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On the road to Denmark -
Swedish gambling legislation in
the light of the European Union

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws
30 higher education credits

Supervisor: Xavier Grousot

Semester: HT12

“An industry worth thousands of millions of euros involving a harmful and culturally sensitive activity. A service which, thanks to new means of communication, finds it easy to cross frontiers. A sector for which the law is not harmonised and the case-law is based on individual cases”

Advocate General Mengozzi, 2010.

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Summary

Gambling is something that has existed in most cultures for centuries and it is a topic which is highly debated. Despite large parts of the world being in an economic crisis, the gambling sector continues to grow. With the aid of new technology the accessibility of gambling has increased immensely. This raises concern on how to regulate this delicate area, as gambling on the one hand is perceived as morally objectionable and socially harmful, yet on the other hand, gambling generates significant amounts of revenue.

The EU has from an early point taken the approach that it is up to each Member State to decide the appropriate measures regarding to gambling to pursue set objectives. This discretion has led to a patchwork of regulations on the matter of gambling and especially regarding online gambling. The regulations still have to adhere to fundamental principles of EU law, which has been brought up in case law, yet the ECJ has given Member States a broad discretion in how to regulate gambling despite clear breaches of fundamental principles.

Sweden has always had a restrictive stance towards gambling and has had a state controlled monopoly for gambling since the 13th century. Questions could be raised whether the Swedish restrictive legislation is coherent with EU law. Case law reveals that the Swedish Courts have refrained from requesting a preliminary ruling up to the Sjöberg and Gerdin case, where the ECJ considered the Swedish legislation to be coherent in principle. The recent judgment where the criminal sanctions were ruled to be discriminative by the Supreme Court, has caused legal uncertainty. Riksdagen and the Swedish Government also raised concerns with parts of the current legislation. The urgent questions are: 1) What will a potential new legislation look like? 2) Can the Danish license system prove to be a suitable alternative for the legislator?

Sammanfattning

Spel och dobbel är något som har funnits i de flesta kulturer i århundraden och är ett ämne där åsikter och intressen går vida isär. Trots att stora delar av världen befinner sig i en finansiell kris, fortsätter spelmarknaden att växa. I takt med att den teknologiska utvecklingen ökar, ökar även tillgängligheten av spel. Den kraftiga tillväxten inom spelsektorn, ger upphov till frågan om hur en marknad som å ena sidan kan uppfattas som moraliskt förkastlig och förknippad med negativa sociala skadeverkningar, och å andra sidan genererar betydande intäkter, ska regleras.

Redan från ett tidigt skede har EU haft förhållningssättet att det är upp till varje medlemsstat att avgöra hur Spel och Dobbelt ska regleras, vilket har lett till ett "lapptäcke" av olika lagstiftningar. De nationella lagstiftningarna måste följa de fundamentala principerna i EU-rätten, vilket har tagits upp i ett flertal rättsfall. ECJ har dock gett medlemsstaternas en bred möjlighet att göra en skönsässig bedömning angående vad som är bäst för respektive land trots klara avvikelser från de fundamentala principerna inom EU.

Sverige har alltid haft en restriktiv hållning gentemot spel och dobbel, som har varit kontrollerat genom ett statligt monopol sedan 1200-talet. Det kan ifrågasättas huruvida den svenska restriktiva lagstiftningen är förenlig med EU-rätten. De svenska domstolarna har undvikit att inhämta förhandsavgöranden innan Sjöberg och Gerdinfallet, där ECJ ansåg den svenska lagstiftningen i stort vara förenlig med EU-rätten. När Högsta domstolen senare dömde i samma fall ansågs straffpåföljderna i lagstiftningen vara diskriminerande, vilket får anses skapa rättsosäkerhet. Riksrevisionen och den svenska regeringen har framfört kritik mot delar av den nuvarande lagstiftningen. De trängande frågorna är: 1) Hur skall en potentiell ny lagstiftning se ut? 2) Kan den danska licensmodellen ses som ett passande alternativ för lagstiftaren?

Preface

I would like to take this opportunity to thank my supervisor Xavier Grousot for his support and valuable feedback. I also want to thank my girlfriend Alexandra, my family and my friends for their support during my studies.

Lund, January 2013

Mikael Westerling

Abbreviations

ECJ	European Court of Justice
EU	European Union
CA	Casino Act
LA	Lottery Act
TFEU	Treaty on the Functioning of the EU
UK	United Kingdom
EGBA	European Gaming and Betting Association
EAA	European Economic Area

1 Introduction

Gambling is heavily debated in most parts of the world today and it is a topic where the opinion is truly dispersed. This is partially due to the specific nature of the activity and partially due to the fact that gambling is an enormous market today. Despite large parts of the world being in an economic crisis, the gambling sector continues to grow utilizing the available technology. Especially the online gambling sector is growing and that is happening regardless whether state regulators and lawmakers like it or not. Gambling was earlier more of a national problem as each country could control its territory as they wished. However, today gambling is easily accessed for consumers online across national borders, which raises uncertainty regarding its size, scope and legal basis.

Gambling, and especially online gambling with an average annual growth rate of 14.7%, presents the world with a dilemma on how to regulate an activity which on the one hand is perceived as morally objectionable and socially harmful, yet on the other hand generates significant amounts of revenue.¹ In 2010, the global gambling market (online and offline) generated a gross gambling revenue of €275 billion, in which the EU had a market share of 29%. The online gambling market was estimated to be worth €23.28 billion and the EU share represented 45 %.²

Sweden has a restrictive gambling legislation where only a few providers are allowed to offer their services.³ Nevertheless, an estimated 150 foreign commercial providers are active on the market offering their gambling services via the internet. The number of players gambling with foreign

¹Van den Bogaert, *“Money for nothing”*: *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1175.

² SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 19.

³ SFS 1994:100 § 9, *Lotterilagen*.

providers is growing from 3% in 2009 to 4.5% in 2010.⁴ The current legislation was introduced when gambling was mainly done through land-based gambling premises. The evolution of gambling has thus caught the legislator off-guard and the question is not really if a new or reconstructed legislation will come, it is a matter of when it must appear.

1.1 Purpose

The purpose of this essay is to discuss the Swedish gambling legislation in the light of EU Law and to discuss whether the new Danish Gambling legislation could serve as an example for a future Swedish Gambling legislation.

Questions to be answered:

- Is the Swedish Gambling legislation in breach of EU law?
- Could the Danish legislative approach be a possible solution for Sweden?

1.2 Limitations

I have chosen to use the term “gambling” as opposed to “gaming” throughout the essay to avoid confusion. I have also decided not to describe the various forms of gambling in detail nor which of these forms is the most damaging. I have also chosen to present the route Denmark has taken in regard to regulating gambling. The Danish legislation itself will not be discussed in depth but rather the characteristics of the legislation and the criticism the legislation has received. This will enable a discussion on how a future Swedish legislation might look like in the light of EU Law.

⁴ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 20.

1.3 Method

I have chosen to use a traditional legal dogmatic method with preparatory work, case law and doctrine. I have also chosen to use articles within the subject to be able to conduct a more profound discussion and analysis. The case law serves to show how the approach towards gambling has shifted in the EU. The regulatory case study with Denmark is used to be able to conduct a more profound discussion on the future of Swedish Gambling legislation.

1.4 Disposition

To get a better understanding of what gambling is and how it has evolved, I will start by briefly describing the evolution of gambling. I will then move on to the EU framework where relevant parts of EU law are described. This section is, followed by EU case law relating to gambling. The case law uncovered is not complete, but attempts to discuss the most relevant cases. After the EU framework, I present the development of Swedish gambling legislation from yesterday, today and a potential future legislation. I will also describe Swedish cases relating to gambling. Regarding the case *Sjöberg och Gerdin* I have decided to place it in the Swedish case section rather than the European eventhough it is a case where the ECJ has ruled, the case is important for the discussion regarding a potential new Swedish gambling legislation.

2 The evolution of gambling

In this chapter, I am going to go through the history of gambling, how it has evolved, what it looks like today and present the main dangers connected to gambling.

2.1 History

Gambling is something that has existed in most cultures for thousands of years, some even argue that gambling has been around nearly as long social life itself. Gambling has a wide spectrum, as it is possible to make a wager on almost anything. Making wagers on contests, both human and animal, has been a large part of gambling as well as different forms of lotteries. Gambling has evolved considerably over the centuries but in reality the actual complexity has not. The changes in gambling are mainly due to the technologies available in a given time and a given place.⁵

Gambling was common among the ancient cultures of Babylonians, the Etruscans, the Romans, the Greeks and the Chinese⁶ and most of today's modern gambling originates from the use of dice and cards.⁷ Through archaeological excavations in North and South America, Africa and the Orient, primitive four-sided gaming sticks have been found dating back to 6000 BC.⁸ The evolution of pieces of bone, to ivory and stone cut pieces and finally machine made dices can serve as an example of how the complexity does not necessarily change.⁹

⁵ Schwarts, *Gambling, space, and time: shifting boundaries and cultures*, p.1.

⁶ Derevensky, *Problem Gambling in Europe*, p. xv.

⁷ Reith, *The Age of Chance*, p. 44.

⁸ Reith, *The Age of Chance*, p. 47

⁹ Schwarts, *Gambling, space, and time: shifting boundaries and cultures*, p. 1.

While the wealthy could afford to place bets, most people often had nothing to lose but their freedom. In their desperation to win, it was common to bet on their own freedom.¹⁰ During the Middle Ages attempts were made to suppress gambling. The Church condoned gambling with the fear of its negative effects.¹¹ In the 17th century, gambling became extremely popular and the awareness of its many problems became more apparent. English poet and writer Charles Cotton described gambling in 1674 as:

“Gaming is an enchanting witchery, gotten betwixt idleness and avarice; An itching disease, that makes some scratch the head, whilst others, as if they, were bitten by a Tarantula, are laughing themselves to death[...].”¹²

2.2 Gambling today

During the last decade, the commercial development of the gambling market in Europe and the rest of the world has gone through drastic changes. The demand and the availability of gambling services have changed significantly since the 1990s with the introduction of internet, satellite TV and mobile phones.¹³ This development has led to bookmakers offering their services cross borders through the Internet, often without the permission from the relevant Member State.¹⁴

Online gambling has the quickest growth within the gambling sector and it is predicted to continue to outpace the rest of the gambling market.¹⁵ Today almost 7 million Europeans gamble online.¹⁶ “Online gambling” can refer to a range of different gambling services and distribution channels. The

¹⁰ Reith, *The Age of Chance*, p. 48.

¹¹ Dunkley, *Gambling : a social and moral problem in France*, p. 37

¹² Cotton, *The Compleat Gamester*, p. 1.

¹³ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – når man målen?*, p. 15.

¹⁴ Riksrevisionen, RiR 2012: 15, *Staten på spelmarknaden – når man målen?*, p. 23.

¹⁵ Gainsbury, *Internet Gambling Current Research Findings and Implications*, p. 7.

¹⁶ Barnier, *Online Betting and Gambling in Europe: from Consultation to Action*, p.3.

definition covers a wide spectrum of gambling services like sports betting, casino, lotteries, services provided by charity organizations and non-profit organizations. However, there is no uniform definition amongst Member States and most even lack a definition.¹⁷ Member States and stakeholders stress that there is a need for a clear definition of gambling in which all forms of gambling are included.¹⁸

The evolution within gambling is everywhere, for example when watching a football match you cannot miss the live odds on the TV screen. Most of this development may for the most part be benign, making it possible for people to place wagers on their favourite team. However, there are also several problems connected to this extreme development, with match fixing being one of the more serious. Corruption in Sport is nothing new and has always existed but the challenge our generation is facing is something completely different. The sport leagues around Asia have been heavily affected by match fixing. As an example, the Malaysian Football League corruption was so common, that at one point an estimated 70 percent of the games were fixed. With the corruption so highly infested, the fans have turned their attention to leagues outside of Asia.¹⁹ However, it is not only the fans who have changed their allegiances, it is also the gamblers and those who engage in fraud by fixing matches. In Europe, intensive police investigation revealed that Asian betting syndicates had infiltrated the European market and fixed games by bribing officials and players.²⁰

Another major negative aspect of gambling is that it can be harmful if not enjoyed responsibly, from a financial, social and health perspective. When gambling becomes a problem there are several terms to describe this behavior and there is no clear definition, but the most common are: problem gambling, gambling addiction, compulsive gambling, excessive gambling

¹⁷ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 6.

¹⁸ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 7.

¹⁹ Hill, *Sports Betting: Law and Policy - The Revolution*, p. 9-12.

²⁰ Hill, *Sports Betting: Law and Policy- The Revolution*, p.12-13.

and pathological gambling. Together with the fraud aspect, problem gambling (and consumer protection) is an used reason for many Member States having a restrictive policy connected to gambling.²¹

²¹ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 19

3 European Framework

In this chapter, a brief background to the EU is given followed by the most basic and relevant legal principles to better understand case law in chapter four. I am also going to go through the developments within the regulation of gambling in Europe, and how gambling is generally perceived.

3.1 The core of the EU

When Sweden entered the EU in January 1 1995, EU Law became binding for the Swedish state, but to a large extent also for its companies and citizens. EU Law should be applied directly by Courts and authorities and when there is a clash between the two, EU Law is superior to domestic law.²² The internal market seeks to enable the free movement of goods, capital, services and people, the so called “four freedoms” within EU’s 27 member states.²³ Free trade allows for specialization, which leads to a comparative advantage and which in its turn leads to economies of scale. This enables maximized welfare and utilization of the world’s resources.²⁴ All countries are unique with different kinds of resources, climate and workforce. These differences give each country a comparative advantage over the others with the same market. Trade between countries allows concentration on what they can do best. The individual advantages, between countries, translate into maximum productivity for all.²⁵

The Treaty of Lisbon came in to force in December 2009. With this Treaty the three pillar structure, which had constituted the EU, fell. This means that it is now correct to talk of ‘Union’ Law instead of ‘Community’ Law when talking about the free movement principles. The free movement principles

²² Bernitz, *Europarättens grunder*, p. 1.

²³ Bernitz, *Europarättens grunder*, p. 187.

²⁴ Barnard, *The Substantive Law of Europe – The Four Freedoms*, p. 3.

²⁵ Barnard, *The Substantive Law of Europe – The Four Freedoms*, p. 4.

are now found within the Treaty on the Functioning of the European Union (all articles referred hereinafter are from the ‘TFEU’).²⁶

3.1.1 Legal Principles

The ECJ often refers to legal principles as there is no complete harmonization within the EU. Therefore these legal principles serve as important tools in the interpretation of applicable law. When a derogation or a public-interest requirement has been identified and accepted by the national Court, it has to be determined whether the steps taken by the Member State were appropriate, are compatible with human rights and proportionate. The latter is, known as the *principle of proportionality*.²⁷ There are various formulations of the principle and due to the ECJ using more lenient versions of the proportionality test, it has caused uncertainty to what the principle actually encompasses. The proportionality issue raises two questions: are the measures suitable for securing the objective and does the measure go beyond what is necessary in the pursuit of attaining the objective?²⁸ Regarding the suitability, it does not require a lot of control of the national legislation to attain the objective. However, the second question does require national Courts to evaluate whether the aim of the objective is achievable with other less restrictive means.²⁹

One of the cornerstones of the four freedoms is the *principle of non-discrimination* on the grounds of nationality. It says that goods, persons, services and capital receive the same treatment as their in-state counter parts.³⁰

²⁶ Lisbon Treaty,

http://circa.europa.eu/irc/opoce/fact_sheets/info/data/how/evolution/article_7164_sv.htm.

²⁷ Barnard, *The Substantive Law of Europe – The Four Freedoms*, p. 516.

²⁸ See *C-67/98 Zenatti*, para. 29.

²⁹ Barnard, *The Substantive Law of Europe – The Four Freedoms* p. 516.

³⁰ Barnard, *The Substantive Law of Europe – The Four Freedoms* p. 18.

The *principle of mutual recognition* secures the free movement of services without the need for harmonization within the EU. If a service is provided legally in one Member State, it should not be prohibited from being provided in another Member State. This principle can be found in the Lisbon treaty and is also confirmed by Cassis de Dijon.³¹ The only justification for an exception from this principle is an overriding general interest such as health, consumer or environment protection.³²

3.1.2 Freedom of Establishment and freedom to provide services

The freedom of establishment is regulated in articles 49-55). Article 49 states that restrictions to the freedom of establishment are not allowed. Article 49 enables primary and secondary establishments. When a company makes a primary establishment it is a question of a complete transfer of the registered seat from one member state to another.³³ When referring to a secondary establishment it can be a company setting up branches, agencies or subsidiaries in another member state.³⁴

The freedom to provide services is regulated in Article 56-57. Article 56 can be used to challenge rules which obstruct the provision of services in the host state as well as the home state. Article 57 defines what a service is and applies the principle of equal treatment to the service provider.³⁵ Articles 52 and 62 allow Member States to derogate the freedom of establishment and the freedom to provide services on the grounds of public policy, public security and public health. However, these exceptions are meant to be used restrictively and the burden is placed on the national authorities and the

³¹ Barnard, *The Substantive Law of Europe – The Four Freedoms* p. 624, see also C-120/78, *Rewe-Zentral AG*.

³² Europa.eu – mutual recognition
http://europa.eu/legislation_summaries/internal_market/internal_market_general_framework/121001b_en.htm

³³ Bernitz, *Europarättens grunder*, p 275.

³⁴ Barnard, *The Substantive Law of Europe – The Four Freedoms* p. 322.

³⁵ Barnard, *The Substantive Law of Europe – The Four Freedoms* p. 356-358.

legislation also has to be proportionate.³⁶ The possibilities for Member States to maintain their discretion in regards to the freedom to provide services has developed through EU case law. The national legislation has to be applicable in a non-discriminatory manner, be justified in accordance with the public interest, be suitable for the pursuance of the aimed objective and not go beyond what is necessary to reach this objective and if these criteria, known as the *Gebhard-test*, are fulfilled the national legislation is deemed to be justified.³⁷ In theory, Articles 49 and 52 allow cross-border movement of gambling service providers within the internal market and Article 56 similarly secures the movement of gambling services. The difference between the two freedoms is not clear and it has been up to the Court to provide guidance.³⁸

3.1.3 Competition Law and State monopolies

Article 101 prohibits limiting competitive measures which may affect trade between Member States, while article 102 prohibits the abuse of a dominant position. Article 106.1 prohibits Member States from enacting or maintaining any measure in force in the case of public, undertakings which have been granted exclusive or special rights. The article only concerns activities of economic nature. It can be difficult to decide whether an activity is economic or non-economic. Gambling is, however, clearly of an economic nature. State trade monopolies are given an exception, according to Article 106.2 when a Member state considers a measure important enough to safeguard the activity in the interest of the general public.³⁹

³⁶ C-260/04, para 33. *Commission v. Italy*.

³⁷ C-55/94, para. 6 and 37, *Gebhard*.

³⁸ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 15-17.

³⁹ Faull, *The EC law of competition*, p. 279-280

3.2 Gambling development in the EU

During the UK presidency of 1992 and the Edinburgh European Council meetings, the Commission decided that they would not continue with proposals for a harmonization regulation of gambling.⁴⁰ Gambling was considered as unsuitable for Community legislation and was therefore entrusted upon National legislation.⁴¹ Gambling services are however subject to two sets of directives in the EU. The first group consists of the *Audiovisual Media Services Directive*, the *e-commerce Directive* and the *Service directive*, which all clearly mention that gambling, should be excluded from the scope of the directives.⁴² Gambling has however not been defined and instead the term “*games of chance*” is used.⁴³ This is the long-standing definition used for gambling and found in its most recent form from 2010 in the *Audiovisual Media Service Directive*:

“Games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services”⁴⁴

The second group of directives consists of: *the notification Directive*, the *Anti-Money Laundering Directive* and the *Directive on the common system of value added tax*, has a larger impact on gambling services by providing the Member States on whose territory gambling services are offered to their

⁴⁰ DOC/92/8, *European council in Edinburgh conclusions of the presidency*, http://europa.eu/rapid/press-release_DOC-92-8_en.htm?locale=en

⁴¹ Kaburakis, *EU Law, Gambling, and Sport Betting. European Court of Justice Jurisprudence, Member States Case Law, and Policy*, p. 31.

⁴² Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 112-113, see also see also SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 15.

⁴³ C-275/92, *Schindler*.

⁴⁴ *Audiovisual Media Services (AMS) Directive*, 2010/13/EU, see also SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 15.

consumers, with supervisory and taxation competence.⁴⁵ As chapter four will show, there is a clear reluctance from the ECJ to step in and judicially regulate gambling despite its part of the internal market. Considering the specific nature of gambling it can be argued that gambling is better handled through a political and legislative response. With the ECJ having difficulty to apply the standard internal market rules to gambling⁴⁶ and the subsequent lack of interest of harmonization amongst most Member States, gambling services have been regulated in very different ways. Several states have banned gambling services, by establishing a monopoly or by issuing licenses for these services. There are also a few Member States without any specific legislation on gambling:

- Ban - Offering gambling services on the internet is prohibited (Germany, The Netherlands)
- Monopoly – Gambling services are either controlled by the state or by a private operator (Sweden, Finland, Portugal)
- Licensing - Providers who have received a license, by the state, can provide gambling services (Denmark, France, Italy)
- No specific regulation – Very few rules connected to online gambling (Ireland, Lithuania)⁴⁷

With the recent developments of online gambling in the EU the European Commission has made no secret that greater clarity is needed. The European Commission therefore adopted the Communication *Towards a comprehensive European framework on online gambling* on October 23th 2012. The purpose of this Communication is to enhance clarity at EU and national level for the benefit of national authorities, bookmakers, consumers and any related industry such as payment or media service. The focus is on

⁴⁵ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 113-114, see also SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 15.

⁴⁶ Van Den Bogaert, “*Money for nothing*”: *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1176.

⁴⁷ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 19.

five areas: compliance of national regulatory frameworks with EU law, enhancing administrative cooperation and efficient enforcement, protecting consumers and citizens, minors and vulnerable groups, preventing fraud and money laundering and safeguarding the integrity of sports and preventing match fixing⁴⁸

⁴⁸ SWD(2012) 345 final, *Online gambling in the Internal Market*, p. 2-3.

4 European Case Law on Gambling

In this chapter, I am going to discuss important gambling case law chronologically from Schindler in 1992 to OPAP in 2012. The first three cases represent the early case law where the market looked very different compared to today. Through the rulings in Gambelli and Placanica the ECJ seemed to try to open up the market. However, in Liga Portuguesa the ECJ takes a u-turn and again places the regulatory responsibility on the Member States and recent case law has shown the same pattern.

4.1 Case Study Schindler: C-275/92

The case was about a UK legislation prohibiting all import of commercials for foreign lotteries. The Schindlers argued that the legislation was incoherent with EU law as it was an anti-competitive measure designed to protect the National Lottery's monopoly.⁴⁹

4.1.1 Ruling

Some Member States advocated that gambling was not an economic activity and thus preventing the ECJ to inquire whether national restrictions were against EC-law. The ECJ decided that gambling, this time in form of lotteries, were deemed to constitute a service.⁵⁰ However, the ECJ said that it was not possible to disregard the moral, religious or cultural aspects of gambling in the Member States. The general opinion of the Member States at the time was to restrict, or even prohibit, gambling for private providers. The ECJ also said that there was a high risk of crime and fraud connected to gambling, due to the scale of the stakes and winnings. The incitement to

⁴⁹ C-275/92, *Schindler*.

⁵⁰ C-275/92, *Schindler* paras. 19 and 25.

spend was also a concern of the ECJ as it may have damaging individual and social consequences. The ECJ concluded by saying that contributions to the benefit of public interests such as charitable works, sports or culture could not be disregarded despite not being regarded as an objective justification.⁵¹ The UK legislation was deemed to be justified as it was in the interest of the public.⁵²

The Schindler-case is interesting as it was the first time that the ECJ concluded that gambling constituted an economical activity in the light of the treaty. The ECJ also decided that gambling activities should be seen as a service. The ruling can be seen as the first step towards including gambling activities within the four freedoms and therefore also within the discrimination test and proportionality test, respectively. The ruling was partially founded on the risks connected to gambling but most likely it was also connected to the fact that gambling was quite insignificant in the inner market.⁵³ The Schindler ruling is also interesting as the ECJ passed over the argument that the ban was discriminatory and how the Court used the rule of reason to expand the list of general interests to solely for public interests and that the Court refused to engage in a proportionality test.⁵⁴

4.2 Case Study Zenatti: C-67/98

This case was regarding Italian gambling legislation which gave certain providers licenses to provide gambling services. The applicants for such licenses would have to pay certain levies and to comply with set guidelines on management of gambling activity. Zenatti acted as an intermediary in Italy for a UK company, without a license, which was illegal according to the Italian legislation.⁵⁵

⁵¹ C-275/92, *Schindler*, paras. 60-61.

⁵² Bamard, *The Substantive Law of Europe – The Four Freedoms* p. 514.

⁵³ Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 16.

⁵⁴ Straetman, *Case C-67/98, Zenatti, Judgment of the Court of 21 October 1999*, p. 991.

⁵⁵ C-67/98, *Zenatti*.

4.2.1 Ruling

The ECJ stated that a legislation which restricts the freedom to provide gambling services are compatible with EU law if they are imposed as a part of a consistent and proportionate national policy to reduce the negative individual and social effects of gambling. Financing of social activities through, as in this case, only should constitute an incidental beneficial consequence. The ruling in *Zenatti* is clearer than previous judgments, by pointing out that the actual purpose of a justified legislation must be to reduce gambling. Benefitting the public can not be the primary objective.⁵⁶

4.3 Case Study Gambelli: C-243/01

Piergiorgio Gambelli and 137 others took bets from Italians to the United Kingdom licensed bookmaker Stanley International Betting Ltd's (hereafter Stanley) via the internet. In Italy this sort of business was exclusive for the state or for operators which had been approved by the state. Gambelli claimed that the Italian legislation was incompatible with the freedom of establishment and freedom to provide services. The defendants also argued that the principle of mutual recognition was overlooked and found it strange that despite having a valid license, they were treated as a company without any license. The case was referred to the ECJ for a preliminary ruling by the Italian Court.⁵⁷

4.3.1 Ruling

The ECJ stated that the Italian legislation constituted a restriction on the freedom of establishment and on the freedom to provide services. However, the ECJ continued saying that there is a possibility that such restrictions can be acceptable as exceptional measures or justified in accordance to case-law of the Court. The Court reiterated what had been said in *Zenatti*, that the measures must have the primary objective to reduce gambling opportunities

⁵⁶ C-67/98, *Zenatti*, para. 36.

⁵⁷ C- 243/ 01, Gambelli.

and provide revenue to the state. The Court took it a bit further than in *Zenatti* by stating that the measures taken must stand in proportion and must be applied in a non-discriminatory matter. The ECJ also sharpens the tone in regard to state monopolies and say that if a Member State incites and encourages consumers to engage in various kinds of gambling in purpose of revenue, the authorities in that Member State cannot use the public order argument in order to justify restrictive measures. The Italian legislation prevented capital companies quoted on regulated markets from obtaining gambling service licenses on the grounds of avoiding licensees being involved in criminal or fraudulent activities. The EJC said that this could be considered a measure which goes beyond what is necessary, as there are other ways of checking the accounts and activities of such companies.⁵⁸ The ECJ established a step-by-step reasoning

1. Is there a restriction of freedom under the treaty? If so
2. Is the restriction justified according to public interests? If so
3. Is the restriction proportionate?

Before the Gambelli ruling there was more focus on step one and two whereas the ECJ shifts focus to the proportionality test.⁵⁹

Following this judgment the European Commission noted that gambling regulation might be needed as it is an area which causes significant Internal Market problems. The Commission said that it would examine whether there is a need for and the potential scope of a possible new EU initiative, based on the received complaints regarding cross-border gambling activities.⁶⁰ This stance suggested that the borderless nature of online gambling services requires a European regulatory framework. Such a framework could seek to harmonize consumer protection but at the same

⁵⁸ C- 243/ 01, *Gambelli*, paras. 54- 59, 60, 65, 69, 72 and 76

⁵⁹ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 88.

⁶⁰ IP/03/1580, *EU law boosting emerging sector*, http://europa.eu/rapid/press-release_IP-03-1580_en.htm.

time let Member States, to a certain degree, still enjoy discretion in determining the measures needed.⁶¹

4.4 Case Study Placanica: C-338/04, C-359/04 and C-360/04

The Placanica case also concerns Italian legislation. Again, UK bookmaker Stanley Leisure plc and three Italian providers, Placanica, Palazzese and Sorrichio were charged with organizing bet collection without the required police authorization. However, it was not possible for the defendants to obtain this authorization.⁶²

4.4.1 Ruling

The ruling in Placanica reinforced what had been said in the Gambelli ruling. In previous case law the ECJ looked at the combination of aims to the legislation. The ECJ takes a different approach in the Placanica case by drawing a distinction between the different objectives set by the Member States. In this case the objective of reducing gambling opportunities was not deemed to hold due to the Italian legislature pursuing increased tax revenues from an expansion in the gambling sector. The second type of objective was the prevention of crime and fraud which was considered to be the true objective of the Italian legislation. The ECJ acknowledge that this objective could be seen as a justification as it attempted to represent a reliable, but at the same time attractive, alternative to clandestine gambling. However, the Court said that the procedure on how licenses were awarded went well beyond what is necessary to achieve the objective and therefore the legislation was an infringement of Articles 49 and 56. The Court also made it clear that a Member State cannot apply criminal sanctions for the

⁶¹ Verbiest, *Gambelli Case Makes it Harder for Nations to Restrict Gaming*, p. 13.

⁶² See Cases C-338/04, C-359/04 and C-360/04, *Placanica*.

providers without a license, which was impossible to obtain, as this constitutes a breach of EU law.⁶³

It is clear that the ECJ used a more stringent assessment regarding the national discretion compared to what was previously said in *Schindler*. If a Member State uses a multiple-license system, as in this case, the criteria, for a restrictive measure to be deemed proportionate, are higher. The principle of mutual recognition may not have been used directly by the ECJ but the fact that a provider is licensed in another Member State clearly had an influence in the proportionality test taken.⁶⁴

4.5 Case study Liga Portuguesa: C-42/07

In 2005 Bwin, an Austrian gambling service provider, and the Portuguese professional football league, *Liga Portuguesa de Futebol Profissional*, entered a sponsorship agreement. This was problematic as offering gambling products is prohibited in Portugal without a license from the State of Portugal. Gambling in Portugal is solely entrusted upon *Santa Casa da Misericórdia de Lisboa*, hereinafter “Santa Casa”, and the monopoly also includes the exclusivity to offer gambling products online. Santa Casa and other public interest institutions are entitled to all of the revenue generated from gambling. Santa Casa subsequently fined the league and Bwin for organizing and advertising online gambling. The league and Bwin challenged this decision before the Portuguese Court, *Tribunal de Pequena Instancia Criminal do Porto*. The Court requested a preliminary ruling regarding the compatibility of the Portuguese legislation with the free movement rights of a company like Bwin. Bwin was legally established and licensed in other member states.⁶⁵

⁶³ Cases C-338/04, C-359/04 and C-360/04, *Placanica*, paras. 52, 54, 55, 62, 64 and 71

⁶⁴ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 91.

⁶⁵ C-42/07, *Liga Portuguesa*.

4.5.1 Ruling

When the judgement in *Liga Portuguesa* came in 2009 it sent shockwaves in the private gambling sector around Europe, as there was belief that the restrictive policies and monopolies would be challenged.⁶⁶ The ECJ go back to the earlier case law by granting a general discretionary margin to regulate gambling. The Court also states that this margin depends on the dubious and disputed nature of gambling and not on any specific ground of justification. The Member states are free to set the objectives of their gambling legislation and to define how this should be met. These restrictions must meet the proportionality condition set in ECJ case law.⁶⁷

Advocate General Bot argued that the purpose of the fundamental freedoms never was not to create an open market for gambling. The Advocate General based this reasoning on the fact that gambling never was envisioned as part of the common market by the treaty. Advocate Bot states that competition normally creates benefits for the consumer in terms of better products and services. However, as the business thrives on players losing more money than they win these advantages are not present when it comes to gambling. Competition in the gambling field would lead to a race in which the one who can offer the most attractive games in order to make bigger profit, wins.⁶⁸

The EJC declared that the fight against crime may constitute an overriding reason in the public interest. Gambling involves a high risk of crime or fraud which constitutes that the restrictions in respect of operators offering gambling services can be justified. The ECJ also points at Santa Casa's reliability as they existed for a long time and that Santa Casa operates under strict control. This enables the state to safeguard that the rules for ensuring

⁶⁶ Kaburakis, *EU Law, Gambling, and Sport Betting. European Court of Justice Jurisprudence, Member States Case Law, and Policy*, p. 53.

⁶⁷ C-42/07, *Liga Portuguesa*, para. 59.

⁶⁸ C-42/07, *Liga Portuguesa*, *Opinion of Advocate General Bot*, paras. 245-249.

fairness in the gambling sector are provided by Santa Casa. Regarding the applicability of the principle of mutual recognition which was brought up in the *Gambelli* and *Placanica* case, the discussion was put to an end with this judgment. The ECJ clearly said that a license in one Member State will not help the provider to obtain a license in a Member State with a legitimate monopoly active. In this case the ECJ also said that as there is no direct contact between the consumer and the provider, service is provided online, there is a different and more substantial risk of fraud for the customers. The Court also said that sponsoring by a gambling provider, on a sporting event or participating teams, may influence the sporting outcome directly or indirectly, with the incitement to increase profits.⁶⁹ For these three reasons the Court subsequently ruled in the favor of Santa Casa stating that a restrictive legislation, like the one in this case, is not precluded within the means of article 56.⁷⁰

The judgment has to be considered clear regarding that gambling is an activity with moral, religious and culture predicaments which is seen with a dispersed approach among the Member States. Together with the fact that there is no harmonized EU-level approach, it is up to the Member States to regulate gambling, as in this case prohibiting the online provision of gambling services from a foreign provider.⁷¹ This ruling subsequently suggests that Members States who wish to retain their monopoly clearly have the ECJ on their side.⁷²

The Court acknowledges the fact that the Portuguese state does not have the same possibility to control foreign providers as they can with Santa Casa.⁷³

⁶⁹ C-42/07, *Liga Portuguesa*, paras. 63 and 68-71.

⁷⁰ C-42/07, *Liga Portuguesa*, para. 73.

⁷¹ Van Den Bogaert, “*Money for nothing*”: *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1184.

⁷² Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 99-100.

⁷³ C-42/07, *Liga Portuguesa*, para. 65.

However, it does not discuss the increasingly important tendering questions despite the fact that Santa Casa has, without competition, controlled gambling since 1783. The Court also made a more lenient interpretation when determining the underlying aim of the contested national measure, by signaling out the fight against crime, and thus leaves the strict approach established in *Placanica*. The more lenient approach continues in regard to the proportionality issue which has prompted questions from the private gambling sector if the legislation truly achieves its goals in consistent and systematic manner, who has to prove that and the role of mutual recognition in this context.⁷⁴ The rejection of the mutual recognition principle suggests the end of “the race to bottom” as the ruling implies that an operator must apply for a license in every Member State. It is questionable if this truly is desirable as it clearly renders the free movement principles as illusory if a provider is subject to a license procedure in each Member State.

However, the actual implications for the providers have not been as bad as this ruling would suggest as providers are still offering their services cross-border without a license. The ruling also does not provide a definitive answer to all specific restrictions, it only answers that a license in one Member State does not automatically imply a license in another Member State.⁷⁵

4.6 Case Study Betfair: C-203/08

In the Netherlands gambling legislation is based on a license system. The legislation prohibits the organization or promotion of gambling without a license. The licensed had been divided between a non-profit “*De Lotto*” and US-based Scientific Games Racing. Betfair is a gambling service provider licensed in the UK and Malta which solely provides its services to their

⁷⁴ Van Den Bogaert, “*Money for nothing*”: *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1184.

⁷⁵ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling* p. 99-100.

customers online or via telephone. In this case Betfair did not have any office or sales outlet in the Netherlands. Betfair offered their services in the Netherlands and enquired whether there was a need for a license to continue doing so. The application was denied and Betfair subsequently appealed this decision and also the fact that renewal of licenses granted to De Lotto and Scientific Games Racing, without letting other potentially interested parties know.⁷⁶ The Dutch asked for a preliminary ruling from the ECJ with three questions: 1) If a closed licensing system, as the Dutch, is allowed, according to article 56, to prohibit a service provider, licensed in another Member State, to offer gambling services online in the Netherlands? 2) Are the principles of equality and transparency applicable within the context of Article 56 to the procedure for granting licenses in a statutorily established single-license system? 3) Can the extension of current licenses, without common knowledge, be considered suitable and proportionate for justification of the freedom to provide services?⁷⁷

4.6.1 Ruling

The issue of competitive tendering did not play a prominent role in the *Liga Portuguesa* case, as discussed above. In the Betfair case however it did and the ECJ identified three distinct restrictions on fundamental freedoms.⁷⁸ The ECJ reiterated what had been said about mutual recognition in *Liga Portuguesa* and said that Betfair's license obtained in another Member State is not a sufficient assurance that national consumers will be protected against crime and fraud, especially in the view of the lack of direct contact between consumer and provider. For the first question the Court said that a Member State can choose a single-provider licensing system as it is up to the states to determine the level protection sought. However, even if a Member State is allowed to choose such a system the national authorities

⁷⁶ C-203/08, *Betfair*.

⁷⁷ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling*, p. 40.

⁷⁸ Van Den Bogaert, "Money for nothing": *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1186.

cannot act with such discretion so that the freedom of providing services loses its purpose.⁷⁹

Advocate General Bot stressed the importance of distinguishing the effects of competition in the gambling market from the effects of a tender call for the award of the license in question. The effects of competition in an open market is that the providers will try to have the most attractive offers. This may in turn lead a consumer to spend more money with an increased risk of gambling addiction. This would not be the case at the stage of granting a license.⁸⁰ Despite what the Advocate General said the Court ruled that the measures taken were proportionate in relation to the set objective to extend an exclusive license without tender competition. If the license is granted to a public or private provider the activities would be subject to strict control by the public authorities. However, the ECJ let the Dutch Court decide whether the current licensees fulfilled these criteria.⁸¹ The Dutch Court later ruled that the licensees did not fulfill these criteria and that therefore the licenses should not have been renewed without opening up the procedure to competition.⁸²

4.7 Case Study Markus Stoß: C-316/07

Mr. Stoß, Mr. Avalon and Mr. Happel had commercial premises in Germany where they offered sports betting on behalf of Happybet Sportwetten GmbH and Happy Bet Ltd. Both these companies had licenses awarded in the region Carinthia and in the UK respectively. The group was on two separate dates, ordered by police authorities to refrain from promoting and concluding sports betting on the grounds that no authorization from the Land Hessen was in place. The group appealed the decision and the Court asked for a preliminary ruling from the ECJ

⁷⁹ C-203/08, *Befair* paras. 33, 37 and 49 see also C-42/07, *Liga Portuguesa*, para. 69.

⁸⁰ C-203/08, *Befair*, Opinion of *General Advocate Bot* para. 161

⁸¹ C-203/08, *Befair* paras. 59 and 60.

⁸² Van Den Bogaert, “*Money for nothing*”: *The case law of the EU Court of Justice on the Regulation of Gambling*, p. 1190.

concerning two questions: 1) Whether a monopoly on sports-betting is precluded from article 49 and 56 when other forms of gambling, with a higher potential addiction rate, are permitted to be offered by private providers? 2) Does a provider with a license in one Member State need to obtain further authorization in another Member State to offer their services in that Member State?⁸³

4.7.1 Ruling

Member States are entitled to discretion regarding their gambling legislation and the restrictive measures in place must satisfy the conditions in regard to proportionality. However, the Court said that in order to justify a monopoly on gambling, as in this case, it is not necessary for the state to prove the proportionality of the measure taken.⁸⁴

The first question is answered with the fact that the regulation of sports-betting is inconsistent and therefore incompatible with Union Law, based on the so called “hypocrisy test”, as it was a fact that the marketing by the monopoly was at times intense. The Court referred back to *Placanica* and state that it may be justified and it also states that it would be unrealistic to expect monopolies not to promote their services.⁸⁵ In the second question referred, the Court reiterated what earlier case law had said that the EU Law does not oblige Member States to mutually recognize national gambling licenses.⁸⁶

Advocate General Mengozzi said the following about the regulation of gambling within the internal Market,

“An industry worth thousands of millions of euros involving a harmful and culturally sensitive activity. A service which, thanks to new means of

⁸³ C-316/07, *Markus Stoß*.

⁸⁴ C-316/07, *Markus Stoß*, para. 77.

⁸⁵ C-316/07, *Markus Stoß*, *Opinion of Advocate General Mengozzi* paras. 36-41 and 50.

⁸⁶ C-316/07, *Markus Stoß*, para.112.

*communication, finds it easy to cross frontiers. A sector for which the law is not harmonised and the case-law is based on individual cases.*⁸⁷

In the aftermath of this statement, further light is cast upon the debate as to how the national competence to regulate gambling should be balanced. The clear aim of the debate is how to remove the discretion Member States have to regulate gambling whilst respecting the supremacy of the freedom to supply services and the freedom of establishment. If the freedom to supply services and the freedom of establishment are to be negated from the regulation of gambling services and gambling service providers, it could create a precedent which could prove harmful to the internal market within the EU.⁸⁸

4.8 Case study Garkalns: C-470/11

Mr Garkalns applied to the authorities for a license to open an amusement arcade in a shopping centre in Riga, Latvia. The application was denied on the grounds to prevent the public from being tempted to favor gambling over other leisure opportunities. Mr. Garkalns appealed the decision and referred to *Betfair*. As although the Latvian state may exercise its discretion on the regulation of gambling, the legislation has to be based objective, non-discriminatory reasons which are announced in advance. The Latvian Court acknowledged the fact that the wording of the legislation might be inconsistent with the principle of equal treatment and the obligation of transparency. The case was subsequently referred for a preliminary ruling.⁸⁹

⁸⁷ C-316/07, *Markus Stoß*, *Opinion of Advocate General Mengozzi*, para. 1.

⁸⁸ Littler, *In the Shadow of Luxembourg – EU and National Developments in the Regulation of Gambling* p. 15-17.

⁸⁹ C-470/11, *Garkalns*.

4.8.1 Ruling

The ECJ confirmed the Garkaln claim that restrictions must be based on objective and non-discriminatory criteria and known in advance. The Court also said that it is essential that the authorities make their decisions accessible to the public. The legislation has to genuinely meet the concern to reduce gambling opportunities in a consistent and systematic manner. The national Court is obliged to verify that the state strictly supervises the activities related to gambling, that restrictions aim to pursue the declared objective of the legislation and that the specific criterion in this case is applied without discrimination.⁹⁰

The EGBA, which represents the major providers of the gambling sector, has welcomed this ruling as it, in their opinion, confirms that Member States must announce draft gambling legislation in advance to the relevant providers for the legislation to be enforced. The EGBA also welcomed the Court's stance regarding that restrictions to the market are only justified subject to strict conditions.⁹¹

4.9 Case study OPAP: C-186/11 and 209/11

This case is about the three UK licensed gambling service providers Stanleybet, William Hill and Sportingbet applying for licenses in Greece. When the Greek authorities had tacitly declined the applications and the three providers subsequently lodged an appeal to the Court. The Greek authorities based their decision on the fact that Greek gambling service provider OPAP had exclusive rights to offer gambling services until 2020. The Greek state had previously been the major shareholder in OPAP but had reduced its ownership to 34%.⁹²

⁹⁰ C-470/11, *Garkalns*, paras. 42-44 and 47.

⁹¹ Ligné, EGBA, <http://www.egba.eu/de/press/610>.

⁹² Joined Cases C-186/11 and C-209/11, *OPAP*.

4.9.1 Ruling

Advocate General Mazak repeated what had been said in previous case law, that a Monopoly may be justified if the legislation pursues the objective of restricting the availability of gambling services or reducing criminality related to gambling. The monopoly should be seen as a safe and controlled alternative. The restrictions should truly reflect the desire to reach the set objectives in a consistent and systematic manner. However, the Court took the view that the monopoly could not be deemed to meet these criteria, in meeting the objection of reducing gambling opportunities, as OPAP seems to employ an expansionist commercial policy and the exclusive right has lead to an increased supply of games of chance. Mazak, continued that if combating crime and fraud should be considered the primary objective of the legislation, it could only be seen as consistent if there was an actual problem of criminal activity significantly related to gambling in Greece and this link could be dealt by an expansion of authorized and regulated gambling activities.⁹³

⁹³ Joined Cases C-186/11 and C-209/11, *OPAP*, *Opinion of Advocate General Mazak*, paras. 43-47 and 62.

5 Swedish Framework

In this chapter, I will briefly describe the development of gambling regulation in Sweden and what gambling in Sweden looks like today. I will also present preparatory works towards a potential new gambling legislation.

5.1 Background

Sweden has a longstanding tradition of strong state authority and the same applies to gambling. Already in *Gutalagarna* dating back to 1220 gambling was prohibited. In *Magnus Erikssons stadslag* from 1350 excessive gambling was prohibited. At the end of the 15th century, playing cards came to Sweden, the oldest cards were found in Lund Cathedral. This prompted more legislation in 1520 when gambling with cards was prohibited.⁹⁴

During the 18th century, the first lotteries in Sweden are organized. The lotteries were subject to approval by the king. Many cities and authorities realized that lotteries were a good way of financing different projects but also wars, like the Pomeranian War.⁹⁵ The benefits of the lotteries led to prohibitions against foreign lotteries and lotteries with a commercial interest.⁹⁶ Regulation continued with legislation adopted in 1844, which continued to suppress the influence of foreign lotteries. In 1939 the first complete and general regulation, “*Lotteriförordningen*” was adopted and it is considered to be the cornerstone in Sweden’s current legislation. The legislation from 1939 was replaced 1982 by the *Lottery Act* and which in its

⁹⁴ Wessberg, *Om spel i svensk lagstiftning fram till år 1900*, p. 13-14.

⁹⁵ Wessberg, *Om spel i svensk lagstiftning fram till år 1900*, p. 16.

⁹⁶ Schwalbe, *Lotterilagen : [lotterinämden samt lotterinämdens praxis]* p. 15.

turn was replaced by the current legislation, *the Lottery Act 1994 and the Casino Act*.⁹⁷

5.2 Gambling in Sweden today

Studies by the Swedish National Institute of Public Health from 2010, estimated that 73 percent of the Swedish population, in the ages 16-84, gamble at least once a year. When the same study was done in 1998 the percentage was 88 percent.⁹⁸ However, it should be noted that the study from 1998 excluded people over 74 years of age.⁹⁹ The number of people having gambling problems in 1998 remained similar according to the study from 2010, where approximately 2 percent of the gambling population are deemed to have gambling problems.¹⁰⁰ However, it is interesting to note that gambling is more common amongst men compared to women. Gambling is especially common for men in the age group 18-24 and it is in this group where we find the highest frequency of problem gamblers. The same group has the highest frequency (18 percent) of gambling on foreign provider sites during the year.¹⁰¹

5.3 Current gambling legislation

The Lottery Act is the main legislation for all gambling activity in Sweden whereas the Casino Act regulates Sweden's casinos. The legislation's objective is to protect consumers, minimize criminality, negative social and economical effects and to control the financial surplus.¹⁰² The Lottery act defines lottery as when a participant, with or without a wager, can obtain

⁹⁷ SFS 1844:12., *förbud mot lotteriinrättningar* 4 s., SFS 1939:207., *Lotteriförordningen*, SFS 1982: 1011., *Lotterilagen* and SFS 1994:1000., *Lotterilagen*, SFS 1999:355., *Kasinolagen*.

⁹⁸ Statens folkhälsoinstitut, FHI R 2012:04, *Spel om pengar och spelproblem i Sverige*, p. 16.

⁹⁹ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – når man målen?*, p. 24-25.

¹⁰⁰ Statens folkhälsoinstitut, FHI R 2012:04, *Spel om pengar och spelproblem i Sverige*, p. 53.

¹⁰¹ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – når man målen?*, p. 25.

¹⁰² Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 37.

winnings to a higher value than most of the other participants. The term “lottery” includes most known gambling types such as sports betting, poker and bingo.¹⁰³ In the proposition, to the Lottery Act, betting is regarded as a form of agreement between parties with the example: Wagering with an amount of money on a certain outcome of an event.¹⁰⁴ The broad definition of the term lottery consequently leads to that all games and gambling where chance plays a predominant role will fall within the scope of the Lottery Act. However, chance is not the only criteria and the general nature of the activity must be regarded.¹⁰⁵ Interesting in this context is the *Grebbestad-case*, where the Supreme Court ruled that poker was deemed to be more depending on skill than chance.¹⁰⁶

The Lottery Act only allows operators, whom have received permission by the state, to provide gambling services.¹⁰⁷ Lotteriinspektionen is responsible for licenses and ensuring that the Swedish gambling market is legitimate, safe and trustworthy.¹⁰⁸ To organize a lottery without permission is prohibited by law. The LA also says that it is a criminal offence to promote lotteries from abroad.¹⁰⁹ The Swedish regulated market consists of five providers, *Svenska Spel*, *Folkspel*, *ATG*, *Postkodlotteriet* and *Kombilotteriet*.¹¹⁰ Private providers are in principle excluded from the market with a few exceptions in form of restaurant casinos, dealers for Svenska Spel and ATG whom are entitled to the revenue raised from their businesses. *ATG* has an exclusivity agreement on horse betting, which is regulated in the LA, an agreement between the state and the horse sport and a permit from the government. *Svenska Spel*, which is owned by the state, has an exclusivity agreement for gambling machines, casinos (through the CA), Sports

¹⁰³ SFS 1994:100 § 3, *Lotterilagen*.

¹⁰⁴ Prop. 1993/94:182, *Ny lotterilag*, s. 54.

¹⁰⁵ Plogell, *Sports Betting Regulation in Sweden* p. 767.

¹⁰⁶ HD Case B 2760-09, *Grebbestad*.

¹⁰⁷ SFS 1994:100 § 9, *Lotterilagen*.

¹⁰⁸ Lotteriinspektionen, <http://www.lotteriinspektionen.se/sv/Om-oss/>

¹⁰⁹ SFS 1994:100 §§ 38 and 54, *Lotterilagen*.

¹¹⁰ Riksdagen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 19.

betting and online poker. Svenska Spel also has lotteries. *Folkspel* have exclusivity on bingo and also have lotteries.¹¹¹ The combined turnover for the regulated Swedish market was around 30 billion SEK for the first three quarters of 2012, which is an overall increase with 77 million SEK compared to 2011.¹¹² The total turnover 2011 was estimated to be almost 42 billion SEK.¹¹³

However, as mentioned above many gambling providers offer their services across borders, which is also the case in Sweden. This unregulated market consists of foreign providers offering products, mainly online poker and sports betting, to Swedish citizens without the required permission over the internet. The products offered by these providers often have a higher payback ratio and a higher risk than those offered by the regulated providers. There is also a Sweden-based illegal gambling activity such as betting machines and poker clubs.¹¹⁴

Since 1991, the Swedish National Institute of Public Health has had the government's responsibility to develop measures to reduce excessive gambling and related negative social effects. The grant to achieve this has been increased from €0.5 million in 1999 to €3 million for 2012. Svenska Spel also devotes €1.2 million annually. In this context it should be noted that Svenska Spel's annual profit is approximately \$450-550 million.¹¹⁵

5.4 Future legislation

The Swedish Government decided to overlook the Swedish Gambling legislation in 2004.¹¹⁶ The reason was that the current legislation came in to

¹¹¹ Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 37-38.

¹¹² Lotteriinspektionen, <http://www.lotteriinspektionen.se/sv/Press/Nyheter/Den-svenska-spelmarknaden-omsatte-nastan-30-miljarder-de-forsta-tre-kvartalen-i-ar/>

¹¹³ Prop. 2012/13:1 Utgiftsområde 17, *Tillsyn över spelmarknaden*, p. 203.

¹¹⁴ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 23.

¹¹⁵ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 94 and 125, See also, Statens folkhälsoinstitut, FHI R 2012:04, *Spel om pengar och spelproblem i Sverige*.

¹¹⁶ Dir. 2004:76, *Översyn av lotterilagen*.

force before the online revolution, resulting in a different market.¹¹⁷ The objective of a new legislation remains the same as in the current legislation and the only way to achieve the objections is through regulation. The revenue raised from gambling activities should benefit the public according to current legislation. However, the report suggests that it may not be possible to guarantee that all of the revenue should benefit the public in the future. The report states that it may be that, due to the market, technology or legal developments, it is a necessity to open up the gambling market in terms of private interests.¹¹⁸ The report states three different options to regulate online foreign gambling services:

- a) prohibit gambling on foreign sites for Swedish residents
- b) prohibit foreign operators to provide services to Swedish residents
- c) prohibit services which makes it possible to access these sites (internet providers and electronic wallets).

Out of the three options only the option (b) was deemed suitable, with an unsanctioned prohibition against foreign providers combined with a wider definition of what constitutes a promotion of commercial interests.¹¹⁹

In the Government report from 2008, the three options for a future legislation had changed to the following:

- a) Maintain the current legislation and restrict it
- b) Open up online gambling for private providers
- c) Open up a certain gambling type for private providers.

According to the report, the first option is possible as there is no requirement from the European Community law to open up the market. The second option was ruled out as certain types of online gambling, as

¹¹⁷ SOU 2006:11, *Spel i en föränderlig värld*, p. 45.

¹¹⁸ SOU 2006:11, *Spel i en föränderlig värld*, p. 131.

¹¹⁹ SOU 2006:11, *Spel i en föränderlig värld*, p. 286-287ff.

interactive games as poker, are said to be the most addictive and therefore would need strict control. The third option was also deemed possible as the most problematic gambling types would not be licensed.¹²⁰ The report also states that the possibility to block IP-addresses and domain names serves as an important aspect of pursuing the purpose of a potential new legislation. However, the report also mentions the possibilities for the consumer or the provider to work around these blocks.¹²¹ There is concern whether this measure would constitute a breach to the freedom of speech. As of now, only child pornography related sites are allowed to be blocked. There has been a proposal similar to this when attempting to limit file sharing. This proposal was rejected as the measure was deemed to be out of proportion and especially in the light of the importance Internet has for society.¹²²

The Government reports from 2006 and 2008 have yet to result in any legislative change. *Riksrevisionen* state in their report from 2012 that the current Swedish gambling legislation does not effectively pursue to meet the objectives set. Part of the criticism is aimed towards *Svenska Spel*, who are not considered to be thorough enough in the pursuit of reducing gambling addiction. With Svenska Spel being a State-controlled company, their measures taken should preferably be in the frontline of the industry. However, the report says that unregulated providers are performing much of these desirable measures, thus questioning the set objective by Svenska Spel. Svenska Spel has limited their responsibility to identification of and contact with problem gamblers. Svenska Spel has also stated that an important part of their strategy is to retake lost market shares. This should be done by improving their products, for example by introducing a mobile version, which has been said to impose a bigger risk in regard to gambling addiction.¹²³ Riksrevisionen also questioned Svenska Spel's intensive marketing and in this context, it is interesting to note that there is an intense competition between Svenska Spel and the non-profit organizations when it

¹²⁰ SOU 2008:124, *En framtida spelreglering*, p. 243ff.

¹²¹ SOU 2008:124, *En framtida spelreglering*, p. 411ff.

¹²² Dnr SU 302-3378-08, see also Ds 2007:29 and prop. 2008/09:67.

¹²³ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 117-118

comes to lotteries. It could be questioned whether pursuing market shares from other legal providers could be seen as systematic and consistent, especially since the marketing has been questioned in Marketing Court.¹²⁴ The report also points out the fact that there is legislation concerning alcohol commercials while there is none for the gambling market, which leads to unclear and questionable commercials and advertising. If the rules on marketing are clarified, Riksrevisionen says that the risks of the Swedish gambling legislation not being coherent with EU law may be reduced.¹²⁵

Another source of criticism is aimed towards the government for not being clear enough in directing Svenska Spel. Riksrevisionen claims there is an absence of knowledge of the subject and that the government has failed to evaluate Svenska Spel's work in regard to problem gambling prevention and marketing. Riksrevisionen also criticized the license procedure as there are no clear criteria which the licensees have to meet in order to renew a license. This procedure cannot be seen as transparent neither predictable, which ultimately prevents future providers from entering the market.¹²⁶

The Swedish government, has in a report, published on December 28th 2012, partially acknowledged Riksrevisionens criticism. Regarding reduction of gambling addiction and excessive gambling the government recognizes the lack of a clear national and local responsibility. The government also refers to the report by the Swedish National Institute of Public Health and says that further action is needed to reduce gambling addiction. Regarding the criticism aimed towards directing Svenska Spel, the government acknowledges the importance of evaluation, however, this is not the government's responsibility but Svenska Spel's.¹²⁷ The government also states, by referring to case law, that although Svenska Spel has strong responsibility when employing marketing campaigns in terms of moderation, the marketing has to exist to ensure that the objective of

¹²⁴ Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 65, See also, MD 2009:15.

¹²⁵ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 123-124..

¹²⁶ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 119-121.

¹²⁷ Skrivelse 2012/13:52, *Riksrevisionens rapport om statens roll på spelmarknaden*, p. 5-7.

channelling gambling to Svenska Spel's services is achievable.¹²⁸ In the budget proposition from earlier this year, the government has said that the marketing employed should have a social responsibility approach and avoid being perceived as intrusive.¹²⁹ In conclusion, the government states that there is a need for a review of parts of the current legislation and that a proposal from the report of 2008 is scheduled to achieve a well functioning regulation of the gambling market.¹³⁰

As mentioned above only certain operators are allowed to provide gambling services in Sweden. Some of these providers are private. In the light of the non-discrimination principle this would constitute a clear breach, since foreign gambling providers are not allowed to provide their services. However, as these private interests are mostly only providing a service for Svenska Spel and ATG they are not in direct competition to the foreign providers. The only exceptions are the restaurant casinos, which have clear wager and winning limits and can therefore be seen as rather insignificant. The legislation does not have any condition of nationality or residency and therefore it cannot be seen as discriminating.¹³¹ Non-profit organizations, unlike foreign providers, have been given privileges on the Swedish gambling market. This can be justified, if it is in the public interest. However, it has been shown that several of these licensed non-profit organizations may be commercial, for example PostkodLotteriet which is owned by a private company with its registered seat in the Netherlands. The non-profit organization is in fact driven by a commercial company with the interest of maximizing its profit.¹³²

¹²⁸ Skrivelse 2012/13:52, *Riksrevisionens rapport om statens roll på spelmarknaden*, p. 8, see also RÅ 2004 ref. 95, *Wärmdö Krog*.

¹²⁹ Prop. 2012/13:1 Utgiftsområde 17, *Tillsyn över spelmarknaden*, p. 206.

¹³⁰ Skrivelse 2012/13:52, *Riksrevisionens rapport om statens roll på spelmarknaden*, p. 8, see also, Prop. 2012/13:1 Utgiftsområde 17, *Tillsyn över spelmarknaden*, p. 206.

¹³¹ Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 58.

¹³² Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 59-60.

6 Swedish Case Study

In this section I will present four cases which question the Swedish gambling regulation's coherence with the fundamental rights on freedom of establishment and freedom to provide services.

6.1 Case Study Wärmköping: RÅ 2004 ref. 95

Wärmköping AB (the company) appealed previous ruling by the Lottery Inspection, which imposed fines on the company if they would continue to provide gambling services to SSP Overseas Betting Limited (SSP), on the grounds that 38 § LA was a hindrance to the freedom to provide services. The company did not question the objectives of the Swedish gambling legislation to be coherent with EU-law. However, the company claimed that the practical use did not serve to meet these purposes. The company argued that Svenska Spel and ATG encouraged consumers to engage in gambling activities, while they were protected by the State at the same time.¹³³

6.1.1 Ruling

The Supreme Administrative Court shared the company's views in regard to the regulated market promoting gambling activities amongst consumers. However, the Court referred to the ECJ rulings, mentioned above, stating that it was up to the national Courts to ensure that the national legislation served its purpose and was in coherence with the proportionality principle. The Court said that the financial benefits from gambling for the general public is not a justification to hindrance of the freedoms, in itself, but rather a contributing positive effect. National Legislation should reduce the gambling possibilities and control the gambling market in a cohesive and systematic way. The Court also said that it was not reasonable to prohibit the regulated market from advertising to the public due to the apparent large

¹³³ RÅ 2004 ref. 95, *Wärmköping*.

demand for gambling services. The Court assumed the regulated market to provide better consumer protection and less risk for fraud than the unregulated market. In conclusion, although the marketing campaigns by the regulated providers were intense at times and could be deemed to “*incite and encourage*” it was not enough to constitute a breach.¹³⁴

The ruling has received criticism. The lack of harmonization and special character of gambling have given the Member State discretion in their choice of regulation. However, this does not exclude Member States from legislating regulation that is not necessary or not proportionate. The Supreme Administrative Court should therefore have performed a proportionality test to see if the national legislation in a cohesive and systematic way contributes to the goals set, which they failed to do according to some critics. Other critics go even further by saying that the Supreme Administrative Court never tested whether the hindrance to freedom to provide services and establishments had actual grounds. They also conclude that the Supreme Administrative Court has overlooked these fundamental principles and given the State unrestricted possibilities to control the gambling market in Sweden.¹³⁵

6.2 Case Study Ladbrokes: RÅ 2005 ref. 54

This case is about the UK gambling service provider Ladbrokes who applied for permission to provide gambling services on the Swedish Market, by establishing betting shops and internet services. They based their application on the ECJ ruling in the Gambelli case. The application was denied on the grounds that the gambling market in Sweden predominantly belongs to the state, social movements and the horse sport. The income generated from gambling should be directed to the public. Ladbrokes claimed that the Swedish State’s approach to gambling was to provide state income and not

¹³⁴ RÅ 2004 ref. 95, *Wärmdö Krog*, see also C-275/92, *Schindler*, note 60 and C-243/ 01, *Gambelli*, note. 62, 69 and 75.

¹³⁵ Hettne, *Rättsprinciper som styrmedel* p.180-181.

to minimize the risks of excessive gambling or gambling addiction. Ladbrokes claim that the intense marketing from the regulated providers and that only a fraction of the raised revenue was used to prevent and treat problem gambling are incoherent with objectives of the legislation.¹³⁶

6.2.1 Ruling

The Supreme Administrative Court mostly referred in this case to the ruling in the Wärmdö case, see above. Ladbrokes questioned the legality of the decision to refuse them a license in Sweden. According to the Supreme Administrative Court the reason of the denied license may be misleading and incomplete in the light of the objectives within the legislation and the ruling in the Wärmdö case. However, the outcome of the decision is in coherence with both the LA and EU case law. The Court therefore decided that the decision not to grant Ladbrokes a license should stand even though the reasoning was not adequate.¹³⁷

6.3 Case Study Betsson: RÅ 2007 note 72

Betsson AB applied for a license to provide gambling services in accordance with the LA and CA. The application was denied on the basis that it was not coherent to the objectives of the Swedish gambling legislation. To achieve the given goals it has been decided to limit the competition on the gambling market. Betsson questioned the decision as they claimed that the State's actions are not driven in the light of the objectives of the LA and instead focus on maximizing state income and generating a percentage to Swedish sports. Betsson maintained the same stance as Ladbrokes, see case above, while adding that the State recently granted Svenska Spel a license to provide online poker, despite the fact that the Swedish National Institute of Public Health and the Lottery Inspection had rejected the idea of introducing licenses in online poker.¹³⁸

¹³⁶ RÅ 2005 ref. 54, *Ladbrokes*.

¹³⁷ RÅ 2005 ref. 54, *Ladbrokes*.

¹³⁸ RÅ 2007 note 72, *Betsson*.

6.3.1 Ruling

The Supreme Administrative Court stated that it could be questioned whether the sometimes intense marketing by the regulated providers, was appropriate to attain the objective of the legislation. However, the Court reiterated their previous stance by saying that the questionability is not strong enough to prove that the legislation's true objective is to ensure state income. The Court said that the measures taken therefore should be seen as proportionate and referred to the *Placanica* case. The Court says that the gambling legislation is coherent with European Community law and that there was no case law saying otherwise. The Court denied the request for a preliminary ruling from the ECJ and ruled in favor of the state.¹³⁹

6.4 Case study Sjöberg och Gerdin: B 3559-11

This case is about two major daily newspapers, *Aftonbladet* and *Expressen*, publishing advertisements for foreign gambling providers, *Expekt*, *Unibet*, *Ladbrokes* and *CentreBet*, to the Swedish public during November 2003 to August 2004. The Chief Editor's, of the respective newspaper, Otto Sjöberg and Anders Gerdin were indicted for promoting foreign gambling providers with a commercial purpose. The District Court's decision to fine the chief editors was overturned by the Court of Appeals, based on the preliminary ruling from the ECJ.¹⁴⁰ The case was granted a certiorari by the Supreme Administrative Court on the 2 November 2011. The Supreme Administrative Court came to the same conclusion, as the Court of appeals, and ruled in favor of Sjöberg and Gerdin on 21 December 2012.¹⁴¹

6.4.1 Ruling

The ECJ stated that effect of paragraph 38 LA, which prohibits the promotion of gambling, is to prevent Swedish consumers from engaging in

¹³⁹ RÅ 2007 note 72, *Betsson*.

¹⁴⁰ B 3559-11, *Sjöberg Gerdin*.

¹⁴¹ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 108

gambling with foreign gambling service providers. This is a clear restriction for Swedish residents as well as providers established in another Member State. The ECJ thereafter examined whether the restriction can be justified on grounds of public policy, public security or public health. EJC referred to *Placanica and Liga Portuguesa* where the overriding reason of the general interest was recognized. The Court yet again said that it is up to each Member State to determine what is required to protect the interest in question. The Member States are free to set the objectives of their gambling policy. This objection must fulfill the conditions laid down in case-law in regard to proportionality. The Court then continued to examine whether paragraph 38§ is suitable for achieving the legitimate objective or objectives set by Sweden and if it goes beyond what is deemed necessary.¹⁴²

The Swedish gambling regulation was, in principle, deemed to be acceptable, prohibiting advertisement of foreign providers and proportional to the set objectives. However, the Court raised concerns regarding the criminal sanctions which only penalized the promotion of foreign providers and not unregulated providers within Sweden.¹⁴³

The Supreme Administrative Court said, in line with the Court of Appeals, that there was no hindrance in applying the prohibition to promote foreign providers. However, the Court decided that the criminal sanction was discriminatory according to EU law and therefore the sanctions for *Sjöberg* and *Gerdin* were not applicable. This was partially based on a historical and systematic approach. The promotion of unregulated Swedish gambling providers and the promotion of foreign gambling providers have been seen as separate criminal offences.¹⁴⁴ The Court argued that if the published advertising promoted unregulated Swedish gambling providers the same criminal offence could not be applied with the result of a more lenient sanction than *Sjöberg* and *Gerdin* could receive.¹⁴⁵

¹⁴² Joined Cases C-447/08 and C-448/08, *Sjöberg Gerdin*, paras. 33-39.

¹⁴³ Joined Cases C-447/08 and C-448/08, *Sjöberg Gerdin*, para. 57.

¹⁴⁴ B 3559-11, *Sjöberg Gerdin*, note 26 -30, see also SFS 1939:207, *Lotteriförordningen*.

¹⁴⁵ B 3559-11, *Sjöberg Gerdin*, note 36.

Riksrevisionen questioned whether the EJC accepted the Swedish gambling legislation, suggesting that there was never an examination whether the legislation fulfilled the set criteria.¹⁴⁶ This statement has received criticism as it is clear that the legislation is accepted by the ECJ as the monopoly is deemed necessary and proportionate in relation to its purpose. The critics say that the report by Riksrevisionen has questioned clear Swedish case law on unfounded grounds. The aforementioned ruling is based on a technicality which does not constitute a reason for questioning the Swedish legislation's coherence to EU law.¹⁴⁷

The judgment by the ECJ has received criticism for using an outdated perception of gambling by referring back to *Schindler*. The ECJ has also failed to instruct the Swedish Court to examine the effect paragraph 54 may have on the online gambling market and economy as a whole. With the ruling overlooking the scope of a national newspapers which is not limited to national territory the online gambling markets suffer from not reaching their customers. The consequence may be that it might harm the lawful online gambling industry in a time when the European economy is in a terrible state. The gambling industry has seen constant employment growth in Europe since 2000 and although the gambling business singlehandedly cannot turn the crisis around, it can at least provide assistance. This is something the governments around Europe have realized. Italy, as an example, enforced taxes on gambling providers for around €150 million last year.¹⁴⁸

The Swedish state however sees the revenue raised from gambling as an incidental benefit. When the ECJ ruled in the *Sjöberg and Gerdin* case they referred to the similarities to *Liga Portuguesa*. Both states have a system where exclusive rights are given to organizations which are subject to strict control. There were however differences as the revenue raised in Portugal

¹⁴⁶ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – när man målen?*, p. 109.

¹⁴⁷ Öberg, *EU-domstolen stödjer Sveriges spelmonopol*.

¹⁴⁸ Caliguiri, *Uncle Sven Knows Best: The ECJ, Swedish Gambling Restrictions, and Outmoded Proportionality Analysis*, p. 582-586.

directly went to social purposes where as in Sweden the revenue was directed to the state, with the previous direct link to sport organizations being cut. However, the ECJ did not put any emphasis on how the revenue was distributed.¹⁴⁹

¹⁴⁹ Hettne, *Statens roll på den svenska spelmarknaden – ett EU-perspektiv*, p. 59-60

7 Regulatory Case Study - The Danish Gambling act 2010

As the previous chapters have shown, the ECJ does not seem to be able to provide a solution to the problem of gambling legislation. This has led to Member States taking different approaches, which is also evident in Scandinavia. Norway and Finland have strengthened their monopolies, while Denmark has introduced a license system¹⁵⁰. In this chapter I will present the Danish gambling legislation. This will enable a discussion, whether the Danish approach is a possible route for Sweden to take on in the analysis.

7.1 Background

In 2010, the Danish Government decided to proceed with a reform of the existing Gambling regulation with the so-called “new act”. The act came into force from January 1st 2012.¹⁵¹ Until the new legislation was introduced, the State monopoly and only provider, *Danske Spil A/S*, mainly governed gambling. During this time, no other providers were allowed to promote any of their gambling services on Danish territory. However, cross-border gambling service providers marketed their services anyway and were by definition providing illegal gambling services.¹⁵²

The comments to the act state that the evolution of internet has had a major influence on the development of the gambling market and the availability that the internet provides meant that Danish players, with a continuous growth, are choosing foreign providers. This development is from a public order view unfavorable as gambling, without intense control and regulation

¹⁵⁰ Riksrevisionen, RiR 2012:15, *Staten på spelmarknaden – når man målen?*, p. 122.

¹⁵¹ LOV nr 848 af 01/07/2010, *Spilleloven*.

¹⁵² C 22/9, 2011. *Duties for Online Gaming in the Danish Gaming Duties Act*, p. 2.

result in negative effects on society in terms of criminality and gambling addiction. Therefore, as the revenue raised from gambling declines, and thus less finances are directed to charity, and as the Danish legislation is not deemed suitable in the pursue to reach the objectives set, it is a necessity to modernize gambling legislation.¹⁵³

7.2 New gambling legislation

The new Act came into force January 1st 2012 and its first paragraph states that the purpose of the legislation is through regulation and control aim to:

- 1) Keep gambling activities at a moderate level
- 2) protect young people or other vulnerable groups from being exploited by gambling or developing gambling addiction
- 3) ensure that provided gambling services are safe, responsible and transparent
- 4) ensure public order and hinder gambling with links to criminality.

The following paragraphs in the first chapter describe that all gambling within Danish territory, online as well as offline, is prohibited, regardless of where the provider is based, unless a license is provided by the relevant authority.¹⁵⁴ In the following chapter, the legislation has clearly attempted to define what constitutes the different types of gambling according to Danish law. Chapter three lists all types of gambling which are available to offer gambling services on the Danish territory. However, there are a few exceptions on certain gambling types which are still reserved for *Danske Spil A/S* like horse racing and various types of lotteries. Chapter four states conditions on who can obtain a license to offer gambling services in Denmark. One of the most important conditions is that to be granted a license the applicant should be established in Denmark or in another EU or

¹⁵³ Folketinget, see "Bemærkninger til lovforslaget" section 2, http://www.ft.dk/samling/20091/lovforslag/L202/som_fremSAT.htm, see also C 22/9, 2011. *Duties for Online Gaming in the Danish Gaming Duties Act.*

¹⁵⁴ LOV nr 848 af 01/07/2010, *Spilleloven*, chapter 1.

EAA country, unless there is a representative from the applicant who has been approved by the Danish Authorities. The successful applicant is also subject to pay an application fee and to pay an annual license fee depending on the taxable income raised by the provider during the calendar year.¹⁵⁵

Paragraph 65 allows that the stakes and winnings from illegal providers as well as transmission of information about an illegal game system to be blocked. *Spillemyndigheten*, which is in charge of controlling the Danish gambling market, issues statements when such sites are blocked.¹⁵⁶

Despite efforts by the legislator, it has been argued that the act still violates Article 56 and other fundamental principles by the lack of reducing gambling opportunities, in the act as well as the preparatory works, in a consistent and systematic manner as described in *Placanica*. The exclusion of lotteries and horse racing from what providers can offer is a breach of Article 56. Another source of criticism has been aimed towards the blocking of illegal gambling sites, which constitutes a violation of the freedom of expression, a fundamental EU law and human rights principle.¹⁵⁷

¹⁵⁵ LOV nr 848 af 01/07/2010, *Spilleloven*.

¹⁵⁶ Spillemyndigheten, <http://www.skat.dk/SKAT.aspx?oId=398&vId=0/>

¹⁵⁷ Jakobsen, *Sports Betting Regulation in Denmark*, p. 362.

8 Analysis

Gambling is an activity which has existed since ancient times with the desire of having more wealth playing a major part. The problem with gambling is that there is chance you will lose what you stake, which can in its turn lead to a need to gamble again to win back what has been lost. The unwritten law amongst gamblers is never to bet with money you cannot afford to lose and if you do lose, do not try to win it back by continuing to gamble. Nevertheless, these rules are constantly broken as often the desire of having more is greater than the will of refraining from gambling, also known as a gambling addiction or problem gambling. Problem gambling can lead to multiple negative side effects not only for the individual engaging in gambling but also for the gambler's family and in the end also for society. There are also concerns that gambling contributes to criminality and fraud. The Asian sports market has been heavily affected by match fixing by players, teams and even authorities through fraudulent behavior from criminal networks. This development has spread to Europe with proof of several sport events being fixed and thus benefitting criminal network. The specific nature of gambling together with apparent links to criminality is mainly why gambling causes a fierce debate around the world in how to best contain, control and regulate gambling. However, history prevails that the problem does not go away simply by prohibiting the activity, as gambling services has been provided despite any restrictive or prohibiting legislation to date. So what is the best way to tackle the problems connected to gambling?

The EU has from an early point taken the approach that gambling is something to which each Member State, due to the moral, religious or cultural aspects has to decide the appropriate measures to perform in regard to what the Member States pursues to protect. Therefore there is no harmonization within the EU, which has led to a patchwork of regulations on the matter of gambling and especially regarding online gambling.

However, despite the fact that Member States have been given discretion on how to regulate gambling, the legislation still has to adhere to fundamental principles of EU law if the activity may be seen as an economic activity. In *Schindler* the Court laid down that gambling constitutes an economic activity, which invokes the freedom of establishment and freedom to provide services which serve to reach the EU objective of a free internal market. The non-discriminative and proportionality principles serve as tools to limit restrictions to these freedoms. However, the ECJ said that the specific nature of gambling enables Member States to justify a restriction in regard to these freedoms. What is interesting from this early case is that the Court saw that the objective of the legislation in that the revenue raised from gambling should be distributed to the public to be a ground for justification despite the fact that it might not be perceived as objective. I agree with the view of the EJC on this decision based on the fact that gambling across borders at the time was relatively insignificant. The internet revolution had yet to influence the gambling sphere and from that point of view it is not possible to request that the ECJ should foresee the extreme growth of cross border gambling which the internet provides.

When the ECJ ruled in *Zenatti* the Court made the important statement that the financing by the public as the primary objective of a legislation could be a ground for a justification, thus leaving the more lenient ruling in *Schindler* behind. The ECJ suggests that the financing of the public could only be an incidental consequence. This could be considered as a break through as monopolies now had to focus their objectives more towards the actual problems related to gambling, rather than making revenue to the state. However, one could debate whether this simply has had the effect that the objective of a state monopoly slightly changes. More focus is taken on the protection of consumers, which would be an accepted objective, while still having the possibility to raise revenue to the state.

The Court took it a bit further in *Gambelli* by stating that the measures taken must stand in proportion and must be applied in a non-discriminatory way.

The ECJ also sharpened the tone in regard to state monopolies which incites and encourages gambling which i.e. the Italian State was considered to do. The ECJ thus inhibits Member States to use the public order argument in order to justify restrictive measures, as focus is now turned whether the restriction stands in proportion to its objective.

The more stringent reasoning continues in *Placanica* by the ECJ stating that if a Member State uses a multiple-license system the criteria for a restrictive measure to be deemed proportionate are higher. The ECJ stance employed in *Gambelli* and *Placanica* contributed to strengthening the case for private online gaming operators. I can understand why the state monopolies around Europe were concerned regarding the seemingly unstoppable growth of online gambling. I do believe the market was on the verge of being opened up, especially as the Commission mentioned that regulation might be inevitable to refrain from causing significant problems to Internal Market.

However, the ECJ rather quickly safeguarded the Member State's monopolies with their ruling in *Liga Portuguesa*. The Court goes back to previous case law by granting Member States discretion due to the specific nature of gambling. The Court takes on an anti-competition approach when it comes to gambling as it cannot be compared to other products or services, due to the business thriving on players losing more money than they win. I agree to a certain extent with these sentiments as gambling is really incomparable with any other activity. However, there are certain parallels that can be drawn to the fact that buying stock could be seen as a type of gambling. You are making assumptions, read "guessing", whether the stock will go up or down based on what the market and "experts" say. One could ask one self, from an objective point of view, what is the difference? Another source of criticism could be aimed at the fact that there are providers who not depend on players losing more than they are winning. This is the example of gambling service provider Betfair, which serves to provide gambling opportunities between consumers on an exchange, where Betfair are taking a commission when an agreement between two parties is

struck. Nevertheless, this was overlooked in *Liga Portuguesa*. Focus was rather taken on the grounds for making restrictions justified in the light of EU law, by stating that the fight against crime and fraud may constitute an example of an overriding reason in the public interest. The *principle of mutual recognition* which normally permeates the discussion on how to secure the free movement of services and products was not even considered. In fact, the principle was said not to relate to gambling due to its specific nature. I think this sends out a dubious message as gambling has been considered an economic activity and if one Member State has recognized a provider as legitimate it should be recognized throughout the EU. However, the decision to disregard the principle has also positive aspects as the “race to the bottom” approach might be phased out as providers have to apply for a license in each Member State. Thus, the more lenient legislations, where a provider is granted a license will not automatically lead to a license in another Member State.

In *Betfair* it was the first time that the ECJ discussed the procedure of offering licenses. The ECJ ruled that if one-license system is used, without tender competition, it has to be given to a public provider or a private provider subjected to strict control. It is clear that the EJC has put a lot of emphasis on the importance of transparency and that it only under very specific circumstances is it justifiable to derogate. The principle of Mutual recognition was clearly rejected again and it seems as when it comes to gambling there is no room for that principle whatsoever

The *Markus Stoß* case is interesting as it deals with a gambling legislation which has liberalized parts of their monopoly. Again, the ECJ highlighted the discretion Member States have when it comes to gambling and said that the applied solution can be justified if it is in proportion to the objectives set. I find it very questionable to liberalize gambling types which have been proven to have a highly more addictive rate. It clearly cannot serve the objective to reduce gambling addiction and gambling opportunities. I do

believe the aforementioned solution has key advantages as the most addictive gambling types could be kept monopolized.

The more lenient approach taken by the ECJ continues in Garkalns where the Latvian Authorities used restrictive measures which could be seen as discriminatory and not announced in due time. What was interesting in this case is that the ECJ said that if a restriction is to be considered to be justified it is subject to strict conditions. What this means is however rather unclear. This ultimately leads to a status quo for both legislators and providers.

The last case, OPAP, I chose to present is highly relevant to the discussion I will take on next as it relates to a monopoly which has a clear objective to reduce gambling opportunities yet at the same time employs a rather intense marketing approach. To be able to serve as an alternative to the foreign providers the monopoly must let the public know about its services. However, there is a thin line regarding when the marketing becomes too intense. In this case the ECJ, with Advocate General Mazak leading the line, considered the Greek approach to be out of proportion and that the true objective was not to limit gambling rather to increase it.

8.1 Swedish legislation in the light of EU

Gambling has always been a source for debate in Sweden, with the predicament on how to regulate an activity, which on the one hand could finance a war yet at the same time may cause harm to society by its specific nature. When the current gambling legislation came, there was no online gambling and gambling was truly a national matter, with few exceptions. Gambling took place over the counter and no one could have imagined the development which gambling has taken in the last decade. However, now the legislator has been caught off-guard by this explosion of opportunities to gamble. The legislation is clearly outdated and lacks adapted definition on what gambling is. The current solution by placing all kinds of gambling in

to “lottery” is a rather confusing description. The ruling by the Supreme Court in the poker case points at an apparent need for a remake on how to define gambling.

In the case law I have presented one can see a red line throughout the judgments by the Court stating the legislation to be consistent with EU law. The Court had until *Sjöberg and Gerdin* not requested a preliminary ruling from the ECJ, which has been highly criticised with concerns to the legislation’s compatibility with EU law. In *Wärmdökrog* the Court decided that legislation served its purpose and that it was proportionate in reference to current ECJ rulings. The Court did, however, say that the marketing employed by regulated providers were intense, but that it was not enough to constitute a breach. I share the critics’ point of view in that the Court should have performed a more thorough proportionality test and more importantly asked for a preliminary ruling in regard to the necessary measures taken. The Court yet again refused to request a preliminary hearing in *Ladbrokes*, where the provider claimed that the true objective of Swedish legislation was to provide revenue for the state. The Court interestingly acknowledged the fact that the reasoning behind the denied license may have been misleading and incomplete but in the end it was the right decision as it was coherent with both the LA and EU case law. This is from my opinion very strange reasoning as the intense marketing can be seen as an indication that the measures go beyond what is necessary. I agree with *Ladbrokes* that if less restrictive measures can lead to the same result these should be used. Svenska Spel has not, *see statistics section 5.2*, been able to reduce the number of problem gamblers thus is not fulfilling its objective. The preparatory works from 2006 and 2008 also suggest that the Swedish legislation does not do enough to prevent problem gambling.

With the *Gambelli* ruling the ECJ had laid down that the revenue raised only could be a positive side effect of a monopoly and not primary objective. I am quite sure that if the preliminary ruling had been requested, in the light of the more stringent approach, the claims by *Ladbrokes* would have had a

good chance of being accepted. The Court ruled once again in *Betsson* that the doubt whether the true objective of the legislation was to provide state income was deemed to not be strong enough. The Court referred to *Placanica* by saying that the measures taken stood in proportion and therefore were justified.

Whether the Swedish Monopoly could have been seen as unjustified after *Gambelli* and *Placanica* will remain unanswered as the ECJ never had the chance. However, when the Court decided to request a preliminary ruling the ECJ was given a golden opportunity to do so in *Sjöberg and Gerdin*. The Court stated that the Swedish gambling regulation was, in principle, deemed to be acceptable and prohibiting advertisement of foreign providers is proportional to the objective set. As *Riksrevisionen* points out one can question how thorough the ECJ were when examining whether the objective of the Swedish legislation was fulfilled and rather focusing on issue of paragraphs 38 and 54, which were discriminatory. The fact that the EJC fails to recognize the scope that newspapers have might harm the online gambling industry in a time where not many industries are seeing growth, rather the opposite with the European economy being in poor state. It is interesting to see that gambling with all its apparent flaws and specific nature is often turned to when something needs financing.

Is it possible to question the Swedish legislation's compatibility with EU law despite the ECJ ruling in *Sjöberg and Gerdin*? First of all only a few providers are allowed to provide gambling services, with some of these providers being private and not owned by the state. I agree with *Riksrevisionen* sentiments that there is no discrimination regarding the fact that some private companies are allowed to engage in the market while others are not. These providers only share a small market share and the competition can be disregarded. However, granting licenses to non-profit organizations, which in reality may be commercial, is in my opinion something that needs to be scrutinized. Postkodlotteriet amasses enormous

amounts of revenue and since this revenue is not solely directed to social benefit, one could question why a license has been provided in the first place.

Another interesting approach is marketing. According to Placanica the marketing from monopolies cannot go beyond what is necessary in directing consumers to controlled gambling services and rather employ a marketing policy with the aim to expand market shares on a global level.

Postkodlotteriet is in my opinion pursuing a very intense marketing policy by trying to take market shares from other regulated providers on the market, like Svenska Spel, which was questioned in Swedish Marketing Court. This competition cannot be said to meet the objectives of the legislation; to reduce gambling opportunities and gambling addiction. This is not a totally different situation from what was brought up in *Betfair* where the national Court used a strict interpretation of the conditions set in paragraph 59 in the ECJ judgment. It could be questioned whether Svenska Spel and other regulated providers really are following these conditions. Riksrevisionen criticized the fact that there is not enough guidance or follow up on Svenska Spel's performance. Since several of the non-profit organizations would be difficult to categorize it is in my opinion unlikely that neither Svenska Spel or the non-profit organizations would meet these conditions. The Swedish government seems to have taken steps in a review of the legislation as they share Riksrevisionen's opinions to a large extent and also see problems with the current legislation. Further problems with the legislations are exposed in the recent judgment of the chief editors Sjöberg and Gerdin who had clearly, and most likely intentionally, committed a criminal offence by promoting foreign providers. As the Court considered the criminal sanction to be discriminative, it could not impose criminal sanctions on the chief editors. This has in my opinion created legal uncertainty, as the ruling basically says that there is no criminal sanction connected to promoting illegal providers, at least in this case. How should the judgment be interpreted? If you ask the editors at Aftonbladet and Expressen, and other sites for that matter, I am sure that they are extremely happy with this ruling as it can increase their revenue significantly. The

relatively critical approach from the government together with the recent Supreme Court's ruling would suggest that a change is not too far away.

8.2 Possible future legislation in the light of Denmark's new legislation

Denmark was the first Scandinavian country to liberalize its gambling Monopoly. Before the new act there were many similarities between the Swedish and the Danish legislation. Denmark also faced the same problems regarding foreign providers reaching the Danish market via the internet. The availability of the internet was one of the key reasons why Denmark changed opinion. The saying "Keep your friends close, but your enemies closer" is very applicable to this situation. The business may not have been wanted, in the eyes of the State, yet it was there and the State could do little to change the situation. With the foreign providers gaining a growing market share and with the legislation being outdated, it was time for a change.

The Danish new act prohibits gambling within the Danish territory unless a license is provided, the difference being that, unlike the Swedish system, the foreign providers are open to apply if they meet the criteria set in the legislation. The applicant can apply for most types of gambling besides lotteries. Successful applicants will need to pay a license fee and taxes to the revenue which can be related to their business in Denmark. Providers which do not seek a license and still provide services have their site blocked by the Danish authorities. The question is now whether the aforementioned approach could be something for Sweden.

Sweden has a choice to restrict the current monopoly or to take the liberalization route Denmark has taken and adapted to the global development as a whole. The Swedish gambling market consists of a regulated market but also a large unregulated online market. The Swedish

legislation is therefore not adapted to the global development or coherent with the fundamental freedoms of the EU. If the freedom to supply services and the freedom of establishment are to be negated from the regulation of gambling services and gambling service providers, it would create a precedent which could prove harmful to the internal market within the EU. There negative effects are not limited to the inner market but predominantly it is the consumer who is affected by the restriction caused by the dispersed approach to gambling. The overhanging risk of new restrictions on how gambling should be regulated creates legal uncertainty.

Despite the fact that the ECJ has in principle said that the Swedish Monopoly is coherent with EU law there is uncertainty in regard to the legislation fulfilling its objectives in a longer perspective. In *Liga Portuguesa* it was stated that the monopoly had the best tools to ensure the best consumer protection. However, the approach Denmark has taken does not necessarily mean that consumer protection is reduced, it is rather the opposite. To be able to offer gambling services in Denmark the provider has to fulfill the conditions and guidelines set in the Danish legislation. According to case law restrictive measures should not go beyond what is necessary and if the objectives can be met with less restrictive measures that option should be applied. This was not the case prior to the introduction of the new act in Denmark, as the authorities lacked control of foreign providers and therefore the consumers had less protection with more restrictive measures.

There are concerns in regard to the Danish legislation as it is not completely liberalized, with lotteries being excluded. In *Markus Stoß*, the national monopoly had also been partially liberalized. This was seen as not being a consistent and systematic legislation and therefore a breach to EU law. However, only opening up the market for certain types of gambling could also be a useful mechanism in controlling consumer protection. This was not the case in the *Stoß* case as it was the more addictive types which were

liberalized. The same can be said about the Danish legislation as lotteries are not connected to as much risks, as for example online poker.

The Danish system employs a rather drastic measure to prevent unlicensed providers from offering their services on the Danish market. The solution is effective yet dubious as it requires a lot of control, which is costly, and it is also a clear breach of freedom of speech. As of now it is only child pornography related sites which have been blocked by the authorities in Sweden. Should such a blocking solution be implemented towards illegal gambling sites it could be debated what else justifies a block and if there are not other sectors which would be more important to block than gambling. However, I think it might be a measure that is necessary and that it definitely stands in proportion as there is an alternative available for the providers. This benefits legal and more trustworthy providers and thus preventing shady providers from being able to offer their services to the Danish consumers.

Last but definitely not least, the Danish approach results in tax revenue from the gambling sector and in times of crisis it is truly time to deregulate the outdated LA. The deregulation of the gambling monopoly might also have an effect on the race to the bottom, which might lead providers with strong Swedish links, such as Unibet, seeking to establish themselves in Sweden instead of for example on Malta. This could lead to more jobs in a growing sector which again would lead to more tax revenue for the state.

9 Conclusion

Despite large parts of the world being in an economic crisis, the gambling sector continues to grow utilizing the technology available. Especially the online gambling sector is growing and that is happening regardless whether state regulators and lawmakers like it or not. Gambling was earlier more of a national activity as each country could control its territory as they wished. However, today gambling is easily accessible for consumers online across national borders, which raises uncertainty around its size, scope and legal basis.

The lack of harmonization within the EU has contributed to a legal uncertainty for its member states, companies and for the consumers. There is an apparent need for regulation on an EU level to harmonize and create legal certainty and predictability in the gambling market. This is important for Member States, consumers and for the industry as whole. The gambling sector raises enormous amounts of revenue but unless legal certainty is created it might deteriorate the industry in the long haul and thus cause economical harm to the EU.

It is possible to interpret the ECJ ruling in the Sjöberg and Gerdin case in several ways. On the one hand the ECJ says, albeit not clearly, that the Swedish legislation is not in breach of EU law. On the other hand one can criticize the approach Riksrevisionen takes by questioning if the legislation is coherent with EU law and rather focus on the question if the criminal sanctions were discriminative or not. Only the fact that the recent Supreme Court ruling says that the sanctions were discriminative, shows an example of the Swedish legislation being outdated and in an apparent need of a review. The ruling has created legal uncertainty whether it is prohibited to promote foreign gambling providers or not.

I suggest that Sweden should follow the route Denmark has taken and liberalize its gambling monopoly and issue licenses for foreign providers. The legislation should stimulate companies to apply for licenses which would increase tax revenue for the state. The recession is still looming over Sweden and a liberalized gambling legislation could partially be a way to turn things around. The liberalization should with few exceptions be complete, with only the most high-risk gambling types to remain under state control. The control of foreign sites would most likely be improved as the foreign providers would be subject to rules and procedures set by the Swedish state.

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