

# On Law and Politics of the Swedish Gambling Monopoly

## 1. Introduction

One of the most prevailing Swedish myths is that the public Swedish gambling monopoly is designed to limit gambling and thereby prevent detrimental public health effects. Nowadays, there is an overwhelming consensus that, during the last 20 years or so, there has never been a true public ambition to limit gambling. Back in the day, the marketing budget of the state controlled gaming services reached new heights every year and the range of products offered grew broader and broader. This market strategy still prevails. The Government policy came to create a culture of gambling. This culture together with a world class level of internet penetration, a flourishing climate for tech innovations, access to venture capital and a lenient stock market, were to set strong incentives for the establishment of highly successful private gambling operators such as *Betsson*, *Unibet* and many others, all established abroad targeting Swedish customers. These companies are founded, run and owned by Swedish privates and corporations. Today, Sweden is one of the most competitive online gambling markets of the world. The only remains of the public monopoly is the marginalized prohibition to promote participation in gambling arranged in other EU member states (the marketing prohibition).

The EU law challenges against the marketing prohibition have been numerous. The prohibition has continuously been justified with reference to public health concerns. This may seem puzzling since the social science is pretty clear regarding the lack of a causal link between the marketing prohibition and any positive health effects. The justification seems even more misguided with regard to the virtual flood of legal marketing channels available to Swedish customers. In this environment, it is scientifically impossible to discern any cause and effect relations. Needless to say, these factual circumstances are of fundamental importance for the EU law conformity of the Swedish gambling policy. If the Government cannot prove that the policy in reality limits gambling and that the marketing prohibition has positive effects on public health, the policy constitutes an illegal restriction on the freedom to provide services granted by the EU Treaty.<sup>1</sup> This fairly straightforward legal reality has been litigated in Swedish courts for more than ten years now. However, the marketing prohibition is still in force, it still stands. How can that be?

In this piece, I will tell the curious (and abridged) story of the survival of the marketing prohibition. The story features a curious merger of interest of the political institutions and the Swedish judiciary.

## **2. The Remains of the Monopoly**

The Lotteries Act (Sw. Lotterilag (1994:1000)) prohibits the arrangement of unlicensed lotteries and the promotion of participation, in commercial operations or otherwise for the purpose of profit, in unlawful domestic lotteries or foreign lotteries.

Gambling companies licensed or authorized elsewhere within the EU (all references made to the EU also include the EEA) can, however, more or less freely pursue an Internet-based gambling business on the Swedish market. Swedish authorities acknowledge that Swedish residents are unimpeded to participate in foreign gambling and that online gambling operators duly licensed or authorized in another EU member state are allowed to offer such services.

Moreover, the Swedish Government has expressed that the Lotteries Act does not have extraterritorial application. Hence, Swedish authorities lack jurisdiction to enforce the Lotteries Act to undertakings and individuals outside of Sweden.

<sup>1</sup> The freedoms' legal bases are presently: Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the Treaty on the Functioning of the European Union (TFEU).

Gambling services can consequently be offered cross border to Swedish customers without violating Swedish law. Also, the room for manoeuvre for marketing and promoting activities that target the Swedish market is extensive. Marketing through cross-border media such as television commercials and web marketing is legal. Given the inherent limitations of the system for administrative and criminal sanctions, sponsoring of sports events, point efforts in display media and other commercial marketing co-operations could be carried out without risk of sanctions, if structured properly.

Hence, what is in essence left of the Swedish gambling monopoly is the prohibition to promote participation in gambling arranged in another EU member state. According to a vast body of case law from the Court of Justice of the European Union (CJEU), the crucial legal questions pertinent to assess the EU law-compatibility of the major remains of the Swedish gaming monopoly and the prohibition against promotion in section 38 of the Act, are the following: the Swedish State's margin of appreciation when restricting the freedom to provide services in the gambling area, the proportionality-test and other restrictions in the State's margin of appreciation, the actual purpose and justification of the restrictions, the channelling-argument and gambling advertisement, and finally gambling addiction and justifications of public health. Due to the limited space assigned to this piece, I will mainly focus on the issue of law, policy and facts in relation to the proportionality-test. In a litigation context, the legal question in a nutshell is: If the Government cannot prove that the policy in reality limits gambling and that the marketing prohibition has positive effects on public health, the policy constitutes an illegal restriction on the freedom to provide services granted by the EU Treaty.

### **3. The Alcohol and Gambling Monopolies in the EU Court**

The analysis of the EU law compatibility needs to be done in the legal-political context of the tradition of Swedish public monopolies. Therefore, I cannot disregard the case law of the CJEU regarding other Swedish public monopolies. The highly relevant comparison between the Swedish alcohol monopoly and the gaming monopoly is central. The comparison is above all essential for the understanding of the role of the principle of proportionality.

In *Gourmet*, a prohibition against advertising of alcohol products was deemed a disproportionate restriction of the freedom to provide services and struck down by the Swedish Market Court (last instance, case 2003:5) after a preliminary ruling rendered by the CJEU (Case C-405/9).

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

Gambling services are not prohibited in Sweden. The state-owned companies offer a wide and well-developed range of gambling services. The public monopoly has through intense and active marketing over the years allowed the gambling market to flourish. It is also legal to offer gambling services to Swedish customers from foreign jurisdictions.

Sweden has a state-monopoly for retail sales of alcohol in place which is safeguarded by harsh restriction on private imports, availability, marketing and consumption. These restrictions stand in stark contrast to the gambling restrictions.

Therefore, it is relevant to make a legal and factual comparison between the *Gourmet* case and the restrictions in place on the gambling market for the purpose of establishing whether they are proportional or not.

In *Gourmet*, the Government rightly invoked the public health-argument. There exists strong empirical evidence for public health risks in connection to the consumption of alcohol.

According to the Government and its public authorities, The Swedish National Institute of Public Health (SNIPH) and The National Board of Health and Welfare (NBHW), there are no coherent opinions on whether addiction to gambling constitutes a serious health problem. However, the detrimental effects of drinking are firmly scientifically established. Vast sums are therefore spent to prevent negative health effects of drinking. The figure on spending to combat the negative health effects of gambling is miniscule in comparison.

The overwhelming majority of gambling services offered by the State companies are not subject to any significant restrictions. They are in principle freely offered by these companies and their middlemen, which consist of privately owned betting shops. Even though some restriction of fine tuning character has been introduced it is still possible for an underage teenager to spend vast amounts of money on public gambling services offered by the State companies through the private gambling shops. The governmental supervision of the numerous and geographically scattered gambling shops is still negligible.

The state-owned companies are some of the largest buyers of advertising on the entire Swedish advertising market. This is still the case after some minor cuts as a result of the doubts and critique expressed on the legality of the restrictions expressed by domestic courts (notably the Supreme Admin-

istrative Court) and authorities such as the EU-commission. The marketing of the public gambling services embraces all media: papers, TV, PR, sponsoring, editorial content, specially produced TV-programs etc. No specific restrictions on gambling marketing applicable to the State-owned companies exist.<sup>2</sup>

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

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

If this test is applied to the gambling market, which is flooded with gambling advertising, it is evident that the prohibition against marketing of foreign gambling services lacks any public health effects. The Government and the Swedish Gaming Authority (Swedish: Lotteriinspektionen) present no evidence whatsoever to sustain the positive public health effects of the prohibition to promote participation in foreign gambling services offered on the Internet.

The fact that the Swedish Government and its responsible health authorities have no recourse to scientific evidence concerning the causal link between gambling advertising and negative effects on public health, and doubts whether a connection even exists, makes the conclusion inevitable: The Swedish prohibition in Article 38 of the Lotteries Act against advertising of foreign gambling services does not survive the proportionality-test.

In this context, it is important to note that the Swedish Government has not considered if there exist less restrictive means than the State monopoly

<sup>2</sup> In the late 1990s, the state controlled operators were the largest investors of the entire Swedish advertising market. Presently, the same companies are the single largest investors of marketing on the gaming market. See annual reports of Svenska Spel and Lotteriinspektionen 2013–2015.

(market regulation, licenses, enhanced supervision and control) to meet the suggested objective of public health.

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

But let us take the alcohol-comparison one step further. The CJEU's judgement in the *Rosengren* case (C-170/04), a case that also concerned the Swedish alcohol monopoly, focused on the relevance of the proportionality-test. In the *Rosengren* case, which was about the Swedish regulations for *private importation of alcoholic beverages*, namely, the regulations that hinder the selling from over the border of alcoholic beverages to private persons residing in Sweden. The CJEU defined, differing with two general advocates, a monopoly's special function very narrowly.

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

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

However, in performing a proportionality-test, the CJEU went further and investigated whether the Swedish policies were effective in relation to their original purpose. It was in this sense that the Swedish system could not be justified. According to the CJEU, the prohibition against private importing could not be justified for public health reasons when *Systembolaget* in any case was obligated to meet customers' demand for imported products. A complete prohibition could not either be justified on the basis of age control since in part *Systembolaget* deals with a very broad sphere of people and in

part because it accepted less than 100 per cent control of age when it delivered goods to end customers through middlemen.

The *Rosengren case* further shows with all desired clarity that the Court's rulings that were founded on articles 28 EC and 31 EC are essentially different. In the *Franzén case* (C-189/95), which was confirmed in the *Hanner Decision* (C-438/02), the CJEU considered it sufficient to determine that the equal treatment principle, including the structural guarantees for equal treatment, were respected. The proportionality principle became only relevant outside of the area applicable to article 31.

The CJEU normally turns over the final decision regarding the assessment of proportionality to the national courts. The *ratio* behind the CJEU's turning over of the proportionality issue in its preliminary rulings is that within the framework for those proceedings it is not competent to speak on issues of national law. According to the preliminary ruling remedy, the Court may only interpret EU Law and review its validity. It is the national courts that are to apply EU Law in each individual case.

In the *Rosengren case*, however, the CJEU did not confer to the Swedish Supreme Court, which requested a preliminary ruling, any independent latitude for action. The preliminary ruling left practically no discretion to the Swedish court and effectively settled the case.

As was clear, the proportionality principle's significance has varied when it concerned the Swedish alcohol and pharmaceutical monopolies. The foundation upon which the monopolies were built has not been subjected to any proportionality test. The reason for this, as became apparent, was that no proportionality test had been done up to this point under the framework of article 31 EG. Only when measures fall outside the areas of application of this article, such as in the *Gourmet* (see above) and *Rosengren* cases, has the proportionality principle had any decisive significance.

The Swedish gaming regulation allows offering, participation and marketing of cross-border gaming services and the Government owns and controls two of the major gaming providers and marketing investors on the Swedish market. From the point of view of the consumer, the market is flooded with easy accessible gaming products and marketing messages. The actual design and concrete functioning of the Swedish regulatory regime makes it impossible to claim that Swedish public policy aims to limit gambling in society. Moreover, there exist very few restrictions for foreign private operators to offer and market gaming services to Swedish customers.<sup>3</sup>

<sup>3</sup> The relevance of the judgment in *Sjöberg and Gerdin* (joined cases C-447/08 and 448/08) is therefore limited. It neither assessed the proportionality on the basis of facts nor in relation to

Hence, the EU-legal question in a nutshell is whether the remains of the Swedish gambling monopoly: the prohibition to promote participation in cross-border gaming services, seen as a restriction of the right to freely offer services cross-border in the EU; could be justified on grounds of public health or public order.

It seems fairly rational to conclude that if the Swedish relatively coherent and systematic alcohol monopoly does not survive a proportionality-test performed by both the CJEU and a national court of last instance, how on earth shall, to put it mildly, the incoherent and unsystematic Swedish gambling monopoly survive? Compared to the alcohol monopoly, the gambling monopoly could be characterized as the horror cabinet of Madame Tussauds’.

But let us analyse the compatibility argument with regard to the factual circumstances in more detail.

#### 4. The Understanding of Law and Facts in Relation to the Principle of Proportionality

Gaming monopolies are commonly seen in EU member countries and the CJEU has in a number of rulings tested if separate countries’ regulations are compatible with EU law. For a long time the courts have taken a careful posture and not seriously criticized member states’ gaming regulations.<sup>4</sup> That stands in stark contrast to judicial practice in other areas where the CJEU during the same period has been relatively severe against member states when dealing with barriers of trade.

In the area of gaming, the CJEU on the other hand has more recently given clear directions about what the national courts should pay attention to when they try proportionality questions. Against that background it is doubtful whether proportionality tests should be more limited in those areas than others. One case where the CJEU is thought to have sought a more thorough proportionality test is the *Gambelli* case<sup>5</sup>, where the CJEU stated that if a member state encourages the participation in lotteries, gambling, or betting, with the purpose of obtaining income, that same state cannot refer to the need to preserve order in society to justify restrictive measures.

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the invoked grounds for justifications: public health and public order. No proportionality-test was performed by the CJEU.

<sup>4</sup> See court ruling of 24 March 1994, in case C-275/92, *Schindler*, ECR 1994, p. I-1039.

<sup>5</sup> The court’s ruling of 6 November 2003 in case C-243/01, *Gambelli*, ECR 2003, p. I-13030.

The CJEU also stated that it was doubtful that it is compatible with the proportionality principle for companies that are listed on the stock market in other countries to be blocked from receiving concessions to organize sports betting, since there are ways to monitor such companies' bookkeeping and business activities.

Against the background of the *Gambelli* case, the Swedish Lotteries Act has been criticized for being built on other purposes than those emphasized in the Lotteries Act's preparatory works. It has been maintained that *Svenska Spel AB* and *AB Trav och Galopp*, on behalf of the Swedish State, encourage participation in lotteries, gambling or betting with the purpose of obtaining income. Sweden could not thereafter cite, e.g., social policy and consumer considerations, as the justification for the monopoly.

The Swedish legislation has been criticized under all conditions from a proportionality perspective, namely it is alleged that the legislation interferes with intra-community trade more than necessary. When a state monopoly is allowed to do aggressive marketing, product development and launch expansive commercial operations the question arises if the actual regulations stand in proportion to the purpose behind limiting of gaming.<sup>6</sup>

I submit that the Swedish Government's, its authorities (Swedish Gaming Board) and Swedish judiciary's conclusion on the EU Law conformity of domestic law derives from a flawed understanding of the operation of the proportionality principle and the actual method for its application to concrete factual circumstances.

It is a fairly old case that serves as precedence, the judgment of the Supreme Administrative Court in *Wermdö Krog*.<sup>7</sup> Its reasoning has served as the intellectual ratio of practically all the following cases.<sup>8</sup>

<sup>6</sup> Meyrowitsch, A., Allroth, E. and Hettne, J., *EU och svenska monopol – teori, verklighet och framtid*, SIEPS 2005:6, p. 67. See also Wahl, N., 'Vad är oddsen för att det svenska spelmonopolet är förenligt med EG-rätten? – Regeringsrättens dom i Wermdö Krog' *Europarätlig tidskrift* 2005 p 119.

<sup>7</sup> RÅ 2004 ref 95.

<sup>8</sup> In 2013 *Aftonbladet* and *Expressen*, the largest tabloids in Sweden, were fined for breach of the prohibition of promotion, i.e. the legislation stating that it is illegal to promote participation in foreign "lotteries" (which has a wide definition in Sweden). The same fine was targeted towards *Nyheter24* (a minor online newspaper) in 2014. They all contested the fine. Not until 2016 the relevant courts addressed the cases, *Nyheter24* in June and *Aftonbladet* and *Expressen* in November. The long wait was mostly due to the fact that Sweden is in breach of EU law, have been brought before the Court of Justice of the European Union by the European Commission (currently at a stand still) and that the current Swedish system is being reviewed after which a licensing system will be introduced. It is still unclear to us why the courts speeded up in relation to the cases, but most likely the Swedish Gambling Authority, issuing the fines,

The Supreme Administrative Court submit in the judgment that the CJEU has stated that lottery activities are of a specific nature which gives cause for imposed restrictions. The Supreme Administrative Court interprets this statement as meaning that when a court reviews the justification of imposed restrictions on the freedom to provide services, it cannot disregard the moral, religious and cultural considerations that exist in all the member states relevant to lotteries and gaming.<sup>9</sup> The Supreme Administrative Court emphasizes that the CJEU has pointed out that lotteries and gambling typically involve large risks for crime and fraud. These circumstances allow, according to the Supreme Administrative Court, the national authorities a

”wide scope of discretion when establishing what is required for the protection of consumers of gambling services and – more generally, in view of each Member State’s social and cultural distinctive character – to maintain public order, when it concerns how to arrange lotteries, size of the stakes as well as the use of the income they generate. Under these circumstances it is up to the Member State to judge whether there is any reason for prohibiting fully or partly this kind of activities or only for limiting them and for this purpose providing more or less strict control measures”.

The Supreme Administrative Court thereafter establishes that, provided the national legislation is supported by such lawful purposes, then the Member States have a *significantly* (my italicizing) great margin of appreciation to choose the means in order to reach their objectives.

It has to be emphasized that the member state’s discretion to act is to be performed in relation to the regulatory alternative available and has nothing to do with the rather strict legal constraints of the principle of proportionality. The member state may choose a total ban, monopoly or licensing system. EU law put loose constraints on the member states with regard to the choice of regulatory alternative.

However, the key legal issue concerns the actual operation of the chosen regulatory alternative. To ascertain the extent of the member state’s margin of appreciation, an analysis must, however, first be made whether the e.g. Swedish legislation actually rests upon such purposes: moral, religious and cultural justifications as well as the protection against crime and other improper actions against gambling consumers.

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put pressure on the courts by requesting the cases to be brought up after the long waiting time. All newspapers lost their respective case.

<sup>9</sup> The Supreme Administrative Court invokes *Schindler* (Case C-275/92 ECR 1994 s I-1039), *Läärä* (Case C-124/97 ECR 1999 s I-6067), *Zenatti* (Case C-67/98 ECR I-7289) and *Gambelli* (Case C-243/01).

As to moral, religious and cultural justifications, it can be established that such reasons have never, neither in preparatory work nor in other contexts, been referred to by the Swedish State as a ground for the restrictions in the right to offer gambling services. This has never even been brought up for discussion by the State.

In this context it can be noted that income from lotteries and gambling has been considered by the Swedish Government to be a suitable form of financing for activities of non-profit associations and that the legislative work during the last few years has been said to aim at strengthening the opportunities for non-profit associations to make a profit on their gambling activities.<sup>10</sup>

It is also worth pointing out that the governing Swedish Social Democratic Party for its own part brings in a significant income from gambling activities. This income constitutes approx. 40 per cent of the party's total income. Under these circumstances, it could hardly be possible to invoke moral, religious and cultural considerations for the restriction in the freedom to provide services in Sweden. Gambling form an integral part of the Swedish secular culture and has done so for many years.

Thus, the State cannot base their margin of appreciation upon moral, religious or cultural grounds. Consequently, the Supreme Administrative Court's reference to moral, religious and cultural hesitation has no relevance at all when determining the State's margin of appreciation.

Hence, it remains to be explored whether there is any other reason for the State to have a significant margin of appreciation that justifies restrictions of the freedom to provide services.

Now the Supreme Administrative Court escapes reality and makes general references to hypothetical risks for crime and fraud. The reason why such risks exist should, according to the Supreme Administrative Court, be the "considerable amounts that may be cashed and the profits the gamblers may get". In other respect, no factual evidence are referred to support the restrictions. Again, these hypothetical risks only apply in relation to the freedom to choose regulatory alternatives.

Thus, the Supreme Administrative Court's argument determining a significantly wide margin of appreciation rests mainly on the hypothesis that gambling activities involve risks for criminality. There is however no empirical evidence of the existence of such criminality to any extent worth men-

<sup>10</sup> SOU 1992:130, *Vinna eller försvinna – folkrörelsernas lotterier och spel i framtiden*. See also the bill (propositionen) to the Lottery Act of 1995; prop. 1993/94:182.

tioning. It is therefore hardly surprising that no such evidence was invoked in the Swedish court proceedings.

Of interest is that the argument seems to have been of secondary importance in the entire history of the Swedish legislative work. The dominating argument has always been considerations of public health.

It is thereby not surprising that the State in the court proceeding never attached any great significance to the criminality and fraud argument. The crime and fraud argument is a novelty invented by the Supreme Court itself. It is repeated all through the reasoning by the Supreme Administrative Court and turns out to be the crucial ground for the determination of the State's margin of appreciation and sole foundation for the justification of the restrictions in the freedom to provide services.

In this context, it is necessary and important to highlight what the CJEU has stated regarding the judgement of the circumstances on which the Supreme Administrative Court forms the basis of its judgement. In *Gambelli*, para 63 the CJEU states:<sup>11</sup>

“... the Court stated in *Schindler*, *Läärä* and *Zenatti* that moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, *could serve* to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require”.

The Supreme Administrative Court has, however, not analysed whether such circumstances in fact exist that can justify the restrictions. It has merely taken this for granted. According to the case law of the CJEU, the national court shall make such an assessment based on the concrete facts applicable in the member state in question. This is also the reason why the CJEU has expressed in its judgements that the national courts are the most appropriate ones to make this analysis and evaluation of the facts at hand in the member state. The Supreme Administrative Court has, however, abstractly construed and feigned such facts.

By disregarding the concrete factual circumstances at hand, the Supreme Administrative Court has made a flawed interpretation of EU law. The Court has then applied this misconstrued legal rule to self-invented or abstractly determined circumstances.

At the heart of the CJEU's method of analysis lies a fully-fledged proportionality-test. There exists coherent authority in the case law on the sig-

<sup>11</sup> Case C-243/01.

nificance of the proportionality-test. In *Gambelli*, paras 64–66, the CJEU stated:

“In any event, in order to be justified the restrictions on freedom of establishment and on freedom to provide services must satisfy the conditions laid down in the case-law of the Court (see, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37). According to those decisions, the restrictions must be justified by imperative requirements in the general interest, be suitable for achieving the objective which they pursue and not go beyond what is necessary in order to attain it. They must in any event be applied without discrimination. It is for the national court to decide whether in the main proceedings the restriction on the freedom of establishment and on the freedom to provide services instituted by Law No 401/89 satisfy those conditions. To that end, it will be for that court to take account of the issues set out in the following paragraphs”.

This is the basic EU legal proportionality-test that should be applied by all national courts. It is quite clear that the test is applicable in gambling cases. The Supreme Administrative Court has, however, bluntly disregarded the criteria laid down by the CJEU.

The Supreme Administrative Court then makes a grave misrepresentation of the case law when it states the following: “The proportionality criterion seems, in the light of the above statements by the ECJ ... to be of limited importance.”

This sentence is for some reason hailed by all Swedish public bodies through their legal analysis. The Supreme Administrative Court on its part means accordingly that the proportionality-test is of limited importance in gambling cases. However, it concedes that a limited proportionality-test has to be performed. This crucial legal question will in the future become decisive for the Government’s overall conclusion on the EU Law conformity of the Lotteries Act.

What is then surprising is that the Supreme Administrative Court refuses to perform even a limited test. What it actually means is that a proportionality-test is superfluous in gambling cases since the member states have such a wide discretion both when choosing means and methods for the restriction of the freedom to provide services.

This interpretation is wholly inconsistent with the rules of law laid down by the CJEU. In *Gambelli*, the CJEU namely states the following:

“First of all, whilst in *Schindler*, *Läärä* and *Zenatti* the Court accepted that restrictions on gaming activities may be justified by imperative requirements in the general interest, such as consumer protection and the prevention of both

fraud and incitement to squander on gaming, restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.” (para 67)

“It is for the national court to determine whether the national legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.” (para 75)

“In the light of all those considerations the reply to the question referred must be that national legislation which prohibits on pain of criminal penalties the pursuit of the activities of collecting, taking, booking and forwarding offers of bets, in particular bets on sporting events, without a license or authorization from the Member State concerned constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 and 49 EC respectively. It is for the national court to determine whether such legislation, taking account of the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.” (para 76)

The Supreme Administrative Court has disregarded these rules of law and declined to make a proportionality-test and concretely assess whether the “restrictions are designed to secure the realization of these aims in the way that these restrictions shall promote the limitation of betting activities in a continuous and systematic way”.

The CJEU has consistently held, both in gambling cases and cases regarding other areas of free movement, that the proportionality-test should be applied generally in a concrete way. The Supreme Administrative Court reads the case law quite differently. The Court seems in cryptic terms to mean that certain wordings of the CJEU that appear in connection with the criteria for the proportionality-test (“seem” or “appear disproportionate”) are suggesting some substantial limitations to the test. This argument lacks every support in case law and is of course not tenable. The “concretization” of the test and conditions stipulated by the CJEU is clearly stated in the case law.

In *Lindman* (Case C-42/02) the CJEU states:

“In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State (see, to that effect, Case C-55/94 *Gebhard* [1995] ECR I-4165, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981).

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In the main proceedings, the file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance or, *a fortiori*, the existence of a particular causal relationship between such risks and participation by nationals of the member state concerned in lotteries organized in other member states.

The reply, therefore, to the question referred must be that Article 49 EC prohibits a Member State's legislation under which winnings from games of chance organized in other Member States are treated as income of the winner chargeable to income tax, whereas winnings from games of chance conducted in the Member State in question are not taxable." (Lindman paras 25–27)

The Supreme Administrative Court turns a blind eye to these statements by the CJEU clearly suggesting that the State shall *prove* (i.e. in principle has the burden of proof for) that such risks exist in society that justify the restrictions. In its judgment, the Supreme Administrative Court consistently refuses to refer to any concrete circumstances in support of the existence of crime or improper measures with implications for gambling consumers. There is not a single factually sustained argument that the restrictions should be justified with reference to such purposes. The Supreme Court only adduces that such circumstances intrinsically justify the restrictions at hand.

Because of a lack of regulation harmonization at the EU level in the area of gambling and lotteries, and considering the lottery business's "very special character", member states have been given latitude to make discretionary judgements in selecting protection levels.

However, those circumstances do not mean that the question of whether the regulations are in agreement with the proportionality principle ought to be toned down. That the member states were given freedom to select regulatory alternatives based on culture and religion themselves does not mean that the requirement for the chosen restrictions must be less necessary and that the requirement for the restrictions to stand in proportion to a legitimate purpose falls away.<sup>12</sup>

As mentioned above, the more recent case law of the CJEU suggests a requirement for a more thorough proportionality examination in cases involving gambling. Even the *Rosengren* case is a clear signal that the discretionary latitude for member states to make politically coloured choices is strictly limited if the policies put in place do not prove effective in achieving their purpose. It is hard to see that gambling is a more politically "sensitive" area than alcohol policy in this context.

<sup>12</sup> See among others ruling of 6 November 2003 in case C-243/01, *Gambelli*, REG 2003, p. I-13031, para. 65.

The national courts thus ought to carry out a proportionality examination where the national regulations real-life effects are examined, i.e. to see if they contribute in a coherent and systematic way to reduce gambling opportunities and limiting gambling business activities.<sup>13</sup>

In such an examination, consideration must be given to how the Swedish gambling and lottery markets actually look like in practice today, where accessibility and marketing call into question the gambling-limiting purpose.

It is apparent that it is very difficult, if not impossible, to shut out competition in today's electronic and borderless gambling market. This is a reason why efforts are made to strengthen the competitiveness of the monopoly companies rather than limit access to gambling and lotteries in the market-place. In that way, attempt is made to preserve the monopoly companies' market share to the greatest degree possible. Against that background, it is highly doubtful that the gambling monopoly can be considered effective in limiting gambling, which is its publicly stated purpose.<sup>14</sup>

Thus, the Supreme Administrative Court's idea, that the assumption of *hypothetical risks* alone can justify restrictions of the freedom to provide gambling services, simply constitutes a grave misrepresentation of the case law of the CJEU.

It should be noted that the EU Commission has emphasized that the proportionality-test should be performed closely to the factual circumstances with an aim to assess whether the restrictions are necessary in view of the invoked objectives (Complaint 2001/4826 C(2004) 3995).

Consequently, the Supreme Administrative Court have misrepresented fundamental legal rules and applied them to hypothetical circumstances for the purpose of allowing the Swedish State a political margin of appreciation principally unlimited to impose severe restrictions in the freedom to provide gambling services.

## 5. Politicization of the judiciary?

Hence, the crucial question is: how on earth has the marketing prohibition survived? I submit that the survival has been sustained by a merge of interests between the political institutions and the judiciary. In all domestic court cases, you find a common denominator. The Government's burden of proof is more or less waived since the claims with regard to the effects of regulations never have to be established. The judiciary just takes the Government's

<sup>13</sup> Meyrowitsch et al. (n 6), p. 67. See also Wahl (n 6) p. 124.

<sup>14</sup> Ibid.

word for granted. The Government has never been required to prove that there exists a causal link between the marketing prohibition and positive public health effects.

Instead, the courts reversed the burden of proof. Myself and many of my fellow attorneys have over years of litigation invoked truck loads of evidence to prove that the gambling policy is not designed to limit gambling and that the true objective of the excessive marketing of gambling services offered by the state controlled companies is nothing less than to enrich the state purse. Not one court has seemingly taken evidence on the lack of empirical relationship between the marketing prohibition and health effects seriously. The handling of these questions of law by the Swedish judiciary is nothing short of a disgrace. The disregard of the principle of proportionality, the redistribution of the burden of evidence, the blind acceptance of the Government's submissions as the voice of right and reason and the reliance on abstractions and policy statements with no or little connection with real world is nothing less than a serious constitutional problem. It is tantamount to an outburst of government policy rather than law. The last thing we need in these troublesome times is a politicization of the judiciary.

