signatures]

* Language of the case: German.