JUDGMENT OF THE COURT (Grand Chamber)

8 September 2010 (*)

(Articles 43 EC and 49 EC – Freedom of establishment – Freedom to provide services – Organisation of bets on sporting competitions subject to a public monopoly at Land level – Decision of the Bundesverfassungsgericht finding the legislation for such a monopoly incompatible with the German Basic Law, but maintaining the legislation in force during a transitional period designed to allow it to be brought into conformity with the Basic Law – Principle of the primacy of Union law – Admissibility of, and possible conditions for, a transitional period of that type where the national legislation concerned also infringes Articles 43 EC and 49 EC)

In Case C−409/06,

REFERENCE for a preliminary ruling under Article 234 EC, from the Verwaltungsgericht Köln (Germany), made by decision of 21 September 2006, received at the Court on 9 October 2006, in the proceedings

Winner Wetten GmbH

v

Bürgermeisterin der Stadt Bergheim,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.−C. Bonichot and P. Lindh, Presidents of Chambers, K. Schiemann (Rapporteur), A. Borg Barthet, M. Ilešič, J. Malenovský, U. Lõhmus, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: Y. Bot,

Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 9 December 2009,

after considering the observations submitted on behalf of:

– Winner Wetten GmbH, by O. Bludovsky and D. Pawlick, Rechtsanwälte,

– the Mayor of Bergheim, by M. Hecker, M. Ruttig and H. Sicking, Rechtsanwälte,

– the German Government, by M. Lumma, C. Schulze−Bahr, B. Klein and J. Möller, acting as Agents,

– the Belgian Government, by A. Hubert, and subsequently by L. Van den Broeck, acting as Agents, assisted by P. Vlaemminck and S. Verhulst, advocaten,

– the Czech Government, by M. Smolek, acting as Agent,

– the Greek Government, by A. Samoni−Rantou, G. Skiani, M. Tassopoulou and K. Boskovits, acting as Agents,

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

– the French Government, by E. Belliard, G. de Bergues, C. Jurgensen, C. Bergeot−Nunes and A. Adam, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, P. Mateus Calado and A.P. Barros, acting as Agents,

– the Slovenian Government, by M. Remic, acting as Agent,

– the Norwegian Government, by F. Sejersted, G. Hansson Bull, K. B. Moen and Ø. Andersen, acting as Agents,

– the European Commission, by E. Traversa and K. Gross, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2010,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 49 EC and the consequences attaching to the principle of the primacy of Community law.

2 This reference has been submitted in the context of a dispute between Winner Wetten GmbH ('WW') and the Mayor of Bergheim, concerning the decision of the latter prohibiting WW from pursuing its business of offering bets on sporting competitions.

National legal context

National legislation

3 Paragraph 12(1) of the German Basic Law (Grundgesetz) provides:

'All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.'

4 Paragraph 31 of the Law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz) provides:

'(1) Decisions of the Bundesverfassungsgericht shall bind constitutional powers of the federation and Länder and all courts and authorities.

(2) ... the decision of the Bundesverfassungsgericht shall have the force of law ... where the Bundesverfassungsgericht declares that a law is compatible or incompatible with the Basic Law, or void. Where a law is declared compatible or incompatible with the Basic Law or other provisions of federal law, or void, the operative part of the decision must be published in the *Bundesgesetzblatt* ...'

5 According to Paragraph 35 of the Law on the Federal Constitutional Court:

'The Bundesverfassungsgericht may decide in its decision who will implement the latter; it may also determine the manner in which implementation shall take place.'

6 Paragraph 284 of the Criminal code (Strafgesetzbuch) provides:

‘(1) Whosoever without the authorisation of a public authority publicly organises or operates a game of chance or makes equipment for it available shall be liable to imprisonment of not more than two years or a fine.

...

(3) Whosoever in cases under subparagraph (1) above acts

1. on a commercial basis ...

...

shall be liable to imprisonment of between three months and five years.

...’

7 By the State treaty concerning lotteries in Germany (Staatsvertrag zum Lotteriewesen in Deutschland; ‘the LottStV’), which entered into force on 1 July 2004, the Länder created a uniform framework for the organisation, operation and commercial brokering of gambling, apart from casinos.

8 Paragraph 1 of the LottStV states:

‘The objectives of the State treaty are:

1. to channel the natural propensity of the population for gambling in an ordered and supervised manner, and, in particular, to prevent it being transferred to unauthorised games of chance;

2. to prevent excessive incitements to gamble;

3. to prevent the exploitation of the propensity to gamble for profit-making private or commercial purposes;

4. to ensure that games of chance take place in a regular manner and that their logic is comprehensible; and

5. to ensure that a significant part of the receipts from games of chance is used to promote public objectives, or objectives with a privileged tax status, within the meaning of the Tax Code.’

9 Paragraph 5(1) and (2) of the LottStV provide:

‘1. The Länder are, within the framework of the objectives set out in Paragraph 1, legally obliged to ensure [the existence of] a sufficient supply of games of chance.

2. On the basis of the law, the Länder may themselves assume that task, or entrust it to legal persons under public law or to private law companies in which legal persons under public law directly or indirectly hold a controlling shareholding.’

10 In the Land Nordrhein-Westfalen, implementation of the LottStV is by means of the Law on Bets on Sporting Competitions (Sportwettengesetz Nordrhein-Westfalen), of 3 May 1955 (the ‘SWG NRW’), of which Paragraph 1(1) provides:

‘The government of the Land may authorise companies taking bets on sporting competitions. Such companies must be legal persons under public law or a private law company the majority of the shares of which belongs to legal persons under public law. ...’

11 One single authorisation of that type has been issued in the Land Nordrhein−Westfalen, namely to Westdeutsche Lotterie & Co. OHG.

The judgment of the Bundesverfassungsgericht of 28 March 2006

12 In a judgment of 28 March 2006, the Bundesverfassungsgericht held, concerning the legislation transposing the LottStV in the Land of Bavaria, that the public monopoly on bets on sporting competitions existing in that Land infringed Paragraph 12(1) of the Basic Law, guaranteeing freedom of occupation. That court held in particular that, by excluding private operators from the activity of organising bets, without at the same time providing a regulatory framework capable of ensuring, in form and in substance, both in law and in fact, the effective pursuit of the objective of reducing the passion for gambling and combating addiction to it, that monopoly had a disproportionately adverse effect on the freedom of occupation thus guaranteed.

13 After emphasising that the legislature had many means at its disposal for remedying the unconstitutionality thus determined, namely either the systematic organisation of the monopoly in order to attain the abovementioned objective, or the establishment by law of arrangements for authorising the organisation of bets on a commercial basis by private companies, the Bundesverfassungsgericht decided not to annul the legislation in question and to maintain its effects until 31 December 2007, stating that, by that date, the legislature should have used its discretionary power by amending the rules held to be in breach of the Basic Law so as to ensure their conformity with the latter.

14 The Bundesverfassungsgericht also held that the existing legal situation could, however, be provisionally maintained only on the condition that, without delay, a minimum of consistency be established between the objective seeking to limit the passion for gambling and combat addiction to it, and the effective exercise of the monopoly. In particular, it was prohibited, during the transitional period instituted, to increase the number of bets available and to make publicity going beyond simple information on the nature and method of operation of the bets on offer. The court further required that active information should immediately be given on the dangers of betting.

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

15 WW has commercial premises at Bergheim (Germany) where it carries on the business of brokering bets on sporting competitions on behalf of Tipico Co. Ltd, a company established in Malta.

16 By order of 28 June 2005, the Mayor of Bergheim prohibited WW from carrying on that business, on pain of closure and sealing of its commercial premises.

17 The administrative complaint against that order brought by WW was rejected by the Landrat (head of administrative services) of the Rhein−Erft−Kreis by decision of 22 September 2005, on the ground that, by that activity, WW rendered itself, if not an accomplice to the organisation of gambling, an activity punishable under Paragraph 284 of the criminal code, at least guilty of an infringement of Paragraph 1 of the SWG NRW, which makes any organisation of bets on sporting competitions subject to the obtaining of prior authorisation issued by the Land Nordrhein-Westfalen.

18 WW brought an action before the Verwaltungsgericht Köln (Administrative Court, Cologne) against that decision and against the order of 28 June 2005, claiming that the public monopoly on

bets on sporting competitions in force in the Land Nordrhein-Westfalen, on which those measures were based, was contrary to the freedom to provide services guaranteed by Article 49 EC.

19 The Verwaltungsgericht Köln observes that neither WW nor Tipico Co. Ltd hold the authorisation required under Paragraph 1 of the SWG NRW in order to carry on the activity at issue in the main proceedings, and that, moreover, such authorisation cannot be granted to them by reason of the existence of the monopoly instituted by the legislation in force in the Land Nordrhein-Westfalen.

20 In that regard, the Verwaltungsgericht Köln nevertheless considers that it follows from the judgment in Case C-243/01 *Gambelli and Others* [2003] ECR I 13031 that a restrictive measure such as the said monopoly cannot, in the present case, be justified by reference to the alleged objective of preventing the encouragement of excessive spending on gambling and combating addiction to the latter, since it is undisputed that participation in bets in sporting competitions is encouraged by the national bodies authorised to organise such bets and that, therefore, the said measure does not contribute to limiting betting activities in a consistent and systematic manner.

21 It follows from the judgment of the Bundesverfassungsgericht of 28 March 2006, referred to above, delivered in respect of the legislation of the Land of Bavaria, and from a similar order issued by the same court on 2 August 2006 in respect of the comparable legislation of the Land Nordrhein-Westfalen, that the public monopoly on bets on sporting competitions existing in that latter *Land* infringes Paragraph 12(1) of the Basic Law, on the ground that the legislative framework in force is not fit to ensure either in law or in fact that the objective of reducing the passion for gambling and combating addiction to it is effectively pursued.

22 In that judgment, the Bundesverfassungsgericht also expressly emphasised that the requirements arising from the abovementioned constitutional provision and those arising from the case-law of the Court of Justice, particularly the judgment in *Gambelli*, converged in that regard.

23 According to the Verwaltungsgericht Köln, it follows from all of the above that the monopoly existing in the Land Nordrhein-Westfalen must be regarded as contrary both to Community law and to the Basic Law, as, moreover, has also been held by the Oberverwaltungsgericht Nordrhein−Westfalen (Higher Administrative Court, Nordrhein-Westfalen).

24 According to that latter court, the fact that Westdeutsche Lotterie & Co. OHG has attempted, since delivery of the judgment of the Bundesverfassungsgericht of 28 March 2006, referred to above, to arrange its practice so as to satisfy the transitional requirements laid down by that latter court, as described in paragraph 14 of this judgment, is not sufficient to put an end to that infringement of Community law, an amendment of the legal framework in force being required for that purpose.

25 The Verwaltungsgericht Köln notes, however, that, notwithstanding the incompatibility between the legislation of the Land Nordrhein−Westfalen and Community law found by the Oberverwaltungsgericht Nordrhein-Westfalen, that latter court held that the said legislation should benefit from the same transitional measures as those decided upon by the Bundesverfassungsgericht in its abovementioned judgment of 28 March 2006, namely, as indicated in paragraphs 13 and 14 of this judgment, maintenance of its effects until 31 December 2007.

26 According to the Oberverwaltungsgericht Nordrhein-Westfalen, the general principle of legal certainty and the need not to create a legal void threatening essential public interests require that the said interests be provisionally given priority over the interest which the offerors of private bets have in free access to the market, by providing, in derogation from the principle of the primacy of Community law, for a transitional period during which the legislation concerned may remain applicable.

27 The Verwaltungsgericht Köln has doubts as to compatibility of the institution of such a transitional period with the requirements arising from the principle of the primacy of Community law, which, as shown in the judgment in Case 106/77 *Simmenthal* [1978] ECR 629, unconditionally requires that national legislation contrary to Articles 43 EC or 49 EC be immediately disapplied.

28 It is in those circumstances that the Verwaltungsgericht Köln decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Are Article 43 EC and Article 49 EC to be interpreted as meaning that national rules governing a State monopoly on sports betting, which contain impermissible restrictions on the freedom of establishment and the freedom to provide services enshrined in Article 43 EC and Article 49 EC, inasmuch as they do not serve to limit betting activities in a consistent and systematic manner within the terms of the Court’s case-law (judgment in Case C−243/01 *Gambelli and Others* [2003] ECR 13031), may still continue to apply for a transitional period on an exceptional basis, notwithstanding the primacy of directly applicable Community law?

2. If Question 1 is to be answered in the affirmative: what conditions need to be met for the purpose of derogating from that primacy and how is the transitional period to be determined?’

Admissibility of the questions referred

29 The Norwegian Government takes the view that the questions referred are hypothetical in nature. The order for reference shows that, without itself examining the monopoly instituted in the Land Nordrhein-Westfalen in the light of Community law, the referring court assumed the incompatibility of that monopoly with the rules of the EC Treaty and referred merely to the judgment of the Bundesverfassungsgericht of 28 March 2006, referred to above. In the first place, the Bundesverfassungsgericht expressly held that it did not have jurisdiction to rule on the compatibility of the monopoly at issue with Community law. Secondly, the fact that the Bundesverfassungsgericht held that monopoly contrary to the Basic Law does not in any way prejudge its possible incompatibility with Community law.

30 For their part, the German and Belgian Governments and the European Commission have argued that, rather than holding the monopoly at issue in the main proceedings incompatible with Community law on the basis solely of the findings made by the Bundesverfassungericht in its abovementioned judgment of 28 March 2006, the referring court should have examined whether such incompatibility endured, taking account of the conditions, as described in paragraph 14 of this judgment, to which the Bundesverfassungsgericht, by that decision, made the provisional maintenance of the effects of the legislation concerned subject.

31 The Belgian Government and the Commission consider that, failing such an examination, the relevance of the questions referred for the resolution of the dispute in the main proceedings is not established. The German Government suggests that the Court should reformulate the questions referred and reply to them that the monopoly thus temporarily reorganised complies with the requirements laid down by the judgment in *Gambelli*, cited above.

32 Desirous of reacting to the objections thus formulated, the referring court sent a letter to the Court dated 11 May 2007, explaining that, in order to determine the dispute in the main proceedings, it would have to have regard to the legal and factual situation as it existed at the time of the decision at issue in the main proceedings, namely 22 September 2005, so that any modifications which took place following the judgment of the Bundesverfassungsgericht of 28 March 2006, referred to above, could not be taken into consideration in determining the dispute in the main proceedings.

33 Having regard to the content of that letter, the Court, acting on the basis of Article 104(5) of its Rules of Procedure, sent a letter to the referring court on 16 July 2008, requesting it to indicate

whether a reply to the questions referred remained necessary for the resolution of the dispute in the main proceedings, having regard to the explanations given in the meantime by the Bundesverfassungsgericht in an order of 22 November 2007. In that order, the Bundesverfassungsgericht held, concerning the legislation at issue in the case which gave rise to its judgment of 28 March 2006, referred to above, that the maintenance of the effects of that legislation decided upon by that judgment was not capable of making the incompatibility with the Basic Law of administrative decisions adopted before that judgment disappear.

34 In its reply of 8 August 2008, the referring court stated that a reply to the questions referred remained necessary since, contrary to what it had previously stated, it would have to have regard to the legal and factual situation existing on 31 December 2007 in order to rule on the legality of the decision at issue in the main proceedings. The case-law had developed to the effect that the legality of a decision such as that at issue in the main proceedings must henceforward be assessed at the date on which the court decision is given. With regard to the case at issue in the main proceedings, however, it is the date of 31 December 2007 which must be taken into consideration, because new legislation, substantially different from the previous legislation and without retrospective effect, came into force on 1 January 2008.

Findings of the Court

35 It should be noted, first, that it is not the function of the Court of Justice to rule on the interpretation of national provisions, that being within the exclusive jurisdiction of the national courts. In addition, when hearing a reference for a preliminary ruling from a national court, the Court of Justice must base its reasoning on the interpretation of national law as described to it by that court (Case C−115/08 *ČEZ* [2009] ECR I-0000, paragraph 57 and case-law cited).

36 Secondly, it is settled case-law that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Union law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C−379/98 *PreussenElektra* [2001] ECR I−2099, paragraph 38, and Case C−169/07 *Hartlauer* [2009] ECR I−1721, paragraph 24).

37 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*PreussenElektra*, paragraph 39, and *Hartlauer*, paragraph 25).

38 The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, in particular, Case C−459/07 *Elshani* [2009] ECR I−2759, paragraph 42 and case-law cited).

39 In those various respects, it should, however, be noted, first, that, according to settled case-law, in the light of the division of responsibilities between the national courts and the Court of Justice, the referring court cannot be required to make all the findings of fact and of law required by its judicial function first before it may then bring the matter before the Court. It is sufficient that both the subject-matter of the dispute in the main proceedings and the main issues raised for the Community legal order may be understood from the reference for a preliminary ruling, in order to enable the Member States to submit their observations in accordance with Article 23 of the Statute of

the Court of Justice and to participate effectively in the proceedings before the Court (Case C−42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I−0000, paragraph 41).

40 Secondly, it is apparent from the statements contained in the order for reference that the Oberverwaltungsgericht Nordrhein-Westfalen, the court ruling on the appeals lodged against the decisions made by the referring court, has already held, first, that the monopoly at issue in the main proceedings is incompatible with Union law and, second, that compliance with the temporary conditions laid down by the Bundesverfassungsgericht in its judgment of 28 March 2006, and referred to in paragraph 14 of this judgment, is not sufficient to put an end to such incompatibility.

41 Having regard to the whole of the above, it is not obvious that the interpretations which have been requested sought bear no relation to the actual facts of the main action or its purpose, or that the problem raised is hypothetical. The questions referred should therefore be regarded as admissible.

The identification of the relevant provisions of Union law

42 The Commission has expressed doubts as to the relevance of the reference which the first question makes to Article 43 EC, that institution maintaining that only Article 49 EC is capable of being applied to a situation such as that at issue in the main proceedings.

43 In that regard, it should be noted that, according to consistent case-law, activities which consist in allowing users to participate, for remuneration, in gambling constitute 'services' within the meaning of Article 49 EC (see, in particular, Case C−275/92 *Schindler* [1994] ECR I−1039, paragraph 25, and Case C−67/98 *Zenatti* [1999] ECR I−7289, paragraph 24). The same applies to the activity of promoting and placing gambling, such an activity constituting only specific steps in the organisation or operation of the gambling to which that activity relates (see, in particular, *Schindler*, paragraphs 22 and 23).

44 Services such as those at issue in the main proceedings may thus fall within the scope of Article 49 EC where, as in the case in the main proceedings, at least one of the providers is established in a Member State other than that in which the service is offered (see, in particular, *Zenatti*, paragraph 24), unless Article 43 EC applies.

45 As regards Article 43 EC, it should be recalled that that provision prohibits restrictions on freedom of establishment for nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries (*Gambelli*, paragraph 45).

46 The case-law shows in this respect that the concept of establishment is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the European Community in the sphere of activities as self-employed persons (see, in particular, Case C−55/94 *Gebhard* [1995] ECR I−4165, paragraph 25). Thus, the maintenance of a permanent presence in a Member State by an undertaking established in another Member State may fall within the provisions of the Treaty on the freedom of establishment even if that presence does not take the form of a branch or agency, but consists merely of an office managed by a person who is independent but authorised to act on a permanent basis for that undertaking, as would be the case with an agency (see Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21).

47 With regard to the area of games and bets, the Court of Justice held, in *Gambelli*, that Article

43 EC can apply to a situation in which an undertaking established in one Member State has, in another Member State, a presence which takes the form of commercial agreements with operators or intermediaries, relating to the creation of data transmission centres which make electronic means of communication available to users, collect and register intentions to bet and forward them to the said undertaking. Where an undertaking pursues the activity of collecting bets through the intermediary of such an organisation of agencies established in another Member State, any restrictions on the activities of those agencies constitute obstacles to the freedom of establishment (*Gambelli*, cited above, paragraphs 14 and 46, and Joined Cases C−338/04, C−359/04 and C−360/04 *Placanica and Others* [2007] ECR I−1891, paragraph 43).

48 In this case, the information contained in the order for reference concerning the relations between Tipico Co. Ltd and WW neither confirms nor excludes the possibility that the latter should be regarded as a subsidiary, branch or agency within the meaning of Article 43 EC.

49 In those circumstances, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (see, in particular, Case C−326/00 *IKA* [2003] ECR I−1703, paragraph 27 and case-law cited).

50 Moreover, as indicated in paragraph 36 of this judgment, it is for the national court alone to assess both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice in that regard.

51 It is thus for the referring court to determine, in the light of the circumstances of the case, whether the situation at issue in the main proceedings falls under Article 43 EC or Article 49 EC.

52 In the light of the above, it is necessary to examine the questions referred having regard to both Article 43 EC and Article 49 EC.

Substance

The first question

53 It should be recalled at the outset that, according to settled case-law, in accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law (see, in particular, *Simmenthal*, cited above, paragraph 17 and Case C−213/89 *Factortame and Others* [1990] ECR I−2433, paragraph 18).

54 As the Court has emphasised, directly applicable rules of law of the Union which are an immediate source of rights and obligations for all concerned, whether Member States or individuals who are parties to legal relationships under Union law, must deploy their full effects, in a uniform manner in all Member States, as from their entry into force and throughout the duration of their validity (see, to that effect, *Simmenthal*, paragraphs 14 and 15, and *Factortame*, paragraph 18).

55 It is also settled case-law that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation pursuant to the principle of cooperation set out in Article 10 EC, fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union (see to that effect, in particular, *Simmenthal*, paragraphs 16 and 21, and *Factortame*, paragraph 19).

56 It follows from the above that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law (*Simmenthal*, paragraph 22, and *Factortame*, paragraph 20).

57 The Court has stated that that would be the case if, in the event of a conflict between a provision of Union law and a subsequent national law, the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Union law, even if such an impediment to the full effectiveness of Union law were only temporary (*Simmenthal*, paragraph 23).

58 It is to be noted, moreover, that, according to settled case-law, the principle of effective judicial protection is a general principle of Union law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, and that, under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Union law (Case C−432/05 *Unibet* [2007] ECR I−2271, paragraphs 37 and 38 and case-law cited).

59 In the present case, it should be noted that, in holding, in its judgment of 28 March 2006 and its order of 2 August 2006, that a monopoly such as that at issue in the main proceedings infringed the requirements of the Basic Law, the Bundesverfassungsgericht did not rule on the compatibility of that monopoly with Community law, but, on the contrary, emphasised in that judgment that, in the case at issue, it considered that it did not have jurisdiction to do so.

60 As for the fact that, once it had made that finding of incompatibility with the Basic Law, the Bundesverfassungsgericht decided, in the conditions set out in paragraphs 13 and 14 of this judgment, to maintain on a temporary basis the effects of the internal legislation concerning that monopoly, it follows from the case-law referred to in paragraphs 53 to 58 of this judgment that such a circumstance cannot prevent a national court, which finds that that same legislation infringes directly effective provisions of Union law such as Articles 43 EC and 49 EC, from deciding, in accordance with principle of the primacy of Union law, not to apply that legislation in the context of the dispute before it (see, by analogy, Case C−314/08 *Filipiak* [2009] ECR I-0000, paragraph 84).

61 Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law (see, to that effect, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3).

62 It is clear from the order for reference and from the very wording of the first question referred that the referring court is also asking whether, more generally, and thus independently of the existence of the decision of the Bundesverfassungsgericht of 28 March 2006, the effect, arising from the principle of primacy, of ousting the national legislation held contrary to Articles 43 EC and 49 EC may be suspended during the time necessary to bring that legislation into conformity with the said treaty provisions. As is apparent from paragraph 26 of this judgment, that question is posed by the referring court particularly in relation to the fact that, whilst holding that the case-law of the Court of Justice shows that the legislation at issue in the main proceedings infringes Articles 43 EC and 49 EC, the Oberverwaltungsgericht Nordrhein-Westfalen held that such suspension was justified in relation to that legislation, on the ground that imperatives concerning the protection of public order and of citizens against the risks connected with gambling precluded the situation of a legal vacuum which would result from the immediate ousting of the legislation.

63 All the Member States submitting observations have, in essence, maintained that recognition of a principle authorising, in exceptional circumstances, the provisional maintenance of the effects of a national rule held contrary to a directly-applicable rule of Union law is justified by analogy, having regard to the case-law developed by the Court of Justice on the basis of the second paragraph of Article 231 EC, with the effect of provisionally maintaining the effects of measures of Community law annulled by the Court under Article 230 EC or ruled invalid by it under Article 234 EC.

64 In that regard, it is true that, under the second paragraph of Article 231 EC, now the second paragraph of Article 264 TFEU, which is also applicable, by analogy, in the context of a reference for a preliminary ruling on validity under Article 234 EC, now Article 267 TFEU, the Court of Justice has a discretion to indicate, in each particular case, which effects of a Union measure which it annuls or declares invalid must be regarded as definitive (see, in particular, Case C−333/07 *Régie Networks* [2008] ECR I−10807, paragraph 121 and case-law cited).

65 In the exercise of that power, the Court may decide, for example, to suspend the effects of the annulment or the finding of invalidity of such a measure until the adoption of a new measure remedying the illegality found (see to that effect, in particular, Joined Cases C−402/05 P and C−415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I−6351, paragraphs 373 to 376, concerning an annulment, and *Régie Networks*, cited above, paragraph 126, concerning a finding of invalidity).

66 As the case-law shows, the maintenance of the effects of a Union measure which has been annulled or declared invalid, the purpose of which is to prevent a legal vacuum from arising before a new measure replaces the measure thus annulled or declared invalid (see, in particular, Case C−157/02 *Rieser Internationale Transporte* [2004] ECR I−1477, paragraph 60), may be justified where overriding considerations of legal certainty involving all the interests, public as well as private, are at stake (see, in particular, *Régie Networks*, paragraph 122 and case−law cited) and during the period of time necessary in order allow such illegality to be remedied (see to that effect, in particular, *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 375, and *Régie Networks*, paragraph 126).

67 However, even assuming that considerations similar to those underlying that case-law, developed as regards acts of the Union, were capable of leading, by analogy and by way of exception, to a provisional suspension of the ousting effect which a directly-applicable rule of Union law has on national law that is contrary thereto, such a suspension, the conditions of which could be determined solely by the Court of Justice, must be excluded from the outset in this case, having regard to the lack of overriding considerations of legal certainty capable of justifying the suspension.

68 Indeed, the order for reference shows that, at this stage, the referring court, which alone has jurisdiction to assess the facts of the dispute before it, has held that the restrictive legislation at issue in the main proceedings did not effectively contribute to limiting betting activities in a consistent and systematic manner, so that it followed from the earlier case-law of the Court that such legislation, which cannot be justified by an objective of preventing the encouragement of excessive spending on gambling and combating addiction to the latter, infringes Articles 43 EC and 49 EC.

69 Having regard to all of the above, the answer to the first question referred must be that, by reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.

The second question

70 Having regard to the reply given to the first question, it is not necessary to examine the second question referred.

Costs

71 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 (Grand Chamber) hereby rules:

By reason of the primacy of directly-applicable Union law, national legislation concerning a public monopoly on bets on sporting competitions which, according to the findings of a national court, comprises restrictions that are incompatible with the freedom of establishment and the freedom to provide services, because those restrictions do not contribute to limiting betting activities in a consistent and systematic manner, cannot continue to apply during a transitional period.

[Signatures]

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* Language of the case: German.