

The Swedish state monopoly on gambling and the dangerous principle of proportionality



By Dr Ola Wiklund, partner at Wistrand Law Offices in Stockholm and associate professor at Stockholm University

Dr Ola Wiklund is a partner and head of the EU/Competition Law Group at Wistrand Advokatbyrå, Stockholm. He has served at the Court of Justice of the European Communities, Luxembourg, been Visiting Professor at the European University Institute, Florence, Italy, and Research Fellow at Université de droit, d'Économie et des Science d'Aix Marseille. Dr Wiklund has acted as counsel in proceedings before the Court of First Instance of the European Communities and the Court of Justice of the European Communities. He has represented clients in administrative

proceedings at the European Commission and the Swedish Competition Authority. He is acting for clients in a number of pending high profile monopoly EC law suits (gaming and alcohol) against the Swedish Government. He is advising public and private clients on public procurement law. He is also responsible for public affairs at Wistrand in Stockholm. Dr Wiklund has published several books, text books and academic articles on EU law.

The development of the internal market within the European Union has removed many national trade obstacles.

In some member states, the integration process has been rather uncomplicated and even smooth. But in some cases and especially in later years, the European Court of Justice in Luxembourg has faced more difficult domestic trade restrictions.

This is indeed true for Sweden's public monopolies on alcohol, gaming and pharmaceuticals, which are all justified by reasons of public health and public policy. They are all deeply rooted in the political and popular culture of Sweden and generate important monetary contributions to the state purse. In this article I'll map out a brief account of some important court cases. They all turn on the interpretation and application of the principle of proportionality. The analysis is geared to make a proposition on the EC law conformity of the Swedish Lotteries Act.

In Gourmet a prohibition against advertising of alcohol products was deemed as a disproportionate restriction of the freedom to provide services and struck

down by the Market Court (last instance, case 2003:5) after a preliminary ruling rendered by the ECJ (case C-405/98).

The Swedish Government has constantly held that Gourmet can't serve as authority in cases concerning restrictions in the gambling area since the sale of alcohol is permitted in Sweden and that the offering of gambling services is not. This argument can't be accepted.

Gambling services are not prohibited in Sweden.

The state-owned companies offer a wide and well-developed range of gambling services. The public monopoly has, through intense and active marketing over the years, allowed the gambling market to flourish. The Swedish state has founded a strong and vivid gambling culture through massive investments in advertising and PR activities.

Sweden has a state monopoly for retail sales of alcohol in place which is safeguarded by harsh restriction on private imports, availability, marketing and consumption. It is therefore relevant to make a legal and factual comparison between the Gourmet case and the restrictions in place on the gambling market for the purpose of establishing whether they are effective and fulfil their alleged objectives of public health and crime prevention.

In Gourmet the Government rightly invoked the public health argument. There exists strong empirical evidence for public health risk in connection with the consumption of alcohol.

According to the Government and its public authorities, the Swedish National Institute of Public Health and the National

Board of Health and Welfare, there are no coherent opinions on whether addiction to gambling constitutes a serious health problem.

The SNIPH and NBHW have expressed divergent opinions. However, the Government and the recently published report of the inquiry on gambling seem to have acknowledged that there exists a public health problem in the form of gambling addiction. But the Government and the inquiry still maintain that the scientific evidence is rather weak and the empirical conclusions remain indecisive.

However, the detrimental effects of drinking are firmly scientifically established. Vast sums are therefore spent to prevent negative health effects of drinking. The figure spent to combat the negative health effects of gambling is miniscule in comparison.

The overwhelming majority of gambling services offered by the state-owned companies (Svenska Spel and ATG) are not subject to any significant restrictions. They are in principle freely offered by these companies and their middle men, which consist of privately owned betting shops scattered around the country. Even though some restriction of fine-tuning character has been introduced, it is still possible for an under-age teenager to spend vast amounts of money on public gambling services offered by the state companies through the private gambling shops. The governmental supervision of the numerous and geographically scattered gambling shops is still negligible.

The state-owned companies are some of the biggest buyers of advertising on the entire Swedish advertising market. This is

still the case after some minor cuts as a result of the doubts and critique expressed on the legality of the restrictions expressed by domestic courts. The marketing of the public gambling services embraces all media: papers, TV, PR, sponsoring, editorial content, specially produced TV programmes, etc. There exist no specific restrictions on gambling marketing applicable to the state-owned companies.

This consistent policy aimed at increasing gambling in society has been consistent over the years. It has led to increased availability through the introduction of new products and development of old ones. As a direct consequence, gambling in Sweden has peaked and is now an integral part of the public culture. Consequently, the state revenue from gambling has struck new record levels. It is difficult not to conclude that the prime objective of the Swedish policy is to encourage consumers to gamble and thereby strengthen the state purse.

The discrepancies between the Swedish alcohol and gambling policy are striking. It's therefore highly relevant to look closer on the proportionality test conducted in *Gourmet*. The Market Court concluded that since the Swedish consumer already has access to many sources of alcohol marketing, the prohibition has limited effect in relation to the purpose of protecting public health.

If this test is applied to the gambling market, which is flooded with gambling advertising, it is evident that the prohibition against marketing of foreign gambling services lacks any public health effects. The Government presents no evidence whatsoever to sustain the positive public

health effects of the prohibition to promote participation in foreign gambling services offered on the internet.

The fact that the Swedish Government and its responsible health authorities has no recourse to scientific evidence concerning the causal link between gambling advertising and negative effects on public health and doubts whether there exists a connection makes the conclusion inevitable: the Swedish Lotteries Act won't survive a proportionality test.

In this context it is important to note that the Swedish Government has not considered if there exist less restrictive means than the state monopoly (market regulation, licences, enhanced supervision and control) to meet the suggested objective of public health.

To conclude, the legal and factual comparison between *Gourmet* and the case of the legality of the gaming monopoly is indeed relevant because it reveals profound and important discrepancies with crucial significance for the assessment of the proportionality of the restrictions of freedom to provide gambling services in Sweden.

But let us take the alcohol comparison one step further. The ECJ's judgement in the *Rosengren* case, a case that also concerned the Swedish alcohol monopoly, focused on the relevance of the EC proportionality principle. The *Rosengren* case was about the Swedish regulations for private importation of alcoholic beverages, namely the regulations which hinder the selling from over the border of alcoholic beverages to private persons residing in Sweden. The ECJ defined, differing with two general advocates, a monopoly's special

function very narrowly.

The ECJ pointed out that a monopoly's special function according to the law on alcohol consists of a sole right to sell alcoholic beverages to consumers in Sweden, excluding restaurants. With that it could be stated that a sole right didn't cover the importing of named beverages. The ECJ thus found that private import limits didn't affect the monopoly's exercise of its special function and consequently didn't have anything to do with the existence of the monopoly.

The ECJ subsequently reviewed the private import regulations against the background of the proportionality principle and didn't approve the Swedish regulations.

in this sense that the Swedish system could not be justified. According to the ECJ, the prohibition against private importing could not be justified for public health reasons when Systembolaget in any case was obligated to meet customers' demand for imported products. A complete prohibition couldn't either be justified on the basis of age control since in part Systembolaget deals with a very broad sphere of people and in part because it accepted less than 100 per cent control of age when it delivered goods to end customers through middle men.

The Rosengren case further shows with all desired clarity that the Court's rulings that were founded on articles 28 EC and 31

to article 234 EC, the Court may only interpret EC law and review its validity. It is the national court that is to apply EC law in each individual case.

In the Rosengren Decision, however, the European Court of Justice didn't confer to the Swedish Supreme Court, which requested a preliminary ruling, any independent latitude for action. The preliminary ruling left practically no discretion to the Swedish court and effectively settled the case.

It seems fairly rational to conclude that if the Swedish relatively coherent and systematic alcohol monopoly doesn't survive a proportionality test performed by both the ECJ and a national court of last instance, how on earth shall, to put it mildly, the rather incoherent and unsystematic Swedish gambling monopoly survive? Compared to the alcohol monopoly, the gambling monopoly could be characterised as the horror cabinet of Madame Tussaud's.

The Lotteries Act and its prohibition of promotion of participation in lotteries arranged in other EU member states have been contested in several court cases and also in the general public and political debate. A Swedish gambling case is now pending in the ECJ. But what is the present state of play in the Swedish judiciary?

In 2004 the Supreme Administrative Court passed two judgements in which it established that the restriction in the Act was not in conflict with EC law. The Swedish authorities have observed the ruling of the Supreme Administrative Court and have acted against persons promoting participation in lotteries arranged abroad. The main target has been the chief editors of Swedish newspapers which have been prosecuted and convicted for transgressions of the Lotteries Act by publishing advertisement for foreign gaming services.

Despite this, there has over the recent years been a formidable explosion of advertisements for foreign gaming services in Swedish media. A great portion of the Swedish media companies are of the opinion that the Swedish lottery legislation is in breach of EC law and has decided not to observe the prohibition against promoting foreign gaming services in the Act.

It should be noticed that the Swedish



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The Rosengren case shows what large significance the proportionality principle has as a complement to the principle of equal treatment. In the judgement, the ECJ ruled that the Swedish prohibition against private imports is based on social policy considerations and would not lead to discrimination or indirect protection of domestic products. Thus the Swedish regulations were justified as being in the public interest and in keeping with the principle of equal treatment.

However, performing a proportionality test, the ECJ went further and investigated whether the Swedish policies were effective in relation to their original purpose. It was

EC are essentially different. In the Franzén Decision, which was confirmed in the Hanner Decision, the European Court of Justice considered it sufficient to determine that the equal treatment principle, including the structural guarantees for equal treatment, were respected. The proportionality principle became only relevant outside of the area applicable to Article 31.

The ECJ normally turns over the final decision regarding proportionality to the national courts. The ratio behind this practice is that within the framework for those proceedings it is not competent to speak on issues of national law. According

authorities have directed their actions only against the parties who communicate the promotion (newspapers, websites, etc.) but not against the parties arranging the lotteries. There exists only one exception. Shopsson's (Swedish subsidiary of Betsson) opening of a betting shop in Stockholm led to administrative sanctions issued by the Lottery Board for violations of the prohibition to promote participation in foreign gambling.

An important indication that a legal change is in motion is that the Swedish Supreme Court recently gave a decision in a case concerning a leave to appeal in which it was stated that there are doubts regarding the conformity between the penalty regulations in the Act and EC law.

The material question in the cases was whether a chief editor of a Swedish newspaper that had published ads for foreign gaming companies could be convicted for having promoted participation in gaming services arranged in another EU member state. The district court convicted the editor, who appealed against the judgement. However, the court of appeal did not give leave to appeal. This decision was in turn appealed, which led to the Supreme Court quashing the court of appeal's decision and referring the case back to the court of appeal for due hearing of the case. The reason given was that there exist doubts regarding the EC law conformity of provisions of the Lotteries Act.

Due to the Supreme Court's decision Utvecklingscentrum Malmö (an agency within the Swedish Prosecution Authority handling crimes under the Act) drew up recommendations that under pending circumstances preliminary investigations regarding transgressions of the prohibitions against promotion of participation in foreign gaming activities shall not be commenced. The recommendation shall be in force until it finally has been tried in court whether the prohibition is in conformity with EC law or not.

The Stockholm Court of Appeal (Expressen and Aftonbladet vs. the Prosecutor) referred the cases for a preliminary ruling to the European Court of Justice on September 24, 2008. The District Court of Eskilstuna is presently formally considering referring the damage case between Unibet and the Swedish

Government to the ECJ.

However, the Lottery Board in July 2008 issued administrative sanctions (prohibition and penalty) against Shopsson AB (a subsidiary to Betsson AB) for violation of the prohibition in 38 § of the Lottery Act. The alleged violation consists of the opening of a betting shop at Götgatan in Stockholm for the purpose of promoting participation in gaming service offered from Betsson Malta.

The decision is aimed to force Shopsson to remove logotypes and marketing material in the shop. An appeal was rejected by to the Administrative Court of Södermanland (case no. 2126-08). However, Shopsson appealed to the Administrative Court of Appeal of Stockholm, which granted Shopsson interim relief, stating that the lower court's judgement is not valid. The case will be tried on its merits later this spring (2009). The court is presently considering referring the case to the ECJ for a preliminary ruling. Hence, the betting shop is likely to remain open in its present form until the Swedish judiciary finally has settled the case.

It was against this legal background the Inquiry on Gambling (SOU 2008:28) presented its proposals for amendments of the Swedish Lotteries Act. The Inquiry concludes that the Swedish regulatory regime on lotteries is in conformity with the requirements of EC Law. Domestic law is non-discriminatory, restrictions of Treaty rights are justified with regard to mandatory public policy and the restrictions are aimed to fulfil the objectives of public policy in a systematic and coherent way.

The domestic regulations are necessary and proportional. Hence, the Inquiry concludes that there is no need for amendments or adjustments of domestic regulations. The Inquiry also states that the proposed amendments do not change the overall conclusion on EC Law compatibility.

I think it is clear that the Inquiry's conclusion on the EC Law conformity of domestic law derives from a flawed understanding of the operation of the proportionality principle and the actual method for its application to concrete factual circumstances.

I conclude that Articles 43 and 49 EC shall be interpreted as precluding the Swedish gaming monopoly since there is no consistent and systematic policy to limit gaming, because the Swedish state

operators (Svenska Spel and ATG) which have been granted exclusive licences encourage and advertise participation in state-run betting and lotteries, with the same potential danger of addiction, as may be provided by private service providers.

I also conclude that if measures like import and marketing prohibitions, that form an integral part of the relatively coherent and systematic alcohol monopoly, do not survive a proportionality test performed by both the ECJ and a national court of last instance, it is most likely that the incoherent and unsystematic Swedish gambling monopoly will be regarded as contrary to Articles 43 and 49 EC.

As regards the Inquiry's half-hearted proposal, "a possible opening for private actors", I conclude that Articles 43 and 49 EC shall be interpreted as precluding the proposed regulations that grant the Swedish state operators (Svenska Spel and ATG) exclusive licences for, say, internet poker and horse-race betting, games with the same potential danger of addiction as the games that may be provided by private service providers.

The Inquiry presents no sustained evidence that supports the distinction between what it calls "most problematic forms of gambling" (including internet poker, internet bingo and internet scratch cards) and other less problematic forms of gambling. Moreover, no evidence is presented to show that a state monopoly is better designed to arrange certain kinds of games for the purpose of protecting public health and consumers against crime and fraudulent behaviour.

The Inquiry also lacks an evaluation of reliable diagnostic tests that is used to diagnose addiction. Consequently, no explanation is presented as to what extent the games offered by private operators are more "dangerous" than the generic games offered by the state-owned operators. Not surprisingly, the Inquiry lacks a comparison between the responsible gaming policies of the state and the private operators. With regard to the fine-tuning measures taken, aimed at protecting public health described in the Inquiry, it is easy to conclude that the measures are diverse and of doubtful effect.